



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 378 OF 2011**

**DINESH CONSTRUCTION LIMITED.....1<sup>ST</sup> PLAINTIFF**  
**DINESH KARSAN BHACHU.....2<sup>ND</sup> PLAINTIFF**  
**PRAVIN KARSAN BHACHU.....3<sup>RD</sup> PLAINTIFF**  
**DINA DINESH BHACHU.....4<sup>TH</sup> PLAINTIFF**  
**CHAMPA PRAVIN BHACHU.....5<sup>TH</sup> PLAINTIFF**  
**SAS INTERNATIONAL TRADING LIMITED.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MOHAMED ADAN MOHAMED.....1<sup>ST</sup> DEFENDANT**  
**HASSAN SHABA ADAN.....2<sup>ND</sup> DEFENDANT**  
**FREDRICK KIMEMIA KIMANI.....3<sup>RD</sup> DEFENDANT**  
**TROPICAL WATER HOLDINGS LIMITED.....4<sup>TH</sup> DEFENDANT**  
**THE PRINCIPAL REGISTRAR OF TITLES.....5<sup>TH</sup> DEFENDANT**  
**THE COMMISSIONER OF LANDS.....6<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. This dispute relates to ownership of the land known as land reference number 20435 I.R. 63788/1 situated off Mombasa Road Nairobi measuring approximately 1.6 hectares (“the Suit Property”) which SAS International Trading Limited, the 6<sup>th</sup> Plaintiff owned. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs claimed they were shareholders and directors of the 6<sup>th</sup> Plaintiff. On their part, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claimed they acquired the Suit Property together with the 6<sup>th</sup> Plaintiff from its previous owners and that they subsequently sold their interest in the Suit Property to the 4<sup>th</sup> Defendant for valuable consideration. The main issue for determination in this suit is ownership of the Suit Property, with the shareholding and directorship of the 6<sup>th</sup> Plaintiff having a direct bearing on the matter.

2. In the Amended Plaint filed on 15/12/2011, the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs averred that they entered into an agreement on 25/10/2004 with Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed for the transfer of shares in the 6<sup>th</sup> Plaintiff together with the Suit Property to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs at the agreed consideration of Kshs. 12,000,000/=. Each share was sold for Kshs. 12,000/= and the sale was subject to the Suit Property being free from encumbrances. In the sale transaction, M/s R. Billing and Company Advocates represented the purchasers while the vendors were represented by M/s. Aboo and Company Advocates.

3. The Plaintiffs claimed that the 6<sup>th</sup> Plaintiff was duly transferred and that they paid the stamp duty in respect of the agreement at the lands office on 18/11/2008 and presented form 203A to the Companies Registry for registration. The Plaintiffs claimed that they had been paying the land rent in respect of the Suit Property and contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with officials from the Companies’ Registry and the Lands Department and frustrated their efforts to register the documents or pursue their complaints regarding missing files at the Companies’ Registry and Lands Department.

4. Further, they averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants applied for a certified copy of the title over the Suit Property on the pretext that they were the directors and shareholders in the 6<sup>th</sup> Plaintiff then they acted fraudulently and colluded with the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants and illegally transferred the Suit Property to the 4<sup>th</sup> Defendant for the consideration of Kshs. 52,500,000/= yet they were not the registered or beneficial owners of the Suit Property.

5. The Plaintiffs further pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants misrepresented to unsuspecting third parties that they were the shareholders of the 6<sup>th</sup> Plaintiff and purported to enter into a sale agreement over the Suit Property for Kshs. 24,000,000/= with S.B. Holdings Limited in August 2007. S. B. Holdings Limited filed **Nairobi HCCC No. 242 of 2009** in which a consent was recorded with the knowledge of the 4<sup>th</sup> Defendant. The Plaintiffs faulted the 1<sup>st</sup> to 3<sup>rd</sup> Defendants for misrepresenting facts to obtain a provisional certificate of title over the Suit Property using a forged police abstract and a perjured statutory declaration made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

6. The Plaintiffs claimed that while they were on the Suit Property, they were threatened by an unruly mob of people at the instigation of the 1<sup>st</sup> to 4<sup>th</sup> Defendants who wanted to demolish the permanent structures on the Suit Property and who wanted to have the Plaintiffs vacate the Suit Property in July 2011 claiming that they owned the suit land.

7. The Plaintiffs sought an order of injunction to restrain the 1<sup>st</sup> to 4<sup>th</sup> Defendants and their agents from dealing with the Suit Property. Secondly, they sought a declaration that the Suit Property rightly belongs to the Plaintiffs and that the resultant entries on the title ought to be nullified including the transfer to the 4<sup>th</sup> Defendant. Thirdly, they sought an order directing the 5<sup>th</sup> and 6<sup>th</sup> Defendants to rectify their records relating to the Suit Property and a further order directing the Registrar General of Companies to rectify the records pertaining to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs in the 6<sup>th</sup> Plaintiff company at the Companies' Registry and expunge the records showing the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> Defendants as directors or shareholders of the 6<sup>th</sup> Plaintiff.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied the Plaintiffs' claim in their Amended Defence and Counterclaim filed in court on 5/7/2012. They denied that the Plaintiffs had the legal capacity to institute the suit and averred that they would apply to have the 6<sup>th</sup> Plaintiff's name struck out of the suit. Further, they denied that the Plaintiffs acquired any interest in the 6<sup>th</sup> Plaintiff or in the Suit Property. In the counterclaim, they averred that they were the directors of the 6<sup>th</sup> Plaintiff and sought a permanent injunction to restrain the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs from acting for the 6<sup>th</sup> Plaintiff.

9. In its Defence and Amended Counterclaim filed in court on 5/12/2011, the 4<sup>th</sup> Defendant denied the Plaintiff's claim and averred that the 6<sup>th</sup> Plaintiff was wrongly sued. It averred that the Registrar of Titles issued a provisional certificate of title over the Suit Property to the 6<sup>th</sup> Plaintiff on 4/8/2009 for the reason that the grant registered as I.R. 63788/1 had been lost following which a provisional certificate registered as I.R. 63788/3 was registered on 4/8/2009. The 4<sup>th</sup> Defendant claimed that by an instrument of transfer dated 31/12/2009 which was registered on 29/1/2010 as I.R. 63788/5, the 6<sup>th</sup> Plaintiff transferred its rights and interests over the Suit Property to the 4<sup>th</sup> Defendant for the consideration of Kshs. 52,500,000/=. The 4<sup>th</sup> Defendant therefore contended that it was a *bona fide* purchaser for value of the Suit Property and that it held an absolute and indefeasible title to the Suit Property.

10. The 4<sup>th</sup> Defendant averred in its Amended Counterclaim that the Plaintiffs wrongfully entered the Suit Property in July 2011 and begun to construct a perimeter wall around it claiming that they owned the land. The 4<sup>th</sup> Defendant sought a declaration that it was the lawful owner of the Suit Property and that it was entitled to immediate possession. It further sought a declaration that the Plaintiffs were not entitled to enter or remain on the Suit Property and sought an injunction to restrain the Plaintiffs from dealing with the Suit Property. It also sought damages and interest at court rates on the damages from 1/8/2011 until delivery up of possession of the Suit Property.

11. The 5<sup>th</sup> and 6<sup>th</sup> Defendants filed their defence on 14/6/2012 in which they denied the Plaintiffs' claim and averred that if the transfers of land and shares in the 6<sup>th</sup> Plaintiff were fraudulently effected as the Plaintiffs alleged, then the transfers were conducted after production of all the necessary documents. The 5<sup>th</sup> and 6<sup>th</sup> Defendants denied involvement in any fraud and invited the Plaintiffs to strictly prove the allegations of fraud and collusion in the Companies' Registry and the Lands Department.

12. The Plaintiffs called four witnesses to give evidence on their behalf. The 2<sup>nd</sup> Plaintiff gave evidence and stated that he was a director of the 1<sup>st</sup> and 6<sup>th</sup> Plaintiffs with effect from 1/11/2004. He relied on the notification of change of directors, known as form 203A filed on 23/10/2008. The 6<sup>th</sup> Plaintiff was the registered proprietor of the Suit Property. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs were shareholders and directors of the 6<sup>th</sup> Plaintiff. He averred that they obtained possession of the original title deed, the company seal, the transfer of the original share certificate and physical possession of the Suit Property pursuant to the agreement for sale dated 25/10/2004, a copy of which he produced in evidence.

13. Through the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs instructed R. Billing and Company Advocates to act for them in the sale transaction. R. Billing and Company Advocates carried out a search vide its letter dated 19/7/2004 on the 6<sup>th</sup> Plaintiff and established that the directors and shareholders were as follows:

- i. Mohammed Arif Aboobaker Cassim 200 shares
- ii. Aboobaker Cassim Cassim 700 shares
- iii. Mohammed Wasseem Ahmed 100 shares

14. Under the agreement dated 25/10/2004, these shareholders agreed to sell their 1000 shares in the 6<sup>th</sup> Plaintiff to the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs,

each of whom acquired 500 shares. Each share was sold for Kshs. 12,000/=. The sale of the shares in the 6<sup>th</sup> Plaintiff was subject to the Suit Property owned by the 6<sup>th</sup> Plaintiff being free from all encumbrances. He stated that the 1<sup>st</sup> Plaintiff wrote to Aboo and Company Advocates on 20/1/2005 and forwarded the deposit of the purchase price to this firm of advocates which represented the 6<sup>th</sup> Plaintiff. A further payment towards the purchase price was forwarded vide R. Billing and Company Advocates' letter dated 1/11/2005 to Aboo and Company Advocates. The 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs confirmed on 11/1/2006 through R. Billing and Company Advocates that the Suit Property had no encumbrances from the official search carried out at the lands office.

15. Aboo and Company Advocates who represented the vendors in the transaction wrote to R. Billing and Company Advocates on 6/9/2006 forwarding the duly executed transfer of shares in the 6<sup>th</sup> Plaintiff in favour of the purchasers or their nominees together with the share certificate issued by the company; form D duly completed and signed by the company's auditors as required by the Stamp Duty Act; acceptable control of the property and business of the 6<sup>th</sup> Plaintiff including share registers; books of account; computer accounting records and the common seal of the company; a resolution passed by the directors of the company and letters of resignation from office signed by the directors; extracts of minutes of the appropriate meetings at which the transfer of shares were approved and passed for registration; register of members and acceptance of resignation of the directors together with documents of title over the Suit Property; a copy of certificate of incorporation of the 6<sup>th</sup> Plaintiff together with copies of Memorandum and Articles of Association and the company seal.

16. Mr. Bhachu stated that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs took over possession of the Suit Property in 2006 and had been in occupation. They registered and paid the registration fees and stamp duty in respect of the agreement for sale at the lands office on 18/11/2008. They presented form 203A at the Companies' Registry, Sheria House, for registration on 23/10/2008. He stated that the Plaintiffs had been paying the land rent, rates and other outgoings in respect of the Suit Property from 2008 up 2011. The Plaintiffs instructed Mwaka Musau Consultants to value the Suit Property and the valuation report dated 9/9/2008 which they prepared showed that the market price of the land was Kshs. 48,750,000/=. The Plaintiffs sought approval to build the boundary wall round the Suit Property, which was granted on 3/11/2010.

17. Mr. Bhachu claimed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with officials from the Companies' Registry at Sheria house with the aid of officials from the Lands Department at Ardhi House and frustrated the Plaintiffs' efforts to register the official documents or pursue complaints regarding missing files at the Companies' Registry at the Lands Office respectively. He invited the court to take judicial notice of the widespread presentation of documents at the Companies' Registry relating to change of directors and fraudulent transfers of shares in companies which forms the basis of fraudulent transactions in the lands office including transfer of prime land.

18. He stated that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants applied to the Lands Department for issuance of a certified title deed on the pretext that they were the directors and shareholders of the 6<sup>th</sup> Plaintiff and were therefore the owners of the Suit Property. He added that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants misrepresented facts to third parties including the 4<sup>th</sup> to 6<sup>th</sup> Defendants that they were the registered or beneficial owners of the Suit Property and that they could transfer a good title over the Suit Property to the 4<sup>th</sup> Defendant.

19. He averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acted fraudulently and colluded with the 5<sup>th</sup> and 6<sup>th</sup> Defendants in illegally transferring the Suit Property to the 4<sup>th</sup> Defendant yet the 5<sup>th</sup> and 6<sup>th</sup> Defendants knew of the letters written by the Plaintiffs through their advocates to the 5<sup>th</sup> and 6<sup>th</sup> Defendants from 17/10/2008 up 19/4/2011 regarding the fraudulent transactions. He stated that the 5<sup>th</sup> and 6<sup>th</sup> Defendants acknowledged receipt of the letters but still colluded with the 1<sup>st</sup> to 4<sup>th</sup> Defendants by giving consent to transfer and registering the transfer. He maintained that the Suit Property was never up for sale and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants could not have passed a good title to the 4<sup>th</sup> Defendant having fraudulently obtained a provisional certificate of title over the Suit Property through dubious means.

20. He pointed out that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not possess the necessary documents, to wit, the original title deed; the original share certificates; the duly executed transfer of 1000 shares; form D in respect of the value of each share as required under the Stamp Duty Act; vacant acceptable control of the 6<sup>th</sup> Plaintiff and its business including books of accounts; a resolution signed by all the directors of the 6<sup>th</sup> Plaintiff; and the company seal. He added that if at all the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants produced any of these documents then what they produced were forgeries obtained to perpetuate the fraudulent transfer of the Suit Property to the 4<sup>th</sup> Defendant.

21. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently misrepresented to third parties that they were the shareholders of the 6<sup>th</sup> Plaintiff and purported to enter into a sale agreement over the Suit Property with S.B Holdings Limited on 8/8/2007 for Kshs. 24,000,000/= out of which they received Kshs. 4,000,000/= and Kshs. 1,573,980/= from this company. S.B. Holdings Limited filed **HCCC No. 242 of 2009** and a consent judgement was entered into on 22/12/2009 in which S.B. Holdings Limited were awarded Kshs. 10,000,000/= together with costs. He noted that the 6<sup>th</sup> Plaintiff did not enter appearance or file a defence in that suit. He averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fraudulently misrepresented to third Parties that they were directors and shareholders of the 6<sup>th</sup> Plaintiff and purported to transfer the Suit Property to the 4<sup>th</sup> Defendant on 31/12/2009 for the sum of Kshs. 52,500,000/= which they received. He gave particulars of the fraudulent acts undertaken by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and their collusion with the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants in effecting the transfer of the Suit Property to the 4<sup>th</sup> Defendant.

22. Mr. Bhachu stated that the Plaintiffs discovered the false representations made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants when their advocate, Mr. R. Billing attended a meeting on 22/7/2011 at the Lands Office with a Mr. George, a Senior Lands Registrar who informed Mr. Billing that a provisional title deed in respect of the Suit Property was issued on 4/8/2009. He stated that after Mr. Billing produced documents showing the ownership of the Suit Property, Mr. George telephoned officers from the Fraud Department at Kilimani Police Station, who commenced investigations into the matter. The investigators took copies of the documents including the agreement for sale between SAS International Trading Limited and S.B. Holdings Limited dated 8/8/2007; the application for provisional certificate dated 10/3/2008 together with the police abstract dated 28/4/2007, the statutory declaration sworn on 10/3/2008 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; the letter dated 7/4/2008 from the Companies' Registry to Ongegu and Associates for SAS International; notice of issue of provisional certificate collected by James Ruto on 23/4/2008; statutory declaration of Shabbir D. Hassanali sworn on 24/4/2008 together with the sale agreement dated 8/8/2007 in relation to S.B Holdings Limited; Njeru Nyaga and Company Advocates' letter of 7/3/2008 addressed to the advocates for S.B. Holdings Limited; the application form forbidding registration of dealings with the Suit Property dated 9/5/2008 lodged by S.B. Holdings

Limited; a newspaper cutting of the *Daily Nation* of 9/7/2009; letter dated 29/7/2009 from Ongicho and Ongicho Advocates to the Registrar of Titles; letter dated 17/7/2009 from P.G. Munyi Advocates; transfer dated 31/12/2009 and the search done on the Suit Property on 22/7/2011 confirming issuance of the provisional certificate and lifting of the caveat vide the court order registered on 29/1/2010.

23. He reiterated that the fraudulent actions and misrepresentations by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants showed that through gross irregularities, fraud and manipulations at the Lands and the Companies' Registries in Nairobi, other persons may have acquired a parallel title over the Suit Property and assumed ownership of the 6<sup>th</sup> Plaintiff representing that they had a right to dispose of the Suit Property. He maintained that neither the 1<sup>st</sup> Plaintiff nor the 6<sup>th</sup> Plaintiff had authorised any person to deal with the suit land and emphasised that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had absolutely no authority to deal with the Suit Property.

24. He urged the court to issue appropriate orders for the cancellation of the fraudulent entries relating to the 6<sup>th</sup> Plaintiff at the Companies' Registry and to order rectification of the records at the lands registry pertaining to the Suit Property. He mentioned that the Plaintiffs were threatened by an unruly mob on 28<sup>th</sup> and 29<sup>th</sup> July 2011 while at the Suit Property at the instigation of the 1<sup>st</sup> to 4<sup>th</sup> Defendants who wanted to demolish the permanent structures on the Suit Property and were demanding that the Plaintiffs vacate the Suit Property. The Plaintiffs realised in 2011 that entries had been effected on the Suit Property regarding a caveat and transferring the land.

25. On cross examination, Mr. Bhachu confirmed that he did not have the CR12 forms from the Companies Registry showing that they were directors of the 6<sup>th</sup> Plaintiff. Mr. Bhachu explained that there was a delay in completion of the transaction relating to the transfer of the Suit Property and the 6<sup>th</sup> Plaintiff because they had not paid the purchase price in full. He stated that they completed payment in 2006. He first met Mr. Mohammed Arif Aboobaker Cassim in 2012. He explained that there was an error in the names of the shareholders appearing in the Notification of Change of Directors showing the changes that were to take place from 25/12/2004.

26. Mr. Abdulhamid Aboo gave evidence. He was the advocate for the vendors in the sale transaction. He stated that the original shareholders and directors of the 6<sup>th</sup> Plaintiff authorised him to sell the Suit Property to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. He adverted to the agreement dated 25/10/2004 for the purchase of shares and the Suit Property and reproduced some of the salient terms and conditions of that agreement. He stated that the original directors and shareholders of the 6<sup>th</sup> Plaintiff were Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed who were all based in Dubai, United Arab Emirates. These directors gave him authority to sell the shares in the 6<sup>th</sup> Plaintiff together with the Suit Property which the 6<sup>th</sup> Plaintiff owned. He was emphatic that the original directors and shareholders of the 6<sup>th</sup> Plaintiff neither sold shares nor the Suit Property to either the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Defendants or the 4<sup>th</sup> Defendant. They sold the shares in the 6<sup>th</sup> Plaintiff and the Suit Property to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. He faulted the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for fraudulently obtaining a copy of the provisional certificate of title over the Suit Property and transferring the Suit Property to the 4<sup>th</sup> Defendant.

27. On cross examination, he clarified that he was instructed by Kermali who was the contact of the 6<sup>th</sup> Plaintiff. He met the directors of the 6<sup>th</sup> Plaintiff and had a close relationship with Mr. Cassim. The Suit Property was handed over by Kermali in 2006 when Mr. Aboo handed over the letter. He confirmed that the purchase price was paid in full to his firm and he transmitted the balance to the 6<sup>th</sup> Plaintiff. He was not involved in the preparation of the completion documents which his client gave to him. He did not have documents in court to verify that he made payments to the vendors. He did not do a search on the 6<sup>th</sup> Plaintiff which he represented.

28. He was referred to the CR12 dated 5/10/2004 which showed that Mohammed Waseem Ahmed held nil shares in the 6<sup>th</sup> Plaintiff on 5/10/2004 and transfer of shares to the 5<sup>th</sup> Plaintiff and his letter to R. Billing Advocates dated 6/9/2006 showing that Mohammed Waseem transferred 100 shares. He believed there was an error in the number of shares indicated in the form but stressed that he got the documents relating to the 6<sup>th</sup> Plaintiff from a reputable company secretary. He referred the court to a copy of the passport of Aboobaker Cassim Cassim as the director of the 6<sup>th</sup> Plaintiff who he dealt with. He prepared the sale agreement and submitted the completion documents to R. Billing Advocate vide his letter of 6/9/2006. When he was shown the original title by the Plaintiffs' advocate in court, he confirmed that that was the title which he forwarded to R. Billing advocate.

29. Mohammed Arif Aboobaker Cassim Pardesi gave evidence. He was one of the original shareholders and directors of 6<sup>th</sup> Plaintiff. The other shareholders and directors were his father Aboobaker Cassim Cassim and nephew Mohammed Waseem Ahmed. They instructed Mr. Abdulhamid Aboo Advocate practicing as Aboo and Company Advocates in Mombasa to act for them in the sale of the shares in the 6<sup>th</sup> Plaintiff and the Suit Property. The three directors gave authority to Mr. Mohammed Kermali to act on their behalf and deal with Mr. Aboo advocate in the sale of the shares in the 6<sup>th</sup> Plaintiff and the Suit Property as set out in the agreement dated 25/10/2004. He denied that Mr. Mohammed Kermali committed any fraud as the Defendants contended. He confirmed that he executed all the original share certificates with his father and nephew. They passed and signed the board resolutions as the original shareholders and directors of the 6<sup>th</sup> Plaintiff to transfer shares in the 6<sup>th</sup> Plaintiff and the Suit Property pursuant to the agreement signed on 25/10/2004. He made reference to the terms of the agreement vide which 500 shares each were to be transferred to the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs in the 6<sup>th</sup> Plaintiff.

30. He held 700 shares in the 6<sup>th</sup> Plaintiff while Aboobaker Cassim Cassim held 200 shares and Mohammed Waseem Ahmed held 100 shares. He corrected the inadvertent typing error in some of the documents which showed that his father held 700 shares and clarified that his father held 200 shares while he held 700 shares in the 6<sup>th</sup> Plaintiff. He was emphatic that the original directors and shareholders of the 6<sup>th</sup> Plaintiff neither sold any shares nor the Suit Property to either the 1<sup>st</sup> to 3<sup>rd</sup> Defendants or the 4<sup>th</sup> Defendant. He maintained that they sold shares together with the Suit Property to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs who paid for the shares and lawfully acquired the 6<sup>th</sup> Plaintiff. He confirmed that the signatures in the agreement for sale, the share certificates and the board resolutions were their true signatures and that the photographs in the documents produced by the Plaintiffs depicted the true likenesses of the three original shareholders and directors of the 6<sup>th</sup> Plaintiff, that is, his father Aboobaker Cassim Cassim, nephew brother Mohammed Waseem Ahmed and him.

31. He stated that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' application for a provisional certificate of title over the suit land on the grounds that the original

title was lost was fraudulent and deceitful because at all material times the original shareholders and directors of the 6<sup>th</sup> Plaintiff had the original title deed in respect of the Suit Property and they passed it on to the Plaintiffs who were in possession of the title. He added that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants in the illegal transfer of the Suit Property to the 4<sup>th</sup> Defendant through forgery, misrepresentation of facts and fraud. He had never seen or dealt with the people whose photographs appear on the transfer dated 31/12/2009 who transferred the Suit Property to the 4<sup>th</sup> Defendant. He maintained that it was a fraudulent transfer. He stated that he came to Nairobi, Kenya on 11/7/2012 specifically to tell the court the truth regarding the matters in dispute.

32. On cross examination, he stated that he gave instructions to Aboo and Company Advocates by telephone. He was not in Kenya from 2002. He was in Dubai and signed the sale agreement and transfer documents while in Dubai. He gave Kermali authority to sell the Suit Property in 2004. He came to Kenya in 2012. He confirmed that his surname was Bardesi and explained that in his culture one does not use their surname which is why this name did not appear in the documents filed in court. He uses the name Cassim which was his grandfather's name.

33. On the discrepancy on the number of shares his father transferred, he explained that his lawyer would know and that his father had 200 shares in the 6<sup>th</sup> Plaintiff. He met the 4<sup>th</sup> Plaintiff in 2012. He stated that if his name was used in any of the transactions relating to the issuance of the provisional certificate of title over the Suit Property, he did not engage in any of those transactions. He never complained about the issuance of the provisional certificate of title over the Suit Property because he learnt of this in 2012 after they had sold the 6<sup>th</sup> Plaintiff in 2004 hence had no further interest in the Suit Property.

34. Mohammed Kermali gave evidence. He knew and had maintained personal contact with Muhammed Arif Aboobaker Cassim, his father Aboobaker Cassim Cassim and Mohammed Waseem Cassim Ahmed, a cousin to Arif, who were the original shareholders and directors of the 6<sup>th</sup> Plaintiff. He was given authority and the mandate by Mohamed Arif Aboobaker Cassim Cassim and Mohamed Waseem Ahmed and the 6<sup>th</sup> Plaintiff to instruct Mr. Abdulhamid Aboo practicing as Aboo and Company Advocates in Mombasa to act on their behalf in the sale of the shares and the Suit Property as set out in the agreement for sale dated 25/10/2004. He also knew the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs and stated that the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs became the new directors and shareholders of the 6<sup>th</sup> Plaintiff.

35. Documents including the original title deed, original share certificates, board resolutions, company seal and other relevant documents were handed over to him to facilitate the completion of the sale of the shares and the Suit Property in accordance with the agreement dated 25/10/2004. He visited the Suit Property prior to the completion of the agreement for sale and confirmed that the land was vacant.

36. He never met, knew or had any personal contact or dealings with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> Defendants regarding the agreement for sale dated 25/10/2004 over the Suit Property. He maintained that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were imposters and fraudulent persons. He denied the allegations of fraud attributed to him and reiterated that the original shareholders and directors of the 6<sup>th</sup> Plaintiff were all known to him and that they executed the original share certificates, signed and passed all board resolutions as the original shareholders and directors of the 6<sup>th</sup> Plaintiff to sell to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs pursuant to the agreement dated 25/10/2004. He received and dealt with oral and written communication from Aboo and Company Advocates; R. Billing and Company Advocates; and from Muhammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Muhammed Waseem Ahmed and the 6<sup>th</sup> Plaintiff pertaining to the agreement for the sale of shares in the 6<sup>th</sup> Plaintiff and the Suit Property.

37. He confirmed that he had the authority and mandate of the original shareholders and directors of the 6<sup>th</sup> Plaintiff to obtain all the necessary documentation, effect and receive payments and sign on their letterheads which he did on their behalf to facilitate the completion of the transfer of the shares in the 6<sup>th</sup> Plaintiff and Suit Property of to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. He made reference to some of the terms of the agreement dated 25/10/2004. He clarified that Mohammed Arif Aboobaker Cassim held 700 shares, Aboobaker Cassim Cassim held 200 shares while Muhammed Waseem Ahmed held 100 shares. Those were the directors of the 6<sup>th</sup> Plaintiff who transferred 500 shares each to the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs under the agreement.

38. He maintained that Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed gave him authority as well as Aboo and Company Advocates who acted for and on behalf the original shareholders and directors of the 6<sup>th</sup> Plaintiff, to sell to 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs pursuant to the agreement for sale executed on 25/10/2004. He was emphatic that neither he nor the original shareholders and directors of the 6<sup>th</sup> Plaintiff ever sold shares or the Suit Property to the 1<sup>st</sup> to 4<sup>th</sup> Defendants. They sold shares and the Suit Property to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs who paid the consideration and lawfully acquired the 6<sup>th</sup> Plaintiff. He confirmed that the photographs and signatures appearing in the transfer produced by the Plaintiffs were those of Mohammed Arif Aboobaker, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed, whom he personally dealt with and who he knew as the original shareholders and directors of the 6<sup>th</sup> Plaintiff.

39. He averred that the application by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants for a copy of title over the suit land on the basis that the original title was lost was done fraudulently because he had the original title which he handed over to Aboo and Company Advocates who delivered it to 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. He stated that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs were in possession of the original title deed which had been shown to him on 7/9/2012. He confirmed that it was the same title that was in his possession before it was submitted to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs 2004. He had never dealt with or seen the persons whose photographs appeared on the transfer documents executed by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants vide which the Suit Property was transferred to the 4<sup>th</sup> Defendant. He confirmed that he met Mr. Mohammed Aboobaker Cassim at Serena Hotel Nairobi when he made a visit to Kenya on 12/7/2012 and that that was the same person who instructed him in 1997 and thereafter.

40. He relied on the Plaintiffs' supplementary list of documents filed in court on 20/7/2012 which included instructions that Mr. A. Cassim Arif gave him on 8/5/1997 to obtain quotes for the building of a boundary wall on the Suit Property; the letter dated 1/2/2001 together with trade license of the 6<sup>th</sup> Plaintiff; statements of account dated 1/3/2001 of the 6<sup>th</sup> Plaintiff from Habib Bank A. G. Zurich; letter dated 8/2/2001 from the 6<sup>th</sup> Plaintiff to Kassim Bharadi enclosing the original file of the 6<sup>th</sup> Plaintiff; the email dated 11/5/2004 from Aboo and Company Advocates to Muhammed Kermali on the proposed sale of the Suit Property; letter dated 23/5/2004 from SAS International

Trading Limited instructing Habib Bank to prepare cheques for the payment of land rent and rates; letter dated 26/5/2004 from the 6<sup>th</sup> Plaintiff to the Ministry of Lands requesting for the land rent certificate; letter dated 30/6/2004 from Kassim Bharadia and Company on the quotation for the preparation of annual returns from 1995 to 2004;

41. He also relied on the letter dated 1/7/2004 from the 6<sup>th</sup> Plaintiff to the 1<sup>st</sup> Plaintiff accepting the 1<sup>st</sup> Plaintiff's offer of Kshs. 12,000,000/=; letter dated 12/7/2004 from the 6<sup>th</sup> Plaintiff to Aboo and Company Limited confirming the sale to the 1<sup>st</sup> Plaintiff; statement of account dated 2/7/2005 of SAS International Trading Limited; bank statements of the 6<sup>th</sup> Plaintiff's dollar Account from Habib Bank A.G Zurich; tenancy agreement dated 1/12/1994 between the 6<sup>th</sup> Plaintiff and Aircon Electra Services, which is Mr. Kermali's company and letter dated 12/10/2011 from his company to the 1<sup>st</sup> Plaintiff enclosing the approved drawings dated April 1997 for the 6<sup>th</sup> Plaintiff.

42. On cross examination, he stated that he was given authority verbally and added that he did a search on the 6<sup>th</sup> Plaintiff to confirm its directors. He was not present when the sale agreement was signed but was privy to all the documents. He later clarified that his lawyer conducted a search at the Companies' Registry. He became aware of the provisional certificate of title over the Suit Property after this suit was filed. He stated that he had no evidence of collusion between the Defendants. He confirmed that Mr. Arif was present in court on that day when he testified.

43. The 2<sup>nd</sup> Defendant testified. He did not know the Plaintiffs except the 6<sup>th</sup> Plaintiff. He stated that the directors of the 6<sup>th</sup> Plaintiff were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He claimed that he bought the Suit Property around 2000 with 1<sup>st</sup> Defendant from the directors of the 6<sup>th</sup> Plaintiff who were Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed. He claimed that they were given possession of the Suit Property which was registered in the name of the 6<sup>th</sup> Plaintiff. He added that he carried out a search at the Lands Office and at the Companies' Registry to confirm the ownership of the Suit Property and the directors of the 6<sup>th</sup> Plaintiff respectively.

44. He stated that sometime in 2006 his house was broken into and some property including documents were stolen and others including the certificate of title over the Suit Property burnt down. He and the 1<sup>st</sup> Defendant applied for a provisional title to the Registrar of Titles in Nairobi on 10/3/2008. He relied on the gazette notice dated 2/5/2008 on the loss of the title. He stated that on 28/2/2009 the board of directors of the 6<sup>th</sup> Plaintiff resolved to transfer 334 shares to Ahmed Mohammed Ali and Nathaniel Kiungu Mwakodi. He produced a copy of the extracts of the minutes showing that the 2<sup>nd</sup> Defendant transferred 166 shares to Hussein Hassan Amin. He claimed that Ahmed Mohammed Ali and Nathaniel Kiungu wrote an agreement and paid Kshs. 16,000/= for the transfer of the shares but did not produce a copy of that agreement. He further claimed that Ahmed Mohammed Ali and Nathaniel Kiungu Mwakodi later declined to pay for the shares transferred to them and they offered to sell those shares to the 3<sup>rd</sup> Defendant for Kshs. 2,000,000/= which he paid. The shares allocated to Mohammed Ali and Nathaniel Kiungu were then transferred to the 3<sup>rd</sup> Defendant making him a director of 6<sup>th</sup> Plaintiff.

45. He claimed that they sold the Suit Property to the 4<sup>th</sup> Defendant after the initial buyers, S.B. Holding Limited and Techsper General Supplies failed to raise the agreed purchase price. The 4<sup>th</sup> Defendant's advocate requested to have an advertisement placed in the local newspapers to inform members of the public of the intended sale of the Suit Property which they did. He reiterated that the transactions between the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and the 6<sup>th</sup> Plaintiff were within the law and that the original title to the Suit Property was extinguished at the lapse of 90 days upon gazette of the loss of the original title. He maintained that the 4<sup>th</sup> Defendant being an innocent purchaser for value held a good title to the Suit Property having acquired it from the rightful beneficial owners who are the directors of the 6<sup>th</sup> Plaintiff.

46. He produced letters from the Registrar of Companies dated 7/4/2008 and 12/9/2008 addressed to Ongegu and Company Advocates giving the names of the shareholders and directors of the 6<sup>th</sup> Plaintiff as Mohammed Adan Mohammed and Hassan Shaba Adan who held 500 shares each. He also produced a copy of the provisional certificate of title over the Suit Property, entry number 3 of which confirmed that a provisional certificate of title was issued vide Gazette Notice number 3519 dated 2/5/2008. Entry number 4 showed a court order issued in **Milimani HCCC No. 242 of 2009** which lifted the caveat registered as entry number 2 by S.B. Holdings Limited who were claiming a purchaser's interest in the Suit Property. Entry number 5 is a transfer to the 4<sup>th</sup> Defendant for Kshs. 52,500,000/= registered on 29/1/2010.

47. Mr. Adan who preferred to testify in Kiswahili stated that the contents of his written statement were explained to him. He stated that he bought the Suit Property when he was with the 1<sup>st</sup> Defendant from Aboobaker Cassim Cassim whom he claimed he knew. He stated that they met in a building in Nairobi at a lawyer's office. They had a sale agreement which unfortunately got burnt. He could not recall the seller's lawyer but claimed that the lawyer who acted for them was called Abogo. He stated that they completed the transaction in 2000 and that they paid Kshs. 11,000,000/= in cash in the presence of Muslim elders. They agreed before the elders and paid the money when they were given the transfer.

48. He stated that he was a businessman who sold clothes. He claimed that after buying the Suit Property the directors gave them the company and the title. He claimed that the company had two directors and that they gave them a title which was burnt together with the Memorandum and Articles of Association of the company. He stated that at the time he lived in Embakasi and the documents got burnt in his grandmother's house. He was not living with his grandmother but had given his grandmother the documents to keep safely. He claimed that the documents got burnt in December 2006 and they reported the fire to the police and got an abstract. He added they were not given a company seal and were told it had not been prepared. They did not go to the Companies Registry to effect the change of names because they believed the sellers who were Muslims. They only followed up the matter after the house burned down. He claimed that they were registered as directors in 2008 based on the trust they had in each other as Muslims.

49. When he was referred to the Plaintiffs' documents on the shareholders of the 6<sup>th</sup> Plaintiff as at 2004, he stated that he did not know the other two persons named and only knew Cassim Cassim. When he was referred to the document that he had produced claiming that the house was broken into he stated that nothing was stolen from the house but that it burnt down and that there were many people putting out the fire. He was also referred to the witness statement in which he had claimed that the title was stolen. He responded that the house burnt down and they did not see the documents hence they believed that they got burnt and reported this to the police. He denied that the Plaintiffs

had the original title. He claimed that even though Mr. Arif who was a Muslim had testified and denied dealing with him, he still maintained that they were given the original title and documents.

50. He explained that he sought the provisional title in 2008 because their title got burnt. They had attempted to sell the Suit Property to S.B. Holdings Limited but the sale did not go through and they instead sold it to the 4<sup>th</sup> Defendant for Kshs. 57,000,000/= and shared out the money. He could not tell the court how much he was paid and only stated that the money was paid in the bank. They executed the agreement for the sale of the Suit Property to the 4<sup>th</sup> Defendant on 5/11/2009. When he was referred to the specific clauses of the sale agreement he stated that he was unable to read but confirmed that they were paid the purchase price by the 4<sup>th</sup> Defendant in accordance with the sale agreement.

51. He claimed that the search they did before buying the 6<sup>th</sup> Plaintiff got burnt with the other documents. He stated that they were shown the Suit Property by brokers who took them to see the directors of the 6<sup>th</sup> Plaintiff. After the company documents together with the original title got burnt, he claimed their lawyer brought them forms which they filled at the Registrar of Companies in 2007/2008 when they got registered. When he was referred to the police abstract he conceded that it only mentioned the title and not the company documents. He claimed that they paid about Kshs. 3,500/= for the shares in the 6<sup>th</sup> Plaintiff. They did not pay any stamp duty for the transfer of shares but they were prepared to pay this. He claimed they took possession after the title burned down and went to fence the Suit Property. He added that they lived near the Suit Property. He claimed they were shown the Suit Property by Cassim Cassim and the lawyers at the time they purchased it but could not recall the date. He maintained that they entered into a sale agreement with the 6<sup>th</sup> Plaintiff prepared by Abogo Advocate which got burnt. He did not look for a copy of sale agreement.

52. On the shareholding in the 6<sup>th</sup> Plaintiff, he claimed that Mohammed Ali and Nathaniel Mwakodi were to pay Kshs. 5,000,000/= which they failed to pay; that Mohammed Ali only paid Kshs. 2,000,000/=. He added that they were with the 3<sup>rd</sup> Defendant from whom they did not receive any money and that it was the 3<sup>rd</sup> Defendant who was running around by going to Kenya Gazette. He later changed his evidence and stated that the 4<sup>th</sup> Defendant paid Kshs. 52,500,000/= but that they sold the Suit Property for Kshs. 57,000,000/=. He also stated that Rainbow Company was authorised by the 3<sup>rd</sup> Defendant to sell the Suit Property. He swore the affidavit claiming that they had lost the original title when he applied for the provisional title over the suit land. He was not there when the house burnt down. He confirmed that the provisional certificate was collected by the 3<sup>rd</sup> Defendant on behalf of Ongegu Advocate.

53. Pravin Chandra Hirji Shah, Managing Director of the 4<sup>th</sup> Defendant gave evidence. He denied that the Plaintiffs were the legal owners of the Suit Property and maintained that the 6<sup>th</sup> Plaintiff had wrongly purported to sue in these proceedings. He claimed that the Registrar of Titles issued a provisional certificate of title to the 6<sup>th</sup> Plaintiff on 4/8/2009 on the ground that the grant registered as I.R 63788/1 was lost. He claimed the 6<sup>th</sup> Plaintiff transferred its interests in the Suit Property to the 4<sup>th</sup> Defendant for the consideration of Kshs. 52,500,000/= and that the 4<sup>th</sup> Defendant was the *bona fide* purchaser for value of the Suit Property while relying on Sections 22 and 23 of the Registration of Titles Act.

54. On or about January 2009, he went scouting for a plot measuring 5 acres along Mombasa Road for the expansion of one of the 4<sup>th</sup> Defendant's factories. Sometime in May 2009 he was approached by one Mr. S.M. Nyota of Rainbow Properties, a firm of estate and managing agents who said that he had a second row plot measuring 3.7 acres on Mombasa Road available for sell. Mr. Nyota showed him the land, gave him a copy of the grant together with a copy of a letter dated 31/3/2009 from the Registrar of Companies giving the names and directors of the 6<sup>th</sup> Plaintiff as Mohammed Adan Mohammed (1<sup>st</sup> Defendant) and Hassan Shaba Adan (2<sup>nd</sup> Defendant). Mr. Nyota explained that the original grant was lost and that the 6<sup>th</sup> Plaintiff applied to the Registrar of Titles for a provisional certificate of title.

55. He claimed that he was given a copy of the gazette notice and a photocopy of the grant. On inquiring from Mr. Nyota about the entry relating to the caveat lodged by S.B. Holdings Limited, Mr. Nyota explained that it related to an abortive sale and that it would be removed by the 6<sup>th</sup> Plaintiff if there was a successful sell. He produced copies of the letter dated 26/5/2009 from Rainbow Properties offering to sell the Suit Property at Kshs. 17,000,000/= per acre; the letter from Ongicho – Ongicho Advocates dated 5/6/2009 addressed to Ongegu and Associates Advocates making the counter offer for Kshs. 52,500,000/=. On his instructions, Ongicho – Ongicho and Company Advocates caused a notice to be published in the *Daily Nation* of 9/7/2009 calling upon anyone with any claim to the Suit Property to lodge the claim with these advocates within 14 days of the notice. He produced a copy of the notice.

56. He also produced a copy of the provisional title and the letter dated 16/8/2009 from the Registrar of Companies addressed to Ongegu and Associates. The letter made reference to the advocate's letter dated 4/9/2009 and the annual returns for the 6<sup>th</sup> Plaintiff last filed on 31/8/2009 which gave the shareholders of the 6<sup>th</sup> Plaintiff as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants holding 166, 334 and 500 shares respectively. His advocates did a search at the lands office. He produced a copy of the sale agreement dated 5/11/2009. The sale agreement made provision at clause 3 for payment to be made to third parties: Kshs. 10,000,000/= in the form of a bank guarantee to be paid to S.B Holdings Limited upon removal of the caveat registered against the Suit Property in final settlement of **Milimani HCCC No. 242 of 2009**; Kshs. 607,164/= or any other amount demanded by the Commissioner of Lands was to be paid on account of the outstanding rent; Kshs. 7,000,000/= in the form of a bank guarantee was to be paid to Techspar General Supplies Limited upon removal of the structures and vacation of the Suit Property; and Kshs. 20,000,000/= was to be utilised by the vendors' in the removal of the caveat and delivery of all completion documents to the purchaser's advocates. This sum was to be paid to the vendor's advocate who were Ongegu and Associates. The balance of the purchase price being Kshs. 14,993,052 was to be paid to the vendors' advocate in the form of bank guarantee. The sale agreement gave the purchase price as Kshs. 52,500,000/=.

57. Mr. Shah stated that throughout the negotiations for sale of the Suit Property which lasted almost seven months, neither the directors of the 4<sup>th</sup> Defendant nor its advocates Ongicho – Ongicho Company Advocates received any information that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs were claiming ownership of the Suit Property through the 6<sup>th</sup> Plaintiff. He explained that the 4<sup>th</sup> Defendant's directors did not commence construction on the Suit Property immediately after the purchase since they were trying to acquire another piece of land to consolidate it with the Suit Property. He claimed that they used to visit the Suit Property at regular intervals and found nothing unusual happening on the land.

58. Sometime in July 2011 Mr. Evans Asuga Ongicho of Ongicho – Ongicho and Company Advocates asked him if they had commenced construction because he had noticed some developments on the Suit Property. Mr. Shah visited the suit land and found some people constructing a perimeter wall on the land. They informed him that they were acting on instructions from the 6<sup>th</sup> Plaintiff. He protested that that it could not be so because the 6<sup>th</sup> Plaintiff had sold the Suit Property to his company. He claimed that some people came out of a car parked nearby and told him to go to court if he had any objection.

59. Later, he saw a notice in the *Daily Nation* of 4/8/2011 being substituted service of the summons to enter appearance in this suit. His company instructed Inamdar and Inamdar Advocates to represent it in the suit. The advocates wrote to the Registrar of Companies seeking to find out the shareholders and directors of the 6<sup>th</sup> Plaintiff. He produced copies of the letters dated 12/9/2011, 21/9/2011 and 3/10/2011 which forwarded the Memorandum and Articles of Association of the 6<sup>th</sup> Plaintiff together with the annual returns under the Companies Act for the years 1995 to 2006. They showed that the shareholders of the 6<sup>th</sup> Plaintiff were Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseen A. & Mohammed who had 200, 700 and 100 shares respectively. He also produced a copy of the letter from the Registrar of Companies dated 12/9/2011 vide which the Registrar indicated that according to the company's returns last filed on 14/3/2008, the shareholders of the 6<sup>th</sup> Plaintiff were Mohammed Adan Mohammed and Hassan Shaba Adan each of whom held 500 shares.

60. He stated that the annual returns for the 6<sup>th</sup> Plaintiff for the years 2005 and 2006 showed that its shareholders were Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseen A. & Mohammed but the directors of the company were the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant and Mohammed Waseen Adan. He relied on a copy of the notification of change of directors and secretaries, form 203A which stated that with effect from 11/5/2005, Mohammed Arif Aboobaker Cassim and Aboobaker Cassim Cassim resigned as directors of the company and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were appointed directors of the 6<sup>th</sup> Plaintiff.

61. Mr. Shah stated that in purchasing the Suit Property from 6<sup>th</sup> Plaintiff, the directors of the 4<sup>th</sup> Defendant dealt with persons who according to the annual returns and the notification of change of directors and secretaries were the true directors of the 6<sup>th</sup> Plaintiff and they believed the contents of the letters dated 31/3/2009 and 16/8/2009 written by the Registrar of Companies. He maintained that there was nothing in the documents filed with the Registrar of Companies which had been produced in court to suggest that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs were in any way connected with the 6<sup>th</sup> Plaintiff or the Suit Property. He contended that the Plaintiffs had neither pleaded nor averred fraud or collusion on the part of the 4<sup>th</sup> Defendant and denied that the 4<sup>th</sup> Defendant and its directors had perpetuated any fraud or were guilty of any collusion. He maintained that the 4<sup>th</sup> Defendant was a *bona fide* purchaser for value of the Suit Property from the 6<sup>th</sup> Plaintiff who at the time of sale was the registered owner of the Suit Property. He urged that the 4<sup>th</sup> Defendant's title to the Suit Property was absolute and indefeasible under Sections 22 and 23 of the Registration of Titles Act. He urged the court to declare that the 4<sup>th</sup> Defendant was the lawful owner of the Suit Property and that it was entitled to immediate possession of the Suit Property.

62. On cross examination, Mr. Shah stated that Mr. Nyotu of Rainbow Properties went to the 4<sup>th</sup> Defendant in 2006 and verbally confirmed that he was authorised to sell the Suit Property. Mr. Shah met the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and they started negotiating for the property in 2009 and got the land transferred to the 4<sup>th</sup> Defendant in 7 months. They went to see the land in 2009 with Mr. Evans Ongicho Advocates and Mr. Nyotu. He stated that there was a cabin in the middle of the land but no boundary wall. The owner gave them the documents and Mr. Nyotu informed him that the title had been misplaced or lost and that they had applied for a duplicate copy. He was happy with this explanation and paid Kshs. 52,500,000/=.

63. They informed him that there was a court case and a caveat registered against the land. They explained that there had been an attempted sale that did not go through and that they did not have the money to refund the purchase price which had been paid to them. He was advised by his lawyers and Mr. Nyotu that the caveat would be cleared once the 4<sup>th</sup> Defendant paid the purchase price and the initial buyer was refunded what it had paid. He maintained that the agent informed him that the title was lost and the owners of the land told him that they had applied for another title. He did not know of the inconsistencies or what really transpired with the title with some documents indicating that it was lost and others that it was burned.

64. He was in court when the 2<sup>nd</sup> Defendant gave evidence but claimed that he was unable to follow the evidence of the 2<sup>nd</sup> Defendant because he testified in Kiswahili. He knew there were previous directors of the 6<sup>th</sup> Plaintiff but maintained that he relied on the letter from the Registrar of Companies. He did not ask for the company resolution on the shareholding and directors of the 6<sup>th</sup> Plaintiff. He claimed that the Plaintiffs started building a wall around the Suit Property at the end of July 2011. He confirmed that the 4<sup>th</sup> Defendant paid Kshs. 10,000,000/= to S. B. Holdings to remove the caveat and also paid for the cabin on the land. He stated that from 2010 to 2020 the 4<sup>th</sup> Defendant did not get any invoices from the lands office to pay the rent despite asking for this. He confirmed that the 4<sup>th</sup> Defendant's advocates wrote to the Registrar of Companies seeking to be furnished with the list of directors and shareholders, form 201, copies of the memorandum and articles of association, the annual returns from 1994 to 2011, form 203 filed at incorporation and forms 203A in respect of any changes relating 6<sup>th</sup> Plaintiff. This was after the 4<sup>th</sup> Defendant had purchased the Suit Property.

65. Mr. Shah stated that initially he negotiated for the Suit Property with Mr. Nyotu and his lawyer and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants came into the picture later as directors of 6<sup>th</sup> Plaintiff. Mr. Nyotu gave him the letter from the Registrar of Companies on the directors of the 6<sup>th</sup> Plaintiff. The transfer was registered on 29/1/2010 before the caveat was removed. He maintained that the 4<sup>th</sup> Defendant did not play any role in the issuance of the provisional certificate of title over the Suit Property.

66. The 4<sup>th</sup> Defendant put up a notice in the newspaper to see if anyone would lay claim to the Suit Property. He was emphatic that the provisional certificate that the 4<sup>th</sup> Defendant held had not been recovered by the government. Mr. Shah contacted the persons who sold the 4<sup>th</sup> Defendant the Suit Property in 2011 after problems arose and they assured him that the 4<sup>th</sup> Defendant was sold a valid title. He claimed they were shown the beacons on the land by Nyotu in the presence of his lawyers and the 2<sup>nd</sup> Defendant.

67. Edwin Munoko Wafula, a Senior Lands Registration Officer at the Ministry of Lands, Housing and Urban Development gave evidence on behalf of the 5<sup>th</sup> and 6<sup>th</sup> Defendants. He testified that according to the records held at the Ministry of Lands, grant I.R. 63788 for L.R. No. 20435 was first issued to the 6<sup>th</sup> Plaintiff on 16/11/1994. The directors of the 6<sup>th</sup> Plaintiff applied for a provisional certificate of title and one was issued to them on 4/8/2009 under presentation book number 191 and gazette notice number 3519 dated 2/5/2008. According to the records held at lands office, a transfer by the 6<sup>th</sup> Plaintiff was executed to the 4<sup>th</sup> Defendant for Kshs. 52,500,000/=.

68. He produced copies of various documents including the provisional certificate of title over the Suit Property; the transfer from the 6<sup>th</sup> Plaintiff to the 4<sup>th</sup> Defendant registered at the lands office; the application for a provisional certificate of title; the rent clearance certificate showing that the rent had been paid up to 31/12/2009; and the rates clearance certificate dated 25/1/2010.

69. Mr. Wafula stated that they followed the proper procedure in issuing the provisional certificate of title over the Suit property. He was not aware that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs had gone to the Lands Office and presented records from the Companies' Registry to show that they were the directors of the 6<sup>th</sup> Plaintiff. He added that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs had never gone to the lands office to claim that they had the original title for the Suit Property or presented it for verification.

70. On cross examination by Mr. Billing who appeared for the Plaintiffs, Mr. Wafula stated that he got involved in this matter in 2013 and had not seen the documents produced by the Plaintiffs in this case. He added that he came to court to give information based on the records held at the lands office. He maintained that they followed the proper procedure in registering the 4<sup>th</sup> Defendant as the proprietor of the Suit Property. To the best of his knowledge, the Plaintiffs had not complained about the title.

71. When he was shown the bundle of documents including the letters written by the Plaintiffs' advocates to the Commissioner of Lands, Mr. Wafula stated that he had not seen those letters in the lands records. On being shown the original title over the Suit Property by Mr. Billing, Mr. Wafula stated that he could not confirm its authenticity because he did not have the deed file in court. He conceded that the letters written by the Plaintiffs' advocates should have been in the deed file and that they ought to have been acted on at the lands office. He was referred to the letter which sought the registration of a caveat against the suit land. When he was referred to the Plaintiffs' advocates' letter dated 8/6/2009 addressed to the Commissioner of Lands seeking his intervention in locating the lands file on the suit land, he stated that the lands file had never gone missing. The letter was received on 9/6/2009.

72. He stated that he had read the deed file but did not find the letters produced by the Plaintiffs in the deed file and that he did not concentrate on the correspondence file. He neither saw the caveat nor the application for its registration presented by R. Billing Advocates in the deed file. He confirmed that the letters Mr. Billing advocate wrote were authored prior to the application for the provisional certificate of title. The provisional certificate of title dated 10/3/2008 was collected on 6/8/2009 by the 3<sup>rd</sup> Defendant. He conceded that there may have been persons at the lands office who were involved in the process that led to the issuance of the provisional certificate of title over the Suit Property. His attention was drawn to the deed of indemnity signed by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs which was registered on 29/6/2011 seeking the reopening of another deed file and correspondence file at the lands office since the caveat over the Suit Property could not be registered because the file was missing. The deed mentioned letters written by Billing Advocate between 13/10/2010 and 16/3/2011 on the unavailability of the deed file.

73. He confirmed that he knew Mr. Kamuyu who worked in a different section at the lands office and explained that it was possible for one lands officer to deal with multiple transactions the way Mr. Kamuyu dealt with the 4<sup>th</sup> Defendant's transactions. On the issuance of the provisional certificate, he claimed that the documents were in the deed file but could not answer the question regarding whether it got burnt or was destroyed. He maintained that the lands officers did due diligence and went by the statutory declaration in issuing the provisional certificate of title over the Suit Property. He added that the gazettement of the loss of the original title was to ensure that objections were lodged in case the lands officers had been misled. According to him, there should have been an objection after gazettement of the loss of the original title over the Suit Property.

74. In Mr. Wafula's opinion, the 4<sup>th</sup> Defendant was misguided in seeking indemnity against the 5<sup>th</sup> and 6<sup>th</sup> Defendants because as far as the 5<sup>th</sup> and 6<sup>th</sup> Defendants were concerned, the original title was first issued to the 6<sup>th</sup> Plaintiff which claimed that its title was lost and was issued a provisional certificate. He said there could only have been an issue had the title been issued to someone else. He added that the original certificate of title should be confiscated and put in the deed file. He had not been informed that the Plaintiffs had the original title. He explained that the lands office works on documents signed by directors but does not call the Registrar of Companies to confirm who the directors of a company were.

75. He confirmed that there was a Land Registrar called George Gachihi at the lands office. The transfer between the 6<sup>th</sup> Plaintiff and the 4<sup>th</sup> Defendant dated 31/12/2009 shows that it was assessed by N.D. Nyambaso and the declared value endorsed by J.W. Kamuyu on 31/12/2009. J.W. Kamuyu registered the caveat by S.B. Holdings Limited on 9/5/2008 and also prepared the gazette notice on the loss of the title over the Suit Property. George Gachihi registered the issuance of the provisional certificate of title as entry number 3 and also registered the transfer against the Suit Property on 29/1/2010 as entry number 5. The summons issued by the Principal registrar of Titles dated 1/7/2009 indicated that the summons was issued at the request of Mohammed Waseen A. Mohammed alongside the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. There is no indication that the caveat prepared by R. Billing Advocates dated 13/10/2010 was ever booked for registration or registered at the lands office. Mr. Wafula concluded that when you have an original title of land and a provisional certificate of title, the provisional certificate of title takes precedence.

76. Parties field submissions which the court has considered. The main issue for determination is whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants lawfully transferred the Suit Property to the 4<sup>th</sup> Defendant. The corollary issues that arise are whether the 4<sup>th</sup> Defendant was a *bona fide* purchaser for value and whether the 5<sup>th</sup> and 6<sup>th</sup> Defendants should indemnify the 4<sup>th</sup> Defendant for the value of the Suit Property in the event that the court finds that the Suit Property was fraudulently transferred and that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants did not pass a good title to the 4<sup>th</sup> Defendant. A determination of these issues will provide guidance on the orders the court ought to grant based on the reliefs sought in the pleadings filed.

77. The Plaintiffs submitted that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs as shareholders and directors of the 6<sup>th</sup> Plaintiff duly obtained possession of the original title deed, company seal and transfer of the original share certificate pursuant to the agreement for sale dated 25/10/2004. They then registered the agreement and paid the stamp duty and registration fees. They relied on the CR 12 dated 5/10/2004 which showed the 6<sup>th</sup> Plaintiff's shareholders as Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseen Ahmed, who relinquished their shares and directorship in the 6<sup>th</sup> Plaintiff on 1/11/2004.

78. The Plaintiffs relied on the correspondence exchanged between R. Billing and Company advocates and Aboo and Company Advocates on the payment of the purchase price for the 6<sup>th</sup> Plaintiff and the Suit Property in the sum of Kshs. 12,000,000/= in support of their claim to the Suit Property. They also relied on the letters which forwarded the company documents of the 6<sup>th</sup> Plaintiff from the original shareholders to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. They submitted that they took possession of the Suit Property in 2006 and have been in possession to date. They added that they have been paying the land rates and rent from 2008 up to 2020 and relied on the rent clearance certificates and consent to transfer rent clearance certificate and consent to transfer the Suit Property issued in 2004. They submitted that they applied for approval to put up a boundary wall around the Suit Property which was granted on 3/11/2010.

79. The Plaintiffs submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with officials from the companies' Registry and the lands department to frustrate their efforts to register the transfer of the 6<sup>th</sup> Plaintiff and the Suit Property as well as their efforts to pursue complaints regarding the missing files at the companies' Registry and lands department. The Plaintiffs pointed out the discrepancies in the CR 12 forms relied on by the 4<sup>th</sup> Defendant in terms of the share capital indicated in those forms and the original shareholders shown on it. The CR 12 dated 7/4/2008 indicated that as at 7/4/2007 the 6<sup>th</sup> Plaintiff had two directors that is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Another undated CR 12 gave the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as directors with Aboobaker Cassim Cassim and Mohammed Ariff Aboobaker as non-director shareholders as at 7/4/2007. The Plaintiffs pointed out that there were no share transfer certificates produced by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants nor was there evidence of payment of stamp duty to confirm that the 6<sup>th</sup> Plaintiff was legally transferred from the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. In addition, no evidence was tendered by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants of the company resolutions or the resignation of the directors or the appointment of new directors.

80. The Plaintiffs submitted that the Defendants ought to have known about the letters their advocates wrote to the 5<sup>th</sup> and 6<sup>th</sup> Defendants from 17/10/2008 up to 19/4/2011 notifying them of the dispute over ownership of the Suit Property which confirmed that the suit land was not free from encumbrances when it was sold to the 4<sup>th</sup> Defendant. That despite the numerous letters they wrote to the 5<sup>th</sup> and 6<sup>th</sup> Defendants including presenting and lodging the deed of indemnity and an application for registration of a caveat against the Suit Property, the Defendants colluded when they registered the transfer in favour of the 4<sup>th</sup> Defendant. They referred to the letter dated 1/7/2009 in which the Principal Registrar of Titles acknowledged the concerns raised by the Plaintiffs' advocate about the acts committed by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. The Plaintiffs invited the court to look at clauses 3 and 5 on the full import and meaning of the deed of indemnity. They referred to the complaints made to the Companies' Registry including the letter dated 24/10/2008 on the issue of the file in respect of the 6<sup>th</sup> Plaintiff missing from the Companies Registry.

81. The Plaintiffs submitted that there was overwhelming evidence to show that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired the Suit Property unprocedurally because they did not have any written agreement with the original directors and shareholders of the 6<sup>th</sup> Plaintiff in relation to the purported agreement for sale entered into in 2000 as the 2<sup>nd</sup> Defendant stated in his evidence. They relied on Section 3(3) of the Law of Contract Act which required any disposition of an interest in land to be in writing and to be signed by the parties with the signatures being witnessed. They contended that the 1<sup>st</sup> to 4<sup>th</sup> Defendants titles to the Suit Property was subject to challenge because it was acquired illegally, unprocedurally or through a corrupt scheme.

82. They relied on Section 26 of the Land Registration Act and contended that the 4<sup>th</sup> Defendant did not conduct due diligence and was not an innocent purchaser for value without notice of the defect in the issuance of the provisional certificate of title over the Suit Property to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. They contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired the Suit Property fraudulently since the Plaintiffs neither solved nor transferred the Suit Property to them. They relied on the definition in the Black's Law Dictionary of fraud. They contended that the application by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for provisional certificate of title was void and that by extension they did not have a valid title over the Suit Property which they could convey to the 4<sup>th</sup> Defendant.

83. They contended that the 4<sup>th</sup> Defendant knew about the caveat registered by S.B. Holdings Limited claiming a purchaser's interest in the Suit Property and the issuance of the provisional certificate on 4/8/2009. In the suit filed by S. B. Holdings Limited, they gave particulars of fraud against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their first attempt to sale the land in that company. They urged that the title acquired by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was subject to challenge on grounds of fraud or misrepresentation to which they were party and that the certificate of title was acquired illegally since they still held the original title over the Suit Property. They faulted the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for not making any effort to obtain copies of the documents which got lost or from the advocate who handled the transaction. The Plaintiffs submitted that their title was first in time and they ought to be held by this court and relied on the decisions in **Gitwany Investments Limited v. Tajmal Limited and 3 other [2006] eKLR**.

84. They urged that the 4<sup>th</sup> Defendant acquired no interest in the Suit Property. They relied on the decision in **West End Butchery Limited v Arthi Highway Developers Limited and 6 others [2012] eKLR** which was confirmed by the Court of Appeal. The Plaintiffs submitted that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were never legitimate directors or shareholders of the 6<sup>th</sup> Plaintiff and could not have transacted any business on behalf of the 6<sup>th</sup> Plaintiff.

85. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that what was in dispute in this suit was the directorship of the 6<sup>th</sup> Plaintiff. They urged that the legal process was not adhered to when the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs purported to transfer the shares in the 6<sup>th</sup> Plaintiff to themselves. They conceded that the original directors of the 6<sup>th</sup> Plaintiff were Aboobaker Cassim Cassim, Muhammed Arif Aboobaker Cassin and Muhammed

Waseem Ahmed; who held 700, 200 and 100 shares respectively. They contended that the agreement for sale and transfer of shares which the Plaintiffs relied on was invalid because it was executed outside Kenya and should have been notarised by a Notary Public. Equally, they added that the letters written by Mohammed Arif Aboobaker Cassim and Aboobaker Cassim Cassim on their resignation as directors of the 6<sup>th</sup> Plaintiff were not valid because they were not dated or notarised yet they were executed in Dubai. They urged that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs had not produced CR 12 from the Companies Registry to confirm that they were directors of the 6<sup>th</sup> Plaintiff.

86. These Defendants challenged the transfer of shares executed in Dubai as being invalid. They contended that Mr. Mohammed Kermali did not have the mandate or resolution of the 6<sup>th</sup> Plaintiff to authorise Aboo & Company Advocates to act for the 6<sup>th</sup> Plaintiff in the transfer of its shares to the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs. They contended that the Plaintiffs never had possession of the Suit Property, and that it was the 1<sup>st</sup> to 3<sup>rd</sup> Defendants who were in possession prior to 2011 when the Plaintiffs encroached on the land. They contended that Mohammed Arif Aboobaker Cassim Pardesi who testified on behalf of the Plaintiffs was never a director of the 6<sup>th</sup> Plaintiff because of his last name which did not appear in the documents the Plaintiffs relied on.

87. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the dispute was on the directorship of the 6<sup>th</sup> Plaintiff since the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs claimed the shares in this company yet the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants maintained that they were directors in that company. They submitted that the agreement for the transfer of shares and sale of Suit Property was not valid for use in Kenya because it was executed outside Kenya without being notarized by a notary public as required by the Notaries Act. They added that the resignation letter by the original directors of the 6<sup>th</sup> Plaintiff should also have been notarized as well as the transfer of shares. They maintained that Mohammed Kermali and Aboo and Company Advocates did not have the authority of the 6<sup>th</sup> Plaintiff to act as they did. They contended that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs failed to call the company secretary who filed the company returns to confirm that the returns were filed at the Companies' Registry. They added that the Plaintiffs never had possession of the Suit Property until they forcefully took it over before filing this suit.

88. They contended that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs had failed to produce CR 12 to confirm that they were the directors of the 6<sup>th</sup> Plaintiff and that this showed that any transactions they claim to have had with the original directors of the 6<sup>th</sup> Plaintiff was suspect, dubious, illegal and fraudulent. They claimed that the witness who testified was Mohammed Arif Pardesi Aboobaker Cassim who they claimed was different from the one named in the Memorandum and Articles of Association of the 6<sup>th</sup> Plaintiff. They added that as directors of the 6<sup>th</sup> Plaintiff the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had not given authority for this suit to be filed by the 6<sup>th</sup> Plaintiff and urged the court to dismiss the suit by the 6<sup>th</sup> Plaintiff.

89. The 2<sup>nd</sup> Defendant contended that the original title over the Suit Property was burnt down when his house caught fire which prompted him to apply for a provisional certificate which was issued by the lands office. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants relied on Section 33 of the Land Registration Act on the procedure for applying for a provisional certificate of title and contended that there was no objection raised by the Plaintiffs when the gazette notice was published. They submitted that the provisional certificate of title was issued according to the law and that it overrode any other title. They relied on Section 33 (6) of the Land Registration Act in urging that the title held by the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs ceased to operate upon the issuance of the provisional certificate of title. They added that besides the notice issued in the Kenya Gazette, the 4<sup>th</sup> Defendant published an advertisement in the *Daily Nation* of 9/7/2009 inviting members of the public who may have had any interest in the Suit Property to lodge their claims before it purchased the Suit Property and that the Plaintiff did not lodge any claim. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contended that this showed that they carried out due diligence when obtaining the provisional certificate of title and when transferring the Suit Property to the 4<sup>th</sup> Defendant.

90. They contended that the Plaintiffs had not shown how they participated in any fraud or collusion and contended that the Plaintiffs had made mere allegations of fraud which they failed to prove. They contended that the original title held by the Plaintiffs was not subjected to forensic examination to determine whether it was authentic. They faulted the Plaintiffs for not calling Mr. George, the lands officer whom Mr. Billing Advocate had a meeting with while pointing out that the same officer known as G. Wanjie issued and signed the provisional certificate of title over the Suit Property which was issued to them.

91. They concluded that they had proved their counterclaim on a balance of probabilities and contended that the records held by the Registrar of Companies confirmed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the directors of the 6<sup>th</sup> Plaintiff. They urged that they followed due process in obtaining the provisional certificate of title over the Suit Property. They relied on the earlier transaction in which they had attempted to sell the Suit Property to S. B. Holdings Limited while pointing out that part of the purchase price was paid to third parties following which a consent was recorded in **Nairobi HCCC No. 242 of 2009**.

92. The 4<sup>th</sup> Defendant submitted that it is a fundamental principle of company law that a shareholder has no property in the assets of a company and that the suit against it by the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs ought to be dismissed with costs for failing to disclose a cause of action. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were the legitimate shareholders of the 6<sup>th</sup> Plaintiff which was confirmed by the documents emanating from the Companies' Registry. They sold the Suit Property to the 4<sup>th</sup> Defendant for the sum of Kshs. 52,500,000 which was paid according to their instructions. It urged that the sale was concluded after it carried out due diligence at the Companies' and Land Registries and even went further to place an advertisement in a local daily newspaper. It paid Kshs. 10,000,000/= of the purchase price to S.B. Holdings Limited which had sued the 6<sup>th</sup> Plaintiff and lodged a caveat seeking a refund of the purchase price it had paid. Kshs. 7,000,000/= was paid to Techspa General Supplies Limited which had erected a temporary structure on the Suit Property. The 4<sup>th</sup> Defendant maintained that Edwin Munoko Wafula who testified on behalf of the 5<sup>th</sup> and 6<sup>th</sup> Defendants confirmed that the 4<sup>th</sup> Defendant was the registered owner of the Suit Property and that the 6<sup>th</sup> Defendant had lawfully issued a provisional certificate of title to the 6<sup>th</sup> Plaintiff in accordance to Section 71 of the Registration of Titles Act.

93. The 4<sup>th</sup> Defendant submitted that the evidence showed that at all material times the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were recognised by the Registrar of Companies as the shareholders and directors of the 6<sup>th</sup> Plaintiff hence anybody dealing with the 6<sup>th</sup> Plaintiff could only deal with the individuals indicated as the directors or shareholders of the 6<sup>th</sup> Plaintiff in the Companies' Registry. The 4<sup>th</sup> Defendant supported the

contention by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants that it was only the 1<sup>st</sup> to 3<sup>rd</sup> Defendants who could have given authority for the 6<sup>th</sup> Plaintiff to file any suit.

94. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants presented themselves to court and admitted that they were recognised by the Registrar of Companies' as the directors of the 6<sup>th</sup> Plaintiff and that they applied for a provisional certificate over the Suit Property which they sold to the 4<sup>th</sup> Defendant. The court notes that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not present themselves to court and that it was only the 2<sup>nd</sup> Defendant who gave evidence. The 4<sup>th</sup> Defendant contended that the records held at the Companies' Registry confirmed the evidence adduced by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants while contending that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs had not produced any documents from the Registrar of Companies to show that they were the directors or shareholders of the 6<sup>th</sup> Plaintiff.

95. The 4<sup>th</sup> Defendant urged that going by the evidence of Mr. Edwin Wafula, its title over the Suit Property was recognised and should prevail and that any other title over the land should be surrendered to the lands office since it was superseded by the provisional certificate of title. The 4<sup>th</sup> Defendant submitted that the Plaintiffs had not challenged the propriety of the actions on the part of the Registry and contended that the Plaintiffs only engaged in self-serving letters written long after the event which do not constitute fraud on the part of the Commissioner of Lands.

96. It relied on Section 71 of the Registration of Titles Act (RTA) on the use of a provisional certificate of title. It contended that it acquired the Suit Property on payment of valuable consideration to the 6<sup>th</sup> Plaintiff which in turn executed a transfer of the provisional title. It contended that there was no evidence on the court record to show that at the time it paid the sum of Kshs. 52,500,000/= it was aware of the claim by the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs to the Suit Property.

97. It also relied on Section 23 of the RTA whose object was to save persons dealing with the registered proprietors the trouble and expense of going behind the register to investigate the history of the title. It submitted that on the strength and validity of the provisional certificate of title it purchased the Suit Property from the registered proprietor while dealing with its directors shown in the CR 12 and was subsequently registered as the proprietor of the land. It contended that the Plaintiffs had not satisfied the standards of proof required where fraud was alleged.

98. The 4<sup>th</sup> Defendant relied on Section 107 of the Evidence Act on the principle that he who asserts must prove existence of those facts. It also relied on Section 109 of the Evidence Act on the burden of proof. The 4<sup>th</sup> Defendant urged that no fraud or misrepresentation had been proved against it and that its title cannot therefore be challenged.

99. The 4<sup>th</sup> Defendant urged that in the unlikely event that this court did not uphold the provisional title which was issued by the 6<sup>th</sup> Defendant then the 5<sup>th</sup> and 6<sup>th</sup> Defendants should indemnify the 4<sup>th</sup> Defendant in the sum of Kshs. 52,500,000/= being the consideration it paid to the 6<sup>th</sup> Plaintiff for the transfer of the Suit Property. It sought to have the sum paid with interest at commercial rates from 28/11/2009 until the date of full payment to compensate the 4<sup>th</sup> Defendant for being deprived of its money. The 4<sup>th</sup> Defendant relied on the decision in **Mumias Sugar Company v. M. M. Shah Msa Civil Appeal No. 21 of 2011**.

100. The 5<sup>th</sup> and 6<sup>th</sup> Defendants submitted that the 6<sup>th</sup> Plaintiff's directors applied for a provisional certificate of title which was issued to them on 4/8/2009 following gazette notice number 3519 dated 2/5/2008. The 5<sup>th</sup> and 6<sup>th</sup> Defendants submitted that in the absence of the Registrar of Companies who was not made a party to this suit so that he could confirm the genuineness or otherwise of the transfer of shares in the 6<sup>th</sup> Plaintiff, there are no grounds for impeaching the transfer of shares to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which underwent the statutory requirements including registration. The Attorney General further submitted that since the Plaintiffs failed to include the Registrar of Companies as a party to this suit, this court lacks the jurisdiction to delve into the affairs of the company and that that power is only vested in the High Court. The Honourable Attorney General submitted that the Plaintiffs ratified the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that they are estopped from denying that they were directors of the 6<sup>th</sup> Plaintiff. There was no elaboration on how the Plaintiffs ratified the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

101. The Honourable Attorney General relied on Section 71 of the repealed RTA on the process of issuance of a provisional certificate of title while submitting that the Registrar of Titles complied with the statutory requirements. It added that the original certificate of title over the Suit Property became in-operational upon the issuance of the provisional certificate of title and that if found, the original title should be returned to the Registrar of Titles for destruction.

102. The Attorney General submitted that this case presented a unique position where a fraction of directors of a company alleged that their house was broken into and a certificate of title went missing and that the original title is later said to be held by a rival fraction of directors with both factions being embroiled in wrangles over the company's ownership.

103. The Attorney General relied on Section 33 (6) of the Land Registration Act on the point that once a replacement certificate of title is issued no further dealings can be carried out using the replaced certificate. The Attorney General submitted that the procedure for issuance of a provisional certificate of title was complied with by the Registrar of Titles and that the Suit Property changed hands to a *bona fide* purchaser for value hence the original title over the Suit Property was useless and should be surrendered for destruction. The Attorney General maintained that a valid transfer was effected to the 4<sup>th</sup> Defendant who obtained a good and indefeasible title as an innocent purchaser for value without notice. It relied on Section 23 of RTA and Article 40 of the Constitution.

104. On the notice of claim against the 5<sup>th</sup> and 6<sup>th</sup> Defendants, the Attorney General submitted that the registration and decisions effected by the 5<sup>th</sup> and 6<sup>th</sup> Defendants were based on the documents submitted by the parties and due diligence was done to the best of its officers while relying on the **case of Sukhdev Singh Laly v. Philip Ojwang' Kamau and 3 others [2018] eKLR** in which the Court of Appeal observed that the Principal Registrar of Titles had recalled the title for cancellation and advised the Plaintiff on what to do upon being alerted of the

fraud. The court found that there was no reason to hold that the Principal Registrar of Titles had acted waywardly.

105. The Attorney General changed position and submitted on a without prejudice basis that in the event that this court found that the root of title of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was obtained by fraud, then a party should not reap from an illegality and added that the court should not aid the illegality. Further, that the 1<sup>st</sup> to 4<sup>th</sup> Defendants should not claim compensation since Article 40(6) of the Constitution, Section 23 of the RTA and Section 26 of the Land Registration Act do not protect titles obtained by fraud. Nevertheless the Attorney General contended that there was no statutory obligation for the Registrar of Titles or the Commissioner of Lands to maintain companies' records in respect of the directorship and shareholding of a company while emphasising that it was the 6<sup>th</sup> Plaintiff which transferred the Suit Property to the 4<sup>th</sup> Defendant. The Attorney General cited **Arthi Highway Developers Limited v. West End Butchery Limited and 6 others [2015] eKLR** in which the Court of Appeal upheld the decision of the High Court that where the Defendant did not obtain a transfer from the registered proprietor but from fraudulent persons who had no claim to the suit property, the Defendant could not invoke the indefeasibility of title and the transfer was null and void. The Attorney General urged the court to dismiss the suit with costs.

106. The court has looked at the documents produced by the Plaintiffs. The Plaintiffs produced copies of receipts evidencing payment of land rates and rent in 2004. The 1<sup>st</sup> Plaintiff wrote to the 6<sup>th</sup> Plaintiff on 6/7/2004 and 22/6/2004 expressing interest in acquiring shares in the 6<sup>th</sup> Plaintiff and the Suit Property. The Plaintiffs produced a copy of the 6<sup>th</sup> Plaintiff's certificate of incorporation issued on 11/11/1994. The copy of title over the Suit Property showed that it was registered on 16/11/1994 and had no other entries. A director of the 6<sup>th</sup> Plaintiff responded to the 1<sup>st</sup> Plaintiff on 1/7/2004 on its notepaper accepting the offer for the sale of the Suit Property while indicating that Aboo & Co. Advocates would represent it in the transaction. R. Billing and Company Advocates wrote to Aboo & Co. Advocates on 8/7/2004 confirming the sale of shares in the 6<sup>th</sup> Plaintiff and the Suit Property to his clients. The 1<sup>st</sup> Plaintiff's letter of 7/7/2004 gave the directors and shareholders in whose names the 6<sup>th</sup> Plaintiff was to be registered. R. Billing Advocates forwarded the draft sale agreement to Aboo & Co. Advocates on 26/7/2004.

107. The Plaintiffs produced copies of various correspondence exchanged in 2004 and 2005 over the sale transaction. The 1<sup>st</sup> Plaintiff forwarded a cheque for Kshs. 2,400,000/= to Aboo & Co. Advocates towards part payment of the agreed consideration on 20/1/2005. These advocates sought the balance of the purchase price vide their letter dated 24/1/2005. There was further correspondence exchanged between the 1<sup>st</sup> Plaintiff and Aboo & Co. Advocates on the matter, copies of which the Plaintiffs produced in evidence. The Plaintiffs produced copies of the cheques dated 5/8/2005 for Kshs. 1,600,000/=; 31/10/2005 for Kshs. 2,000,000/= and 30/11/2005 drawn in the name of Aboo & Co Advocates together with the letters which forwarded the cheques being payment of the purchase price for the 6<sup>th</sup> Plaintiff and the Suit Property.

108. The Plaintiffs produced the rates demand note for 2005 and the cheque dated 24/1/2005 drawn in favour of Nairobi City Council on account of rates for the Suit Property. R. Billing Advocates did a search on the Suit property on 23/12/2005 and ascertained that the land was registered in the name of the 6<sup>th</sup> Plaintiff. Aboo & Co Advocates wrote to R. Billing Advocates on 20/6/2006 expressing concern over the length of time it was taking for the sale to be concluded and the accumulation of rates and rent in the intervening period. R. Billing Advocates forwarded the cheque dated 30/6/2006 drawn in favour of Aboo & Company Advocates for the balance of the purchase price on 6/7/2006. Aboo & Co Advocates wrote to R. Billing Advocates on 9/7/2006 confirming that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs would have the Suit Property handed over to them in the state it was in. R. Billing responded on 5/9/2006 confirming that the sale was not subject to vacant possession. The letter sought additional documents including share certificates, executed transfer forms, resolutions and other company documents in respect of the sale of the 6<sup>th</sup> Plaintiff. Aboo & Co Advocates forwarded those documents vide their letter dated 6/9/2006 while reiterating that the completion date was 1/11/2004.

109. The Plaintiffs produced various documents relating to the 6<sup>th</sup> Plaintiff including the form for annual returns dated 11/5/2004 which gave the shareholders and directors of the 6<sup>th</sup> Plaintiff as Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseem and Mohammed. They also produced undated transfers of shares in the 6<sup>th</sup> Plaintiff to the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs executed by Mohammed Arif Aboobaker Cassim and Aboobaker Cassim Cassim which were witnessed by attorneys in Dubai. They produced form 203A which is the notification of change of directors showing Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseem resigned as directors of the 6<sup>th</sup> Plaintiff with effect from 1/11/2004 and that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were appointed as the new directors. They attached copies of the passports for Mr. Aboobaker Cassim, Mr. Muhammed Arif [Pardesi](#) Aboobaker Cassim and Mr. Mohammed Waseem. The Plaintiffs produced undated letters written by Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseem which were executed before an advocate in Dubai confirming that they had resigned as directors of the 6<sup>th</sup> Plaintiff; together with the resolutions by the 6<sup>th</sup> Plaintiff to transfer its shares to the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs.

110. Correspondence was exchanged between R. Billing & Co. Advocates and Aboo & Co Advocates on the transfer of shares in the 6<sup>th</sup> Plaintiff to the 1<sup>st</sup> Plaintiff or its nominee including the letters dated 11/9/2006 and 1/11/2006. R. Billing & Co Advocates' letter of 11/9/2006 acknowledged receipt of the original title deed for the Suit Property, copies of annual returns and resolutions for the transfer of shares in the 6<sup>th</sup> Plaintiff to the 1<sup>st</sup> Plaintiff or its nominees, which Aboo & Co. Advocates forwarded vide their letter of 6/9/2006. Mr. Billing forwarded the original share certificates to the 1<sup>st</sup> Plaintiff through his letter of 1/11/2006 for execution. Kassim Bharadia & Co, a firm of certified public accountants wrote to Aboo & Co. Advocates on 6/1/2007 regarding the 6<sup>th</sup> Plaintiff while enclosing the notification of change of directors for approval. These accountants also prepared certificates for transfer of shares in the 6<sup>th</sup> Plaintiff dated 6/1/2007 by Aboobaker Cassim Cassim, Mohammed Waseem and Mohammed Arif Aboobaker Cassim to the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs. The CR 12 from the Registrar of Companies the Plaintiffs produced showed that Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseem held shares in the 6<sup>th</sup> Plaintiff based on the records held at the Companies Registry as at 23/9/2004. The Plaintiffs produced the rates demand note for the Suit Property from the City Council of Nairobi showing payment of rates of Kshs. 258,600/= on 30/1/2007. A further payment of Kshs. 145,247/= was made by the Plaintiffs towards the rates for the Suit Property on 31/5/2007.

111. R. Billing & Co. Advocates wrote many letters to the Commissioner of Lands regarding the transfer of shares in the 6<sup>th</sup> Plaintiff and the Suit Property. The letter dated 17/10/2008 which was received on the same day at the Department of Lands, expressed concern that there was

a third party claiming to be the owner of the Suit Property. The letter forwarded various documents on the transaction including the sale agreement dated 25/10/2004. The Plaintiffs produced another set of transfer of shares forms dated 1/11/2004 executed by Aboobaker Cassim Cassim, Mohammed Arif Aboobaker Cassim and Mohammed Waseem witnessed by R. Billing Advocate. The Plaintiffs Advocates wrote to the Commissioner of Lands on 18/12/2008 and the stamp shows the letter was received on the same day, expressing concern over the existence of another title over the Suit Property. Mr. Billing stated in the letter that he had met the Principal Registrar of Titles on the same day and showed him a copy of the original title deed over the Suit Property. The letter requested the lands officials to register a caveat against the land to prohibit dealings with the land.

112. R. Billing Advocates wrote to the Registrar of Companies on 24/10/2008 seeking the latest details of the 6<sup>th</sup> Plaintiff including the annual returns and its shareholders and directors. This firm also wrote to the Commissioner of Lands on 19/2/2009 regretting that its letters dated 17/10/2008, 18<sup>th</sup> and 19<sup>th</sup> December 2008 and 29/1/2009 had not elicited any response from the lands office. The letter was received and stamped on 20/2/2009. R. Billing Advocates' letter of 19/12/2008 forwarded proof of payment of rates and land rent for the Suit Property in 2004 and 2006 together with the valuation report prepared by Mwaka Musau Consultants. Another reminder was received at the Lands Registry on 9/6/2009 regarding the transfer of shares in the 6<sup>th</sup> Plaintiff and the Suit Property, the missing file at the lands office and a copy of the application for a copy of the title which had been received at the Lands Registry on 7/11/2008 and 12/1/2009. Another application for a copy of the title over the Suit Property made by R. Billing Advocates was received at the Lands Registry on 11/6/2009.

113. R. Billing Advocates wrote to the Principal Registrar of Titles on 10/7/2009 regarding the summons its clients had received to appear before the Registrar on 9/07/2009, a date which had already passed. The summons issued by the Principal Registrar of Title on 1/7/2009 in relation to the Suit Property were sent by registered post. Another letter dated 18/3/2010 was received by the Commissioner of Lands on the same day from R. Billing & Co. Advocates requesting the lands office to respond to earlier letters from this firm while beseeching the Commissioner of Lands to register a caveat against the Suit Property to prohibit dealings with the land. The Plaintiffs' Advocates wrote to the Chief Land Registrar on 11/11/2010 and the letter was received at the lands office on 16/11/2010 seeking to know if the caveat said to be pending before Mr. Mbutia, Deputy Land Registrar had been registered against the Suit Property. The application for the registration of the caveat prepared by R. Billing Advocates was received at the lands office on 19/10/2010. The Plaintiffs produced copies of documents pertaining to its application for approval to erect a perimeter wall around the Suit Property dated together with the environmental impact assessment report dated 21/1/2011.

114. The Plaintiffs called several witnesses to testify and corroborate the fact that shares in the 6<sup>th</sup> Plaintiff were never transferred to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. The 2<sup>nd</sup> Plaintiff gave evidence and produced documents showing how the 6<sup>th</sup> Plaintiff and Suit Property were transferred to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. The Plaintiffs produced the sale agreement the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs entered into with the original shareholders and directors of the 6<sup>th</sup> Plaintiff together with the board resolutions for the transfer of the Suit Property and the 6<sup>th</sup> Plaintiff to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. They also produced evidence of payment of the consideration by the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs for the 6<sup>th</sup> Plaintiff and the Suit Property. Mr. Aboo Advocate who was involved in the sale transaction and whom the purchase price was paid through also gave evidence on the transaction between the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs and the original shareholders of the 6<sup>th</sup> Plaintiff. Mr. Kermali who acted as the agent for the original shareholders and directors of the 6<sup>th</sup> Plaintiff testified and confirmed that the Suit Property together with the 6<sup>th</sup> Plaintiff were transferred to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs by the original shareholders of the 6<sup>th</sup> Plaintiff. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants admitted that the original shareholders and directors of the 6<sup>th</sup> Plaintiff were Aboobaker Cassim Cassim, Muhammed Arif Aboobaker Cassim and Muhammed Waseem Ahmed.

115. Mr. Mohammed Arif Aboobaker Cassim Pardesi, one of the original shareholders and directors of the 6<sup>th</sup> Plaintiff also testified and confirmed that the original shareholders and directors of the 6<sup>th</sup> Plaintiff sold and transferred shares to the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. He was emphatic that the original shareholders and directors of the 6<sup>th</sup> Plaintiff never had any dealings with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants regarding the sale of shares in the 6<sup>th</sup> Plaintiff or the Suit Property. The court found the witnesses called by the Plaintiffs to be credible and believable. Their evidence was corroborated by the documents they produced in court.

116. The court did not find the 2<sup>nd</sup> Defendant to be a credible witness. He was not truthful and his evidence was unbelievable. The facts and account given by the 2<sup>nd</sup> Defendant on what happened to the original title over the Suit Property which they supposedly acquired from the original shareholders of the 6<sup>th</sup> Plaintiff were contradictory. It is not clear whether the original title the 2<sup>nd</sup> Defendant claimed to have had got burnt or it got lost. The 2<sup>nd</sup> Defendant who testified on behalf of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants did not produce any evidence on how the 1<sup>st</sup> to 3<sup>rd</sup> Defendants purchased shares in the 6<sup>th</sup> Plaintiff together with the Suit Property from the original shareholders of the 6<sup>th</sup> Plaintiff. There was no evidence of the consideration the 1<sup>st</sup> to 3<sup>rd</sup> Defendants paid for the acquisition of the 6<sup>th</sup> Plaintiff and the Suit Property from the original shareholders of the 6<sup>th</sup> Plaintiff. The 2<sup>nd</sup> Defendant merely stated that he bought the Suit Property around 2000 with the 1<sup>st</sup> Defendant from the directors of the 6<sup>th</sup> Plaintiff who were Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed. He did not produce any resolutions or other company documents to show how shares in the 6<sup>th</sup> Plaintiff were transferred to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.

117. The 2<sup>nd</sup> Defendant stated that sometime in 2006 his house was broken into and some property including documents were stolen and others including the certificate of title over the Suit Property were burnt down. He claimed that he bought the Suit Property from Aboobaker Cassim Cassim whom he claimed he knew but failed to call him to testify and corroborate his evidence that he purchased the Suit Property from him. He stated that the sale agreement got burnt and that the lawyer who acted for them was called Abogo. If indeed this were true, the 2<sup>nd</sup> Defendant could have obtained a copy of the sale agreement from the advocate who acted for them in the sale or called that advocate to give evidence. The 2<sup>nd</sup> Defendant claimed that they paid consideration of Kshs. 11,000,000 in cash in the presence of Muslim elders but did not call any of the Muslim elders to give evidence. He claimed that they agreed before the elders and paid the money when they were given the transfer. He never called any of the Muslim elders to give evidence. The Law of Contract required that there be a written agreement on the purchase of the suit land, duly executed by the parties and their signatures witnessed. The 2<sup>nd</sup> Defendant did not call Aboobaker Cassim Cassim who he claimed he bought the Suit Property to give evidence.

118. The information the 2<sup>nd</sup> Defendant gave to the police while taking out the abstract on 28/4/2007 was that he had lost the land title deed over IR 63788 within Mukuru kwa Njenga Area in Embakasi. The 2<sup>nd</sup> Defendant's statutory declaration also stated that he lost the original title on or about 28/4/2007. If indeed the 2<sup>nd</sup> Defendant lost the original title over the Suit Property on 28/4/2007 then this fact should have been disclosed when the 1<sup>st</sup> to 3<sup>rd</sup> Defendants offered to sell the Suit Property to S.B. Holdings Limited and entered into the sale agreement dated 8/8/2007. The 2<sup>nd</sup> Defendant was required by paragraph 9 of that agreement to deliver up the original title over the Suit Property which they could not possibly have delivered up if it got lost four months earlier. S.B. Holdings Limited later sued the 6<sup>th</sup> Plaintiff when the 1<sup>st</sup> to 3<sup>rd</sup> Defendants failed to complete that transaction and a consent was recorded following which the 4<sup>th</sup> Defendant paid part of the consideration to this company.

119. The 2<sup>nd</sup> Defendant applied for a provisional certificate over the Suit Property on 10/3/2008 claiming he had lost the grant. He undertook at paragraph 4 of the application to forward the grant to the Registrar of Lands immediately if it was found. The provisional certificate is indicated to have been collected and signed for by the 3<sup>rd</sup> Defendant on 6<sup>th</sup> August 2007 on behalf of Ongegu Advocates who the court notes represented the 1<sup>st</sup> to 3<sup>rd</sup> Defendants in these proceedings. The police abstract dated 28/4/2007 showed that the police had received a report that the original title was lost within Mukuru kwa Njenga Area in Embakasi and was accompanied by a statutory declaration sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 10/3/2008 deponing that it got lost or was misplaced on or about 28/4/07. If the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had acquired shares in the 6<sup>th</sup> Plaintiff and the Suit Property then one would have expected the company documents to be kept safely and not given to the 2<sup>nd</sup> Defendant's grandmother to keep as he claimed in his evidence.

120. There is no evidence that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants ever took control of the 6<sup>th</sup> Plaintiff or that they ever traded with this company. They did not write any letters on its notepaper or operate bank accounts in its name. All they appear to have done was attempt to sell the Suit Property owned by the 6<sup>th</sup> Plaintiff initially to S.B. Holdings Limited and later to the 4<sup>th</sup> Defendant.

121. When the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' lawful acquisition of the 6<sup>th</sup> Plaintiff was challenged by the Plaintiffs, it was not enough for them to rely on the letters from the Registrar of Companies to prove that the shares in the 6<sup>th</sup> Plaintiff were transferred to them. They ought to have gone beyond those letters and showed that they acquired shares in the 6<sup>th</sup> Plaintiff through a legal and formal process. Even under the repealed Companies Act that was in force at the time, the Registrar of Companies could not have transferred shares in a company or changed the directorship merely by a formal letter giving the names of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants as the new shareholders without following the procedure for transfer of shares and change of directors in a company. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants failed to produce resolutions and extracts of minutes of the meeting of the 6<sup>th</sup> Plaintiff when it was resolved to transfer the shares to them.

122. There should have been share transfer forms signed in 2000 by the Company Secretary and affidavits sworn by Mohammed Arif Aboobaker Cassim, Aboobaker Cassim Cassim and Mohammed Waseem Ahmed confirming that they had transferred their shares to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants if at all the 1<sup>st</sup> to 3<sup>rd</sup> Defendants acquired shares in the 6<sup>th</sup> Plaintiff from the original shareholders in 2000 as the 2<sup>nd</sup> Defendant stated in his evidence. Even if the documents got lost or got burnt as the 2<sup>nd</sup> Defendant urged the court to believe, there should have been copies of those documents which would have been retrieved from the Companies Registry. The burden lay on the 1<sup>st</sup> to 3<sup>rd</sup> Defendants to prove that they acquired shares in the 6<sup>th</sup> Plaintiff and the Suit Property from the original shareholders if they wished to have the court believe that they lawfully acquired shares in the 6<sup>th</sup> Plaintiff. They failed to discharge this burden.

123. The Plaintiffs pleaded that the Defendants acted fraudulently in the transfer of the Suit Property. The definition of fraud given in the repealed RTA is not very helpful in the context of this dispute. The RTA defined fraud on the part of a person obtaining registration as including proved knowledge of the existence of an unregistered interest on the part of some other person whose interest he knowingly and wrongfully defeated by that registration. Black's Law Dictionary, 10<sup>th</sup> edition defines fraud as a knowing misrepresentation or concealment of a material fact made to induce another to act to his detriment or a reckless misrepresentation made without justified belief in its truth to induce another person to act. The dictionary quotes John Willard, *A Treatise on Equity Jurisprudence* 147 (Platt Potter ed, 1879) who defined it thus:

“Fraud has been defined to be, any kind of artifice by which another is deceived. Hence all surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one, is to be considered as fraud.”

124. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants acted fraudulently when they unlawfully engineered the changes at the Companies' Registry to reflect that the original shareholders of the 6<sup>th</sup> Plaintiff had transferred shares to them and that they had become the directors of the 6<sup>th</sup> Plaintiff. They also acted fraudulently when they purported to be directors of the 6<sup>th</sup> Plaintiff and applied for a provisional certificate of title over the Suit Property claiming the original title was lost and later purported to transfer the Suit Property to the 4<sup>th</sup> Defendant. They acted fraudulently when they misrepresented facts to the 4<sup>th</sup> to 6<sup>th</sup> Defendants that they were the owners of the Suit Property. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants acted fraudulently when they purported that the Suit Property was for sale and that they could transfer a good title to the 4<sup>th</sup> Defendant.

125. The letters dated 17/10/2008 and 18/12/2008 from R. Billing Advocates to the Commissioner of Lands pointed out that the shareholders and directors of the 6<sup>th</sup> Plaintiff had the original title over the Suit Property in their possession. The court notes that the Lands Department issued the provisional certificate to the 2<sup>nd</sup> Defendant on 4/8/2009 despite the many letters written by Mr. R. Billing. Surprisingly the 1<sup>st</sup> to 3<sup>rd</sup> Defendants successfully applied for a provisional certificate of title over the Suit Property and effected the transfer to the 4<sup>th</sup> Defendant during the time the file relating to the Suit Property was said to be missing from the Lands Department. Mr. Wafula who testified on behalf of the 5<sup>th</sup> and 6<sup>th</sup> Defendants confirmed that the lands file relating to the Suit Property had never gone missing. He also stated that he could not find the letters the Plaintiffs' advocates wrote to the Lands Department complaining about the missing file.

126. The 5<sup>th</sup> Defendant registered the transfer of the Suit Property in favour of the 4<sup>th</sup> Defendant despite knowing that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs

laid claim to the Suit Property. The lands officials colluded with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants when they concealed the material fact that the file was available from the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs and acted fraudulently by not taking any action on the Plaintiffs' complaints about the missing file. The 5<sup>th</sup> and 6<sup>th</sup> Defendants acted fraudulently when they failed to register the caveat against the Suit Property presented by the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs. At the time the 5<sup>th</sup> and 6<sup>th</sup> Defendants issued the provisional certificate of title to the 2<sup>nd</sup> Defendant and registered the transfer over the Suit Property in favour of the 4<sup>th</sup> Defendant, there were numerous letters from the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs' advocates complaining about the illegal dealings with the Suit Property. The same lands officer, George Gachihi who held a meeting with Mr. Billing to discuss the Plaintiffs' complaints about the missing file and the concerns about illegal transactions on the Suit Property, was the one who registered the issuance of the provisional certificate of title to the 2<sup>nd</sup> Defendant as well as the transfer to the 4<sup>th</sup> Defendant. The court finds that the Plaintiffs have proved that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants acted fraudulently and colluded with the 5<sup>th</sup> and 6<sup>th</sup> Defendants in their dealings with the Suit Property as pleaded in the plaint.

127. Section 23 of RTA provided that the certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor would be taken by the courts as conclusive evidence that the person named was the absolute and indefeasible. Such a title was subject to the encumbrances, easements, restrictions and conditions contained on the title. Further, such a title could only be challenged on grounds of fraud or misrepresentation which the purchaser was proved to have been party to.

128. The RTA defined proprietor as the person or corporation registered under that Act as the owner of the land or as lessee from the Government. Section 23 anticipated that it would be the owner of the land transferring it to a purchaser whose title was then afforded protection. The 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs contended that the 6<sup>th</sup> Defendant never sold or transferred the Suit Property. It is not in dispute that the 6<sup>th</sup> Plaintiff owned the Suit Property as a corporation. The 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs proved that the 6<sup>th</sup> Plaintiff never transferred the Suit Property to the 4<sup>th</sup> Defendant for it to be afforded the protection under Section 23 of the RTA.

129. The court does not agree with the contention by the Defendants that the provisional certificate of title over the Suit Property issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant should prevail over the original certificate which the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs still hold. The provisional certificate was issued when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants swore affidavits that the original certificate of title was lost. Section 71 of RTA cannot be of assistance to the Defendants because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were neither shareholders nor directors of the 6<sup>th</sup> Plaintiff to have applied for a provisional certificate. The declarations by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as to the loss of the original certificate of title were far from honest. The 5<sup>th</sup> and 6<sup>th</sup> Defendants' witness, Mr. Edwin Wafula did not lead any evidence to show that the Land Registrar was satisfied as to the truth of the declaration by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants regarding the loss of the original title when they applied for a provisional certificate over the Suit Property. The Land Registrar ought to have satisfied himself of the bona fides of the transaction. This is borne out by the numerous correspondence that R. Billing and Company Advocates wrote to the Lands Office complaining about the missing file. A provisional certificate of title issued under Section 71 would only be available for use if indeed the original certificate was either lost or destroyed. The original certificate of title was never lost or destroyed as the 2<sup>nd</sup> Defendant would have had the court believe. The provisional certificate of title over the Suit Property was irregularly issued by the Land Registrar.

130. The records from the Registrar of Companies on the shareholding of the 6<sup>th</sup> Plaintiff leave a lot of doubt as to the veracity and credibility of the records this office held in relation to the 6<sup>th</sup> Plaintiff. An undated letter from this office gave the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as holding nil shares and Mohammed Waseem Mohamed, Aboobaker Cassim Cassim and Mohamed Arif Aboobaker as holding 100, 200 and 700 shares respectively as at 27/4/2007 and gave the postal address for all of them as 57743 Nairobi. The letter was addressed to the 6<sup>th</sup> Plaintiff ostensibly in reply to the 6<sup>th</sup> Plaintiff's letter dated 27/4/2007.

131. The Registrar General of Companies issued a notice on 2/3/2009 on the notification of change of directors and transfer of shares. She noted with great concern that fraudulent documents had been presented at the Companies Registry relating to change of directors and transfer of shares. The Director General directed that company secretaries were to present the documents signifying changes in companies. The changes were to be accompanied by extracts of the minutes at which the resolution was passed signed by the director. A person resigning would be required to give a statutory declaration or a resignation letter. The documents signifying changes in companies could also be presented by an advocate of the court.

132. The court notes that paragraph 4 of the application for the provisional certificate of title made by the 2<sup>nd</sup> Defendant stated that they undertook to forward the certificate of title or grant for I.R. No. 63788 to the Registrar of Titles immediately should it be found. If the 2<sup>nd</sup> Defendant had genuinely lost the original title over the Suit Property and it was found then it was to be returned to the Lands Office. The evidence adduced in court showed that the original title over the Suit Property is with the Plaintiffs and was never lost as the 2<sup>nd</sup> Defendant falsely misrepresented to the Land Registrar.

133. The 4<sup>th</sup> Defendant contended that it was an innocent purchaser for value without notice of any defect on the title over the Suit Property. Black's Law Dictionary, 10<sup>th</sup> edition defines a bona fide purchaser for value as someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects or claims or equities against the seller's title. Further, that generally a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the purchase price the purchaser paid.

134. The 4<sup>th</sup> Defendant appears to have dealt with a Mr. Nyotu of Rainbow Properties initially yet this entity had no nexus to the 6<sup>th</sup> Plaintiff. Mr. Nyotu was not called to give evidence on the role he played in the transaction. The manner in which the sale proceeds for the Suit Property were to be shared out should have raised a red flag for the 4<sup>th</sup> Defendant at the time. Of the sale proceeds, Kshs. 20,000,000/= which was to be paid to Ongegu and Advocates Associates was to be utilised by the vendors' in the removal of the caveat and delivery of all completion documents to the purchaser's advocates. This is despite the fact that Kshs. 10,000,000/= was to be paid to S.B. Holdings to remove the caveat against the Suit Property and the provisional certificate of title had already been issued to the 2<sup>nd</sup> Defendant. Ordinarily, a genuine owner of property would drive a hard bargain for his land and do his best to retain most of the sale proceeds. The 4<sup>th</sup> Defendant conducted due diligence on the directorship and shareholding of the 6<sup>th</sup> Plaintiff long after the Suit Property had been transferred to its

name.

135. The Plaintiff produced copies of pleadings filed in **Milimani High Court Commercial Case No. 242 of 2009** filed by S.B. Holdings Limited against the 6<sup>th</sup> Plaintiff and David and Martin Njeru Nyaga seeking a refund of the sum of Kshs. 4,000,000/= being the deposit it had paid for the purchase of the Suit Property following an agreement dated 8/8/2007; which was to be held by Njeru Nyaga and Company Advocates as stakeholders and costs incurred in the sum of Kshs. 1,173,980/=. Njeru Nyaga and Company Advocates drew the sale agreement. The suit was premised on the grounds that the 6<sup>th</sup> Plaintiff had misrepresented facts that it held a valid title over the Suit Property yet it had a forged title. The 6<sup>th</sup> Plaintiff did not participate in those proceedings and the court entered interlocutory judgement against it on 5/6/2009. A consent was recorded on 22/12/2009 for the 6<sup>th</sup> Plaintiff to pay S.B. Holdings Limited Kshs. 10,000,000/= plus costs pursuant to which the caveat placed by that company against the Suit Property would be removed. The 4<sup>th</sup> Defendant was well aware of the claim by S.B. Holdings Limited and paid part of the purchase price to that company. Had the 4<sup>th</sup> Defendant conducted due diligence and looked at the claim filed by it S.B. Holdings Limited, it would have seen the allegations of fraud made against the 6<sup>th</sup> Plaintiff which in actual sense were committed by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants who it transacted with.

136. Under Section 26 of the Land Registration Act, the certificate of title issued to the 4<sup>th</sup> Defendant could be challenged on the grounds of fraud or misrepresentation to which it was proved to be a party or where the certificate was acquired illegally, unprocedurally or through a corrupt scheme. It is notable that the protection afforded by Section 26 is to a purchaser upon a transfer by the proprietor of the land. The 6<sup>th</sup> Plaintiff never transferred the Suit Property and the 1<sup>st</sup> to 3<sup>rd</sup> Defendants unlawfully applied for the provisional certificate of title over the \ Suit Property which they purported to transfer to the 4<sup>th</sup> Defendant.

137. The 4<sup>th</sup> Defendant contended that it caused an advertisement to be placed in the newspaper inviting anyone who may have had a claim to the Suit Property to come forth and state its claim but that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs never responded to it. The Defendants argued that the provisional certificate of title which the 1<sup>st</sup> to 3<sup>rd</sup> Defendants used to transfer the Suit Property to the 4<sup>th</sup> Defendant was properly issued by the Lands Department and relied on Section 71 of the repealed RTA in support of this contention mainly because it was issued after the purported loss of the title was put in the Kenya Gazette. The fallacy of this argument is that a proprietor of land would be expected to read each and every publication of the Kenya Gazette just to be sure that his title is safe from fraudsters. In this court's view, it would be preposterous to expect genuine proprietors of land to keep reading every edition of the Kenya Gazette and the daily newspapers to see if their land has been offered for sale by unscrupulous persons. For this would in effect fetter the right to property under Article 40 of the Constitution which gives instances in which one may be lawfully deprived of their right to property with due compensation being paid to the proprietor.

138. Further, it would make Section 25 of the Land Registration Act which protects the rights of a proprietor superfluous. Article 40 of the Constitution, Sections 25 and 26 of the Land Registration Act and Section 23 of the repealed RTA all point to the legal position that a title obtained through fraud even if held by an innocent purchaser for value cannot supersede the original title held by a proprietor who never transferred his interest in the land. Sanctity of titles must be jealously guarded and fraudsters made criminally liable for their illegal activities. The recourse for innocent purchasers is to pursue the fraudsters for the purchase price paid.

139. **Arthi Highway Developers Limited v West End Butchery Limited and 6 Others [2015] eKLR** had facts which are somewhat similar to this case in that shares in West End which owned the suit land were fraudulently transferred with the land without the consent of the original shareholders and directors. The point of departure is that in that case forms for the transfer of shares were lodged and registered at the Companies Registry unlike in this case where no such forms were lodged with the Registrar of Companies. In that case the alleged fraud was brought to the attention of the Registrar General and the Commissioner of Lands after the events complained of. In this case the numerous correspondence from the Plaintiffs' lawyers, R. Billing and Company Advocates confirm that the attention of the Commissioner of Lands and the Companies Registry were drawn to the fraud before the Suit Property was transferred to the 4<sup>th</sup> Defendant. The Commissioner of Lands failed to register a caveat against the Suit Property despite the Plaintiffs' Advocates lodging the application for a caveat.

140. In the **Arthi Highway Developers** case, the court dealt with the issue of whether the directors of West End gave instructions to the advocates for the filing of the suit in the company's name and was satisfied that they did. The court observed that West End's claim was that its property was alienated through a nefarious scheme in which two fraudsters engineered the alteration of its shareholding and directorship to facilitate the transfer of its land. The court rejected the submission that the two fraudsters were capable of passing a lawful resolution for the filing of a suit in West End's name. That is precisely what happened in this case and it would offend basic logic to argue that the 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs could not have given authority for the filing of this suit in the 6<sup>th</sup> Plaintiff's name to pursue recovery of the 6<sup>th</sup> Plaintiff's land which the 1<sup>st</sup> to 3<sup>rd</sup> Defendants fraudulently transferred to the 4<sup>th</sup> Defendant. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants could not possibly have passed a lawful resolution for the filing of the suit by the 6<sup>th</sup> Plaintiff.

141. The court agreed in the **Arthi Highway Developers** case that the documents which perpetrated the fraudulent transfer of West End's shares were forgeries and never bound West End in any way. The court found that the Registrar of Companies had failed in his statutory duty to West End and members of the public who rely on the authenticity of documents entrusted to that office. That would apply to this case where the Registrar of Companies wrote letters confirming that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had become shareholders or directors of the 6<sup>th</sup> Plaintiff without proof of any transfer of shares from the original shareholders of the 6<sup>th</sup> Plaintiff or notices signifying change in the directorship of the 6<sup>th</sup> Plaintiff from the original directors.

142. On the plea that the Appellant was an innocent purchaser for value the court found that West End did not divest itself of its registered interest in the disputed land which was not an equitable one. That it was the proprietor of the legal interest in the land and did not part with it. The court clarified that the protection afforded to a bona fide purchaser for value without notice is only against equitable interests. The court concluded that no valid title passed from West End to Arthi Highway Developers and that Arthi Highway Developers had no title to pass to subsequent purchasers. No valid title passed to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and they had no title in the Suit Property that they could pass to the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant cannot succeed on its claim against the 6<sup>th</sup> Plaintiff which was the proprietor of the legal interest in the Suit

Property.

143. Due to the rampant fraud in land transactions in this country it bears repeating that officials in the lands registry and the companies' registry are complicit and aid the perpetuation of fraud in the transfer of land and shares in companies which own prime land. This has led to numerous cases being filed in the Environment and Land Court which has created the backlog in this court. Public officers who work at the Lands Department and those in the Companies' Registry are bound by the Public Officers Ethics Act which requires a public officer to carry out his duties in accordance with the law and not to knowingly give false or misleading information to members of the public. That Act enjoins a public officer to carry out his duties in a way that maintains public confidence in the integrity of his office and to provide services efficiently and honestly. Chapter 6 of the Constitution and Article 232 of the Constitution give the values and principles of public service and accountability expected of public officers.

144. The Ethics and Anti-Corruption Commission jointly with the Directorate of Criminal Investigations are directed to carry out investigations into the manner in which the 6<sup>th</sup> Plaintiff's shares were transferred to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants by the Companies Registry. The investigations should extend to the lands officers to determine those who participated in the issuance of the provisional certificate of title over the Suit Property to the 2<sup>nd</sup> Defendant; those who colluded to ensure that the lands file on the Suit Property was hidden from the Plaintiffs' Advocates; and those who meddled with the lands records and ensured that the numerous letters the Plaintiffs' advocates wrote were never placed in the lands file or acted on. The investigations will be carried out with a view to charging those found culpable with offences under the Anti-Corruption Act, Penal Code and other relevant laws. Hopefully this will restore propriety in transactions carried out in the lands office and accountability by the public officers serving in that office.

145. The Attorney General who is mandated by law to promote, protect and uphold the rule of law and defend public interest is to formulate regulations in conjunction with the Cabinet Secretary in charge of Lands, to streamline operations in the Lands Department regarding the issuance of provisional certificates of title over land to protect genuine proprietors of land from fraudsters while safeguarding innocent purchasers who may end up dealing with fraudsters purporting to sell them land which they have no legal interest in.

146. Public officers who register land transactions knowing that they are fraudulent ought to be made personally liable for the loss that innocent purchasers for value suffer as a result of their registration of the fraudulent transactions. This liability should also extend to those who issue double titles for one piece of land or tamper with lands records. Any person applying for a replacement certificate of title under Section 33 of the Land Registration Act ought to give a suitable indemnity to the Lands Department, which is capable of enforcement in the event that it is found that they had no legal interest in the land and a third party suffers loss as a result of reliance on the replacement certificate.

147. Advocates who carry out land transactions tainted with fraud unwittingly participate in the fraudulent transactions. From the many fraudulent conveyances of land in which parties were represented by Advocates, it would seem that the oath taken by Advocates on admission to the Bar to uphold the administration of justice and to discharge their duties as Advocates of the High Court of Kenya ceased to have meaning and was replaced by "I will earn a living by hook or crook, so help me God", which lends credence to the belief that an honest lawyer is an oxymoron. Advocates should play their role in upholding the rule of law and the administration of justice by carrying out due diligence to verify the legal owners of the land when they take instructions on any land transaction.

148. The court dismisses the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Counterclaim dated 4/7/2012 with costs to the Plaintiffs. The court dismisses the 4<sup>th</sup> Defendant's Amended Counterclaim dated 5/12/2011 with each party bearing its own costs of the counterclaim. The court finds no merit in the 4<sup>th</sup> Defendant's claim against the 5<sup>th</sup> and 6<sup>th</sup> Defendants and dismisses it.

149. The court grants prayers 7, 8, 9 and 10 of the Amended Plaint dated 15/12/2011 together with the costs of the suit which will be borne by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.

**Dated and delivered virtually at Nairobi this 18<sup>th</sup> day of August 2020.**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. Rajinder Billing for the Plaintiffs

Ms. B. Nzioki holding brief for Mr. R. Ongegu for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants

Mr. G. Muchiri holding brief for Mr. W. Amoko for the 4<sup>th</sup> Defendant

Mr. Allan Kamau for the 5<sup>th</sup> and 6<sup>th</sup> Defendants

Mr. V. Owuor- Court Assistant