



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.213 OF 2014**

**MARCELLO PERRUCCHETTI**

**MARILENA BELLI.....PLAINTIFFS**

**VERSUS**

**KINUTHIA HOLDINGS LTD.....1<sup>ST</sup> DEFENDANT**

**OBADIA KIOKO KAVINYA.....2<sup>ND</sup> DEFENDANT**

**CAROLINE NJOGU T/A**

**MS. J. THONGORI CO. & ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**KWALE DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

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

**JUDGMENT**

**PLAINTIFFS' CASE**

1. The Plaintiffs' instituted this suit by a plaint dated 14<sup>th</sup> August 2014 which was later amended on 25<sup>th</sup> April 2017. The plaintiffs pray for judgment against the defendants for the following orders:

**1. A permanent injunction restraining the defendants by themselves, their agents and/or servants from trespassing onto the plaintiffs' parcel of land known as KWALE/GALU KINONDO/2368 measuring 0.60 Ha.**

**2. A declaration that the plaintiffs are the absolute owners of land known as KWALE/GALU KINONDO/2368 measuring 0.60 Ha.**

**3. In the alternative, an order do issue against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and severally compelling them to refund the purchase price paid to them by the plaintiff.**

**4. A mandatory injunction compelling the defendant to forthwith pull down and remove any buildings and/or other structures buildings and/or other structures built by the defendant on the plaintiffs parcel of land known as KWALE/GALU KINONDO/2368 measuring 0.60 Ha**

**5. General damages**

**6. Costs of the suit and interest.**

**7. Any other relief this Honourable Court may deem just and fair to grant.**

2. The plaintiffs' case as pleaded is that they were bona fide purchasers for value of all that parcel of land known as KWALE/GALU

KINONDO/2368 measuring 0.60 Ha (“the suit property”), from one Obadiah Kioko Kavivya, the 2<sup>nd</sup> Defendant herein. The plaintiffs averred that during and after the purchase of the suit property, they instructed Caroline Njogu t/a Ms. J. Thongori & Advocates, the 3<sup>rd</sup> Defendant herein to be their legal counsel to among other things, conduct due verification of ownership of the suit property and oversee the process of subdivision of land known as KWALE/GALU KINONDO/399 which subdivision gave rise to the suit property. The plaintiffs further averred that it was an implied, alternatively, a tacit term of the advocate /client relationship that the 3<sup>rd</sup> defendant had the duty to perform her services diligently and in the exercise of skill which can be reasonably expected of a person of her knowledge and experience, the 3<sup>rd</sup> defendant has a duty to act in good faith including the duty to work honestly, to desist from any form of fraud and deceit; in their relationship with the plaintiffs, the 3<sup>rd</sup> defendant was not to engage in any form of collusion with the vendor, and was expected to generally look and act in the interests of the plaintiffs; and as a legal counsel, the 3<sup>rd</sup> defendant was required to exercise all due diligence to verify ownership of the suit property and protect the plaintiffs from any sort of fraud.

3. The plaintiffs stated that on the basis of the legal advice of the 3<sup>rd</sup> defendant and assurance that the suit property belonged to the 2<sup>nd</sup> defendant, the plaintiffs, on 13<sup>th</sup> March, 2014 entered into a sale agreement with the 2<sup>nd</sup> defendant to purchase the suit property for a consideration of kshs.13,500,000.00 which money was paid in full through the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs averred that subsequent to the execution of the sale agreement, the 4<sup>th</sup> Defendant duly approved the transfer of the property from the 2<sup>nd</sup> defendant to the plaintiffs by appending his signature and issuing a title deed as proof of ownership. The plaintiffs further averred that they then embarked on constructing their holiday home when the 1<sup>st</sup> defendant confronted them and laid claim of ownership of the suit property and produced another title deed of the property in the name of the 1<sup>st</sup> defendant. The plaintiffs stated that they reported the matter to the police and also went to peruse the parcel file of the suit property at the Kwale District Land Registry where they noticed that the 4<sup>th</sup> defendant had made an adverse entry on the Green card freezing all transactions on the suit property on grounds that the plaintiffs title was procured illegally and fraudulently. The plaintiffs averred that they immediately approached the 2<sup>nd</sup> defendant with view of obtaining a refund of the purchase price but the 2<sup>nd</sup> defendant informed them that he was not aware of any fraud and that he was not paid the full purchase price. The plaintiffs stated that they discovered that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants conspired to defraud them the purchase price by opening and creating another parcel file for the suit property. The plaintiffs contend that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants prepared and advised the plaintiffs to sign the sale agreement when they knew or had reasons to know that the suit property did not belong to the 2<sup>nd</sup> defendant, and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants illegally opened another parcel file of the suit property and prepared a title deed in favour of the plaintiffs when they knew or had reasons to know that the 2<sup>nd</sup> defendant did not have any title in the suit property, and illegally and fraudulently issued and/or caused to issue official searches, Green Card, parcel file and title deed in the name of the 2<sup>nd</sup> defendant when they knew or had reasons to know that the 2<sup>nd</sup> defendant had no ownership on the suit property. The plaintiffs averred that as a result of the fraud and breach of duty aforesaid, they have suffered loss and damage.

4. On 2<sup>nd</sup> May 2019, the plaintiffs and the 1<sup>st</sup> defendant recorded a consent which was adopted as an order of the court to have the plaintiffs' suit against the 1<sup>st</sup> defendant, Kinuthia Holdings Limited, marked as withdrawn with no order as to costs.

5. Marcello Perrucchetti, the 1<sup>st</sup> plaintiff testified as PW1. He stated that he is an insurance agent based in Milano, Italy and a tourist in Kenya. He stated that while on a visit to Kenya, he was interested in buying a property at Diani Beach to construct a holiday home. He stated that he was shown some land by one Collins who was referred to him by some people he knew. PW1 testified that he liked that land. He stated that the said Collins told him the land belonged to one Obadiah Kioko Kavivya, the 2<sup>nd</sup> defendant herein and who was staying in Nairobi. It was the evidence of PW1 that Collins did not take him to the 2<sup>nd</sup> defendant. Instead, he was advised to go and see an advocate.

6. PW1 testified that he went to Imperial Bank, Diani Branch where he saw the Manager whom he asked to recommend to him an advocate, and the Bank Manager referred him to Caroline Njogu Advocate, the 3<sup>rd</sup> defendant herein. He stated that he called the 3<sup>rd</sup> defendant to book an appointment and later visited her office in the company of his wife Marilena Belli, the 2<sup>nd</sup> plaintiff herein, and a friend one Eva. PW1 stated that he informed the 3<sup>rd</sup> defendant of his interest in purchasing some land. He stated that the 3<sup>rd</sup> defendant inquired about the location and the owner of the land and PW1 testified that he told her.

7. PW1 stated that Collins informed him that the 2<sup>nd</sup> defendant was asking for the sum of Kshs. 13.5 million as purchase price. He stated that he was asked to engage the 2<sup>nd</sup> defendant to agree on the purchase price before they could proceed with the transaction. PW1 testified that he engaged the 3<sup>rd</sup> defendant to prepare a sale agreement. He stated that the 3<sup>rd</sup> defendant told him the procedure of how to make payments. PW1 stated that after signing the sale agreement, a search was carried out by one Vincent. He stated that he had not seen any title in the name of the 2<sup>nd</sup> defendant. He testified that later, the 3<sup>rd</sup> defendant called him and told him the land was clean, but advised him not to pay the entire consideration. PW1 testified that he signed the sale agreement together with the advocate for the 2<sup>nd</sup> defendant at the offices of the 3<sup>rd</sup> defendant.

8. PW1 produced the Agreement for sale as P.exhibit 1. He stated that he paid a deposit of Kshs.1.5 million on 13<sup>th</sup> March 2014 and a second installment of Kshs.4 million in May 2014 in the name of the 2<sup>nd</sup> defendant. PW1 stated that he paid the final payment of Kshs.8 million to the 3<sup>rd</sup> defendant in August 2014. He produced copies of Bankers cheques dated 13<sup>th</sup> March 2014 in the name of Obadiah Kioko Kavivya as p.exhibit 2 and copy of Funds Transfer form dated 30<sup>th</sup> May 2014 for Kshs. 4,000,000.00 in favour of Obadiah Kioko Kavivya as P.exhibit 3. He also produced funds transfer dated 6.8.2014 in favour of John Thongori & Co. Advocates as P.exhibit 4.

9. PW1 testified that after paying the full purchase price, he went to the office of Caroline Njogu Advocate who gave him the title deed for PARCEL NO. KWALE/GALU KINONDO/2368 in the plaintiffs names. PW1 produced the said title deed as p.exhibit 5. PW1 stated that after about a week, he went to the site with the intention of putting up a perimeter wall around the plot. That while there, a lorry came and demolished what was being constructed. That a lady came out of the lorry and showed him a copy of a title deed, claiming the land was hers and that I had been conned. PW1 stated that he called the 3<sup>rd</sup> defendant who came and told him that she was sorry and that she could not continue with the transition and referred him to Vincent who was the advocate for the vendor. PW1 stated that he went to Ukunda Police Station where he made a report and recorded a statement on 21<sup>st</sup> March, 2015. The statement was produced as p.exhibit 6. He stated that the

police promised to carry out investigations. PW1 stated that he also followed up the issue with the Kwale Lands Registry where he was informed that he had been conned as the title deed given to him was fake. PW1 testified that he blames the 3<sup>rd</sup> defendant whom he paid Kshs.8 million through her firm and also paid Kshs.500,000 as legal fees and another Kshs.500,000 for search, conveyancing and taxes. He stated that the total sum they paid was Kshs.14,500,000/= and urged the court to enter judgment against the defendants as prayed.

10. PW1 was cross-examined by Ms. Ngigi, counsel for the 1<sup>st</sup> defendant and Mr. Mwandenje counsel for the 4<sup>th</sup> & 5<sup>th</sup> Defendants. He stated that he had visited the land and found that there was a small house which was being occupied by some people. He stated that he never saw the 2<sup>nd</sup> defendant and cannot tell if he exists or not. He stated that he was given the title deed by the 3<sup>rd</sup> Defendant and could not know if stamp duty was paid or not. PW1 stated that he went to the lands office after hearing that he had been conned. He stated that he trusted his advocate.

11. Marilena Belli, the 2<sup>nd</sup> plaintiff testified as PW2. She stated that she lives in Milano, Italy and was a tourist in Diani Beach, Mombasa. She adopted her witness statement dated and filed on 14<sup>th</sup> August, 2014. PW2 asked the court to order for the refund of the consideration paid for the property, being kshs.13,500,000.00.

### **1<sup>st</sup> DEFENDANT'S CASE**

12. As already stated, the plaintiffs' suit against the 1<sup>st</sup> defendant was withdrawn. However, the 1<sup>st</sup> defendant prosecuted its counter-claim in terms of the Amended Defence and counter-claim dated 29<sup>th</sup> August, 2017 in which it seeks the following orders:

**a. The amended plaint be dismissed.**

**b. A declaration that plaintiff is the rightful and/or bona fide owner of the property known as KWALE/GALU KINONDO/397.**

**c. A declaration that the purported registration of the 1<sup>st</sup> defendant as the owner of PLOT NUMBER KWALE/GALU KINONDO/397 and the resultant subdivisions number KWALE/GALU KINONDO/2366, KWALE/GALU KINONDO/2367 and the registration of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as owners of KWALE/GALU KINONDO/2368 is invalid, null and void.**

**d. An order compelling the 4<sup>th</sup> defendant to revoke and/or cancel the titles to PLOT NUMBERS KWALE/GALU KINONDO/397, KWALE/GALU KINONDO/2366, KWALE/GALU KINONDO/2367 registered in the name of the 1<sup>st</sup> defendant and KWALE/GALU KINONDO/2368 registered in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.**

**e. An order compelling the 4<sup>th</sup> defendant to rectify the land register and to register and/or restore the plaintiff as the owner plot number KWALE/GALU KINONDO/397.**

**f. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants whether by themselves or through their servants, agents and/or employees or through anyone deriving title through them from entering, occupying, leasing, transferring, charging, selling and/or from demolishing the structures on and/or evicting the defendants' agents, servant and/or employees or in any manner whatsoever dealing with the property known as plot number KWALE/GALU KINONDO/397.**

**g. The defendants do jointly and severally pay the costs of the suit plus interest.**

13. The 1<sup>st</sup> defendant averred that it is and was registered as the absolute and indefeasible owner of the property known as KWALE/GALU KINONDO/397 measuring about 1.4 hectares having purchased the same from one William Njoroge Mbote in or about October 1980. Philip Waithaka Kinuthia (DW1), a director of the 1<sup>st</sup> defendant testified on behalf of the 1<sup>st</sup> defendant and produced the copy of sale agreement, title deed, copies of Excerpts of Green Card for Serial No. 0832415 and Serial No.0832416, copy of indemnity dated 9<sup>th</sup> June 2014, copy of the letter dated 10<sup>th</sup> June 2014, copies of receipts dated 10<sup>th</sup> June 2014, copy of certificate of title dated 23<sup>rd</sup> October, 1980, copy of Certificate of search dated 21<sup>st</sup> June, 2004, copy of map sheet No. 6 from Director of Survey, copy of Letter dated 8<sup>th</sup> August 2014, copies of certificates dated 10<sup>th</sup> June 2014 and a bundle of photographs as D.exhibits 1-13. DW1 testified that the 1<sup>st</sup> defendant purchased the suit property in the 1980s and was issued with title on 23<sup>rd</sup> October, 1980. He stated that with the 1<sup>st</sup> defendant's permission, there are structures on the suit property, including a church which operates from a makeshift structure and a shade used by taxi operators.

14. DW1 stated that in June 2014, they were informed by their agents on site that there were people checking on the property. He stated that immediately they visited the Kwale Land Registry to conduct a search but were informed that the Green Card was missing and/or misplaced. DW1 stated that the 4<sup>th</sup> defendant, the registrar, advised the 1<sup>st</sup> defendant to initiate the process of opening a new Green Card. He testified the shortly thereafter, they received information that there were building materials which had been deposited on the suit property and a letter from J. Thongori Advocates dated 8<sup>th</sup> August 2014 had been served upon the church members on the suit property to vacate the property. The 1<sup>st</sup> defendant was then sued by the plaintiff for trespass. That is when the 1<sup>st</sup> defendant discovered that the suit property had fraudulently, illegally, unlawfully and/or wrongfully been subdivided and registered in the plaintiffs' name as well as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is the 1<sup>st</sup> defendant's evidence that the registration of parcel KWALE/GALU KINONDO/397 in the 2<sup>nd</sup> defendant's name and the subsequent subdivisions were fraudulent and ought to be cancelled and the title to revert to the 1<sup>st</sup> defendant.

### **2<sup>ND</sup> DEFENDANTS'S CASE**

15. In his defence dated 20<sup>th</sup> September, 2017 and filed on 25<sup>th</sup> September, 2017, the 2<sup>nd</sup> defendant essentially denied the plaintiffs' claim and made no averment particularly as to whether the title documents registered in his name were fraudulently procured or not. Instead, the 2<sup>nd</sup> defendant pleaded that his relationship with the plaintiffs ceased at the point of sale of the suit property. The 2<sup>nd</sup> defendant further pleaded advocate-client relationship and confidentiality.

### **3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS CASE**

16. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants' neither filed defence nor gave any evidence in the matter.

### **PLAINTIFFS' DEFENCE TO THE 1<sup>ST</sup> DEFENDANT'S COUNTER-CLAIM**

17. The plaintiffs' filed their defence dated 20<sup>th</sup> December, 2016 in which they denied the 1<sup>st</sup> defendant's counter-claim. They averred that at the time of purchase of land parcel numbers KWALE/GALU KINONDO/397, the same was in the name of the 2<sup>nd</sup> defendant. They further averred that the said land measuring 1.4 Hectares was subdivided into KWALE/GALU KINONDO/2367 and into KWALE/GALU KINONDO/2368. It is their contention that upon conducting a search and due diligence, they purchased parcel number KWALE/GALU KINONDO/2368 measuring 0.60 Hectares from the 2<sup>nd</sup> defendant for sum of Kshs.13,500,000/= and had it transferred and registered in their names and are in possession. The plaintiffs urged the court to dismiss the counter-claim and in the alternative, order a refund to them of the full purchase price paid plus general damages, costs and interest.

### **PLAINTIFFS' COUNSEL SUBMISSION**

18. Counsel for the plaintiffs submitted that the plaintiffs were innocent purchasers for value without notice of defect of title. Counsel cited the Ugandan Court of Appeal decision in the case of **Katende –v- Haridar Company Limited (2008) & 2 E.A 173** in which the tests for innocent purchaser for value without notice were espoused. Counsel also relied on the case of **Lawrence Mukiri –v- Attorney General & 4 Others (2013) eKLR**, **Eunice Grace Njambi Kamall and Another –v- The Hon. Attorney General and 5 Others Civil Suit NO. 976 of 2012** where the court cited with approval the case of **Fletcher –v- Peck 10. U.S 87 (1810)** and submitted that any fraud, if at all, cannot be attributed to the plaintiffs since they followed the law to the letter in acquiring their title to the suit property. Counsel submitted that if there was fraud, the same must be linked to the mother title, KWALE/GALU KINONDO/397 back in 2012 when the 2<sup>nd</sup> defendant allegedly procured title. Counsel further submitted that the allegations of fraud or collusions have not been proved against the plaintiffs. The plaintiffs' counsel also relied on the case of **Kinyanjui Kamau –v- George Kamau (2015)eKLR**; **Vijay –Morjaria –v- Nansingh Madhusingh Darbar & Another (2000) eKLR**; **Kuria Kiarie & 2 Others –v- Sammy Magera (2018)eKLR**; **Duncan Githiga Mwangi –v- Kanu Maendeleo Ya Wanawake Muranga Branch & 4 Others (2019)eKLR** and **Sukhdev Singh Lady –v- Philip Ojwang Kamau & 3 Others (2018)eKLR** and urged the court to dismiss the 1<sup>st</sup> defendant's counter-claim with costs and allow the Plaintiff's suit and order the defendants to jointly and severally refund the plaintiffs' purchase price.

### **1<sup>ST</sup> DEFENDANT'S COUNSEL'S SUBMISSION**

19. Counsel for the 1<sup>st</sup> defendant submitted that the 2<sup>nd</sup> defendant failed to adduce evidence as to how he acquired title to the suit property on 11<sup>th</sup> October, 2012 which was already in the name of the 1<sup>st</sup> defendant as at 23<sup>rd</sup> October 1980. That in perpetuating the fraud further, the 2<sup>nd</sup> defendant proceeded to illegally subdivide the suit property into three portions and sold a portion, KWALE/GALU KINONDO/2368 to the plaintiffs while knowing that he did not have a valid title and was not the genuine owner thereof. Relying on the case of **Samuel Odhiambo Oludhe & 2 Others –v- Jubilee Jumbo Hardware Limited & Another (2018)eKLR** and **Alice Chemutai Too –v- Nickson Kipkurui Korir & 2 Others (2015)eKLR**, the 1<sup>st</sup> defendant's counsel submitted that it was obvious that the 2<sup>nd</sup> defendant deliberately and fraudulently colluded with the 4<sup>th</sup> defendant to obtain the registration of the suit property in the 2<sup>nd</sup> defendant's name because the 4<sup>th</sup> defendant is the one who has the sole mandate to register interests in land. It was submitted that the 1<sup>st</sup> defendant has proved fraud on the part of the 2<sup>nd</sup> and 4<sup>th</sup> defendants as well as on the part of the plaintiffs. It was counsel's submission that the plaintiffs cannot claim to be innocent purchasers for value without notice, and that even if they were, their title cannot stand under Section 26 (1) (b) of the Land Registration Act, 2012. Counsel relied on the case of **Elijah Makeri Nyang'ra –v- Stephen Mungai Njuguna & Another (2013) eKLR** and **Petronillah Nafuna Khaemba –v- Attorney General & 7 Others (2017)eKLR**. Counsel urged the court to allow the 1<sup>st</sup> defendant's counter-claim and find that the 1<sup>st</sup> defendant is the lawful owner of the suit property and to revoke and/or cancel the 2<sup>nd</sup> defendant's title to the property together with the resultant subdivisions and to order the 4<sup>th</sup> defendant to rectify the land register to restore the 1<sup>st</sup> defendant as owner of the property KWALE/GALU KINONDO/397.

### **ANALYSIS AND DETERMINATION**

20. I have considered the pleadings and evidence on record. The main issues for determination are whether the plaintiffs are entitled to refund of the purchase price paid, and if so, by whom, and whether the 1<sup>st</sup> defendant is entitled to the prayers sought in the counter-claim.

21. From the evidence on record and the documents produced, it is evident that the property known as KWALE/GALU KINONDO/397 was registered in the name of Kinuthia Holdings Limited, the 1<sup>st</sup> defendant herein on 23<sup>rd</sup> October, 1980. The 1<sup>st</sup> defendant produced a certificate of title issued to it on 23<sup>rd</sup> October, 1980 as D.exhibit No.8. While the plaintiffs claimed that they purchased a portion of the suit property, being PARCEL NO. KWALE/GALU KINONDO/2368 from the 2<sup>nd</sup> defendant, there was no evidence adduced to show how the 2<sup>nd</sup> defendant acquired title to the suit property on 11<sup>th</sup> October, 2012 when the same was already in the name of the 1<sup>st</sup> defendant. It was the 1<sup>st</sup> defendant's evidence that it never transferred or sold or parted with its interest in the suit property in favour of the 2<sup>nd</sup> defendant or anyone else. The evidence by the 1<sup>st</sup> defendant was uncontroverted and remains unchallenged. From the evidence on record what has emerged is a clear fraudulent scheme between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and probably in cohort with the 4<sup>th</sup> defendant or its officers. The evidence in this case puts no one in doubt that the title to the 2<sup>nd</sup> defendant and the subsequent subdivision were obtained illegally,

unprocedurally or through a corrupt scheme. The 1<sup>st</sup> defendant is still holding the original title to land parcel number KWALE/GALU KINONDO/397. In the absence of any evidence to show that the 1<sup>st</sup> defendant sold and transferred the said land to the 2<sup>nd</sup> defendant, or that the 1<sup>st</sup> defendant's title was cancelled and/or revoked, the documents (if any) that conveyed title to the 2<sup>nd</sup> defendant were no doubt forged. The title in the name of the 2<sup>nd</sup> defendant could not therefore have been obtained legally or procedurally. The 1<sup>st</sup> defendant as the real title holder having led evidence that it neither sold nor transferred the suit land to the 2<sup>nd</sup> defendant, or anyone else, is prima facie evidence that the 2<sup>nd</sup> defendant obtained title to the suit land by way of fraud or misrepresentation or through a corrupt scheme. Any title to land obtained fraudulently and through a corrupt scheme is subject to impeachment under the provisions of Section 26 of the Land Registration Act. It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions such as the purported subdivisions and transfer and registration in favour of the plaintiffs are null and void and have to be cancelled as well, for they were entered into by a party who had no capacity to do so, he not having a title in the first place. It is my finding, and I so hold that Obadiah Kioko Kavivya, the 2<sup>nd</sup> defendant herein was not the owner of the suit property as Kinuthia Holdings Limited, the 1<sup>st</sup> defendant herein had not transferred it to him. As a consequence, the 2<sup>nd</sup> defendant did not hold any valid title or interest in the suit property to pass onto the plaintiffs. The 2<sup>nd</sup> defendant has completely failed to demonstrated how he acquired title in his name.

22. In light of the above finding, I am satisfied that the 1<sup>st</sup> defendant has proved its case on a balance of probabilities and are entitled to the orders sought in the counter-claim. The court is satisfied that the 1<sup>st</sup> defendant has proved that its case falls within the exceptions under Section 26 (1) of the Land Registration Act, 2012 which provides as follows:

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

**a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

23. Further, Section 80 of the Land Registration Act provides as follows:

**“Subject to subsection 2, the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied the any registration was obtained, made or omitted by fraud or mistake**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease, or charge for valuable consideration, unless the proprietor had knowledge of the omissions, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

24. In the case of **Petronillah Nafuna Khaemba –v- Attorney General & 7 Others (supra)**, Eboso J stated:

**“Both this court and the Court of Appeal have been consistently categorical that it was never the intention of parliament to confer a thumb of approval to fraud in acquisition of title to land both under the repealed and current land registration framework. Where a legitimate land owner is disposed of land through fraud such as what is before court presently, courts of law have a duty to remedy the fraud by annulling the fraudulent entries....”**

25. From the evidence on record, there is no doubt that the title in the name of the 2<sup>nd</sup> defendant was acquired fraudulently. However from the evidence on record, it is not clear whether the 4<sup>th</sup> defendant or its registry staff were involved in the fraudulent, illegal, unprocedural or the corrupt scheme that led to the registration of the suit property in the name of the 2<sup>nd</sup> defendant together with the subsequent subdivisions and transfer to the plaintiffs. I say so because the evidence by the 1<sup>st</sup> defendant was that it was informed by the 4<sup>th</sup> defendant that the Green Card in respect of the suit property was missing and were advised to initiate the process of opening a new Green Card. In my view, the information and advice given could not have come from a person who was party to the fraudulent activities that led to the registration of the 2<sup>nd</sup> defendant and subsequently the plaintiffs, as owners of the suit property or part of it. Further, it was the plaintiffs' evidence that they were given title by the 3<sup>rd</sup> defendant and not the 4<sup>th</sup> defendant. I am therefore prepared to give the 4<sup>th</sup> defendant the benefit of doubt with the regard to the fraudulent actions that took place. However, there is no doubt that the title that was held by the 2<sup>nd</sup> defendant was acquired fraudulently, illegally and unprocedurally or through a corrupt scheme and therefore did not have a good title to pass to the plaintiffs. Accordingly, and in light of the above findings, the title of Obadiah Kioko Kavivya the 2<sup>nd</sup> defendant over TITLE NO.KWALE/GALU KINONDO/397 and the subsequent subdivisions, as well as the subsequent transfer of the suit property to the plaintiffs are invalid and are subject to cancellation as they were improperly procured.

26. It was the 2<sup>nd</sup> defendant's duty to make a good and marketable title to the property contracted to be sold to the plaintiffs. In this case, the sale has gone off because the 2<sup>nd</sup> defendant is unable to make title as he had no title to pass to the plaintiffs. Therefore there is a total failure of consideration and the plaintiffs as purchasers are entitled to recovery of the money paid. There is no doubt that the plaintiffs paid money for a title that was not good at law. From the evidence on record, the plaintiffs have shown that they carried out due diligence before purchasing the land, including, engaging the legal advice from the 3<sup>rd</sup> defendant. It is worth to note that the plaintiffs who are foreigners were shown a title in the name of Obadiah Kioko Kavivya, the 2<sup>nd</sup> defendant which was allegedly obtained in 2012. Of course that title has turned out to be a forgery. There was no evidence tendered to show that the plaintiffs participated in the fraud. I agree with the submissions by counsel for the plaintiffs that the plaintiffs were under no duty to trace the root title for parcel KWALE/GALU KINONDO/397, or KWALE/GALU KINONDO/2368 other than the record in the possession of the 4<sup>th</sup> defendant. From the evidence tendered, I am prepared to

hold that the plaintiffs were innocent purchasers for value without notice of defect of title of portion of parcel KWALE/GALU KINONDO/397 from which KWALE/GALU KINONDO/2368 was allegedly subdivided from. While there is no doubt that the plaintiffs are entitled to refund the question is who is liable to make the refund.

27. From the evidence on record it is clear that the plaintiff paid the purchase price of Kshs.13,500,000/= to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs produced copies of bankers cheques and funds transfers. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are therefore liable to refund the plaintiffs the sum of kshs.13,500,000/= paid as purchase price. Further, the plaintiffs are also entitled to refund of Kshs.1,000,000/= from the 3<sup>rd</sup> defendant which was paid by the plaintiffs allegedly as legal fees, taxes and other expenses. The 3<sup>rd</sup> defendant, Caroline Njogu is an advocate of this court. She neither entered appearance nor filed defence. She is the one who is alleged to have uttered the alleged fake title document and carried out the transactions that led to the impugned transfer to the plaintiffs. It is also alleged that the 3<sup>rd</sup> defendant is the one who handed over the impugned title to the plaintiffs. As already stated, the 3<sup>rd</sup> defendant is also the one who received the purchase price in respect of the impugned sale and transfer. No doubt the 3<sup>rd</sup> defendant was a key player in the impugned transaction. The plaintiffs' case against the 3<sup>rd</sup> defendant is undefended and wholly succeeds. The same also applies to the 1<sup>st</sup> defendant's counter-claim.

28. The plaintiffs' have also made a claim for general damages. I am of the view that in a case where the vendor under a contract for the sale of land is in breach of the contract due to a defect in the vendor's title, the damages are at large, and the court can give such damages as according to general principles, it thinks right. In the instant case, the plaintiffs' evidence was that they were purchasing the suit land to put up their retirement/holiday home. No doubt their desire has been shattered by the failure by the 2<sup>nd</sup> defendant to make a good title, and there has been a total failure of consideration. I will award the plaintiffs a sum of Kshs.1,000,000/= as general damages payable by the 2<sup>nd</sup> defendant. The damages will attract interest from the date of judgment. Lastly, costs of the suit shall be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally. On the whole, the plaintiff's case partly succeeds and the 1<sup>st</sup> defendant's counter-claim succeeds and I make the following orders:

1. A declaration is hereby issued that the 1<sup>st</sup> defendant, Kinuthia Holdings Limited is the legal owner of LAND PARCEL NUMBER KWALE/GALU KINONDO/397.
2. That the title of the 2<sup>nd</sup> defendant, Obadiah Kioko Kivivya to the land parcel number KWALE/GALU KINONDO/397 and the subsequent subdivisions into KWALE/GALU KINONDO/2366, KWALE/GALU KINONDO/2367 and KWALE/KINONDO/2368 were improperly procured and the same are hereby cancelled.
3. A declaration is hereby issued that the sale and transfer of KWALE/GALU KINONDO/2368 from the 2<sup>nd</sup> defendant to the plaintiffs was unprocedural and illegal
4. That the title of the plaintiffs to LAND PARCEL KWALE/GALU KINONDO/2368 is hereby cancelled.
5. An order is hereby issued compelling the 4<sup>th</sup> defendant to cancel the title to land parcel numbers KWALE/GALU KINONDO/397 and the resultant subdivision numbers KWALE/GALU KINONDO/2366, KWALE/GALU KINONDO/2367 and KWALE/GALU KINONDO/2368 and the registration of the 2<sup>nd</sup> defendant and the plaintiffs as owners.
6. An order is hereby issued compelling the 4<sup>th</sup> defendant to rectify the register of land parcel KWALE/GALU KINONDO/397 the resultant subdivisions KWALE/GALU KINONDO/2366, KWALE/GALU KINONDO/2367 and KWALE/GALU KINONDO/2368 so as to remove entries in favour of the 2<sup>nd</sup> defendant and the plaintiffs and the TITLE KWALE/GALU KINONDO/397 to revert back to the proprietorship of Kinuthia Holdings Limited.
7. An order is hereby issued compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally to refund the sum of Kshh.14,500,000/= paid to them by the plaintiffs as purchase price and other expenses.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally to pay Kshs.1,000,000/= general damages to the plaintiffs.
9. A permanent injunction is hereby issued restraining the plaintiffs, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from entering into, dealing or in any way interfering with the LAND PARCEL KWALE/GALU KINONDO/397.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally shall bear the costs of the plaintiffs and of the other defendants to the suit.

29. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 28<sup>th</sup> day of September 2020

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C.K. YANO

JUDGE

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**