



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 367 OF 2012**

**FRAYSHYA NJERI MBUGUA .....1<sup>ST</sup> PLAINTIFF**

**NAOMI NYAMBURA MWANGI.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**GEOFFREY MACHARIA MURAYA.....1<sup>ST</sup> DEFENDANT**

**JORETH LIMITED.....2<sup>ND</sup> DEFENDANT**

**THOME FARMERS NO.5 LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background.**

This is one of the many cases that this court has been called upon to determine concerning the ownership of portions of land that originated from L.R. No. 4920/3 and L.R No. 4921/3. Joreth Limited and Thome Farmers No. 5 Limited, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein have been common parties to the numerous cases that have been brought to this court over disputes relating to the ownership of portions of the two parcels of land in which cases one or both of them have been sued as defendants.

The 2<sup>nd</sup> defendant was at all material times the registered owner of L.R. No. 4920/3 and L.R No. 4921/3. The 2<sup>nd</sup> defendant agreed to sell to the 3<sup>rd</sup> defendant L.R. No. 4920/3 and L.R No. 4921/3. The 3<sup>rd</sup> defendant had several shareholders and intended to purchase the two parcels of land for its members. Following that agreement, the 3<sup>rd</sup> defendant took possession of L.R. No. 4920/3 and L.R No. 4921/3 and subdivided the same into several portions that it allocated to its shareholders. The 2<sup>nd</sup> defendant did not however transfer to the 3<sup>rd</sup> defendant L.R. No. 4920/3 and L.R No. 4921/3. In the circumstances, neither the 3<sup>rd</sup> defendant nor its shareholders acquired legal interest in L.R. No. 4920/3 and L.R No. 4921/3 or in the subdivisions thereof. L.R. No. 4920/3 and L.R No. 4921/3 were subsequently consolidated to form L.R No. 13330.

Sometimes in 1992, the 2<sup>nd</sup> defendant filed a suit at the High Court in Nairobi namely, HCCC No. 6206 of 1992 against the 3<sup>rd</sup> defendant and 23 others seeking vacant possession of the portions L.R. No. 4920/3 and L.R No. 4921/3 that the 3<sup>rd</sup> defendant had allocated to some of its shareholders that the 2<sup>nd</sup> defendant considered as trespassers. In the said suit, a consent was recorded on 27<sup>th</sup> June, 2002 between the 2<sup>nd</sup> defendant and some of the defendants in the suit to the effect that the said defendants would pay to the 2<sup>nd</sup> defendant additional sum of Kshs. 200,000/- after which the 2<sup>nd</sup> defendant would transfer to them the said portions of L.R. No. 4920/3 and L.R No. 4921/3 that had been allocated to them by the 3<sup>rd</sup> defendant. It was a term of the said consent that any party to the consent who defaulted in the payment of the said sum of Kshs. 200,000/- would have judgment entered against him as prayed in that suit. It is not clear as to what became of that suit as far as the defendants who never subscribed to the said consent were concerned. A number of shareholders of the 3<sup>rd</sup> defendant who were allocated portions of L.R. No. 4920/3 and L.R No. 4921/3 by the 3<sup>rd</sup> defendant were not parties to that suit and as such were not bound by the said consent.

The 2<sup>nd</sup> defendant nevertheless applied the said consent order to all those who were allocated portions of L.R. No. 4920/3 and L.R No. 4921/3 by the 3<sup>rd</sup> defendant. The shareholders of the 3<sup>rd</sup> defendant who paid Kshs. 200,000/- in accordance with the terms of the consent retained their plots and had the same transferred to them by the 2<sup>nd</sup> defendant while those who refused or failed to pay had their plots sold by the 2<sup>nd</sup> defendant to third parties.

**The suit before the court.**

The 1<sup>st</sup> plaintiff is the widow of the late Hezekiah Kagunda Mbugua and a legal representative of his estate while the 2<sup>nd</sup> plaintiff is the widow of the late Mwangi Gakure and a legal representative of his estate. Hezekiah Kagunda Mbugua and Mwangi Gakure (both referred to hereinafter only as “the deceased”) were shareholders of the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant allocated to them jointly a portion of L.R. No. 4920/3 and L.R. No. 4921/3 known as L.R. No. 13330/216 (hereinafter referred to as “the suit property”). The plaintiffs brought this suit by way of a plaint dated 22<sup>nd</sup> June, 2012 filed in court on the same date. The plaint was amended on 18<sup>th</sup> November, 2013 and again before the commencement of the trial. In their amended plaint dated 28<sup>th</sup> June, 2013, the plaintiffs averred that the deceased had purchased the suit property from the 3<sup>rd</sup> defendant in 1975. The plaintiffs averred that on 7<sup>th</sup> February, 2012, the 2<sup>nd</sup> defendant fraudulently and illegally purported to sell and transfer the suit property to the 1<sup>st</sup> defendant without any right to do so to the detriment of the plaintiffs.

The plaintiffs sought judgment against the defendants for;

- (a) A permanent injunction restraining the defendants from selling, alienating, disposing, constructing on, developing and/or interfering with the suit property.
- (b) A declaration that the plaintiffs are the sole owners and are entitled to sole possession of the suit property.
- (c) An order for the rectification of the register of the suit property by cancellation of the registration of the 1<sup>st</sup> defendant as the owner of the suit property and registration of the property in the name of the plaintiffs as the proprietors.
- (d) A declaration that the plaintiffs are entitled to compensation by the defendants for the current value of the suit property being Kshs. 18,500,000/-.
- (e) Costs of the suit.

The 1<sup>st</sup> defendant filed his statement of defence on 30<sup>th</sup> October, 2012. The 1<sup>st</sup> defendant denied the plaintiffs’ claim in its entirety. The 1<sup>st</sup> defendant denied that he acquired the suit property illegally and fraudulently as claimed by the plaintiffs. The 1<sup>st</sup> defendant averred that as the sole and absolute registered owner of the suit property, he had a right to develop the same. The 1<sup>st</sup> defendant averred that he was a bona fide purchaser of the suit property for value from the 2<sup>nd</sup> defendant which was the registered owner thereof. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiffs’ suit with costs.

The 2<sup>nd</sup> defendant filed its statement of defence on 22<sup>nd</sup> June, 2017. The 2<sup>nd</sup> defendant also denied the plaintiffs’ claim in its entirety. The 2<sup>nd</sup> defendant averred that it was at all material times the registered owner of the suit property. The 2<sup>nd</sup> defendant averred that the suit property had at no time been registered in the name of the 3<sup>rd</sup> defendant as the owner thereof and that the 2<sup>nd</sup> defendant had no relationship with the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant averred that the receipts issued by the 3<sup>rd</sup> defendant to the plaintiffs for the payments that the plaintiffs had made to it and the share certificates issued by the 3<sup>rd</sup> defendant to the plaintiffs in acknowledgment of the deceased’s membership in the 3<sup>rd</sup> defendant had nothing to do with the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant averred that the said documents did not entitle the plaintiffs to the suit property that belonged to the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant averred that in 1992 it filed a suit in the High Court namely, HCCC No. 6206 of 1992 against twenty-four identifiable persons who had trespassed on L.R. No. 13330. The 2<sup>nd</sup> defendant averred further that a consent order was made in that suit pursuant to which the defendants in that suit and other trespassers on L.R. No. 13330 who were willing would pay a sum of Ksh 200,000/- plus legal costs to the 2<sup>nd</sup> defendant after which the parcels of land that they were occupying would be transferred to them. The 2<sup>nd</sup> defendant averred that the plaintiffs did not pay the said sum of Kshs. 200,000/- to the 2<sup>nd</sup> defendant within the stipulated time. The 2<sup>nd</sup> defendant averred that as the registered owner of the suit property it was free to offer the property for sale to other interested purchasers when the plaintiffs failed to pay the said sum of Kshs. 200,000/-. The 2<sup>nd</sup> defendant averred that it legally sold and transferred the suit property to the 1<sup>st</sup> defendant.

The 3<sup>rd</sup> defendant neither entered appearance nor filed a defence. Before the hearing of the suit commenced on 22<sup>nd</sup> June, 2017, the plaintiffs sought and were granted leave to amend prayer (c) in the amended plaint dated 28<sup>th</sup> June, 2013 by deleting Kshs. 18,500,000/- and inserting in place thereof Kshs. 30,000,000/-. The plaintiffs called three witnesses. The first to give evidence was a valuer; Stephen Bonface Mureithi Wamae (PW1). PW1 told the court that he was a registered valuer practising as Wamae Muriuki & Associates. He stated that he was instructed by the plaintiffs to value the suit property. He stated that his firm inspected the suit property after which they prepared a valuation report dated 9<sup>th</sup> December, 2016. He stated that they valued the suit property at Kshs. 30,000,000/- in vacant possession. He produced in evidence as exhibit a copy of his firm’s valuation report dated 9<sup>th</sup> December, 2016.

The plaintiffs’ second witness was the 1<sup>st</sup> plaintiff, Frashya Njeri Mbugua (PW2). PW2 testified as follows: She was the widow and administrator of the estate of Hezekiah Kagunda Mbugua (deceased). The deceased and his friend, Mwangi Gakure (deceased) were allocated the suit property by the 3<sup>rd</sup> defendant. Hezekiah Kagunda Mbugua and Mwangi Gakure (both referred to as “the deceased”) purchased the suit property from the 3<sup>rd</sup> defendant in 1975. The deceased were members of the 3<sup>rd</sup> defendant and were issued with a share certificate. PW2 produced as exhibits a number of receipts that were issued to the deceased by the 3<sup>rd</sup> defendant for the various payments that they made to the 3<sup>rd</sup> defendant. PW2 also produced as an exhibit a copy of the share certificate that was issued to the deceased by the 3<sup>rd</sup> defendant on 29<sup>th</sup> July, 1979. PW2 stated further that after the deceased were issued with the said share certificate, they were invited to ballot for plots. After balloting, they were shown the suit property. She stated that they did not follow up on the title for the suit property and after some time, they heard announcements through the radio that those who were allocated land by the 3<sup>rd</sup> defendant were required to make further payments to the 2<sup>nd</sup> defendant through the law firm of Kimani Kahiro & Associates Advocates in order to get titles. Following that announcement, they made the payments that were required on various dates to the said firm of advocates and were issued with receipts. She stated that the said payments were received by Kimani Kahiro & Associates Advocates on behalf of the 2<sup>nd</sup> defendant. She produced the receipts in evidence as

exhibit.

She stated that after making the said payments, they waited to be issued with a title for the suit property which they never received. They later learnt that someone had entered the suit property and was developing the same. Upon inquiry, they learnt that the person developing the property was the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant told them that he acquired the suit property from the 2<sup>nd</sup> defendant. She stated that they paid a total of Kshs. 217,000/- for the suit property which was never refunded to them.

The plaintiffs' last witness was Edward Gakure Mwangi (PW3). PW3 was the son of the 2<sup>nd</sup> plaintiff and Mwangi Gakure (deceased). In his evidence, PW3 stated as follows: The 2<sup>nd</sup> plaintiff was living in their rural home and that it was he who was looking after the suit property. The suit property was co-owned with the 1<sup>st</sup> plaintiff. The property was acquired from the 3<sup>rd</sup> defendant. He learnt from a friend that the suit property was being developed. He informed the 1<sup>st</sup> plaintiff of this development. They got police officers to accompany them to the suit property where they found the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant identified himself as the owner of the suit property. PW3 corroborated the evidence of PW2 that following announcements that were made through the radio, the plaintiffs made further payments for the suit property to the 2<sup>nd</sup> defendant through the firm of Kimani Kahiro & Associates Advocates so that they could be issued with a title for the property. He stated that together with the 1<sup>st</sup> plaintiff, they paid a total of Kshs. 211,000/- to the said firm of Kimani Kahiro & Associates Advocates who received the payments on behalf of the 2<sup>nd</sup> defendant. PW3 stated further that when he started pursuing the issue of the title deed with the said firm of Kimani Kahiro & Associates Advocates, the said firm told him that they no longer had instructions to act for the 2<sup>nd</sup> defendant. The firm referred him to another firm of advocates, Chege Wainaina & Co. Advocates.

PW3 stated that although the plaintiffs had paid the purchase price for the suit property in full to the 3<sup>rd</sup> defendant, they made the additional payment of Kshs. 200,000/- in order to be issued with a title for the suit property. He stated that although they made payment of all the amount that was required, they were never issued with a title deed for the property. He stated that the firm of Chege Wainaina & Co. Advocates to which they were referred to by Kimani Kahiro & Associates Advocates was not helpful. He stated that it was after a long wait for the title that they learnt that the suit property was being developed by the 1<sup>st</sup> defendant as stated earlier.

On the part of the defendants, the 1<sup>st</sup> defendant, Geoffrey Macharia Muraya (DW1) was the first to give evidence. DW1 adopted his witness statement dated 31<sup>st</sup> January, 2018 as his evidence in chief and produced as exhibits the documents that were attached to his bundle of documents of the same date. In his witness statement, DW1 stated as follows: Sometimes in 2011 he learnt from a friend that the 2<sup>nd</sup> defendant had repossessed some plots and were selling the same. He visited the 2<sup>nd</sup> defendant and was shown several plots. He showed interest in the suit property and made an offer to purchase the same at Kshs. 1,800,000/-. His offer was accepted and after the formalities associated with purchase of land, he was issued with a title for the property. He took possession of the property thereafter and started developing the same. It was at that stage that some people came to the premises accompanied by police officers and demanded to know who was developing the property. He told them that he was the one developing the property and showed them his title document after which they left. It was after that that the plaintiffs brought this suit. He stated that he had put up a family home on the suit property at a cost of Kshs. 20,000,000/-.

Next to give evidence for the defendants was Robertson Nderitu Mwihi (DW2). DW2 told the court that he was an employee of the 2<sup>nd</sup> defendant and that he was authorised by the 2<sup>nd</sup> defendant to give evidence on its behalf. DW2 adopted his witness statement dated 22<sup>nd</sup> June, 2017 as his evidence in chief and produced the documents attached to the 2<sup>nd</sup> defendant's list of documents dated 22<sup>nd</sup> June, 2017 as exhibits. In his witness statement, the DW2 reiterated the contents of the 2<sup>nd</sup> defendant's statement of defence. DW2 reiterated that prior to the transfer of the suit property to the 1<sup>st</sup> defendant, the same belonged to the 2<sup>nd</sup> defendant and that at no time had the deceased or the 3<sup>rd</sup> defendant acquired interest in the same. DW2 stated that neither the 2<sup>nd</sup> defendant nor its advocates received Kshs. 200,000/- from the plaintiffs pursuant to the orders that were issued in HCCC No. 6206 of 1992. DW2 stated further that the 2<sup>nd</sup> defendant sold and transferred the suit property to the 1<sup>st</sup> defendant after the plaintiffs failed to comply with the terms of the consent order that was made in HCCC No. 6206 of 1992.

#### Submissions.

After the close of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 24<sup>th</sup> April, 2019 while the 1<sup>st</sup> defendant filed his submissions on 10<sup>th</sup> February, 2020. The 2<sup>nd</sup> defendant had not filed its submissions as at 10<sup>th</sup> February, 2020 when the court fixed a judgment date for this matter. The 2<sup>nd</sup> defendant was given 14 more days from 10<sup>th</sup> February, 2020 to file submissions and none was filed even after that extension of time.

The plaintiffs submitted that they had established that the deceased were allocated the suit property by the 3<sup>rd</sup> defendant after making full payment of the purchase price for the property. The plaintiffs submitted that after those who were allocated plots by the 3<sup>rd</sup> defendant were called upon to make further payments so that they could be issued with titles, they made further payment through the firm of Kimani Kahiro & Associates Advocates. The plaintiffs submitted that they had placed evidence before the court showing that they paid a total of Kshs. 217,152/- for the suit property contrary to the claim by the 2<sup>nd</sup> defendant that they only paid Kshs. 110,000/-. The plaintiffs submitted that Kimani Kahiro Advocate admitted having received payment from the plaintiffs on behalf of the 2<sup>nd</sup> defendant before instructions were withdrawn from him. The plaintiffs submitted that having paid the full purchase price for the suit property, they were entitled to the property or in the alternative Kshs. 30,000,000/- being the value thereof. In support of their submissions, the plaintiffs relied on [Thomas Gitura Gathu v Joreth Limited & 2 others \[2010\]eKLR](#) and [Jerusha Wangari Mwangi v Beatrice Muthoni Karanja\[2018\]eKLR](#). The plaintiffs urged the court to find that they had proved their case on a balance of probabilities.

On his part, the 1<sup>st</sup> defendant submitted that he purchased the suit property from the 2<sup>nd</sup> defendant at a price of Kshs. 1,800,000/- after undertaking all necessary due diligence through the advocates that he had engaged for that purpose. The 1<sup>st</sup> defendant submitted that he was

a bona fide purchaser of the suit property for value without notice of any defect in the title thereof. The 1<sup>st</sup> defendant averred that it had absolute and indefeasible title to the suit property. In support of his submissions, the 1<sup>st</sup> defendant relied on the cases of Eunice Grace Njambi Kamau & another v Attorney General & 5 others [2013]eKLR and Christopher Wachira Githui v Joreth Limited & another [2014]eKLR.

Analysis of the parties' respective cases and determination of the issues arising.

The parties did not frame and file in court a statement of agreed issues. From the pleadings and the evidence tendered by the parties, the following in my view are the issues which arise for determination in this suit;

- 1) Whether the plaintiffs are the owners of the suit property and are entitled to possession thereof.
- 2) Whether the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was illegal and fraudulent.
- 3) Whether the 1<sup>st</sup> defendant was a bona fide purchaser of the suit property for value without notice of any defect in the title thereof.
- 4) Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
- 5) Who is liable for the costs of the suit?

Whether the plaintiffs are the owners of the suit property and are entitled to possession thereof.

The deceased whose estates are represented by the plaintiffs were shareholders of the 3<sup>rd</sup> defendant. It was not disputed that the deceased acquired the suit property from the 3<sup>rd</sup> defendant. It was also not disputed that at all material times, the 2<sup>nd</sup> defendant was the registered owner of the two parcels of land known as L.R No. 4920/3 and L.R No. 4921/3 which were consolidated to form L.R No. 13330. From the evidence that was placed before the court by the 2<sup>nd</sup> defendant, in February, 1974, the 2<sup>nd</sup> defendant agreed to sell the two parcels of land to the 3<sup>rd</sup> defendant at a price to be agreed upon. On the strength of that agreement, the 3<sup>rd</sup> defendant subdivided the two parcels of land into several plots which it allocated to its shareholders. From the evidence on record, the deceased were allocated one of the sub-divisions of L.R No. 4920/3 and L.R No. 4921/3 that was referred to as Plot No. 468. After the completion of survey, consolidation and subdivision of L.R No. 4920/3 and L.R No. 4921/3, Plot No. 468 that was allocated to the deceased was given land reference number 13330/216 (the suit property). It was not disputed that as at the time the 3<sup>rd</sup> defendant allocated the suit property to the deceased, the 2<sup>nd</sup> defendant had not transferred L.R No. 4920/3 and L.R No. 4921/3 to the 3<sup>rd</sup> defendant. The two parcels of land remained registered in the name of the 2<sup>nd</sup> defendant. According to the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant had not made any payment to it in respect of L.R No. 4920/3 and L.R No. 4921/3 when it subdivided the same and allocated portions thereof to its shareholders that the 2<sup>nd</sup> defendant referred to as trespassers on L.R No. 4920/3 and L.R No. 4921/3. Since L.R No. 4920/3 and L.R No. 4921/3 remained registered in the name of the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant had not acquired any legal title over the same and the subdivisions thereof when it allocated the same to its shareholders. In the circumstances, the deceased who were allocated the suit property by the 3<sup>rd</sup> defendant could not get a better title than that which was held by the 3<sup>rd</sup> defendant.

The 2<sup>nd</sup> defendant however gave the shareholders of the 3<sup>rd</sup> defendant who were allocated portions of L.R No. 4920/3 and L.R No. 4921/3 a lifeline. The 2<sup>nd</sup> defendant agreed to transfer to the shareholders of the 3<sup>rd</sup> defendant the portions of L.R No. 4920/3 and L.R No. 4921/3 that were allocated to them on condition that they paid to the 2<sup>nd</sup> defendant Kshs. 200,000/-. The plaintiffs accepted this offer and although they had paid all the charges that were payable to the 3<sup>rd</sup> defendant for the suit property, they made a further payment of Kshs. 211,152/- to the 2<sup>nd</sup> defendant between 26<sup>th</sup> August, 2005 and 7<sup>th</sup> July, 2009 through the firm of Kimani Kahiro & Associates Advocates which had been instructed by the 2<sup>nd</sup> defendant to receive on its behalf the payments from those who had been allocated portions of L.R No. 4920/3 and L.R No. 4921/3 by the 3<sup>rd</sup> defendant. In paragraph 2 of his affidavit sworn on 19<sup>th</sup> November, 2012 and filed herein pursuant to an order by the court, Ernest Kahiro Kimani the managing partner in the firm of Kimani Kahiro & Associates Advocates admitted that his firm received from the plaintiffs the said sum of Kshs. 211,152/- in respect of which the firm issued receipts. The said advocate stated further that the payments that his firm received from the plaintiffs were received on behalf of the 2<sup>nd</sup> defendant and that the firm accounted to the 2<sup>nd</sup> defendant for the same.

In its statement of defence, the 2<sup>nd</sup> defendant averred that the plaintiffs did not pay the said sum of Kshs. 200,000/- within the prescribed period of 6 months. In his evidence, the 2<sup>nd</sup> defendant's witness, DW2 stated that the plaintiffs were late in making the payments and did not complete the payment of the said sum of Kshs. 200,000/-. DW2 stated that the plaintiffs were to pay Kshs. 210,000/- but only paid Kshs. 110,000/- to the firm of Kimani Kahiro & Associates Advocates. I am satisfied from the evidence placed before the court that the plaintiffs paid to the firm of Kimani Kahiro & Associates Advocates on behalf of the 2<sup>nd</sup> defendant a total sum of Kshs. Kshs. 211,152/- and not Kshs. 110,000/- as claimed by the 2<sup>nd</sup> defendant. I have looked at the consent that was recorded in HCCC No. 6206 of 1992. The consent provided for the payment to the 2<sup>nd</sup> defendant of Kshs. 200,000/- within 6 months of the consent. The consent order was made on 27<sup>th</sup> June, 2002. The 6 months referred to in the consent was to expire on 27<sup>th</sup> December, 2002. I have noted however that the firm of Kimani Kahiro & Associates Advocates received payment from the plaintiffs between 2005 and 2009 several years after the consent and that the monies were received on behalf of the 2<sup>nd</sup> defendant without any protest. I have also noted that when the said firm was receiving the payments from the plaintiffs, it had instructions to act for the 2<sup>nd</sup> defendant. I have noted further that the 2<sup>nd</sup> defendant did not reject the payments that were made by the plaintiffs.

I am of the view that having agreed to transfer the suit property to the plaintiffs upon receipt of Kshs. 200,000/- and having been paid the

said amount, the 2<sup>nd</sup> defendant had an obligation to effect the transfer. It is common ground that the 2<sup>nd</sup> defendant did not transfer the suit property to the plaintiffs. The plaintiffs did not therefore acquire legal right or proprietary interest in the suit property. What was acquired by the plaintiffs in my view was an equitable interest in the suit property pending transfer of the property to them. This equitable interest came to an end when the 2<sup>nd</sup> defendant who was the legal owner of the suit property transferred the same to the 1<sup>st</sup> defendant on 7<sup>th</sup> March, 2012 in breach of the agreement that the 2<sup>nd</sup> defendant had entered into with the shareholders of the 3<sup>rd</sup> defendant who had been allocated portions of L.R No. 4920/3 and L.R No. 4921/3 by the 3<sup>rd</sup> defendant.

The 1<sup>st</sup> defendant was issued with a certificate of title on 7<sup>th</sup> March, 2012 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). In Arthi Highway Developers Limited v West End Butchery Limited & 6 others (supra) the Court of Appeal stated as follows with regard to section 23 of the Registration of Titles Act:

***“The law is typically stated in the case of Dr. Joseph Arap Ngok v Moijo Ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 where the court categorically declared that;***

***Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on the grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya be placed in jeopardy.”***

It is clear from the foregoing that the legal interest in the suit property that was acquired by the 1<sup>st</sup> defendant from the 2<sup>nd</sup> defendant superseded all equitable rights that existed over the suit property including the plaintiffs’ beneficial interest.

In the final analysis, it is my finding that the plaintiffs have not established that they are the owners of the suit property and that they are entitled to possession thereof. The first issue is therefore answered in the negative.

Whether the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was illegal and fraudulent.

In Black’s Law Dictionary 9<sup>th</sup> Edition at page 731 fraud is defined as:

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

In Ratilal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314, the court stated as follows at page 317:

***“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”***

The plaintiffs did not prove fraud against any of the defendants. The plaintiffs proved however that the 2<sup>nd</sup> defendant breached the agreement that the 2<sup>nd</sup> defendant entered into with the plaintiffs in relation to the suit property under which the suit property was to be transferred to the plaintiffs by the 2<sup>nd</sup> defendant upon payment of Kshs. 200,000/- which amount the plaintiffs paid in full.

Due to the foregoing, it is my finding that the suit property was not transferred by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant fraudulently but in breach of the agreement that the 2<sup>nd</sup> defendant had entered into with the plaintiffs aforesaid.

Whether the 1<sup>st</sup> defendant was a bona fide purchaser of the suit property for value without notice of any defect in the title thereof.

In Katende v Haridar & Company Limited [2008] 2 E.A.173 the Court of Appeal in Uganda held that:

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

- (a) he holds a certificate of title;***
- (b) he purchased the property in good faith;***
- (c) he had no knowledge of the fraud;***
- (d) he purchased for valuable consideration;***
- (e) the vendors had apparent valid title;***
- (f) he purchased without notice of any fraud;***

***(g) he was not party to any fraud.”***

It was not disputed that the 1<sup>st</sup> defendant is the registered proprietor of the suit property and that he has a certificate of title in respect thereof. From the evidence before the court, I am satisfied that the 1<sup>st</sup> defendant acquired the suit property in good faith for valuable consideration from the 2<sup>nd</sup> defendant. I am also satisfied that the 1<sup>st</sup> defendant had no notice of the plaintiffs' interest in the suit property before he purchased the same and that he was not involved in any acts of fraud in the purchase of the property. It is my finding therefore that the 1<sup>st</sup> defendant was an innocent purchaser of the suit property for value without notice of any defect or limitation in the title that was held by the 2<sup>nd</sup> defendant.

Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.

The plaintiffs sought several reliefs against the defendants. From the findings that I have made above, the plaintiffs have not proved their case as against the 1<sup>st</sup> defendant who is now the registered proprietor of the suit property and who is in possession thereof. The plaintiffs are therefore not entitled to prayers (a) and (b) of the amended plaint that are directed against the 1<sup>st</sup> defendant. I am satisfied however that the plaintiffs have proved their case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs proved that the deceased were shareholders of the 3<sup>rd</sup> defendant and were allocated the suit property by the 3<sup>rd</sup> defendant after paying the full purchase price. The 3<sup>rd</sup> defendant however failed to transfer the property to the deceased. The plaintiffs also established that after the 3<sup>rd</sup> defendant failed to deliver on its promises and vanished from the scene, the 2<sup>nd</sup> defendant who was the registered owner of the suit property came up and promised to facilitate the transfer of the property to the plaintiffs on payment of Kshs. 200,000/-. The plaintiffs tendered evidence showing that even after paying over Kshs. 200,000/- to the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant failed to transfer the suit property to the plaintiffs but instead sold the property to the 1<sup>st</sup> defendant without even refunding the payments that had been made by the plaintiffs.

I am satisfied that the plaintiffs have proved that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants breached the agreements that they entered into with the deceased and that the plaintiffs have suffered loss and damage. Since the suit property is now beyond the reach of the plaintiffs the same having been sold to the 1<sup>st</sup> defendant who has taken possession and developed the same, the court will award the plaintiffs general damages for loss of the suit property. The plaintiffs have claimed compensation in the sum of Kshs. 30,000,000/- being the current value of the suit property. The valuation report that was put in evidence by the plaintiffs was not challenged by the defendants in any material respect. There is no doubt that the plaintiffs have lost a bargain. The plaintiffs would not be able to get similar property in the neighbourhood of the suit property at the price at which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had agreed to sell the same to the deceased. The plaintiffs are entitled to general damages for loss of bargain. I will award the plaintiffs Kshs. 10,000,000/- as general damages.

Who is liable for the costs of the suit?

Costs are at the discretion of the court. The plaintiffs have succeeded in their claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs shall have the costs of the suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. As between the plaintiffs and the 1<sup>st</sup> defendant, each party shall bear its own costs.

Conclusion:

In conclusion, I hereby make the following orders;

1. The plaintiffs' claim against the 1<sup>st</sup> defendant is dismissed with each party bearing its own costs.
2. Judgment is entered for the plaintiffs against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally for;
  - (i) Kshs. 10,000,000/- as general damages.
  - (ii) Costs of the suit.

**Delivered and Dated at Nairobi this 24<sup>th</sup> Day of September, 2020**

**S. OKONG'O**

**JUDGE**

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Plaintiffs

Mr. Mwinzi for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

N/A for the 3<sup>rd</sup> defendant

