



No. 12

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 129 OF 2010**

**MWANAISHA KIRIALE MOHAMED..... 1<sup>ST</sup> PLAINTIFF**

**MBARAK HAMISI MBARAK..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ALFRED WAFUA OKUKU..... 1<sup>ST</sup> DEFENDANT**

**PETER THUO GACHERI..... 2<sup>ND</sup> DEFENDANT**

**NELLY NGONYO KAMAU..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

0. By a plaint dated the 28<sup>th</sup> April 2010, the plaintiffs, who claimed to be the registered owners of the suit property, namely suit parcels of land plots 6490, 6489, 6481 and 6480, alleged fraudulent transfer thereof to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by the 1<sup>st</sup> defendant to whom the plaintiffs had transferred the property, with no authority to sell, as a security for a loan obtained for them from a bank, Savings and Loan (K) Ltd. The particulars of fraud against the defendants were set out in the plaint: - as against the 1<sup>st</sup> defendant for primarily failing to pay monthly instalment to the said bank and allowing the loan account to fall in arrears despite receiving monies for such payment from the plaintiffs and offering the property for sale to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants without informing the plaintiffs; and as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in buying the property without due diligence. Consequently, the plaintiffs, prayed, principally, for a declaration that the transfer of the suit property was null and void.
0. The 1<sup>st</sup> Defendant filed a Defence dated 20<sup>th</sup> May 2010 in which he denied all the material paragraphs of the Plaint dated 28<sup>th</sup> April 2010 as follows:

*“3. The contents of paragraph 4,5,6,7,8,9,10,11,12,13,14,15,16 are hereinafter denied and the 1<sup>st</sup> defendant puts the plaintiffs on notice that, he shall demand evidence to that effect, and hence puts the said plaintiffs to strict proof.” (sic)*

0. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a defence dated the 8<sup>th</sup> June 2010 in which they set up a case of bona fide purchasers for valuable consideration without notice of the plaintiffs' alleged interest in the parcels of land, and the subsequent transfer and registration thereof in their names as registered proprietors. The jurisdiction of the Court was not admitted in view of a plea of *res judicata* by virtue of judgment made on the 14<sup>th</sup> May 2010 in a previous suit filed by the 2<sup>nd</sup> defendant against the 1<sup>st</sup> plaintiff in the Resident Magistrate's Court, being Mombasa CMCC No. 3049 of 2009, ***Peter Thuo Gatheri v. Mbarak Hamisi Mbarak***.
0. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants then made an application dated 23<sup>rd</sup> August 2010 seeking orders that:-
  1. ***The Complaint dated 28/04/2010 be struck out as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the suit be dismissed with costs for:-***
    - a. ***not disclosing a reasonable cause of action; [and]***
    - b. ***being frivolous, vexatious and an abuse of the court process.***
  2. ***Costs of the application.***
0. The application was supported by the affidavit of the 2<sup>nd</sup> defendant sworn on 23<sup>rd</sup> August 2010. The case for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/Applicants as discernible from the affidavit is simply that they were the joint proprietors of the suit property following their purchase of the same at Ksh.10,000,000/- from the 1<sup>st</sup> defendant, who was the then registered proprietor of the parcels of land, by virtue of an agreement of sale dated 16<sup>th</sup> February 2009 and subsequent registration of transfer dated on 8<sup>th</sup> September 2009; that they bought the property in good faith in the ordinary course of business for valuable consideration without notice of the plaintiffs claim on the property or privity of the arrangements between the plaintiffs and the 1<sup>st</sup> defendant; and that the plaintiffs had admitted through the 2<sup>nd</sup> plaintiff's two affidavits filed in the CMCC NO 3049 of 2009 on 30<sup>th</sup> November 2009 and 26<sup>th</sup> February 2010 that they had transferred the suit property to the 1<sup>st</sup> defendant and that he was the registered owner of the property at the time of the sale to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The said defendants therefore contended that the plaintiffs lost their interest in the suit property upon their agreement for sale and transfer of the property to the 1<sup>st</sup> defendant, and further that following judgement of the court in previously instituted suit CMCC NO 3049 of 2009, in which the court struck out the 2<sup>nd</sup> plaintiff's defence and entered judgment in favour of the 2<sup>nd</sup> defendant herein, the present suit was barred by *res judicata*, and an abuse of the court process being in fundamental contradiction with the plaintiffs statements in the affidavits filed in the said previous suit.
0. The plaintiffs' case as set out in the Complaint dated 28<sup>th</sup> April 2010 and the replying affidavit of the 1<sup>st</sup> plaintiff of 20<sup>th</sup> December 2010 [page 2 whereof (containing paragraphs 6-10) is missing from the record] together with the two affidavits filed in CMCC 3049 of 2009 attached to the 2<sup>nd</sup> defendant's supporting affidavit herein is that the plaintiffs, respectively mother and son, sought help from their family friend 1<sup>st</sup> defendant to save the suit property from imminent sale by the Standard Chartered Bank over a loan of Ksh.3.5 million and the 1<sup>st</sup> defendant agreed to loan them Ksh.3.5 million which was to be procured from Savings and Loan (K) Ltd for which purpose the plaintiffs executed a transfer to the 1<sup>st</sup> defendant to enable him to give the suit property as security for the loan. The plaintiffs contended that the transfer of the property to the 1<sup>st</sup> defendant was a conditional transfer for purposes of the loan only and the 1<sup>st</sup> respondent was obliged by agreement of 8<sup>th</sup> October 2007 setting out this arrangement to transfer back the property to the borrowers. The plaintiffs alleged to have paid Ksh.900,000/- towards the repayment which the 1<sup>st</sup> defendant failed to remit to the Bank but there was no evidence of any further repayments. By a letter of 13<sup>th</sup> August 2009, the 1<sup>st</sup> defendant is alleged to have demanded the payment within seven days of 'Ksh.6,070,000/- being the mortgage balance at Savings and Loan in default of which he threatened to *'dispose off the mortgage security to settle all the indebtedness incurred by me as a consequence of the loan agreement...'* The plaintiffs also alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were aware of the arrangement between the plaintiffs and the 1<sup>st</sup> defendant having been notified

when they approached the 2<sup>nd</sup> plaintiff to buy the plots and the houses. The plaintiffs therefore contended that the transfer was a fraud perpetrated by the defendants.

0. The 1<sup>st</sup> Defendant though filing a defence dated 20<sup>th</sup> May 2010 in which he denied all the material paragraphs of Plaintiff dated 28<sup>th</sup> April 2010, as aforesaid, did not participate in the application.
0. The counsel for the parties to the application – the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the plaintiffs - filed written submissions on the parties' respective contentions set out above and ruling was reserved.

### **Issues for determination**

0. The primary issues before the court are:-
  - a. whether the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants discloses a reasonable cause of action;
  - b. whether the suit is an abuse of the process of the court; and
  - c. whether this suit is *res judicata* by virtue of CMCC No. 3049 of 2009.

### ***Whether the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants discloses a reasonable cause of action***

0. The tests for an application to strike out a suit or pleading are well known and are set out in various decisions of the Court of Appeal including the ***DT Dobie & Company (Kenya) Ltd v. Muchina and Anor.***, Civil Appeal No. 37 of 1978 reported in (1982) KLR 1 and ***Said Hamad Shamisi v. Diamond Trust of Kenya Ltd.*** Civil Appeal No. 109 of 2009 reported in (2009) eKLR cited by the plaintiffs. In paraphrasing the leading decisions on the point, it is trite law that the court's power to summarily strike out a suit should be used sparingly and only in clearest of cases where it is plain and obvious that the suit as it stands it is incontestably bad and insufficient to entitle the plaintiff to the relief sought and it cannot be redeemed by amendment of the pleadings, and that where there are triable issues, the case should be heard on merit. See ***DT Dobie Company (K) Ltd v. Muchina*** and ***Said Hamad Shamisi v. Diamond Trust of Kenya Ltd.***, supra, and decisions cited therein.
0. In considering an application to strike out a pleading for disclosing no cause of action or defence, no evidence is admissible in terms of the applicable old Order 6 rule 13 (2) [now Order 2 rule 15 (2) of Civil Procedure Rules, 2010]. Looking, therefore, only at the plaint sought to be struck out, I am not able to hold that it is a plain and obvious case as it raises the issue of fraud against the defendants in the transfer of the property and subsequent registration in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' title is, in terms of section 23 of the Registration of Titles Act under which the property is registered, subject to challenge on the grounds of fraud in which they can be shown to have been party. Although the allegation of fraud against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is not strong in the face of denial by the two in their defence that they were bona fide purchasers for value without notice, it is a matter that ought to be investigated at the trial bearing in mind that the discretion under Order 6 rule 13 includes power to order amendment of pleadings and in this case the plaintiffs could amend their plaint and give better and further particulars of the fraud.
0. The observation by the learned authors of ***Halsburys Laws of England*** 4<sup>th</sup> ed. vol. 36 at para. 73, on the principle for striking out of pleadings supports this view as follows:

*“In judging the sufficiency of a pleading for this purpose, the Court will assume all allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable that an absolute defence exists, the Court will not strike it out. A pleading will not be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases....”*

See also ***Mosi v National Bank of Kenya Ltd.*** (2001) KLR 333.

0. Moreover, the allegation of fraud on the part of the 1<sup>st</sup> defendant and the want of his authority to sell the property raises the issue of ***nemo dat*** qui non habet that a person cannot transfer a title that

he does not have, making the purported transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants null and void. This is an issue for investigation and determination at the trial.

0. Accordingly, without expressing concluded views on the merits of the case, as cautioned in the decision of Madan JA in the **DT Dobie** case that “*the power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge.*”, this court is not able to hold that the suit by the plaintiffs against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is incontestably bad and irredeemable by amendment. I consider that there are genuine triable issues, which ought to go to trial, since triable issues do not have to be issues that must succeed upon hearing on the merits. Some of the triable issues in the suit are:
  - a. The issue of fraud against the defendants. As held by the Court of Appeal in **West Power Kenya Ltd. v. Frederick & Anor.** (2003) KLR 357, “it is quite unusual to enter summary judgment when serious allegations of fraud and other wrong doings are made. Such issues could only be decided during a proper trial and not on conflicting affidavits.”
  - b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are bona fide purchasers for value without notice or participants in the fraud making their title defeasible under section 23 of the Registered Titles Act.
  - c. Whether the principle of **nemo dat** applies in view of the alleged want of authority to sell on the part of the 1<sup>st</sup> defendant.

#### ***Whether suit an abuse of the process of the court.***

0. The plaintiffs’ case in the plaint herein, that they transferred the suit property to the 1<sup>st</sup> defendant to save the property from sale by the first chargee, Standard Chartered Bank and to obtain a loan from the second charge, Savings and Loan Bank, with no authority for the 1<sup>st</sup> Defendant to sell the property, appears consistent with the 2<sup>nd</sup> plaintiff’s statement in the two affidavits at the followings paragraphs:
  - a. **Supporting Affidavit of 30<sup>th</sup> November 2009 at paragraphs 5 -11,as follows:**
    5. *That I am not a Tenant of the Plaintiff and neither do I owe him arrears of rent in the sum of Kshs.320,000/= as alleged in the Plaint.*
    6. *That the property the subject of the suit belonged to me and my mother Mwanaisa K. Kiriale.*
    7. *That sometimes last year we transferred the property to ALFRED WAFUA OKUKU who is a family friend in order to avoid the property being sold by the Standard Chartered Bank (Annexed hereto is the Agreement with Alfred Wafua Okuku marked MHM 2.*
    8. *That Alfred Wafula Okuku did not pay a single cent for the property. He only took a loan from Savings and Loan (K) Limited to redeem the property from the Standard Chartered Bank.”*
    9. *That I also paid a sum of Kshs.900,000/= which was to be used to repay the installments due to Savings and Loan (K) Limited.*
    - 10.*That Alfred Wafula Okuku went underground and I later learnt that he had sold the property to the Plaintiff for Kshs.10,000,000/=.*
    - 11.*That I made contact with him but he denied the sale and as I was in the process of getting another loan from Gulf African Bank when I was told of the existence of this suit.*
  - b. **Replying affidavit of 26<sup>th</sup> February 2010 at paragraphs 3-9, as follows:**
    3. *That the Plaintiff/Applicant conspired with Alfred Wafua to fraudulent deprive us of our property.*
    4. *That the Plaintiff/Applicant went ahead and bought the said premises yet he was very aware that the premises was not up for sale.*
    5. *That the Plaintiff/Applicant cannot claim that he bought the property in good faith without notice of the Defendant's claim on the property. The Applicant/Plaintiff only took advantage of the situation as he was aware that Alfred Wafua Okuku was not supposed to sale the property.*
    6. *That at the time the Plaintiff/Applicant was purchasing the suit premises Alfred Wafua Okuku was*

- the registered owner because I had transferred the property to him as a family friend to avoid the property being sold by Standard Chartered Bank. (Annexed hereto and marked MHM 1 is a copy of the Agreement for Sale with Alfred Wafua Okuku).*
7. *That Alfred Wafua Okuku was holding the property after lending me money he got from Savings & Loan (K) Ltd to redeem the property from standard Chartered Bank, amount which I was to pay him back hence he could not transfer the property to a 3rd party.*
  8. *That I paid a sum of Kshs.900,000/= to Alfred Wafua Okuku which was to be used to repay the instalments due to savings and Loan (K) Ltd and that Alfred Wafua Okuku would re transfer the property to me.*
  9. *That is at that time that Alfred Wafua Okuku went underground. I learnt that he had sold the property to the Plaintiff/Applicant at Kshs.10,000,000.00.*
0. I, therefore, do not find, as contended by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, that the plaintiffs have contradicted their position taken in averments in the two affidavits that the 2<sup>nd</sup> plaintiff filed in the previous suit CMCC NO. 3409 of 2009.
0. Indeed, in the Loan Agreement between the plaintiffs and the 1<sup>st</sup> defendant dated the 8<sup>th</sup> October 2007, it appears that the agreement between the parties was merely a lending transaction with express provision for the property to be used as security only and to be re-transferred to the plaintiffs upon full payment of the debt but with no authority to the 1<sup>st</sup> defendant to sell the property as follows:

### **LOAN AGREEMENT**

An Agreement made this 8th Day of October 2007 **Between MBARAK HAMIS MBARAK and MWANAISHA K. MOHAMED** of P.O. Box 84680, MOMBASA (hereinafter called the Borrowers and **ALFRED WAFUA OKUKU** of P.O. Box 84680, MOMBASA (hereinafter called the Lender)

**WHEREAS** Borrowers are the registered proprietors of the properties known as Plot NO. 6481, 6482, 6489 and 6490 of Section I M.N.

**AND WHEREAS** the borrowers had charged the said properties to Standard Chartered Bank Limited to secure a sum of Kshs.3,500,000/=

**WHEREAS** the Bank has now issued Notices to sale the said property,

**AND WHEREAS** the Lender has agreed to take a loan from Savings and Loan (K) Ltd to off set the said loan.

### **NOW THIS AGREEMENT WITNESSETH AS FOLLOWS**

1. The Lender hereby gives to the Borrower a sum of Kshs.3,500,000/= (Three Million and Five Hundred Thousand only).
2. The said sum of Kshs.3,500,00/= has been procured as a loan from Savings and Loan (K) Ltd on the security of the properties known as sub division numbers 6481, 6482, 6489 and 6490 of Section I M.N.
3. That the Borrowers will transfer to the Lender all the titles to the said properties to enable the Lender obtain the loan
4. The Borrowers will repay the loan due to Savings and Loan (K) Ltd by monthly installments which the Bank will advise.
5. ***That in default of the payment of the installments by the Borrowers, the Lender may pay to the Bank any outstanding of installment and recover from the Borrowers.***
6. ***Upon full payment of the loan to Savings and Loan (K) Ltd, the Lender shall transfer the property back to the Borrowers.***
7. ***The transfer to the Lender is only meant to facilitate the loan application and the Borrowers shall bear the full responsibility to repay the loan.***

IN WITNESS WHEREOF the parties have hereunto set their signatures the date hereinabove stated.” [emphasis added]

0. From the said agreement, there appears to be serious questions surrounding the agreement between the plaintiffs and the 1<sup>st</sup> defendant as relates to the dealing with the property that requires full investigation at the full hearing, including: whether there was full repayment of the loan; if not, at whose default was the loan allowed to get into arrears; whether the 1<sup>st</sup> defendant paid any consideration for the transfer of the property by plaintiffs; how default in loan repayment was to be dealt with – by the 1<sup>st</sup> defendant paying it off and recovering from the plaintiffs or otherwise; whether the property was ever available for sale to realise the loan amount as the 1<sup>st</sup> defendant; the reason why the property was not sold by the mortgagee if the object was to realise the security and whether the property could have been sold by the 1<sup>st</sup> defendant by private treaty to recover any monies owed to him as claimed in the demand letter of 13<sup>th</sup> August 2009 attached to the replying affidavit of the 1<sup>st</sup> plaintiff. This factual basis of the case, which no doubt has a bearing on the legal rights of the parties, must be established on evidence tested by cross-examination during the trial. In these circumstances, it cannot be held that the plaint was an abuse of the court process.

### ***Whether the suit is barred by res judicata***

0. In CMCCC No. 3049 of 2009, the 2<sup>nd</sup> defendant herein sued the 2<sup>nd</sup> plaintiff for arrears of rent and eviction of the plaintiff from the suit property while asserting his proprietary right as the registered proprietor. The 2<sup>nd</sup> plaintiff herein denied that he was a tenant and raised the defence of fraudulent transfer of the property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as detailed in the two affidavits filed therein, as set out above. The 2<sup>nd</sup> plaintiff’s defence dated 21<sup>st</sup> December 2009 also expressly raised the issue of jurisdiction of the court at paragraph 5 of the defence, as follows: “*The jurisdiction of this Honourable Court is denied on the grounds that the subject property is valued at more than Ksh.3,000,000/-*”. On an application to strike out the defence, the Resident Magistrate’s court struck out the defence and granted order as prayed for the eviction of the plaintiff from the suit property.
0. The finding of the court as set out in its Ruling dated 14<sup>th</sup> May 2010 is as follows:

*“From the materials placed before me, the applicant herein bought the suit property from a third party. The suit property was transferred to him and the Respondent who transferred it to the third party is still in possession. The suit as filed also seeks rent from month of March 2009 and eviction of the defendant from the premises together with costs.*

*The applicant through two certificates of title has established that he is the registered owner of the suit premises with one Nelly Ngonyo Kamau. Two postal searches are also annexed confirming the position. The suit as it were is for vacant possession and recovery of a specified sum of Ksh.320,000.00*

*I have considered the application, the affidavits and the defence filed. It is apparent that the Respondent continues to occupy the applicant’s property without any colour of right and without paying. I find that the application has merit and allow the same as prayed.”*

0. However, the Resident Magistrate’s court did not decide the issue of jurisdiction which was raised in the defence that it struck out. The question of jurisdiction, which was raised in the Defence sought to be struck out, ought to have been dealt with *in limine* as held by the Court of Appeal in **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Ltd.** (1989) KLR 1 before dealing with the merits of the application to strike out the defence. As Nyarangi JA at p.14 said:

*“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity” and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more*

step. When a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down[s] tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

0. A judgment by a court that did not have jurisdiction cannot operate as *res judicata*. As the learned authors of Mulla, **The Code of Civil Procedure**, 18<sup>th</sup> ed. (2012) at page 285 observe:

**“Judgment of a Court not competent to deliver it.** A judgment delivered by a court not competent to deliver it cannot operate as *res judicata*, since such a judgment is not of any effect. It is a well-settled position in law that if a decision has been rendered between the same parties by a court, which had no jurisdiction to entertain and decide the suit, it does not operate as *res judicata* between the same parties in subsequent proceedings....The Supreme Court has held that an order passed by a court without jurisdiction would be a nullity. It will be **coram non iudice**. It is **non est** in the eye of the law. Principles of *res judicata* would not apply in such cases.”

0. The highest pecuniary jurisdiction of a magistrate’s court at the time of the CMCCC No 3049 of 2009 was Ksh3,000,000/- [Ksh.7,000,000/- today by virtue of 2012 amendment to section 5 of the Magistrates’ Courts Act] which is below the value of the suit property the subject matter of the suit shown in the plaintiff’s affidavit in the suit as sh.10,000,000/- the alleged consideration paid by the plaintiff in the suit for the sale of the property. It would appear that the Chief Magistrate’s Court had no jurisdiction to deal with the suit in CMCCC No. 3409 of 2009, which sought the eviction of the defendant from the suit premises which the plaintiff alleged to have acquired at the purchase price of Ksh.10,000.000/- and which the defendant claimed ownership and asserted fraudulent transfer to the plaintiff. However, the court did not deal with the question of jurisdiction of the court despite its being expressly raised at paragraph 5 of the Defence that the court ordered to be struck out.
0. Even if it is assumed that, in entertaining and determining the application on the merits, the Senior Resident Magistrate’s Court in the previous suit must have decided that it had jurisdiction, it does not estopp the plaintiffs in this suit from challenging the court’s decision on jurisdiction. **Mulla, The Code of Civil Procedure**, *ibid* at p. 286 observes on the point that –

**“Decision on a question of jurisdiction.** – The principle of *res judicata* is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of *res judicata*. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or *res judicata*. The law is well settled that a court which has no jurisdiction to try a cause cannot by its own erroneous decision confer on itself competence to decide it, and its decision on the question of jurisdiction cannot operate as *res judicata* in a subsequent suit between the parties. The court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of *res judicata*. It is well settled that there can be no estoppel on a pure question of law”.

0. Accordingly, I do not find that the decision of the Resident Magistrate’s court in CMCCC No. 3409 of 2009 can operate *res judicata* to bar the plaintiffs’ suit herein against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as prayed.

### **Orders**

0. For the reasons set out above, I find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ Chamber Summons dated 23<sup>rd</sup> August 2010 is not well founded and it is therefore dismissed with costs to the plaintiffs. In view of the parties’ obvious interest in early determination of their rights in the property, the hearing of the suit will be fixed on priority basis.

**Dated, signed and delivered on the 11<sup>th</sup> February 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

No appearance for the Plaintiffs

No appearance for the 1<sup>st</sup> Defendant

Mr. Ndegwa for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Miss Linda - Court Assistant