



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 23 OF 2012**

**MANAN JAYENDRA CHUNIBHAI.....1<sup>ST</sup> PLAINTIFF**

**ANERI JAYENDRA CHUNIBHAI.....2<sup>ND</sup> PLAINTIFF**

**(Suing as Guardians of the Pannaben Jayendra Patel)**

**VERSUS**

**JITENDRAKUMAR C. PATEL.....1<sup>ST</sup> DEFENDANT**

**JAISHRI JITENDAKUMAR PATEL.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs brought this suit as the guardians of their mother, Pannaben Jayendra Patel pursuant to leave granted by the court on 23/12/2011 in Nairobi Petition No. 133 of 2011 under the Mental Health Act. Pannaben Jayendra Patel (hereafter Pannaben) was the registered owner of L.R. No. 1870/11/321, General Mathenge Drive, Nairobi (“the Suit Property”) pursuant to a transfer registered in her favour on 7/3/1995. The 1<sup>st</sup> Defendant was Pannaben’s tenant having leased the main house on the Suit Property when Pannaben elected to live in the extension to the house while her children were studying abroad.

2. The Plaintiffs claim that they learned in 2011 that the Defendants had purportedly paid their mother, Pannaben the sum of Kshs. 17 million as consideration for the purchase of the Suit Property and that the property had been transferred to the Defendants. They claim that at the time of the purported sale and transfer, Pannaben was unwell, immobile and mentally incapable of entering into the agreement for sale or the transfer. They claimed Pannaben had undergone an unsuccessful medical operation and that she suffered from chronic pain and clinical depression following the botched operation. They contend that the transfer of the Suit Property to the Defendants was procured fraudulently or through undue influence of the 1<sup>st</sup> Defendant and that the sale should be rescinded or declared void. The Plaintiffs gave particulars of fraud and undue influence on the part of the 1<sup>st</sup> Defendant which include causing Pannaben to purport to sell and transfer the Suit Property to the Defendants while knowing that she was incapable of making conscious decisions; manipulating her judgement having been her tenant for a long time and using his personal relationship and closeness to influence Pannaben to sell the Suit Property; and literally taking advantage of an invalid suffering from mental and psychological illness.

3. In the Amended Plaint dated 12/7/2018, the Plaintiffs seek a permanent injunction to restrain the Defendants from interfering with Pannaben’s peaceful enjoyment of the Suit Property; a declaration that the sale and transfer of the Suit Property is void, and an order to rectify the land register and revert title over the Suit Property to Pannaben.

4. In the Amended Defence filed in court on 20/7/2018, the Defendants denied the Plaintiffs' claim and averred that Pannaben is a person of sound mind and the leave granted in **Petition No. 33 of 2011** was obtained through concealment of material facts. They further averred that the sale of the Suit Property was lawfully entered into with the full knowledge of the Plaintiffs and that due process was stringently observed. They averred that Pannaben was fully in charge of her mental faculties at the time she sold the Suit Property to the Defendants and that she entered into the sale agreement of her own volition. The Defendants maintained that the Plaintiffs were present during the sale of the Suit Property and that they took part in the negotiations.

5. The Defendants counterclaimed for judgement against the Plaintiffs for Kshs. 3,563,973.69 as at September 2012 on account of rent from March 2008 to September 2012, together with the water and electricity charges for March 2006 to September 2011. The Defendants claimed that it was a term of the sale agreement that upon completion of the sale Pannaben was to give vacant possession of the Suit Property and continue to occupy the small house which is a bungalow on a rent free basis for a period of 24 months. The Defendants claim that Pannaben failed to give vacant possession of the bungalow when the 24 months lapsed. In addition, the Defendants seek mesne profits of Kshs. 66,500/= per month from October 2012 until the Suit Property is surrendered, as well as vacant possession of the Suit Property, costs and interest.

6. The Plaintiffs gave evidence. The 2<sup>nd</sup> Plaintiff confirmed that their mother moved into the extension of the house and collected rent from the main house for her sustenance from the 1<sup>st</sup> Defendant. She was shocked to learn of the purported sale and transfer of the Suit Property to the Defendants because Pannaben had been ill since undergoing the operation, which was unsuccessful. She was emphatic that her mother lacked the ability or mental acuity to negotiate the contract and that the transaction was a fraud and therefore void. She stated that her mother was diagnosed with temporo mandibular joint dysfunction in 1985 while in the United States of America (USA). She also knew that her mother suffered chronic pain for years which compounded her depression rendering her incapable of managing and administering her property or entering into legal transactions due to her diminished mental capacity. Pannaben's medical situation worsened following the demise of her husband in 1993. She also suffered from severe osteoporosis and rheumatoid arthritis which rendered her immobile.

7. On learning of the sale in August 2011, the 2<sup>nd</sup> Plaintiff instructed Mr. Paul Muite Advocate who wrote to the 1<sup>st</sup> Defendant inquiring about the position. The 2<sup>nd</sup> Plaintiff also obtained a valuation report which showed that the estimated value of the Suit Property at the time the purported sale took place was between Kshs. 36 million and Kshs. 40 million. The value had risen to Kshs. 100,000/= million by January 2012. She denied being in Kenya at the time the 1<sup>st</sup> Defendant claims to have negotiated for the purchase of the Suit Property with both Plaintiffs.

8. The 2<sup>nd</sup> Plaintiff produced several documents including the court order appointing the Plaintiffs as Pannaben's guardians and authorising them to execute court papers for the filing of cases towards the preservation and protection of any right of the estate or the assets of Pannaben. She stated that there was a house help to assist her mother and that relatives would also assist her. She stated that they always had a driver and that his mother last drove when he was very young. She did not drive after 1995 because she had rheumatoid arthritis which had disfigured her joints. She produced a copy of the medical report done by Kevin L. McBride on the evaluation of Pannaben's facial pain. She also produced a copy of the letter by Mr. Paul Muite Advocate and the response by the Defendants' advocates to the Plaintiffs' demand. She produced a copy of the valuation report together with a copy of the title confirming that the Suit Property was transferred to the Defendants on 28/7/2006.

9. Both Plaintiffs studied in the USA. She stated that the 1<sup>st</sup> Defendant had promised to take care of their mother while they studied abroad. The Plaintiffs produced copies of their passports showing immigration stamps made on 16/1/2005, 21/9/2005 and 2/10/2007 when the 1<sup>st</sup> Plaintiff was exiting Kenya. The stamps by the Immigration Office depicting the 1<sup>st</sup> Plaintiff's arrival in Kenya are dated 31/3/2006, 14/3/2006 and 25/5/2006. Copies of the 2<sup>nd</sup> Defendant's passport bears immigration stamps dated 19/8/2005, 26/12/2006, 28/1/2007, 11/6/2008 and 14/1/2011. Both Plaintiffs denied being in Kenya at the

time the 1<sup>st</sup> Defendant contends he negotiated the purchase of the suit land from Pannaben.

10. On cross examination the 2<sup>nd</sup> Plaintiff maintained that there was no agreement to extend the completion date for the purported sale which according to the sale agreement was slated for 31/1/2006. She pointed out that all the payments represented by the cheques produced by the 1<sup>st</sup> Defendant bear dates after the completion date and contended that there was no evidence that the sums of Kshs. 1 million and 700,000/= mentioned in the sale agreement were ever received by his mother. It was her evidence that her mother suffered from degenerative illnesses from 2000 and was not in the proper frame of mind to bind herself to contracts. She denied that Farouk and Company Advocates represented her mother and stated that she had not seen any communication from this law firm. The 1<sup>st</sup> Defendant was her mother's accountant in the 1990s and the 1<sup>st</sup> Defendant used to purchase groceries for Pannaben such as dog meat, milk, sukuma wiki, kerosene and other items and would also settle her utility bills.

11. She confirmed that the 1<sup>st</sup> Defendant used to pay rent to her mother, which would be the balance after deducting what he had spent on Pannaben's groceries and utility bills. She denied that her mother drove a car until 2011. Her mother received an insurance contribution when her father died. Her mother purchased the Suit Property for Kshs. 6 million and renovated it at a cost of Kshs. 10 million. When Pannaben bought the Suit Property she was represented by Patel and Patel Advocates and that she had the mental capacity to transact in 1995.

12. Her mother used to travel abroad for medical treatment. She denied that they had asked the 1<sup>st</sup> Defendant to sell them the portion with the guest house and maintained that she did not know that Pannaben had sold the Suit Property to the Defendants. She maintained that the 1<sup>st</sup> Defendant knew of Pannaben's affairs and had been assisting her. She relied on the 1<sup>st</sup> Defendant's letter dated 17/7/1998 addressed to the Principal Immigration Officer seeking a permit for Pannaben. The letter mentions the Suit Property and gives its approximate value as Kshs. 12 million. She stated that Pannaben used to send curios to her brother but she discontinued that.

13. Dr. Nelly Aliviza Kitazi gave evidence. She is a specialist psychiatrist working for the government and the Aga Khan University Nairobi. She produced a copy of the report she prepared when she examined Pannaben. She first saw Pannaben on 28/8/2011 when she was taken to see her by her daughter. Pannaben had a long history of arthritis and psychiatric problems and had been treated in India by a doctor who prescribed anti-depressants. She stated that it was difficult to tell how long Pannaben had suffered from psychiatric problems. The doctor stated that Pannaben was on and off the wheelchair and the first time she went to see the doctor she had a walking aid. The doctor learned about the sale of the house when Pannaben went to see her in January 2012 after her condition had relapsed. The doctor put her on anti-depressants and anti-psychotics.

14. The 1<sup>st</sup> Plaintiff gave evidence along the same lines as the 2<sup>nd</sup> Plaintiff explaining Pannaben's illness while challenging the sale of the Suit Property to the Defendants on the basis that their mother lacked the mental capacity to manage or administer her property or enter into legal transactions due to her severe pain and mental incapacity. He stated that the 1<sup>st</sup> Defendant was a trusted guardian and father figure and that they let him run all their affairs including taking care of their mother and paying the utility bills. He challenged the demand for rent made by the 1<sup>st</sup> Defendant for Kshs. 65,000/= per month for the small unit which Pannaben was occupying on the basis that the 1<sup>st</sup> Defendant used to pay far less for the main building consisting of offices and the 4-bedroom bungalow that he had let from Pannaben. He stated that the 1<sup>st</sup> Defendant had computed invoices which included outgoings such as electricity, water and security for the building he was occupying.

15. He denied that there was a meeting between the Honourable Retired Justice A. B. Shah and his mother to negotiate the sale of the Suit Property. He stated that the 1<sup>st</sup> Defendant invited her mother to his office to meet retired Judge A. B. Shah to discuss her personal legal matters and that there had been no follow up on those discussions. He stated that the 1<sup>st</sup> Defendant was left with their furniture and household goods and that they trusted him as a father figure. He denied that they went to expensive

schools. He stated that his mother could not drive and would travel on a wheel chair. His mother had been on a wheel chair since 2000. He reiterated that had they wished to sell the Suit Property they would have carried out a valuation to establish its market value.

16. He took issue with the lawyer who purportedly represented his mother in the sale transaction while pointing out that there was no written communication to their mother during the period of the sale transaction. He argued that the sale agreement was an afterthought as it is dated 19/10/2005 and purports that payment of Kshs. 1 million would be made on 15/10/2005. He stated that his mother was immobile from 2000 and that they looked after her with the help of family friends and the 1<sup>st</sup> Defendant. He stated they had a family driver. He stated that his mother's mental capacity was affected from 2000 and that she had not been okay since the death of their father. He stated that he was in Kenya until 21/9/2005 but did not know about the sale of the Suit Property. He learned in August 2011 that the house had been sold. He denied that they wished to relocate to the USA and stated that his uncle paid his university fees. He stated that his mother was guided when she bought the Suit Property in 1995. They had a caretaker and family friends were taking care of his mother. The 1<sup>st</sup> Defendant assured them that he would take care of their mother while they were in school. He confirmed that they had dogs and the 1<sup>st</sup> Defendant used to take care of everything and settle bills. He denied that Pannaben ever paid rent to the 1<sup>st</sup> Defendant. The Plaintiffs filed this suit when they learned that their mother was almost being evicted from the Suit Property.

17. He stated that he travelled abroad to study on 21/9/2005. He contended that his mother was in India in February 2006, which is when the 1<sup>st</sup> Defendant claims Pannaben acknowledged receipt of the banker's cheques for the total sum of Kshs. 15,300,000/=.

18. The Plaintiffs applied to amend the plaint after the evidence of three witnesses had been taken. Parties recorded a consent on 10/7/2018 allowing the Plaintiffs to amend their plaint and giving the Defendants time to file and serve their amended defence, which they did.

19. The Plaintiffs called Doctor Nira Patel, a dental surgeon to give evidence. She stated that she met Pannaben in 1978 through her husband when she was in good health. They were family friends and she knew around 1984 that Pannaben suffered rheumatoid arthritis which caused her severe pain and led to her hands and toes being twisted. Pannaben's small joints would get infected making it difficult for her to do routine work. She stated that from 2000 Pannaben could not move without assistance and that Pannaben was in pain since 2000. She was not aware that Pannaben ran a business. On the issue of international travel, she stated that Pannaben could have travelled on a wheelchair or flown with the support of airport staff. She confirmed that Pannaben still suffers after the surgery on her temporomandibular joint. She stated that the head and neck are affected if the jaw is affected. She stated that she used to pick Pannaben from her house and then drop her back after her dental clinic. She confirmed that Pannaben had a maid for a long time. She assisted with the wedding arrangements for Pannaben's children. She also stated that pain can incapacitate a person making it difficult to make a decision in which case they would have to involve another family member.

20. Manoj Shah gave evidence. He had known Pannaben since 1995 when she was a member of the Lion's Club. Due to her inability to drive a car, other club members used to pick her up and drop her from the club events. He spoke of Pannaben's contributions towards humanitarian causes through the club. He stated that Pannaben had to resign from the Lion's Club due to her progressive illness. He stated that in his opinion, Pannaben lacked capacity to transact without assistance. The witness stated that he personally dropped Pannaben to meetings as did other club members and that she needed assistance to understand what was being discussed at the Lion's Club. He stated that mental capacity is not a requirement for membership to the Lion's Club and that all that is needed is that one must be over 18 years old, pay subscription and be willing to serve the less fortunate and needy members of the society. He stated that Pannaben had difficulty performing the tasks allocated to her but that she had the deep desire to help the less fortunate and went out to get donations and contributions from her community. He was aware that Pannaben travelled abroad for treatment but not for business.

21. Aron Ogwago Musumba, a valuer was called to give evidence for the Plaintiffs. He gave the open market value of the Suit Property as Kshs. 32 million as at 1/10/2005 and Kshs. 36 million as at 15/1/2006. He produced a copy of the valuation report. The valuer confirmed that valuers can work retrospectively to determine the value of a property. He confirmed that the valuation of the Suit Property was done by Mr. David M. Harber and is dated 29/9/2011. The valuer gave evidence on behalf of Mr. Harber who is dead. He stated that there were three methods of valuing properties which are based on comparables, costs and the income approach. In order to establish the retrospective value of a property, a valuer looks at comparables for properties that were similar to the property at that time in order to ascertain that property's value back then.

22. The Defendants called Mr. Amritlal Bhagwanji Shah and Mr. Mohammed Farouk Adam, both advocates of the High Court of Kenya to give evidence on their behalf. Mr. A.B Shah testified that he was called by the 1<sup>st</sup> Defendant who is his auditor on or about the third week of 2008 to assist Pannaben claim her entitlements from Kenya General Industries Limited. They met at the 1<sup>st</sup> Defendant's office and he claims he took instructions from Pannaben. His offices were in Transnational Plaza Mama Ngina Street. He produced a copy of his handwritten note which is undated and stated that he wrote a demand letter to Kenya General Industries on behalf of Pannaben, but did not produce the letter in evidence. Mr. Shah stated that Pannaben consulted him over several legal matters and to his mind she was sane. Mr. Shah claimed that he had letters he wrote on behalf of Pannaben but did not have them in court. He stated that he did not charge Pannaben any fees since he was helping a widow. Mr. Shah stated that at the time he saw Pannaben in 2008 she was in full command of her faculties.

23. Mr. Mohammed Farouk Adam who drew the sale agreement and the transfer of land in respect of the Suit Property was called as a witness. He confirmed that he acted for both the vendor and the purchaser in the sale transaction and that he exercised due diligence in drafting the sale agreement and getting the transfer registered at the Lands Office on 28/7/2006. He stated that he drove to Pannaben's residence to have her execute the sale agreement at Pannaben's request, which was for the convenience of all the parties. He stated that he explained succinctly to Pannaben the contents of the sale agreement and she understood this before signing the agreement. He stated that at no time did Pannaben exhibit any mental deficiency that would have hindered her from comprehending the sale agreement and maintained that Pannaben's instructions were clear, unambiguous and from a sane person fully in charge of her mind. He stated that Pannaben confirmed to him that those were the terms of the agreement she had reached with the Defendant. Mr. Adam witnessed the sale agreement.

24. On cross examination, Mr. Adam confirmed that he had known the 1<sup>st</sup> Defendant for 40 years and that the 1<sup>st</sup> Defendant called him about the sale agreement stating that he wanted to buy property from Pannaben. He got verbal instructions from 1<sup>st</sup> Defendant. He confirmed that he relied on the information the 1<sup>st</sup> Defendant gave him to prepare the sale agreement. He first met Pannaben when he took her the documents to sign. He could not recall when he got the title. He confirmed that the 1<sup>st</sup> Defendant went to his office at Ruprani House on Mokhtar Dada Street. The advocate could not recall having written any letters to 1<sup>st</sup> Defendant but confirmed that he did not write any letters to Pannaben in relation to the sale transaction. He did not handle the money paid as purchase price by the Defendants and did not know if the sums mentioned in Clause 3 of the sale agreement were paid. He also confirmed that the agreement was not extended and that the 1<sup>st</sup> Defendant paid the stamp duty. Pannaben did not pay his legal fees and he had never met her after the transaction.

25. This would mean that Pannaben signed both the sale agreement and the transfer prepared by Mr. Farouk Adam on the 1<sup>st</sup> Defendant's instructions on the same day at the 1<sup>st</sup> Defendant's office even though these documents bear different dates. It is not denied that most of the payments towards the purchase price were made after the execution of the sale agreement. This would also mean that Mr. Farouk Adam advocate got Pannaben to sign the transfer long before the 1<sup>st</sup> Defendant had paid the purchase price to her.

26. The 1<sup>st</sup> Defendant gave evidence on behalf of the 2<sup>nd</sup> Defendant, who is his wife. He confirmed that

the Plaintiffs are well known to him. He confirmed that he was Pannaben's tenant in the Suit Property and produced a copy of the agreement prepared by Pannaben setting out the tenancy agreement between him and Pannaben. He stated that Pannaben informed him in 2005 that she was looking for a buyer for the Suit Property because she wanted to relocate to the USA to join the 1<sup>st</sup> Plaintiff who was in the process of settling there. He stated that Pannaben marketed the house without success and offered to sell the Suit Property to him on condition that she would remain in the bungalow before going to join her son in the USA. He claimed he accepted the proposal and they negotiated and settled on the price of Kshs. 15 million.

27. He claimed the Plaintiffs later negotiated the price upwards and they eventually settled on Kshs. 17 million. He was categorical that throughout the negotiations both Plaintiffs were present in Kenya and were fully aware of the agreed price of Kshs. 17 million. He claimed that Pannaben was in charge of her mental capacity during the negotiations and freely consented to the purchase price of Kshs. 17 million. He claimed they approached Mr. Farouk Adam Advocate to handle the conveyance transaction and that Mr. Adam explained the contents of the sale agreement to Pannaben whom he claims was fully in command of her mind. He stated that it was part of the agreement that Pannaben would occupy the bungalow while paying rent for 24 months and that the utility expenses in respect of water, electricity and security would be shared up to 29/2/2008 and that thereafter rent was to be charged.

28. He stated that Pannaben who he had known for many years lived in a small house alone and took good care of herself including driving to the market and that Pannaben's children would reside in the small house with her when they came to the country. He claimed that he paid the purchase price in full to Pannaben and that he is the registered owner of the Suit Property with his wife. He claimed that Pannaben declined to give vacant possession in February 2008 and pleaded for more time. He also claimed that Pannaben refused to pay rent and feigned sickness whenever rent was demanded from her. He claimed that as at 1/11/2011, Pannaben was in arrears of Kshs. 2,523,973.09 being the total amount due for unpaid bills. He further claimed that Pannaben was in rent arrears of Kshs. 798,000/= chargeable at Kshs. 66,000/= per month. He produced a copy of the demand letter written by his advocates dated 14/12/2011 demanding payment of rent of Kshs 798,000/=. The letter was copied to A. B. Shah Advocate.

29. The 1<sup>st</sup> Defendant vehemently denied the allegation that the transaction leading to the sale and transfer of the Suit Property was fraudulent or that Pannaben was mentally or physically unwell at the time she entered into that transaction. According to him, these allegations were only intended to defeat his registered interest in the Suit Property and to deny the Defendants rent arrears which were due and payable. He urged the court to dismiss the suit and enter judgement on his counterclaim.

30. On cross examination the 1<sup>st</sup> Defendant confirmed that he acted for Pannaben as her tax agent and wrote the letter to the Immigration Department. He stated that the documents produced by the Plaintiff related to the expenditure for Pannaben's house during the time when she had travelled out of the country. He would deduct the expenses from the rent he was to pay to Pannaben. He confirmed that his office knew about Pannaben's financial position in respect of payments they were making for utilities and other expenses on her behalf. He stated that Pannaben was able to sign to acknowledge receipt of monies paid.

31. He confirmed that Pannaben's children were studying abroad and stated that they came to visit her every six months. When he was shown copies of the Plaintiff's passports showing that the 2<sup>nd</sup> Plaintiff left the country on 18/8/2005 and returned on 26/12/2006, while the 1<sup>st</sup> Plaintiff left on 21/9/2005 and returned on 14/3/2006, he conceded that the Plaintiffs were away when both the sale agreement and transfer were signed. He maintained that he did not purposely undertake the transactions while the Plaintiffs were away but there was no opportunity to do it when the Plaintiffs were in Kenya but maintained that the Plaintiffs were present when they did the negotiations. No evidence of this was given.

32. He stated that the negotiations for the purchase of the Suit Property started three months before they signed the agreement. Since the agreement was signed in October 2005, that would be in July 2005. From the copies of the passports of the Plaintiffs they were not in the country at that time. He stated that when they signed the agreement he had already paid the deposit then Pannaben travelled out of the

country.

33. He conceded that Pannaben was out of the country on 31/1/2006 when completion of the sale was scheduled to take place. He claimed that Pannaben gave him the title to the Suit Property and that she did not write this anywhere. He confirmed that Pannaben did not write any letters either to him or to A. B. Shah and Mr. Farouk Adam advocates. He confirmed that he looked for these advocates having previously dealt with both of them. He claimed that he handled the cash himself and that he paid fees to Mr. Farouk Adam. He confirmed that the property had one meter and stated that the bills he produced were for Pannaben's apportioned share of the utilities.

34. He stated that his office did not charge Pannaben for the services rendered to her and that his office took care of her bills when she was away. On the tabulations done by the 1<sup>st</sup> Defendant's office, it is not clear whether Pannaben was meeting the full cost for water and electricity since the handwritten accounts prepared by the 1<sup>st</sup> Defendant show that he used to deduct these from the rent due to Pannaben in 2001 up to 2004. The utility bills were in the name of Jessie and Associates.

35. He claimed that after the expiry of 24 months when Pannaben was to live in the bungalow without paying rent, she paid rent without complaining from 2008 to 2010. He claimed it was a verbal decision for her to pay rent and that she stopped paying rent in 2011. He did not produce evidence that Pannaben had indeed paid rent to him from 2008 to 2010. He maintained that Pannaben was able to sign despite her hands being disfigured and that she had signed to acknowledge payment of the cheques.

36. Hudson Jananga Madanga gave evidence. He stated that he was employed by Pannaben for one year from 2004 to 2005 as a housekeeper. Pannaben used to give him instructions for gardening, domestic work and the upkeep of the dogs. He claimed that Pannaben used to drive her car personally and he would accompany her for shopping at City Park Market and that she only got employ a driver in 2012. He also claimed that Pannaben advertised her property for sale between June and October 2005 and many people went to view it. He stated that Pannaben travelled overseas by herself. The witness stated that he used to get money to buy food for the dogs from the 1<sup>st</sup> Defendant as well as money for buying kerosene to cook for the dogs. He confirmed that he was working for the 1<sup>st</sup> Defendant at the time this suit was heard. He confirmed that they used to assist Pannaben and that she lived alone.

37. Wilberforce Andatsi Asutsa gave evidence. He was employed by the 1<sup>st</sup> Defendant as a night guard. He previously worked for Pannaben. He claimed that Pannaben drove her own car at all times and that she went shopping and ran errands on her own. He stated that she used to cook her own food and at times she would invite visitors over for dinner. He claimed that a notice was placed for the sale of the Suit Property in 1999 and many people came to view the property. He also claimed that Pannaben sold most of her household items because she wanted to migrate to the United States of America and join her children there. The witness stated that he was employed by the 1<sup>st</sup> Defendant when Pannaben migrated to USA and later returned after a number of years and occupied the rear unit of the Suit Property. He further stated that Pannaben drove her car and he used to open for her the gate at night and that she employed a driver in 2013. On cross examination he stated that the 1<sup>st</sup> Defendant who he works for told him to testify on how they used to work with Pannaben. He stated that Pannaben used to drive during the day and at night going to the mosque. When he was shown the photographs showing Pannaben's deformed hands he conceded that Pannaben's hands had problems but that they could still hold the steering wheel of a car and that she drove her car. He later stated that he worked for Pannaben as a *shamba* boy on Sundays. The inconsistencies in the evidence of this witness makes it hard to believe his testimony.

38. Parties filed submissions which the court has considered together with the authorities relied on by the parties. The main issues for determination are:

- a) Was Pannaben of sound legal mind between October 2005 and May 2006 when it is alleged that she entered into the sale transaction for the Suit Property.
- b) Was there a valid sale agreement between Pannaben and the Defendants?

c) Are the Plaintiffs entitled to judgement in terms of their claim?

d) Are the Defendants entitled to judgement in terms of their counterclaim?

39. Dr. Aliviza Kitazi confirmed that she started seeing Pannaben in August 2011, which was five years from the date of the sale of the Suit Property. The doctor confirmed that Pannaben had suffered chronic pain for many years which compounded her depression. One of the psycho stressors she gave as affecting Pannaben is the rheumatoid arthritis which had led to her immobility. The Plaintiffs gave evidence that Pannaben was in perpetual pain following a botched up operation on her jaw and was going through depression and that she therefore did not have the mental capacity to enter into the sale transaction over the Suit Property. The Defendants urged that Pannaben was of sound legal mind in 2005/2006 when she sold the Suit Property to the Defendants. No other documentary evidence was adduced to show other transaction Pannaben carried out after the tenancy agreement she entered into with the 1<sup>st</sup> Defendant in August 2000. The 1<sup>st</sup> Defendant managed most of her finances. It is difficult to tell whether or not Pannaben was of sound mind between 2005 when the sale was done and 2011 when the Plaintiffs applied to court and obtained an order to manage her affairs based on her mental incapacity.

40. The Defendants submitted that the general rule of law is that any person is competent to bind himself to any contract he chooses to make provided it is not illegal or void. Exceptions to this rule include minors, mentally incompetent and intoxicated persons. The Defendants submitted that there is always a presumption that every person is of sound mind until the contrary is proved by the person alleging the contrary. The Defendant relied on the case of **Grace Wanjiru Munyinyi and another v. Gideon Waweru Githunguri and 5 others [2011] eKLR** where the court stated that there is no right to avoid a contract made with a person of unsound mind unless it is proved that the other party knew that he was of unsound mind or knew such facts about him that he must be taken to have been aware that he was of unsound mind. Contracts of a person who is *non compos mentis* may be avoided when there is prove that this condition was known to the other party.

41. The Defendants took issue with the fact that Dr. Omondi Oyoo whose witness statement was filed by the Plaintiffs was not called to give evidence. The court did not consider the contents Dr. Omondi Oyoo's witness statement. The Defendants argued that Pannaben sold the Suit Property at a time when she was in full control of her mental faculties and that any subsequent lack of mental capacity cannot be a basis for undoing the sale and transfer of the Suit Property to the Defendants. The Defendants relied on the case of **John Patrick Machira v. Patrick Kahiaru Muturi [2002] eKLR** where the court stated that if mental disorder develops in an individual after he has made a contract the illness does not release either party from the terms of the contract unless it is impossible for the insane individual to fulfil the terms of the contract. The Defendants submitted that the Plaintiffs had failed to prove that Pannaben was not of sound mind at the time she sold and transferred the Suit Property to the Defendants. The Defendants relied on the case **S. Basavaraj and Others v. Smt. Adilakashmamma Ilr 1998 KAR 2220** in which the court stated there must be strict factual proof that the infirmity was present at the time when the contract was executed.

42. In **John Patrick Machira v. Patrick Kahiaru Muturi (supra)**, the court stated that soundness of mind may be presumed if it appears that the negotiation of the agreement was conducted by a person of unsound mind with apparent prudence, sanity and judgement although he was insane before and after the transaction. The Defendants did not lead any evidence to show how Pannaben negotiated the agreement for the sale of the Suit Property. The Plaintiffs led evidence to show that they were not in Kenya when the 1<sup>st</sup> Defendant claimed they negotiated the terms of the sale. Mr. Farouk Adam advocate confirmed that he received instructions on the terms of the sale from the 1<sup>st</sup> Defendant and met Pannaben in the 1<sup>st</sup> Defendant's office where the agreement was signed. If Pannaben had an advocate during the purchase of the suit land, it does not make sense why she could not get her own advocate during the sale of the property and chose to use the same advocate with the 1<sup>st</sup> Defendant in the transaction.

43. Apart from claiming that Pannaben gave him the original title over the Suit Property without any acknowledgement, the 1<sup>st</sup> Defendant did not lead evidence to show how he obtained the original title

document, passport photos, copies of PIN and other documents necessary to register a transfer from Pannaben for presentation to Mr. Farouk Adam advocate for him to prepare, lodge and register the transfer of the Suit Property at the lands office.

44. In their submissions, the Defendants challenged the application made by the Plaintiffs in respect of Pannaben's mental capacity. They argued that it was made after a long delay of six years. They urged that the application should have been made shortly after the sale and transfer of Suit Property in 2005/2006 or when the Plaintiffs became aware of Pannaben's state of mental incapacity. The Plaintiffs in their evidence stated that they learned of the sale of the Suit Property by Pannaben in 2011 when their mother was threatened with eviction. That is when they moved the court to be appointed Pannaben's guardians. The Defendants did not lead any evidence to show that the Plaintiffs were aware of the sale and transfer of the Suit Property to the Defendants prior to 2011. If the Defendants wished to challenge the appointment of the Plaintiffs as guardians of Pannaben, then they should have done this within that suit.

45. The Defendants argued that the Plaintiffs' plea on fraud and undue influence was barred by the statute of limitation. They argued that the cause of action based on fraud and undue influence was introduced six years after the original plaint was filed and twelve years from the date the cause of action arose. Parties agreed and recorded a consent on 10/7/2018 to allow amendments to the plaint and the defence. Both parties amended their pleadings pursuant to this consent. The decisions the Defendants relied on in their submissions dealt with cases involving applications to amend plaints. The cases do not assist the Defendants as amendments had already been allowed by consent. In any event the period of limitation for claims based on a defendant's fraud begins to run when the plaintiff discovered the fraud or could reasonably have discovered it under section 26 of the Limitation of Actions Act. The Plaintiffs claim they discovered in 2011 that the Suit Property had been transferred to the Defendants, which they claim was fraudulently done. Time for purposes of limitation for the Plaintiffs' claim began to run from 2011.

46. The Plaintiffs submitted that the sale of the Suit Property should be set aside on the grounds of Pannaben's lack of mental capacity to enter into the transaction and the undue influence the 1<sup>st</sup> Defendant exerted on her to enter into the transaction. The Plaintiffs relied on **LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions- Und Entwicklungsgellschaft (Deg) & Others [2011] eKLR** in which the Court of Appeal stated that the evidence required to discharge the burden of proving undue influence depended on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship and all the circumstances of the case.

47. The Defendants argued that no special kind of relationship existed between Pannaben and the 1<sup>st</sup> Defendant for the presumption of undue influence to arise and that this could not arise in the context of a landlord and tenant relationship. The court is of the view that there was a special relationship between Pannaben and the 1<sup>st</sup> Defendant beyond that of a landlord and tenant. This is confirmed by the 1<sup>st</sup> Defendant's letter written in 1998 stating that he was the tax adviser of Pannaben. The 1<sup>st</sup> Defendant wrote that letter before he entered into the tenancy agreement with Pannaben on 1/8/2000. The special relationship between the 1<sup>st</sup> Defendant and Pannaben is also confirmed by the documents produced by the 1<sup>st</sup> Defendant showing that he used to manage part of Pannaben's household chores including paying bills, buying groceries and dog food whose cost he would deduct from the rent. The court observes that the 1<sup>st</sup> Defendant kept such meticulous records of the services he rendered to Pannaben. One of the summarised account for 24/3/2005 prepared by the 1<sup>st</sup> Defendant shows expenses of Kshs. 60,530/= for Travelmart Ltd (implying some travel expenses) on 8/2/2005, Kshs. 8,200 for land rent, Kshs. 70,591/= for Kenindia Assurance Co. Ltd, Kshs. 33,610.20 for NCC rates and tax instalment of Kshs. 26,500/=. These sums are deducted and the balance due to Pannaben on account of rent from the 1<sup>st</sup> Defendant for January to June 2005 is indicated as Kshs. 190,568.80. The statement confirms that the 1<sup>st</sup> Defendant was handling payment for Pannaben's personal travel, insurance, rates and land rent. The Plaintiffs stated in their evidence that the 1<sup>st</sup> Defendant acted as a father figure, their father having died in 1993 when they were young. The letter of 17/7/1998 written by the 1<sup>st</sup> Defendant to the Department of Immigration confirms the special relationship between Pannaben and the 1<sup>st</sup> Defendant.

48. The Defendants submitted that the sale agreement between Pannaben and the Defendants was a valid agreement in which Pannaben took home a whopping Kshs. 17 Million which was by no means a small amount in 2005/2006. The Defendants argued that Pannaben must have used the sale proceeds to sustain the two Plaintiffs overseas only for them to come back and seek to nullify the sale of the Suit Property having directly benefited from the proceeds.

49. The sale agreement is dated 19/10/2005. The banker's cheques copies of which the 1<sup>st</sup> Defendant produced as evidence of payment of the purchase price are dated 22/2/2006, 23/2/2006, 24/2/2006 and 25/2/2006. Going by the 1<sup>st</sup> Defendant's accounting background, and the meticulous accounting records he kept in respect of Pannaben's expenses, the court would have expected the 1<sup>st</sup> Defendant to give evidence of the source of the funds for the purchase price. No bank statements were produced to show the cheques were banked and cleared by Pannaben or by the 1<sup>st</sup> Defendant on Pannaben's behalf.

50. It is not in dispute that Pannaben suffered acute rheumatoid arthritis which made her hands deformed. Naturally a person with severely deformed hands would find some difficulty in executing documents. No evidence was led to confirm that Pannaben signed for and acknowledged receipt of the cheques dated 8/10/2005 and 19/10/2005 for Kshs. 700,000/= and Kshs. 1 Million the 1<sup>st</sup> Defendant claimed to have paid Pannaben on account of the deposit of the purchase price. The court has looked at the signatures claimed to be Pannaben's and notes that the signatures appearing on the letter giving the terms of the lease between Pannaben and the 1<sup>st</sup> Defendant dated 1/8/2000, the note acknowledging receipt of the cheques in February 2006, the sale agreement dated 19/10/2005 and pages 1 and 2 of the transfer are all different. This raises doubt about the signatures on all these documents having been made by Pannaben in light of evidence of her acute arthritis which the doctor told the court is progressive and the deformed state of her hands.

51. No evidence was provided by the 1<sup>st</sup> Defendant in support of the allegation that Pannaben ran an export business. The court notes that the letter from Michael Daud & Associates Advocates dated 10/1/2012 to Jenen Marpa Agencies giving them instructions to levy distress for rent against Pannaben was copied to Mr. A.B. Shah, retired Judge of Appeal. Michael Daud Advocates' letter of 26/10/2011 mentioned that Pannaben had given instructions to Mr. A.B. Shah in 2008 to pursue her rights against Kenya General Industries Limited. Mr. Shah confirmed that the 1<sup>st</sup> Defendant introduced him to Pannaben. Mr. Shah was not therefore a credible witness to give evidence on Pannaben's mental status and the case based on his close relationship with the Defendant.

52. The court notes that the only document that Pannaben prepared produced in evidence was the letter dated 1/8/2000 setting out the terms on which she was leasing the main house to the 1<sup>st</sup> Defendant. No other evidence was produced to show that Pannaben was in good health in 2006 and that the deformity to her fingers could only have worsened in 2012 and not earlier. The 1<sup>st</sup> Defendant confirmed that Pannaben's hands were deformed when he was shown the photograph.

53. Taking into account the considerations set out in **LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions- Und Entwicklungsgellschaft (Deg) & Others** and applying them to the circumstances of this case, the court is persuaded that Pannaben was unduly influenced by the 1<sup>st</sup> Defendant to enter into the sale transaction based on her relationship with the 1<sup>st</sup> Defendant. The sale transaction cannot readily be accounted for looking at all the circumstances of this case and taking into account Pannaben's state of mental health and the role the 1<sup>st</sup> Defendant played in running her financial affairs. It is clear from the evidence in this case that Pannaben reposed trust and confidence in the 1<sup>st</sup> Defendant.

54. The House of Lords considered the issue of undue influence in **Barclays Bank Plc v O'Brien [1994] 1 AC 180** and stated that a person who has been induced to enter into a transaction by the undue influence of another is entitled to set the transaction aside. Such undue influence could either be actual or presumed. For presumed undue influence, the person has to show that there was a relationship of trust and confidence between that person and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused the relationship in procuring the person complaining to enter into the impugned

transaction. The court stated that even if the relationship in question is outside those which as a matter of law raise the presumption that undue influence has been exercised, the person complaining of undue influence will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without proving that the wrongdoer exerted actual undue influence or otherwise abused the trust and confidence in relation to the particular transaction impugned, unless there is evidence disproving undue influence. The 1<sup>st</sup> Defendant did not lead evidence disproving undue influence over Pannaben who from the evidence adduced is shown to have reposed trust and confidence in him. Taking into consideration the totality of the facts of this case, the Plaintiffs have proved on a balance of probabilities that Pannaben entered into the sale transaction under the 1<sup>st</sup> Defendant's undue influence and that the sale transaction over the Suit Property should be set aside.

55. The court wishes to thank Mr. E. Mwangi, Mr. Kounah and Mr. I. Wanjohi, the advocates who appeared for both parties in this case for the extensive research they did on the issues in dispute and the legal authorities they provided which were very helpful and assisted the court in arriving at its decision.

56. The court finds that the Plaintiffs have proved their case on a balance of probabilities and grants prayers 1, 2 and 3 of the Amended Plaint dated 12/7/2018. The Plaintiffs are awarded the costs of the suit. The Plaintiffs stated in their submissions that they were prepared to refund the sum of Kshs. 17 Million to the Defendants. The Plaintiffs are directed to refund the Defendants the sum of Kshs. 17 Million within six months of the date of this judgement together with interest at court rates to be calculated from January 2011 until payment in full.

57. The Defendants have failed to prove that they are entitled to rent in respect of the Suit Property from the Plaintiffs from March 2008 to September 2008. They have also failed to prove that they are entitled to mesne profits they seek in the Amended Defence and Counterclaim dated 17/7/2018. The court finds that the sum of Kshs. 850,000/= mentioned in the Counterclaim is more than sufficient to cover the Plaintiffs' share of water, electricity and security charges from March 2008 to September 2011. The Defendants' counterclaim is dismissed. Each party will bear its costs for the Counterclaim.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of March 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. E. Mwangi for the Plaintiffs

Mr. I. Wanjohi for the Defendants

Mr. V. Owuor- Court Assistant