

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 100 OF 2019**

**KENROID LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**AUREUM LIMITED ..... 1<sup>ST</sup>**  
**DEFENDANT**

**IRENE NZISA WANJIGI ..... 2<sup>ND</sup>**  
**DEFENDANT**

**TYL LIMITED ..... 3<sup>RD</sup>**  
**DEFENDANT**

**KAIRO AUGUSTINE THUO ..... 4<sup>TH</sup>**  
**DEFENDANT**

**HORIZON HILLS LIMITED ..... 5<sup>TH</sup>**  
**DEFENDANT**

**DAVID NJENGA SAMSON KURIA ..... 6<sup>TH</sup>**  
**DEFENDANT**

**HENRY NJOROGE NJENGA ..... 7<sup>TH</sup>**  
**DEFENDANT**

**SAMUEL NJUGUNA CHEGE ..... 8<sup>TH</sup>**  
**DEFENDANT**

**CISSY KALUNDE MUSEMBI ..... 9<sup>TH</sup>**  
**DEFENDANT**

**CONSOLIDATED WITH**  
**ELC CASE NO. 227 OF 2019**

**CISSY KALUNDE MUSEMBI .....**  
**PLAINTIFF**

**VERSUS**

**AUREUM LIMITED ..... 1<sup>ST</sup>**  
**DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup>**  
**DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup>**  
**DEFENDANT**

**KENROID LIMITED ..... 4<sup>TH</sup>**  
**DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit unveils a tale of corporate intrigue and deceit, where the boardroom became a battlefield and the company seal a weapon of fraud. At the heart of the dispute lies a prime parcel of land in Westlands, an asset of immense value, whose ownership and control have been entangled in a web of forged documents, shadowy directorships, and competing claims of legitimacy.
2. The Court is therefore called upon not merely to determine who sits rightfully at the company’s helm, but to restore integrity to the corporate structure that has been hijacked by deceit for the single purpose of acquiring the pricey land.

3. This Judgment is with respect to two suits, consolidated pursuant to an order of this court, that is ELC case number 100 of 2019 and 227 of 2019.

**ELC 100 of 2019**

4. In ELC case number 100 of 2019, the Plaintiff, Kenroid Limited, by way of an Amended Plaint dated 25<sup>th</sup> February 2019 seeks judgement against the Defendants jointly and severally for the following reliefs:

- a) ***Specific performance of the Agreement for Sale dated 21<sup>st</sup> June 2018 entered into between the Plaintiff and the 1<sup>st</sup> Defendant.***
- b) ***All necessary accounts and enquiries.***
- c) ***Damages for breach of contract in lieu or in addition to specific performance.***
- d) ***A permanent injunction do issue to permanently restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants in this action and each and or all of them jointly and or severally and or any other 3<sup>rd</sup> parties either by themselves or their servants and/or agents and/or employees and/or howsoever from entering upon occupying, constructing on or developing or selling, leasing, licensing, transferring, charging, mortgaging and or in any manner whatsoever transacting in and or over and or is any other***

***manner whatsoever and howsoever dealing with and or interfering with all or any part of all that portion of land situate in the City of Nairobi in the Nairobi Area of the Republic of Kenya containing by measurement nought decimal three three one four (0.3314) of a hectare or thereabouts being Land Reference Number 1870/II/200 being the premises comprised in a Grant registered in the Land Titles Registry at Nairobi as Number I.R. 65800/1 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the said Grant and more particularly on Land Survey Plan Number 175145 deposited in the Survey Records Office at Nairobi held for the remainder of the term of Fifty Years (50) from the 1<sup>st</sup> Day of June 1993 together with all rights, easements, advantages and privileges appertaining or belonging thereto or usually held enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereinafter referred to as “the Suit Premises”).)***

***e) Spent***

***f) An order directing the Inspector General of Police and the OCPD in charge of the area and***

***the OCS in charge of the Police Station concerned to enforce the Court's orders and ensure that the Defendants or any other 3<sup>rd</sup> parties of any description are not allowed to access or enter upon the Suit Premises and or to interfere with the Plaintiff's quiet possession thereof either by themselves and/or their servants and/or their agents and/or employees and/or howsoever from either entering upon occupying, constructing on or developing or selling, transferring, charging, mortgaging, or in any other manner whatsoever or howsoever dealing with or transacting with or interfering with and/or remaining on or continuing in occupation of all that piece or parcel of land situate in the City of Nairobi in the Nairobi Area of the Republic of Kenya containing by measurement nought decimal three three one four (0.3314) of a hectare or thereabouts being Land Reference Number 1870/II/200 being the premises comprised in a Grant registered in the Land Titles Registry at Nairobi as Number I.R. 65800/1 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the said Grant and more particularly on Land Survey***

**Plan Number 175145 deposited in the Survey Records Office at Nairobi held for the remainder of the term of Fifty Years (50) from the 1<sup>st</sup> Day of June 1993 together with all rights, easements, advantages and privileges appertaining or belonging thereto or usually held enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereafter referred to as “the Suit Premises”).**

**g) Spent.**

**h) An order for the eviction of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, their agents, servant, employees, proxies and any other parties connected to them or 3<sup>rd</sup> parties from the Suit Premises and with these same orders to apply in relation to any purported sub-divisions deriving out of the said Suit Premises.**

**i) An order directing the Chief Land Registrar or his equivalent and the Registrar of Lands and or their servants, agents and or employees to ensure that they do rectify the register by cancellation of all the entries relating to the transfer of the Suit Premises from the 1<sup>st</sup> and or 5<sup>th</sup> Defendant and or any other party to the favour of the 9<sup>th</sup> Defendant and or any other subsequent dealing with and or transfer of the**

***Suit Premises and Title thereto to any other party other than the Plaintiff and to forthwith cancel, reverse, rectify and or in any manner required amend the same or do any act necessary and in all manners required so as to ensure the intended objective and result of the Plaintiff's instatement and registration as the sole legal and beneficial owner thereof is achieved and the Title to the Suit Premises be issued to the favour of the Plaintiff.***

- j) An order directing the defendants and each of them jointly and or independently together with their directors, servants, employees and or agents or any third party to deliver up vacant possession of the suit premises to the Plaintiff.***
- k) Costs of and incidental to this suit.***
- l) Interest on (c) and (k) and wherever applicable above on a compounding basis at the rate of 14% per annum.***
- m) In the alternative, a refund of the purchase price of Kshs. 56, 000,000/= plus all penalties provided for under the contract, damages for breach of contract and interest thereon at the rate of 16% on a compounded basis.***

***n) Further and or other relief as this Honourable Court may deem fit to grant.***

**The Plaintiff's case (Kenroid Limited)**

5. In the Plaint, the Plaintiff, Kenroid Limited, asserted that it is the legal and beneficial owner of the parcel of land known as LR No. 1870/ II/200 IR 65800/1, delineated on Land Survey Plan Number 175145 (the suit property). It contended that it purchased the suit property from the 1<sup>st</sup> Defendant, Aureum Limited, pursuant to a Sale Agreement dated 21<sup>st</sup> June 2018, which incorporated the Law Society's Conditions of Sale (1989) at a consideration of Kshs. 280,000,000.
6. It was averred that in accordance with Clause 2(a) of the Agreement, the Plaintiff paid a deposit of Kshs. 56,00,000 to the 1<sup>st</sup> Defendant's advocates as stakeholders and that while performing its obligations, Kenroid Limited discovered that the suit property had been irregularly and unlawfully transferred and allegedly registered in favour of the 9<sup>th</sup> Defendant, Cissy Kalunde Musembi (the Plaintiff in ELC No. 227 of 2019).
7. The Plaintiff averred that the said registration followed the cancellation of entries on the title reflecting the change of name from Horizon Hills Limited to Aureum Limited, and the removal of a caveat lodged by the Plaintiff claiming a purchaser's interest.

- 8.** It was averred that Kenroid Limited, the Plaintiff, notified the 1<sup>st</sup>-4<sup>th</sup> Defendants of these irregularities; that when the 1<sup>st</sup> Defendant was unable to complete the transfer, Kenroid Limited demanded a refund of the deposit and that it also sought proof that the 1<sup>st</sup> Defendant was the registered proprietor of the suit property, evidence that the transfer to the 9<sup>th</sup> Defendant was illegal, confirmation that the matter had been reported to the police, and copies of the relevant statements and Occurrence Book number.
- 9.** The Plaintiff maintained that it had at all times been ready and willing to complete the transaction but found it futile to proceed in view of the registration in favour of the 9<sup>th</sup> Defendant. It accused the 1<sup>st</sup> Defendant of failing to complete within the contractual period and of neglecting to refund the deposit despite repeated demands, thereby breaching the contract.
- 10.** Without prejudice, the Plaintiff alleged that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants induced it to enter into the sale by representing that the 1<sup>st</sup> Defendant held good title, had authority to sell, and that the property was unencumbered.
- 11.** Alternatively, the Plaintiff alleged that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants fraudulently used the 1<sup>st</sup> Defendant as a shell company to defraud it, being aware that the company had no assets and could not satisfy any judgment, thereby leaving them to enjoy the fraudulent proceeds.

- 12.** The particulars of fraud included registering and maintaining the 1<sup>st</sup> Defendant as a front for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants; failing to file meaningful returns or pay taxes; diverting transaction proceeds; and failing to account for funds received from the Plaintiff.
- 13.** The Plaintiff further averred, in the alternative, that it purchased the property for valuable consideration and is the true beneficial owner and that it has neither sold, leased, charged nor disposed of the suit property to the 5<sup>th</sup> to 9<sup>th</sup> Defendants or any third party, and is unaware of any adverse claim over the land.
- 14.** It contended that through forged instruments and falsified company resolutions, the 5<sup>th</sup> to 9<sup>th</sup> Defendants fraudulently transferred the property to the 9<sup>th</sup> Defendant and presented themselves as shareholders and directors of Horizon Hills Limited. The Plaintiff alleged that the said Defendants falsified and manipulated company and land records at the Companies Registry and at the land's office
- 15.** The Plaintiff maintained that two separate entities existed under the name Horizon Hills Limited: one operated by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants (later renamed Aureum Limited), and another operated by the 6<sup>th</sup> to 8<sup>th</sup> Defendants. It asserted that the latter never owned the property, and that any purported transfer of shares or property to the 9<sup>th</sup> Defendant was fraudulent, illegal and *void ab initio*.

- 16.** Alternatively, the Plaintiff maintained that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants, being shareholders and directors of the 1<sup>st</sup> Defendant, never sold or transferred their shares or assets to the 9<sup>th</sup> Defendant, nor did they authorize such transfer.
- 17.** The Plaintiff alleged that sometime in 2018 and 2019, the 5<sup>th</sup> to 9<sup>th</sup> Defendants fraudulently disposed of the 1<sup>st</sup> Defendant's shares and transferred the property to themselves as purported purchasers for value. It contended that they unlawfully altered the register of shareholders and directors at the Companies Registry, effectively removing the genuine shareholders and directors from record.
- 18.** It was further averred that the 5<sup>th</sup> to 9<sup>th</sup> Defendants were not entitled to any transfer or transmission of ownership, and that any indentures, conveyances or titles issued in favour of the 9<sup>th</sup> Defendant were fraudulent and void.
- 19.** The Plaintiff claimed that files relating to the property and the company were missing from the Lands and Companies Registries, which is by fraudulent design or engineering by the Defendants.
- 20.** It maintained that any instruments of transfer or change of shareholding effected by the 6<sup>th</sup> to 9<sup>th</sup> Defendants were incapable of conferring title or any proprietary rights over the suit property. In the alternative, it asserted that the property and associated company shares belong wholly to the 1<sup>st</sup> and/or 5<sup>th</sup> Defendants, and that all other Defendants

and third parties claiming through them are fraudulent and illegal holders.

- 21.** The Plaintiff further averred that between December 2018 and January 2019, the 9<sup>th</sup> Defendant and her agents unlawfully entered upon the suit premises, attempted to take possession, and have since been trespassing thereon. It alleged that in February 2019, the 9<sup>th</sup> Defendant attempted to dispose of portions of the suit property to third parties and continues to hold herself out as the owner, having placed the land on the market.

**The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case**

- 22.** The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, through their Amended Statement of Defence, denied that the 4<sup>th</sup> Defendant was ever a shareholder or director of the 1<sup>st</sup> Defendant. They averred that **Horizon Hills Limited**, which subsequently changed its name to **Aureum Limited**, has never had among its shareholders or directors the 6<sup>th</sup> to 9<sup>th</sup> Defendants.
- 23.** They admitted that the 1<sup>st</sup> Defendant entered into a Sale Agreement with the Plaintiff, Kenroid Limited for the property known as LR No. 1870/II/200, IR 65800/1, (the suit property), but asserted that the Plaintiff never completed the purchase, having only paid a deposit. It was contended that the 1<sup>st</sup> Defendant remains the lawful and registered proprietor of the property and has not transferred its title or interest to any person, including the Plaintiff.

- 24.** The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied any involvement in the alleged cancellation of entries on the property's title and maintained that the title held by the 1<sup>st</sup> Defendant has never been cancelled or transferred to one Cissy Kalunde Musembi, whom they described as a stranger to them.
- 25.** They further stated that the attempt by Cissy Kalunde Musembi (the Plaintiff in ELC No. 227 of 2019) to generate a fraudulent title over the property was reported to the police and was the subject of a criminal investigation; that the Plaintiff was not ready or willing to complete the transaction, and that the filing of these proceedings was intended to avoid its contractual obligation and the consequences of forfeiting the deposit already paid.
- 26.** It was averred that the 1<sup>st</sup> Defendant's title to the property has always been legal and that it has at all times been ready to complete the transaction. The Defendants maintained that they have complied with all terms of the Agreement save for those made impossible by the Plaintiff's failure to meet its own obligations.
- 27.** They explained that the completion documents were always in the custody of the 1<sup>st</sup> Defendant's advocates and could only be released upon receipt of a professional undertaking from the Plaintiff's advocates, which was never issued. They denied that the suit property was ever encumbered in any manner, and asserted that the Plaintiff's own due diligence,

undertaken through its counsel, confirmed the 1<sup>st</sup> Defendant's good and valid title.

- 28.** The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied all allegations of fraud, maintaining that the 1<sup>st</sup> Defendant was not incorporated as a shell or front company but operates in accordance with its memorandum and articles of association and remains compliant with all statutory requirements. They put the Plaintiff to strict proof of the alleged failure to conduct business or pay taxes.
- 29.** They also denied making any misrepresentations to the Plaintiff, asserting that the Plaintiff voluntarily entered into the Agreement after conducting its own due diligence. They relied on Clause J of the Agreement, which provides that the contract embodies the entire agreement between the parties and excludes reliance on any external representations.
- 30.** The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further denied that their title had ever been impeached. They stated that the 1<sup>st</sup> Defendant lawfully changed its name from Horizon Hills Limited to Aureum Limited, and that this change was properly recorded at the Companies Registry, which had noted the existence of two separate companies with similar names.
- 31.** They maintained that the title to the property has at all times remained in the 1<sup>st</sup> Defendant's name and that if the 5<sup>th</sup> to 9<sup>th</sup> Defendants hold any parallel title, the same is a forgery that will be addressed through appropriate criminal proceedings.

**32.** The Defendants denied that the Plaintiff has suffered any loss or damage and contended that any such loss arose from the Plaintiff's own actions and failure to comply with the Agreement. It was averred that the Plaintiff cannot seek an arbitrary refund of the deposit, as any rescission or refund must follow the procedure and consequences provided in the Agreement, including potential forfeiture of part of the purchase price.

**The 4<sup>th</sup> Defendant's case**

**33.** The 4<sup>th</sup> Defendant, in his Statement of Defence, asserted that he is neither a shareholder nor a director of the 1<sup>st</sup> Defendant. The 4<sup>th</sup> Defendant acknowledged that Horizon Hills Limited later changed its name to Aureum Limited, which remains the lawful proprietor of the suit property. He stated that while he was once a director of the 1<sup>st</sup> Defendant, he has since resigned and therefore bears no liability in the present proceedings. He urged the Court to strike out his name from the suit.

**The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants' case**

**34.** The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, in their joint Statement of Defence, denied all allegations of fact and law contained in the Plaint. They refuted the existence of two companies bearing the name Horizon Hills Limited, asserting that there exists only one such company, whose directors are the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants.

- 35.** They averred that Horizon Hills Limited was the previous registered owner of LR No. 1870/II/200, Grant IR 65800, (the suit property), which it sold to the 9<sup>th</sup> Defendant in 2018 and that the suit property was thereafter transferred to and registered in the 9<sup>th</sup> Defendant's name, who holds a valid title.
- 36.** The 5<sup>th</sup> to 8<sup>th</sup> Defendants alleged that in 2018, the 1<sup>st</sup> to 4<sup>th</sup> Defendants, together with the Plaintiff, attempted to tamper with the 5<sup>th</sup> Defendant's company records at the Companies Registry (Horizons Hills Limited) to create the false impression that another company existed under the same name. They contended that this scheme failed, as the property had already been sold and transferred to the 9<sup>th</sup> Defendant.
- 37.** They particularized the alleged attempted fraud by the 1<sup>st</sup> to 4<sup>th</sup> Defendants as including: falsely claiming to be directors of Horizon Hills Limited; forging documents in the 5<sup>th</sup> Defendant's name to alter company and land records; and colluding with the Plaintiff to manipulate registration details, as evidenced by the Plaintiff's assertion that two companies bore the same name.
- 38.** The 5<sup>th</sup> to 8<sup>th</sup> Defendants denied the Plaintiff's allegations of forgery. They maintained that Horizon Hills Limited, whose directors are the 6<sup>th</sup> to 8<sup>th</sup> Defendants, has never changed its name to Aureum Limited. They contended that the Plaintiff,

in collusion with the 1<sup>st</sup> to 4<sup>th</sup> Defendants, orchestrated a scheme to defraud the 5<sup>th</sup> to 9<sup>th</sup> Defendants and deliberately failed to join the Chief Land Registrar as a party to the proceedings in order to conceal their actions.

**The 9<sup>th</sup> Defendant's case**

- 39.** The 9<sup>th</sup> Defendant, Cissy Kalunde Musembi, (who is the Plaintiff in ELC No. 227 of 2019) in her Defence, averred that she is the registered proprietor of the suit property, LR No. 1870/II/200 (Grant IR 65800/1), measuring approximately 0.3314 hectares and delineated on Land Survey Plan No. 175145.
- 40.** She stated that she lawfully purchased the property for valuable consideration pursuant to a Sale Agreement dated 12<sup>th</sup> September 2018 between herself and **Horizon Hills Limited (Reg. No. C.110776)**, executed by the 6<sup>th</sup> and 7<sup>th</sup> Defendants as directors of the company, and that the property was transferred to her on 3<sup>rd</sup> October 2018 and registered in her name on 7<sup>th</sup> November 2018.
- 41.** The 9<sup>th</sup> Defendant denied that the property was unlawfully transferred to her, stating that she conducted due diligence before purchase and confirmed that the title was clean and registered in Horizon Hills Limited's name. She maintained that she was unaware of any alleged cancellation of entries in favour of the Plaintiff or the 1<sup>st</sup> Defendant and insisted that

the 1<sup>st</sup> Defendant had no proprietary interest capable of being transferred to the Plaintiff.

**42.** The 9<sup>th</sup> Defendant denied all allegations of fraud, trespass or illegality, and further denied that the Plaintiff had suffered any loss attributable to her actions. She emphasized that any alleged loss arose from a contract to which she was not a party.

**ELC Case No. 227 of 2019**

**43.** In **ELC No. 227 of 2019**, the Plaintiff, Cissy Kalunde Musembi, (who is the **9<sup>th</sup> Defendant in ELC Case No. 100 of 2019**) averred that she is the registered proprietor of the suit property. She described herself as an innocent purchaser for value without notice, having neither participated in nor known of any fraud affecting the title.

**44.** She averred in the Plaint that she undertook reasonable due diligence before purchase. She contended that the deed of title executed in her favour by the Chief Land Registrar is a good title which confers protectable rights under **Article 40** of the **Constitution of Kenya** and under **Sections 24** and **25** of the **Land Registration Act**.

**45.** She stated in the Plaint that in early 2018, she was approached by David Njenga Samson Kuria, Henry Njoroge Njenga and Samuel Njuguna Chege, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, as directors of Horizon Hills Limited, with an invitation to purchase the suit property, and that through her

advocates, Wambua and Maseno LLP, an official search was conducted at the Lands Registry on 18<sup>th</sup> April 2018 which confirmed that the property was registered in the name of Horizon Hills Limited.

- 46.** It was averred that her advocates also sought confirmation from the Registrar of Companies who verified the existence of Horizon Hills Limited, Registration Number C.110776, incorporated on 2<sup>nd</sup> July 2004, and issued a CR12 naming the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants as directors, and that further verification was undertaken with the National Registration Bureau which confirmed that the national identity cards of the said directors were genuine.
- 47.** She averred that having undertaken the standard due diligence required of a prudent purchaser, and with the Chief Land Registrar having confirmed ownership of the land by Horizon Hills Limited, she was entitled to rely on those official records and that a sale agreement was executed on 12<sup>th</sup> September 2018 for Kshs. 220,000,000; that a 10% deposit was paid and held by Wambua and Maseno LLP as stakeholders pending registration of the transfer in her favour.
- 48.** She stated in the Plaint that on 14<sup>th</sup> September 2018 she transferred Kshs. 30,000,000 to the parties' advocates as part payment to be released upon successful registration; that on 19<sup>th</sup> November 2018, after registration in her favour,

she paid a further Kshs. 24,000,000 to the parties' advocates for transmission to the vendor, and that cash payments to the directors brought the paid up total amount to Kshs. 92,000,000.

- 49.** According to the Plaintiff, her advocates issued to the vendors a professional undertaking for the balance of Kshs. 128,000,000 upon completion.
- 50.** In the Plaint, the Plaintiff averred that in December 2018, she was granted vacant possession, sought approvals from the Nairobi City County for renovations and electrical works, and applied to change county records from Horizon Hills Limited to her name. She contended that she remains in effective possession of the suit land and has engaged Beyond Borders Securities to provide continuous security at the premises.
- 51.** It is the Plaintiff's case that while preparing to release the balance under the professional undertaking, she learned that the 1<sup>st</sup> Defendant had lodged a complaint with the Directorate of Criminal Investigations at Parklands concerning ownership and had produced a title in its name.
- 52.** She averred that when her advocates appeared before the Chief Land Registrar on 19<sup>th</sup> March 2019 with the original documents, they learned that another claimant, besides the 1<sup>st</sup> Defendant, also asserted ownership. The 1<sup>st</sup> Defendant and its directors initially failed to produce their title, leading

to an adjournment to 27<sup>th</sup> March 2019 when the 1<sup>st</sup> Defendant produced what it said was the original title while the Registry produced the Plaintiff's title.

**53.** The Plaintiff contended that the double registration arose because the Horizon Hills Limited from which she purchased the property was incorporated on 2<sup>nd</sup> July 2004 as C.110776, whereas the Horizon Hills Limited that transitioned to the 1<sup>st</sup> Defendant was incorporated on 24<sup>th</sup> November 2006 as C.131937. The Plaintiff contended that the 1<sup>st</sup> Defendant's claim to proprietorship is hollow, baseless and fraudulent, incapable of conferring any enforceable right under Article **40(6)** of the **Constitution** and **Section 25** of the **Land Registration Act**.

**54.** It is the Plaintiff's case that the Registrar of Companies' directive that Horizon Hills Limited C.131937 change its name to Aureum Limited as evidence of passing off; that it was improbable that two companies would be registered within a relatively short interval and both would hold titles bearing near similarities and that Horizon Hills Limited C.131937 holds several titles whose contents contradict the deed file for the suit property, thereby casting doubt on the 1<sup>st</sup> Defendant's claim.

**55.** In the alternative, she averred that if the Court finds there was inadvertent double registration, then her equity, which is aligned to Horizon Hills Limited C.110776 and is first in time,

prevails over any equity of Horizon Hills Limited C.131937 and of the 1<sup>st</sup> Defendant or any person claiming through it. She added that she is firmly and effectively in possession of the land.

**56.** The Plaintiff further pleaded that should the Court find that she is not the proper proprietor, she is entitled to compensation or rebate for losses resulting from the aborted transaction against the Chief Land Registrar and the Attorney General. She particularized special damages as follows:

- i. The value of the suit property at Kshs. 350,000,000.***
- ii. Legal fees to Wambua & Maseno Advocates at Kshs. 3,600,000.***
- iii. Renovation Costs at Kshs. 550,000.***
- iv. Security Services at Kshs. 1,000,0000 to Beyond Borders Securities; and***
- v. Stamp Duty at Kshs. 14,000,000.***

**57.** The Plaintiff, Cissy Kalunde Musembi prayed for judgement against the Defendants for:

- a) An order of permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, whether by themselves, agents, nominees or any other person whosever claiming through the 1<sup>st</sup> Defendant from entering upon, occupying,***

***selling, leasing, licensing, charging, mortgaging, transferring, constructing or in any manner howsoever dealing in or interfering with any portion of whole or all the suit property known as LR No. 1870/II/200 I.R. No. 65800, the property of the Plaintiff.***

***b) An order of court under Section 80 of the Land Registration Act No. 3 of 2012 cancelling any and all registration of titles held by the 1<sup>st</sup> Defendant over LR No. 1870/II/200 I.R. No. 65800;***

***Alternatively to (a) and (b) above:***

***c) An order directed at the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to pay to the Plaintiff the sum pleaded and itemized of Kshs. 369,150,040.00 being the market value of the suit property LR No. 1870/II/200 I.R. No. 65800, as compensation to the Plaintiff in consideration of the Plaintiff yielding its proprietorship over the property.***

***d) Interest over (c) above at court rates from date of judgement of court until payment in full.***

***e) Costs of the suit on indemnity basis.***

**58.** The 1<sup>st</sup> Defendant, Aureum Limited, in its Statement of Defence, denied the Plaintiff's claim to proprietorship of the suit property and maintained that it is the lawful registered owner thereof. It asserted that it has never sold or disposed

of its interest in the property to the Plaintiff. The 1<sup>st</sup> Defendant alleged that the Plaintiff is a fraudster attempting to unlawfully claim ownership of the property without any legal basis and to usurp its title.

- 59.** It was averred that David Njenga Samson Kuria, Henry Njoroge Njenga, and Samuel Njuguna Chege, the 6<sup>th</sup> - 8<sup>th</sup> Defendants in ELC 100 of 2019, have never been directors of Horizon Hills Limited and therefore had no authority to dispose of the property.
- 60.** The 1<sup>st</sup> Defendant stated that it remains the registered owner of the suit property, having lawfully acquired majority shares in Horizon Hills Limited, Registration No. C131937 and that it was directed by the Registrar of Companies to change its name to Aureum Limited, although the Registrar later acknowledged that the directive had been issued in error.
- 61.** It was contended that Registration No. C.110776 does not belong to Horizon Hills Limited but to a company known as Bosorana Limited, whose directors are David Njenga Samson Kuria, Henry Njoroge Njenga, and Samuel Njuguna. The 1<sup>st</sup> Defendant stated that Bosorana Limited has never owned or held any interest in the suit property, and its directors had no authority to transact in respect of it.
- 62.** The 1<sup>st</sup> Defendant stated that it only had one title to the suit property and denied the claim that it had numerous titles

over the suit property. It was contended that if the Plaintiff conducted any due diligence as she had alleged, she could have determined that the company registered under Reg No. C-110776 was incorporated on 2<sup>nd</sup> July 2004 and was registered as Bosorana Limited, and later changed its name to Horizon Hills Limited.

- 63.** It was argued that any payments made by the Plaintiff were made to fraudsters, not to the representatives of the legitimate Horizon Hills Limited. The 1<sup>st</sup> Defendant denied receiving any professional undertaking and claimed that the Plaintiff was part of a wider criminal scheme intended to fraudulently charge the property and obtain a credit facility.
- 64.** In reply, the Plaintiff denied that the suit property is registered in the 1<sup>st</sup> Defendant's name and reiterated that the 1<sup>st</sup> Defendant's documents of ownership are fraudulent and forged. She restated that she is an innocent purchaser who conducted due diligence before acquiring the property.
- 65.** The Plaintiff alleged that the 1<sup>st</sup> Defendant's fraud was evident from the production of two transfer documents, both dated 27<sup>th</sup> November 2006 and bearing the same Day Book Number 2166. She noted that one document bore revenue stamps allegedly franked at the Ministry of Lands on 5<sup>th</sup> December 2004, a Sunday, when government offices are closed, and at a time when Horizon Hills Limited C131937 (now Aureum Limited) did not exist, having been incorporated on 24<sup>th</sup> November 2006. The second document

was franked on 5<sup>th</sup> December 2006, with valuation endorsed on 21<sup>st</sup> January 2007, also a Sunday, and after registration of the transfer on 29<sup>th</sup> December 2006, contrary to normal conveyancing practice.

- 66.** The Attorney general filed a Defence on behalf of the 2<sup>ns</sup> and 3<sup>rd</sup> Defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, in their Statement of Defence, denied the Plaintiff's claim and maintained that the registered proprietor of the suit property is the 1<sup>st</sup> Defendant, Aureum Limited, as reflected in the records held by the Government. They averred that the searches relied upon by the Plaintiff show ownership in favour of Aureum Limited.
- 67.** It was further averred by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that investigations revealed that all documents relied upon by the Plaintiff including the grant IR 65800 LR 1879/II/200 are forgeries, and that forensic audits conducted on the Ministry of Lands and Physical Planning servers by ICT experts from Coseke Kenya Limited, Scorpion Consulting Limited, the Lands Information Management System, and the DCI Forensic Investigations Unit confirmed that the Plaintiff's documents and searches were fraudulent.
- 68.** The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contended that the alleged due diligence by the Plaintiff was a farce intended to sanitize fraudulent dealings, and that the purported purchase was a sham unsupported by any authentic records from the Lands or Companies Registries.

- 69.** They averred that Company No. C.110776 belongs to Bosorana Limited, incorporated on 2<sup>nd</sup> July 2004, while Aureum limited was incorporated under Registration Number C.131937 on 24<sup>th</sup> November 2006 in the name of Horizon Hills Limited. They further stated that Bosorana Limited attempted to change its name to Horizon Hills Limited through an application lodged on or about 31<sup>st</sup> July 2014, which was not approved.
- 70.** They denied that any registration was ever effected in the Plaintiff's favour on 7<sup>th</sup> November 2018. While disclaiming knowledge of the property's occupation status, they contended that no cause of action lies against the Government based on possession.
- 71.** The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further averred that the Plaintiff's claim for indemnity is misconceived, as she was party to the fraud and failed to exercise due diligence, thereby disqualifying her from the protection afforded to a bona fide purchaser for value without notice. They maintained that the particulars of special damages are unfounded, as no payment was made for a legitimate title, and any recovery should be sought from the purported vendors and their agents.
- 72.** In reply, the Plaintiff accused the 3<sup>rd</sup> Defendant of dishonesty and alleged collusion with Nicholus Osuri (Force Number 80936), the DCI Investigating Officer, to mislead the Court. She argued that the statements of the Investigating Officer

and the Land Administration Officer cannot determine ownership, which lies within the exclusive mandate of the Land Registrar.

- 73.** The Plaintiff alleged that the investigations were deliberately skewed to favour the 1<sup>st</sup> Defendant, and that the Investigating Officer is currently under inquiry by the DCI Complaints Department for bias. She asserted that had the officer acted impartially, he would have noted the numerous discrepancies in the 1<sup>st</sup> Defendant's documents, which reveal forgeries.

#### **Hearing and Evidence**

- 74. PW1 Cissy Kalunde Musembi, the Plaintiff in ELC No. 227 of 2019,** adopted her witness statement dated 4<sup>th</sup> July 2019 as her evidence-in-chief and relied on the bundle of documents dated 5<sup>th</sup> July 2019, marked PEXB1, and a supplementary bundle dated 16<sup>th</sup> July 2020, marked PEXB2.
- 75.** PW1 stated that she is the registered proprietor of the suit property, having purchased it for valuable consideration. She maintained that she had no knowledge of any fraud or defect in title during the transaction and denied that her acquisition was tainted by any illegality or misrepresentation.
- 76.** She asserted that she was an innocent purchaser for value without notice, and that her title, executed in her favour by the Chief Land Registrar, conferred upon her a good title

protected under **Article 40** of the **Constitution** and **Sections 24** and **25** of the **Land Registration Act**.

77. PW1 testified that she engaged the firm of Wambua & Maseno Advocates LLP, which represented her throughout the transaction, from the initial purchase to the registration of the title in her name, and in subsequent proceedings before the Chief Land Registrar and the Directorate of Criminal Investigations when the 1<sup>st</sup> Defendant lodged a complaint.
78. She adopted the contents of the sworn statement of Prisca Wambua, her advocate, particularly the details of the due diligence undertaken before acquisition of the property and affirmed that the account given therein accurately reflected the steps taken on her behalf.
79. In cross-examination, PW1 stated that she is a businesswoman dealing in electronics under the name Lakesea Technologies Limited. She testified that her company's annual turnover exceeds Kshs. 150,000,000 and that she operates accounts with Equity Bank and Diamond Trust Bank.
80. She confirmed that she did not know why the vendor had not been joined as a party to her suit and reiterated that she holds title to the property, but explained that she did not have the original title in court as it had been surrendered to the DCI on her instructions.

- 81.** PW1 testified that she did not personally know the vendors; that the offer to purchase the suit property had been presented to her by her advocate, Prisca Wambua, in early 2018 and that she did not meet or negotiate directly with the sellers, relying entirely on her advocate to handle the transaction.
- 82.** According to PW1, the agreed purchase price was Kshs. 220,000,000. She produced proof of payments amounting to Kshs. 54,000,000: Kshs. 30,000,000 transferred to her advocate on 14<sup>th</sup> September 2018 and a further Kshs. 24,000,000 from her personal account.
- 83.** She testified that she made an additional cash payment of Kshs. 45,000,000, supported by her advocate's letter dated 5<sup>th</sup> October 2018 confirming receipt of Kshs. 25,000,000 and a further Kshs. 20,000,000. She stated that these funds came from her electronics business and personal savings.
- 84.** PW1 admitted that she had no documentary evidence showing withdrawal of the alleged Kshs. 45,000,000 in cash or proof that she paid the entire Kshs 220,000,000 purchase price. She acknowledged that only (Kshs. 54,000,000 could be traced through bank records and stated that her lawyers were best placed to account for the balance of Kshs. 99,000,000 allegedly paid to the vendors.
- 85.** PW1 denied knowledge of any caveat registered by Kenroid Limited over the property. She stated that she has been

paying land rent and rates since 2018, producing a Rates Clearance Certificate at page 12(b) of her bundle. She maintained that out of the Kshs. 99,000,000 she paid, Kshs. 92,000,000 went to the vendors, while Kshs. 14,000,000 was used to pay stamp duty.

- 86.** She explained that when the ownership dispute arose, she instructed her advocates to withhold payment of the balance of Kshs. 128,000,000 pending resolution of the matter.
- 87.** In re-examination, she referred to a letter at page 38 of her bundle confirming that the title was forwarded to the DCI. She stated that the vendor, Horizon Hills Limited, had not sued her to recover the purchase price of Kshs. 220,000,000. She also referred to exhibit PNW12(a), a letter from Beyond Borders Securities, confirming that their guards remained deployed at the property and that payments for their services were made by cheque.
- 88.** PW2, Prisca Wambua, an Advocate and Managing Partner of Wambua & Maseno Advocates LLP, relied on her witness statements dated 4<sup>th</sup> July 2018 and 16<sup>th</sup> July 2020. She testified that her firm acted as the transaction advocates for both the vendor and the purchaser in the sale of the suit property.
- 89.** According to PW2, under the sale agreement dated 12<sup>th</sup> September 2018, the Plaintiff was to pay a deposit of Kshs. 22,000,000 upon execution, although she could not recall the

exact date of payment or produce proof thereof, and that the balance was to be paid upon exchange of completion documents. PW2 reiterated that the Plaintiff, Cissy Kalunde Musembi, is the registered proprietor of the suit property and an innocent purchaser for value, having acquired title after conducting reasonable due diligence and without notice of any defect in title or fraud.

- 90.** PW2 denied that the property was ever registered in the name of the 1<sup>st</sup> Defendant, contending that the documents produced by Aureum Limited to support its claim were fraudulent and incapable of conferring ownership.
- 91.** She narrated that in early 2018, a friend, Arthur Kenga, introduced her to Henry Njoroge Njenga and David Njenga Samson Kuria, whom he identified as directors of Horizon Hills Limited, the vendor and that the said directors sought legal representation for the sale of the suit property and furnished her with copies of the title, their identity cards, and the company documents.
- 92.** PW2 stated that she carried out searches at the Lands Registry, Companies Registry, and National Registration Bureau; that the Land Registry search confirmed that the suit property was registered in the name of Horizon Hills Limited and that a CR12 from the Companies Registry indicated that Horizon Hills Limited (Reg. No. C-110776), incorporated on 2<sup>nd</sup> July 2004, listed Henry Njoroge Njenga,

David Njenga Samson Kuria, and Samuel Njuguna Chege as its directors.

- 93.** PW2 further testified that the National Registration Bureau verified the authenticity of the directors' identity cards, and a search at the Survey of Kenya revealed that a previous subdivision attempt in 2002 had been cancelled, reinstating the original Deed Plan No. 175145 and that upon inspection of the deed file at the Lands Registry, she confirmed that the property was indeed registered in the name of Horizon Hills Limited (C-110776), and she therefore proceeded with the transaction.
- 94.** PW2 stated that a buyer was not secured until September 2018 when the Plaintiff agreed to purchase the property for Kshs. 220,000,000; that her firm represented the Plaintiff, and that upon execution of the sale agreement on 12<sup>th</sup> September 2018, 10% deposit was paid and held in trust pending registration of the transfer in the purchaser's favour.
- 95.** She testified that on 14<sup>th</sup> September 2018, the Plaintiff transferred Kshs. 30,000,000 to the firm's Equity Bank account via RTGS, and on 19<sup>th</sup> November 2018, after registration of the transfer, an additional Kshs. 24,000,000 was received via a further RTGS and that various cash payments to the vendor's directors brought the total to Kshs. 92,000,000.

- 96.** PW2 stated that under the Plaintiff's instructions, the firm issued a professional undertaking for the balance of Kshs. 128,000,000; that in October 2018, the firm paid Kshs. 14,000,000 as stamp duty, and that on 17<sup>th</sup> November 2018, the transfer was registered in the Plaintiff's favour.
- 97.** PW2 stated that in December 2018, the Plaintiff took vacant possession, obtained renovation approvals from the Nairobi County Government, and updated ownership records. She also engaged Beyond Borders Securities to secure the property.
- 98.** She asserted that the 1<sup>st</sup> Defendant had generated multiple title deeds purporting ownership of the same property, none of which was consistent with the official record at the Lands Registry. She denied the allegations that the Plaintiff was fraudulent, asserting instead that it was the 1<sup>st</sup> Defendant whose conduct evidenced fraud in the acquisition of its alleged titles.
- 99.** In cross-examination, PW2 confirmed awareness of the sale agreement between Kenroid Limited and Aureum Limited. She stated that she dealt with David Njenga Samson, Henry Njoroge, and Samuel Chege, the directors of Horizon Hills Limited (C-110776), and personally visited the vacant land. She noted that Aureum Limited (C-131937) had different directors, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and was not the vendor in the transaction.

- 100.** PW2 maintained that the 1<sup>st</sup> Defendant, Aureum Limited, had no claim over the land, explaining that two titles exist: one in the name of Cissy Kalunde Musembi derived from Horizon Hills Limited (C-110776) and another in the name of Aureum Limited derived from the same Horizon Hills Limited but with a different registration number C-131937.
- 101.** PW2 admitted that she had erroneously included incorporation documents for C-131937 in her bundle, but clarified that the correct certificate for Horizon Hills Limited (C-110776) was produced by the Attorney General.
- 102.** She confirmed that Horizon Hills Limited (C-110776) was incorporated on 2<sup>nd</sup> July 2004, with Samson Njenga, Henry Njoroge, and Samuel Chege as its founding directors. She denied any knowledge of Bosorana Limited, although she noted that its unsigned incorporation certificate bore the same number, C-110776.
- 103.** Referred to documents by the 2<sup>nd</sup> Defendant dated 20<sup>th</sup> August 2020 showing changes of directors and share transfers, she confirmed she did not verify whether Horizon Hills Limited was ever known as Bosorana Limited. She maintained that she relied on the certificate of incorporation and PIN certificate for C-110776 when paying stamp duty.
- 104.** Regarding the payment of Kshs. 14,000,000 as stamp duty, she explained that Kshs. 7,000,000 came from the purchase funds, while the balance came from other client monies; that

the declared value in the transfer was Kshs. 150,000,000 for purposes of stamp duty, although the sale agreement reflected Kshs. 220,000,000 and the government valuation Kshs. 350,000,000.

**105.** She testified that she acted for both parties; that Kshs. 92,000,000 was paid to the vendors, and that she received Kshs. 20,000,000 as part of her commission while the balance of Kshs. 128,000,000 remained unpaid when the dispute arose. She denied any involvement in the alteration of company records and added that she was remunerated for her legal services in accordance with the Advocates Remuneration Scale.

**106.** PW2 opined that Kenroid Limited, the Plaintiff in ELC No. 100 of 2019, could not obtain a valid title since the one it relied upon was inconsistent with the Registrar's records. She highlighted the alleged discrepancies in the 1<sup>st</sup> Defendant's transfer documents, including valuation dates occurring after registration and on Sundays, inconsistent frankings, and mismatched denominations between the original and counterpart instruments.

**107.** In re-examination, PW2 stated that she verified the company records on the eCitizen platform and confirmed the existence of Horizon Hills Limited (C-110776) through its incorporation certificate, memorandum, and annual returns. She referred to CR12 forms and searches showing the directors as David

Njenga, Henry Njoroge, and Samuel Njuguna, the same individuals who sold the property.

**108.** She reiterated that there was no certificate of name change from Bosorana Limited to Horizon Hills Limited and that Gerald Maina and David Kimotho Mugambi had never been directors of Horizon Hills Limited (C-110776). PW2 concluded that she acted for both parties and that, in such cases, payment of the purchase price is deemed complete once the advocate receives the funds. She maintained that receiving cash payments in conveyancing transactions is not unusual.

**109.** PW3, **Patrick Maloba Kayemba (Police No. 235014, retired)**, testified that he served as Chief Inspector of Police in charge of the Legal Investigations Unit at DCI Headquarters. He relied on his report dated 3<sup>rd</sup> May 2021 contained in the Plaintiff's supplementary bundle of 17<sup>th</sup> November 2021, marked PEXB3, and a further report dated 25<sup>th</sup> January 2023, marked PEXB4.

**110.** PW3 stated that the matter was referred to his office on 17<sup>th</sup> July 2020 after initial investigations by DCI Parklands and following the filing of a complaint by Aureum Limited on 29<sup>th</sup> August 2018; that he took over the file which had been transferred to DCI Headquarters on 4<sup>th</sup> April 2019 and that the handover notes recorded fifty-six witness statements.

- 111.** He observed that in ELC No. 227 of 2019, the Attorney General had filed a document purporting to be a DCI status report dated 20<sup>th</sup> August 2020, yet the attached “covering report” was an internal document from the officer who handed over the file to him on 17<sup>th</sup> July 2020 and was not a status report. He added that he could not have filed a report with the Attorney General on 20<sup>th</sup> August 2020 although he was in possession of the file.
- 112.** He stated that Mr. Osuri’s Report bears the date 20<sup>th</sup> August 2020 and could not have been filed by him since he had already taken over the file. He testified that three parties claimed ownership of the land, namely Aureum Limited, Horizon Hills Limited, and another entity described as Aureum Limited associated with one Kinuthia. He testified that Cissy Kalunde acquired her title from Horizon Hills Limited C.110776 whose directors were David Njenga Samson Kuria, Henry Njoroge Njenga, and Samuel Njuguna Chege.
- 113.** It was his evidence that before the name change, Aureum Limited had been Horizon Hills Limited C.131937, whose directors were Irene Nzisa Wanjigi and Tyl Limited through John Njenga. Aureum Limited changed its name on 31<sup>st</sup> May 2018.
- 114.** PW3’s averred that when Aureum Limited sold the land, there was an intention to defraud Kenroid Limited, and that he was aware of Corporal Osuri’s Report which concluded

that the land belonged to Aureum Limited. PW3 stated that his conclusions differed with corporal Osuri's and that in his view, Osuri's report was fraudulent.

**115.** PW3 stated that both companies named Horizon Hills Limited claimed to have bought the land from Velji Dodhia; that he met Velji and learned that the land had belonged to Velji and his father; that the said Velji told him that he had dealt with Mohammed Nurani, a director of Horizon Hills Limited, and did not know David Njoroge and it is David Njenga who transferred the land to Cissy in 2018.

**116.** According to PW3, he checked with Chase Bank and did not find an account in the name of Tyl Limited; that at the Companies Registry, he was given the original correspondence files for the two similarly named companies and that he was not aware of a letter from the Registrar of Companies indicating that registration number C.110776 belonged to Bosorana Limited.

**117.** PW3 highlighted discrepancies that were absent in Osuri's Report. He noted that the alluded the alleged payments by Tyl Limited did not factor in Chase Bank evidence, yet no such account existed. He observed that a transfer for Aureum Limited was presented for stamping on a Sunday and that the title listed Dodhia Foam Limited as first allottee, with Velji as second allottee. He maintained that once statements were on file, it was not necessary to retake them.

- 118.** PW4, (for the Plaintiff in ELC 100 of 2019) Madhav Bhalla, adopted his witness statement dated 14<sup>th</sup> March 2019 as evidence-in-chief. He produced the Plaintiff's bundle at pages 90-419 as exhibits 2PEXB 1-97 and adopted the affidavit dated 7<sup>th</sup> March 2019 at pages 20-33 of the same bundle.
- 119.** He testified that he is an Advocate of the High Court and a partner at Taibjee & Bhalla Advocates LLP; that his firm acted for both vendor and purchaser in the proposed sale and that in 2018; that a director of Kenroid Limited provided a copy of the title to the suit property and that the parties, who knew each other, met, agreed on the price and terms, and jointly instructed him to act.
- 120.** According to PW4, during preparation of the agreement and due diligence, it emerged that the registered owner of the land was Horizon Hills Limited and that two companies existed under that name and that he sought further details from Karn Behal and was informed that Kembi Gitura & Company Advocates were attending to a change of name on the Registrar's advice due to duplication.
- 121.** He testified that the change of name from Horizon Hills Limited to Aureum Limited was then effected and company history was supplied to him; the principal shareholders were Irene N. Wanjigi and Tyl Limited; that Karn Behal informed him that he was a beneficial co-owner with the Wanjigi family, who owned and operated the company and the premises, and that Irene Wanjigi acted as a front.

**122.** PW4 stated that he received identification documents for the company directors and conducted searches before and after registration of the certificate of change of name; that at Karn's request, he introduced the company to the Bank of India to open an account and that Kembi Gitura & Company Advocates liaised with the bank and provided a CR12 in July 2018.

**123.** It was the evidence of PW4 that a sale agreement was executed between the directors of Aureum Limited and those of Kenroid Limited; that the purchaser paid the deposit in accordance with the agreement; that one of the conditions was that upon deposit of completion documents, the deposit would be released to the vendor and that a caveat claiming purchaser's interest was registered in favour of Kenroid Limited.

**124.** PW4 stated that company documents were later released to his firm through Kembi Gitura & Company Advocates, whereupon the deposit was released to that firm on 12<sup>th</sup> July 2018. However, he was later alerted of a potential problem with the title, namely, that another party held or claimed to have a duplicate title.

**125.** In cross-examination, PW4 confirmed that Kenroid Limited had an agreement with the 1<sup>st</sup> Defendant and, after due diligence, believed the 1<sup>st</sup> Defendant to be the registered proprietor. It was his testimony that he was supplied with

rent and rates clearances, consent to transfer, and the original title. He stated that the 1<sup>st</sup> Defendant did not hand over vacant possession.

**126.** He stated that at the time of their search there was no entry in the name of Cissy Kalunde; that the search at page 114 showed the last entry as number 9, a transfer to Horizon Hills Limited; that the transaction began with Horizon Hills Limited, which later changed to Aureum Limited, with a corresponding entry on the title.

**127.** According to PW4, the documents he received included the title and searches showing Horizon Hills Limited as proprietor; that he obtained documents from the Companies Registry and Lands; that he called for the 2006 transfer to Horizon Hills Limited and that at that time, the directors were Mohamed Hussein and Mohammed Hassanali.

**128.** It was his evidence that by the time of his instruction, shareholding had changed to Irene Nzisa and Tyl Limited; that he was informed of the two companies and relayed this to the sellers, who instructed their advocates to change the name to Aureum Limited; that he inquired into the directorship of C.110776 and obtained the 2004 incorporation record at page 207 and that he did not know what became of the other Horizon Hills Limited.

**129.** He clarified that entry number 7 did not specify the company number, only the name Horizon Hills Limited and that he was

denied CR12s for both entities once the duplication issue arose and therefore could not independently verify the directors of both companies.

**130.** PW4 stated that he did not do a search on Tyl Limited; that the agreement was signed by Irene Nzisa Wanjigi and Tyl Limited and that the Director of Tyl Limited who appeared before the advocate is not disclosed.

**131.** He referred to a share sale agreement dated 9<sup>th</sup> April 2010 and a land sale agreement. He noted that a company acts through resolutions; that the sale agreement named Kairu Thuo and Robert Mwangi as directors of Tyl Limited; that he did not know John Nyanjua Njenga and that he established Tyl's Ltd directorship but had no documents in court. He was referred to an affidavit by John Nyanjua sworn on 24<sup>th</sup> January 2022 denying execution of share transfer documents.

**132.** In re-examination, PW4 stated that his mandate was to act on a sale conditioned on payment of a deposit of Kshs. 56,000,000; that he released the deposit upon receipt of completion documents but did not lodge them for registration because the vendor could not transfer the land, did not deliver vacant possession, and the property was not free from encumbrances due to competing claims.

**133.** He stated that the existence of two companies with the same name did not initially alarm him because he did not doubt the vendor's ownership; that the change of name was done on

advice since one entity was registered later; that fraud is pleaded against the Defendants and that his client seeks either refund or specific performance.

- 134.** PW5, Amos Odoyo, Financial Director and Manager of Kenroid Limited, adopted his statement dated 14 March 2019 as evidence-in-chief. He agreed with and relied on the affidavit and statement of Madhav Bhalla and on the pleadings filed by the Plaintiff.
- 135.** DW1, Carolyn Njoki Gachihi, an advocate, adopted her statement dated 22<sup>nd</sup> September 2020 and relied on two document bundles dated 9<sup>th</sup> March 2020, marked 1DEXB1 save for pages 15 and 16, and 15<sup>th</sup> August 2020, marked 1DEXB2.
- 136.** DW1 stated that she is the Managing Partner at Kembu Gitura & Co. Advocates; that in April 2018 she received instructions from Horizon Hills Limited (C.131937) to act in the sale of the suit property and that for due diligence, she requested for the following documents: the certificate of incorporation dated 24<sup>th</sup> November 2006, the memorandum and articles, PIN P051193732T, Grant IR 65800 for LR No. 1870/II/200, the transfer dated 27<sup>th</sup> November 2006, a share sale agreement dated 9<sup>th</sup> April 2010, executed share transfer deeds, board minutes of 9<sup>th</sup> April 2010, and CR12 dated 10<sup>th</sup> September 2010.

**137.**DW1 stated that she was informed that Taibjee & Bhalla Advocates LLP would act for the vendor in the sale while her role was to oversee the transaction and secure completion documents; that she instructed the company secretary, Cosec Associates, to obtain a current CR12 and that during this process, a separate company named Horizon Hills Limited (C.110776), stated to have been incorporated on 2<sup>nd</sup> July 2004, was identified.

**138.**According to DW1, CR12 for C.110776 was generated and showed directors as David Njenga Samson Kuria, Henry Njoroge Njenga, and Samuel Njuguna Chege. On 23<sup>rd</sup> April 2018 she wrote to the Registrar of Companies reporting that the file for C.131937 could not be traced and that by a letter dated 24<sup>th</sup> April 2018, the Registrar advised that Horizon Hills Limited (C.110776) had been incorporated earlier and that the allocation of the same name to C.131937 was inadvertent. The client was advised to change its name within six weeks as the two entities could not co-exist under the same name.

**139.**On that advice, it was the evidence of DW1 that on 3<sup>rd</sup> May 2018 she forwarded a name reservation for Aureum Limited; that on 30<sup>th</sup> May 2018, she transmitted board and shareholder resolutions to change the name from Horizon Hills Limited to Aureum Limited and that a certificate of change of name was issued on 31<sup>st</sup> May 2018, retaining the same registration number.

**140.**DW1 stated that her firm applied to register the change of name against Grant IR 65800 for LR No. 1870/II/200, which was done on 5<sup>th</sup> June 2018; that she also recorded changes in shareholding and directorship so that Kairo Thuo transferred one share to Irene Nzisa Wanjigi, and resigned as director, and Irene Nzisa Wanjigi was appointed.

**141.**DW1 stated that all completion documents were provided to Taibjee & Bhalla, including the original grant, rent and rates clearances, and directors' PINs and IDs; that on 6<sup>th</sup> July 2018, she applied for consent to transfer the land which was issued and that around August 2018, Henry Njoroge Njenga and David S. Kuria purported to be directors of Horizon Hills Limited and proprietors of the property.

**142.**In cross-examination, DW1 said she dealt with C.131937 from April 2018 and only learned of C.110776 upon conducting searches; that she was not involved in the earlier change of name process; that the Registrar informed her that C.110776 had been registered first and advised a name change for C.131937 and that at that time, the directors were Thuo A. Kairo and Tyl Limited.

**143.**She maintained that the Horizon Hills Limited for which she acted for did not transfer the property to Cissy Kalunde and that she did not deal with the directors listed in a search dated 17<sup>th</sup> October 2018, showing the 5<sup>th</sup>-8<sup>th</sup> Defendants in the Plaintiff's bundle.

- 144.** It was her evidence that when she wrote on 7<sup>th</sup> November 2019 seeking clarification on the relationship between C.110776 and C.131937, on 29<sup>th</sup> April 2019, the Registrar replied and informed her that number C.110776 belonged to Bosorana Limited and that the Registrar later stated that the change of name directive had been issued under a mistaken belief of double registration and that the entity she was dealing with in the transaction should not have changed its name.
- 145.** DW1 stated that in 2018, the registry file for C.131937 was missing when she sought a CR12; that she provided certified company returns which were accepted for reconstruction; that the existing CR12 named the directors and that after reconstruction of the file, a search was conducted.
- 146.** She stated that as at February 2013 the shareholders of C.131937 were Mohamed, Kaneez Nurani, and Anastacia Kioko; that she had share transfer documents dated 27<sup>th</sup> May 2010 by which those shareholders transferred to her client the company and resigned and that she did not conduct the September 2010 search but understood it emanated from the registry.
- 147.** According to DW1, new directors were registered after the change of name was made on 5<sup>th</sup> June 2018, and Augustine Kairo Thuo thereafter transferred his one share to Irene Wanjigi and resigned. She stated that they acted on instructions from Kairo and John Njenga, and that she could

not reconcile an email of 22<sup>nd</sup> February 2018 referring to other directors.

**148.** She confirmed that Kshs. 53,792,500 was paid to her client, which she remitted through her firm and released to the client, which payment was acknowledged; that no other sum was received; that she applied for a CR12 in April 2018 in anticipation of the agreement but did not obtain it then and that although aware of two entities named Horizon Hills Limited, she did not inform Kenroid Limited at execution since Kenroid was not her client.

**149.** She denied that her client was in breach of the agreement; that John Nyanjua Njenga and K. Thuo were directors of Tyl Limited; that John Njenga is an advocate working with Equity Bank and that the consideration for acquisition of shares, Kshs. 154,000,000, was to be paid by Tyl Limited from its account to J. M. Njage & Advocates at Bank of Africa.

**150.** In re-examination, she stated that as a commercial and conveyancing advocate, she routinely reserves names. She maintained that Kshs. 138,000,000 was paid by her client in the acquisition of the shares, referring to a Bank of Africa statement confirming payment by Kairu Advocate. On Kenroid's claim for specific performance, she said completion documents were ready and trespass was reported.

**151.** DW2, Irene Nzisa Wanjiku, a director of the 1<sup>st</sup> Defendant, adopted her witness statement. She stated that the

company's acquisition and dealings over the suit property were handled by Kairo & Co. Advocates and Kembi Gitura & Co. Advocates. She adopted the statement and testimony of Ms. Carolyne Njoki Gachihi as the company's evidence.

**152.** In cross-examination, she testified that Horizon Hills Limited (C.131937) is her company and that its name was changed in 2010; that she was aware of the purchase of shares from the former directors; that the company was incorporated in 2006 and the shares acquired shortly thereafter and that she could not recall the consideration or the mode of payment, stating that these details are with counsel.

**153.** She referred to a letter dated 29<sup>th</sup> April 2010 from Tyl Limited to the Manager Chase Bank Ltd which contained instructions for the transfer of Kshs. 138,600,000. She stated that she had no proof that the transfer was effected and could not recall whether they held an account at Chase Bank. She stated that Kairu acted as a proxy for the company but later resigned.

**154.** DW2 stated that the land was purchased through their lawyer to whom funds were provided to facilitate the 2006 acquisition. She said the land purchase and the company share purchase occurred contemporaneously, although she had no documentary proof of payment for the land.

**155.** She referred the court to the agreement dated 9<sup>th</sup> April 2010 which shows Kaneez Noorani, Mohamed Hussein, and

Hassanali selling their shares to Tyl Limited and Thuo A. Kairo. She described Kairo as their proxy who later resigned and transferred the shares to her and her husband. She clarified that the share purchase occurred in 2010 but that she had engaged with Horizon Hills Limited in 2006 in relation to the land transaction.

- 156.** DW2 testified that she currently operates one bank account at the Bank of India in the name of Aureum Limited. She confirmed receipt by the 1<sup>st</sup> Defendant of Kshs. 54,000,000, stating that the funds are in a bank account, although she was uncertain which one since they maintain several accounts not in the name of Aureum Limited. She stated that proxies are used for legal reasons, including tax avoidance.
- 157.** It was her evidence that Horizon Hills Limited (C.131937) was acquired for legal reasons to enable the purchase of land and other properties. She stated that Aureum Limited currently has no assets and did not purchase any other land; that tax returns have been filed and that Horizon Hills Limited declared the purchase price to the tax authorities.
- 158.** It was her evidence that she and her husband are directors of Tyl Limited. She acknowledged the existence of two disputed titles and stated that the transfer cannot proceed while the title is contested. She added that they do not object to refunding the funds.

- 159.**DW3, Zacharia Waithaka Mwangi, an Assistant Registrar of Companies at the Business Registration Service, adopted his statement dated 13<sup>th</sup> February 2023 as his evidence-in-chief and produced a bundle of documents dated 14<sup>th</sup> February 2023 marked as 2DEXB1.
- 160.**Regarding Aureum Limited (C.131937), DW3 testified that the company was originally registered as Horizon Hills Limited on 24<sup>th</sup> November 2006 following a name reservation made on 4 October 2006 and extended on 20<sup>th</sup> November 2006 and that the initial directors were Kaneez Zehra Noorani, Mohamed Hussein Noorani, and Mohamed Hassanali, each holding one share, while the company secretary was Anastacia Kioko Mululu.
- 161.**DW3 stated that on 24<sup>th</sup> April 2018, the company applied to transition to the eCitizen platform through Robert Mwangi Ndungu, listed as company secretary; that the directors/shareholders were listed as Tyl Limited and Thuo A. Kairo, and that during this process, the registry discovered the existence of another company, Horizon Hills Limited (C.110776), incorporated on 2<sup>nd</sup> July 2004.
- 162.**Consequently, a change-of-name directive was issued on 24<sup>th</sup> April 2018. The company then changed its name from Horizon Hills Limited to Aureum Limited, and a certificate of change of name was issued on 31<sup>st</sup> May 2018.

**163.**DW3 stated that on 27<sup>th</sup> June 2018, Robert Mwangi filed annual returns for 2011-2017 showing Thuo A. Kairo as director/shareholder with one share and Tyl Limited with two shares; that the company was verified on the eCitizen platform on 29<sup>th</sup> June 2018 after filing the return and registering the name change and that on n 3<sup>rd</sup> July 2018, Irene Nzisa Wanjigi was appointed as a director, and Kairo Augustine Thuo resigned. On 12<sup>th</sup> July 2018, Kairo transferred one share to Irene Nzisa Wanjigi.

**164.**DW3 confirmed that the current position at the registry shows Robert Mwangi Ndungu as company secretary, Tyl Limited as director/shareholder with two shares, and Irene Nzisa Wanjigi as director/shareholder with one share.

**165.**He further stated that Bosorana Limited (C.110776) was incorporated on 2<sup>nd</sup> July 2004 after reserving the name on 1<sup>st</sup> July 2004; that its directors/shareholders were Gerald Maina Ng'ayu and David Kimotho, each holding one share; that the company sought to change its name to Horizon Hills Limited through an application lodged on 31<sup>st</sup> July 2014, but the application lacked a name search and was therefore not approved and although an unsigned draft certificate of change of name existed in the file, Bosorana Limited remained the registered name.

**166.**DW3 added that Bosorana Limited notified the Registrar that Gerald Maina Ng'ayu and David Kimotho Mugambi had resigned and that David Njenga Samson, Henry Njoroge

Njenga, and Samuel Njuguna Chege had been appointed as new directors.

- 167.** It was stated that the outgoing directors transferred their shares to David Njenga and Henry Njoroge on 30<sup>th</sup> October 2017, and a return of allotment filed the same day allotted 600 shares to David Njenga, 199 to Henry Njoroge, and 199 to Samuel Njuguna and that when updating the company's records on 21<sup>st</sup> March 2018, a clerical error led to the company being mistakenly entered in the system as Horizon Hills Limited.
- 168.** DW3 clarified that the change-of-name directive issued to Horizon Hills Limited (C.131937) arose from this mistaken belief of double registration. He stated that although the company complied and changed its name to Aureum Limited, the directive was unnecessary because there was no actual double registration and that any search results referring to Horizon Hills Limited in this context was therefore erroneous, and the Registrar has since notified the affected parties.
- 169.** He was referred to page 411 of the Plaintiff's bundle, showing an electronic search dated 25<sup>th</sup> January 2019 for Horizon Hills Limited (C.110776) listing David Njenga, Henry Njoroge, and Samuel Njuguna as directors. He confirmed that searches cost Kenya Shillings Six Hundred Fifty (Kshs. 650) and that eCitizen records cannot be manipulated by private users.

- 170.** Referring to another search dated 17<sup>th</sup> April 2018 for Horizon Hills Limited (C.110776) at page 6 of the 1st Defendant's bundle, he confirmed that the same directors appeared. He was also referred to page 12 of that bundle which is the Registrar's letter dated 24<sup>th</sup> April 2018 directing Horizon Hills Limited (C.131937) to change its name due to the existence of C.110776. He clarified that, contrary to the letter, there were no two entities legitimately registered under that name.
- 171.** At page 91 of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' supplementary bundle dated 20<sup>th</sup> August 2020, there appears a certificate of incorporation for Horizon Hills Limited (C.110776). DW3 testified that this document had been erroneously inserted into the file of Bosorana Limited and was not a genuine certificate issued by the Registrar. He stated that all company records had since been scanned and backed up.
- 172.** While referring to the Certificate of Incorporation registration number C.110776 for Horizon Hills Limited, signed by S.M. Ndisya, Registrar of Companies, he referred to a letter dated 29<sup>th</sup> November 2019 from Joyce Koech, State Counsel, confirming that C.110776 was issued to Bosorana Limited and not Horizon Hills Limited and that a further letter of 18 May 2020 to the DCI forwarded the contents of Bosorana Limited file. He noted that while the documents

forwarded included memorandum and articles of association, the certificate of incorporation was missing.

- 173.** DW3 acknowledged that errors occasionally occur at the registry leading to near-duplicate company names. In such cases, the Registrar instructs the later-registered entity to change its name, as happened in this matter.
- 174.** He was referred to the statement of David Kimotho contained in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Bundle, in which he described himself as a director of Horizon Hills Limited and not Bosorana Limited. DW3 stated that if he were a director of Bosorana Limited, he could not lawfully transfer shares in Horizon Hills Limited. He added that by 2018, the directors of Horizon Hills Limited (C.131937) were Tyl Limited and Irene Nzisa, consistent with filings of 27 June 2018.
- 175.** DW3 confirmed that the physical file of Horizon Hills Limited (C.131937) went missing, but digital records were preserved; that he had not seen the reconstructed file but relied on electronic backups dating back to 2006.
- 176.** He stated that the company was linked to eCitizen on 24 May 2018 after Kembi Gitura & Co. Advocates furnished the Registrar with all incorporation documents. He identified Emmy Wambui Wanjigi and James Maina Wanjigi as directors of Tyl Limited, although he could not specify when they were appointed.

- 177.** He emphasized that only one valid Horizon Hills Limited exists in their records; that the letter from Joyce Koech was sufficient to confirm that forgery had been established and that the purported certificate of incorporation for Horizon Hills Limited (C.110776) was falsified. In re-examination, DW3 explained that every company has a unique registration number that cannot be shared; that the search reflects the current status while the file shows the historical record and that linking to eCitizen does not itself constitute verification.
- 178.** He referred to searches dated 25<sup>th</sup> January 2019 and 17<sup>th</sup> April 2018 showing C.110776 in the names of David Njenga, Henry Njoroge, and Samuel Njuguna, but clarified that the identifier C.110776 properly belongs to Bosorana Limited. He noted that interference with company records occurred on 5<sup>th</sup> April 2018, leading to the mistaken directive to change the name of Horizon Hills Limited (C.131937).
- 179.** DW3 drew the court's attention to the certificate dated 24<sup>th</sup> November 2004. He confirmed that this document did not originate from the Registrar and was invalid. The genuine certificate of change of name for C.110776 from Bosorana Limited to Horizon Hills Limited dated 31<sup>st</sup> July 2014 was never issued or signed.
- 180.** It was his evidence that the Index Register shows Bosorana Limited (C.110776) as registered on 2<sup>nd</sup> July 2004 with details of name, address, and capital. He clarified that the annual returns filed under C.110776 relate to Bosorana

Limited and do not reflect the records of Horizon Hills Limited and that annual returns merely record changes in a given year and do not reflect the status of a company.

- 181.** He referred to transfer documents showing that David Kimotho Musembi transferred shares to Samuel Njuguna Chege and Gerald Maina Ng'ayu transferred shares to Henry Njoroge Njenga, confirming that both Gerald Maina and David Kimotho were directors of Bosorana Limited.
- 182.** DW3 stated that his testimony was based on registry backups retained after the loss of file C.131937. He stated that the confusion arose when Horizon Hills Limited was mistakenly referred to as Bosorana Limited in the system through an erroneous entry made by Valentine Jelimo Kibire on 5<sup>th</sup> April 2018. He maintained that his evidence reflects the true position of both companies.
- 183.** DW4, Sgt. Nicholus Osuri (Service No. 80936), adopted his statement dated 29<sup>th</sup> January 2020 as evidence in chief and produced two document bundles dated 20<sup>th</sup> August 2020, marked DEXB3, and 10<sup>th</sup> February 2023, marked DEXB4.
- 184.** It was his evidence that on 29<sup>th</sup> August 2018, the DCI received a complaint from Aureum Limited through Jimmy Richard Wanjigi and that save for the advocates' correspondence, documents provided by the Plaintiff (Cissy Kalunde) including the grant and transfer were forged.

- 185.** DW4 stated that all searches relied upon by the Plaintiff favoured the 1<sup>st</sup> Defendant after forensic audit of the Ministry of Lands servers by ICT experts from Coseke Kenya Limited, Scorpion Consulting Limited, the Lands Information Management Systems team, and the DCI Forensic Investigations Unit.
- 186.** He stated that on 23<sup>rd</sup> June 2020 he was instructed to hand over the file to the then DCI Director and that the two DCI reports exist reflecting divergent positions. He alleged that Chief Inspector Khaemba altered evidence and produced a parallel report, which is under DCI Inquiry File No. 3 of 2020 concerning the conduct of Chief Inspector Maloba and the former DCI Director.
- 187.** DW4 maintained although he holds the original title issued to Aureum Limited and the original transfer, which he presented to court, neither the Plaintiff's advocate nor the directors of Horizon Hills Limited gave him any original title or transfer and that he obtained a purported title from the Ministry of Lands for investigation.
- 188.** He testified that both titles were submitted to the Government Printer; that the title submitted by Taibjee & Bhalla Advocates was confirmed as authentic; that the title produced through Wambua & Maseno LLP was found not genuine; that a document examiner also concluded that the Plaintiff's title was a forgery and that the texture of the

Plaintiff's title differed from the genuine title that he had seen.

**189.** He noted that the transfer produced by Taibjee & Bhalla bore stamp duty franking for Tuesday, 5 December 2006. He traced the history of the property to the Dodhia family and said that he met Himanshu Velji Dodhia who recorded a statement; that Dodhia informed him that they had lived on the land before selling it to HassConsult Ltd, whose directors were Mohamed Hassanali together with Ms. Noorani who later incorporated Horizon Hills Limited and registered the property in its name.

**190.** According to DW4 the property was subsequently acquired by the family of Mr. and Mrs. Wanjigi for Kshs. 154,000,000. He stated that 10% deposit (Kshs. 15,400,000) was paid on 22 March 2010 and the balance of Kshs. 138,600,000 was paid on 7 May 2010 into J. M. Njage & Co. Advocates account 00100083621211 at I&M Bank, Kenyatta Avenue. He said he verified the transactions with the bank and that the then conveyancing advocate, now a Judge of Appeal, confirmed acting for the vendor.

**191.** DW4 testified that he found two companies named Horizon Hills Limited under different numbers. He stated that there was no original registration of Horizon Hills Limited under number C.110776 since that number had been issued to Bosorana Limited on 2<sup>nd</sup> July 2004. He said he seized of the Bosorana Limited file and presented it in court, noting

alterations on the cover to read Horizon Hills Limited under the rubric “Change of Name”.

**192.**DW4 stated that the three purported directors Horizon Hills Limited C.110776 produced a Memorandum and Articles allegedly drawn by Odero Obara & Co. Advocates. He summoned Kennedy Obara Odera, who disowned the document, denied any relationship with a person named Mose shown as an attesting employee, and denied that the individuals named therein as Directors were his firm’s clients.

**193.**DW4 obtained orders in Misc. Criminal Application No. 2332 of 2019 to conduct forensic interrogation of the Companies Registry system. He stated that the cybercrime officers confirmed alterations of the records for Horizon Hills Limited (C.131937) by a staff member, Valentine Jelimo Kibire, who on 5<sup>th</sup> April 2018 between about 5.29 pm and 5.50 pm deleted the genuine directors, Irene Nzisa and Tyl Limited, and replaced them with David Njenga Samson Kuria, Henry Njoroge, and Samuel Njuguna. Activity logs were produced by DW4 to confirm the alterations.

**194.**DW4 stated that registration numbers were not altered. He added that C.110776 predates C.131937 and that the alterations were intended to project earlier incorporation. He said his investigations showed the 9<sup>th</sup> Defendant (Cissy) paid only Kshs. 8,300,000 to David Njoroge.

- 195.**DW4 concluded that Aureum Limited is the genuine owner and that the change of name was on the advice of State Counsel Hiram Gachui, who was not aware of the eCitizen alterations by Jelimo. He said his investigation began in 2019 and that Chief Inspector Khaemba’s report to the Attorney General dated 3<sup>rd</sup> May 2021 postdated his conclusions.
- 196.**DW5, David Njenga Samson Kuria, relied on his statements dated 2<sup>nd</sup> June 2022 and 25<sup>th</sup> April 2024 and produced a document bundle dated 2<sup>nd</sup> June 2022, marked 5DEXB1-10.
- 197.**He stated that in 2004 he, Henry Njoroge Njenga and Samuel Njuguna Chege instructed G. Kamonde Advocate to reserve the name Horizon Hills Limited; that the name was reserved and the company was, according to him, incorporated on 24<sup>th</sup> November 2004 as Horizon Hills Limited under Certificate No. C110776, with shareholding recorded as six hundred shares to himself, two hundred to Henry, and two hundred to Samuel.
- 198.**It was his evidence that in 2006 their advocate informed them of the suit property in Westlands which was being sold at Kshs. 40,000,000; that the the land, then in the names of Velji Premchand Dodhia and Himanshu Velji Dodhia, was shown to them by the vendors’ advocate and that the purchase price was agreed at Kshs. 33,600,000.
- 199.**According to DW5, after acceptance by a letter dated 3<sup>rd</sup> October 2006, a sale agreement was executed; that they

procured a banker's cheque from KCB, Jomo Kenyatta Avenue Mombasa, for Kshs. 35,440,000 to cover the purchase price and incidental costs and that the transfer of the land to Horizon Hills Limited C.110776 was registered on 29<sup>th</sup> December 2006, after which they took possession of the suit land and demolished an old structure.

**200.** According to DW5, In February 2018, a company resolution authorized sale of the property; that Wambua & Maseno Advocates approached them in 2018, through a broker with a buyer, having confirmed by searches that the owner of the land was Horizon Hills Limited C.110776 whose Directors were David, Henry and Samuel and that after due diligence, they agreed on a price of Kshs. 220,000,000.

**201.** DW5 informed the court that although already acting for the purchaser, Wambua & Maseno Advocates sought and received instructions to act for the vendors as well; that a sale agreement was executed on 12<sup>th</sup> September 2018 and that a subsequent search disclosed a change on the title to Aureum Limited and a caveat by Kenroid Limited.

**202.** DW5 stated that he complained the Chief Land Registrar asserting that he and his co-directors remained the directors of Horizon Hills Limited and had not effected changes in the name of the company and that the Registrar rectified the register so that the proprietorship reverted to Horizon Hills Limited and cancelled the impugned entries, after which Wambua & Maseno sought completion documents.

- 203.**The transfer to Cissy Kalunde Musembi (the 9<sup>th</sup> Defendant) was prepared on 13<sup>th</sup> September 2018; that registration occurred on 7<sup>th</sup> November 2018 and vacant possession was given, with the balance to be paid one month later under a professional undertaking and that the purchaser's advocates failed to honour the undertaking and were reported to the Advocates Complaints Commission in January 2019.
- 204.**He stated that on 11<sup>th</sup> May 2021, he and his co-directors received a DCI report through Muriuki & Co. Advocates indicating that the title registered in the name of Horizon Hills Limited C.110776 and transferred to Cissy Kalunde Musembi on 7<sup>th</sup> November 2018 was genuine.
- 205.**DW5 maintained that Horizon Hills Limited C.110776, PIN P1051617358S, never changed its name to Aureum Limited and that he was unaware of Horizon Hills Limited C.131937, which he understands was registered later.
- 206.**DW5 asserted that Horizon Hills Limited C.131937 changed its name to Aureum Limited upon the Registrar's directive and that certified returns used to reconstruct the C.131937 file were supplied externally by Carolyn Njoki Gachihi Advocate OF Kembi Gitura & Co., acting for Irene Nzisa Wanjigi and Tyl Limited.
- 207.**He referred to DCI Inquiry File No. 119 of 2019 and a report dated 11<sup>th</sup> May 2021 signed by P. M. Khaemba for the Director of Criminal Investigations, which, he said, affirmed

that the suit land passed to Cissy Kalunde Musembi upon sale and transfer.

**208.** He further stated that Horizon Hills Limited C.110776 was registered first; that Horizon Hills Limited C.131937 was incorporated on 24<sup>th</sup> November 2006 and later changed to Aureum Limited on 31<sup>st</sup> May 2018 and that it is the latter company that dealt with Kenroid Limited.

**209.** He denied any connection with Bosorana Limited C.110776 and termed the efforts to link him to them to the said company as false. He added that the Companies Registry had confirmed that Horizon Hills Limited C.110776 was incorporated earlier and that a later letter dated 29<sup>th</sup> November 2019 could not displace earlier official communications and searches.

**210.** DW5 challenged the transfer dated 27<sup>th</sup> November 2006 because on one face, it refers to Horizon Hills Limited with directors Mohamed Hussein Noorani and Mohamed Hassanali, noting an apparent franking date of Sunday, 5<sup>th</sup> December 2004, which is inconsistent with the stated execution date.

**211.** In cross-examination, DW5 stated that the company was registered on 24<sup>th</sup> November 2004. He maintained that they bought the land under an agreement of 27<sup>th</sup> November 2006 for Kshs. 33,600,000, which they paid; that they converted USD 500,000 at KCB Mombasa and purchased a banker's

cheque of Kshs. 35,440,000 which was sent to the vendors' advocates and that they possessed the land from 2006 until the sale of the same to Cissy Kalunde in 2018 and that she paid them 10% deposit of Kshs. 20,000,000.

**212.**DW5 denied knowledge of Bosorana Limited and said the DCI collected all documents, including the banker's cheque, under inventory and the agreed purchase price with Cissy Kalunde was Kshs. 220,000,000 of which Kshs. 92,000,000 was received while the balance of Kshs. 128,000,000 secured by a professional undertaking to be paid within 30 days after investigations. On default, a complaint was lodged with the Advocates Complaints Commission.

**213.**DW5 stated that he did not meet the Dodhias personally, stating that vacant possession was delivered through his advocates and that he obtained demolition approvals. He denied that Odero Obara & Co. registered the company. He said annual returns were filed but admitted that it was only the returns for 2004 to 2016 that were not in court.

**214.**According to DW5, he had no sale agreement or correspondence with the Dodhias in court; that he conducted due diligence before purchase and that his vehicles and guards occupied the land from 2004 to 2018. Shown an appointment of directors, he denied the email address attributed to him and disowned the documents relating to Bosorana Limited.

**215.**In re-examination DW5 said the Dodhias agreement and cheque copy were given to the DCI but have never been returned. He clarified that the date of 2<sup>nd</sup> July 2004 in his statement reflected the date of the instructions to the advocate and that the incorporation of the company occurred on 24<sup>th</sup> November 2004.

**216.**He reiterated that they sold the land to the 9<sup>th</sup> Defendant for Kshs. 220,000,000; that Kshs. 350,000,000 was what the government valued the land while Kshs. 14,000,000 was the payable stamp duty, being four percent. He stated that he had received Kshs. 90,000,000, of which Kshs. 60,000,000 was paid to the brokers through the purchaser's advocate. He denied knowledge of Bosorana Limited or Valentine Jelimo and said all dealings with the registry were handled by his lawyer.

### **Submissions**

**217.**Counsel for the Plaintiff (Kenroid Limited, the Plaintiff in ELC 100 of 2019) submitted that the 1<sup>st</sup> to 4<sup>th</sup> Defendants fundamentally breached the sale agreement by failing to tender a good and marketable title, failing to give vacant possession, misrepresenting the status of the title, and failing to complete. It was urged that these were core obligations that the vendor was unable to perform from the very beginning.

**218.**In the alternative, counsel contended that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants are liable in fraudulent misrepresentation, as

they represented that the 1<sup>st</sup> Defendant's title was good and indefeasible, the property was dispute-free, vacant possession would be delivered, and the provenance of their title was regular, yet they knew those representations to be false or were reckless as to their truth.

**219.** It was submitted that the Plaintiff relied on those representations to its detriment by paying Kshs. 56,000,000 as deposit. Counsel argued that confiscation of the vendor's title by the DCI halted lodging of the transfer and terminated completion, while the DCI materials and the pendency of ELC 227 of 2019 confirmed the falsity of the vendor's case.

**220.** It was further submitted that, in cross-examination, the 2<sup>nd</sup> to 4<sup>th</sup> Defendants admitted using proxies; that the 1<sup>st</sup> Defendant was a shell vehicle with no asset other than the suit property, no KRA filings and no bank account; and that the 2<sup>nd</sup> Defendant appropriated purchase funds. The court was urged to pierce the corporate veil and impose personal liability.

**221.** Counsel relied on DCI findings on dates and entries to submit that the vendor's root of title was forged. A letter dated 7 February 2023 filed in ELC 227 of 2019 was cited as evidencing continuing criminal inquiry and the DCI's official stance in support of the Plaintiff's claims of fraud.

**222.** Kenroid maintained that it was an innocent purchaser for value, contracting with Aureum Limited in good faith. The

lynchpin, it was argued, is that a transfer said to vest the land in “Horizon Hills Limited” was lodged on 5<sup>th</sup> December 2004, two years before “Horizon Hills Limited” C.131937 was incorporated on 24<sup>th</sup> November 2006, which is legally impossible.

**223.** Counsel submitted that the 1<sup>st</sup> to 4<sup>th</sup> Defendants received Kenya Kshs. 56,000,000 under false pretenses, sold a contested property on a fraudulent title, ignored clear notice of double registration and rival titles, and unreasonably refused to refund the deposit. It was submitted that restitution and compensatory relief should be granted.

**224.** As to remedies, the Plaintiff pressed for rescission and refund as the primary relief, with specific performance only in the alternative. It was submitted that the chain of title founded on the 2004/2006 discrepancy is void and that the deposit of Kshs. 56,000,000 should be returned with damages, costs and interest, the Plaintiff having been ready and willing to complete.

**225.** Counsel argued that the 5<sup>th</sup> to 9<sup>th</sup> Defendants’ defence collapses on the undisputed filing anomaly: the transfer that allegedly vested title in “Horizon Hills Limited” in 2006 bears a franking of 5<sup>th</sup> December 2004, which establishes forgery. It was submitted that this is not a curable irregularity but a legal impossibility, thereby nullifying the 9<sup>th</sup> Defendant’s title and that the Defendants’ narrative of a

2006 purchase and transfer was incredible in light of the DCI record.

- 226.** Counsel described a two-limb fraud at the registries. First, fabrication around “Horizon Hills Limited” C.131937 through reconstruction of a company file using unverified documents, inability to produce a CR12 for directors, and a sham 2010 share purchase allegedly funded by Kshs. 138,000,000 from a Chase Bank account that did not exist and that no credible banking trail was produced.
- 227.** Second, it was submitted, there was a staged disposal of the land to the 9<sup>th</sup> Defendant to launder the title, marked by dual representation by Wambua & Maseno Advocates, opaque flows notwithstanding the alleged payments of Kshs. 99,000,000, meagre remittances to purported vendors Kshs. 9,500,000, and unexplained withholding of Kshs. 128,000,000.
- 228.** The DCI Report dated 3<sup>rd</sup> May 2021, and the forensic materials were termed central and unrefuted. The court was invited to adopt their conclusions.
- 229.** It was submitted that the written statement of David Njenga Samson Kuria for the 6<sup>th</sup> to 8<sup>th</sup> Defendants was overtaken by the DCI findings. Counsel argued that any sale to Cissy Kalunde conveyed no interest because the vendor’s title was void.

**230.** Counsel cautioned the court against reliance on a DCI letter of 11<sup>th</sup> May 2021, submitting that any preliminary communication was superseded by the final investigative report which undermined the Defendants' position.

**231.** As to Cissy Kalunde, it was submitted that even if due diligence was undertaken, the root of her title is impeached; proof of full consideration was lacking, and that in any event, the *nemo dat* principle applies. Her recourse, it was urged, lies in restitution against the purported vendors and their advocate, not against the property or Kenroid's claim.

**232.** The 5<sup>th</sup> to 9<sup>th</sup> Defendants were accused of collusion by registering a transfer despite Kenroid's caveat, falsifying company records, cancelling legitimate entries including the caveat, and procuring a fraudulent transfer to the 9<sup>th</sup> Defendant.

**233.** It was argued that the transfer to the 9<sup>th</sup> Defendant was unlawful because no consideration was paid, the 1<sup>st</sup> Defendant's directors did not authorize the transfer, and the Plaintiff's caveat was irregularly removed.

**234.** Counsel for the Plaintiff in ELC No. 227 of 2019 submitted that the dispute presents two rival grants over the same parcel, the land being formerly registered under the Registration of Titles Act, a Torrens-based regime.

**235.** It was urged that the Plaintiff (9<sup>th</sup> Defendant in ELC No. 100 of 2019) is the registered proprietor and that official

searches conducted before purchase and after transfer on 7<sup>th</sup> November 2018 confirmed registration in her favour. Counsel contended that the certificate in the Plaintiff's name mirrors the register and therefore attracts indefeasibility, citing the Ugandan decision in **Katende vs Haridar & Co Ltd (2008) 2 EA** and the Court of Appeal decision in **Samuel Kamere v Kanare vs Land Registrar Kajiado, (2015) eKLR** on the elements of a bona fide purchaser.

**236.** While acknowledging authorities such as **Nairobi Permanent Markets Society & 11 others v Salima Enterprises & 2 others [1997] KECA 350 (KLR)**, on the strength of the last bona fide purchaser's title under the Torrens system, counsel accepted the subsequent qualifications to indefeasibility found in **Article 40(6)** of the **Constitution**, **Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] KECA 816 (KLR)** and, most authoritatively, the Supreme Court in **Dina Management Ltd vs County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, to the effect that a registered title resting on an unlawful or irregular process is impeachable and confers no protection.

**237.** The Plaintiff relied on Inspector Patrick Khaemba's report to argue that the deed file and correspondence file entries align with her grant: Dodhia Foam Ltd as grantee from 1<sup>st</sup> June 1993; a transfer to Velji and Himanshu on 27<sup>th</sup> November 1997; a transfer on 29<sup>th</sup> December 2006 to Horizon Hills Ltd

C.110776; and, later, the 2018 sale agreement to her at Kshs. 220,000,000, with the associated valuation uplift and stamp duty payment of Kshs. 14,000,040.

**238.** It was submitted that the competing chain advanced by the 1<sup>st</sup> Defendant originates in the narrative of Himanshu Velji that he and his father were first allottees, a position that contradicts the deed record naming Dodhia Foam Ltd as grantee from 1993; that the certified copy of the grant presented through the 1<sup>st</sup> Defendant does not show Himanshu and Velji as allottees, and that Himanshu's statement cannot support the 1<sup>st</sup> Defendant's root of title.

**239.** Counsel scrutinized the 27<sup>th</sup> November 2006 transfer and stamp duty records relied upon by the 1<sup>st</sup> Defendant and Detective Osuri, observing that the valuation date endorsed is 21<sup>st</sup> January 2007, a Sunday, and post-dates the asserted registration on 29<sup>th</sup> December 2006, and that the Ministry of Lands, by a letter of 8<sup>th</sup> April 2020, denounced the transfer documents as forgeries because valuation and stamp duty must precede registration and government offices do not operate on Sundays.

**240.** It was emphasized that a stamp duty declaration slip dated 1<sup>st</sup> December 2006 could not logically precede a valuation carried out on 21<sup>st</sup> January 2007.

**241.** Turning to the share-purchase route, counsel submitted that even if Horizon Hills Ltd C.131937 had acquired the

property, the 1<sup>st</sup> Defendant's claim through Tyl Ltd and Kairo Thuo fails for want of a valid, executable contract and credible proof of consideration.

**242.** On the alleged consideration, counsel noted the 1<sup>st</sup> Defendant's reliance on a transfer of Kshs. 138,600,000 said to have been paid through a Chase Bank account of Tyl Ltd into J. M. Njage & Co. Advocates at Bank of Africa, against which Chase Bank, through Kevin Kimani, averred that Tyl Ltd held no account and that the transaction did not occur.

**243.** On company identity, the Plaintiff's counsel challenged the proposition that C.110776 belongs to Bosorana Ltd. It was contended that only a certificate of incorporation proves a company's number and that the 3<sup>rd</sup> Defendant failed to produce a certificate for Bosorana Ltd, instead exhibiting memoranda, articles, a name-reservation and nominal capital documents. It was further argued that the Companies Registry has issued multiple letters and e-citizen searches confirming Horizon Hills Ltd C.110776, and that a Certificate of Incorporation for Horizon Hills Ltd bearing the date 24<sup>th</sup> November 1904 is evidently a typographical error because it refers to the Companies Act (Cap 486), which did not exist in 1904, and bears the signature of S. M. Ndisya as Registrar in 2004. The Plaintiff urged the Court to treat such clerical errors as curable and to estop the Registry from denying the existence of Horizon Hills Ltd C.110776.

**244.** In the alternative, and to the extent necessary, the Plaintiff's advocate invoked authorities on the burden when title is under challenge, including *Munyu Maina vs Hiram Gathiha Maina [2013] KECA 94 (KLR)*, to contend that the 1<sup>st</sup> Defendant cannot merely wave instruments of title but must demonstrate the legality of the root, which, it was submitted, it failed to do in light of the irregularities surrounding the 2006 transfer and the reconstruction of the C.131937 file from documents supplied externally when the correspondence file was missing.

**245.** The Plaintiff also addressed the position taken by the Attorney-General, arguing that, save for that office, all governmental records and confirmations align with the Plaintiff's ownership; that the AG has, without evidential foundation, advanced the 1<sup>st</sup> Defendant's cause; and that presentation of the 1<sup>st</sup> Defendant's grant as if held by the 2<sup>nd</sup> Defendant amounted to misdirection to the Court.

**246.** Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in ELC 100 of 2010 submitted that the Dodhias once held the property but submitted that the legitimate transferee in 2006 was Horizon Hills Ltd C.131937, represented by Mohamed Hassanali, after due payment and registration. He argued that Horizon Hills Ltd C.131937 was incorporated for the sole purpose of holding the property and produced a documentary trail that, in their view, the rival entity C.110776 could not match.

**247.** It was submitted that the 1<sup>st</sup> Defendant produced in evidence the certificate of incorporation, memorandum and articles, annual returns, and what counsel termed as the original 2006 transfer from the Dodhias. He contended that Horizon Hills Ltd C.110776 failed to produce any primary transactional documents from the Dodhias to it, or evidence of duty, rates, or outgoings, and presented no returns between 2006 and 2016.

**248.** Relying on the testimony of the Assistant Registrar of Companies, counsel submitted that Company No. C.110776 belongs to Bosorana Ltd; that an attempted change of name to Horizon Hills Ltd was never perfected in the physical file; that an erroneous reflection occurred on the portal and was later corrected; and that the letter of 24<sup>th</sup> April 2018 directing Horizon Hills Ltd C.131937 to change its name to Aureum Ltd was based on the mistaken assumption of double registration.

**249.** It was the 1<sup>st</sup> Defendant's counsel's submissions that the shares of Horizon Hills Ltd C.131937 were validly transferred on 9<sup>th</sup> April 2010 to Tyl Ltd and Irene Nzisa Wanjigi, with consideration of Kenya Shillings One Hundred and Fifty-Four Million (Kshs. 154,000,000) paid to the vendors' advocates, J. M. Njage & Co. Advocates, a fact they said was confirmed by the vendors' affidavit.

**250.** Counsel argued that Aureum Ltd lawfully changed name from Horizon Hills Ltd pursuant to the Registrar's directive

and duly provided Kenroid with completion documents, including the original title and consent to transfer. He maintained that there was no proof of fraud on their part and relied on several decisions.

**251.** On the competing DCI reports, the 1<sup>st</sup> Defendant's counsel relied on a letter dated 7<sup>th</sup> February 2023 indicating that the Directorate recognizes only the material filed by Corporal Nicholus Osuri, urging the Court to disregard Inspector Khaemba's report as inconclusive and not emanating from the agency.

**252.** Finally, the 1<sup>st</sup> Defendant submitted that the Plaintiff's claim, said to emanate from a sale with Horizon Hills Ltd C.110776, cannot stand because that entity failed to demonstrate a legitimate root of title and therefore could not pass a good title to the Plaintiff. They asked that the Court find the suit property to be lawfully owned through the C.131937 chain, uphold the Aureum-Kenroid transaction, and dismiss the claims grounded on C.110776.

**253.** Counsel for the 5<sup>th</sup> to 8<sup>th</sup> Defendants submitted that the claim advanced by Aureum Limited is tainted by illegality and falls squarely within the doctrines of *ex turpi causa non oritur actio* and *ex dolo malo non oritur actio*, which preclude a party from deriving benefit or enforcing rights founded on its own unlawful conduct. It was argued that no legal remedy can arise from a transaction rooted in fraud or illegality.

**254.** Counsel submitted that the central issue is the transfer of the suit property on 29<sup>th</sup> December 2006 from Velji Premchand Dodhia and Himanshu Velji Dodhia for Kshs. 33,600,000, and the question of which of the two entities bearing the name Horizon Hills Limited, Company No. C.110776 or C.131937, was the genuine transferee.

**255.** Counsel further submitted that while Aureum Limited presented a document purporting to be the original grant, together with transfer instruments allegedly executed by the Dodhias, it failed to demonstrate the process or criteria used to verify the authenticity of these documents. It was contended that mere physical inspection of a title deed is insufficient; rather, its legitimacy must be established through forensic analysis of security features such as the watermark of the Kenyan Coat of Arms, micro-text visible under magnification, and a unique serial number bearing the government seal.

**256.** Counsel highlighted numerous anomalies in Aureum Limited's title, including a countersignature by Registrar Lubullelah on 22<sup>nd</sup> February 2007 without a corresponding day book number, and a purported franking of transfer documents on 5<sup>th</sup> December 2004, a Sunday, at a time when Horizon Hills Limited C.131937 was not yet incorporated, as it was only registered on 24<sup>th</sup> November 2006.

**257.** It was further submitted that the testimony of Himanshu Velji Dodhia was self-contradictory and unsupported by

documentary evidence. Whereas he claimed that he and his father were the first allottees of the property in 1997, the Grant produced clearly shows that the property had already been allotted to Dodhia Foam Limited on 1<sup>st</sup> June 1993, rendering the subsequent purported allocation legally untenable. The foundation of Aureum Limited's claim was therefore said to be invalid.

**258.** Conversely, it was submitted, the directors of Horizon Hills Limited C.110776 maintained that their company was incorporated on 24<sup>th</sup> November 2004, purchased the property from Velji Premchand Dodhia and Himanshu Velji Dodhia for Kshs. 33,600,000, and later sold it to Cissy Kalunde Musembi Kshs. 220,000,000 through an agreement dated 12<sup>th</sup> September 2018.

**259.** Counsel further argued that the alleged sale of shares to Tyl Limited was fictitious, as John Nyanjua Njenga, a director of Tyl Limited, denied ever purchasing shares from the company's former directors. It was therefore submitted that Aureum Limited lacked capacity to transact with Kenroid Limited, rendering the agreement between them null and void.

**260.** The 5<sup>th</sup> to 9<sup>th</sup> Defendants, it was contended, were bona fide purchasers who lawfully acquired and transferred the property, and there was no evidence linking them to any fraud.

**261.** Counsel concluded that Company No. C.110776 acquired the lawful and genuine title, having been incorporated first in time and lawfully registered as proprietor of the suit property. It was argued that no credible evidence of fraud had been demonstrated against the 5<sup>th</sup> to 9<sup>th</sup> Defendants, and that the title held by Cissy Kalunde Musembi is the only one capable of protection under the law.

**262.** Counsel for the 9<sup>th</sup> Defendant submitted that the 9<sup>th</sup> Defendant purchased the suit property from Horizon Hills Limited (C.110776) under an agreement of 12<sup>th</sup> September 2018, after standard conveyancing due diligence by Wambua & Maseno Advocates.

**263.** Relying on the DCI Report of 3<sup>rd</sup> May 2021 and its forensic annex, the 9<sup>th</sup> Defendant's counsel argued that Cissy Kalunde Musembi's title alone traces coherently to Grant I.R. 65800 issued upon surrender and resurvey in favour of Dodhia Foam Limited in 1993, thence to Himanshu the Transferee and Velji in 1997, to Horizon Hills Limited (C.110776) in 2006, and finally to the 9<sup>th</sup> Defendant upon registration on 7<sup>th</sup> November 2018.

**264.** As to Kenroid's prayers, Counsel argued that specific performance cannot lie where the vendor's root is conceded to be forged and where the instrument is void for want of capacity. Counsel pointed to the affidavit of John Nyanjua Njenga disowning any authority under Horizon Hills

(C.131937) and, in any event, that a party who elects rescission and refund cannot simultaneously seek performance.

**265.**The Attorney General, who appeared for the Chief Land Registrar, the 2<sup>nd</sup> Defendant in ELC 227 of 2019, filed submissions rather late in the day, on 22<sup>nd</sup> October 2025, a day before this judgment was initially scheduled for delivery. It was contended that no cause of action had been disclosed or proved against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, namely, the Chief Land Registrar and the Attorney General. It was submitted that the 2<sup>nd</sup> Defendant not interfere with the title registered and issued to Cissy Kalunde Musembi, the Plaintiff.

**266.**The Attorney General's submissions, for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in ELC 227 of 2019, marked a departure from the position taken in the Defence and the testimony of its witnesses. Counsel contended that none of the parties had impugned or sought to impugn the transfer to the Plaintiff, Cissy Kalunde Musembi; that the Plaintiff's title was protected by law and that no fraud had been pleaded against the 2<sup>nd</sup> Defendant, the Chief Land Registrar.

**267.**It was further submitted that the 1<sup>st</sup> Defendant, Aureum Limited, was not the registered proprietor of the suit property, having only become owner upon the conversion of Horizon Hills Limited to Aureum Limited on 5<sup>th</sup> June 2018. Counsel stated that the subsequent entries vesting

ownership in the 1<sup>st</sup> Defendant and registering a caveat by Kenroid Limited were lawfully cancelled under **Section 79** of the **Land Registration Act**, and that the rectification merely corrected procedural errors without affecting the 1<sup>st</sup> Defendant's interests.

**268.** The Attorney General submitted that, on a balance of probabilities, the entries in favour of the Plaintiff (Cissy Kalunde) were more credible than those of the 1<sup>st</sup> Defendant (Aureum Limited). It was asserted that the Deed Plan dated 20<sup>th</sup> July 1993 has a verifiable root, and the transfer to the Plaintiff was validly executed by the directors of Horizon Hills Limited. Counsel maintained that the 2<sup>nd</sup> Defendant, having acted upon authentic and verifiable records, lawfully registered the transfer to the Plaintiff.

**269.** It was further submitted that in the event the sale transaction were to fail for any reason, the Plaintiff would only be entitled to recover from the vendor the consideration and related expenses, including legal and renovation costs. Counsel added that the State would only be liable to refund the actual amount of stamp duty paid, being a statutory charge properly received by the Government.

**270.** As to which company was the legitimate Horizon Hills Limited, the Court was urged by the Attorney General to consider the reports by P.M. Khayemba and Detective

Corporal Nicholas Osuri, noting that no convictions had arisen therefrom.

**271.** It was submitted that the Plaintiff, Cissy Kalunde Musembi, had demonstrated on a balance of probabilities that she acquired a legitimate and indefeasible title from Horizon Hills Limited, while the 1<sup>st</sup> Defendant's title was lawfully cancelled by the Registrar of Titles. The Attorney General urged that the claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants lacked merit and should be dismissed. Reliance was placed on **Hubert L. Martin & 2 Others v Margaret J. Kamau & 5 Others [2016] eKLR.**

**Analysis and Determination**

**272.** Having carefully considered the pleadings, the evidence adduced by all parties, and the respective written submissions, the following issues arise for determination:

- a) *Which company between Horizon Hills Limited (C.110776) and Horizon Hills Limited (C.131937)/Aureum Limited is the legally registered entity.*
- b) *Who between Horizon Hills Limited (C.110776) and Horizon Hills Limited (C.131937)/Aureum Limited lawfully derived title to Land Reference Number 1870/II/200 (Grant I.R. 65800) from its previous owners, Velji Premchand Dodhia and Himanshu Velji Premchand.*

- c) *Whether the Plaintiff, Cissy Kalunde Musembi, qualifies as a bona fide purchaser for value without notice.*
- d) *Whether Kenroid Limited established breach of contract or misrepresentation.*
- e) *Whether the 1<sup>st</sup> Defendant, Aureum Limited, lawfully acquired and subsequently disposed of any valid interest in the suit property to Kenroid Limited.*
- f) *What reliefs, if any, each party is entitled to.*

**273.** This dispute concerns competing claims to ownership of a prime parcel of land Westlands, Land Reference Number 1870/II/200 (Grant I.R. 65800), situated within Nairobi (the suit property). At its core, two parties, Kenroid Limited and Cissy Kalunde Musembi, each claim to have lawfully purchased and acquired the same parcel of land, and each holding a certificate of title issued under the Registration of Titles Act (now repealed).

**274.** What convolutes the case is the existence of two distinct companies both bearing the name “Horizon Hills Limited”, registered under different incorporation numbers, C.110776 and C.131937, each of which purports to have derived title of the suit property from the same proprietors, Velji Premchand Dodhia and Himanshu Velji Premchand.

**275.** In ELC No. 100 of 2019, Kenroid Limited contends that it entered into a valid sale agreement with Aureum Limited (formerly Horizon Hills Limited C.131937) for the purchase

of the land for Kshs. 280,000,000. It claims to have paid a deposit of Kshs. 56,000,000 and alleges that Aureum Limited, formerly Horizon Hills Limited C.131937, misrepresented its ownership, failed to provide a genuine title, and was therefore in breach of contract. Kenroid is seeking for rescission of the sale, refund of its deposit, and damages for misrepresentation and loss suffered as an alternative prayer. The main relief sought by Kenroid Limited is for an order of specific performance as against Aureum Limited.

**276.** In ELC No. 227 of 2019, Cissy Kalunde Musembi asserts that she is the lawful proprietor of the same parcel, having purchased it from Horizon Hills Limited C.110776 for a consideration of Kshs. 220,000,000. She avers that her purchase was preceded by extensive due diligence and that the title in her possession reflects the official land register, thereby rendering her an innocent purchaser for value without notice. She denies any knowledge of the rival claim or of any fraudulent dealings in the transfer process and maintains that her title is valid and indefeasible.

**277.** On its part, Aureum Limited (formerly Horizon Hills Limited C.131937) and its directors, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, maintain that they are the legitimate successors in title of the suit property asserting that the purported Horizon Hills Limited C.110776 is a different and irregularly constituted entity.

**278.**The Registrar of Companies and Attorney-General (in its Defence and witnesses) supporting the position taken by Aureum Limited (formerly Horizon Hills Limited C.131937, contend that company number C.110776 was originally assigned to Bosorana Limited, and that the name Horizon Hills Limited C.110776 was only erroneously associated with it on the online registry.

**279.**The 5<sup>th</sup> to 8<sup>th</sup> Defendants, who are the Directors of Horizon Hills Limited C.110776 contended that they are the bona fide directors and shareholders of Horizon Hills Limited C.110776 having lawfully registered the company in 2004, and bought and registered the suit property in the company's name in 2006, which they sold to Cissy Kalunde, the Plaintiff in ELC No. 227 of 2019.

**280.**Thus, the central question emerging is which of the two Horizon Hills entities, C.110776 or C.131937, lawfully derived title from the original grantee, and consequently, whether the subsequent purchasers, Cissy Kalunde Musembi or Kenroid Limited, acquired any valid and enforceable interest in the suit property.

**281.**The suit property is governed by the **Registration of Titles Act** regime (now repealed). **Section 23(1)** provided as follows:

***“The certificate of title issued by the registrar to a purchaser of land upon a transfer or***

***transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”***

**282.** The current position in law is that a certificate of title is not absolute, particularly where the legality of a title is challenged, the proprietor must go beyond the certificate and demonstrate the root of title. The Supreme Court in its seminal decision in ***Dina Management Limited vs County Government of Mombasa & 5 Others [2021] KECA 503 (KLR)*** stated:

***“As held by the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition***

*was legal, formal and free from any encumbrance including interests which would not be noted in the register.*

*It is not enough for a party to state that they have a lease or title to the property.... Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible.”*

**283.** This is in line with **Article 40(6)** of the **Constitution** which limits the protection of the right to property, providing that it does not extend to any property that has been found to have been unlawfully acquired. This was upheld by the Court of Appeal in **Henry Muthee Kathurima vs Commissioner of Lands & another [2015] KECA 892 (KLR)** where it held that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.

**284.** The Court of Appeal in **Presbyterian Foundation vs Kibera Siranga Self Help Group Nursery School [2023] KECA 371 (KLR)** restated that a party must show good root of title and went further to detail what this would entail:

*“The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of*

***title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title."***

**285.** These principles were equally stated in ***Hubert L Martin & 2 Others vs Margaret J Kamar & 5 Others [2016] eKLR*** as follows:

***"A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to***

***procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."***

**286.** Based on these authorities, a duty lay upon each party to present evidence to satisfy this court as to the root of their title. Equally, each party bore the statutory burden of proof under **Section 107(1)(2)** of the **Evidence Act**, which provides as follows:

***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.  
(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

**287.**As to fraud, it must be specifically pleaded and strictly proved to a standard higher than a balance of probabilities, although not beyond reasonable doubt. The Court of Appeal in **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR** ably stated that as follows:

***“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of Pleadings 13<sup>th</sup> Edition at page 427:***

***“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App Cas 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).”***

***The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see***

*Lawrence V Lord Norreys (1880) 15 App Cas 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 chD 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice". See Insurance Company of East Africa v The Attorney General & 3 others HCCC 135/1998. Whether there was fraud is, however, a matter of evidence."*

**288.** The cumulative effect of the foregoing judicial authorities is that a title to land is not merely a piece of paper conferring ownership, it is the end product of a lawful process. The validity of a title, and indeed the sanctity accorded to it under Section 26 of the Land Registration Act and the repealed Registration of Titles Act, rests upon the integrity of the steps leading to its issuance.

**289.** Each party claiming ownership therefore bears the burden of demonstrating, not only that they hold a certificate of title, but also that the process through which that title was procured was lawful, regular, and free from fraud or misrepresentation.

- 290.** The historical ownership of the suit property is largely uncontested. The land records produced before this Court reveal that Land Reference Number 1870/II/200 (Grant I.R. 65800) was originally registered in the name of Wigglesworth & Co. Africa Limited. On 1<sup>st</sup> February 1967, it was transferred to Wigglesworth & Co. Kenya Limited. A further transfer was effected on 29<sup>th</sup> April 1972 to Sutcliffe Estates Limited.
- 291.** On 13<sup>th</sup> November 1976, the property changed hands to Rubislaw Limited, and later, on 7<sup>th</sup> December 1979, it was transferred to Dodhia Foam Limited. Following an application by the latter for extension of lease, the Nairobi City Commission approved the request on 24<sup>th</sup> March 1993, which approval was duly endorsed by the Ministry of Lands.
- 292.** Upon payment of Kshs. 13,325, on 21<sup>st</sup> October 1993, and the surrender of the earlier title in 1995, Dodhia Foam Limited was issued with a fresh title under the Registered Titles Act (now repealed), extending its lease for a further term of fifty (50) years from 1<sup>st</sup> June 1993.
- 293.** Subsequently, on 30<sup>th</sup> May 1997, the Commissioner of Lands granted Dodhia Foam Limited consent to transfer the property to Himanshu Velji Dodhia and Velji Premchand Dodhia. That transaction forms the first critical link in the chain of ownership now in dispute.

**Who between Horizon Hills Limited (C.110776) and Horizon Hills Limited (C.131937)/Aureum Limited is the proper and legally registered entity**

- 294.** The root of title to the suit property is, by all accounts, intertwined with the company known as Horizon Hills Limited, whose name appears consistently in the chain of titles produced before the Court.
- 295.** The question that arises, however, is which among the two entities bearing that name, Company No. C.110776 and Company No. C.131937 (later renamed Aureum Limited), is the genuine corporate entity capable of holding and transmitting a lawful interest in land.
- 296.** The evidence presented by the 5<sup>th</sup> to 9<sup>th</sup> Defendants in ELC No. 100 of 2019 indicates that Company No. C.110776 was allegedly registered on 24<sup>th</sup> November 2004, while Company No. C.131937 represented by the 1<sup>st</sup> to 4<sup>th</sup> Defendants in ELC No. 100 of 2019 was incorporated on 24<sup>th</sup> November 2006. Both have produced certificates of incorporation and CR12 records.
- 297.** **Section 17(1)** of the repealed Companies Act provided that a certificate of incorporation issued by the Registrar of Companies is conclusive evidence that all statutory requirements relating to registration have been complied with, and that the association is duly incorporated. This

principle is now restated under **Section 18(4)** of the **Companies Act, 2015**.

**298.** However, where allegations of fraud, forgery, or impersonation are raised, the Court cannot merely accept a certificate of incorporation at face value. The conclusiveness accorded by **Section 17(1)** does not immunize a document procured through fraud or manipulation of the registration process.

**299.** The 6<sup>th</sup> Defendant, David Njenga, a director of Company No. C.110776, testified that in 2004, he, together with Henry Njoroge Njenga and Samuel Njuguna Chege, instructed the firm of G. Kamonde Advocates to reserve the name Horizon Hills Limited. He stated that the name was duly reserved and that a certificate of incorporation was issued on 24<sup>th</sup> November 2004.

**300.** It is, however, notable that in his witness statement dated 2<sup>nd</sup> June 2022, the same witness averred that the company was registered on 24<sup>th</sup> November 2004, whereas in a subsequent statement dated 25<sup>th</sup> April 2024, he changed the date to 2<sup>nd</sup> July 2004. The date of 2<sup>nd</sup> July, 2004 will turn out to be key in this dispute.

**301.** On the hand, the Plaintiff (Cissy Kalunde) who bought the suit property from the said witness averred in the Plaint that the double registration arose because the Horizon Hills Limited from which she purchased the property was

incorporated on 2<sup>nd</sup> July 2004 as C.110776. A copy of a certificate of incorporation dated 24<sup>th</sup> November 2004 (sic) was produced for Company No. C.110776, together with a CR12 indicating its directors as David Njenga Samson Kuria, Henry Njoroge Njenga, and Samuel Njuguna Chege.

**302.** Conversely, the directors of Aureum Limited (originally Horizon Hills Limited C.131937) adduced evidence which showed that the company was incorporated on 24<sup>th</sup> November 2006 by Kaneez Zehra Noorani, Mohamed Hussein Noorani, and Mohamed Hassanali, who subsequently transferred their shares in April 2010 to Tyl Limited (the 3<sup>rd</sup> Defendant) and Thuo Kairo (the 4<sup>th</sup> Defendant). Further changes in directorship were effected in June 2018, when Thuo Kairo resigned and transferred his share to Irene Nzisa Wanjigi.

**303.** The Directors of Aureum Limited (originally Horizon Hills Limited C.131937) tendered documentary evidence in support of their acquisition of shares, and by extension the suit property, including an Agreement for Sale of Shares dated 9<sup>th</sup> April 2010, a Stamp Duty Declaration and Pay-in Slip dated 14<sup>th</sup> May 2010, minutes of a shareholders' meeting held on 9<sup>th</sup> April 2010, a banker's cheque for Kshs. 513,360/= in favour of the Commissioner for Domestic Taxes, a letter dated 10<sup>th</sup> September 2010 confirming that Thuo Kairo and Tyl Limited were directors of the company, and bank records of J.M. Njage & Co. Advocates showing receipt of Kshs.

138,600,000 from the 1<sup>st</sup> Defendant's counsel, Steve Gatembu Kairu T/A Kairu & Co. Advocates to the Bank of Africa account of J.M. Njage Advocates, the Vendor's counsel.

**304.** Aureum Limited (originally Horizon Hills Limited C.131937) alleged that payment for the shares was effected through a Chase Bank account held in the name of Tyl Limited. In support, they produced a letter of instructions addressed to the Manager, Chase Bank, dated 29<sup>th</sup> April 2010, authorising the transfer of Kshs. 138,600,000 to Bank of Africa Account of J.M Njage & Co. Advocates.

**305.** The Plaintiff, however, adduced an affidavit sworn by Kevin Kimani, a Legal Officer at SBM Bank (Kenya) Limited (formerly Chase Bank), who deponed that the bank held no account in the name of Tyl Limited.

**306.** Notwithstanding this discrepancy, the bank records of J.M. Njage & Co. Advocates, the vendor's counsel, clearly indicate that payment for the purchase of shares was made by the 1<sup>st</sup> Defendant's counsel to its account.

**307.** The absence of an account in the name of Tyl Limited, and the vendors having not denied receipt of the said Kshs. 138,600,000, therefore, does not impeach the transaction, which is otherwise corroborated by contemporaneous banking and corporate records. The Court is thus persuaded that the share transfer was duly executed and supported by adequate consideration.

**308.** It is not disputed that, by a letter dated 24<sup>th</sup> April 2018, the Registrar of Companies advised Company No. C.131937 to change its name, having discovered that the name Horizon Hills Limited had been previously allocated to Company No. C.110776. In compliance, Company No. C.131937 passed resolutions and obtained a certificate of change of name on 31st May 2018 to Aureum Limited, retaining its registration number C.131937.

**309.** Both companies rely on investigative findings by the Directorate of Criminal Investigations, each report bearing divergent conclusions. The Court, therefore, bears the duty to evaluate these conflicting reports alongside other evidence adduced. As stated by the Court of Appeal in **Kenya Ports Authority vs. Modern Holdings [EA] Limited [2017] eKLR** :-

***“...In the event of conflicting expert evidence, it is the duty of the court to consider the evidence and form its opinion. However, in so doing, the court must give cogent reasons why it prefers the evidence of one expert over the other.”***

**310.** Likewise in **Musa Cherutich Sirma vs. Independent Electoral and Boundaries Commission (I.E.B.C) & 2 Others [2017] eKLR** the court held that:-

***“... As may be discovered from case law on the matter, it is trite law that expert opinion is not***

***binding on the court and in reaching its determination the court is entitled to consider other relevant facts. In cases where opinion of experts conflicts, the court is entitled to resolve the conflict or acquire the evidence of one expert in preference of the other. It is also trite that a person who is offered as an expert must be qualified by presentation of evidence indicating his expertise before his evidence on the facts of the case is accepted as expert evidence.”***

**311.** Having reviewed the two reports, this Court finds the report prepared by Corporal Nicholas Osuri to be more comprehensive and credible. It contains corroborative witness statements, primary documents, and logical sequencing of the events that led to the competing registrations.

**312.** The subsequent report by P. M. Kayemba omits critical statements, including those of Thuo Kairo, Valentine Jelimo Kibire, and Alphaxard Kyalo Mboni, and makes no mention of the position of the Registrar of Companies relating to Company No. C.110776, which is alleged to have been the number previously assigned to Bosorana Limited. The selective omission of relevant evidence renders the Khaemba report unreliable.

- 313.**The Court also takes note of the letter dated 7<sup>th</sup> February 2023 from Amos Omuga, for the Director of Criminal Investigations, confirming that the Office of the Attorney-General recognized the affidavit sworn by Corporal Nicholas Osuri as the valid investigative report on record.
- 314.**In his report, Corporal Osuri recorded statements from several key witnesses, including Thuo Kairo, who confirmed the purchase of shares in Company No. C.131937 for Kshs. 138,600,000 through Advocate Stephen Gatembu Kairu (now a Judge of the Court of Appeal). He also interviewed Himanshu Velji Premchand Dodhia and members of the Noorani family, who detailed how they acquired and sold the suit property. These accounts were internally consistent and supported by banking and registry records.
- 315.**On the contrary, the same report detailed how employees within the Companies Registry, acting in collusion with private individuals, altered the registration details of a file No. CPR/2010/271529 to C.131937 to Horizon Hills Limited, and later from No. C.131937 to C.110776 to reflect the name *Horizon Hills Limited*. Statements by Agnes Kung’u and Valentine Jelimo Kibire confirmed the manipulation of the Business Registration System on 5<sup>th</sup> April 2018, at the instigation of one Tabitha Nyamweru Thuo.
- 316.**The evidence of DW 3 from the Business Registration Services was unshakable. He stated that the company presently known as Aureum Limited was originally

incorporated on 24th November 2006 under the name Horizon Hills Limited (C.131937); that the initial directors were Kaneez Zehra Noorani, Mohamed Hussein Noorani, and Mohamed Hassanali, with Anastacia Kioko Mululu as company secretary and that upon the company's transition to the eCitizen platform in April 2018, the application was made by Robert Mwangi Ndungu, then company secretary, listing Tyl Limited and Thuo A. Kairo as directors and shareholders.

**317.** It was his evidence that it was during this transition that the Registry discovered the existence of another entity also called Horizon Hills Limited (C.110776), said to have been incorporated earlier in 2004 and that as a result, on 24th April 2018, the Registrar issued a directive requiring the 2006 company to change its name, following which it was renamed Aureum Limited, and a certificate of change of name was issued on 31st May 2018.

**318.** DW3 testified that annual returns filed by Robert Mwangi on 27th June 2018 for the years 2011-2017 indicated Thuo A. Kairo and Tyl Limited as shareholders and directors and that on 3rd July 2018, Irene Nzisa Wanjigi was appointed as a director in place of Kairo, who simultaneously transferred one share to her; that the current position at the Registry shows Tyl Limited and Irene Nzisa Wanjigi as directors/shareholders, with Robert Mwangi Ndungu as company secretary.

**319.**Turning to Bosorana Limited (C.110776), DW3 stated that it had been incorporated on 2<sup>nd</sup> July 2004, with Gerald Maina Ng'ayu and David Kimotho as directors and shareholders. This is the same date that the 6<sup>th</sup> Defendant had mentioned in his initial witness statement as the date of incorporation Horizon Hills Limited C.110776, before he changed that position.

**320.**Further, 2<sup>nd</sup> July, 2004 is the same date that was pleaded in the Plaint by the Plaintiff, Cissy Kalunde, in ELC 227 of 2019 as follows:

***“31. The double registration aforesaid arose because the original Horizon Hills Limited from which the Plaintiff purchased the suit property was incorporated on 2<sup>nd</sup> July, 2004 and assigned company number C.110776 while the Horizon Hills Limited that transitioned to the 1<sup>st</sup> Defendant was incorporated on 24<sup>th</sup> November, 2006 as C131937.”***

**321.**According to the witness from the Registry, DW3, an application to change Bosorana's name to Horizon Hills Limited was made in July 2014 but was not approved because it lacked the requisite name search, and that although an unsigned draft certificate of change of name appeared in the file, Bosorana Limited remained the registered name.

**322.** Later, he stated, the Bosorana Limited notified the Registrar of the resignation of the initial directors and the appointment of David Njenga Samson, Henry Njoroge Njenga, and Samuel Njuguna Chege, the 6<sup>th</sup> to 8<sup>th</sup> Defendants as new directors.

**323.** According to DW3, when the Registry updated company records in March 2018, an error resulted in Bosorana Limited being erroneously entered into the system as Horizon Hills Limited C.110776 and that this error gave rise to the mistaken belief that two entities were registered under the same name, prompting the name-change directive being issued to Horizon Hills Limited (C.131937). He clarified that there was in fact no double registration, and that the directive was therefore unnecessary. The Registrar later corrected the error and informed the affected parties.

**324.** DW3 referred to searches dated 25th January 2019 and 17th April 2018 which listed the directors of C.110776 as David Njenga, Henry Njoroge, and Samuel Njuguna, but emphasized that C.110776 properly belonged to Bosorana Limited, not Horizon Hills Limited. He stated that the purported certificate of incorporation for Horizon Hills Limited (C.110776) appearing in the Defendants' documents was not genuine, having been wrongly inserted in Bosorana's file.

**325.**DW3 acknowledged that errors occasionally occur at the Companies Registry, especially in legacy files predating digitization, and that in such situations the Registrar normally instructs the later-registered entity to change its name. He explained that each company has a unique registration number which cannot be shared, and that while an eCitizen search shows the current status, the company file contains the historical record.

**326.**In conclusion, DW3 maintained that the Registry's records recognize only one valid Horizon Hills Limited, being company number C.131937, now known as Aureum Limited. The entity recorded as Horizon Hills Limited (C.110776) was, in truth, Bosorana Limited, and the alleged certificate of incorporation in that name was falsified. The confusion, he stated, arose from a clerical mistake (forgery?) made on 5th April 2018 by an officer named Valentine Jelimo.

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**328.**The documentation availed to this Court from the Business Registration Service paints a revealing chronology of corporate manipulation.

**329.**The records included the original registration documents of Bosorana Limited; a Notification of Change of Directors to David Njenga Samson Kuria, Henry Njoroge Njenga, and Samuel Njuguna Chege dated 3<sup>rd</sup> November 2004 but received at the Companies Registry only on 10<sup>th</sup> December 2011; and an unsigned duplicate certificate dated 31<sup>st</sup> July

2014 purporting to change the name from Bosorana Limited to Horizon Hills Limited.

**330.**The records further contained copies of annual returns for the years 2006, 2007 and 2008, received belatedly in 2011, together with returns for 2011, 2012, 2014, 2015 and 2016, all filed simultaneously in 2016.

**331.**Also annexed was a “special resolution” dated 31<sup>st</sup> July 2014 approving the purported change of name, alongside minutes of a meeting allegedly held on 30<sup>th</sup> October 2017 in which David Njenga, Henry Njoroge, and Samuel Njuguna were appointed directors upon the resignation of Gerald Ng’ayu and David Kimotho Mugambi.

**332.**A contemporaneous Notice of Appointment of Directors dated the same day reflected these changes, and a Return of Allotment received at the Registry on 30<sup>th</sup> October 2017 indicated that the company’s issued shares had been expanded from 100 to 998, with 600 shares allotted to David Njenga, 199 to Henry Njoroge, and 199 to Samuel Njuguna.

**333.**The validity of the records from the Business Registry Services have neither been challenged nor impeached. Indeed, the court was shown the original file of Bosorana Limited, C.110776, the name of the company having been crossed on the file with a pen.

**334.**Taken together, these records expose a pattern of retroactive filings, unsigned name-change instruments, and

administrative irregularities inconsistent with the procedure prescribed under the Companies Act. The chronology demonstrates that what began as Bosorana Limited C.110776 in 2004 was gradually and irregularly transformed, through unauthenticated resolutions and belated filings, into a façade bearing the name Horizon Hills Limited (C.110776).

**335.** That metamorphosis was not a lawful corporate evolution but a deliberate reconstruction of identity, intended to confer upon a different group of individuals a semblance of legitimacy and thereby facilitate dealings in the suit property.

**336.** The searches produced before the Court shows no record of Horizon Hills Limited C.110776 prior to 19<sup>th</sup> April 2018, coinciding precisely with the dates of the alleged fraudulent alterations. The inference is inescapable that the company known as Horizon Hills Limited C.110776 was fabricated through unauthorized changes in the registry, with the intention of creating an instrumentality to dispose of the suit property.

**337.** In any event, and as rightly observed by DW3 from the Companies Registry, company searches merely present a snapshot of a company's particulars as they stand at the time of the search and do not reveal its historical records or antecedent changes. This limitation explains how the 5<sup>th</sup> to 8<sup>th</sup> Defendants were able to weave their deception and masquerade the Directors of Horizon Hills Limited C.110776 in the manner they did.

- 338.**The evidence demonstrates that Horizon Hills Limited C.110776 was not a legitimate incorporation but a fraudulent contrivance intended to secure and transfer the suit property to unsuspecting third parties, including the Plaintiff, Cissy Kalunde Musembi, in 2018.
- 339.**Conversely, the Attorney General adduced documents with respect to Horizon Hills Limited C.131937 dating 20<sup>th</sup> May 2009 and 21<sup>st</sup> October 2009 which lists Kaneez Noorani, Mohammed Hussein Noorani and Mahemd Hassanali as directors.
- 340.**As to the allegation that the reconstruction of the file for Company C.131937 was unlawful, it is noteworthy that Hiram Gichugi Wanjohi from the Companies Registry, in his statement, admitted that upon discovering that the physical file for the company could not be traced, he requested certified copies of the company's records from incorporation, as the scanned images available only extended up to the year 2010. While this process may have been unprocedural, there is no evidence to suggest that the 1<sup>st</sup> Defendant and its directors engaged in any fraudulent conduct in that regard.
- 341.**Indeed, the Court found the testimony of DW3 to be credible, cogent, and materially consistent with the documentary evidence on record. His explanation of the registry processes, the chronology of filings, and the error, which was intentional, that led to the mistaken duplication was both

logical and corroborated by official correspondence from the Registrar and the State Counsel. The Court is satisfied that DW3, as an officer charged with custody of company records, had access to the relevant data and spoke from official knowledge.

**342.** His evidence effectively clarified the true corporate identity of the entities involved, demonstrated that Aureum Limited (formerly Horizon Hills Limited, C.131937) was lawfully incorporated, and established that the alleged Horizon Hills Limited (C.110776) was in fact Bosorana Limited, whose records had been intentionally altered. The Court therefore accepts DW3's evidence as authoritative and finds that the confusion surrounding the company names stemmed solely from document manipulation at the Registry.

**343.** Arising from the foregoing, the Court is persuaded that the corporate identity of Aureum Limited is distinct and lawfully constituted, and any suggestion of a competing entity under the same name is unfounded. The Court finds that the purported existence of Horizon Hills Limited (C.110776) was a product of forgery within the Companies Registry, subsequently acknowledged and corrected by the Registrar. Consequently, Aureum Limited (C.131937) remains the only valid successor to the entity originally incorporated as Horizon Hills Limited in 2006.

**344.** The alleged certificate and records bearing registration number C.110776 purporting to belong to another Horizon Hills Limited are irregular and of no legal effect, having been conclusively shown to belong to Bosorana Limited. The Court therefore holds that any rights, obligations, or transactions traceable to Horizon Hills Limited must, in law, attach to Aureum Limited, the duly registered and continuing legal entity.

**345.** In view of this finding, the Court holds that the foundation of the Plaintiffs' claim and the Defendants' respective positions must be assessed against the verified legal status of Aureum Limited as the legitimate corporate successor of Horizon Hills Limited. Any acts, instruments, or representations made in the name of "Horizon Hills Limited (C.110776)" cannot confer legal rights or obligations, the same having emanated from a non-existent entity.

**346.** It follows, therefore, that any transfer of property, appointment of directors, or execution of agreements purportedly made under that name were void *ab initio* for want of a lawful juristic personality. The Court shall accordingly determine the ensuing questions of title, directorship, and liability within the framework of this verified corporate identity, as established by the testimony of DW3 and the supporting documentary record.

**Who between Company C.110776 and C.131937 established lawful root of title to the suit property.**

- 347.**The next issue for consideration concerns the manner in which the suit property was acquired and, in particular, the authenticity of the transactions relied upon by the parties claiming through the two entities known as Horizon Hills Limited.
- 348.**The 6<sup>th</sup> Defendant testified that his company, Horizon Hills Limited (C.110776), purchased the suit property through the firm of G. Kamonde Advocates for a consideration of Kshs. 33,600,000. He stated that their offer was accepted through a letter dated 3rd October 2006 and that payment was made by banker's cheque of Kshs. 35,444,000, inclusive of conveyancing fees and stamp duty.
- 349.**According to him, the property was subsequently registered in their favour Horizon Hills Limited (C.110776) on 29<sup>th</sup> December 2006. It is not by coincidence that this is the same year that Horizon Hills Limited (C. 131937) was incorporated.
- 350.**In cross-examination, he reiterated that the company was incorporated on 24<sup>th</sup> November 2004 and that the purchase of the suit land between themselves and the Dodhias for Kshs. 33,600,000 by way of a banker's cheque was effected under an agreement dated 27<sup>th</sup> November 2006. However, no

such agreement or proof of payment was produced before this Court.

**351.** Indeed, the directors of Horizon Hills Limited C.110776 did not tender any primary documents to substantiate their alleged transaction: no sale agreement, no duly executed transfer, no bank statements, nor correspondence between themselves and the Dodhias or their counsel. Their assertion of purchase therefore remains uncorroborated by documentary evidence.

**352.** In his investigative report, Corporal Nicholas Osuri stated that the 5<sup>th</sup> -8<sup>th</sup> Defendants presented a letter of offer dated 19<sup>th</sup> September 2006 by G. Kamonde Advocates, and a purported acceptance dated 3<sup>rd</sup> October 2006 allegedly signed by F. O. Atieno Advocates for the vendors. Upon verification with the Law Society of Kenya, it emerged that there is no firm known as F. O. Atieno Advocates existed.

**353.** Moreover, the LSK confirmed that following the demise of the late G. Kamonde, one Mary Wanjuhi Muigai had been appointed to wind up his firm. In her recorded statement, Ms. Muigai denied that the alleged letter of offer formed part of the late advocate's files.

**354.** On the other hand, the directors of Horizon Hills Limited (C.131937), now Aureum Limited, testified that the company, then under the directorship of Kaneez Zehra Noorani, Mohamed Hussein Noorani, and Mohamed Hassanali,

purchased the suit property directly from Velji Premchand Dodhia and Himanshu Velji Dodhia.

**355.** In support of this assertion, the 1<sup>st</sup> Defendant produced, in its bundle of documents, a duly executed transfer between the said vendors and Horizon Hills Limited, duly witnessed by Advocate Jimmy Rayani. A copy of the same transfer was also adduced by the Office of the Attorney-General, corroborating the transaction.

**356.** The 1<sup>st</sup> Defendant further relied on an affidavit sworn by Mohamed Hassanali, wherein he affirmed that together with Kaneez Zehra Noorani and Mohamed Hussein Noorani, they lawfully purchased the suit property from the Dodhias for valuable consideration.

**357.** Corporal Osuri's report corroborated this position. He obtained a statement from Advocate Jimmy Jivabhai Alibhai Rayani, who confirmed acting for both the vendors, Velji Premchand Dodhia and Himanshu Velji Dodhia, and the purchaser, Horizon Hills Limited, in a transaction concluded by a sale agreement dated 7<sup>th</sup> November 2005 and a transfer dated 27<sup>th</sup> November 2006.

**358.** The Land Registry records similarly contained a Valuation Requisition for Stamp Duty reflecting the same parties Velji Premchand Dodhia as vendor and Horizon Hills Limited of P.O. Box 14090-00800, Nairobi as purchaser. Notably, the

address used by C.131937 and specifically Mohamed Hassanali is P.O. Box 14090-00800.

**359.**The Plaintiff, Cissy Kalunde, however, alleged fraud on the part of the 1<sup>st</sup> Defendant. While she claimed that Aureum Limited had produced multiple title deeds, this was not supported by evidence nor buttressed by the findings of the investigation.

**360.**She also pointed to two transfer instruments each dated 27<sup>th</sup> November 2006 but curiously bearing the same Day Book Number 2166. One was stamped as having been franked on 5<sup>th</sup> December 2004, a Sunday and notably two years prior to the incorporation of Horizon Hills Limited (C.131937), while the other was franked on 5<sup>th</sup> December 2006, with valuation endorsed on 21<sup>st</sup> January 2007, also a Sunday.

**361.**According to the Plaintiff, the sequence of these dates rendered the transactions impossible and in contravention of the provisions of the Stamp Duty Act, which require valuation and payment of stamp duty prior to registration.

**362.**She further relied on a letter from the Ministry of Lands dated 8<sup>th</sup> April 2020, wherein the Ministry confirmed that the two transfers were not genuine.

**363.**Considering that the transfer was evidently effected in November 2006, it is manifest that the endorsement indicating a franking date of 5<sup>th</sup> December 2004 was made in error. The Plaintiff further noted that valuation of the

transfer was purportedly conducted on 21<sup>st</sup> January 2007, also a Sunday, after the transfer had already been registered on 29<sup>th</sup> December 2006.

**364.** Be that as it may, the discrepancies noted, though irregular, do not go to the root of the title so as to render it invalid. Further reference was made to Entry Number 5 in the Grant produced by the 1<sup>st</sup> Defendant, which bears the stamp of G.G. Gachihi and is countersigned by Registrar F. Indoko Lubullelah on 22<sup>nd</sup> February 2007.

**365.** With respect to the validity of Entry Number 5, one G.G. Gachihi, in his statement to the Directorate of Criminal Investigations (DCI), stated that the signatures purported to be his on both the Grant issued to Cissy Kalunde and the “Free on Government Account” (FOGA) document were forgeries.

**366.** As regards the countersignature attributed to Registrar Fredric Indoko Lubullelah, he likewise recorded a statement confirming that the title held by Cissy Kalunde was fraudulent, whereas the title surrendered by Kenroid’s Counsel, Mr. Madhav Bhalla, Advocate, was genuine.

**367.** This position was corroborated by the findings of John Ondigo, a Senior Printer at the Government Printer, who verified that the title held by Cissy Kalunde Musembi was not genuine, while that produced by Kenroid Limited, obtained from Company C.131937, was authentic.

**368.** While the raised irregularities pique legitimate questions about the integrity of the transfer process, they do not, in the Court's view, displace the established evidential chain showing that the Noorani group purchased the suit property from the Dodhias and later transferred through their company, Horizon Hills Limited, their interest through a documented and traceable process.

**369.** This evidence together with that already found that Kaneez Noorani, Mohamed Hussein and Mohamed Hassanali lawfully transferred shares to the 1<sup>st</sup> Defendant on 9<sup>th</sup> April 2010 for lawful consideration proved through evidence, on a balance of probability, that the Aureum Limited has established the root of its title.

**370.** Considering the totality of the evidence, including the verified statements of Advocate Rayani, the supporting registry documents, and the confirmed share transfer of 9<sup>th</sup> April 2010 through which Kaneez Noorani, Mohamed Hussein Noorani, and Mohamed Hassanali lawfully transferred their shares to Tyl Limited and Thuo Kairu, the Court is satisfied that Aureum Limited (formerly Horizon Hills Limited C.131937) has demonstrated a legitimate and continuous root of title traceable to the original grantees, the Dodhia family.

**Whether the Plaintiff in ELC 227 of 2009, Cissy Kalunde Musembi, qualifies as a bona fide purchaser for value without notice**

- 371.** Having found that Horizon Hills Limited (C.110776) was a fraudulent creation with no lawful registration or legitimate root of title, it follows, as a matter of law, that Cissy Kalunde Musembi, whose claim derives from that entity, cannot assert a better title than her predecessor. A person cannot, in law, transfer what he/she does not possess.
- 372.** This position finds firm grounding in **Article 40(6)** of the **Constitution**, which expressly excludes from protection any property that has been unlawfully acquired, and in **Section 26(1)(a)** and **(b)** of the **Land Registration Act, 2012**, which permits impeachment of a title obtained through fraud, misrepresentation, or illegality.
- 373.** The principle is well captured in ***Henry Muthee Kathurima vs Commissioner of Lands & Another [2015] eKLR*** and ***Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR***, where the Court of Appeal held that a title founded on fraud or illegality cannot confer proprietary rights, nor can it be cleansed by subsequent transfer to an innocent purchaser for value.
- 374.** The 9<sup>th</sup> Defendant nonetheless contends that she is a bona fide purchaser for value without notice, relying on the classical formulation in ***Katende vs Haridar & Company***

**Limited [2008] 2 E.A. 173.** However, the jurisprudence on this doctrine has since evolved.

**375.**In **Mwangi James Njehia vs Janetta Wanjiku Mwangi & Another [2021] eKLR**, the Court of Appeal revisited the **Katende** test and emphasized that for one to rely on the doctrine, it must first be shown that the vendor held a valid and lawful title capable of being transferred.

**376.**The Court of Appeal in that case observed that while a purchaser must demonstrate good faith, valuable consideration, and absence of notice of fraud, such protection cannot attach where the vendor's own title is void *ab initio*.

**377.**Guided by **Article 40 (6)** of the **Constitution** and cited authorities, this Court finds that since Horizon Hills Limited (C.110776) had no good and lawful title to the suit property, the Plaintiff, Cissy Kalunde Musembi, could not, by any stretch of legal reasoning, acquire a better title than the one held by the vendor.

**378.**Moreover, the Plaintiff's own conduct, and that of her advocate, reveals material irregularities inconsistent with the conduct expected of a prudent purchaser. Although Cissy Kalunde Musembi asserted that she carried out due diligence prior to purchase, her own testimony and that of her advocate paint a different picture.

**379.**The Plaintiff testified that she did not personally know the vendors; that the offer to purchase was introduced to her by her advocate, Ms. Prisca Wambua, in early 2018 and that she did not engage directly with the sellers but relied wholly on her advocate to negotiate and conclude the transaction.

**380.**The Plaintiff also denied knowledge of any caveat registered by Kenroid Limited over the property, notwithstanding that the Land Registry records reflected its existence at the time of her transaction. Her assertion that she paid rates and rent since 2018, while producing receipts, does not cure the defective title nor demonstrate bona fides in acquisition.

**381.**There is further concern regarding the manner in which the caveat lodged by Kenroid Limited and subsequent entries in favour of Cissy Kalunde Musembi were handled. Corporal Osuri's forensic review of the Land Information Management System (LIMS) revealed that Mr. Owen Cartwright logged into the registry system on 5<sup>th</sup> December 2018, made entries converting ownership from Horizon Hills Limited to Cissy Kalunde Musembi, and manually canceled entries Nos. 8 and 9, which related to a change of name and caveat by Kenroid Limited, by physically applying rubber stamps. He admitted that he did so "in good faith" but without any formal instruction or notice to the affected parties.

**382.**This Court observes that such unilateral cancellation of register entries was not only irregular but ultra vires the powers of the Registrar under the Registration of Titles Act

(repealed). The law required the Registrar to act procedurally and upon due notice to affected parties. The unlawful cancellation of entries Nos. 8 and 9 is an indictment of the registry's administrative propriety and vitiates any reliance on the resultant record.

**383.** The Court of Appeal in *Charles Karathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others [2013] eKLR* reaffirmed that the Government, as the custodian of the land register, bears a constitutional and statutory duty to guarantee the integrity of land records, and that indefeasibility of title is predicated upon the regularity of those records.

**384.** Indeed, the process for removal of cautions or caveats is expressly provided under **Section 73** of the **Land Registration Act, 2012**, which requires the Registrar to issue notice to the cautioner and to hear any objections before removal. No such process was followed in the instant case.

**385.** For these reasons, the Court finds that Cissy Kalunde Musembi has not satisfied the legal requirements of a bona fide purchaser for value without notice, and that the title registered in her name was founded upon a defective, fraudulent, and procedurally flawed process. Her claim to the suit property fails. Further, her claim for indemnity by the government for the loss of the suit property as particularised

in the Plaintiff, save for the stamp duty of Kshs.14 Million that she paid to the Chief Land Registrar, cannot succeed.

**386.**I say so because the evidence before this court shows the fraud that was perpetuated by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, which I have summarized above, in the acquisition of the suit property by falsifying company's records. Consequently, the Plaintiff's recourse is as against the 6<sup>th</sup> , 7<sup>th</sup> and 8<sup>th</sup> Defendants for a refund of the monies paid to them or their Advocate.

**Whether Kenroid Limited established breach of contract or misrepresentation.**

**387.**The Plaintiff in ELC No. 100 of 2019, Kenroid Limited, seeks, among other reliefs, rescission of the sale agreement entered into with Aureum Limited (formerly Horizon Hills Limited C.131937), refund of the deposit paid, and damages for misrepresentation and breach of contract. This court takes note that the said prayer is in the alternative, the main prayer being for specific performance.

**388.**It is not in dispute that the parties executed a Sale Agreement dated 21<sup>st</sup> June 2018 for the purchase of the property known as Land Reference No. 1870/II/200 at a consideration of Kshs. 280,000,000.

**389.**When the transfer did not materialize, the Plaintiff demanded a refund of the deposit and compensation for loss of opportunity, contending that the Defendants had

misrepresented ownership of the property, tendered a defective title, and failed to deliver vacant possession as agreed.

**390.** The 1<sup>st</sup> Defendant, however, maintained that the agreement was frustrated by the registration of a transfer in favour of Cissy Kalunde Musembi, and that the delay in completion arose from circumstances beyond its control. It denied any misrepresentation, asserting that the Plaintiff executed the agreement with full knowledge of the dispute affecting the property.

**391.** The 1<sup>st</sup> Defendant further explained that the completion documents remained in the custody of its advocates and could only be released upon receipt of a professional undertaking from the Plaintiff's advocates, which was never issued. It also denied that the suit property was encumbered in any manner, maintaining that the Plaintiff's own due diligence had confirmed the 1<sup>st</sup> Defendant's good and valid title.

**392.** In construing the agreement, this Court is guided by the principle that written contracts are self-contained and must be interpreted strictly according to their terms. As stated by the Court of Appeal in **Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited [2017] eKLR:**

***“This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it...”***

**393.** The agreement provided that a deposit of Kshs. 56,000,000 was to be paid upon execution. This was confirmed by PW4, Madhav Bhalla, counsel for Kenroid Limited, who testified that the said amount was paid to the vendor’s advocates, Kembi Gitura & Company Advocates, and acknowledged by a letter dated 13<sup>th</sup> July 2018. A receipt for Kshs. 53,792,500/= was issued, the difference representing the agent’s fees and bank charges.

**394.** The balance of Kshs. 224,000,000 was to be secured by an irrevocable and unconditional letter of guarantee from the purchaser’s financier, accompanied by a professional undertaking to pay within seven days of successful registration of the transfer in favour of the purchaser.

**395.** The vendor warranted that it was the sole, beneficial and registered owner of the suit property, that the property was free from encumbrances, and that it was in quiet and peaceful possession. However, following payment of the deposit, the transaction stalled when Kenroid Limited

discovered the existence of two entities bearing the name Horizon Hills Limited and two separate titles relating to the same property.

**396.** This is apparent from the testimony and documentary evidence adduced by PW4, as he referred to multiple conversations between himself, Jimmy Wanjigi, Kembi Gitura & Company, and their proxy, Karn, prior to the issuance of the letter of rescission dated 17<sup>th</sup> September 2018.

**397.** Having found that the 1<sup>st</sup> Defendant, Aureum Limited, held lawful title to the suit property known as L.R. No. 1870/II/200, and noting from the pleadings and testimonies of both parties that Kenroid Limited and Aureum Limited remain willing and ready to complete the sale transaction, this Court finds that the equities of the case favour performance, rather than rescission.

**398.** Accordingly, the Court allows the prayer for specific performance, and directs the parties to proceed to completion of the agreement for sale dated 21<sup>st</sup> June 2018 in strict accordance with its terms, upon fulfillment of all requisite statutory and contractual conditions. For purposes of the said agreement, and the completion date, time will start running from the date of this Judgment.

**399.** As to the claim for general damages, it is settled law that general damages do not lie for breach of contract. As held in ***Sundowner Lodge Limited vs Kenya Tourist***

**Development Corporation (Civil Application Sup 19 of 2018) [2023] KECA 1131 (KLR) (22 September 2023)**  
**(Ruling)** citing its earlier exposition in which it stated thus;

*“...We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi v Karsan [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa JA expressing the view that such an award would amount to duplication. And so, it would be. See also Securicor (K) v Benson David Onyango & Anor 2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and*

***unquantified sum of Kshs.30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent’s claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.”***

**400.** The Court in the case of **Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd [2015] eKLR** explained why general damages cannot be awarded in cases of breach of a contract as hereunder:

***“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the***

***breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd Nrb CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale [1854] 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others Nrb CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, Nrb CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, Nrb CA Civil Appeal No. 154 of 1992 (UR))."***

**401.** The court concurs. Damages arising from breach of contract are ascertainable, and quantifiable. They are essentially in the nature of special damages and should be specifically pleaded and proved.

**402.** Kenroid Limited did not specifically set out the nature of the loss alleged or quantify the same. Consequently, the claim for general damages and special damages fails for want of proof.

### **Orders of the court**

**403.** This court has found that Horizon Hills Limited C.110776 was fraudulently incorporated and did not lawfully obtain title to the suit property. Consequently, it could not convey a valid title to Cissy Kalunde Musembi, the Plaintiff in ELC 227 of 2019.

**404.** On that basis, the Plaintiff's suit in ELC No. 227 of 2019, save for a refund of the Stamp Duty paid to the Government, is devoid of merit. Conversely, the court allows the claim in ELC No. 100 of 2019.

**405.** For the reasons aforesaid, the court makes the following final orders:

**a) The 1<sup>st</sup> Defendant, Aureum Limited C.131937 is hereby declared the lawful proprietor of the suit property known as L.R. No. 1870/II/200.**

**b) The 1<sup>st</sup> Defendant, Aureum Limited, shall transfer the suit property to Kenroid Limited, in strict compliance with the sale agreement.**

- c) Subject to the terms of the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant in ELC No. 100 of 2019, a permanent injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants in ELC 100 OF 2019 and each and or all of them jointly and or severally and or any other third parties either by themselves or their servants and/or agents and/or employees and/or howsoever from entering upon, occupying, constructing on or developing or selling, leasing, licensing, transferring, charging, mortgaging and or in any manner whatsoever transacting in and or over and or is any other manner whatsoever and howsoever dealing with and or interfering with all or any part of all that portion of land being Land Reference Number 1870/II/200.**
- d) Subject to the sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant in ELC No. 100 of 2019, an order for the eviction of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, their agents, servants, employees, proxies and any other parties connected to them from the suit premises be and is hereby issued.**
- e) An order be and is hereby issued directing the Inspector General of Police and the OCPD in**

**charge of the area and the OCS in charge of the Police Station concerned to enforce the Court's orders as stated in (c) and (d) above.**

- f) An order be and is hereby issued directing the Chief Land Registrar or his duly authorised officers, to rectify the register by cancelling all entries relating to the transfer of the suit property, Land Reference Number 1870/II/200, from Horizon Hills Limited to Cissy Kalunde Musembi.**
- g) The Chief Land Registrar to refund to the Plaintiff in ELC No. 227 of 2019, Cissy Kalunde Musembi, Kshs. 14,000,000, being stamp duty paid, together with interest at court rates from the date of filing this suit until payment in full.**
- h) The 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in ELC No. 100 of 2019 to pay the Plaintiff in ELC N0. 100 of 2019 the costs of that suit (ELC No. 100 of 2019).**
- i) The Plaintiff in ELC N0. 227 of 2019 to pay the costs of that suit (ELC No. 227 of 2019).**

**Dated, signed and delivered virtually in Nairobi this 30<sup>th</sup> day of October, 2025.**

**O. A. Angote**  
**Judge**

**In the presence of;**

Mr. Taib for Plaintiff, Kenroid (100 of 2019)

Mr. Bwire for Plaintiff in 227 of 2019.

Mr. Willy Otieno for 1<sup>st</sup> - 3<sup>rd</sup> Defendants

Mr. Allan Kamu for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 227 of 2019

Ms Kigen for 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in 100 of 2019

Mr. Benard Otieno for 9<sup>th</sup> Defendant in 100 of 2019

Court Assistant: Tracy