



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 281 OF 2015**

**FRANCIS KANYANJUA MWANGI .....PLAINTIFF**

**VERSUS**

**MUGO GITARI *alias***

**JULIUS MUTUGI MUCHEMI.....1<sup>ST</sup> DEFENDANT**

**COMAT MERCHANTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**EDWARD NDUNGU WAMBUI.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed this suit against the defendants through a plaint dated 7<sup>th</sup> April, 2015 which was amended on 30<sup>th</sup> April, 2015 and further amended on 8<sup>th</sup> December, 2015 seeking the following orders:

- 1) A declaration that the plaintiff is the legal owner of the leasehold title comprised in a property known as Nairobi/ Block 93/1257.
- 2) A declaration that the sale and transfer of Nairobi/Block 93/1257 from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and further to the 3<sup>rd</sup> defendant was unprocedural and illegal.
- 3) A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants, agents, employees or anybody claiming under them from entering into, evicting the plaintiff, depositing materials and or constructing any structures on, selling, charging, alienating, disposing off, dealing with or in any way interfering with the plaintiff's quiet possession and/ or title to the property known as Nairobi/Block 93/1257.
- 4) An order for the cancellation of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' names from the land register in respect of the property known as Nairobi/ Block 93/1257 and rectification thereof to restore the plaintiff's name as the proprietor of the said land.
- 5) In the alternative, an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to execute and deliver up to the plaintiff for registration, a transfer and all other relevant documents in respect of the property known as Nairobi/Block 93/1257 to facilitate the transfer of the said property to the plaintiff within 14 days of the order hereof and in default thereof, the Land Registrar to execute the transfers and/ or other documents necessary to transfer ownership of the said property to the plaintiff at the defendants' costs.
- 6) Damages for fraud and misrepresentation against the defendants.
- 7) Costs of the suit.
- 8) Any other order that the court may deem just and fit to grant.

The plaintiff averred that in November, 1989, he acquired a leasehold interest in the property known as Nairobi/Block 93/1257 (hereinafter referred to as "the suit property") for a period of 99 years commencing on 1<sup>st</sup> July, 1989. The plaintiff averred that he had quiet, peaceful and

uninterrupted possession of the suit property and paid land rates regularly to the relevant authorities. The plaintiff averred that on or about July, 2009, the 1<sup>st</sup> defendant with intent to commit fraud filed a fictitious claim against the plaintiff in the High Court of Kenya at Milimani namely, HCCC No. 555 of 2009 where he unlawfully and unprocedurally obtained ex parte judgment against him without his knowledge.

The plaintiff averred that in execution of the said judgment in HCCC No. 555 of 2009, a prohibitory order was registered against the title of the suit property on 12<sup>th</sup> November, 2009 and the property transferred to the 2<sup>nd</sup> defendant on 1<sup>st</sup> August, 2012 pursuant to a vesting order issued in the said suit. The plaintiff averred that he was not aware of HCCC No. 555 of 2009 and was not notified of the said prohibitory order or any other order issued in the said suit. The plaintiff averred that he learnt of all these developments on or about April, 2015 when he carried out a search on the title of the suit property at the Land Registry.

The plaintiff averred that after learning of these developments, he lodged a complaint with the Criminal Investigation Department of the National Police Service regarding interference with the title of the suit property. The plaintiff averred that the 2<sup>nd</sup> defendant conspired with the 1<sup>st</sup> defendant to fraudulently acquire title to the suit property since it knew or ought to have known that the purported sale and transfer of the suit property to it was tainted with illegality. The plaintiff averred that the suit property was subsequently transferred to the 3<sup>rd</sup> defendant who knew or ought to have known that the title to the suit property was tainted with illegality.

The plaintiff averred that the 4<sup>th</sup> defendant registered the instruments of transfer in respect of the suit property in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants despite having knowledge that the suit property was under criminal investigations by the Directorate of Criminal Investigations for having been acquired through fraudulent, illegal and unlawful dealings. The plaintiff averred that the title for the suit property that was held by the 2<sup>nd</sup> defendant was void *ab initio* since the same was obtained pursuant to a fraudulent court decree. The plaintiff averred that the 3<sup>rd</sup> defendant did not get a better title since the title that was conveyed to him was a product of fraudulent, illegal, unprocedural and corrupt schemes.

The plaintiff averred that in April, 2015, the 3<sup>rd</sup> defendant pulled down the plaintiff's fence around the suit property and erected a new fence without the plaintiff's consent. The plaintiff averred that unless the defendants were restrained by the court, they would proceed to evict him from the suit property thereby occasioning him irreparable loss.

The 2<sup>nd</sup> defendant filed a mended statement of defence and a response to the notice of claim against it by the 3<sup>rd</sup> defendant on 25<sup>th</sup> January, 2016. The 2<sup>nd</sup> defendant denied the plaintiff's claim in its entirety and averred that it was a stranger to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant denied that it was a party to the proceedings in HCCC No. 555 of 2009, Julius Mutugi Muchemi vs. Francis Kanyanjua Mwangi. The 2<sup>nd</sup> defendant averred that it purchased the suit property through a public auction sanctioned by the court in execution of a decree issued in the said suit where it emerged as the highest bidder.

The 2<sup>nd</sup> defendant denied the particulars of fraud, misrepresentation, illegality, negligence, corrupt scheme and conspiracy contained in the further amended plaint and averred that it acquired an indefeasible title to the suit property. The 2<sup>nd</sup> defendant averred that it became a bona fide purchaser for value of the suit property with absolute and indefeasible title at the fall of the hammer at the auction. The 2<sup>nd</sup> defendant averred that when it acquired the suit property, no investigations had been initiated in respect thereof by the Directorate of Criminal Investigations. The 2<sup>nd</sup> defendant averred that it had legal, registered and absolute title to the suit property before transferring the same to the 3<sup>rd</sup> defendant.

In response to the notice of claim by the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant denied liability to the 3<sup>rd</sup> defendant and reiterated that it was a bona fide purchaser of the suit property through a court process with absolute and indefeasible title. The 2<sup>nd</sup> defendant averred that in the event of it being held liable, it was entitled to full indemnity and/or contribution by the Judiciary of Kenya and the land registrar against whom it was entitled to institute third party proceedings.

The 3<sup>rd</sup> defendant filed amended statement of defence and notice of claim against the 2<sup>nd</sup> defendant on 19<sup>th</sup> January, 2016. The 3<sup>rd</sup> defendant denied that the plaintiff was in possession of the suit property. The 3<sup>rd</sup> defendant averred that he took possession of the suit property, fenced off the same and commenced construction thereon after purchasing the same from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant denied that the 1<sup>st</sup> defendant transferred the suit property to the 2<sup>nd</sup> defendant. He contended that 2<sup>nd</sup> defendant bought the property through a public auction sanctioned by the court. The 3<sup>rd</sup> defendant denied the allegation that the plaintiff had no knowledge of the dealings involving the suit property. The 3<sup>rd</sup> defendant denied the allegations of fraud, misrepresentation and illegality pleaded in the further amended plaint. He averred that he acquired the suit property for valuable consideration after ascertaining the 2<sup>nd</sup> defendant's ownership of the same.

In his notice of claim against the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant stated that under a sale agreement dated 4<sup>th</sup> April, 2014 between him and the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant warranted to him that the 2<sup>nd</sup> defendant had a good and valid title to the suit property with no competing claims. In the alternative and without prejudice to his amended defence, the 3<sup>rd</sup> defendant sought indemnity against the 2<sup>nd</sup> defendant as follows:

- a) Special damages of Kshs 82,408,155/-
- b) General damages
- c) Interests on (a) and (b) at court rates from the date of filing suit.
- d) Mesne profits

e) Costs of the suit.

At the trial, the plaintiff (PW1) adopted his witness statements dated 7<sup>th</sup> April, 2014, 30<sup>th</sup> April, 2015, 8<sup>th</sup> December, 2015 and 11<sup>th</sup> December, 2015 as his evidence in chief and produced documents which were attached thereto as exhibits. In his witness statements aforesaid, the plaintiff stated that he was a retired civil servant who worked with the Ministry of Foreign affairs as a diplomat stationed in various stations across the world. He stated that in November, 1989, he acquired a leasehold interest in the suit property for a period of 99 years with effect from 1<sup>st</sup> July, 1989.

He stated that he took possession of the suit property immediately after acquiring the same and put up a fence around it. He stated that he enjoyed quiet and peaceful possession until 1<sup>st</sup> April, 2015 when the defendants pulled down his fence, erected their own fence and commenced excavation works without his consent. He stated that an official search that he carried out on 21<sup>st</sup> March, 2015 revealed that the 3<sup>rd</sup> defendant was the registered owner of the suit property. He stated that he later learnt that the 1<sup>st</sup> defendant had instituted a fictitious claim against him in the High Court of Kenya at Milimani namely, HCCC No. 555 of 2009 without his knowledge where he unlawfully and unprocedurally obtained an ex parte decree whose execution led to the transfer of the suit property to the 2<sup>nd</sup> defendant. He stated that subsequently, HCCC No. 555 of 2009 was struck out on 9<sup>th</sup> February, 2016 for having been filed by an unqualified person in violation of sections 9, 31 and 34 of the Advocates Act, Chapter 16 Laws of Kenya. The plaintiff stated that the purchase of the suit property by the 2<sup>nd</sup> defendant and the subsequent sale of the same to the 3<sup>rd</sup> defendant was null and void the same having emanated from a suit which was fraudulent, incompetent and a nullity.

The plaintiff stated that he lodged a complaint with the Criminal Investigations Department(CID) in respect of the fraudulent transfer of the suit property. He stated that the Chief Land Registrar had knowledge of the investigations by the police on the fraudulent, unlawful and corrupt scheme that led to the transfer of the suit property to the 2<sup>nd</sup> defendant. The plaintiff stated that the 2<sup>nd</sup> defendant conspired with the 1<sup>st</sup> defendant and third parties to acquire the suit property unprocedurally, fraudulently, unlawfully and through a corrupt scheme.

In cross-examination by the advocate for the 3<sup>rd</sup> defendant, the plaintiff stated that at the time he was allocated the suit property by the Ministry of Lands, he was working as a protocol officer at the Ministry of Foreign Affairs. He stated that he was issued with a title to the suit property in 1989 which title got lost in 1991 but was replaced with a new one upon application. He stated that he fenced off the suit property in 2005 using barbed wire and later with iron sheets.

The plaintiff stated further that he learnt of the encroachment on the suit property in the year 2012 when he found the fence that he had put up around the suit property demolished and building materials assembled on the property. He stated that he reported the matter to the Criminal Investigations Department and later discovered that the suit property had been transferred to a third party after his advocate conducted a search on the title of the property. The plaintiff contended that the 3<sup>rd</sup> defendant started developing the suit property in the year 2015. The plaintiff contended that the property was transferred to the 3<sup>rd</sup> defendant when the complaint he had made was pending investigations at the Criminal Investigations Department.

In cross-examination by the advocate for the 2<sup>nd</sup> defendant, the plaintiff stated that save for the title, he had no other documents showing that the suit property was allocated to him in the year 1989. He stated that he had been in peaceful occupation of the suit property until 2015 when the defendants disturbed his possession by pulling down his fence. He stated that he learnt in 2012 that his iron sheet fence had been pulled down. He averred that the 2<sup>nd</sup> defendant owned a plot next to the suit property which was developed. He stated that he could not remember the last time he paid rates for the suit property. The plaintiff stated further that he was not aware of HCCC No. 555 of 2009 and did not know the plaintiff therein or the advocates who instituted the suit.

In cross-examination by the advocate for the 4<sup>th</sup> defendant, the plaintiff stated that the suit property was undeveloped and that he was not aware of the prohibitory order that was registered against the title of the property until he was informed of the same by the Criminal Investigation Department. He admitted that Chief Land Registrar was not asked to place a restriction on the title of the suit property.

During re-examination, the plaintiff stated that at the time of the transfer of the suit property to the 3<sup>rd</sup> defendant, the Chief Land Registrar was aware of the investigations surrounding the fraudulent transfer of the suit property from his name to that of the 2<sup>nd</sup> defendant. He reiterated that he did not know the plaintiff in HCCC No. 555 of 2009 and that he had no dealings with him and did not owe him any money. He stated further that the decree issued in HCCC No. 555 of 2009 was set aside and that he sued the 4<sup>th</sup> defendant for authorising the transfer of the suit property when there was a pending case.

The plaintiff's first witness was Cpl. Samuel Kamau (PW2). He testified that in the year 2012, he was working at the Criminal Investigations Department headquarters in the land fraud investigations unit when the plaintiff lodged a complaint that the suit property had been transferred to the 2<sup>nd</sup> defendant without his knowledge. He reported the complaint to Supt. Nicholas Etyang who was heading the unit and who assigned the case to him. He wrote a letter dated 15<sup>th</sup> January, 2017 to the Chief Land Registrar requesting for documentation on the ownership of the suit property. The Chief Land Registrar provided him with a copy of the Green Card and a certified copy of the certificate of lease.

He stated that; the first entry in the Green Card was made on 28<sup>th</sup> November, 1989 when the plaintiff was registered as proprietor of the suit property and was issued with a certificate of lease; entry number 3 was made on 2<sup>nd</sup> May, 1991 when the certificate of lease was re-issued through Gazette Notice number 332 of 25<sup>th</sup> January, 1991; entry number 4 was another re-issue of the certificate of lease through Gazette Notice number 1966 of 29<sup>th</sup> May, 1992; entry number 5 was made on 12<sup>th</sup> November, 2009 and it was a prohibitory order issued in HCCC No. 555 of 2009, entry number 6 was made on 1<sup>st</sup> August, 2012 and it removed the prohibitory order and, entry number 7 which was made on the same date was in respect of a transfer of the suit property to the 2<sup>nd</sup> defendant.

PW2 stated that he wrote to the Registrar of the High Court requesting for information relating to HCCC No. 555 of 2009 and was allowed to peruse the court file from which he established that the plaintiff in the case was one, Julius Mutugi Muchemi who was represented by Newton Mungalla Advocate. He later learnt from the Law Society of Kenya that Newton Mungalla advocate worked at City Hall. He established further that the defendant in the case was Francis Kanyanjua Mwangi and that the case concerned a debt of Kshs. 13,000,000/=. He stated that in the court file, it had been indicated that summons had been served upon the defendant through one, Ezekiel Masai. He stated that he recorded a statement from Ezekiel Masai who admitted having received summons from Mungalla & Company advocates for service and which summons he delivered to Francis Kanyanjua in Nairobi who declined to acknowledge service.

PW2 stated that he interrogated Mr. Newton Mungalla regarding the said case. Mr. Newton Mungalla informed him that Julius Mutugi Muchemi the plaintiff in HCCC No. 555 of 2009 had visited his office and instructed him to act on his behalf. He obtained a copy of identity card number 2913480 said to belong to Julius Mutugi Muchemi from Newton Mungalla who informed him of his inability to trace Julius Mutugi Muchemi. He produced a copy of the said identity card number 2913480 as PExh 2. He thereafter went to the registrar of persons to enquire about the identity of the person whose identity card he had received and was issued with an identification report showing that the owner of identity card number 2913480 was one, Mugo Gitari and not Julius Mutugi Muchemi who were both unknown to the plaintiff. He stated that he did not manage to trace Julius Mutugi Muchemi.

In cross-examination by the advocate for the 3<sup>rd</sup> defendant, PW2 stated that the plaintiff visited his office in the year 2012 when the suit property had already been transferred to the 2<sup>nd</sup> defendant through a court order. He stated that the plaintiff learnt of HCCC No. 555 of 2009 through him. He stated that he wrote to the registrar of persons in 2013 and was transferred from the land fraud unit in the 2015. He stated that he visited Mwea once in a bid to trace Mugo Gitari following details collected from the registrar of persons but he was not successful.

PW2 stated that at the time he left the land fraud unit, the matter was still pending under investigation and a decision to have any person charged with a criminal offence had not yet been made. He averred that he visited the land registry in person to peruse the Green Card and that having been provided with all the documents he wanted, he did not deem it necessary to discuss the matter with the land registrar.

In cross-examination by the advocate for the 2<sup>nd</sup> defendant, PW2 stated that during his investigations, he found that the person who filed HCCC No. 555 of 2009 was a nonexistent person. He stated that a copy of the identity card which was given to Newton Mungalla advocate belonged to Mugo Gitari and that Julius Mutugi Muchemi was a fraudster. He stated that Ezekiel Masai, the process server told him that he had served someone who identified himself as Francis Kanyanjua Mwangi while the plaintiff contended that he was never served.

PW2 stated that he learnt that the suit property was sold in a public auction which he averred was not tainted with fraud. He stated that there was no fraud on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He contended that he did not trace the money that was realised at the public auction because Mr. Mungalla advocate who acted in the matter informed him that it was remitted to Julius Mutugi Muchemi through petty cash vouchers. He stated that Mr. Mungalla who had the fraudulent identity card had not been charged at the time he left the investigations.

In re-examination, PW2 stated that the process server informed him that he was directed to the person he was required to serve by Newton Mungalla. He reiterated that HCCC No. 555 of 2009 was filed by a fraudster and that the entries made in the register of the suit property were made pursuant to orders issued in that case.

The 2<sup>nd</sup> defendant called its managing director, Peter Maina Mugambi(DW1) as its sole witness. He adopted his statement dated 25<sup>th</sup> September, 2015 as his evidence in chief and produced the documents attached thereto as Dexh. 1. He stated that he came to know the plaintiff in October/November, 2011 when he received summons from the Criminal Investigations Department (hereinafter referred to as "CID") through his advocates, Onesmus Githinji & Co. Advocates. He appeared with his advocate before a Mr. Kamau at the CID offices. He recorded a statement with the CID and presented all the documents relating to the suit property. He stated that the CID never contacted him again. DW1 stated that they were issued with a title to the suit property on 1<sup>st</sup> August, 2012. He stated that before the 2<sup>nd</sup> defendant was issued with a title, the land registrar had issued a Gazette Notice number 7001 of 25<sup>th</sup> May, 2012 and the plaintiff did not raise any objection. He stated that Mr. Mungalla advocate acted on behalf of Keysian Auctioneers and that he never heard from the 1<sup>st</sup> defendant.

In cross-examination by the advocate for the 4<sup>th</sup> defendant, DW1 stated that the 2<sup>nd</sup> defendant was in the business of buying and selling land. He stated that the 2<sup>nd</sup> defendant conducted due diligence before purchasing the suit property and that the advocates who acted for the 2<sup>nd</sup> defendant confirmed that a case had been filed in which a judgment and a prohibitory order had been issued. He stated that no caveat had been registered against the title of the suit property. He admitted that the suit property was transferred to the 2<sup>nd</sup> defendant after he had been summoned by the CID in relation to the property.

DW1 stated that the CID informed him that there was a complaint about the sale of the suit property and that he did not bother to find out the person who had an interest in the property. He stated that the 2<sup>nd</sup> defendant proceeded with the sale after conducting due diligence. He stated that the 2<sup>nd</sup> defendant transferred the suit property to the 3<sup>rd</sup> defendant on 4<sup>th</sup> April, 2014. He stated that the 2<sup>nd</sup> defendant did not develop the suit property but put up a hedge around the same without any objection.

In cross examination by the advocate for the plaintiff, DW1 stated that his authority to appear in court on behalf of the 2<sup>nd</sup> defendant was filed together with the defence. When referred to an advertisement by Keysian Auctioneers in the Kenya Times Newspaper of 21<sup>st</sup> November, 2009, he admitted that the property that was to be sold on 17<sup>th</sup> December, 2009 was L.R No. Nairobi/Block 93/1267 owned by Francis Kanyanjua Mwangi. He stated that he was taken to the suit property by the said auctioneers' agents and that the 2<sup>nd</sup> defendant did not make a deposit of Kshs. 300,000/- before bidding and did not pay 25% of the purchase price at the fall of the hammer as indicated in the advert.

DW1 stated further that the 2<sup>nd</sup> defendant did not pay the balance of the purchase price within 60 days. He stated that the 2<sup>nd</sup> defendant purchased the suit property at Kshs. 9,000,000/-. He stated that the 2<sup>nd</sup> defendant paid a deposit of Kshs. 2,500,000/- through its advocates

who forwarded the money to M/s Mungalla & company advocates who were acting for the auctioneers. He stated that as at 1<sup>st</sup> April, 2010, the 2<sup>nd</sup> defendant had not paid the deposit and the balance of the purchase price.

DW1 stated that he did not have documentary evidence of the payment of the purchase price. He denied that the 2<sup>nd</sup> defendant acquired the suit property fraudulently and contended that it was not necessary to find out about the plaintiff. He contended that at the time of buying the suit property, the plaintiff had outstanding rates of over Kshs. 3,600,000/- which was settled by the 2<sup>nd</sup> defendant. He stated that the settlement was made in the name of the plaintiff as the registered owner of the property at the time.

In re-examination, DW1 stated that there was no dispute over the payment which was made to Mr. Mungalla. He stated that there was nothing on the advertisement about the outstanding rates and contended that the payment period was extended by 90 days. He stated that a period of about 5 years had passed between the time the 2<sup>nd</sup> defendant bought the suit property and the time it sold the same to the 3<sup>rd</sup> defendant.

The 3<sup>rd</sup> defendant (DW2) adopted his witness statement filed in court on 11<sup>th</sup> August, 2015 as his evidence in chief. He also produced the witness statements of Hans Sodo and James Wanjohi Kamanu together with the documents attached and/or referred to in those statements as Dexh. 2. He testified that he purchased the suit property from the 2<sup>nd</sup> defendant on 4<sup>th</sup> April, 2014 and paid for the same by way of Real Time Gross Settlement(RTGS). He stated that his advocates conducted due diligence and established that the suit property belonged to the 2<sup>nd</sup> defendant and was not encumbered. He stated that his advocates went further and wrote to the Nairobi County Government inquiring if the suit property was a road reserve and that it had not been compulsorily acquired. The letters were produced as part of Dexh. 2.

DW2 stated that the suit property was transferred to him on 26<sup>th</sup> September, 2014. He stated that around April, 2015, he was called by the plaintiff's advocate who informed him that the land he was developing belonged to someone else and that it had been unlawfully acquired. He averred that prior to being called by the plaintiff's advocate, he had no knowledge of any third party claims or investigations which were being carried in respect of the suit property. He contended that there was no caveat or restriction on the register of the suit property when he purchased the same.

He stated that after learning about the existence of this suit, he instructed his advocate to file a defence. He also stopped developments on the property and inquired from the CID on the nature of the investigations which they were carrying out on the suit property. He contended that if a caveat had been registered after a complaint was lodged with the CID, he would have been alerted that there was a problem with the suit property.

In cross-examination by the advocate for the 2<sup>nd</sup> defendant, DW2 reiterated that he carried out due diligence through his advocates. He stated that he also visited the suit property which he found vacant. He referred to a search certificate issued on 27<sup>th</sup> February, 2014 which indicated that the suit property had no encumbrance and was owned by the 2<sup>nd</sup> defendant. He stated that it was on the basis of the foregoing that he purchased the suit property. He contended that he learnt of the investigations regarding the suit property after he had purchased the same and averred that he was in possession and held the original title.

In cross-examination by the advocate for the plaintiff, DW2 referred to the sale agreement dated 4<sup>th</sup> April, 2014 between him and the 2<sup>nd</sup> defendant and averred that the 2<sup>nd</sup> defendant had undertaken to indemnify him if it turned out that the 2<sup>nd</sup> defendant did not have a good title to the suit property. He stated that he learnt of this suit in April, 2015 and that he stopped the construction in July, 2015.

In examination by the court, DW2 stated that when he was buying the suit property from the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant did not disclose that there were ongoing investigations concerning the suit property. He stated that when he entered into the agreement for sale, he had no idea that there was an existing dispute over the suit property.

#### Submissions:

The plaintiff filed submissions on 17<sup>th</sup> April, 2018 and supplementary submissions on 20<sup>th</sup> September, 2018. He submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' titles to the suit property were acquired illegally, unprocedurally and through a corrupt scheme. He referred to sections 25(1) and 26(1) of the Land Registration Act and Article 40(6) of the Constitution and submitted that the orders issued in HCCC No. 555 of 2009 pursuant to which the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired their interest in the suit property were obtained through misrepresentation, fraud and illegality on the part of the 1<sup>st</sup> defendant.

The plaintiff submitted that as demonstrated by PW2, the plaintiff in HCCC No. 555 of 2009 was a fraudster and not a person in law or fact capable of sustaining a suit, obtaining a court decree or executing the same. He argued that HCCC No. 555 of 2009 was therefore a nullity and any orders issued therein could not confer upon the 1<sup>st</sup> defendant an interest in the suit property transferable to the 2<sup>nd</sup> defendant. He contended that the orders issued in HCCC No. 555 of 2009 had at the plaintiff's instance been set aside by orders issued on 21<sup>st</sup> April, 2015 in which the court found that the suit was a nullity and based on a void statement of claim.

The plaintiff submitted that the attachment of the suit property was part of the consequential orders that flowed from a null and void suit which had since been set aside and any interest in the property that had its root in the said nullity was also a nullity. He relied on the case of Association of Member Episcopal Conference in Eastern Africa(AMECEA) v Alfred Romani T/A Romani Architects & 3 others [2002]eKLR where the court cited with approval the holding in the case of Macfoy v United Africa Co. Ltd(1961)3 All ER 1169 that everything which flows from a nullity is itself a nullity and cannot stand.

The plaintiff submitted that the 2<sup>nd</sup> defendant was party to the illegalities, fraud and misrepresentation in the acquisition of the suit property having participated in a flawed auction which breached express provisions of the law. He stated that besides not producing the certificate of

incorporation to prove the existence of the 2<sup>nd</sup> defendant, it was also not in dispute that the property advertised for auction was L.R No. Nairobi/Block 93/1267 and not the suit property. The plaintiff argued that furthermore, DW1 admitted non compliance with fundamental conditions of the auction as advertised such as failure to pay the non-refundable deposit of Kshs. 300,000/- and 25% deposit of the purchase price at the fall of the hammer. The plaintiff cited Rule 17(4) of the Auctioneers Rules 1997 which requires the highest bidder to comply with the conditions of sale and submitted that having breached conditions 2 and 3 of the auction sale, the 2<sup>nd</sup> defendant could not be a purchaser in law and in fact.

It was further submitted by the plaintiff that although the auction took place on 17<sup>th</sup> December, 2009, the 2<sup>nd</sup> defendant defaulted in paying the 25% deposit immediately upon being declared the highest bidder as required by the mandatory provisions of Order XXI Rule 73 of the old Civil Procedure Rules. The plaintiff argued that there was also noncompliance with Order XXI Rule 76 of the old Civil Procedure Rules which provides for a resale where there is default in the payment of the purchase price within the specified period. The plaintiff contended that instead of the suit property being resold, the 2<sup>nd</sup> defendant paid the deposit 4 months after the lapse of the contractual period.

The plaintiff submitted further that there was also non-compliance with the provisions of Order XXI Rule 74 of the old Civil Procedure Rules which required the balance of the purchase price to be deposited in court. The plaintiff contended that the auction also breached Rule 18(3) of the Auctioneers Rules 1997 which obligates an auctioneer to only execute a Memorandum of Sale upon receipt of the proceeds of sale which was not the case herein. The plaintiff submitted that the purported auction was a fraud marred with material irregularities in breach of the Auctioneers Rules and the Civil Procedure Rules rendering it null and void. The plaintiff submitted that there was no evidence that the 2<sup>nd</sup> defendant paid Kshs. 9,000,000/- for the suit property and that the order confirming the sale should not have been issued.

The plaintiff argued that the 2<sup>nd</sup> defendant's title was obtained illegally, unprocedurally and in clear breach of the law rendering it a nullity, impeachable and not capable of protection under section 99(3) of the Land Act, 2012 or at all. Reliance was placed on the case of Kenya Airways Ltd. v Satwant Singh Flora [2013]eKLR and Mapis investment(K)Ltd v Kenya Railways Corporation [2006]eKLR for the submission that no rights can accrue from an illegal contract. The plaintiff cited sections 25 and 26 of the Land Registration Act, 2012, Article 40(6) of the Constitution and Order 22 Rule 75 of the Civil Procedure Rules and the case of Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others [2015]eKLR and submitted that an unlawful process cannot confer any title or proprietary rights.

In his further submission, the plaintiff submitted that on the basis of section 26(1)(b) of the Land Registration Act, 2012 and the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015]eKLR the 3<sup>rd</sup> defendant's title was impeachable even if he was not party to the illegality. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had not acquired good title and that the sale to the 3<sup>rd</sup> defendant could not sanctify the illegalities since the 2<sup>nd</sup> defendant could not pass a good title to the 3<sup>rd</sup> defendant.

The plaintiff submitted that despite having received notification from the CID on the fraudulent transactions involving the suit property, the Chief Land Registrar failed to register a restriction on the title thereof in breach of his statutory duty under section 76 of the Land Registration Act, 2012 thereby aiding the furtherance of the illegalities aforesaid.

The plaintiff contended that the 3<sup>rd</sup> defendant should not be allowed to keep the suit property just because he has already taken it from him stating that equity does not defeat a statute. For this submission, the plaintiff relied on the cases of Kamau Mucuha v Ripples Ltd. [1993]eKLR and Ms Gusii Mwalimu Investment Co. Ltd. & 2 others v Ms Mwalimu Hotel Kisii Ltd. [1996]eKLR. The plaintiff submitted further that sections 79(2) and 80 of the Land Registration Act, 2012 allow rectification of the land register and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have recourse to the 1<sup>st</sup> defendant, his advocate and the 4<sup>th</sup> defendant if necessary.

The 2<sup>nd</sup> defendant filed its submissions on 28<sup>th</sup> August, 2018 where it argued that the plaintiff had raised new issues with regard to the auction which were not specifically pleaded as required by law. The 2<sup>nd</sup> defendant relied on the cases of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000]eKLR and Central Bank of Kenya Ltd. v Trust Bank Ltd & 4 others [1996]eKLR for the submission that fraud must be distinctly alleged and distinctly proved to a standard beyond balance of probabilities.

The 2<sup>nd</sup> defendant submitted that the plaintiff did not adduced any evidence with regard to the auction process so as to lay a basis for the submissions made in that regard. The 2<sup>nd</sup> defendant argued that the issue of irregularities marring the auction process only emerged during cross examination of DW1 who was ambushed by the new claims. The 2<sup>nd</sup> defendant relied on the case of Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014]eKLR where it was held that a court can base its decision on an un-pleaded issue only if it appears from the course followed at the trial that the issue had been left to the court for decision. The plaintiff also relied on the case of Kinyanjui Kamau v George Kamau Njoroge [2015]eKLR where the Court of Appeal disallowed grounds of appeal which raised fresh issues that had not been canvassed before the trial court. The 2<sup>nd</sup> defendant submitted that fraud could not be imputed against the 2<sup>nd</sup> defendant which was not a party to HCCC No. 555 of 2009 and which did not also play a role in the auction process.

Without prejudice to the foregoing submissions, the 2<sup>nd</sup> defendant submitted that the public auction which took place on 17<sup>th</sup> December, 2009 was conducted prior to the commencement of the Civil Procedure Rules, 2010 and as such the applicable rules were Order XXI Rules 73-83 of the repealed Civil Procedure Rules. The 2<sup>nd</sup> defendant submitted on the basis of section 26 of the Auctioneers Act, Chapter 526 Laws of Kenya and the case of Jacob Ochieng Muganda v Housing Finance Company of Kenya Ltd HCCC No. 1436 of 1999 that an irregularity on the part of the auctioneer cannot invalidate a sale and that damages against the auctioneer are recoverable where a person suffers damage owing to the irregularity. The case of Nancy Kahoya Amadiva v Expert Credit & another [2015]eKLR was cited for the submission that having failed to sue the auctioneer, the claim against the 2<sup>nd</sup> defendant for irregularities in the conduct of the auction sale was untenable.

The 2<sup>nd</sup> defendant also relied on Article 159(2)(d) of the Constitution and the case of David Njenga Ngugi v Attorney General [2016]eKLR in imploring the court to exercise its discretion in the interpretation of Order XXI rule 73 of the old Civil Procedure Rules and infer that the use of the word "shall" is not mandatory in the circumstances of this case. The 2<sup>nd</sup> defendant submitted that a strict interpretation of the said

provision as urged by the plaintiff would override a constitutional right to representation by counsel in dealings related to land.

The 2<sup>nd</sup> defendant submitted that the operation of Order XXI rule 73(1) of the old Civil Procedure Rules ought to be construed as that of an overriding objective in equity by an aggrieved party who moves the court under Order XXI rule 79 of the repealed Civil Procedure Rules in an application to set aside a sale on grounds of irregularity or fraud. The 2<sup>nd</sup> defendant submitted that neither the decree holder nor the judgment debtor filed an application to set aside the auction sale prior to the confirmation of the sale by the court and as such, the plaintiff was estopped from bringing a claim in equity outside the statutory window period.

The 2<sup>nd</sup> defendant relied on sections 38 and 54 of the Land Act, 2012 and section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya to argue that dispositions of land by public auction are protected by the law and that having acquired a good title through a judicial process, the plaintiff was barred from bringing a claim against it. The 2<sup>nd</sup> defendant cited sections 25 and 26 of the Land Registration Act, 2012 and submitted that it acquired absolute and indefeasible title over the suit property. The 2<sup>nd</sup> defendant averred that it was a bona fide purchaser for value without notice of any defect in the title of the property. The 2<sup>nd</sup> defendant submitted that the plaintiff had not established that it had actual, constructive or imputed knowledge of the alleged illegalities by the 1<sup>st</sup> defendant and therefore, it was protected by section 53 of the Land Registration Act, 2012.

The 3<sup>rd</sup> defendant filed his submission on 31<sup>st</sup> May, 2018 where he argued that section 26(1) of the Land Registration Act, 2012 must be read together with section 80(2) of the same Act. He submitted that in the case of Alice Chemutai v Nickson Kipkurui Korir & 2 others (supra) relied on by the plaintiff, the court found that applicability of section 26(1) of the Land Registration Act, 2012 was limited by section 80 of the same Act.

The 3<sup>rd</sup> defendant argued that the plaintiff had not tendered cogent evidence to support the claim that the 3<sup>rd</sup> defendant acquired title to the suit property in a way that was illegal, unprocedural or corrupt. He stated that the presumption raised by section 26 of the Land Registration Act, 2012 had therefore not been rebutted. He submitted that the evidence which he produced demonstrated that he followed due process in acquiring the suit property.

The 3<sup>rd</sup> defendant submitted further that he applied for a certificate of official search, wrote to various regulatory institutions and paid valuable consideration to acquire the property. He urged the court to uphold the sanctity of his title and its indefeasibility arguing that the plaintiff had failed to discharge the burden of proving that he acquired the title illegally, unprocedurally or through a corrupt scheme.

The 3<sup>rd</sup> defendant referred to the Black's Law Dictionary, 8<sup>th</sup> edition definition of a bona fide purchaser and the case of Katende v Haridar & Company Ltd. [2008] 2 E.A 173 cited in Lawrence Mukiri v Attorney General & 4 others [2013]eKLR in support of his submission that he was a bona fide purchaser for value without notice of defect in the title of the suit property. He urged the court to be guided by section 80 (2) of the Land Registration Act, 2012 to find that the said section protected the rights of a bona fide purchaser and limited the application of section 26 of the same Act.

The 3<sup>rd</sup> defendant submitted that his title was indefeasible and could only be impeached under circumstances spelt out in Joseph N. K. Ngok v Justice Moijo Ole Keiwua CA No. 60 of 1997. He stated that while interpreting the effect of section 26(1) of the Land Registration Act, 2012 the court in Alice Chemutai Too v Nickson Kipkurui Korir & 2 others case (supra) did not deal with section 80(2) of the same Act which protects an innocent purchaser for value who is in possession.

The 3<sup>rd</sup> defendant relied on the case of Showind Industries v Guardian Bank Ltd. & another [2002]1EA 284 cited in David Ngugi Ngaari v Kenya Commercial Bank Ltd.[2015]eKLR and submitted that the plaintiff's conduct disentitled him to the equitable remedies sought. The 3<sup>rd</sup> defendant argued that delay defeats equity and that despite knowing of the alleged illegal dealings with the suit property, the plaintiff only lodged a complaint with the CID and did not register a caution against the title of the suit property. The 3<sup>rd</sup> defendant argued further that nothing stopped the plaintiff from filing a suit as soon as he had knowledge of the transfer of the property to the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant argued that allowing a party who slept on his rights to benefit from such lethargy would amount to injustice. The court was referred to the case of Smith v Clay (1767)29ER 743 cited in Abigael Barmao v Mwangi Theuri[2015]eKLR in support of the submission that a court of equity has always refused its aid to stale demands where a party has slept on his rights and acquiesced for a long time.

With regard to the vesting order issued in HCCC No. 555 of 2009, the 3<sup>rd</sup> defendant submitted that ownership of the suit property was vested in the 2<sup>nd</sup> defendant pursuant to a court sanctioned public auction sale. The 3<sup>rd</sup> defendant argued that the suit property was not sold by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and that no relationship existed between the said parties. The 3<sup>rd</sup> defendant submitted that the effect of the vesting order was to vest absolute ownership in the 2<sup>nd</sup> defendant and divest the plaintiff of his proprietary rights. The 3<sup>rd</sup> defendant submitted on the basis of the case of Y.F.O Masakhalia & another v Nairobi City Council & 3 others [2010]eKLR that the said order vested absolute ownership of the suit property in the 2<sup>nd</sup> defendant and that the same could not be set aside since the 3<sup>rd</sup> defendant had acquired rights resulting therefrom.

With regard to the effect of the decree setting aside the judgment and striking out the pleadings in HCCC No. 55 of 2009, the 3<sup>rd</sup> defendant submitted that the plaintiff had failed to disclose to the court the existence of this suit. The 3<sup>rd</sup> defendant argued that the plaintiff had also failed to inform the court that resulting from that decree, the court had sold the suit property to a 3<sup>rd</sup> party who was an innocent purchaser for value without notice.

As to whether the registration of the suit property in the name of the 2<sup>nd</sup> defendant was illegal, fraudulent or unprocedural, the 3<sup>rd</sup> defendant submitted that the sale of the suit property to the 2<sup>nd</sup> defendant was pursuant to an order issued in HCCC No. 555 of 2009. The 3<sup>rd</sup> defendant submitted that lawful procedure was followed in the making of the judgment, issuing of the decree and subsequent execution. He contended that until voided, the decree and subsequent court orders were binding on the land registrar since until set aside, obedience of court orders is

mandatory. The 3<sup>rd</sup> defendant submitted that the registration of the 2<sup>nd</sup> defendant as the owner of the suit property was proper and within the law.

The 3<sup>rd</sup> defendant submitted that parties are bound by their pleadings and averred that the conduct of the public auction was an un-pleaded issue. He relied on the case of Malawi Railways Ltd. v Nyasulu (1988) MWSC 3 cited in Independent Electoral and Boundaries Commission case(supra) where the court stated that each party is bound by its own pleadings and cannot be allowed to bring a fresh case without due amendment properly made.

With respect to his notice of claim against the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant submitted that in the agreement of sale dated 4<sup>th</sup> April, 2014, the 2<sup>nd</sup> defendant warranted to him that he had a good and valid title to the suit property which had no competing claims. He submitted that the 2<sup>nd</sup> defendant's warranty contained an indemnity and that without prejudice to his defence against the plaintiff's claim, his claim against the 2<sup>nd</sup> defendant was as pleaded in his notice of claim.

The 3<sup>rd</sup> defendant submitted that he was entitled to special damages from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant submitted that he had pleaded and adduced evidence setting out the particulars of all the expenses that he incurred in the acquisition of the suit property. He relied on the case of Capital Fish Kenya Ltd. v The Kenya Power & Lighting Company Ltd. [2016] eKLR where it was held that special damages must be specifically pleaded and proved. The 3<sup>rd</sup> defendant also cited the case of Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd. [2015]eKLR in support of his submission that as a bona fide purchaser for value, the 3<sup>rd</sup> defendant was entitled to general damages to restore him to the position he would have been had the breach not occurred. The 3<sup>rd</sup> defendant also relied in the case of Rajan Shah T/A Rajan S. Shah & partners v Bipin P. Shah [2016]eKLR in support of his claim for mesne profits.

The 4<sup>th</sup> defendant in its submissions filed 14<sup>th</sup> June, 2018 argued that the Chief Land Registrar merely implemented a vesting order that was issued in favour of the 2<sup>nd</sup> defendant pursuant to a sale sanctioned by the court. The 4<sup>th</sup> defendant argued that failure to comply with the court order could have exposed the Chief Land Registrar to claims of contempt. The 4<sup>th</sup> defendant relied on the cases of Central Bank of Kenya & another v Ratilal Automobiles Ltd. & others, Civil Appl. No. 247 of 2006 as well as the case of Teachers Service Commission v Kenya National Union of Teachers & 2 others, Petition No. 23 of 2013 where it was stated that court orders must be obeyed and that it was not open to any person to choose whether or not to comply.

The 4<sup>th</sup> defendant contended that the order that was presented to the Chief Land Registrar met the threshold of a valid court order as it was signed, dated, sealed and stamped and therefore, the Chief Land Registrar had no reason to reject the same. The 4<sup>th</sup> defendant submitted that the Chief Land Registrar was not a party to the sale and transfer or any dealings between the plaintiff and the defendants in relation to the suit property. On the contention by the plaintiff that the Chief Land Registrar should have registered a restriction against the title of the suit property, the 4<sup>th</sup> defendant submitted that there was no valid reason for such action. The 4<sup>th</sup> defendant submitted that a bona fide purchaser of property for value without notice acquires good title to the property purchased. In support of this submission, the 4<sup>th</sup> defendant relied on the case Katende v Haridar & Company Limited (supra). Finally, the 4<sup>th</sup> defendant submitted the Chief Land Registrar acted in good faith in the line of duty and as such he was not culpable.

#### Determination:

The parties did not agree on the issues to be determined by the court. In their submissions, each party framed its own issues. From the pleadings, I am of the view that the following are the main issues that arise for determination in this suit:

1. Whether the sale of the parcel of land known as L.R No. Nairobi/Block 93/1257("the suit property") to the 2<sup>nd</sup> defendant at a public auction in execution of a decree that was issued in Milimani HCCC No. 555/2009, Julius Mutugi Muchemi v Francis Kanyanjua Mwangi (hereinafter referred to as "the High Court case") in favour of the 1<sup>st</sup> defendant was lawful.
2. Whether the 2<sup>nd</sup> defendant acquired a valid title over the suit property.
3. Whether the 3<sup>rd</sup> defendant acquired a valid title over the suit property from the 2<sup>nd</sup> defendant.
4. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
5. Whether the 3<sup>rd</sup> defendant is entitled to the reliefs sought against the 2<sup>nd</sup> defendant.
6. Who is liable for the costs of the suit and the claim by the 3<sup>rd</sup> defendant against the 2<sup>nd</sup> defendant?

Whether the sale of the suit property to the 2<sup>nd</sup> defendant at a public auction in execution of a decree that was issued in the High Court case in favour of the 1<sup>st</sup> defendant was lawful.

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

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

In the case of Railal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314, the court held that *allegations of fraud must be strictly proved to a*

standard which is more than a balance of probabilities but not beyond any reasonable doubt. The court stated as follows at page 317:

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

From the evidence adduced by the plaintiff, it was demonstrated beyond any reasonable doubt that the 1<sup>st</sup> defendant who filed the High Court case was a fraudster and that the case was filed solely for the purposes of fraudulently acquiring the suit property and depriving the plaintiff of the same. The claim brought against the plaintiff in the High Court case was fake and was conjured up by the 1<sup>st</sup> defendant for the purposes of achieving his fraudulent intent aforesaid. Whereas the High Court case was filed in the name of Julius Mutugi Muchemi, the Identity Card No. 2913480 a copy of which the 1<sup>st</sup> defendant gave to his advocates Mungalla & Company Advocates turned out to be that of one, Mugo Gitari. This shows that the 1<sup>st</sup> defendant used false identity in instituting the High Court case and it may never be known whether the person who instituted the High Court case was Julius Mutugi Muchemi or Mugo Gitari.

On 9<sup>th</sup> April, 2015, the High Court on application by the plaintiff set aside the decree that was obtained by the 1<sup>st</sup> defendant in the High Court together with all consequential orders that were made pursuant thereto and granted the plaintiff unconditional leave to defend the suit. On 9<sup>th</sup> February, 2016, the High Court struck out the High Court case after establishing that the firm, James Mbugua Advocates which purportedly filed the suit on behalf of the 1<sup>st</sup> defendant did not exist in the year 2009 when the suit was filed. It was not disputed that after the filing of the High Court case by the 1<sup>st</sup> defendant who was a fraudster, he obtained judgment against the plaintiff and executed the same by attaching and selling the suit property which was registered in the name of the plaintiff.

From the evidence on record, there is no doubt that the judgment that was obtained by the 1<sup>st</sup> defendant against the plaintiff was fraudulent the same having been obtained through misrepresentation and concealment of facts to the court with the intention of defrauding the plaintiff of the suit property. When the High Court was furnished with the true facts of the case, the High Court had no hesitation in setting aside the fraudulent judgment and subsequently striking out the entire fictitious claim. The question that now arises is the effect of the acts done pursuant to a fraudulent judgment.

I find no difficulty in stating that a fraudulent judgment is not a judgment at all. It is a nullity and nothing done pursuant thereto however innocent can derive any validity from the judgment. In the Texas case of City of Lufkin v McVicker, 510 S.W.2d 141, 144 (Tex. Civ. App. 1973), the court stated that:

*“As was said in Southern Surety Co. v. Texas Oil Clearing House, 281 S.W.2d 1045, 1046(Tex.Comm.App. 1926, jdgmt. adopted):*

*“Strictly speaking, a void judgment is one which has no legal force or effect whatever. It is an absolute nullity and such invalidity may be asserted by any person whose rights are affected, at any time and at any place. It need not be attacked directly, but may be attacked collaterally whenever and wherever it is interposed. Usually it carries the evidence of its invalidity upon its face, while a voidable judgment is one apparently valid, but in truth wanting in some material respect; in other words, one that is erroneous. Such vice may be the want of jurisdiction over the person or other similar fundamental deficiency, but which vice does not affirmatively appear upon the face of the judgment.”*

In the Supreme Court of Virginia case of Jones v Willard 224 Va. 602, 607 (Va. 1983), the court stated that:

*“The judgment of a court, procured by intrinsic fraud, i.e., by perjury, forged documents, or other incidents of trial related to issues material to the judgment, is voidable by direct attack at any time before the judgment becomes final; the judgment of a court, procured by extrinsic fraud, i. e., by conduct which prevents a fair submission of the controversy to the court, is void and subject to attack, direct or collateral, at any time.”*

In Fritts v Krugh, Supreme Court of Michigan, 92 N.W.2d 604, 354 Mich. 97(1958), the court stated that:

*“A “void” judgment, as we all know, grounds no rights, forms no defense to actions taken thereunder, and is vulnerable to any manner of collateral attack (thus here, by habeas corpus). No statute of limitations or repose runs on its holdings, the matters thought to be settled thereby are not res judicata, and years....later, when the memories may have grown dim and rights long been regarded as vested any disgruntled litigant may reopen the old wound and once more probe its depths. And it is then as though trial and adjudication had never been.”*

Since the judgment of the High Court in favour of the 1<sup>st</sup> defendant was void, the execution thereof was equally void. In the circumstances, the auction sale that was conducted at the instance of the 1<sup>st</sup> defendant in which the 2<sup>nd</sup> defendant acquired the suit property was a void exercise. It is my finding therefore that the sale of the suit property to the 2<sup>nd</sup> defendant was unlawful the same having resulted from a fraudulent, null and void process.

Whether the 2<sup>nd</sup> defendant acquired a valid title over the suit property.

In Macfoy v United Africa Co. Ltd. (supra), Lord Denning stated as follows at page 1172:

*“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to*

*stay there. It will collapse.”*

I have already held that the auction sale through which the 2<sup>nd</sup> defendant acquired the suit property was a nullity the same having been carried out in execution of a void judgment. I am of the view that the 2<sup>nd</sup> defendant could not acquire a valid title from an invalid sale. I am in agreement with the 2<sup>nd</sup> defendant that there is no evidence linking him to the 1<sup>st</sup> defendant and his fraudulent scheme. I am also in agreement that the 2<sup>nd</sup> defendant may have been a bona fide purchaser of the suit property for value without notice of the 1<sup>st</sup> defendant's fraud. I am of the view however that the 2<sup>nd</sup> defendant's title being rooted on a fraudulent and illegal decree cannot stand against the plaintiff's interest in the property.

The 2<sup>nd</sup> defendant was registered as the owner of the suit property on 1<sup>st</sup> August, 2012 when The Land Registration Act, 2012 was in force. Section 26 of the Land Registration Act, 2012 provides as follows:

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

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

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

It is clear from the foregoing that a title procured through fraud or misrepresentation to which the holder is proved to be a party; or which is procured illegally, unprocedurally, or through a corrupt scheme is not protected by the law. The 2<sup>nd</sup> defendant's case was that it purchased the suit property innocently at a public auction sanctioned by the court without notice of the 1<sup>st</sup> defendant's fraud. This fact was not contested. However, I have already found for reasons given that the entire process leading to the said auction was a charade. The whole litigation process in the High Court was illegal and unprocedural. The decree that was obtained by the 1<sup>st</sup> defendant that entitled him to sell the suit property was tainted with illegality. The 1<sup>st</sup> defendant having attached and sold the suit property illegally, the 2<sup>nd</sup> defendant's title which was acquired through that illegal process was defeasible. In the case of **Alberta Mae Gacie v Attorney General & 4 Others [2006] eKLR** the court stated as follows:

*“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”*

It was argued by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the 2<sup>nd</sup> defendant did not acquire its title from the 1<sup>st</sup> defendant and as such was not affected by the 1<sup>st</sup> defendant's acts of fraud. I see no merit in this argument. It was not contested that the suit property was sold pursuant to a fraudulent decree that was obtained by the 1<sup>st</sup> defendant and that the property was put up for sale by the 1<sup>st</sup> defendant through its advocates after attachment. The effect of the 1<sup>st</sup> defendant's fraudulent sale of the suit property would be the same whether he sold the property directly to the 2<sup>nd</sup> defendant rather than through a fraudulent court process which he adopted.

In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court of Appeal clarified the distinction between **legal rights and equitable interests when it comes to the invocation of the doctrine of innocent purchaser as follows:**

*“...Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests...Snell's Principles of Equity (supra) illustrate the issue, thus:-*

*“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.*

*1. The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”*

*It is also stated therein that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests”. So that, even if the issue of bonafide purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.”*

In the circumstances of this case, it is my finding that the 2<sup>nd</sup> defendant did not acquire a valid title over the suit property and even if it did,

its title could not defeat the plaintiff's legal rights over the same property.

Whether the 3<sup>rd</sup> defendant acquired a valid title over the suit property from the 2<sup>nd</sup> defendant.

For the reasons which I have given above, it is my finding that the 3<sup>rd</sup> defendant did not acquire a valid title from the 2<sup>nd</sup> defendant. Since the 2<sup>nd</sup> defendant did not acquire a valid title at the auction sale, he had not title which he could transfer to the 3<sup>rd</sup> defendant. I wish to add that as at the time the 2<sup>nd</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant had notice that the process through which the suit property was sold to it was the subject of inquiry by the Directorate of Criminal Investigations. As I have stated earlier with regard to the 2<sup>nd</sup> defendant, there was no evidence that the 3<sup>rd</sup> defendant was involved in or was aware of the fraud that was at the root of the title when he acquired the suit property. As was held in **Alberta Mae Gacie v Attorney General & 4 Others(supra) and Arthi Highway Developers Limited v West End Butchery Limited & 6 others(supra)**, **the doctrine of innocent purchaser without notice cannot come to the 3<sup>rd</sup> defendant's aid against the plaintiff who holds a valid legal title over the suit property.**

Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

I am satisfied that the plaintiff has proved his claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on a balance of probabilities and that he is entitled to the reliefs sought in the further amended plaint dated 8<sup>th</sup> December, 2015 save for damages. The plaintiff has not established any wrong doing against the 4<sup>th</sup> defendant and as such he is not entitled to any relief as against him. The plaintiff had contended that since it had been brought to the attention of the Chief Land Registrar that the Directorate of Criminal Investigations was investigating the circumstances under which the suit property was transferred to the 2<sup>nd</sup> defendant, the Chief Land Registrar had a duty to register a restriction against the title of the property. This contention is not based on any law or practice. Under section 76(1) of the Land Registration Act, 2012, the Registrar has a discretionary power to register a restriction against a title to any land on its own motion or on application by any person interested in the land. There no law placing an obligation upon the Land Registrar to place a restriction on a title in every case that it has been brought to his attention that the title is under investigation by the police. Neither the plaintiff nor the Directorate of Criminal Investigations requested the Chief Land Registrar to place a restriction on the title of the suit property. The plaintiff had a right to apply to the Chief Land Registrar to put a restriction on the title of the suit property if he felt that it was necessary. The plaintiff having failed to apply to the Registrar to place a restriction on the title of the suit property cannot fault the Registrar for not acting on its own motion to place such restriction.

With regard to the damages sought by the plaintiff, the plaintiff did not tender any evidence of loss suffered as a result of the 1<sup>st</sup> defendant's acts of fraud. A part from stating that he wanted to develop the suit property, no evidence was led as to the nature of the development he wanted to carry out, what it would have costed him and the income he was likely to derive. It is my finding that general damages for fraud and misrepresentation was not proved. With regard to the plaintiff's alternative prayer for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to be ordered to transfer the suit property to him, the same would have been granted only if the plaintiff had pleaded trust. The suit property having been transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants through a fraudulent process, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants held the same in trust for the plaintiff. In the circumstances, the court in exercise of its equitable jurisdiction would have had no difficulty restoring the suit property to the lawful owner by directing the 3<sup>rd</sup> defendant to transfer the same to the plaintiff. Since trust was not pleaded, I am unable to grant the alternative prayer. The prayer for the rectification of the register is however available to the plaintiff.

Whether the 3<sup>rd</sup> defendant is entitled to the reliefs sought against the 2<sup>nd</sup> defendant.

A notice of claim by a defendant against a co-defendant served under Order 7 rule 8 of the Civil Procedure Rules is treated as a cross-suit and unless ordered otherwise, the court is supposed to determine the same at the same time as the claim between the plaintiff and the defendant. The 3<sup>rd</sup> defendant in his defence raised a claim against the 2<sup>nd</sup> defendant for special damages of Kshs 82, 408,155/-, general damages, mesne profits together with interest at court rates. The 3<sup>rd</sup> defendant averred that in the agreement for sale dated 4<sup>th</sup> April, 2014 between him and the 2<sup>nd</sup> defendant in respect of the suit property, the 2<sup>nd</sup> defendant warranted to him that it had a good and valid title to the suit property with no competing claims. In its response to the 3<sup>rd</sup> defendant's claim, the 2<sup>nd</sup> defendant denied that it was liable to the 3<sup>rd</sup> defendant for the warranty that it had given in the agreement for sale aforesaid. The 2<sup>nd</sup> defendant maintained that it had a valid and indefeasible title to the suit property when it sold the property to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant averred that it was not liable for the developments that the 3<sup>rd</sup> defendant had carried out on the suit property and could not be called upon to indemnify the 3<sup>rd</sup> defendant in respect thereof.

I have already made a finding that the 2<sup>nd</sup> defendant did not have a valid title to the suit property. From the evidence on record, before the 2<sup>nd</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant was aware of the investigations that had been instituted by the Directorate of Criminal Investigations regarding the circumstances under which the suit property was transferred to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant's director, DW1 admitted that he was summoned by the Directorate of Criminal Investigations and he recorded a statement in respect to the suit property. He stated in his evidence in cross examination that he was informed by the police that someone had complained about the sale of the suit property. He told the court that he did not bother to find out about the party who had an interest in the property. In his evidence, the 3<sup>rd</sup> defendant told the court that at the time of entering into an agreement for sale with the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant did not disclose that there were ongoing investigations on the manner in which the 2<sup>nd</sup> defendant acquired the property. With full knowledge that there was ongoing criminal investigation on the circumstances under which it acquired the suit property, the 2<sup>nd</sup> defendant warranted to the 3<sup>rd</sup> defendant that it had a valid title to the property and agreed to indemnify the 3<sup>rd</sup> defendant in the event that its title to the property was found to be wanting.

The court having found that the 2<sup>nd</sup> defendant did not have a valid title to the suit property when he entered into agreement for sale with the 3<sup>rd</sup> defendant in respect thereof and that the 3<sup>rd</sup> defendant did not acquire a valid title to the property, the 2<sup>nd</sup> defendant is liable to the 3<sup>rd</sup> defendant on its warranty. The 3<sup>rd</sup> defendant is entitled to be indemnified in respect of the entire loss he has incurred as a result of the 2<sup>nd</sup> defendant's breach of the said warranty. The 3<sup>rd</sup> defendant has in the circumstances established his claim against the 2<sup>nd</sup> defendant. The 3<sup>rd</sup>

defendant claimed a sum of Kshs. 82,408,155/- as special damages. The law on special damages is settled that the same must be pleaded, particularised and strictly proved. The 3<sup>rd</sup> defendant set out in his notice of claim the particulars of the said amount claimed as special damages. With regard to proof, the 2<sup>nd</sup> defendant did not support some of the expenditures with receipts or invoices. I found the claims for legal fees; agency fees; change of user fees; Architectural design, drawings and submission fees; architectural supervision fees; structural design, drawing and submission fees; structural engineer supervision fees; mechanical design fees; electrical design fees and NEMA documentation fees not proved. The remaining claim in the sum of Kshs. 78,173,655/- was proved to the required standard. With regard to general damages, the 3<sup>rd</sup> defendant did not prove that he suffered any damages over and above special damages as a result of the 2<sup>nd</sup> defendant's breach of the said agreement for sale. As concerns the claim for mesne profits, no basis was laid for the same.

Who is liable for the costs of the suit and the claim by the 3<sup>rd</sup> defendant against the 2<sup>nd</sup> defendant?

Costs is at the discretion of the court. As a general rule, costs follow the event unless ordered otherwise by the court for good reason. In this case, the plaintiff has proved his claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff is therefore entitled to his costs from the three defendants. However, I have noted that if the plaintiff had brought this suit earlier, the sale of the suit property to the 3<sup>rd</sup> defendant would have been avoided. I will therefore excuse the 3<sup>rd</sup> defendant from bearing the plaintiff's costs which will be recovered from the 1<sup>st</sup> and 2<sup>nd</sup> defendants only. As concerns the costs for the cross-suit by the 3<sup>rd</sup> defendant against the 2<sup>nd</sup> defendant, no reason has been put forward to warrant a departure from the general rule on costs. The 2<sup>nd</sup> defendant shall bear the costs of the cross suit. As concerns the 4<sup>th</sup> defendant against whom the plaintiff's case was not proved, I will make no order as to costs in view of the circumstances of this case.

In conclusion, I hereby make the following orders;

1. Judgment is entered for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in terms of prayers I, II, III, and IV of the amended plaint dated 8<sup>th</sup> December, 2015 together with costs to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
2. The plaintiff's suit against the 4<sup>th</sup> defendant is dismissed.
3. Judgment is entered for the 3<sup>rd</sup> defendant against the 2<sup>nd</sup> defendant in the sum of Kshs. 78,173,655/- together with costs and interest at court rates from the date hereof until payment in full.

**Delivered and Dated at Nairobi this 25<sup>th</sup> day of July 2019**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Litoro for the Plaintiffs

N/A for the 1<sup>st</sup> Defendant

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

Mr. Muchemi for the 3<sup>rd</sup> Defendant

Mr. Kamau for the 4<sup>th</sup> defendant

C. Nyokabi-Court Assistant