

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO 36 OF 2017

JOEL KANGETHE IKURO AND JAMES WAMWATI MAMBO
(Suing as Administrators in the Estate of the
Late George Mambo(deceased)
PLAINTIFFS

VERSUS

SIMON MUNYI THEURI 1ST
DEFENDANT

WILLIE MAHUNGU NDAMBI.....2ND
DEFENDANT

REGISTRAR OF TITLES 3RD
DEFENDANT

AND

DAVID ABDULRAHMAN &
SAAD MIGDADA SAAD T/A ABDULRAHMAN
SAAD & CO. ADVOCATES 1STINTERESTED
PARTY

FIVE STAR CONSTRUCTION
COMPANY LIMITED.....2ND INTERESTED
PARTY

AS CONSOLIDATED WITH
HCCOMM/E188 OF 2019

DIANA MAISIE OSANO ODERO

T/A ODERO & ASSOCIATES ADVOCATES..
.....PLAINTIFF

VERSUS

DAWID ABULRAHMAN SAAD MIGDAD

SAAD T/A ABDULLRAHMAN SAAD &
COMPANY ADVOCATES 1ST
DEFENDANT

FIVE STAR CONSTRUCTION

COMPANY LIMITED 2ND
DEFENDANT

JUDGMENT

Background

1. This Judgment concerns two consolidated matters, ELC 36 of 2017 and HCCC E188 of 2019.

ELC 36 of 2017

2. Vide a Plaint dated 13th January, 2017, the two Plaintiffs seeks the following reliefs as against the Defendants:

- i. A declaration that Land Reference No 36/III/215 belongs to and is rightly registered in favour of George Mambo by dint of the Indenture dated 11th May, 1971 and registered in Volume N 31 Folio 43/14.***
- ii. An order compelling the 3rd Defendant to rectify their records by cancelling the entry made in the name of Simon Munyi Theuri and in its***

place insert the name George Mambo as the owner of the suit property.

- iii. An order compelling the 3rd Defendant to rectify their records by cancelling the entry made in Volume N 116 Folio 287/15 thereby permanently removing the name of Willie Mahugu Ndabi as the owner of the suit property.*
- iv. A mandatory and permanent injunction to issue restraining the Defendants by themselves, their alienating, selling, interfering or otherwise disposing off the suit property.*
- v. Costs of this suit.*
- vi. Any other of further relief that the Honourable Court may deem just and expedient to grant.*

3. The Plaintiffs' case is that at all material times, George Mambo (now deceased) was the duly registered owner of all that parcel of land being L.R No 36/III/215 situated in Eastleigh (*hereinafter the suit property*) having purchased the same from Amritben Narshi (wife of Raishid Hansraj) and was registered as owner of the same on 11th May 1971 and that the Indenture thereof was registered in volume n. 31 folio 43/14, file 9811 in the records held by the 3rd Defendant.

4. According to the Plaintiffs, upon purchasing the property, the deceased took out and was granted a mortgage over the suit

property by Jasvint Kaur, the wife of Abhai Singh Grewal in the amount of Kshs. 35,000 and that this charge was registered in volume n.31 folio 43/15, file 9811 in the records held by the 3rd Defendant.

5. It was averred that the said mortgage was discharged vide an Indenture of reconveyance dated 16th January 1973 which was registered in volume n.31 folio 43/16 in the records held by the 3rd Defendant and that the the deceased held the property as owner untill his demise on 17th October 1980; that thereafter, the property remained as part of the deceased's estate and has not been sold or otherwise alienated and that the Estate has in their possession all the original conveyances relating to the suit property.
6. Despite the foregoing, they urged, on or about 28th November 2016, they were informed by their tenants residing in the premises erected on the suit property that the 2nd Defendant through a letter dated 25th November, 2016 had laid claim over the property and that the letter was delivered to the property by the O.C.S Pangani Police Station.
7. Among the documents annexed to the letter were copies of the national identity cards of Simon Munyi Theuri and Willie Mahugu Ndabi; their respective PIN certificates and an Indenture of conveyance dated 14th January 2013 registered in volume n.116 folio 287/15.

- 8.** The Plaintiffs aver that upon receipt of the information aforesaid, they moved with speed and undertook a search at the lands registry which revealed that the 2nd Defendant is the registered owner of the property and that the search further revealed that the 2nd Defendant had purchased the property from the 1st Defendant who had allegedly purchased the same from Amritben Narshi (wife of Raishid Hansraj) and was registered as owner thereof on 11th May 1971.
- 9.** According to the Plaintiffs, even more disturbing and distressing was the discovery that the 3rd Defendant holds in their records in file no. IR 9811 two (2) Indentures of conveyance in favour of the 1st Defendant from Amritben Narshi (wife of Raishid Hansraj) both dated 11th May 1971, which are manifestly different despite carrying the same information.
- 10.** The Plaintiffs aver that as they awaited to be furnished with the official search by the 3rd Defendant, they filed a report at the Directorate of Criminal Investigations Land Fraud Unit and an investigation was commenced. Nonetheless, the 2nd Defendant has continued to threaten them with eviction through unlawful means and in the absence of any eviction order issued by this court.
- 11.** It is the Plaintiffs' case that the Defendants have jointly connived, colluded and conspired to illegally, unjustifiably and fraudulently deprive, deny and/or disenfranchise the

estate of George Mambo, of the ownership, use and benefit of their property by *inter-alia*, altering, deleting, removing and/or erasing information from volume n.31 folio 43/14 held by the 3rd Defendant relating to the ownership of L.R. No. 36/III/215 by the late George Mambo.

12. Further, it was contended that the Defendants altered, inserted and/or registered Simon Munyi Theuri as owner of the suit property in volume n.31 folio 43/14 on 11th May 1971; removed the deed file no. IR 9811 held by the 3rd Defendant; and altered the conveyance records as regards the Indenture of conveyance from Amritben Narshi dated 11th May 1971 in favour of the late George Mambo.
13. The 1st and 2nd Defendants filed their Defence and Counterclaim on 23rd February, 2017. They denied the allegations contained in the Plaint and contended that the 1st Defendant no longer has any interest in the suit property, having relinquished and disposed of all his rights thereto.
14. The 2nd Defendant filed a counterclaim seeking the following reliefs:
 - i. ***That there be a declaration that the 2nd Defendant is the rightful owner of the suit premises.***
 - ii. ***That the 2nd Defendant prays that all the people occupying the suit premises be compelled by an order of this court to vacate the suit premises***

forthwith and do give him vacant possession thereof the OCS Pangani Police Station do enforce this order.

- iii. That the Plaintiffs jointly do pay the 2nd Defendant through this court all the monthly rent collected form the tenants since the 14th Day of January, 2013 in a lump sum amount with monthly rates to be approved by a rent officer to be appointed by this court.***
- iv. Any other relief as this court may deem expedient.***
- v. Costs of this suit plus interests.***

15. The 3rd Defendant filed its Defence on 14th February 2018. It denied the allegations set out in the Plaint and stated that, if the suit property was at all registered in the name of the 2nd Defendant, such registration was undertaken on the basis of documents presented to the 3rd Defendant's office and that due diligence was exercised and the documents presented were believed by the Registrar to be genuine.

16. The 3rd Defendant further averred that it cannot be held liable for any fraud that may have been perpetrated by the 1st and 2nd Defendants, if at all, and in particular not for any acts committed by those parties, whether arising from fraud, professional misconduct, or otherwise, where the 3rd Defendant exercised all due care.

- 17.** According to the 3rd Defendant, the Plaintiff failed to serve it with the mandatory notice to institute legal proceedings required under **Section 13A** of the **Government Proceedings Act** and reserves the right to raise a preliminary objection thereunder and that should the court find it culpable for any act or omission arising from the fraudulent acts, omissions, or misrepresentations of the 1st and 2nd Defendants, then it shall seek indemnity against the said Defendants pursuant to **Order 1 Rule 24** of the **Civil Procedure Rules**.
- 18.** The 1st and 2nd Interested Parties, referencing themselves as the 4th and 5th Defendants, filed a Defence and cross-claim on 16th June 2022. They denied the assertions contained in the Plaintiff and stated that the 2nd Interested Party entered into an agreement for the sale and purchase of the suit property from the 2nd Defendant, Mr. Willie Mahugu Ndabi.
- 19.** According to the Interested Parties, its engagement with the 2nd Defendant was on the strength of the title documents presented during the transaction, particularly the title that appeared free from any encumbrance, and that the 2nd Defendant went so far as to depone, by consent in these proceedings, that an understanding had been reached with the Plaintiffs in relation to the dispute.
- 20.** It was averred that the 2nd Interested Party proceeded to pay the requisite 10% deposit of Kshs. 4,500,000 together with other payments totalling Kshs. 12,300,000 and that the

deposit and related payments were made through the 6th Defendant and were thereafter remitted by the 2nd Defendant to his conveyancing advocates.

- 21.** They contend that thereafter, the sale of the suit property became untenable, particularly in light of allegations that the 2nd Defendant had a history of disregarding court orders and engaging in fraudulent land transactions and that the 2nd Defendant is an accused person in CM Court Thika Criminal Case No. 1999 of 2012 and CM Court Thika Criminal Case No. 4419 of 2014, where he is charged with obtaining money by false pretences contrary to **Section 313** of the **Penal Code** in transactions relating to the suit property. As a consequence, they rescinded the agreement citing breach of contract and demanded reimbursement of the monies paid as deposit.
- 22.** It was averred by the Interested Parties that in response of the above actions, the 2nd Defendant's advocate unilaterally transferred the property to the 2nd Interested Party on 7th of May 2018. Thereafter, the 2nd Defendant, through its counsel proceeded to file a suit against them in HCCOM E188 of 2019 to recover the remaining amount of the purchase price for L.R. 36/III/215 and proceeded to obtain ex-parte orders therein.
- 23.** According to the Interested Parties, it is only after the filing of the suit at the High Court Commercial Division that they became aware that this suit was still alive as well as pending

criminal matters and that it was improper, illegal and fraudulent for the 2nd Defendant to enter into a sale agreement for the suit property despite the fact that there was an injunction in force granted so as to preserve the suit property until the hearing and determination of this suit.

- 24.** The Interested Parties maintained that the 2nd Defendant did not enter into the sale and purchase agreement with them with clean intentions and that it was always his intention to pass off the property knowing full well that he had no legal right to do so and there was an order barring him from doing so.
- 25.** On the other hand, it was averred that the 2nd Defendant's advocates retained the sum of Kshs. 12,300,000 paid to them and failed to refund the money even after the contract was rescinded and that the actions of the 2nd Defendant amounted to a breach of contract.
- 26.** Further, it was averred that the 2nd Defendant's advocate breached her duties as an officer of the court by using court processes to enable her client to circumvent his obligations, and that she also acted in breach of the LSK Conditions of Sale by purporting to transfer the property to the 2nd Interested Party, a function which, according to them, ought to have been undertaken by the 1st Interested Party.
- 27.** The Interested Parties seek vide the counterclaim for the following reliefs:

- i. An order that the 5th Defendant is a third-party purchaser for value without notice hence not liable for entering the sale and purchase agreement touching on L.R 36/III/215 nor the subsequent transfer.*
- ii. Reimbursement in the amount of Kenya Shillings Twelve Million Three Hundred Thousand (Kshs 12, 300,000) paid by the 5th Defendant as deposit for the sale and purchase of L.R 36/III/215 and any other payments paid thereof.*
- iii. An order compelling the Chief Land Registrar to revoke the transfer of the property to the 5th Defendant and to expunge the entry indicating the same.*
- iv. General damages for breach of contract.*
- v. Costs of this suit.*
- vi. Interests on prayers ii, iv, v above at court rates and*
- vii. Any other orders this court may deem just and fit to grant.*

HCCC E118 OF 2019

28. Vide an Originating Summons dated 13th June, 2019, the Plaintiff in HCCC No. E118 of 2019 seeks the following reliefs:

- i. That an account be taken and the Defendants be ordered to pay the amount still outstanding in the sale transaction of Land Reference Number 36/III/215 Eastleigh, Nairobi and interests thereon at the rate of 15.5% per annum from 19th February, 2018 until payment in full in terms of the 1st Defendants professional undertaking given to the Plaintiff.***
- ii. That the 2nd Defendant be restrained from charging, transferring, mortgaging and or dealing with the property in any manner whatsoever pending the hearing of these summons.***
- iii. Any other relief as the court may deem just and fair to award as the circumstances of the case shall demand.***
- iv. That costs and interests of this suit shall be awarded to the Plaintiff.***

29. The Plaintiff herein is a firm of Advocates which acted for the vendor, Willie Mahungu Ndambi in the sale of the L.R No Volume 36/III/215 Eastleigh to the 2nd Defendant, represented in the transaction by the 1st Defendant

30. It is its case that a sale agreement was executed on 19th February 2018 between the vendor, Willie Mahungu Ndambi, and the purchasers, Omar Elmi Qaire and Yusuf Hashi Farah,

and that pursuant to the agreement, a deposit of Kshs 4,500,000 was paid on 15th February 2018, while the balance of the purchase price was to be paid to the vendor's advocate on or before completion, which was scheduled to take place within ninety (90) days.

- 31.** According to the Plaintiff, on 15th March 2018, the 1st Defendant wrote to them indicating that the purchasers, Omar Elmi Qaire and Yusuf Hashi Farah, were in the process of incorporating a company known as Five Star Construction Limited, through which they intended to complete the purchase. They accordingly requested that the company be substituted as the purchaser in the transaction.
- 32.** Following that request, it was averred, the transfer document was prepared in the name of the substituted purchaser, Five Star Construction Limited, upon production of the company's certificate of incorporation and that the transfer was subsequently completed on 7th May 2018 under presentation no. 288.
- 33.** It was averred that a search conducted on 11th June 2018 confirmed that Five Star Construction Limited had been duly registered as the proprietor of the suit property and that thereafter, a copy of the transfer was transmitted to it vide the Plaintiff's letter ref. AO/CONV/WMN/18/1 dated 8th October 2018 and vacant possession was delivered on 12th September 2018, whereupon the 1st Defendant and the 2nd Defendant, as the registered proprietors, were informed by

telephone to take over the property either personally or through their agents.

- 34.** According to the Plaintiff, vacant possession was achieved by clearing the parcel and partially demolishing the dilapidated structure standing thereon.
- 35.** The Plaintiff further avers that on 17th September 2018, a letter was delivered to the 1st Defendant formally setting out the foregoing facts; that in the same letter, demand was made for immediate remittance of the balance of the purchase price, being Kshs 40,500,000 and that the 2nd Defendant, as the new owner, applied for and obtained authority from the Nairobi City County Government on 13th September 2018 to undertake maintenance works on the premises, which, according to them confirmed that the property had already been taken over.
- 36.** According to the Plaintiff, it sent numerous further correspondence demanding payment which the Defendants ignored; that it had, at the request of the vendor, given undertakings for the payment of various sums to his creditors, including through the Thika Law Courts, DPP Thika and DCIO Thika and that these undertakings have now come to naught due to unethical practice of the Defendants.
- 37.** The Plaintiff further states that in Criminal Case No. 1999 of 2012 at Thika Chief Magistrate's Court, the vendor had been convicted for failure to reimburse the complainants therein, which failure they attribute to the Defendants' refusal to

release the balance of the purchase price despite all the conditions of the sale having allegedly been fulfilled by the Plaintiffs' firm.

- 38.** The Plaintiff maintains that it continues to suffer loss and damage because its law firm is unable to honour the professional undertakings it had issued on behalf of the vendor, whose intention in selling the property was primarily to settle his creditors.
- 39.** In response to the Originating Summons, the 1st and 2nd Defendants filed a replying affidavit sworn by Omar Elmi Qaire, the Director of the 2nd Defendant dated 2nd September 2019.
- 40.** He confirmed that the 2nd Defendant had entered into an agreement with the vendor to purchase the suit property known as L.R. No. 35/III/215 in Eastleigh. However, he maintained that vacant possession was never been delivered despite being a fundamental term of the sale transaction. According to him, despite numerous requests by their advocates, the vendor failed to ensure that the property was vacant, thereby breaching the agreement.
- 41.** He further deponed that because of the vendor's failure to provide vacant possession, the 2nd Defendant's advocates demanded either vacant and quiet possession of the property or reimbursement of the monies already paid. He asserted that the Plaintiff and the vendor failed to take those requests

seriously and instead sought to shift responsibility to the 2nd Defendant.

- 42.** He maintained that there was no assurance that vacant possession would ever be provided, particularly because there were persons on the property who claimed ownership and violently resisted attempts by the 2nd Defendant to fence off the land.
- 43.** The 2nd Defendant's Director also denied any responsibility for the professional undertakings issued by the Plaintiff and the vendor, stating that the same was given independently at the vendor's request and not at the instance of the 2nd Defendant or its advocates.
- 44.** He deponed that any losses arising from those undertakings cannot therefore be visited upon the 2nd Defendant. He further stated that the 2nd Defendant had incurred costs and losses while awaiting vacant possession and, despite obtaining permits, could not proceed with the development of the property because possession had not been granted.
- 45.** Finally, he deponed that the sale agreement contained an arbitration clause requiring all disputes arising therefrom to be referred to arbitration in the first instance. He therefore contended that the suit ought to be dismissed and referred to arbitration, and further maintained that the Plaintiff was undeserving of the orders sought, had not come to court with clean hands, and had instituted the suit in bad faith.

Hearing and Evidence

- 46.** The matter proceeded for hearing on 20th March, 2024. PW1 was Joel Kangethe Ikuro, a farmer. He adopted his witness statement dated 13th January, 2017 as his evidence in chief and produced the documents dated 13th June, 2023 as PEXHB1. It was his oral evidence that the suit land originally belonged to his late father, who purchased it in 1970 from an Asian vendor for Kshs. 70,000. Of that amount, Kshs. 35,000 was paid in cash, with the balance financed through a mortgage arrangement, and that his father passed away in 1980, following which his mother took over the management of the property.
- 47.** PW1 testified that the land had been leased to Kenya Cooperative Creameries from 1971 to 1999 and that the family retained documentation evidencing that arrangement. According to him, the company paid land rent on behalf of his parents, and he had documents confirming the same. He further stated that the original title had never been lost and remained in the family's possession. He denied that the title had ever been replaced as alleged.
- 48.** Following the death of his mother, he stated, he assumed responsibility of managing the property; that in 2016, the 1st and 2nd Defendants emerged claiming ownership of the land and presented him with what they alleged was a title document and that he remains in possession of the original title documents and indentures relating to the suit property.

- 49.** It was the evidence of PW1 during cross-examination that the grant issued to him on 9th November 2016 was obtained approximately 26 years after the death of his grandfather. He explained that the intention was to facilitate the subdivision and administration of the land among the family members. He stated that there are eight siblings in the family; that he is the fourth born, and that he serves as the administrator of the Estate.
- 50.** PW1 further testified that he did not have a copy of the green card relating to the suit property. He stated, however, that the family has a tenant who pays rent in respect of the land. According to him, the property was discharged in 1973 and the family has evidence of that discharge, although he did not have an official search confirming the same.
- 51.** He maintained that the 1st and 2nd Defendants perpetrated fraud in relation to the suit property. However, he stated that he did not know whether they worked at the Lands Office. He further testified that some folios had been destroyed, and that he reported the matter to the authorities, and that arrests were subsequently made.
- 52.** During re-examination, he stated that he holds letters of administration and was testifying in his capacity as a son and administrator of the deceased's estate, which capacity had not been challenged. He further testified that when he conducted an official search, it reflected different names in

respect of the suit property. However, he stated that he did not know when the alleged fraud had been perpetrated.

- 53.** PW2 was James Wamwali Mambo, a son of the late George Mambo. He testified that he is one of the administrators of the estate and that the suit property, situated in Eastleigh, belonged to their late father. He adopted his witness statement dated 13th January 2017 as part of his evidence in chief. He further stated that he had in his possession the original title and the accompanying documents, which he produced as PEXHB 2.
- 54.** He further testified that when the family completed the succession process and begun distributing the estate, they learned that the same had allegedly been sold. According to him, they became aware of that claim in 2006. He maintained that the family had never lost the original title documents and had never sold the suit property.
- 55.** During cross-examination, he testified that their father, George Mambo, was also known as Peter Kariuki. He explained that Peter Kariuki was their grandfather and that their father was at times referred to as George Mambo alias Peter Kariuki, as it was common for people to use their father's name in certain instances. He maintained, however, that the property was never registered in the name of Peter Kariuki.

- 56.** DW1 was Mahungu Ndabi. He adopted his witness statement dated 20th March, 2024 as his evidence in chief and produced his bundle of documents of even date as DEXHB 1.
- 57.** He testified that he met Simon Munyi in Thika, who informed him that he was selling a plot; that Simon Munyi then told him about a property in Eastleigh; that upon visiting the property, he found that it had a house and a tenant and that he also spoke to the caretaker, who informed him that the land belonged to the 1st Defendant.
- 58.** He further testified that in 2010, he purchased the plot and was issued with an indenture. However, he did not obtain an official search until 2013. He stated that, on the advice of the Lands Registry, they had to prepare an indemnity as the process of reconstruction of the title documents was underway; that he purchased the land while that reconstruction of the file was ongoing; that the transaction was completed in 2013, and that the title was eventually issued to the 1st Defendant in 2015 after gazettelement.
- 59.** DW1 further stated that when they later returned to the property, they found different people on the land claiming ownership thereof. As a result, they reported the matter to the police in 2016 and they subsequently met the persons who claimed to be the owners and who also had documents relating to the property. He stated that they later managed to sell the land.

- 60.** During cross-examination, he testified that he had no documents to show that Simon had given him an indenture. He stated that Simon had informed him that he had purchased the land from an Asian; that Simon's identity card showed that he was born in 1952, yet Simon claimed to have purchased the land in 1971 and that Simon informed him that he had purchased the property in cash.
- 61.** It was also his evidence during cross-examination that he was not aware of any orders restraining the sale of the suit property. He conceded to have been charged with offences relating to the sale of the land and obtaining money by false pretenses.
- 62.** DW1 acknowledged that the agreement entered into with Five Star expressly stated that there was no threat of litigation or any dispute in respect of the property. He also acknowledged being aware of this case as at the time he was selling the land and having received Kshs 7, 830,000 on diverse dates and that it is his Advocate who did the transfer.
- 63.** DW2 was Mark Mungai, the Deputy Chief Land Registrar. He adopted his witness statement dated 24th October, 2025 as 3DEX1. It was his evidence that a deed file is maintained by the Chief Land Registrar and it contains copies of documents relating to any transaction on piece of land registered under the Registration of Titles Act Cap 281 (*repealed*).

- 64.** With respect to the parcel in issue, he stated that the records held by the 3rd Defendant show that on 13th June, 1946, a conveyance dated 15th June, 1946 was registered in respect of the property from Santokh Singh S/o Sunder Singh, as the assignor, to Sant Ram S/o Sunder Dass, Tara Singh S/o Maghar Singh, and Ganda Singh s/o Jagat Singh Sobredar, as the assignees.
- 65.** It was his evidence that on 11th May, 1971, a memorandum of discharge of an equitable mortgage dated 11th May, 1971 was registered. On 11th May, 1971, a conveyance dated 11th May, 1971 was registered from Amratben d/o Narshi to Simon Munyi Theuri at a consideration of Kshs 70,000.
- 66.** He noted that on 20th May, 2014, a conveyance dated 14th January, 2013 was registered from Simon Munyi Theuri to Willie Mahugu Ndabi at a consideration of Kshs 16,000,000 and that the register was reconstructed vide Gazette Notice dated 13th March, 2015.
- 67.** It was the evidence of DW2 that on 7th May, 2018, a transfer dated 28th March, 2018 was registered in favour of Five Star Construction Limited at a consideration of Kshs 45,000,000; that Five Star Construction Limited is the current registered owner of L.R No. 36/111/215; that the office of the 3rd Defendant has no record of any registration in favour of the late George Mambo and that the registrations in favour of the 1st and 2nd Defendants were effected on the basis of documents lodged with the 3rd Defendant, which were

believed to be genuine at the time and were therefore registered accordingly.

- 68.** DW2 conceded that the Plaintiff was in possession of the original conveyancing documents and that some of those documents corresponded with the records available to him, including the mortgage dated 21st May 1947 and the conveyance dated 10th April 1947.
- 69.** He stated that although he did not have the original conveyance dated 11th May 1947 between Marshi and Munyi, he had a certified copy thereof. He also acknowledged having seen the original indenture produced by the Plaintiff, but stated that he had never previously seen the same.
- 70.** He further stated that he has in his bundle, a rates clearance certificate dated 30th April 2018 in the name of George Mambo. According to him, the register had been reconstructed because the original folio had been lost, and the reconstruction process was undertaken on the basis of documents supplied by the registered proprietor together with an indemnity.
- 71.** DW2 explained that the indemnity had been sworn by Simon Munyi Theuri and referred to volume 31 folio 34/4 file no. 9811. He noted, however, that the folio reference appearing in the indemnity differed from that appearing in the indenture in George Mambo's name, which referred to volume 43/14 file no. 9811. He observed that the file number

was the same as that appearing in the indenture at page 58, although the entry number differed, being 43/4 in the deed of indemnity.

- 72.** DW2 stated that the discrepancy could have been the result of a typographical error. He further explained that original documents are ordinarily required during the indemnity process, although he could not confirm whether the original had in fact been presented in this instance. He also explained that any court order affecting the property ought to have been registered against the title.
- 73.** During re-examination, he testified that he had no records showing that Mr. Mambo was the registered proprietor of the suit property. He stated that the document at page 43 was merely a statement of payment of rates from the Nairobi City Council and not from the Lands Office, and further noted that no supporting attachment had been made to that document.
- 74.** He stated that he could see the folio at page 122, which related to the deed of indemnity. According to him, entry number 13 on that folio was a memorandum of discharge dated 11th May, 1971. He further explained that the document at page 27, being the deed of indemnity, was contained in parcel file N31 4314 file 9811 which is the same folio in the deed of indemnity.

- 75.** For purposes of reconstruction, he explained, all original documents must be presented. Once the originals are presented, the Lands Office makes copies and returns the originals to the parties; that the office retained certified copies while the originals were returned and remained in the possession of the Plaintiff and that the Plaintiffs never wrote to them any letter.
- 76.** DW3 was Omar Elmi Qaire, a Director of Five Star Construction Limited. He adopted his witness statement dated 16th September 2022 as his evidence in chief and produced the bundle of documents dated 23rd October 2023 as 4DEXB1.
- 77.** It was his evidence that on 19th February 2018, the firm of Odero & Associates, acting for Mr. Willie Mahungu Ndabi, who purported to be the owner of L.R. No. 36/III/215, entered into a sale agreement with Five Star Construction Limited; that the agreed purchase price was Kshs. 45,000,000 and that a deposit of 10% amounting to Kshs. 4,500,000 was paid, together with other miscellaneous sums requested by the vendor and his counsel.
- 78.** He explained that he was later on informed by their conveyancing advocates, that they had raised concerns regarding the title and ownership of the property. In response, they were furnished with a purported court order entered by consent of all the parties in ELC No. 36 of 2017

indicating that there were no encumbrances affecting the title.

- 79.** DW3 stated that their advocates subsequently discovered that the said order had been fraudulently obtained by the 2nd Defendant and had later been set aside by the court. He stated that they were also informed that their advocates had, on several occasions, written to the vendor and his advocates seeking vacant possession of the land and, in the alternative, reimbursement of the monies paid, but to no avail.
- 80.** He stated that despite the balance of the purchase price in the sum of Kshs. 40,500,000/= remaining unpaid, the vendors advocate nonetheless prepared and filed the transfer documents and hurriedly transferred the property in favour of Fivestar Construction Limited and that the transfer, registered on 7th May 2018 was an attempt to compel them to complete payment of the balance of the purchase price.
- 81.** Mr. Qaire stated that attempts by the vendors advocate to hand over possession of the property was met with violent opposition from persons whom they later learnt were the genuine owners of the property and that the vendor's advocate proceeded to institute a suit by way of Originating Summons in an attempt to compel them to complete payment for a property which, according to him, the vendor did not own and which was already the subject of pending court orders.

- 82.** During cross-examination, DW3 testified that he purchased the property from Willy Mahungu; that he had never seen the order issued by Obaga J on 3rd November, 2017 and that, at the time of purchase, he had not been informed of the existence of any court order affecting the property.
- 83.** He further stated that he was unsure whether Willy was in fact the owner of the land. He also confirmed that Willy did not give him vacant possession of the property. According to him, they intended to fence the land and were granted consent to do so by the Nairobi City County.
- 84.** During re-examination, he testified that he had no issue with the transaction at the outset and that he paid the vendor a sum of Kshs. 4,500,000. He stated, however, that he did not pay the balance of the purchase price because he was never given vacant possession of the property.

Submissions

- 85.** The Plaintiffs in ELC 36 of 2017 filed submissions on the 12th January, 2026. Counsel submitted that pursuant to **Section 26** of the **Land Registration Act**, a certificate of title can be invalidated on account of fraud or misrepresentation to which the person is proved to be a party or if the title has been acquired illegally, unprocedurally or through a corrupt scheme.
- 86.** It was stated that the 1st Defendant's failure to testify calls upon the court to make an adverse inference. Reliance in this regard was placed on the cases of ***Safarilink Aviation***

Limited vs Trident Aviation Kenya Limited & Anor [2015] eKLR, Cabro East Africa Ltd vs Rosoga Investment Ltd [2017] eKLR, Trust Bank Limited vs Paramount Bank Limited & 2 Others, Nairobi Milimani HCC No 1234 of 2001 and Mary Njeri Murigi vs Peter Macharia & Anor [2016] eKLR.

- 87.** Counsel submitted that the 2nd Defendant's fraudulent conduct is apparent from his own admissions that he had previously faced criminal proceedings in Thika Magistrates' Court in MCCR No. 1999 of 2012 and MCCR No. 4419 of 2014, including a charge of obtaining by false pretences contrary to **Section 313** of the **Penal Code** in relation to property transactions and that under **Section 55** of the **Evidence Act**, evidence of a person's character is generally inadmissible unless it arises from otherwise admissible facts and is relevant in making the alleged conduct more or less probable.
- 88.** As regards the 1st Defendant, it was submitted that the documents upon which he relied were forgeries and that, consequently, all subsequent entries founded on those documents were equally tainted and should fail and that the Land Registrar is also complicit in this scheme of fraud and ought to be treated as such.
- 89.** It was contended that the Plaintiff in HCCC 188 of 2019 is also guilty of fraud, illegality, irregularity and breach of an advocate's duty of disclosure as provided for under **Section**

134 of the **Evidence Act** and that there is no indication that she disclosed to the 5th Defendant's advocate that her client was incapable of giving vacant possession of the suit property.

- 90.** It was urged that the Plaintiffs are entitled to damages by way of compensation assessed at Kshs. 200,000 per month from December 2016, amounting to approximately Kshs. 21,600,000 and that they are also entitled to exemplary damages on account of the Defendants' conduct deliberately calculated to generate profit far exceeding any compensation payable to the Plaintiffs.
- 91.** The Plaintiff in HCC E188 of 2019 filed submissions on 13th January 2026. Counsel submitted that pursuant to **Section 24(a)** of the **Land Registration Act**, registration vests in a proprietor absolute ownership together with all rights and privileges appurtenant thereto. Reliance was placed on the decision in ***Dr Joseph Arap Ngok vs Justice Moiyo Ole Keiwua & 5 Others Civil Appeal No. Ca 60 of 1997*** for the proposition that title is absolute and indefeasible save where fraud, misrepresentation, illegality, procedural impropriety or a corrupt scheme is proved.
- 92.** It was submitted that before the 2nd Defendant purchased L.R. No. 36/III/215, an official search was conducted which confirmed that the property belonged to Willy Mahungu Ndabi; that there were no encumbrances registered against it, a fact confirmed by the Chief Lands Registrar and that a

sale agreement was thereafter prepared and executed, culminating in the transfer of the property in favour of the 2nd Defendant in HCCC No. E188 of 2019.

- 93.** It was submitted that, under **Order 1 Rules 6** and **7** of the **Civil Procedure Rules**, the 1st Defendant was properly joined because he bore joint liability with the 2nd Defendant in relation to the conveyancing transaction and the professional undertaking issued therein. Counsel further relied on **Clause 8.3** of the **Law Society Conditions of Sale**, which requires a purchaser, upon completion, either to pay the balance of the purchase price in cleared funds or provide an irrevocable professional undertaking from the purchaser's advocates confirming that they are in funds.
- 94.** Counsel submitted that the 1st Defendant, as advocate for the 2nd Defendant, gave a professional undertaking and was therefore bound by it. Reliance was placed on the letters dated 1st October 2018 and 9th January 2019 in which the 1st Defendant referred to payment of the balance of the purchase price upon vacant possession being given.
- 95.** It was argued that vacant possession had been achieved by 12th September 2018 and that, in any event, completion had taken place on 7th May 2018, making the balance of the purchase price immediately payable under **Section 44** of the **Land Act**.

- 96.** Counsel submitted that the 1st Defendant, acting on behalf of the 2nd Defendant and in light of the professional obligations imposed upon an advocate, breached the terms of the sale agreement and was therefore jointly liable with the 2nd Defendant for the balance of the purchase price, interest at 10% per month, and costs.
- 97.** The 2nd Defendant in ELC 36 of 2017 filed submissions on 17th February 2026. Counsel submitted that as explained in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Muraguri vs Mwangi & 4 others (Environment & Land Case 34 of 2020)[2022]KEELC 13559 (KLR)913* and *Kinyanjui Kamau vs George Kamau [2015] eKLR* fraud is a serious allegation which must be specifically pleaded and strictly proved to a standard higher than a balance of probabilities, though not beyond reasonable doubt.
- 98.** In this case, it was urged, the Plaintiffs had failed to establish a coherent chain of title in favour of the late George Mambo and that the documents relied upon by the Plaintiffs were not traceable in the official registry records, as confirmed by the Deputy Chief Land Registrar and that there was no forensic evidence, registry audit, expert testimony or proof of collusion between the 2nd Defendant and registry officials.
- 99.** Counsel submitted that the registration of the 2nd Defendant is protected under **Sections 24, 25 and 26** of the **Land Registration Act**, which confers absolute ownership and

statutory protection upon a registered proprietor unless fraud, illegality, procedural impropriety or a corrupt scheme is proved.

- 100.** Counsel argued that the Land Registrar confirmed the authenticity of the register entries relating to the suit property and that the Plaintiffs had failed to demonstrate that the registration was unlawful, irregular or made in contravention of statutory requirements.
- 101.** It was argued that under **Section 47A** of the **Evidence Act**, only a final conviction may be treated as conclusive evidence in subsequent civil proceedings, while mere allegations or collateral proceedings cannot substitute strict proof of fraud and that **Section 163** of the **Evidence Act** limits the use of character evidence in civil cases unless character is directly in issue.
- 102.** The 3rd Defendant in ELC 36 of 2017 filed submissions on 23rd February 2026. Counsel submitted that since the Plaintiffs alleged that the 3rd Defendant fraudulently reconstructed the register and registered transfers in favour of the 2nd and 5th Defendants, the burden lay upon them under **Sections 107** and **108** of the **Evidence Act** to prove those allegations.
- 103.** According to counsel, the reconstruction of the register was undertaken lawfully and in accordance with **Section 33(5)** of the **Land Registration Act** and **Regulation 28** of the

Land Registration (General) Regulations, 2017; that the deed of indemnity was regular, properly drawn and lodged in the normal process, and that there was no evidence that the 3rd Defendant had failed to follow the prescribed statutory procedure.

104. Counsel also submitted that the Plaintiffs' allegation that they still held the original indentures of conveyance did not establish fraud on the part of the 3rd Defendant. It was argued that the Gazette Notice inviting objections to the intended reconstruction was published so as to allow any interested party to object or produce documents supporting their claim.

105. The Interested Parties in ELC 36 of 2017/1st and 2nd Defendants in HCC HCOMM/E188/19 filed submissions on 29th day of January 2026. Counsel submitted that no party can lawfully sell or transfer property in defiance of a court order and that any such transaction is void ab initio and that the 2nd Defendant's conduct in purporting to sell the property despite knowledge of the injunctions amounted to fraud, misrepresentation and breach of warranty.

106. Counsel further submitted that the 2nd Interested Party lawfully rescinded the sale agreement upon discovering that there were pending disputes, court orders and competing claims affecting the suit property. Reliance was placed on the principle of *nemo dat quod non habet* to argue that the 2nd Defendant could not pass a better title than he possessed.

107. It was submitted that the 2nd Defendant and the firm of Odera & Company Advocates had received Kshs. 12,300,000 on stakeholder basis pending completion of a lawful conveyance and that, upon rescission, they became obligated to refund the same. Instead of refunding the monies, Odera & Company Advocates unlawfully transferred the suit property to the 2nd Interested Party without instructions and in disregard of the sale agreement, court orders and the Law Society Conditions of Sale.

Analysis and Determination

108. Having considered the pleadings, evidence and submissions, the issues that arise for determination include:

- i. Who is the legitimate proprietor of L.R. No. 36/III/215?*
- ii. Whether there was any breach of the sale agreement dated 19th February 2018 in respect of L.R. No. 36/III/215 and, if so, which party or parties were responsible for such breach and the resultant consequences?*
- iii. What are the appropriate reliefs to issue?*

Who is the legitimate proprietor of of L.R. No. 36/III/215?

109. The present dispute concerns the ownership of the parcel of land known as L.R. No. 36/III/215, as well as allegations of breach of contract arising from transactions relating to the same parcel.

- 110.** Beginning with the issue of ownership, the Plaintiff in ELC No. 36 of 2017 contends that the late George Mambo was at all material times the registered owner of the suit property, having acquired the same by way of purchase in 1971 through an indenture of conveyance dated 11th May 1971.
- 111.** According to the Plaintiff, George Mambo remained the registered proprietor of the property until his death in October 1980, after which the property devolved to his estate. They assert that the suit property has never been sold, transferred or otherwise alienated from the estate.
- 112.** Nonetheless, it was argued that sometime in 2016, they were informed by their tenants that another person was claiming the parcel and upon investigating, discovered that the 1st Defendant had been registered as owner thereof and had transferred the parcel to the 2nd Defendant.
- 113.** On its part, the 2nd Defendant concedes that it purchased the suit property from the 1st Defendant and maintains that the transaction was lawful. It states that during the conveyancing process, it was discovered that certain crucial land records relating to the property were missing.
- 114.** Consequently, an application was made for reconstruction of the register and, following gazettelement and the lapse of the prescribed statutory period, the indenture was registered by the 3rd Defendant on 15th May 2015.

115. The 2nd Interested Party on its part, contends that it entered into an agreement with the 2nd Defendant for the purchase of the suit property. Pursuant thereto, it paid a deposit of Kshs. 4,500,000 together with a further sum of Kshs. 12,300,000. However, difficulties later arose during the transaction, prompting it to rescind the agreement. Despite the rescission, the property was unilaterally transferred into its name, and it remains the current registered proprietor of the suit property.

116. It is trite that he who alleges must prove. Under **Sections 107(1) and (2) and 109** of the **Evidence Act**, the burden lies upon the party who seeks the court to believe in the existence of a particular fact or legal right. **Section 112** imposes a further burden upon a party to prove facts that are especially within that party's own knowledge.

117. It is also notable that allegations of fraud have been expressly pleaded in the matter. In law, such allegations attract a heightened burden of proof, requiring the party so asserting to not only plead the particulars with specificity, but also to strictly prove the same to a standard higher than a balance of probabilities, though not as high as beyond reasonable doubt.

118. Speaking to this, the Court of Appeal in **Demutilla Nanyama Pururmu vs Salim Mohamed Salim [2021] eKLR** relying on an earlier exposition by **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR** noted thus:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

119.As regards the standard of proof, the Court of Appeal in **Demutilla Nanyama Pururmu vs Salim Mohamed Salim (supra)** looked to its earlier decision in **Kinyanjui Kamau vs George Kamau [2015] eKLR** wherein it had held:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than

that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

120. The evidence before the court shows that the 2nd Interested Party is the current registered owner of the suit property, holding an indenture of conveyance dated 28th March, 2018 and registered on 7th May, 2018. However, the Plaintiff challenges the propriety and validity of that title.

121. It is now settled that where the validity of a registered proprietor's title is called into question, it is not sufficient for the proprietor to merely produce a title document as proof of ownership. The proprietor must go further and demonstrate that the process through which the title was acquired was lawful, procedurally proper, and free from fraud, illegality or other irregularity. [See **Munyu Maina v Hiram Gathiha Maina [2013] KECA 94 (KLR)**].

122. Reiterating this, the Appellate Court in **Gathondu (As Administrator of the Estate of the Late Thumbi Kariuki) vs Registrar & Others (supra)** noted as follows:

“It is, to my mind, a question of the greatest importance because, like ‘Eneke’, the bird in

Chinua Achebe's Things Fall Apart, who learnt to fly without perching because men had learnt to shoot without missing, Kenyan courts can no longer content to perch on the branch of simply accepting titles as conclusive, incontestable and indefeasible; or the concomittant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities from our superior court such as Munyu Maina vs. Hiram Gathiha Maina (supra) and Funzi Development Ltd & others vs. Country Council of Kwale [2014] eKLR, by this Court; Esther Ndegi Njiru & another vs. Leonard Gatei (supra) by the Environment Court (Mutungi, J)."

123. Where the acquisition process leading to the issuance of a title is tainted by illegality or non-compliance with the law, such a title cannot be sustained. This position was affirmed

by the Supreme Court in **Dina Management Limited vs County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** which noted that:

“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 infeasible...Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

124. Indisputably, the 2nd Interested Party traces its title to the 2nd Defendant through the conveyance dated 28th March 2018 and registered on 7th May 2018. The 2nd Defendant, in turn, traces its title to the 1st Defendant through the conveyance dated 14th January 2013 registered on the 20th May, 2014.

125.The evidence shows that the 1st Defendant acquired the suit property from one Amritben Narshi through an indenture of conveyance dated 11th May, 1971. However, that is the very same date on which the Plaintiffs contend that George Mambo also acquired the same parcel from the same vendor, likewise through an indenture of conveyance. On the face of it, both transactions could not validly have occurred in respect of the same property on the same date.

126.The Plaintiffs maintain that the late George Mambo purchased the suit property from Amratben d/o Narshi and remained in possession thereof until his death in 1980, after which the property devolved to his estate.

127.In support of that position, the Plaintiffs produced original conveyancing documents tracing the history of the property from 1946, including the conveyance in favour of George Mambo dated 11th May 1971, the mortgage in his favour, the reconveyance dated 16th January 1973, and the lease thereof by George Mambo in favour of Kenya Co-operative Creameries.

128.By contrast, the root of title now held by the 2nd Interested Party remained largely unexplained. Although Willie Mahugu Ndabi stated that he purchased the property from Simon Munyi Theuri, no evidence was produced showing how Simon Munyi Theuri himself acquired the property beyond the reconstructed registry entry and the conveyance relied

upon. The 1st Defendant did not testify at all, only stating in the defence that he had no interest in the property.

129. Equally, during cross-examination, Willie Mahugu Ndabi admitted that he had no documentary proof showing how Simon Munyi Theuri acquired the land from Amritben not having been given the initial indenture.

130. According to him, Mr. Munyi merely informed him that he had purchased the property from an Asian woman and had paid for it in cash. He further stated that at the time of purchase, he was unable to conduct an official search on the property. He further admitted that an indemnity was undertaken because there were no available records relating to the property. He stated that they found people in occupation of the land.

131. The evidence of the Deputy Chief Land Registrar did not cure the gaps in Simon Munyi's acquisition. While he confirmed that the register reflected Simon Munyi Theuri as proprietor, he equally acknowledged that the relevant folio had been lost and that the register was only reconstructed on the basis of documents supplied by Simon himself.

132. The Land Registrar further conceded that the Plaintiffs were in possession of original conveyancing documents, including the original indenture in favour of George Mambo, and that some of those documents corresponded with the registry records available to him.

133. He also admitted that there were inconsistencies in the folio references appearing in the deed of indemnity and the indenture relating to George Mambo, and could not confirm whether the original indenture relied upon during the reconstruction process had in fact been produced.

134. More significantly, the Land Registrar explained during re-examination that, for purposes of reconstruction, all original documents must be presented to the Lands Office, copies are then retained, and the originals are returned to the party presenting them. If indeed Simon Munyi Theuri had presented the original indenture in support of the reconstruction exercise, one would have expected him or the 2nd Defendant to be in possession of that original document, and produce it in evidence.

135. Also, the evidence as a whole strongly points to continued possession and occupation by the Plaintiffs and the estate of George Mambo. Indeed, the 2nd Defendant admitted that when it sought to take possession, it found people already in occupation of the land who claimed ownership of the property and violently resisted attempts to fence it off.

136. The Interested Parties also conceded that vacant possession was never delivered to them and any attempt thereof was resisted by people who were on the parcel of land. They maintained that it was uncertain whether the 2nd Defendant was in fact the true owner of the property. These facts substantially undermine the assertion that the 1st Defendant

and 2nd Defendant held a clean and unassailable title capable of being transferred.

137. In the premises, and upon weighing the competing evidence placed before the court, the court is not satisfied that Simon Munyi had any valid interest in the suit property capable of being transferred to Willie Mahugu Ndabi. Consequently, Willie Mahugu Ndabi equally had no valid title capable of being conveyed to the 2nd Interested Party.

138. The principle of *nemo dat quod non habet*, namely that one cannot give what one does not have, therefore applies squarely in the present circumstances. As explained in **Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] KEELC 842 (KLR):**

“The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”

139. A natural consequence of the application of the *nemo dat principle* is that the doctrine of bona fide purchaser cannot avail the 2nd Defendant or 2nd Interested Party, since no party can derive a good title from a person who had none to convey in the first place.

140. Indeed, the Court of Appeal in *Mwangi James Njehia vs Janetta Wanjiku Mwangi & Another [2021]KECA 768* observed that the formulation in *Katende vs Haridar & Company Ltd (2008) 2 EA 173* particularly the requirement that the vendor need only have an “apparent” valid title, was no longer sound. The Court held that the notion of “apparent” title should be omitted altogether. Accordingly, only a purchaser who acquires title from a person with a valid and lawful interest can invoke the doctrine of bona fide purchaser.

141. Ultimately, whereas the court is not satisfied that fraud was specifically proved against the Defendants to the standard required under **Section 26(1)(a)** of the **Land Registration Act**, the evidence nonetheless demonstrates that the title presently held by the 2nd Interested Party was procured through a process that was irregular, unprocedural and incapable of conferring a valid interest, thereby bringing it within the ambit of **Section 26(1)(b)** of the **Land Registration Act**.

142. In view of the foregoing findings, the various arguments advanced by the 2nd Interested Party regarding the effect of the subsisting court orders, the alleged fraudulent consent, and whether it had notice of the disputes affecting the property in relation to the transaction with the 2nd Defendant have been rendered moot, since, as already found, the defect in the title arose much earlier in the chain.

Whether there was any breach of the sale agreement dated 19th February 2018 in respect of L.R. No. 36/III/215

- 143.** Vide their cross-claim, the Interested Parties seek in ELC 36 of 2017, among other reliefs, reimbursement of the sum of Kshs. 12,300,000 paid towards the transaction, general damages for breach of contract, costs and interest, as well as an order for revocation of the transfer of the suit property into the name of the 2nd Interested Party and expunging of the corresponding entry from the register.
- 144.** On the other hand, through the Originating Summons in HCCC No. E188 of 2019, the Plaintiff therein seeks, *inter alia*, an order that accounts be taken and that the Defendants be directed to pay the amount allegedly outstanding in the sale transaction relating to Land Reference Number 36/III/215, Eastleigh, Nairobi, together with interest thereon at the rate of 15.5% per annum from 19th February, 2018 until payment in full, in accordance with the 1st Defendant's professional undertaking.
- 145.** The Plaintiff also sought for an order restraining the 2nd Defendant from charging, transferring, mortgaging, or in any other manner dealing with the property pending the hearing and determination of the summons, together with such further or other relief as the court might deem just and fair in the circumstances.

146. To begin with, the prayer relating to title and cancellation of the transfer has already been substantially answered above, where the court found that the 1st Defendant had no title to pass invalidating the subsequent transactions.

147. It is trite that a claim for breach presupposes the existence of a valid, lawful and enforceable contract. In **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] eKLR** the Court of Appeal stated that:

“It is trite law that a court will not enforce an agreement that is illegal or otherwise void.”

148. Likewise, the Court of Appeal in **Suleiman Rahemtulla Omar & another vs Musa Hersi Fahiye & 5 others [2014] KECA 553 (KLR)** observed that:

“Having found that the contract was null and void ab-initio, it will not be necessary for us to make any finding on whether there was any breach of contract or not - as a null and void contract is incapable of being breached. This brings us to the all important issue of fraud.”

149. The same position was reiterated in **Olegasalie New Properties Limited vs Lematasho (Environment and Land Appeal E003 of 2022) [2025] KEELC 6465 (KLR) (24 September 2025) (Judgment)** where the court held that breach is predicated on enforceability and that a party

cannot be held liable for breaching an agreement that does not exist in law.

150. The court agrees. Having found that Simon Munyi Theuri had no valid title to pass to Willie Mahugu Ndabi, and that Willie Mahugu Ndabi equally had no valid title to transfer to the 2nd Interested Party, it follows that the sale agreement dated 19th February 2018 was incapable of lawful completion from the outset.

151. The 2nd Defendant could not lawfully convey good title or vacant possession, while the 2nd Interested Party (5th Defendant) could not be compelled to complete payment for a property that the vendor had no legal capacity to sell. In those circumstances, the transaction was rendered unenforceable *ab initio* and no actionable breach can properly be said to arise from it. The only remedy available to the 2nd Interested Party is a refund of monies paid towards the sale.

152. In this regard, whereas the Interested Parties (4th and 5th Defendants) claim the sum of Kshs 12, 300,000 being 10% of the purchase price of Kshs 45,000,000 together with other miscellaneous payments, it is only the sum of Kshs 9,800,000 that was proved vide the letter dated 18th October, 2018 authored by the 2nd Defendant.

153. In the said letter, and during cross examination, the 2nd Defendant admitted having received Kshs 4,500,000, Kshs

3,300,000 and Kshs 2,000,000 from the 4th Defendant (1st Interested Party), the 5th Defendant's Advocate, on diverse dates. This is the only refund that the 5th Defendant is entitled to, together with interest.

154. For those reasons, the court makes the following determination:

- i. The Plaintiffs' claim in ELC 36 of 2017 succeeds in the following manner:**
 - a. A declaration does hereby issue that Land Reference No 36/III/215 belongs to and is rightly registered in favour of George Mambo by dint of the Indenture dated 11th May, 1971 and registered in Volume N 31 Folio 43/14.**
 - b. An order does hereby issue compelling the 3rd Defendant to rectify its records by cancelling the entry made in the name of Simon Munyi Theuri and in its place insert the name George Mambo as the owner of the suit property.**
 - c. An order does hereby issue compelling the 3rd Defendant to rectify its records by cancelling the entry made in Volume N 116 Folio 287/15 thereby permanently removing**

the name of Willie Mahugu Ndabi as the owner of the suit property.

- d. A mandatory and permanent injunction does hereby issue restraining the Defendants by themselves, their alienating, selling, interfering or otherwise disposing off the suit property.**
- e. The 1st and 2nd Defendants' Counterclaim in ELC 36 of 2017 be and is hereby dismissed with costs.**
- f. The 1st and 2nd Defendants in ELC No. 36 of 2017 to pay costs of the suit.**
- g. The 1st and 2nd Interested Parties' counterclaim in ELC 36 of 2017 (5th and 6th Defendants) succeeds with costs to the extent that the 2nd Defendant is hereby directed to reimburse the 2nd Interested Party (5th Defendant) the sum of Kshs 9,800,000 paid towards the sale and purchase of L.R. No. 36/III/215 within 30 days of the date hereof.**
- h. The 2nd Defendant to pay interest to the 2nd Interested Party on the above sum from the date of filing the Counter claim at court rates until payment in full.**

- i. HCCC E188 of 2019 be and is hereby dismissed with costs.**

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

**O. A. Angote
Judge**

In the presence of:

Mrs Odero for Plaintiff in 188 of 2019

Mr. Reirimri for Juma for Plaintiff in 36/2017

Mr. Mohammed and Onchoka for Defendant in 188/2019

Ms Kariny holding brief for Koech for 2nd Defendant in 36/2017

Court Assistant: Tracy