



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 725 OF 2003(O.S)**

**SANTABEN RAMNIKLAL PARMAR.....1<sup>ST</sup> PLAINTIFF**

**ISAAC GICHAMBA WANGAGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BEATRICE WARUGURU GITURU.....1<sup>ST</sup> DEFENDANT**

**WARDPA LIMITED.....2<sup>ND</sup> DEFENDANT**

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

**JUDGMENT**

The plaintiffs brought this suit by way of Originating Summons dated 7<sup>th</sup> July, 2003. In the Originating Summons, the plaintiffs sought the determination of the following issues:

1. That the plaintiffs and the 1<sup>st</sup> defendant had been in ownership of the parcel of land known as L.R No. 209/2489/21 (hereinafter referred to only as “the suit property”) as tenants in common and wished to determine the said tenancy in the most practical and economical way.
2. That the suit property was practically incapable of subdivision as the same comprised of flats and that the best way to determine the tenancy was by way of sale and eventually sharing of the proceeds of sale amongst the parties.
3. That the plaintiffs had obtained a buyer for the suit property, one, Michael Mbira and had entered into an agreement for sale of the suit property with him and what remained was for the 1<sup>st</sup> defendant to execute her part of the said agreement.
4. That it was only fair and just that the property be sold as contemplated by the plaintiffs.

The Originating Summons was supported by the affidavit of the 2<sup>nd</sup> plaintiff, Isaac Gichamba Wangage sworn on 7<sup>th</sup> July, 2003. The 2<sup>nd</sup> plaintiff averred that the plaintiffs and one, Daniel Gituru Ngai, deceased owned the suit property as tenants in common since 1983. The 2<sup>nd</sup> plaintiff averred that the 1<sup>st</sup> defendant was the legal representative of Daniel Gituru Ngai, deceased. The 2<sup>nd</sup> plaintiff averred that on or about 14<sup>th</sup> July, 2002 the plaintiffs and the 1<sup>st</sup> defendant entered into an agreement to sell the suit property to a company known as Wardpa Limited on terms and conditions that were set out on the said agreement.

The 2<sup>nd</sup> plaintiff averred that it was a term of the said agreement that the completion date was 90 days from the date of the agreement namely, 14<sup>th</sup> July, 2002. The 2<sup>nd</sup> Plaintiff averred that Wardpa Ltd. failed to complete the agreement within the 90 days completion period as a result of which the said agreement for sale was rescinded. The 2<sup>nd</sup> plaintiff averred that after the rescission of the said agreement, the 1<sup>st</sup> defendant at her own instance and without notice to the plaintiffs obtained further payments from Wardpa Ltd. on the basis that the 1<sup>st</sup> defendant was capable to selling her share in the suit property to the said company without the consent of the plaintiffs. The 2<sup>nd</sup> plaintiff averred that the plaintiffs were not privy to the subsequent sale agreement between the 1<sup>st</sup> defendant and Wardpa Ltd. in respect of her share in the suit property and that the suit property was incapable of being subdivided to satisfy the 1<sup>st</sup> defendant’s intention.

The 2<sup>nd</sup> plaintiff averred that in order to achieve the original intention of the parties which was to determine the tenancy in common through the sale of the suit property, the plaintiffs entered into an agreement for sale with Michael Mbira to sell the suit property to him at a consideration of Kshs. 4,000,000/= and that what remained for the transaction to be completed was for the 1<sup>st</sup> defendant to execute the said agreement being one of the parties to the same. The 2<sup>nd</sup> plaintiff averred that despite demand and notice of intention to sue, the 1<sup>st</sup> defendant

had failed and/or neglected to attend to the plaintiffs' request that she executes the said agreement for sale so as to pave way for the determination of the tenancy in common. The 2<sup>nd</sup> defendant averred that it was only fair and just that the issues raised in the Originating Summons be determined in the plaintiffs' favour so that they may determine the tenancy in common between the parties.

The 1<sup>st</sup> defendant filed a replying affidavit on 14<sup>th</sup> August, 2003 in response to the Originating Summons. The 1<sup>st</sup> defendant admitted that the plaintiffs and the 1<sup>st</sup> defendant were co-owners of the suit property and that the plaintiffs and she had entered into an agreement on or about 14<sup>th</sup> July, 2002 to sell the suit property to Wardpa Ltd. The 1<sup>st</sup> defendant denied however that Wardpa Ltd. (hereinafter referred to only as "the 2<sup>nd</sup> defendant") had failed to complete the said agreement. She averred that the plaintiffs after receiving the purchase price for the suit property from the 2<sup>nd</sup> defendant purported to rescind the said agreement for sale. The 1<sup>st</sup> defendant denied that she acted unilaterally in receiving more payments from the 2<sup>nd</sup> defendant and contended that she received the said payments as a co-owner of the suit property pursuant to a valid agreement for sale.

The 1<sup>st</sup> defendant averred that the agreement between the plaintiffs and the 1<sup>st</sup> defendant on the one hand and the 2<sup>nd</sup> defendant on the other hand was valid and binding. The 1<sup>st</sup> defendant contended that the suit property was capable of being subdivided and each party's share identified. The 1<sup>st</sup> defendant averred that the plaintiffs did not involve her in the sale of the suit property to Michael Mbira and that the purported sale of the property to the said Michael Mbira was null and void as the suit property had already been sold to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant denied that she was served with a demand or a notice of intention to sue before the suit was filed. She urged the court to dismiss the suit with costs.

On 29<sup>th</sup> November, 2010, the plaintiffs amended the Originating Summons and added Wardpa Limited and Kirgeo Ltd. to the suit as 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively. In the amended Originating Summons dated 26<sup>th</sup> November, 2010, the plaintiffs sought among others the following reliefs:

1. A declaration that the suit property was owned by the plaintiffs and the 1<sup>st</sup> defendant as tenants in common and was not capable of subdivision and as such the tenancy in common could only be determined by the sale of the property.
2. A declaration that the 1<sup>st</sup> defendant was perverse to the sale of the suit property as intended by the plaintiffs.
3. An order directed at the 1<sup>st</sup> defendant to execute the agreement for the sale of the suit property to Michael Mbira together with the instrument of transfer in default of which the Deputy Registrar of the court be authorised to execute the same on her behalf.
4. A declaration that the sale and transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant was contrary to the tenancy in common under which the plaintiffs and the 1<sup>st</sup> defendant held the suit property and as such the same was irregular and illegal.
5. An order that the transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant be cancelled and the suit property be returned to the names of the plaintiffs and the 1<sup>st</sup> defendant as tenants in common.

The amended Originating Summons was supported by the affidavit of the 2<sup>nd</sup> plaintiff. The same was brought on the same grounds as the original Originating Summons. The plaintiffs added however that with a view to defeat the determination of the tenancy in common as was initially intended by the plaintiffs and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant proceeded with the sale of the suit property to the 2<sup>nd</sup> defendant despite of the fact that the agreement had been rescinded. The plaintiffs averred that the 2<sup>nd</sup> defendant thereafter proceeded to have the property transferred to its name without involving the plaintiffs and the 1<sup>st</sup> defendant who were the owners of the suit property.

The plaintiffs averred that the 2<sup>nd</sup> defendant subsequently transferred the suit property to the 3<sup>rd</sup> defendant whose directors are the same as those of the 2<sup>nd</sup> defendant. The plaintiffs averred that it was only fair that the transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be cancelled and the title reverted to the original tenants in common who are the plaintiffs and the 1<sup>st</sup> defendant to enable them determine the tenancy. In his affidavit, the 2<sup>nd</sup> plaintiff averred that the suit property was transferred to the 2<sup>nd</sup> defendant in whole without any consideration of the shares held by the plaintiffs therein. The 2<sup>nd</sup> plaintiff averred that the plaintiffs only learnt of the transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant upon carrying out a search on the title of the property. The 2<sup>nd</sup> plaintiff averred that the transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was done contrary to the terms of the tenancy in common under which the plaintiff and the 1<sup>st</sup> defendant held the property as it was done in disregard of the shares that the plaintiffs held in the property and without their consent or involvement.

The 2<sup>nd</sup> plaintiff annexed to his affidavit in support of the amended Originating Summons among others, a copy of the search conducted on the title of the suit property on 1<sup>st</sup> October, 2007 and letters from the Registrar of Companies containing the particulars of the directors and shareholders of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The 1<sup>st</sup> defendant responded to the amended Originating Summons through a replying affidavit sworn on 8<sup>th</sup> December, 2010 filed in court on the same date. The 1<sup>st</sup> defendant averred that the plaintiffs having earlier admitted that the sale of the suit property to Michael Mbira had similarly been rescinded, the Originating Summons was not the appropriate procedure for the reliefs sought by the plaintiffs in the amended Originating Summons. The 1<sup>st</sup> defendant averred further that the plaintiffs having admitted earlier that the suit property was transferred to the 2<sup>nd</sup> defendant pursuant to orders issued by the court, it was not proper for them to allege that it was the 1<sup>st</sup> defendant who sold and transferred the property to the 2<sup>nd</sup> defendant.

The 1<sup>st</sup> defendant averred that since the suit property was transferred to the 2<sup>nd</sup> defendant through a court order, the plaintiffs' recourse was to have the said orders set aside or to lodge appeal against the same. The 1<sup>st</sup> defendant averred that the plaintiffs' remedy lied in claiming the balance of the purchase price as there was no evidence that the plaintiffs had refunded the deposit that was paid to them by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant annexed to her affidavit, correspondence exchanged between the plaintiffs' former advocate and the 1<sup>st</sup> defendant's advocate in which the plaintiffs' advocate had informed the 1<sup>st</sup> defendant's advocate that the sale of the suit property to Michael Mbira had been cancelled and a deposit that he had paid refunded to him. In the correspondence, the plaintiffs said former advocate also forwarded to the 1<sup>st</sup> defendant's advocates copies of orders that were issued at the High Court in Mombasa in HCCC No. 150 of 2003 and HC. Misc. Application No. 804 of 2004 pursuant to which the suit property was transferred to the 2<sup>nd</sup> defendant. The plaintiffs' said advocate also forwarded to the 1<sup>st</sup> defendant's advocates a copy of the instrument of transfer of the suit property by the 2<sup>nd</sup> defendant to 3<sup>rd</sup> defendant dated 20<sup>th</sup> June, 2006 through the same correspondence.

From the material on record, there is no evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants responded to the amended Originating Summons although they appointed Mr. Siagi Advocate to act for them. When the matter came up for hearing for the first time on 19<sup>th</sup> November, 2014 before Mutungi J., the 2<sup>nd</sup> plaintiff informed the court that his case was based on the original Originating Summons filed in court on 15<sup>th</sup> July, 2003. He disowned the amended Originating Summons filed on 29<sup>th</sup> November, 2010. The 2<sup>nd</sup> plaintiff informed the court that he wished to abandon the amended Originating Summons so that he could prosecute his case on the basis of the original Originating Summons. The court observed that since a search that had been conducted on the title of the suit property showed that the suit property was transferred to the 2<sup>nd</sup> defendant in 2005 and subsequently to the 3<sup>rd</sup> defendant in 2006, any order made in the matter would affect the two defendants. The court directed that that the hearing of the suit proceeds on the basis of the amended Originating Summons filed on 29<sup>th</sup> November, 2010 and fixed the matter for hearing on 27<sup>th</sup> February, 2015. Those directions were neither varied nor set aside.

The hearing of the suit commenced before Mutungi J. on 27<sup>th</sup> February, 2015. The 2<sup>nd</sup> plaintiff told the court that the suit property was owned by the plaintiffs and the 1<sup>st</sup> defendant. He stated that he purchased the 1<sup>st</sup> plaintiff's share in the suit property and that the 1<sup>st</sup> plaintiff had acknowledged receipt of payment for the property and had executed a transfer in his favour in respect of her share in the property but the transfer was not registered because the property file went missing at the land registry. He stated that the plaintiffs and the 1<sup>st</sup> defendant entered into an agreement to sell the suit property to the 2<sup>nd</sup> defendant at Kshs. 4,300,000/=. He stated that the 2<sup>nd</sup> defendant only paid a sum of Kshs. 430,000/= and did not complete the payment of the balance of the purchase price even after demand was served upon it to do so.

The 2<sup>nd</sup> plaintiff stated that the plaintiffs did not transfer the suit property to the 2<sup>nd</sup> defendant and that the transfer that was registered in its favour on 25<sup>th</sup> June, 2005 was a forgery. The 2<sup>nd</sup> defendant stated that the original title for the suit property got lost at the land registry when the same was presented to that office for the purposes of endorsing the 1<sup>st</sup> defendant's interest in the property after the death of her husband who was a co-owner of the property. The 2<sup>nd</sup> plaintiff stated that the 2<sup>nd</sup> defendant had filed a suit against the plaintiffs and the 1<sup>st</sup> defendant in Mombasa claiming that they had refused to transfer the property to it and that an order was made that the case be transferred to Nairobi. The 2<sup>nd</sup> Plaintiff stated that the transfer of the suit property to the 3<sup>rd</sup> defendant was also fraudulent. The 2<sup>nd</sup> plaintiff stated that when they purchased the suit property, the same was vacant and that they had intended to put up a four storey building on the same. The 2<sup>nd</sup> plaintiff relied on the bundles of documents that he had filed in court in support of the plaintiffs' case.

In cross-examination by the 1<sup>st</sup> defendant's advocate, the 2<sup>nd</sup> plaintiff stated that he was not aware that the 1<sup>st</sup> defendant had sold the suit property. He stated the 1<sup>st</sup> defendant could not singlehandedly transfer a property that was owned by three people. When shown an affidavit that he swore in support of the amended Originating Summons, he stated that he was misled into swearing into matters that were not within his knowledge. He admitted that he had been given some orders issued by the High Court at Mombasa but denied that the court had ordered the Deputy Registrar to transfer the suit property to the 2<sup>nd</sup> defendant. He contended that an order was made transferring the Mombasa cases to Nairobi.

At the conclusion of the hearing on 27<sup>th</sup> February, 2015, the court ordered the Chief Land Registrar to appear in court and produce records relating to the suit property and in particular copies of instruments through which the suit property was transferred to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant. The Chief Land Registrar was also ordered to furnish the court with an official search on the title of the suit property.

The suit was adjourned on several occasions subsequently due to the failure by the Chief Land Registrar to comply with the said court order. On 16<sup>th</sup> October, 2018, a land registrar by the name Mr. Charles Ngetich appeared in court on behalf of the Chief Land Registrar. He told the court that although he was able to get the Deed file for the suit property, he did not get a copy of the title in the file. He stated that it appeared as if someone had removed the title from the Deed file. He stated further that what he found inside the file were several applications that had been made for provisional titles by various parties. He handed to the court a number of documents that he obtained from the Deed file for the suit property. He promised that he would go and look for more information. Mr. Ngetich returned to court on 15<sup>th</sup> November, 2018 and informed the court that he was unable to trace the title for the suit property.

When the hearing of the suit resumed before me on 4<sup>th</sup> July, 2019, the 2<sup>nd</sup> plaintiff was cross-examined by the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 2<sup>nd</sup> plaintiff denied that the plaintiffs and the 1<sup>st</sup> defendant had entered into an agreement with the 2<sup>nd</sup> defendant for the sale of the suit property. The 2<sup>nd</sup> plaintiff also denied that he received any payment from the 2<sup>nd</sup> defendant. He told the court that he was not aware if the 1<sup>st</sup> defendant received any payment for the suit property. When referred to the affidavit in support of the plaintiffs' amended Originating Summons, the 2<sup>nd</sup> plaintiff denied that he had filed an amended Originating Summons. He denied the affidavit and contended that he did not join the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the suit. The 2<sup>nd</sup> plaintiff denied having instructed the firm of C.M Kingori & Co. Advocates to file the amended Originating Summons.

After the close of the plaintiffs' case, the advocates for the defendants informed the court that the defendants did not wish to tender evidence. The defendants' cases were therefore closed without the defendants tendering any evidence in their defence. The parties chose not to make closing submissions.

#### Determination:

The first issue that I need to determine is whether the plaintiffs' case is based on the original Originating Summons or the amended Originating Summons. From the material on record, it appears that after the plaintiffs had filed this suit which was originally brought only as against the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant in unclear circumstances travelled all the way to Mombasa a jurisdiction which had no nexus of whatsoever nature with the suit property or the parties and filed parallel proceedings against the plaintiffs and the 1<sup>st</sup> defendant herein and managed to obtain orders compelling the plaintiffs herein and the 1<sup>st</sup> defendant to transfer the suit property to it in default of which the Deputy Registrar was to be at liberty to execute the instrument of transfer of the property on behalf of the plaintiffs and the 1<sup>st</sup> defendant in favour of the 2<sup>nd</sup> defendant.

The said orders were issued while this suit was pending. The plaintiffs have contended that they were not served with the pleadings in the Mombasa High Court cases in which the said orders were given. The court files in which the said orders were made in favour of the 2<sup>nd</sup> defendant went missing as soon as the orders were extracted and the 2<sup>nd</sup> plaintiff was forced to make an application for the cases to be transferred to Nairobi in another miscellaneous application No. 169 of 2010. Although the order for transfer was made on 17<sup>th</sup> May, 2010, there is no evidence that the transfer of the said files to Nairobi took place. I believe that there was nothing to be transferred to Nairobi now that the physical files had disappeared in Mombasa. Without the benefit of the court files for the two cases, this court is unable to comment on the genuineness of the orders that were obtained by the 2<sup>nd</sup> defendant in Mombasa having regard to the circumstances under which the said orders were procured and the subsequent disappearance of the files.

The said orders were used to transfer the suit property to the 2<sup>nd</sup> defendant on 21<sup>st</sup> June, 2005. The 2<sup>nd</sup> defendant subsequently transferred the suit property to the 3<sup>rd</sup> defendant which was a sister company on 27<sup>th</sup> July, 2006. From the evidence on record, the transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant was brought to the attention of the plaintiff on or about 3<sup>rd</sup> October, 2007. On 7<sup>th</sup> September, 2010, the plaintiffs filed an application for leave to add the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to this suit as defendants on the grounds that the suit property had been transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants during the pendency of the suit.

The application was brought by the 2<sup>nd</sup> plaintiff in person and was supported by his own affidavit. The application was allowed and on 29<sup>th</sup> November, 2010, the plaintiff filed amended Originating Summons which brought in the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as parties to the suit. The amended Originating Summons was filed by C. M. Kingori Advocates who were appointed by the plaintiffs to act for them on 28<sup>th</sup> September, 2010. As I have mentioned earlier, when the hearing of the suit commenced, the 2<sup>nd</sup> plaintiff disowned the amended Originating Summons but was overruled by Mutungi J. who ordered that the suit shall proceed on the basis of the amended Originating Summons and not the original originating summons. That said order by Mutungi J. as I have mentioned earlier was never varied or set aside. Although during cross-examination by the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the 2<sup>nd</sup> plaintiff once again disowned the amended Originating Summons, that to me was inconsequential as it could not overturn the order by Mutungi J. It follows therefore that the plaintiffs' suit is to be determined on the basis of the amended Originating Summons.

The parties did not agree on the issues for determination by the court. As I have mentioned earlier, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not respond to the amended Originating summons. They also did not tender any evidence at the trial. From the amended Originating Summons and the response thereto by the 1<sup>st</sup> defendant, the issues that arise for determination in my view are as follows:

1. Whether the suit property was capable of being partitioned so that each of the co-owners could own separate titles in respect of their shares therein.
2. Whether the best option for determining the tenancy in common between the plaintiffs and the 1<sup>st</sup> defendant is the sale of the suit property.
3. Whether the 1<sup>st</sup> defendant had unreasonably refused to have the suit property sold so as to determine the tenancy in common.
4. Whether the 1<sup>st</sup> defendant should be compelled to execute the agreement for sale of the suit property to Michael Mbira and the instrument of transfer.
5. Whether the sale and transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant was irregular and illegal.
6. Whether the transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant should be cancelled so that the title of the suit property is reverted to the plaintiffs and the 1<sup>st</sup> defendant as tenants in common.

#### Whether the suit property was capable of being partitioned so that each of the co-owners could own separate titles in respect of their shares therein.

The suit property measures 0.0348 hectares. The plaintiffs contended that the suit property was not capable of partition amongst the plaintiffs and the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant contended in her replying affidavit that the property was capable of being partitioned. No evidence was placed before the court by either party as to the nature and condition of the property. In the circumstances, there is no material

before the court on the basis of which the court can say positively that the property can or cannot be partitioned. The court has however noted that the suit property is a leasehold interest from the Government of Kenya and as such partitioning of the same may require consent. I have also noted from the evidence on record that the parties had agreed to determine the tenancy in common through the sale of the suit property to the 2<sup>nd</sup> defendant. This implies that there was a consensus that the property could not be partitioned. In the face of that consensus and in the absence of evidence to the contrary, it is my finding that the property cannot be partitioned.

Whether the best option for determining the tenancy in common between the plaintiffs and the 1<sup>st</sup> defendant is the sale of the suit property.

A tenancy in common can be determined either through partition, sale of the whole property or sale of shares of the other co-owners of the property to the others. In this case, there is no evidence that the parties had considered other options apart from partition and sale of the whole property. Since the parties had agreed to put up the property for sale, I believe that that was the best option available to them to determine the tenancy in common and I so hold.

Whether the 1<sup>st</sup> defendant had unreasonably refused to have the suit property sold so as to determine the tenancy in common.

I am not satisfied from the evidence on record that the 1<sup>st</sup> defendant had unreasonably refused to have the suit property sold. It is common ground that the parties had initially agreed to sell the suit property to the 2<sup>nd</sup> defendant. From the 1<sup>st</sup> defendant's replying affidavit, as far as she was concerned, the agreement for sale between the plaintiffs and the 1<sup>st</sup> defendant with the 2<sup>nd</sup> defendant was still subsisting when the plaintiffs entered into another agreement for sale with one, Michael Mbira. Whereas the plaintiffs had claimed that the agreement with the 2<sup>nd</sup> defendant was rescinded for failure by the 2<sup>nd</sup> defendant to complete, the 1<sup>st</sup> defendant contended to the contrary. The 2<sup>nd</sup> plaintiff led evidence that the 2<sup>nd</sup> defendant only paid a deposit of Kshs. 430,000/= and did not pay the balance of the purchase price. Neither the 1<sup>st</sup> defendant nor the 2<sup>nd</sup> defendant gave evidence. In the absence of evidence that the 2<sup>nd</sup> defendant paid the purchase price in full, I am unable to find that it completed the purchase of the suit property. The fact that the 2<sup>nd</sup> defendant paid to the 1<sup>st</sup> defendant her share of the purchase price could not be construed as settlement of the full purchase price. If the 2<sup>nd</sup> defendant failed to pay the full purchase price for the suit property, the owners thereof were at liberty to rescind the agreement with the 2<sup>nd</sup> defendant and to put up the property for sale to another interested purchaser. The difficulty the 1<sup>st</sup> defendant found herself in was that she had received some payments from the 2<sup>nd</sup> defendant. She wanted the first agreement to be brought to a close one way or the other before she could enter into another agreement. In the circumstances, it cannot be said that the 1<sup>st</sup> defendant's refusal to enter into a fresh agreement for sale with a new purchaser, Michael Mbira was unreasonable.

Whether the 1<sup>st</sup> defendant should be compelled to execute the agreement for sale of the suit property to Michael Mbira and the instrument of transfer.

From the evidence on record, this issue has been overtaken by events. The agreement that the plaintiffs entered into with Michael Mbira that was not signed by the 1<sup>st</sup> defendant was cancelled and the deposit that had been paid by Michael Mbira returned to him. Following that development, Michael Mbira's application to join this suit as a party was withdrawn. It is not necessary in the circumstances for the court to determine whether or not the 1<sup>st</sup> defendant should be compelled to execute the agreement that the plaintiffs had entered into with Michael Mbira.

Whether the sale and transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant was irregular and illegal.

As I have stated earlier, there is evidence on record that the 2<sup>nd</sup> defendant obtained some orders from the High Court at Mombasa pursuant to which it was registered as the owner of the suit property before it transferred the property to the 3<sup>rd</sup> defendant which is a sister company. The validity of the said orders and the circumstances under which they were issued cannot be established by this court. From the evidence before the court, the relevant court files disappeared in the High Court at Mombasa soon after the orders were extracted. An order was made that the suits in which the said orders were made be transferred to Nairobi. That order seems not to have been complied with. As I observed earlier, lost files could not be transferred. I am in agreement with the 1<sup>st</sup> defendant in her contention that the appropriate forum in which the plaintiffs herein should have challenged the transfer of the suit property to the 2<sup>nd</sup> defendant was in the two cases that were filed in Mombasa and in which orders for the transfer of the suit property to the 2<sup>nd</sup> defendant were issued. However, how could the plaintiffs do that when the orders were issued without their involvement and court files were caused to disappear?

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants had an opportunity in this case to come clean on the said orders which they obtained over 400 km away from Nairobi where the suit property is situated. The 2<sup>nd</sup> defendant did not produce the pleadings and proceedings in Mombasa High Court Civil Suit No. 150 of 2003 where it obtained an order compelling the plaintiffs to transfer the suit property to it. There is no evidence that when it obtained the said order, it had completed the payment of the purchase price in the sum of Kshs. 4,300,000/= to the plaintiffs and the 1<sup>st</sup> defendant. There is also no evidence before the court that the 3<sup>rd</sup> defendant which shares directors and shareholders with the 2<sup>nd</sup> defendant purchased the suit property from the 2<sup>nd</sup> defendant. The suit property is said to have been transferred to the 3<sup>rd</sup> defendant at a consideration of Kshs. 6,000,000/=. No evidence was placed before the court showing that any payment moved from the 3<sup>rd</sup> defendant to the 2<sup>nd</sup> defendant apart from what is declared in the instrument of transfer. The property was also transferred to the 3<sup>rd</sup> defendant while this suit was pending. Under the doctrine of *lis pendens*, the interest that was acquired by the 3<sup>rd</sup> defendant from the 2<sup>nd</sup> defendant was subject to the outcome of these proceedings.

Although I am unable to declare the transfer of the suit property to the 2<sup>nd</sup> defendant as irregular and illegal the same having been done pursuant to court orders that have not been set aside, I am of the view that this court would not have done justice to the plaintiffs if the 2<sup>nd</sup> defendant is not held to account on how it paid the balance of the purchase price for the suit property before the property was transferred to it. If that account is not given and the plaintiffs paid what is due to them, the plaintiffs would have been cheated of their share in the suit

property by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the court would have left them without a remedy. The 2<sup>nd</sup> defendant having failed to prove that it paid the purchase price for the suit property in full, it is liable for the balance thereof.

Whether the transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant should be cancelled so that the title of the suit property is reverted to the plaintiffs and the 1<sup>st</sup> defendant as tenants in common.

As I have already stated above, I am unable to declare the transfer of the suit property to the 2<sup>nd</sup> defendant and subsequently to the 3<sup>rd</sup> defendant irregular and illegal due to the fact that the 2<sup>nd</sup> defendant acquired its interest in the property pursuant to the court orders that it obtained at the High Court in Mombasa. The said court orders could only have been given on the basis that the 2<sup>nd</sup> defendant had purchased the suit property from the plaintiffs and the 1<sup>st</sup> defendant and had paid the full purchase price. In the circumstances, there would be no basis for cancelling the transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. From the evidence on record however, it appears that the 2<sup>nd</sup> defendant only paid to the 1<sup>st</sup> defendant Kshs. 1,400,000/= for the suit property out of the total purchase price of Kshs. 4,300,000/=. There is no evidence that the 2<sup>nd</sup> defendant paid the balance of the purchase price in the sum of Kshs. 2,900,000/=. I am of the view that although there is no basis for cancelling the transfers of the suit property in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, a court of law cannot allow the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to keep the property if they fail to pay the balance of the purchase price in the sum of Kshs. 2,900,000/= aforesaid to the plaintiffs.

In conclusion, I hereby enter judgment for the plaintiffs against the defendants as follows:

1. The 2<sup>nd</sup> defendant shall pay to the plaintiffs a sum of Kshs. 2,900,000/= being the balance of the purchase price for L.R No. 209/2489/21 (“the suit property”) that was payable by the 2<sup>nd</sup> defendant to the plaintiffs and the 1<sup>st</sup> defendant within 90 days from the date hereof together with interest at court rates from the date hereof until payment in full.
2. In the event that the 2<sup>nd</sup> defendant fails to pay the said amount within the prescribed period, the transfer of the suit property to the 2<sup>nd</sup> defendant registered on 21<sup>st</sup> June, 2005 and the subsequent transfer of the suit property to the 3<sup>rd</sup> defendant registered on 27<sup>th</sup> July, 2006 shall be cancelled and the property reverted back to the names of the plaintiffs and the 1<sup>st</sup> defendant.
3. If the transfers in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are cancelled pursuant to preceding order, the plaintiffs and the 1<sup>st</sup> defendant shall sell the suit property after valuation and shall refund to the 2<sup>nd</sup> defendant a sum of Kshs. 1,400,000/= that was paid by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant for the suit property which amount shall be deducted from the share of the 1<sup>st</sup> defendant who received the same.
4. Each party shall bear its own costs of the suit.

**Delivered and Dated at Nairobi this 5<sup>th</sup> day of December 2019**

**S. OKONG’O**

**JUDGE**

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

The 2<sup>nd</sup> Plaintiff present in person

Ms. Nyakundi h/b for Mr. Maina Irungu for the 1<sup>st</sup> Defendant

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

Ms. C. Nyokabi-Court Assistant