



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 32 OF 2013

(Formerly Eldoret Hccc No. 85 of 2011)

BISHOP BENEDICTOR MAKANI BAHATI – CHAIRMAN.....1ST PLAINTIFF
DANIEL KHATERA – VICE CHAIRMAN.....2ND PLAINTIFF
RICHARD MUNYANG’ORI – SECRETARY.....3RD PLAINTIFF
SAMSON JUMA – ASSISTANT SECRETARY.....4TH PLAINTIFF
MARY WAIRIMU – TREASURER (Suing as the registered trustees
of Global Field Evangelism Mission).....5TH PLAINTIFF

VERSUS

BEN MUNERIA WESONGA.....1ST DEFENDANT
ERI PLASTICS LIMITED.....2ND DEFENDANT
MUNICIPAL COUNCIL OF ELDORET.....3RD DEFENDANT
THE LAND REGISTRAR, UASIN GISHU DISTRICT.....4TH DEFENDANT
THE CHIEF LAND REGISTRAR.....5TH DEFENDANT
THE COUNTY GOVERNMENT OF UASIN GISHU.....6TH DEFENDANT

JUDGMENT

PLAINTIFFS’ CASE

Bishop Benedictor Makani Bahati – Chairman, Daniel Khatera – Vice Chairman Richard Munyang’ori – Secretary, Samson Juma – Assistant Secretary, Mary Wairimu – Treasurer Suing as the registered trustees of Global Field Evangelism Mission (**herein referred to as the plaintiffs**) have come to this court against the defendants stating that they are registered trustees of Global Field Evangelism Mission Christian Church duly registered under the provision of the Societies Act. The plaintiffs claim that by sale agreement dated 15th April, 2008 between the plaintiff and the 1st defendant, the plaintiff purchased from the 1st defendant that parcel of land known as Eldoret Municipality Block 2/83/1 at a total consideration of Kshs.6,500,000.

They claim further that by an addendum agreement dated 3rd November, 2008, the 1st defendant apart from acknowledging receipt of further payment, also confirmed that the property was charged to National Bank and the 1st defendant undertook to pay all the liabilities upon receipt of the first payment from the plaintiff. The 1st defendant confirmed that the property was free from any other liability or encumbrance or claim from any 3rd party and undertook to indemnify the plaintiff against any loss that could be incurred in the court of the transaction.

By a further addendum agreement dated 14th January, 2010, it was agreed that the plaintiff was to pay National Bank of Kenya a total sum of Kshs.3 Million payable by monthly installments of Kshs.70,000 per month for a period of four (4) years.

The balance remaining in respect of the total consideration upon taking into account payments in terms of Clause 7(a) above was to be paid to the 1st defendant. The plaintiff has so far paid a total of Kshs.3,310,000 towards completion comprised as follows:

- (i) Payments to 1st defendant directly.....Kshs.1,955,000**
- (ii) Payment to National Bank to clear 1st defendant's loan...Kshs.1,335,000**
- (iii) Legal fees paid to M/s Gumbo & Co. Advocates.....Kshs.3,310,000**

The plaintiff further avers that the period of four (4) years within which the plaintiff was to repay the loan to National Bank of Kenya has not lapsed. The plaintiff took immediate possession and occupation of the property upon execution of the agreement dated 15th April, 2008 and proceeded to construct a temporary church building on the said property. The church has four hundred (400) members who congregate and worship therein. The current value of the church building is estimated at Kshs.4,300,000.

That the plaintiffs aver that the Sale Agreement aforestated together with the various Addendum agreements are still valid and binding in so far as the same have not been rescinded or cancelled by any of the parties thereto.

The plaintiff further avers that time was not of essence per the terms of the sale agreement and that prior to purchasing the property, the plaintiff was leasing the same from the 1st defendant with effect from 24th January, 2008 and the parties had executed lease agreements dated 24.1.2008 and 16.2.2008.

That on 2nd May 2011 or thereabout, the plaintiff was surprised and perplexed to receive a letter dated 28.04.2011 from M/s Chemitei & Company Advocates, whose import and purpose was inter alia thus;

- (a) The letter alleged that Eri Plastics Limited, the 2nd defendant herein had purportedly paid the loan to National Bank of Kenya and land rates to the Municipal Council of Eldoret.**
- (b) The letter demanded that the plaintiff's do vacate from the premises as a matter of priority.**

The plaintiff claims to have made frantic efforts to contact the 1st defendant with a view to verify the veracity of the contents of the letter from M/s Chemitei & Company plaintiff lodged a caution at the District Land Registry whereupon carrying out a search it transpired that the 1st defendant had fraudulently clandestinely and secretly transferred the said property in favour of the 2nd defendant but nonetheless the caution was registered to protect the plaintiff's purchaser interest.

On 9th May 2011, the plaintiff was surprised when a person who introduced himself as a council employee delivered a copy of a letter dated 28th April, 2011 which was directing the 1st applicant to demolish the church building and that by a letter dated 10th May 2011, the plaintiff lodged a complaint with the council regarding the threatened demolition of its church.

On 11th May 2011, the plaintiff was again surprised and perplexed to receive a copy of a letter from Municipal Council of Eldoret which purported to direct the plaintiff to demolish the church buildings standing on the said premises within three (3) days failure to which the council would demolish the same.

The plaintiff contends that the 1st defendant conduct of purporting to sell the suit land to the 2nd defendant was illegal, wrongful and fraudulent on the part of 1st and 2nd defendants jointly and severally as demonstrated below.

The Particulars of Illegalities and Or Fraud on The Part of the 1st Defendant are enumerated as follows; -

- (i) Purporting to sell the said land to the 2nd defendant whilst he knew that the land was not available for him to sell thereby acting in blatant breach of the sale agreement and addendum agreements between himself and the plaintiff.**
- (ii) Purporting to sell the land whilst he knew the sale agreement between himself and the plaintiff was still subsisting and binding and that the plaintiff was already on an actual possession and occupation of the land.**
- (iii) Purporting to offer for sale the plaintiff's parcel of land without authority or permission on the part of the plaintiff and then fraudulently clandestinely and secretly purporting to transfer the title to the 2nd defendant.**
- (iv) Fraudulently receiving money from the 2nd defendant and executing the purported sale agreement by false misrepresentation.**
- (v) Collecting the original title deed from National Bank secretly and without notifying the plaintiff.**
- (vi) Attempting to corruptly and unjustly enriching himself.**
- (vii) Attempting to deprive the plaintiff church of its property contrary to the Laws of Kenya.**

(viii) Colluding and or conniving with the 1st and 2nd defendant on an attempt to swindle the plaintiff of its land.

The particulars of illegalities and or fraud on the part of the 2nd defendant are enumerated as follows:-

(i) Colluding and conniving with the 1st and 3rd defendant with a view to illegally and fraudulently deprive the plaintiff of its parcel of land.

(ii) Failing and or ignoring to make enquiries regarding the bonafide and legitimate ownership of the said parcel of land before attempting to purchase the same.

(iii) Engaging himself in fraudulent and corrupt transaction.

(iv) Threatening to evict the plaintiff without a court order or decree sanctioning the same.

(v) Interfering with the plaintiff's quiet possession and occupation of the said land.

The plaintiff further contends that the 3rd defendant's threat to demolish the plaintiff's church is unlawful and null and void as demonstrated below:

The particulars of illegalities on the part of the 3rd defendant

i) Threatening to demolish the Plaintiff's church building without a lawful cause.

ii) Colluding and or conniving with the 1st and 2nd Defendant to illegally deprive the Plaintiff of its property through unlawful means.

iii) Acting contrary to the tenets of the public interest and morality.

iv) Being high handed and acting ultra vires its powers.

v) Engaging in inhuman, immoral and wrongful conduct.

vi) Exposing the Plaintiff and its members to anxiety and unwarranted threats of demolition and eviction.

The Plaintiffs aver that the 4th and 5th defendants are enjoined in this suit as necessary parties being vested with powers to cancel a title and to rectify the register by removing the name of the 2nd defendant and instead inserting the name of the Plaintiff Church as the registered owner of the suit land.

The plaintiffs further contend that the 4th and 5th Defendants committed illegalities and abuse of office by effecting the transfer and issuance of the title document to the 2nd defendant.

The particulars of illegalities on the part of the 4th and 5th defendants:-

(a) Purporting to effect transfer of ownership and to issue a title document to the 2nd Defendant in respect of the suit land which was not available for such transfer as it belongs to the plaintiff.

(b) Facilitating and or sanitizing the illegal and fraudulent actions of the 1st and 2nd Defendants which were clearly designed and calculated to deprive the plaintiffs of the suit property.

(c) Engaging in actions that were injurious and grossly prejudicial to the plaintiffs by violating their rights to own and use the suit property as enshrined in the constitution.

(d) Purporting to unlawfully effect the transfer of ownership and issuance of a title document to the 2nd Defendant without ensuring that all the pre-requisite clearances, consents and or approvals were applied for and or obtained as provided for by the law.

(e) Failing to ensure that all the statutory remittances including stamp duty, land rates/rent: consents were paid prior to effecting the transfer of ownership and or issuance of the title document.

(f) Engaging in unlawful actions that amount to abuse of office and or misuse of powers.

(g) Flouting the Constitution of Kenya and the law.

The Plaintiffs aver that the 3rd to the 6th Defendants were under a statutory and fundamental duty to ensure compliance with all the requisite

legal processes and steps as appertains to all the transactions involving the transfer of the suit and issuance of title document by ensuring that all the necessary approvals, consents and clearances were lawfully applied for and obtained and that all statutory taxes including land rates/rent, stamp duty, clearance fees, consent fees and other government outlays were fully paid for. The 4th and 5th Defendants are necessary parties in facilitating the execution of the Decree that may ensue herein by effecting cancellation of the title document which was unlawfully and irregularly issued to the 3rd Defendant and to cause the rectification of the register in favour of the plaintiffs.

The 3rd to 6th Defendant have manifestly flouted their fundamental duty to observe, respect, protect, promote and fulfill the plaintiff's rights and fundamental freedoms in the Bill of Rights as codified in the Constitution of Kenya thereby exposing the plaintiff to immense injury, loss and damage.

The plaintiffs state that by reason of the foregoing, they are under imminent risk of being deprived of their parcel of land known as ELDORET MUNICIPALITY BLOCK 2/83/1 and the church buildings standing thereon are threatened with demolition in which event the Plaintiffs stand to suffer irreparable loss and damage.

That on 13th May, 2011 at 4:45pm or thereabout, the 3rd Defendant through its agents and or Servants and in the company of police officers from Eldoret Police Station invaded the suit premises and proceeded to demolish the church building using the Council forklift (tractor) thereby exposing the Plaintiff's church to substantial loss and damage to the tune of Kshs. 1,229,240/=.

The Plaintiff contends that the conduct of the 3rd Defendant of demolishing the church building was illegal, null and void ab initio as the demolition was carried out after an order of temporary injunction had been issued and served upon the 3rd Defendant. The 3rd Defendant is a busy body and acted without jurisdiction and ultra vires its powers in the demolition of the church premises in so far as the matter involves a dispute of ownership of private land. The 3rd defendant was actuated by malice and vendetta in its actions.

That further to a foregoing, the four hundred (400) members of the Plaintiff's church are at a risk of being denied a place to congregate and worship hence interference with their right of worship and association.

The plaintiffs state that by reason of the 3rd Defendant's demolition of the Plaintiff's church, the worshippers were exposed to great suffering inconveniences and disturbances as they had to perform the church services/functions in the open space and were as such denied a proper place to congregate and worship hence interference with their constitutional right of worship and association. The Plaintiff's church was constrained to incur a lot of expenses in carrying out reconstruction work in the form of materials and labour at an estimated costs of Kshs 1,229,240/= for which the plaintiff claim as against the Defendants both jointly and severally.

The Plaintiff's claim against the Defendants jointly and severally a temporary and permanent injunction to restrain the Defendants, jointly and severally, either by themselves, their agents or servants from demolishing the Plaintiff's church buildings standing on the parcel of land known as ELDORET MUNICIPALITY BLOCK 2/83/1 and or evicting or threatening to evict the Plaintiff there from or in any other manner interfering with the Plaintiff's quiet possession and occupation thereof.

The plaintiffs further pray for a declaration that the Plaintiff is the bonafide and legitimate purchaser and proprietor of that parcel of land known as ELDORET MUNICIPALITY BLOCK 2/83/1, and that the Plaintiff is in lawful and actual possession and occupation thereof and a declaration that the 1st Defendant's purported sale of the suit land to the 2nd Defendant and the subsequent transfer and issuance of the Title document to the 2nd Defendant, was/is illegal, fraudulent and vitiated by the law and an order do issue for cancellation of the Title and that rectification of the register at the land registry be effected to reflect the Plaintiff as the owner thereof.

The plaintiffs further pray for general punitive and aggravated damages for illegal and wrongful demolition of the Plaintiff's church building together with compensation in respect of the cost of rebuilding the church premises.

This cause of action belongs to the Plaintiff and the Plaintiff avers that, there is no other suit pending and there have been no previous proceedings in any other court between the parties herein over the same cause of action.

Demand and Notice of intention to issue have been issued to no avail hence rendering this suit necessary. The cause of action arose within the jurisdiction of its honourable court.

1ST DEFENDANTS DEFENCE

The 1st Defendant states that the plaintiffs' suit is misconceived, bad in law and discloses no cause of action against him. He states that the agreements of sale are null and void and not enforceable. He contends that any payment made by the plaintiffs was for the renting and or lease of the 1st Defendant's premises. The 1st Defendant contends that the plaintiffs are tenants and/or licensees of the suit property. He denies allegations of illegalities and fraud and contends that he was the registered proprietor of the suit land.

The 1st Defendant avers that the plaintiffs suit is a nullity, misconceived, bad in law and discloses no cause of action against him. In alternative and without prejudice to the above, the 1st Defendant contends that the alleged Sale Agreement(s), if any, is not enforceable. The 1st Defendant contends that the plaintiffs are tenants and / or licensees at the suit property.

The 1st Defendant denies the allegations of illegalities and fraud and puts the Plaintiffs to strict proof thereof. He contends that he was the registered proprietor of the land parcel. The 1st Defendant denies the allegations that he was served with a demand or notice to sue. The 1st Defendant prays that the plaintiffs suit be dismissed with costs.

2ND DEFENDANT'S DEFENCE

The 2nd Defendant denied the allegation in the further amended plaint and all allegations of fraud and state that it did all any reasonable purchaser will do to ascertain the veracity of the title and that it even went ahead to pay the loan to M/S National Bank of Kenya Limited and the rates due to the 3rd defendant on behalf of the 1st Defendant. He states that due diligence was done before effecting the transfer and issuance of the title documents in the 2nd defendant's favour. The defendant avers that it never connived or colluded with any party or at all but as an investor it purchased the suit property lawfully and responsibly. The structures on the property were reconstructed after the suit was filed. He prays that the suit be dismissed with costs.

The 2nd defendant further denies the having been involved in any fraud or illegality especially the particulars of fraud directed against it and beside putting the plaintiff to strict proof avers that it was an innocent purchaser for value without notice.

The 2nd defendant further avers that it did all any reasonable purchaser will do to ascertain the veracity of the title and that it even went ahead to pay the loan to M/S National Bank of Kenya Limited and the rates due to the 3rd defendant on behalf of the 1st defendant.

The 2nd defendant states that due diligence was done before effecting the transfer and issuance of the title documents in the 2nd defendant's favour. The 2nd defendant therefore avers that it never connived or colluded with any party or at all but as an investor it purchased the suit property lawfully and responsibly.

The jurisdiction of this court is admitted but the 2nd defendant denies having received any notice of intention to sue. The 2nd defendant prays for this suit to be dismissed with costs.

3RD DEFENDANT'S DEFENCE

The 3rd Defendant denies that the plaintiffs are the registered trustees of Global Field Evangelism Mission Christian Church. The 3rd Defendant further avers that at all material times the 1st Defendant was the registered owner of the land parcel number ELDORET MUNICIPALITY BLOCK 2/83/1. The 1st Defendant was also the rate payer for the said property according to the records maintained at the Municipal council of Eldoret.

According to the Physical Planning Act, the Local Authority Act and the Building By-Laws made thereunder every owner of land is required to seek for building permission before erecting any structure on any land within the Municipality.

The plaintiff did not apply for any Building permission in view of the fact that they have never been the registered owners of the suit land. The 1st Defendant however previously sought for permission to build a temporary structure on the land which was granted but was later revoked on the 1st Defendant's request upon the transfer of the property to the 2nd Defendant.

The 1st Defendant therefore contends that there was no evidence showing the plaintiffs have ever been the registered owners of the suit property and or any structure standing thereupon.

The 3rd Defendant particularly denies that the plaintiffs were the owners of the suit land and further denies that is colluded and or connived with the 1st and the 2nd Defendant to illegally deprive the Plaintiff of its property through unlawful means and further denies that it acted contrary to the tenets of public interest and morality. Denies being high handed and or acting ultra-vires it's powers. Denies engaging in inhuman, immoral and wrongful conduct. Denies exposing the plaintiff and its members to anxiety and or unwarranted threats of demolition and eviction.

The 3rd Defendant denies that the 4th and 5th Defendants are vested with powers to cancel a title and to rectify the register by removing the name of the 2nd Defendant and instead inserting the name of the Plaintiff Church as alleged in paragraph 19 A of the amended plaint.

The 3rd Defendant particularly denies that the 4th & 5th defendants purported to transfer ownership and to issue a title document to the 2nd Defendant and that they Facilitated and or sanitized any illegal and or fraudulent actions of the 1st and 2nd Defendants in depriving the plaintiffs of the suit property and that they engaged in actions that were injurious and grossly prejudicial to the plaintiffs by violating their rights.

The 3rd defendant denies having been engaged in unlawful actions that amounted to abuse of office and or misuse of powers and flouted the Constitution of Kenya and the law.

The 3rd Defendant denies the allegations that the 4th and 5th Defendants effected the said cancellation of the title document and that the document was irregularly issued to the 3rd Defendant.

The 3rd Defendant further denies that the 3rd to 5th Defendants manifestly flouted their fundamental duty to observe, respect, protect, promote and fulfill the plaintiff's rights and fundamental freedoms.

The 3rd Defendant denies that it's agents and or servants invaded the suit premises and destroyed the church buildings using the council forklift (tractor) in the company of police officers from Eldoret Police Station or the 13th May 2011 at 4.45 p.m thereby exposing the

plaintiff's church to substantial loss and damage to the tune of Kshs.1, 229,240.00.

The 3rd Defendant denies the plaintiffs incurred any expenses in carrying out reconstruction work in the form of materials and labour at an estimated cost of Kshs. 1,229,240.00 or any greater or lesser sum or at all.

The 3rd Defendant further denies that the plaintiffs are entitled to general, punitive and aggravated damages for the alleged illegal and wrongful demolition of the plaintiff's church in terms of paragraphs 19A and 20B of the emended amended plaint.

The jurisdiction of the court is denied by the 3rd defendant and the 3rd Defendant gave notice that at the earliest possible opportunity before or at the hearing of this suit, he would raise a preliminary objection to the same on the grounds that the dispute is entirely an ownership dispute between the plaintiffs and the 1st and the 2nd Defendant and therefore the 3rd Defendant had been wrongly joined to this suit. The 3rd Defendant prays that the plaintiffs suit against it be dismissed with costs.

DEFENCE BY THE 4TH AND 5TH DEFENDANT

The 4th and 5th defendants aver that property Eldoret/Municipality Block 2/83/1 was first registered in the name of Jason Richard Asembo on 6th December 1983 and charged to standard chartered Bank for ksh 150000 on the 2nd July 1991. The said parcel of land was transferred to Ben Wesonga Muneria on the 17th February 1995 and charged to the National bank of Kenya for Ksh 2,000,000. The Charge was discharged and the property transferred to Eri Plastics Ltd on 16th April 2012 and a certificate of lease issued. The 4th defendant has not received any transfer in favor of the plaintiff for registration and that he is not guilty of any wrong doing. The 4th and 5th defendants deny being party to any fraud and state that they are ready to comply with any court order.

PLAINTIFFS EVIDENCE

PW1, Mary Bahati states that she is a trustee of the Global Field Evangelism Church which is registered and is in good books with the government and has a constitution. On the subject matter, she states that they got into a lease agreement with Ben Wesonga, the 1st defendant. on 24.1.2008. They entered into a sale agreement with Wesonga on 15.4.2008 in respect of property Eldoret/Municipality Block 2/83/1. The consideration was Kshs.6.5 million which was paid by the church.

The agreement was entered into at Gumbo & Associates. The money was paid to Wesonga personally and sometimes to National Bank of Kenya because Wesonga had acquired a loan.

The plaintiff paid the 1st defendant Kshs.3, 310,000. The church was in possession of the land and had constructed on the land offices and a school. They were threatened by the Eldoret Municipal Council with eviction. The Eldoret Municipal Council demolished the property valued at Kshs.4,300,000. They lost property of value of Kshs.1,229,240 but the church was rebuilt.

When the 2nd defendant entered into agreement with the 1st defendant, the agreement between the plaintiff and 1st defendant was still subsisting and that the 1st defendant wrote to the 3rd defendant informing them that the said 1st defendant had entered into agreement with the plaintiff and requested the 3rd defendant to allow the plaintiff put up a temporary structure.

The church was paying some money to National Bank and requested the bank to accept direct payments. The plaintiff produced a letter by the 1st defendant requesting the 3rd defendant to allow the church to construct temporary structures. The plaintiff further produced a letter for renewal of licence for the structures. However, the letter dated 28.4.2010 addressed to Ben Muneria was a revocation of the authority to construct structures. On cross examination by Mr. Marube, she states that the church had leased the property for 3 years. There was a 3 years lease. On cross examination by Mr. Kiboi, she states that they initially occupied the property by virtue of a lease for three years. At first, it was a lease agreement but later her husband entered into a sale agreement at an agreed figure of Kshs.6.5 million. They did not do a search but acted on trust. No consent was obtained from the Commissioner of Lands. They came to learn that the 2nd defendant had purchased the land. On cross examination by Mr. Mathai, she states that she did not apply for the permit to construct permanent structures but the same had been applied by the 1st defendant was granted. The demolition was done by the Municipal council as it then was using its machinery. The property was valued by highland valuers

PW2, Kite Mark a Valuer with Reaget Valuers Institution (K) Ltd valued the fair market value of the structure developed on the land parcel No. Eldoret/Municipality/Block 2/83/1. The structure was valued at Kshs.4,300,000 and the valuation fee was Kshs.10,000.

On cross examination, he states that he found the valuation done by his colleague. He did not have any document to show that he was engaged by Reaget Valuers. He did not have a written authority from Mr. Ketei. The owner of property was Eri Plastics of consideration. Valuation was done by Highlands Valuers after destruction.

On cross examination by Mr. Odongo, she states that the church has never lodged any documents. There is no transfer because they have not paid the whole amount.

The land Registrar is sued because he should have known that there is a sale agreement. There was no caution registered in register when the property was transferred.

PW3, Shane Macharia, the Church administrator states that in 2011, they received some letters to vacate the building. After 2 days, the guys from the Municipal Council went and destroyed the building however the church was reconstructed. He prepared a report. It cost them Kshs.1.2 million to reconstruct the church. He does not know who demolished the church.

The plaintiffs closed their case paving the way for the 1st defendant Ben Muneria Wesonga who started testifying by stating that he was a good friend of Ben Bahati. He states that the dispute is over Plot No. Eldoret Municipality/Block 2/83/1. The original owner was Asembo, a former Town Clerk and was transferred to Ben Wesonga, the 1st defendant who took a loan with the property. Ben Bahati approached him to lease the property and eventually leased it in 2008.

They entered into a sale agreement with Global Evangelism at Ksh.6.5 million and the lease agreement converted all lease money to be part of the consideration in the sale agreement on 15.4.2008.

He gave the church 12 months to pay Kshs.2.7 million. As at 3.11.2008, he had been paid Kshs.1,000,000. They agreed that Kshs.70,000 was to be paid monthly to the bank for 4 years, the balance was to be paid to the 1st defendant. National bank was to release title to Global Field Evangelism. The plaintiff did not comply. There was a breach of contract after receiving Kshs.100,000 from the plaintiff, Kshs.300,000 was to pay someone to assist to bring down interest.

He was later arrested and locked up for obtaining money by false presences. The plaintiff paid Kshs.70,834 per month for 48 months and the loan came down to 5 million but later the plaintiff started issuing bouncing cheques.

The bank decided to sell the property due to bouncing cheques. The Auctioneers were about to auction the property. To pre-empt the auction of the property, he sold the same to the 2nd defendant. By the time the property was being sold, Kshs.12,875,933 was outstanding. According to the 1st defendant, the right owner of the property is Eri Plastics Ltd. The suit should be dismissed.

On cross examination by Mr. Njuguna, he states that the sale agreement with the plaintiff did not have a default clause and time lines. At the signing of agreement, he had received Kshs.800,000. This was to facilitate the overdue bank draft. He admits that the church paid the bank money to offset the loan and some money was paid to the 1st defendant directly. He admits that the plaintiff was still paying the loan as at 27.4.2011 and yet the sale agreement between the 1st defendant and the 2nd defendant was executed on 4.2.2011 and the church was not notified of the sale agreement.

The church constructed the temporary structures on the approval of the Eldoret Municipal Council and through the 1st defendant. The permit was revoked on 28.4.2011.

On cross examination by Mr. Kiboi, he states that Eri Plastics was not aware that the church had purchased the land. He indicated to Eri Plastics that there was a tenant on the land who was about to leave. Eri Plastics paid the bank Kshs.6,000,000 which was channeled through the lawyer. Kshs.3,000,000 was to be paid upon transfer. Ultimately, the property was transferred to Eri Plastics. He sold the property to pay the loan. Eri Plastics have been denied possession by the plaintiff. On cross examination by Mr. Muthai, he states that he was a landlord to the plaintiffs and lessee to the Municipal Council of Eldoret.

On cross examination by Mr. Odongo, he states that there was no engagement between himself, the church and the Registrar. In other words, the Land Registrar, Uasin Gishu was not aware that there was a lease agreement as the lease was not registered. However, the transfer between the 1st defendant and the 2nd defendant was executed and registered by the County Land Registrar, Uasin Gishu.

The 2nd defendant, Rajesh Navnital Sanghrajka testified that he purchased the suit land from the 1st defendant. The purchase price was Kshs.9,000,000. Kshs.6,000,000 was paid to clear the loan and Kshs.3,000,000 was paid for the transfer to the 1st defendant. The transfer was executed and the property registered in the name of Eri Plastics. He was not given vacant possession by the church who were the tenants.

On cross examination by Mr. Njuguna, he states that he is a director of Eri Plastics Limited. He visited the premises and saw a church. He was told that the church was a tenant. The 1st defendant was supposed to give him vacant possession. He was informed that the church had leased the property. The 3rd defendant did not call any witness.

The 4th defendant called Dorothy Chepkogei Leting who states that she is the County Land Registrar. The roles of the Land Registrar are issuance of title deeds, issuance of certificate of leases, issuance of official Searches, registration of charges and other land transactions. She is the custodian of all documents and records for all parcels of land situate in Uasin Gishu County.

She had a copy of the white card. The white card was first opened on the 6th of December, 1983 in the name of Jashon Richard Asembo. This is the first entry on the register.

On 19.12.1983, a certificate of lease was issued to Richard Jashon Asembo. This is the second entry. On 2.7.1991, Jashon borrowed a loan from Standard Chartered Bank Ltd for Kshs. 100,000. The entry is on the encumbrance section. The loan was discharged on 17.2.1995. The land was subsequently transferred to Ben Muneria Wesonga on 17.2.1995 and a certificate of lease issued on the same date. On 17.2.1995, the land was charged to National Bank of Kenya for Kshs. 2,000,000. The loan was discharged on 19.4.2011 and the land was then transferred to Eri Plastics Limited on 16.4.2011 and a certificate of lease issued on 16.4.2011.

On 19.4.2011, a restriction was entered until valuation was done. A caution was placed by Benedicto Makani Bahati. Entry No. 9 is a court order of temporary injunction. That is the last entry. She produced the white card as 4th defendant DEX.1.

The property was transferred to Eri Plastics from Ben Wesonga. She has the transfer of land (lease) document from Wesonga to Eri Plastics dated 12.4.2011. The parcel of land is Eldoret Municipality Block 2/83/1. The document is signed by both transferrer and transferee before Hillary Chemitai, advocate as he then was. The transferor signed by pw4 herself. There was a passport size photograph. The signature was

attested. The transfer was signed by the transferee thus the Directors of Eri Plastics. Passport size photographs are affixed. The revenue stamp is on the document. It was franked. The charge was discharged on 19.4.2011. She produced the discharge of charge and transfer.

Prior to the transfer, the relevant documents were availed to her thus;

1. **Consent to transfer the land in issue from Ben Muneria Wesonga to Eri Plastics dated 14.4.2011. The document is signed by the Town Clerk, Eldoret Municipality.**
2. **Rates clearance Certificate for Eldoret Municipality dated 6.4.2011.**
3. **Original title for Certificate of Lease.**

Stamp duty was paid. The declared value was Kshs.700,000. Kshs.28,000 was paid as stamp duty as 4%. She has the banking slip. The document as assessed on 11.4.2011 and paid on 12.4.2011.

The statutory forms for registration was paid in terms of Kshs.1000. She had a receipt for registration of discharge of charge. She did not assist the 1st and 2nd defendants to deprive the plaintiff. It is not true that she facilitated illegal activities. The documents were presented by Chemutai & Company Ltd. The land belonged to Ben Muneria Wesonga. She did not participate in any action of depriving the plaintiffs of their property. It is not true that she did anything illegal. She has all documents. All the fees were collected.

In this case, the declared value was accepted as per the transfer document. It is not her duty to confirm the position on the ground. It is the duty of the advocate to do a site visit. The sale agreement does not form part of the documents. The agreement is not registered under any law.

On cross examination by Mr. Njuguna, she states that she is a State Officer. She is a civil servant and she is guided by Chapter 6 of the Constitution, Article 73(2)(b). She should not engage in improper practices or corrupt practice.

She does not have the valuation report in respect of the suitland. The property had secured a loan of Kshs.2 Million way back on 17.2.1992. There was a restriction to enable a government valuer to do a report. A government valuer must visit the site. Having accepted the transfer of lease for Kshs.700,000, she needed a report of the government valuer within 2 days. The transfer of lease form was presented on 19.4.2011 and the restriction was removed on 19.4.2011 on the same day she received the transfer of lease. She admits that there are errors in the white card. The restriction was placed on a date she cannot remember. The dates of the entry are not clear.

She states that it is within her powers to accept a declared value but with a restriction. The restriction was removed on 19.4.2011. She does not have evidence that the transfer form was referred to the government valuer in her office. She is the custodian of all records of the Lands. She does not know where all the parcels of land are located but the surveyor knows. She knows that she is accused of undervaluing the land but the matter is in court. She never colluded with the 1st and 2nd defendant to defraud the plaintiff. She looked at the declared value. The declared value was Kshs.700,000. She recorded the discharge of charge on the 19.4.2011. This is the same date she received the transfer of lease. That is the same date she recorded the restriction on the white card. The charge had been registered on 17.2.1992. The property could have appreciated a lot since 1992 to 2011. Valuation of charges is done by a private valuer. She does not have a government valuation report. The declared value was 1/3 of the secured loan.

The process of transaction is that once you prepare a transfer of land or lease, he goes ahead to get the rate clearance and consent to transfer. He prosecutes the documents to land for assessment. The documents are presented and payment made later. The documents were received on 11.4.2011 for assessment. The money was paid on 12.4.2011.

Submissions by Plaintiff

The gravamen of the plaintiff's written submissions filed on the 20th July 2017 is that in the absence of any rescission the contract/agreement for sale stands and the 1st defendant illegally and improperly entered into another agreement for sale with the 2nd defendant. The parties to the agreement for sale entered into the contract for sale voluntarily on the mutual understanding that they would be legally bound to the contract. The fact that the agreement was never rescinded by the 1st defendant who alleged that the plaintiff was in breach means that the 1st defendant is legally bound to the agreement for sale to the Plaintiff.

The 1st defendant neglected to exercise his rights as provided above if he felt that indeed the Plaintiff had breached the conditions of the sale agreement. He instead chose to irregularly and illegally enter into another contract for sale of the same land with the 2nd defendant when he knew too well that he had no capacity to do so. The 1st defendant was aware of the fact that the Plaintiff as per the agreements was in possession of the suit land and was repaying the 1st Defendant's loan at the National Bank.

The plaintiff submits that if the 1st defendant felt that the plaintiff was in breach he ought not to have waived his right to rescind the agreement by issuing notice but to have been in the process of regaining possession of the suit land as provided by the law. The plaintiff therefore submits that the 1st defendant's failure to rescind the contract and his conduct of waiving his right to repossess the suit land took away his right to sell the land thus had not capacity to sell the same to the 2nd defendant.

The 1st defendant could not pass good title to the 2nd defendant which title he did not have for as long as the sale agreement to the Plaintiff was never rescinded. The Plaintiff had an overriding interest as he had been allowed occupation by the 1st defendant.

The parties to the agreement dated 15th April, 2008 and the addendums thereto mutually agreed that the suit property was charged at the National Bank and that the plaintiff should pay part of the consideration to offset the loan owed to the bank by the 1st Defendant. That subsequently, the title to the suit land would be discharged to the Plaintiff upon full payment. That the monthly installments payable to National Bank would run for a period of four (4) years from the date of the agreement dated 14th January, 2010.

The projected completion date would thus be four (4) years from 14th January, 2010. The fixation of period for full payment per se does not make time of the essence of the contract. Time was this not of essence as the same was not expressly stipulated in the agreement. The plaintiff had four years within which to repay the 1st defendant's loan. The Plaintiff submits that time was not of the essence as the same was not expressly stipulated in the agreement and that there was no delay in making the loan repayments on behalf of the 1st Defendant. That it was ready and willing to fulfill its obligation to make monthly, installments to the bank when the 1st defendant unlawfully entered into an agreement for sale with the 2nd defendant.

On Whether the Land Registrar acted within the law in issuing Certificate of Lease to the 2nd Defendant, the plaintiff submits that DW3, the Land Registrar, testified that she did not have in court the report by the Government Valuer to establish the true value of the suit property at the time of effecting transfer of the property to the 2nd defendant. That the Government Valuer had a duty to visit the site to ascertain the actual value of the land before stamp duty could be paid.

The Plaintiff contends that DW3 abused her office by allowing or colluding with the 2nd defendant to undervalue the suit property thereby defrauding the government of revenue. He contravened the express provisions of Section 10A of the Stamp Duty Act by failing to inquire into the open market value of the suit property before allowing the transfer and issuance of the Certificate of Lease to the 2nd defendant. She failed in her obligation to call for the report of the Government valuer that would establish the actual stamp duty payable as well as failing to put on hold the transfer process until the said report has been availed.

The plaintiff has proved that he was the *bonafide* purchaser and occupant of the suit land. That the contract of sale of land which was never rescinded bestows on him the absolute right of ownership of the suit land.

According to the plaintiff, the 1st defendant abused the trust held by the plaintiff by falsely misrepresenting himself to the 2nd defendant that he had capacity to sale the suit property to him. The 1st defendant's right to sell the land was relinquished the moment he entered into a legally binding agreement for sale with the plaintiff.

That as such he is estopped from claiming ownership or purporting to sell the suit property. It is worth noting that since the 1st defendant's right was relinquished, he could have or did not have the capacity to sell nor transfer the suit property to the 2nd defendant.

The 2nd Defendant in collusion with the Land Registrar fraudulently obtained title over the suit property which title should be revoked for being obtained illegally, irregularly and unprocedurally.

SECOND DEFENDANTS SUBMISSIONS

Mr. Kiboi learned counsel for the 2nd defendant submits that the 2nd defendant entered into a sale agreement with the 1st defendant voluntarily and the two bound themselves with the terms of the agreement, where the second defendant performed his part and the 1st defendant performed his part by transferring the property to the second defendant. According to Mr. Kiboi, the fact that the 2nd defendant was not aware that the land had already been sold and that the 1st defendant had entered into another agreement with the plaintiff exonerates the 2nd defendant of any wrong doing and validates his agreements into a legally binding contract. He submits further that the 2nd defendant is a bonafide purchaser for value without notice and therefore has a good title.

Counsel submits further that the certificate of lease held by the 2nd defendant is indefeasible as he followed due process of law as he did a search before the agreement, the owner of the property signed a transfer of the property, obtained consent of the Commissioner OF Lands , paid rates ,transfer was registered and the certificate of lease was issued. The 2nd defendant relies on sections 24, 25, and 26 of the land registration Act no 6 of 2011.

SUBMISSIONS BY THE 4TH AND 5TH DEFENDANTS

Mr Odongo learned counsel for the 4th and 5th defendant *submits that the Issue for determination* as against 4th and 5th defendants is whether Land Registrar acted within the law. He submits that by virtue of privity of contract the 4th and 5th defendants have nothing to say in regard to the dealings between plaintiff and 1st defendant on one hand and 1st defendant and 2nd defendant on other hand. The 4th and 5th defendants were never parties in the said transactions. None of sale agreements in the two transactions was registered or brought to the attention of 4th and 5th defendants.

The only issue presented against land registrar which is pleaded as fraud is that she breached the provisions of Stamp Duty Act by accepting document for registration without ascertaining how much was payable or whether what was as stamp duty had been paid.

In this regard, the plaintiff stated that the Land Registrar ought to have visited the site to ascertain the actual value of the property. She also testified that the Land Registrar did not rely or instruct a valuer to ascertain the actual value of the property. That it was wrong for the Land Registrar to rely on declared value of the property. She should have waited for the valuer's actual value.

Mr. Odongo submits that Section 14 of Land Registration Act, 2012 places on the Land Registrar discretionary powers on deciding whether to accept or refuse any document for registration. In this instant case, the Land Registrar accepted the instrument for registration but took enough safeguards to protect government's interest. After transfer to 2nd defendant, government restriction was placed on the register awaiting valuation report. DW 3 confirmed that such a restriction can never be removed until the report is available. She also stated that presentation of valuation report was stalled by injunctive orders issued herein and registered on the suit parcel of land.

The transfer of lease from 1st the defendant to 2nd the defendant was stamped. Therefore, section 46 of Land Registration Act is inapplicable. In any case, non-compliance with section or any other provision of the Stamp Duty Act does not render transactions such as transfer invalid. The objective behind the provisions of section 19 of Stamp Duty Act is to ensure that parties should not avoid payment of stamp duty. Such duty can however be paid at any stage and there is always a penalty under Section 19(5).

The plaintiff offered no evidence to confirm what the actual value of property was at the time of transfer. According to Mr. Odongo, it was not enough for the plaintiff to make the unsubstantiated allegations. It is not enough for a party to merely allege or infer to acts of fraud. The party must tender evidence to prove the acts of fraud. On preponderance of evidence, plaintiff failed to discharge this burden. Consequently, the suit against 4th and 5th ought to be dismissed.

ANALYSIS AND DETERMINATION

I have considered the pleadings evidence on record and submissions and do find that Global field evangelism missions, the plaintiff, was registered by the Republic of Kenya under the societies act on the 4th of March 2005. The plaintiff entered into a lease agreement with the 1st defendant on the 24TH OF January 2008. The tenancy period was 3 years renewable at the option of each party by way of three months' notice and terminable by three months' notice in advance by either party. The monthly rent was 10,000 payables one year in advance thus Kshs. 120,000 p.a. The plaintiff constructed on the suit property structures for church purposes being Mabati structures used for Sunday school, 47 treated gum posts, toilet, septic tank with power and water.

On the 15th of April 2008, vide addendum agreement, the plaintiff paid the 1st defendant Kshs. 80,000 and the defendant undertook to release the title to the plaintiff. The 1st defendant was to give the plaintiff a grace period of 12 months to allow the plaintiff pay kshs. 2.71 million.

The church's relationship with Mr Wesonga did not change and therefore the church entered into agreement of sale with the 1st defendant on the 15th of April, 2008 in respect of ELDORET MUNICIPALITY BLOCK 2/83/1. The consideration was kshs. 6,500,000. The property was sold subject to Kshs. 500,000 which had already been paid and an additional Kshs. 300,000 which was to be paid at the signing of the agreement. The title deed was to be released from the bank and handed over to the purchaser for the purposes of settling the balance. On the 3rd November 2008, the plaintiff and the 1st defendant signed an addendum to the agreement drawn between themselves dated 14th April 2008 and agreed that the 1st defendant was to pay rates for the period upto the year 2009 and was to execute all the documents in relation to conferring ownership of the property to the plaintiff and parties acknowledged that the property was charged to the National Bank of Kenya. The 1st defendant was to make good of all liabilities upon receipt of the first payment and undertook to avail the title documents as well as the discharge of charge and transfer duly executed upon receipt of the initial payment of kshs. 400,000 and acknowledged having received kshs. 1,000,000 and confirmed that the property was free from any liability or encumbrance or claim from any other party. The 1st defendant undertook to indemnify the plaintiff for any loss incurred during the transaction.

On the 14th of January 2010, an agreement was entered into between the plaintiff and the first defendant to the effect that the plaintiff was to pay the National Bank of Kenya Kshs. 70,000 Monthly upto kshs. 3,000,000 for 4 years and that the balance of the payments was to be paid to the 1st defendant. The National bank of Kenya was to release the title to the plaintiff upon completion of the payment. The agreement was duly executed. The plaintiff paid the 1st defendant a total of Kshs.3,100,000.

The Plaintiff was in occupation of the land when all this was happening. However on the 28th of April 2011 the plaintiff received a letter from the 3rd defendant revoking the authority to put up structures on the land. This was followed by a letter dated 11th May 2011 by the Municipal council of Eldoret that required the church to demolish the structures on the suit parcel failure of which the same was to be demolished by the council without any further notice. On the 12th of May 2011, the district commissioner Eldoret west wrote to the Town Clerk Eldoret Municipal Council requesting them not to demolish the premises as there were outstanding issues of ownership that were to be addressed. However the structures were demolished anyway on the 13th of May 2011 at 4.45 pm. The plaintiff suffered a loss of kshs. 1,229,240.

The church was reconstructed at a cost of kshs. 4,200,000. The PW1 stated that the 1st defendant approved the structures on the ground before the aforesaid demolition and renewed the licence for the structures on the ground.

This court finds that when all this was happening, it transpired that the 1st defendant without notice to the plaintiff entered into a second agreement of sale with the second defendant on the same parcel of land. The purchase price was ksh. 9,000,000 that was to be split into two thus ksh. 6, 000,000 to be paid on 28th February, 2011 and the balance of ksh. 3,000,000 to be paid after transfer of the property. Moreover, that ksh. 6,000,000 was to be used to clear the existing bank loan.

Ultimately, the 2nd defendant complied with the terms of the agreement and cleared the bank loan and a discharge of charge was registered on the 19th of April 2011. The 2nd defendant was registered on the 16th April 2011 as per the white card but on the 19th April 2011 as per the certificate of lease.

This court finds that the first issue to be determined is the validity of the two agreements between the plaintiff and the 1st defendant and between the 1st defendant and the 2nd defendant. The agreements between the plaintiff and the 1st defendant and the 2nd defendant were

entered into without the consent of the National bank of Kenya contrary to clause 2 h and I of the charge instrument that prevented the chargor from leasing, selling or transferring the charged property without the prior written consent of the bank. The plaintiff and the 2nd defendant were not diligent when they entered into agreement with the 1st defendant without reading the charge document and without involving the bank. There was no evidence adduced to the effect that the bank was aware of the arrangement.

This court finds that the 1 defendant had no capacity to enter into a contract of sale of land with the plaintiff as he was barred from transferring the property to anybody without the prior consent of the bank and therefore the agreements entered into by the plaintiff and the 1st defendant and 2nd defendants were voidable either by the bank or the 1st defendant and nothing stopped the 1st defendant from causing the loan to be repaid by a third party and the property being discharged and transferring the property to the third party as he did.

This finding is based on the provisions of *Section 87 of the Land Act* which provides for the Chargee's consent to transfer as follows: -

If a charge contains a condition, express or implied that chargor prohibits the chargee from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.

The second issue is ***whether the plaintiffs interest on the parcel of land is superior to the 2nd defendants interest.*** The plaintiffs interest is based on a sale agreement as opposed to the 2nd defendants interest which is absolute interest. The land registration Act 2012 provides for the effect of registration of a person as the proprietor of land.

Section 24 of the land registration act 2012 provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 provides for the rights of a proprietor thus that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty

or obligation to which the person is subject to as a trustee.

Section 26 provides for the Certificate of title to be held as conclusive evidence of proprietorship thus that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 28 provides for overriding interests, thus unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) deleted by Act No. 28 of 2016, s. 11(a)
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) deleted by Act No. 28 of 2016, s. 11(b);
- (g) charges for unpaid rates and other funds which, without reference to

registration under this Act, are expressly declared by any written law

to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written

law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines,

aqueducts, canals, weirs and dams erected, constructed or laid in

pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law,

The plaintiffs case is that the 1st, 2nd, and 3rd and 4th defendants connived and colluded to register the suit land in the 2nd defendant's name. The defendants are alleged to have acted illegally and fraudulently.

In **Vijay Morjaria -versus- Nansingh Madhusingh Darbar & Another (2000) eKLR (Civil Appeal No. 106 of 2000)** Tunoi, JA (as he then was) stated as follows:

“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 as distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

On standard of proof, the court in **Ndolo -versus- Ndolo (2008) 1 KLR (G&F) 742** held 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 **Kinyanjui Kamau -versus- George Kamau Nioroge (2015) eKLR**, it was held as follows:

“In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that appellant had not made out a case for the grant of the orders he sought.”

In this case there is no tangible evidence that the 1st, 2nd, 4th and 5th defendants were involved in any fraudulent activity. The plaintiff appeared to suggest that the failure to account fully for the stamp duty payable by the 2nd defendant and failure to obtain a valuation report from the government value was evidence of fraud but this court finds that not all irregularities amount to fraud and indeed if there is undervaluation of the property the remedy is not to nullify the agreement but to order the parties to pay the difference.

On the issue of constructive trust, the court finds that the doctrine of constructive trust does not apply in this case as the land was charged to the bank when the agreements were entered into and that the 1st defendant did not have the authority to transfer the property. Moreover, the 2nd defendant, who is the registered proprietor of the suit land was not privy to the contract between the plaintiff and the 1st defendant and that the plaintiff and the 1st defendant did not involve the bank in their transactions despite the provisions of section 87 of the land Act. The plaintiff has not demonstrated any entitlement under section 28 of the act as there is no evidence of any overriding interest accruing to the plaintiff.

On the issues, as to who is the *bonafide* purchaser for value without notice, this court finds that the 2nd defendant did a search at the lands office and obtained a certificate of official search paid the bank balance and obtained a discharge of charge from the bank, and caused the same to be registered in the name of the 2nd defendant. The 2nd defendant was not aware that the plaintiff had also paid the 1st defendant and therefore I do find the 2nd defendant to be an innocent bonafide and diligent purchaser for value without notice of any wrongdoing. The plaintiff is only entitled to a refund of all the money paid to the bank to offset the loan and money directly paid to the 1st defendant unfortunately, the plaintiff has not prayed for the same.

Ultimately, this court finds that the plaintiff is not entitled to the permanent injunction and declarations as prayed as she is not the registered proprietor of the suit property and that the 2nd defendant followed the lawful procedure in obtaining the title to the property.

However, the plaintiff has demonstrated that the 3rd defendant without any legal justification went and destroyed her church premises occasioning her the loss of property. The plaintiff has proved that she lost property worth ksh. 1,229,240 in the demolition and therefore the 3rd defendant is hereby ordered to pay the plaintiff ksh.1,229,240 with interest from the time of filing suit. Order accordingly.

Dated, signed and delivered at Eldoret this 10th day of August, 2018.

A. OMBWAYO

JUDGE