REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 613 OF 2009

ASHIT PATANI……..…….….....……..1ST PLAINTIFF

SELINA PATANI……..……....…….....2ND PLAINTIFF

RAMABEN PATANI……...….....3RD PLAINTIFF

VERSUS

DHIRAJLAL V. PATANI.…….….….….....……1ST DEFENDANT

VIJYA DHIRAJLAL VIRPAL PATANI……...2ND DEFENDANT

AZIZ DEVELOPERS LIMITED…….....3RD DEFENDANT

JUDGMENT

The Pleadings

The Plaintiffs commenced the suit by way of a Plaint dated 1st December 2009 as amended on 10th December 2009 and further amended on 2nd February 2011. The Plaintiffs have claimed that at all material times, the 1st Defendant together with the late Ramniklal Virpal Vrajpal Patani (Deceased) (hereinafter referred to as "R. V Patani"), and the late Mansukhlal Virpal Patani (Deceased) (hereinafter referred to as "M. V Patani") were registered as proprietors of that parcel of land originally known as Land Reference Number 1/167 which was subsequently subdivided into two portions namely Land Reference No. 1/681 and 1/682 (hereinafter referred to as "the suit properties") as tenants in common in equal shares.

The Plaintiffs have averred that the R. V Patani passed away on 6th June 2006 and left a will naming them as his executors. Further, the Plaintiffs stated that they applied for and obtained a grant of probate of written will which was issued on the 5th January, 2007. It is the Plaintiffs' case that they have brought this suit in their capacities as the executors of the written will of the late R. V Patani, and as beneficiaries to his estate which compromises the suit properties among other properties.

It is claimed by the Plaintiffs that a bungalow developed on Land Reference Number 1/681 which measures approximately 0.48 acres is occupied by the 1st Defendant together with his immediate family.

Further, that the 1st Defendant has rented out three (3) maisonettes developed on Land Reference Number 1/682 which measures approximately 0.419 acres where he collects rent to the exclusion of the other equally entitled beneficiaries who include the Plaintiffs. While stating that the 1st and 2nd Defendant executed a transfer on 14th October, 2009 in favour of the 3rd Defendant without their knowledge, approval or consent, the Plaintiffs have contended that the purported sale, transfer, and/or disposal of the suit premises was fraudulent, unlawful and illegal for want of consent.

The Plaintiffs have sought the following substantive orders against the Defendants;-

a. A permanent injunction restraining the Defendants whether by themselves or through their servants, agents and/or workmen from further selling, transferring, disposing off, charging leasing out and/or in other manner interfering with the Plaintiffs right of ownership and legal interest in all those parcels of land known as Land Reference Number 1/681 and Land Reference Number 1/682 (Originally L.R No. 1/167).
b. An order directing the Principal Land Registrar, Nairobi Lands Registry to cancel and nullify the sale and transfer of the suit property by the 1st and 2nd Defendants to the 3rd Defendant which was done in a fraudulent manner.
c. An order that the suit properties be valued by an independent valuer with a view of ascertaining the true value and share of each of the registered owners and/or their representatives for sharing and/or buying out by the parties.
d. In the alternative to prayer (b) above, an order that the sale proceeds be distributed equally between the earlier three (3) registered owners and/or their representatives.
e. An order directing the 1st Defendant to account to the Plaintiffs for all the rents collected on the maisonettes, on L.R No. 1/682 since the 6th June 2006.
f. A declaration that the 1st Defendant was and still is required to pay to the Plaintiffs on a prorata basis a third of the market rent for the bungalow he has occupied on L.R No. 1/681 since 6th June 2006 being a share of their entitlement and to give an account for the same, and make payments thereof.
g. Costs and interest of the case.
h. Any other relief that the court may deem fit to grant.

The 1st and 2nd Defendant filed a defence dated 23rd February 2011 where they admitted that the suit properties were jointly acquired by the 1st Defendant together with his late bothers namely R. V Patani and M. V Patani on 18th December 1970. The 1st and 2nd Defendants have averred that on 14th December 1985, the three owners signed an agreement sharing out all the properties they had acquired jointly, whereof L.R No. 1/681 and L.R No. 1/682 together with all the buildings were awarded to the 1st Defendant. Further, the 1st and 2nd Defendants have alleged that in 1992, the late R. V Patani and the late M. V Patani executed a Deed of Assignment assigning the suit property to the 1st Defendant.

It is the 1st and 2nd Defendants' case that the assignment was confirmed by an affidavit sworn on 23rd February 1994 by all the three brothers, which was filed in court on 25th February 1994 in HCCC No. 210 of 1994 (O.S). According to the said Defendants, a conveyance transferring L.R No. 1/681 and L.R. No. 1/682 to the 1st Defendant was registered on 30th April 2008 and further, that on 28th May 2008, the 1st Defendant transferred half interest in the suit property to the 2nd Defendant making them joint owners to the suit property. It is averred by the 1st and 2nd Defendants that being the legal owners of this suit property, they validly sold the same to the 3rd Defendant and the Plaintiffs have no right to make any claim over the suit property.

The 3rd Defendant filed an amended defence dated 3rd March 2011 where the joint ownership of the 1st Defendant and the late R. V Patani and M. V Patani over the suit property was denied. The 3rd Defendant averred that after confirming the 1st and 2nd Defendants' ownership of the suit property through a search conducted on 10th June 2009, it entered into an agreement and validly acquired the suit property from the

registered owners in October 2009 for a consideration. It is the 3rd Defendant's case that at the time of purchasing the suit property, it was not aware of any disputes or alleged interest by the Plaintiffs over the suit properties, since no such interest was registered against the title documents. The 3rd Defendant contended that it had been wrongly joined in this suit.

The Plaintiffs' Evidence

Hearing commenced on 5th November 2013 when the 1st Plaintiff (PW1) solely testified for the Plaintiffs' case, and sought leave to have his witness statement dated 19th December 2011 adopted as part of his evidence. His evidence was that he lived in Ngara and was an accountant by profession, employed by Athi River Grant and Marble Ltd in Westlands. He informed the court that the 2nd and 3rd Plaintiffs who were his sister and mother respectively, had given him authority to plead on their behalf. PW1 averred that the 1st Defendant was his uncle while the 2nd Defendant was his aunt and wife to the 1st Defendant.

It was the evidence of PW1 that before registration of the suit property in favour of the 3rd Defendant, it was registered in the names of the 1st Defendant, together with his deceased uncle M.V. Patani and his father R.V. Patani who died on 6th June 2006. PW1 stated that after his father's death, the Plaintiffs obtained a grant of probate which was issued on 5th January 2007 and confirmed on 3rd October 2007. This witness testified that at the time his father died on 6th June 2006, the suit properties were owned by the 1st Defendant, his uncle and his father.

While stating that the suit properties were sold to the 3rd Defendant in 2009, PW1 averred that it was only the 1st Defendant who was alive at that time since his uncle M.V. Patani had passed on in 1992. PW1 made reference to an application for a caveat lodged with the Registrar of Lands on 17th November 2009 and stated that the registration did not go through since the caveat had been overtaken by events as the property had been transferred.

PW1 informed the court that they got to know that the property was transferred in 2009 from a conveyance dated 14th October 2009 between the 1st Defendant, 2nd Defendant and 3rd Defendant. He averred that the conveyance evidencing transfer to the 1st Defendant was effected on 25th April 2008, and that by that date his father and uncle had passed on yet they were said to have executed the conveyance which had their photographs and purported signatures.

According to PW1, the 1st and 2nd Defendants were aware of his father's death. Further, this witness alleged that V. W. Muriuki who is the lawyer who purportedly witnessed the execution of the conveyance is the same lawyer who witnessed the conveyance dated 28th May 2008 by the 1st Defendant to the 2nd Defendant. It is the evidence of PW1 that the instant suit was not the only suit between him and the 1st Defendant with regards to his father's properties, as HCCC no. 2250 of 2007 which involved a property named Garden Chambers was finalized and an order issued that the property be disposed and proceeds shared among the 4 owners.

While stating that the suit property was one of the properties in his father's will, PW1 averred that his father could not have donated any property which he named in the will. PW1 made reference to a sale agreement dated 14th February 1985, and averred that it did not indicate that the suit properties were being given to the 1st Defendant. This witness referred the court to an indenture of conveyance dated 18th September 1970 which indicated that the owners of the suit properties were the 1st Defendant, his father and uncle, and averred that this altered was in 2008. He stated that the 1st Defendant was the one in possession and occupation of the suit properties and was residing in a bungalow developed on LR 1/681 while L.R 1/682 had three maisonettes and 3 servant quarters which were under the control of the 1st Defendant.

It was the further averment of PW1 that since their father died in 2006, they had not derived ant rent from

the suit properties and further, that there was always a dispute in respect to who was to manage and collect rent from the premises or Garden Chambers, which started while his father was still alive. PW1 denied knowledge of a receiving order against his father and averred that his father was never bankrupt. According to PW1, even if his father was declared bankrupt in 2002, he could not have transferred the property to the 1st Defendant in 2008.

PW1 urged the court to cancel the sale of the suit properties or redistribute the proceeds of sale among the three owners, and for the 1st Defendant to account for the rent received from the suit properties. PW1 stated that if the 3rd Defendant had done due diligence, they would have discovered the fraud. He made reference to a replying affidavit filed on 24th February 1994 by the 1st Defendant and R.V. Patani in HCCC No. 210 of 1994, and stated that the 3rd Defendant was aware of the disputes with respect to the suit properties. The Plaintiffs' bundle of document dated 19th December 2011 was produced as Plaintiffs Exhibit 1.

During cross examination by counsel for the 1st Defendant, PW1 stated that the suit properties were jointly acquired by the 1st Defendant, his father and uncle in 1970 when he was 4 years old. He however could not tell how the 3 brothers acquired the suit properties. He also could not tell whether the estate of his deceased uncle M.V. Patani were laying a claim on their share of the suit property in court or otherwise. PW1 further informed the court that although he was above 18 years when the purported agreement for the division of suit property was made on 14th February 1985, he was not consulted. PW1 could not tell how the property referred to as Swara Road on the partition agreement was registered in his father’s name, and he stated that the property was no longer there having been sold by public auctioneers for a debt he did not know about.

PW1 was referred to a replying affidavit sworn by the 1st Defendant and his father on 20th February 1994 filed in HCCC 210 of 1994 which made reference to the partition agreement where LR 1/681 and LR 1/682 were to go to the 1st Defendant while his father was to get a plot on Swara Road and on Chamber Road. He could however not verify that his father signed the affidavit and admitted having not made any attempts to disprove that the signature was not his father's.

While referring to his father's will produced in Plaintiffs' Exhibit 1, PW1 maintained that his father was to get a share of Garden Chambers building, Wood Avenue maisonettes, Lenana Road maisonettes and Lenana Road bungalow. He also informed the court that the 1st Defendant had not made a claim on the property at Wood Avenue or the properties given to his father. PW1 maintained that he made a claim on the suit properties as an administrator of his father's will.

When referred to the conveyance dated 25th April 2008 in the 1st and 2nd Defendants bundle of documents, PW1 confirmed that the photograph thereon was his father’s although he could not tell whether the PIN and Identity Card number were his father's. According to this witness, the sale of the suit properties by the 1st Defendant was fraudulent because the conveyance indicates that it was signed after his father had died.

In further cross examination by Counsel for the 3rd Defendant, PW1 stated that he did not know the 3rd Defendant who was now the registered owner of the suit properties. PW1 was referred to the sale agreement dated 4th August 2009 between the 1st and 2nd Defendants and James Mwangi Kamau, and stated that the property was sold for Kshs.100,000,000/=. This witness informed the court that he did not have any evidence of the 3rd Defendant's fraud who had done nothing illegal. He reiterated that the property at Swara Road was sold by public auction for a debt he did not know about, and further, that Chamber Road's property was also sold by public auction for a debt.

In re-examination, PW1 stated that the file for the suit properties was not readily available to enable him register his father’s death certificate and grant of probate against the title to the suit property. PW1 averred that the 1st Defendant's attempts to challenge the grant of probate was not successful and further,

he reiterated that his father was clear in his mind about his properties in his will which revoked any previous agreements in existence. Lastly, this witness reiterated that the conveyance dated 25th April 2008 which was said to have been drawn and signed before his father died was signed when his father and uncle were dead.

The Defendants' Evidence

The defence case proceeded on 23rd January 2014 when James Mwangi Kamau (DW1) testified for the 3rd Defendant. His evidence was that he was a Director of the 3rd Defendant, and that he did not know the Plaintiffs but had met the 1st and 2nd Defendants when he was purchasing the suit properties. DW1 informed the court that a search conducted on 28th May 2008 revealed that the land was owned by the 1st and 2nd Defendants.

DW1 stated that the 3rd Defendant and 1st and 2nd Defendants entered into a sale agreement for the purchase of the suit properties at 100 million shillings, whereof the deposit was paid and the balance was cleared after 90 days. DW1 made reference to a conveyance dated 14th October 2009 indicating that the 3rd Defendant was the registered owner of the suit property, and stated that they were now in possession of the suit property having obtained vacant possession upon payment of the balance. With leave of the court, DW1's witness statement dated 31st January 2012 was adopted as part of his evidence while the bundle of document dated 31st January 2012 and filed on 2nd February 2012 was produced as the 3rd Defendant's Exhibit 1. Lastly, DW1 testified that he did not have any knowledge of any dispute between the 1st and 2nd Defendant and the Plaintiffs, and urged the court to dismiss the case against the 3rd Defendant.

During cross examination by the Plaintiffs' counsel, DW1 stated that he did not know the process used to transfer the property to the 1st and 2nd Defendants. While admitting that one cannot sell property when they are dead, DW1 informed the court that it was in the course of this suit, he discovered that R.V. Patani had died in 2006, while the transfer to the 1st and 2nd Defendant took place in 2008. He admitted that the purchase price of Kshs.100,000,000/= paid was a lot of money, and averred that Kshs 2 million for stamp duty was paid although he had no documents to prove the same.

In further cross examination by counsel for the 1st and 2nd Defendants, DW1 stated that he developed an interest to purchase the property from brokers who introduced him to the 1st Defendant in 2009. He stated that at the time of purchase, he did not come across any information that the 1st Defendant was not the owner and according to him, nothing more needed to be done beyond meeting the owners of the property and doing a search. He contended that he learnt of the Plaintiffs' claim after the property had been transferred to the 3rd defendant.

During re-examination, DW1 reiterated that he knew of the dispute involving the property after he had taken possession and further, that he would not have purchased the property had he known that there was a dispute. Lastly, DW1 stated that he paid stamp duty on the declared value of the property which was Kshs 50,000,000/- .

The 1st Defendant (DW2) also testified for the 1st and 2nd Defendants and sought to rely on his witness statement dated 21st March 2012. He stated that he was retired and the 2nd Defendant was his wife. His evidence was that the Plaintiffs were children of his older brother who died in 2006. While stating that R.V. Patani died in 2006, DW2 averred that the conveyance was signed when R.V. Patani and M.V. Patani were alive, but that they could not clear a charge on the suit properties. According to DW2, the property could not be registered until 2008 due to some monies owing to the Kenya Revenue Authority.

DW2 informed the court that in 1985, they had a partnership agreement with his brothers where LR 1/681 and 1/682 were allocated to him. He made reference to an indenture where Theodorio De Souza and Margareth De Souza transferred the suit properties to him and his two brothers R.V. Patani and M.V.

Patani. He also referred the court to the agreement dated 14th February 1985 and stated that LR/520 in Wood Avenue was transferred to M.V. Patani, while R.V. Patani borrowed money on the property given to him on Swara road and Chambers Road which was sold by public auction when he was unable to pay. Further, DW2 stated that LR 29/2632/14355 Garden Chambers was sold in 2009 and the proceeds shared equally among the partners whereof the Plaintiffs got their father's share. DW2 maintained that the property at Wood Avenue was shared equally among M.V. Patani's sons and further, stated that he did not know of any claim by the Plaintiffs over that property.

According to DW2, the replying affidavit sworn on 25th February 1994 by him and R.V. Patani and filed in HCCC No. 210 of 1994 (OS) involved a family dispute where the wife and sons of M.V. Patani had sued him and R.V. Patani . DW2 informed the court that the dispute was about the sharing of the property and that the Replying Affidavit confirmed how the property was to be shared as per their agreement of 1985. He also informed the court that the family of M.V. Patani had not made any claim against him and further, that nobody laid a claim on the suit properties from 1977 when he started living thereon until they was sold in 2009.

During cross examination by the Plaintiffs' advocate, DW2 stated that R.V. Patani was his elder brother. He averred that he, together with R. V. Patani and his other brother M. V. Patani were the registered owners of LR 1/681 and 1/682. DW2 informed the court that R. V Patani died in 2006 while M. V. Patani died in 1994. DW2 made reference to a conveyance dated 25th April 2008 in his bundle of documents and averred that it was witnessed on 29th April 2008 when both his brothers were dead. He insisted that those were the signatures of R. V. Patani and M. V. Patani who had signed the conveyance when they were both alive. DW2 could not tell when they signed and averred that it was around 1985 when they entered into the property sharing agreement. He averred that the conveyance was signed before a lawyer called V. W. Muriuki. According to this witness, the conveyance was done and prepared in advance and dated later. DW2 maintained that the conveyance was first done and signed by all of them in 1985 before V. M. Patel advocate and was later on prepared by Mr. Muriuki.

DW2 was referred to the agreement dated 14th February 1985 and he confirmed that it did not show that LR 1/681 and LR 1/682 were given to him. He also referred to the conveyance dated 25th April 2008 and averred that although it indicates that there was a consideration of Kshs.20,000,000/= , he did not pay any money. DW2 referred to a ruling by W. Karanja J (as she then was) in succession cause 1834 of 2006 and stated that he relied on the agreement and the affidavit of 1985 to show that the properties belonged to him. He admitted that according to clause 10 of the agreement dated 14th February 1985, the partition agreement needed to be finalized before the transfer. DW2 averred that the property at Garden Chambers was sold pursuant to a court directive and that the proceeds were divided equally. He also informed the court that a receiving order dated 25th November 2002 in his bundle of documents was obtained from the receiver's office and was not a forgery.

In further cross examination by counsel for the 3rd Defendant, DW2 stated that he entered into an agreement with the 3rd Defendant for the sale of LR 1/681 and LR 1/682 for Kshs.100 million for both properties, whereof all parties honoured their part of the sale agreement. He stated that the 3rd Defendant has possessed the property since 2009 and further, that no family dispute or divisions regarding the properties were discussed with the 3rd Defendant at the time of purchase.

DW2 averred that he and his wife were the registered proprietors of the property at the time of the purchase. He reiterated that paragraph 5 of the of the replying affidavit he swore with R. V. Patani in HCCC No. 210 of 1994 shows how the property was to be divided. He maintained that no fraud was committed by him and the 3rd Defendant who is the current owner of LR 1/681 and LR 1/682.

In re-examination, DW2 stated that LR 1/681 and 1/682 were originally owned by his brothers in 1970 and that by 1985, the 3 brothers had jointly acquired other properties jointly as per the agreement of 14th February 1985. He stated that although the property in Swara Road was originally acquired by the three brothers, it was registered in R.V Patani's name to enable him obtain a loan. DW1 contended that they

could not transfer the suit properties to their names in 1985 as they were charged. His evidence was that the mortgage on LR. 1/682 and LR 1/681 was paid on 30th April 2008, and that it was only after this time that they could deal with the property and R. V. Patani had died.

DW2 reiterated that the family of M. V. Patani had never claimed a share in LR 1/682 and LR 1/682 and further, that the property at Chamber Garden was bought after the agreement of 15th February 1985 whereof each of the four shareholders got a quarter share. DW2 informed the court that he did not pay the consideration of 20 million indicated in the conveyance dated 25th April 2008 since his two brothers were not alive. He contended that HCCC 210 of 1994 filed by the family of M. V. Patani against him was withdrawn since all the issues were settled between the parties. Lastly, DW2 averred that the administrators of the estate of R. V. Patani did not make any claim on the suit properties between 2006 when R. V. Patani died and 2009 when he sold it. The evidence of DW2 marked the close of the 1st and 2nd Defendant case.

<u>The Issues and Determination</u>

The parties relied on written submissions filed in court. The Plaintiffs' counsel filed submissions dated 22nd April 2014, while the 1st and 2nd Defendants' counsel and 3rd Defendant's counsel filed submissions dated 8th May 2014 and 14th May 2014 respectively. From the pleadings and evidence by the parties, it is not disputed that the 1st Defendant, and his deceased brothers the late R.V. Patani and the late M.V. Patani, were registered as tenants in common in equal shares of the original property known as Land Reference Number 1/167. This was by virtue of the indenture of conveyance dated 18th December 1970 registered in Volume N33 Folio 420/20 GLA 10436 that was produced by both the Plaintiffs and 1st Defendant in evidence. This property was later subdivided into the two portions forming the suit properties, which were also held under a tenancy in common by the three brothers.

What is in dispute is the sharing of the suit properties and other properties as between the Plaintiffs being the beneficiaries of R.V Patani, and the 1st Defendant. There are three 1ssues for determination in this regard:

1. Whether there was a valid agreement as to the sharing of the suit properties as between the 1st Defendant and the deceased. R. V. Patani and M. V. Patani.
2. Whether the conveyance dated 25th April 2008 between R. V. Patani and M. V. Patani on the one hand and the 1st Defendant on the other hand is valid.
3. Whether the 3rd Defendant has acquired any interests in the suit properties by virtue of the conveyances entered into with the 1st and 2nd Defendants dated 14th October 2009.
4. Whether the Plaintiffs are entitled to the reliefs sought.

Whether there was a valid agreement as to the sharing of the suit properties as between the 1st Defendant and the deceased R. V. Patani and M. V. Patani

The 1st and 2nd Defendants have relied on two documents to show that there was such an agreement to share the suit properties. The first is an agreement dated 14th February 1985 between the 1st Defendant and the deceased. R. V. Patani and M. V. Patani on the partition of jointly held family owned immovable property, in which after valuing all the properties co-owned by the parties including the suit properties, and removing a share for their mother, the said parties agreed that the balance of the then value of all the properties be shared equally between them.

The second document relied upon is a replying affidavit sworn by the 1st Defendant and R.V Patani on 25th February 1994 and filed in court on the same date in Nairobi High Court Civil Case Number 210 of 1994(O.S) (hereinafter "Nairobi HCCC No. 210 of 1994"), in which the two deponents aver in paragraph 4 to 5 thereof as to the distribution of the said properties pursuant to the agreement of 14th February 1985 as follows:

4. **"That on the 14th February, 1985, an Agreement was reached between the deceased, the 1st and the 2nd Defendants. The said Agreement was duly singed and attested by all the parties.**

   A copy of the said agreement is annexed hereto and marked "A".

5. **That in pursuance to the said Agreement, in or about 1988, the joint properties were distributed as follows:-**

a. **Mr. M. V. Patani (the Deceased)**

i. **Plot No. L.R 1/520, Wood Avenue, Hurlingham.**

   The rent was being paid direct to and received by the deceased and now to the plaintiffs or one of the plaintiffs.

ii. **Plot No. L.R. 209/2632/4355, (Garden Chambers).**

There is no dispute that one-quarter share of the property is that of the deceased or the estate of the deceased.

b. **That D. V. Patani (1st Defendant)**
   i. **Plot No. L.R. 1/681, Lenana Road, Nairobi**
   ii. **Plot No. L.R. 1/682, Lenana Road, Nairobi**
   iii. **One-quarter share in Garden Chambers (L.R. No. 209/2632/4355).**
c. **Mr. R. V. Patani (2nd Defendant)**
   i. **Plot No. 209/3529/5, Suswa Road, Nairobi**
   ii. **Plot No. 209/1765, Chambers Road, Nairobi**
   iii. **One-quarter Share in Garden Chambers – Plot No. 209/2632/4355."**

The Plaintiffs on their part submitted that the agreement made on 14th February 1985 which was not registered cannot confer registrable interests over the suit property as it was a mere expression of what the parties would do. Their counsel submitted that the agreement had no mention whatsoever of what property was being shared and to whom, and therefore, cannot be relied on by the 1st Defendant. Further, that a valid agreement that had not been perfected before a party died is by law perfected by the administrators of the deceased, and that the 1st Defendant ought to have sued the administrators of the party he intended to enforce the agreement against.

In respect to the replying affidavit of 25th February 1994 filed in Nairobi HCCC No. 210 of 1994, the Plaintiffs argued that it was a pleading filed in an ongoing suit, and did not amount to a determination pronounced by Court and therefore, that the contents of the affidavit cannot be relied upon. In further submission, counsel for the Plaintiffs argued with respect to the will of R. V. Patani made in the year 1995, that the testator was aware of his properties available for disposition and could not have included the suit properties in the will if he had no interest in the same. It is submitted for the Plaintiffs that both the agreement and the replying affidavit were made earlier than the will, and that by operation of law, the will revoked any earlier disposition.

Counsel averred that the 1st Defendant's attempt to challenge the will in the Probate and Administration Cause No. 1834 of 2006 were unsuccessful. The Plaintiffs urged the court to be guided by the determination in the succession cause where the replying affidavit was found not to have been an agreement transferring titles to the 1st Defendant ,while the property sharing agreement was found not to have specifically allocated the suit properties to the 1st Defendant.

The 1st and 2nd Defendants' counsel's submission on this issue was that that the 1st Defendant was assigned the suit properties by the 1985 agreement while his late brothers, R. V. Patani and M.V Patani

were assigned the properties along Swara Road Parklands, the property on Garden Chambers Road and the property in Wood Avenue, Hurlingham respectively. Counsel contended that the assignment to the 1st Defendant was confirmed by the Deed of Assignment executed by all 3 brothers in 1992 and the Replying Affidavit sworn and signed by the 1st Defendant and the Plaintiffs' father and husband respectively. However, the court notes in this regard that no evidence of the said Deed of Assignment of 1992 was brought by the 1st and 2nd Defendants.

It is the 1st and 2nd Defendants' submission that the Plaintiffs claim is questionable since the estate of the late M. V. Patani had not made any claim with respect to the suit properties, which were owned in common as testified in court. Counsel argued that if the property had been improperly acquired, the commissioner of lands had power subsequent to registering the transfer, to recall, cancel or revoke the title accordingly which was not done, as the Plaintiffs withdrew their claim against the Registrar of Lands.

While submitting that the replying affidavit sworn by the late R. V. Patani and the 1st Defendant in HCCC No. 210 of 1994 set out how the properties were to be divided between the 3 brothers, the 1st and 2nd Defendants argued that it was written evidence under oath which can be adduced in a court of law. The 1st and 2nd Defendants relied on Order 19 rule 1 of the Civil Procedure Rules as well as the case of **Michael Ngania –vs- Elphas Munyolimo, (2004) eKLR** in this respect.

Reliance was also placed on Section 34(1) (d) and Section 34(2) (a) of the Evidence Act for the proposition that evidence tendered in previous proceedings is admissible in a subsequent judicial proceeding. Counsel for the 1st and 2nd Defendants urged that there was no bar in having the affidavit sworn on 23rd February, 1994 admitted as evidence confirming that there was an agreement to divide and transfer the suit property to the 1st Defendant, and the rest of the properties to the 1st Defendant's brothers M. V. Patani (deceased) and R. V. Patani (deceased) respectively.

This Court has considered the arguments and evidence on the issue at hand. It is noted by the Court that the law on the termination of a tenancy in common and ending of co-ownership allows co-owners to by agreement sever the co-ownership by partition, by acquiring the interests of another co-owner and thus become solely entitled, or by the sale of the common property and division of the proceeds of the sale. It is provided in **Halsbury's Laws of England, Fourth Edition (Reissue) Volume 39(2)** at paragraphs 214-215 as follows in this regard:

> **"214. Determination of union of interests in one person. A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land.**
>
> **215.Determination by partition. A tenancy in common may be determined by partition. The legal term 'partition' is applied to the division of land, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."**

The agreement dated 14th February 1985 in my view is an agreement that points to a union of interests of the parties thereto in the various properties that they held under a tenancy in common. The replying affidavit sworn by the 1st Defendant and R.V Patani is evidence of the intention of the parties in this regard, and particularly the intentions and agreement between the 1st Defendant and R.V. Patani, as to which particular properties that were owned in common were to be solely owned by each of the parties, and which of the properties were to be partitioned. The said replying affidavit is admissible in evidence under section 34 (1) of the Evidence Act which provides as follows:

> **"Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances–**

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding–

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding."

In addition the subsequent dealings with the suit properties and the other properties that were the subject of the said agreement are also evidence of the intention of the parties. The Plaintiffs admitted that the properties given to R.V. Patani on Swara Road and Chambers Road were sold by public auction for non-payment of debts. He alleged not to know how the debts were incurred, but did not disprove the 1st and 2nd Defendant's averments that his late father R.V. Patani had borrowed money using the said properties as security, which were properties were sold upon his inability to repay the loans. In addition the Plaintiffs did not bring any claim or evidence of R.V. Patani's share in the property in L.R. 1/520 Wood Avenue that was agreed would be given to M.V Patani, which they ought to have done as this property was also provided in their late father's will, and as they claim to have brought this suit in their capacity as administrator of their father's will.

Lastly, the Plaintiffs also admit that R.V. Patani received his one-quarter share in Garden Chambers (L.R. No. 209/2632/4355). It is this court's finding that these subsequent dealings with the properties co-owned by the three brothers is evidence of the implementation of their agreement and intention as to the sharing of the said properties.

The holding of this court is therefore that the effect of the agreement dated 14th February 1985 entered into between the 1st Defendant and the deceased. R. V. Patani and M. V. Patani, as further explained by the replying affidavit sworn by the 1st Defendant and R.V Patani on 25th February 1994 and filed in court on the same date in Nairobi High Court Civil Case Number 210 of 1994(O.S), was that there was a valid intervivos agreement and intention between the 1st Defendant and the deceased R. V. Patani and M. V. Patani as to the union of all the legal and beneficial interests in the suit properties in the 1st Defendant, who this Court finds to be the beneficial owner of the suit properties.

This Court in this regard appreciates the observations made by W. Karanja J. (as she then was) in the ruling delivered on 5th July 2011 on an application for revocation of a grant in **Ramaben Ramniklal Patani & Others vs Dhirajlala Virpal Patani & Another, Nairobi High Court Succession Cause No 1834 of 2006**. The learned Judge correctly noted that the 1985 agreement and the replying affidavit referred to hereinabove were not evidence of transfer of the properties named therein. The learned judge did not in the said ruling consider the legal effect of the said documents in the context of the common ownership of the named properties among the three brothers, nor was it in issue in the said application. It is however in issue herein and this Court has given its opinion thereon.

This Court is also aware that when there is such an agreement to share properties that are co-owned, the law requires that such a beneficial owner such a the 1st Defendant was of the suit properties, obtains from the other co-owners a conveyance of the properties in question. This requirement was provided in section 99 of the repealed Government Lands Act which was the legal regime under which the suit properties were registered, and one of the applicable laws at the time of the subject agreements and filing of this suit. The said section required the registration of all transactions entered into, affecting or conferring or purporting to confer, limit or extinguish any right, title or interest in or over land registered under the Act. The 1st and 2nd Defendant in this respect have relied on the conveyance dated 25th April 2008 between

him and R. V. Patani & M. V. Patani, and the validity of the said conveyance is the next issue for determination.

Whether the conveyance dated 25th April 2008 between R. V. Patani & M. V. Patani on the one hand and the 1st Defendant on the other hand is valid

Evidence tendered in court reveals that R. V. Patani and M. V. Patani passed on in the year 2006 and 1994 respectively. The 1st Defendant while admitting this fact, sought to explain that R. V. Patani and M. V. Patani had allegedly signed the conveyance dated 25th April 2008 in 1985 before an advocate known as V. M. Patel when they were both alive. However, this Court notes that it is indicated in the said conveyance that it was executed by R . V. Patani and M. V. Patani on 29th April 2009 before an advocate by the name of V. W. Muriuki.

The Plaintiff's counsel submitted in this regard that the said conveyance was made by the late R. V. Patani and the late M. V. Patani while dead, and argued that the 1st Defendant's explanation that the document was drawn and executed in 1985 and kept under lock and key for twenty three (23) years before retrieval for registration cannot suffice. It is the Plaintiffs submission that the 1st Defendant's claim to the suit property would only be effected through suing the administrators of the estate of R. V. Patani and M. V. Patani for transfer of the properties through transmission.

Counsel for the Plaintiffs further submitted that the conveyance made on 25th April 2008 and expressed to have been drawn by an advocate by the name V. W. Muriuki was made and drawn by an unqualified person and did not have any force of law. Counsel relied on a letter dated 8th April 2014 from the Law Society of Kenya that was annexed to the Plaintiffs' submissions, and submitted that V. W. Muriuki was the only one in the legal profession by the names Victor Wachira Muriuki, and that according to the letter from the Law Society of Kenya, he last took out a valid Practicing Certificate in the year 1979.

Reliance was also placed on Section 34 (1) and 35(2) of the Advocates Act as well as the case of **Orao – Obura –vs- Koome, (2001) KLR 109** where a memorandum of appeal signed by an advocate who was not entitled to appear was found to have been incompetent. Counsel also relied on the case of **Omulo –vs- Small Enterprises Finance Co. Ltd & Another, (2005) 1 KLR 668** for the proposition that documents witnessed by a person who was not an advocate were void.

It was submitted by the 1st and 2nd Defendants in this respect that the Plaintiffs did not adduce any evidence to show that there existed collusion between the Defendants and the Land Registrar and further, that no official or representative from the land registry was called or joined to the suit to prove that the Defendants tried to defeat the Plaintiffs' interest in the suit property. Reliance was placed in the case of **Mutsonga -vs- Nyati, (1984) KLR 425** and **Koinange & 13 others -vs- Koinange, (1986) KLR 23** as cited in the case of **Mary Jerono Mengich -vs- David Kipleting Regut, (2013) eKLR** for the proposition that the Plaintiffs had failed to prove the particulars of fraud as alleged in the amended Plaint.

It was also argued that the Plaintiffs had failed to tender evidence challenging the authenticity of the signatures in the Deed of Assignment and the Replying Affidavit and therefore, that the allegation of forgery of the executed documents cannot stand.

The counsel for the 3rd Defendant 0n his part contended that the reference to the deceased's will a well as to an advocate by the name of V. W. Muriuki ought not to be points of submissions because they were not raised during the hearing of this suit. Counsel argued that the letter from the Law Society of Kenya was an unacceptable way for the Plaintiffs to introduce new evidence, which the Defendants had not had a chance of viewing before, nor cross-examine and the court was urged to disregard the same.

This Court appreciates that the key features of a tenancy in common are that each tenant has a distinct share in the common property which has not yet been divided among the co-owners , and there is no right of survivorship as among the co-owners. Therefore the size of a tenant's share is not affected by the death

of the other co-owners, and when a tenant dies, his interest in the property passes on to his or her beneficiaries under a will or intestacy.

Section 61 of the Land Registration Act now provides for the procedure for dealing with a tenancy in common where the proprietor has died. It provides that the personal representative is entitled to be registered by transmission as proprietor in the place of the deceased, and further, that such registration relates back to and takes effect from the date of the death of the proprietor.

This Court has in this respect noted and does not doubt the reasons given by the 1st Defendant as to why the conveyance between R. V. Patani & M. V. Patani on the one hand and the 1st Defendant on the other hand was dated 25th April 2008 and not earlier, as the 1st and 2nd Defendant brought evidence of the charge over the suit properties that could not have made a conveyance before 2008 possible. The Plaintiff did not bring any contrary evidence.

However, the 1st Defendant in enforcing the partition agreement between him and his two brothers M.V Patani and R.V. Patani, ought to have dealt with the personal representatives of his late brothers, as it is not disputed that on 25th April 2008 M.V Patani and R.V Patani were already deceased. Therefore, the conveyance of 25th April 2008 is to this extent irregular. This court also finds that the evidence as to the said conveyance being drawn by an unqualified person who did not hold a practicing certificate as required by the Advocates Act was not properly produced before the Court, as it was introduced by the Plaintiffs in their submissions and was therefore not subject to verification. Laslty, this Court notes that no particular relief was sought by the Plaintiffs as regards the conveyance dated 25th April 2008.

The above findings notwithstanding, it is still the holding of this Court that the 1st Defendant has the sole beneficial ownership of the suit property for the reasons given earlier in this judgment. It would also be inequitable and unfair to allow the Plaintiffs to doubly benefit from the properties that were co-owned by the 1st Defendant, M.V Patani and R.V Patani, as it has been found that R.V. Patani did receive and utilize his share of the co-owned properties. It is also noted by the court in this respect that the only unity that is required to be present in a tenancy in common is the unity of possession, and the unity of interest may be absent, which means that tenants can hold unequal interests in a tenancy in common. In light of the 1st Defendants sole beneficial ownership of the suit properties, R.V Patani's legal estate in the suit property can only be held in a resulting trust for the benefit of the 1st Defendant.

Whether the 3rd Defendant has acquired any interests in the suit properties by virtue of the conveyances entered into with the 1st and 2nd Defendants dated 14th October 2009 .

It is the Plaintiffs' submission on this issue that having obtained registration through fraud and misrepresentation, the 1st and 2nd Defendants' title to the suit premises was defective and therefore, that the same title which was passed to the 3rd Defendant is not valid. Reliance was placed on the case of **Elijah Makeri Nyangw'ara –vs- Stephen Mungai Njuguna & Another, (2013) e KLR**. Counsel for the Plaintiffs argued that the 3rd Defendant was unable to explain how the Kshs.100, 000,000/= was paid and had no evidence of how the stamp duty which would have amounted to Kshs. 4, 000,000/= was paid and was thus a guilty party working in collusion with the 1st Defendant.

Counsel submitted that the Plaintiffs had on a balance of probabilities established that the 3rd Defendant was not a purchaser who paid any consideration to warrant protection from Court, and reliance was also placed in this regard on the case of **Mathenge & Another –vs- Kimotho,(1994) KLR 461**. Counsel urged the court to cancel the conveyance and the resultant title in the names of the 3rd Defendant, and to revert the title back to the original owners. It is the Plaintiffs' submission that section 26(1) of the Land Registration Act grants the court power to cancel the 3rd Defendant's title.

Counsel for the 1st and 2nd Defendants sought to rely on section 26(1) of the Land Registration Act, 2012, and submitted that the 1st Defendant was the registered absolute owner with an indefeasible title and

unfettered rights to deal with the suit property as he pleased. It was contended that the 1st Defendant's right to transfer part of the suit property to the 2nd Defendant and eventually sell and transfer the property to the 3rd Defendant could only be challenged on grounds of fraud or misrepresentation.

It is the 1st and 2nd Defendants' submission that the Plaintiffs failed to plead particulars of fraud as against the 3rd Defendant as required by Order 2 rule 10 of the Civil Procedure Rules, and reliance was placed on the case of **Omar Salim Bendo –vs- Luke M. Mutiso & Another, (2005) eKLR** for the proposition that grounds of fraud must be specifically pleaded. It was further submitted that the 3rd Defendant acquired a good title from the 1st and 2nd Defendant which deserves protection under Article 40 of the Constitution

The 3rd Defendant's counsel argued that the 1st and 2nd Defendants were the registered proprietors of the suit properties at the time they entered into a sale agreement, a fact which was not rebutted by the Plaintiffs. Counsel argued that the 3rd Defendant had demonstrated that it carried out due diligence before purchasing the suit properties by producing a search document which revealed that there were no encumbrances on the suit properties. It was also contended that the 3rd Defendant's directors visited the premises and established that the 1st Defendant and his wife, the 2nd Defendant, were in possession of the suit properties as set out in the Plaintiff's further Amended Plaint.

The counsel submitted that there was nothing in the Lands Office records indicating fraud or any third party interests in the suit properties. In respect to the sale agreement dated 4th August 2009 executed between the 1st and 2nd Defendants and the 3rd Defendant, the counsel submitted that there was no dispute by any of the parties as to its validity. It is the 3rd Defendant's submission that no evidence was led by the Plaintiffs to rebut the Defendants' evidence with respect to payment of the purchase price.

While submitting that the 3rd Defendant was a bona fide purchaser for value without notice, Counsel contended that neither the Plaintiffs nor the 1st and 2nd Defendants accused the 3rd Defendant of any fraud, and that instead, that all witnesses testified that they did not believe the 3rd Defendant to be guilty of any fraud. It is the 3rd Defendant's submission that no particulars of fraud were specifically pleaded against it in the Plaint. The court was referred to the case of **Koinange & 13 others –vs- Koinange, (supra)**, for the proposition that allegations of fraud must be strictly proven on a standard of proof that is more than on a balance of probabilities.

Reliance was also placed on the case of **Bosley Fredrick & Mohammed Ali t/a Continental Traders & Marketing -vs- Westmont Power (Kenya) Limited, Nairobi HCCC No. 1700 OF 2001** for the submission that a general allegation of fraud or illegality is not sufficient to infer liability on the part of those who are said to have committed it. Counsel also relied on section 26 of the Land Registration Act as well as the case of **Kuria Greens Limited –vs- The Registrar of Titles & Another, Nairobi High Court Petition Number 107 of 2010** for the proposition that a certificate of title is conclusive evidence that the person named as proprietor is the absolute and indefeasible owner.

With respect to the stamp duty of Kshs 4,000,000/- paid, counsel for the 3rd Defendant relied on section 10A of the Stamp Duty Act and submitted that the Chief Government Valuer found the open market value of each of the two suit properties to be Kshs.50,000,000/= each, making a total of Kshs.100,000,000/=. It was argued that no evidence was led by the Plaintiffs to prove otherwise and further, that no complaints were made to the Collector of Stamp Duty by the Plaintiffs.

The sale agreement dated 4th August 2009 and conveyances dated 14th October 2009 between the 1st and 2nd Defendants on the one part and the 3rd Defendant on the other part with respect to the suit properties were produced in evidence. Contrary to the Plaintiff's submissions, there was no obligation on the Defendants to prove payment made under the sale agreement, it was up to the Plaintiffs to disprove the same, as they were the ones alleging non-payment. In any event all the Defendants admit and do not dispute that payment was made under the sale agreement.

This Court also notes that neither the Plaintiffs nor the 1st and 2nd Defendants attributed any fraudulent dealings to the 3rd Defendant in this respect. No particulars of fraud were specifically pleaded against the 3rd Defendant in the further amended Plaint dated 2nd February 2011, and the Plaintiffs did not bring any evidence in this regard. The 3rd Defendant submitted that it conducted due diligence to confirm ownership and further, that he would not have purchased the suit property had it known that there was a dispute surrounding it. It availed before the court a search dated 10th June 2009 showing that L.R. 1/681 was registered in the names of the 1st and 2nd Defendants as at 28th May 2008.

DW2 also testified that no discussion about the family dispute was held with the 3rd Defendant at the time of purchase. It is also not in contest that the 1st Defendant was in possession and occupation of the suit premises. In my view, the 3rd Defendant is an innocent purchaser for value without notice, and therefore acquired title to the suit properties by virtue of the conveyances dated 14th October 2009. In the case of **Bruce Joseph Bockle -vs- Coquero Limited, [2014] eKLR**, the Court of Appeal declined to nullify a title acquired by an innocent purchaser for value without notice and held that the appellant's remedy was in damages.

This Court having already found the conveyance between the 1st Defendant and M.V Patani and R.V. Patani dated 25th April 2008 to have been irregular, the legal effect of this finding on the 3rd Defendant's title is that the suit properties were therefore still co-owned by the 1st Defendant, R.V Patani and M.V Patani, at the time of the sale agreement and conveyances executed between him and the 3rd Defendant. What this Court therefore has to consider is the legal effect of a sale of co-owned property by one co-owner. The legal effect of such a sale is that the transferor acquires the transferees interest in the co-owned property.

This effect of termination of a tenancy in common by sale was provided by section 44 of the repealed Indian Transfer of Property Act, which was the substantive law that applied to transactions made under the Government Lands Act at the time of the sale of the suit properties to the 3rd Defendant. Section 44 stated as follows:

> **"Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. "**

The effect of a transfer by a co-owner of their share in a common tenancy registered under the repealed Government Lands Act was also provided for under section 47 of the repealed Indian Transfer of Property Act as follows:

> **"Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares."**

This Court has already found that the 1st Defendant's was both a legal co-owner and the sole beneficial owner of the suit properties, and to this extent, his transfer to the 3rd Defendant was a valid transfer and allowed by law, and was of his sole entire beneficial ownership in the suit properties. The Plaintiffs are also not entitled to any proceeds of the sale as they had no beneficial interest in the suit properties as shown in the foregoing.

Whether the Plaintiffs are entitled to the reliefs sought.

The effect of the foregoing findings on the issues in this suit is that the Plaintiffs have no legal or equitable interest in the suit properties, and are therefore not entitled to the orders they sought aimed at giving effect to their alleged interests in the same. This includes the orders sought to have the suit properties valued by an independent valuer with a view of ascertaining the true value and share of each of the registered owners and/or their representatives.

The Plaintiffs have also sought orders directing the Principal Land Registrar to cancel and nullify the sale and transfer of the suit property by the 1st and 2nd Defendants to the 3rd Defendant. The circumstances under which a court can order rectification under section 80 of the Land Registration Act have not been met. Section 80(2) provides:-

> **"The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."**

The Court of Appeal in the case of **Nairobi Permanent Markets Society & 11 others -vs- Salima Enterprises & 2 others [1997]eKLR** held that in the absence of any allegations of fraud or misrepresentation perpetrated by the company in the acquisition of the suit land, the company as the registered proprietor was the absolute and indefeasible owner. In **Bruce Joseph Bockle -vs- Coquero Limited [2014] eKLR** the court held that even if the appellant had proved fraud and illegalities, the respondent's title could not have been nullified since the respondent was not party to the fraud or illegalities that preceded its acquisition of the suit premises nor was there prove that the respondent had knowledge of the fraud, illegalities and misrepresentations.

From the evidence tendered in court, the 3rd Defendant took possession of the suit premises upon payment of the balance of the purchase price. There is no evidence to prove that the 3rd Defendant had knowledge of any omission, fraud or mistake in consequence of which the rectification is sought, or that the 3rd Defendant caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default. On the contrary the evidence shows that the 3rd Respondent was ignorant of any irregularities as regards the title to the suit properties. An order for rectification cannot therefore issue as against the 3rd Respondent's title in the circumstances.

This Court accordingly dismisses the Plaintiffs' suit herein for the foregoing reasons, and as this suit arose from a family dispute, the Plaintiffs shall only meet the 3rd Defendant's costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of_____July____, 2014.

P. NYAMWEYA

JUDGE