



Sampa Investments Limited v Summer Properties Co Ltd & 2 others; Chief Land Registrar Kwale & another (Third party) (Environment & Land Case 115 of 2021) [2025] KEELC 885 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 115 OF 2021
AE DENA, J
FEBRUARY 27, 2025**

BETWEEN

SAMPA INVESTMENTS LIMITED PLAINTIFF

AND

SUMMER PROPERTIES CO LTD 1ST DEFENDANT

VIPUL JASVANTRAI SHETH 2ND DEFENDANT

JITENDRA LAKHAMSHI DANDHIA 3RD DEFENDANT

AND

CHIEF LAND REGISTRAR KWALE THIRD PARTY

ATTORNEY GENERAL THIRD PARTY

JUDGMENT

1. The Plaintiff in this suit seeks for judgement against the Defendants for; -
 - a. A declaration that the Defendants fraudulently sold to the Plaintiff land parcel Kwale/Galu Kinondo/1636-1639 when the same was not available for sale.
 - b. The Defendants be jointly and/or severally ordered to compensate the Plaintiff for the suit property Kwale/Galu Kinondo/1636-1639 at a market rate of Kshs 222,700,000/- with interest at court rates from the date of judgement until payment in full
 - c. The Defendants be jointly and or severally ordered to compensate the Plaintiff the cost of feasibility study undertaken by Jones Lang Lassalle Kenya Limited at the cost of US\$55,100 and legal fees of Kshs 102,000 with interest at court rates from the date of judgement until payment in full.



- d. The Defendants be jointly and or severally ordered to compensate the Plaintiff the lost business opportunity in the sum of US\$12,395,829 with interest at court rates from date of judgement till payment in full
 - e. General and exemplary damages for fraud and deceit
 - f. Costs of the suit
 - g. Any other relief that the honourable court may deem fit and just to grant.
2. The Plaintiff describes itself as a limited liability company duly incorporated under the *Companies Act* within the Republic of Kenya. The same description falls on the 1st Defendant while the 2nd and 3rd Defendants are male adults working and residing in the country. It is the Plaintiffs case that sometime on 22nd December 2004 one Omar Said Mwatayari filed Mombasa HCCC No 277 of 2004 Omar Said Mwatayari Versus Bharatkumar Nathalal Shah and Vipinkumar Nathalal Shah and another suit being Mombasa HCCC No 276 of 2004 Omar Saidi Mwatayari V South Coast Beach Properties Limited for recovery of his land Kwale/Galu Kinondo/55 which he alleged had been fraudulently subdivided into Kwale/Galu Kinondo/733 and 734 which were registered in the names of South Coast Beach Properties Limited and Bharatkumar Nathalal and Vipinkumar Nathalal Shah respectively.
 3. It is alleged that the Defendants in the said suit failed to enter appearance and consequently ex parte judgement was entered in favour of the Plaintiff Omar Saidi Mwatayari on 16/9/2005. The title deeds to the Defendants in the suits were revoked and the land reverted back to its original number Kwale/Galu Kinondo/55. At paragraph 7 of the plaint, it is averred that sometime on 24/2/2006 the 3rd Defendant together with one Subash Lakhamshi Dadhia incorporated a company called Coastland Properties Ltd and bought land parcel number Kwale/Galu Kinondo/55 from one Omar Said Mwatayari. Later, on 5/5/2006 the Defendants in HCCC No 276 and 277 of 2004 applied to court to set aside the ex parte judgement earlier entered. That on 22/5/2006, the 3rd Defendant and other directors of Coastland Properties Limited proceeded to transfer their shares to Rajesh Ramji Shah and Meena Rajesh Shah. On 16/6/2006 the court issued conservatory orders against the suit property, however while the same was still in place, Coastland Properties Limited subdivided the land creating 4 new parcels being Kwale/Galu Kinondo/1636-1639. The company went ahead to develop the properties but were found in contempt of court orders on 7/6/2007. On 9/11/2009 the Court of Appeal delivered its judgement and set aside the ex parte judgement ordering for the cancellation of the titles and reverting back of the titles to the existing title numbers before judgement. The court further issued orders restricting any dealings on the suit property and the created subdivisions.
 4. It is averred that on 31/7/2013 the 2nd and 3rd Defendants incorporated a company the 1st Defendant herein and which proceeded to purchase the suit properties from the 3rd Defendant. The Defendants later sold the 4 subdivided portions being Kwale/Galu Kinondo/1636-1639 to the Plaintiff. This transaction is termed as having been fraud on the part of the defendants. The particulars of fraud are listed under paragraph 15 of the plaint. The plaintiff states that after the said purchase they took over the developments of the suit property and further refurbished the same. At paragraph 17 it is averred that the Plaintiff contracted Jones Lang Lassalle Kenya Limited which conducted a marketing and feasibility study on making further developments on the suit property. The cost of contracting them is stated at paragraph 18. That legal fees was further paid over the project totalling to Kshs 102,000/-. The Plaintiff states that it was intent on opening a subsidiary of the Dusit International and the same was to be known as the Dusit Princess Galu Beach Resort Kenya. The Plaintiff states that since its possession of the suit property sometime in 2016 they have been in occupation of the suit property and were not aware of any pending court cases as the Defendants never bothered to inform them of the same.



5. The Plaintiff states that the court vide its judgement delivered on 19/9/2020 dismissed the plaintiffs case in Mombasa HCCC No 276 and 277 of 2004 and still the Defendants failed to inform the Plaintiff in the present suit of this judgement. The Defendant's actions are termed as negligent and malicious with aspects of the same being listed under paragraph 25 of the plaint. The Plaintiff states that the Defendants cannot rely on the bonafide principle as the 3rd Defendant was a director of Coastland Properties Limited and was aware of the court cases. The Plaintiff states that in implementation of the courts judgement in Mombasa HCCC No 276 and 277 of 2004 their titles to the suit property was cancelled, the developments on the property demolished and the properties including customised designer furniture destroyed. The Plaintiff further states that its dream of owning a top notch resort was never realised and was thwarted by the Defendants actions hence necessitating this suit.

Defence

6. The 1st, 2nd and 3rd Defendants filed a joint statement of defence on 17/8/2021. The said parties denied the averments raised in the plaint save for the description of the parties. The 2nd and 3rd Defendants aver that there is no cause of action against them as they are separate in personality, distinct and independent of a duly incorporated limited liability company. The Defendants state that it is the Defendants in Mombasa HCC No 276 and 277 of 2004 who failed to enter appearance leading to a default judgement against them. The Defendants allege that it is now that they have been made aware that on 5/10/2005 through a court order the sub division of parcel Number Kwale/ Galu Kinondo/55 into parcels Kwale/ Galu Kinondo/733 and 734 respectively was closed and the original Parcel Number 55 reinstated and registered in the names of Omar Said Mwatayari. The Defendants allege that though the 3rd Defendant was initially a shareholder of Coastland Properties Ltd but sold and transferred his shares on 8/4/2006 to a new shareholder way before Coastland Properties Ltd acquired the suit properties.
7. It is admitted at paragraph 12 of the defence, that the 1st Defendant was incorporated on 31/7/2013 and purchased from Coastland Properties Ltd the parcels for an aggregate sum of Kshs 50 million vide agreement dated 10/10/2013. The Defendants deny the listed particulars of fraud and state that the suit property Kwale/Galu Kinondo/55 was subdivided in the course of the year 2006. That none of the Defendants participated in the sub division. It is averred that the 1st Defendant purchased the suit parcels Kwale/Galu Kinondo/1636,1637,1638 and 1639 at Kshs 12,500,000 totalling to the Kshs.50 million. The Defendants deny having prior knowledge of Mombasa HCC No 276 and 277 of 2004 and being party to the same. That none of them was therefore in contempt of court. That the 1st Defendant sold to the Plaintiffs the suit properties in good faith. The Defendants pray that the Plaintiffs claim is dismissed with costs.
8. During the proceedings a Third-Party Notice dated 20/6/22 was issued by leave of the court on 8/6/22 to the Country Land Registrar Kwale County and the Attorney General. The same claimed indemnity and or contribution on the basis that the parties were the custodians of all records relating to the suit properties and were responsible for facilitating and effecting all transactions thereof. Further that they validated the sanctity of the titles and transfer between the 1st Defendant and the Plaintiff.
9. State Counsel Paul Waga entered appearance and filed Statement of Defence dated 2/08/22 on behalf of the 3rd parties. The descriptive parts were admitted only to that extent. The parties denied being privy to the contents in 5,6,7,8, 9, 11,12,13, 14, 16,17,18, 19, 20-30 of the Plaint. It is averred that the mandatory notice of intention to sue was not served upon the Attorney General making the suit incurably and fatally defective. That the reliefs sought by the Plaintiff were not merited. The parties prayed that the suit be dismissed as against the Land Registrar and the Attorney General.



Hearing

10. This matter was heard on 15/02/23, 16/02/23, 27/4/23 and 11/10/23. The Plaintiff was represented by Mr. Olendo from the firm of Olendo, Orare & Samba Advocates, the 1st 2nd and 3rd Defendants by Mr. Ngaine from the firm of Nyaanga & Mugisha Advocates and Ms. Kiti State Counsel for the 3rd parties.

Plaintiff's Case

11. PW1 Beatrice Moraa Ongige** testified as one of the directors of the Plaintiff with authority of the co-directors to file suit and testify on their behalf as evidenced by PExh1 which was a letter of authority. The witness relied on her statement filed before court on 5/7/2021 as part of her evidence in chief. That sometime in 2015 they decided to settle in Kenya at the beach, they also had interest in apartments. That Kenneth the co-director engaged one Fred Kamotho a surveyor in Mombasa to assist in identifying land. That the land identified was Kwale/Galu Kinondo/1636-39 and had all the four titles. MNM Advocates were retained for the conveyancing at a purchase price of Kshs 79 million. The witness states that the Plaintiff undertook renovation of the property on the parcels as the same was viewed as an investment opportunity.
12. The witness testified that they engaged the Jones Lang Lassalle Company to do a feasibility sketch of a hotel for a project they intended to do and for marketing. That they chose to work with Dusit and the project was estimated to bring an income of USD 12,395,829/-. That they would visit the properties every Christmas after taking possession of the same. That on 19/2/2021 they received a call from the caretaker that court orders had been issued over the property. They had not been made aware of the same initially. That auctioneers visited the property and destroyed everything.
13. That later they found out that a court case had been running before court. That Coastland Properties Limited had been registered as proprietor in 24/2/2006. That Rajesh and Meena bought part of the property on 30/3/2006 at Kshs 21,182,000/- and the transfer was registered. That however there was a court order barring Coastal Properties from further dealings on the suit property 55 but they proceeded to have the same subdivided. They were cited for contempt and paid a fine of Kshs 250,000/-. It is stated that in July 2013 the 2nd and 3rd Defendants incorporated the 1st Defendant company and transferred the subdivided parcels to it. That Coastlands then transferred the properties to the 1st Defendant as evidenced by the entries in the green card. The witness maintained that the 2nd and 3rd Defendants planned meticulously to sale the land to the Plaintiff knowing very well they did not have a proper title to the same.
14. That from the sale agreement, the funds released directly to Madhani Advocates who acknowledged receipt vide a receipt dated Kshs 15,500,000/- and transferred to the 2nd Defendants account and who also received the payment of Kshs 63,200,000/-. The witness stated that the land was valued in 2019 at Kshs 170 million and the developments at Kshs 30 million. That a second valuation returned a figure of Kshs. 192,700,000. The witness reiterated the claims as pleaded in the Plaint and referred the court to the corresponding exhibits. The witness emphasized that all they want is reimbursement of what had been used in purchasing the property as outlined in her testimony.
15. The witness was cross examined on 16/2/2023. She admitted that she knew the original owner of the suit property was Omar Said Mwatayari as per the adjudication record dated 24/5/1974 and 21/5/1974. That as per the green card the 1st entry was in favour of the said Omar Mwatayari. Title was issued on 4/2/1975. The title was closed on subdivision to parcels 733 & 734. The witness was referred



- to the green card in the 3rd Defendants bundle and confirmed that the same was different from the green card in her bundle of documents and held different information including addresses indicated thereon.
16. PW1 admitted that the court in Mombasa had ordered plots 733/4 to be reverted to plot 55. That the restored parcel was subsequently sold to Coastal Properties Limited and the same was subdivided to parcels 1636-1639. That from the record, the ruling was delivered on 23/6/2008 while the subdivision occurred on 17/6/2006 a year before the Court of Appeal rendered its decision.
 17. On cross examination by Ms Kiti the witness testified that due diligence was done before she purchased the property. That the same indicated the property was clean and she proceeded with the purchase.
 18. On re-examination, the witness testified that the sale agreement does not state the reasons for purchase. She denied that prayer (d) of the plaint was speculative but clarified that it was the sum she estimated to have used for consulting and planning and the legal fees. She stated that Coastal Properties and Summer Properties were one and the same. That from the AGs bundle at page 6, there were two green cards to the suit property and one could not tell which of the two was the original.
 19. PW2 Edwin Mutwiri a registered valuer testified that he had been contacted by Sampa to undertake some work as per the report dated 18/5/2019 produced as PEXH10. Highlighting the contents of the same PW2 testified that the property was developed and as at the year 2019 had a value of Kshs 200 Million. That he was again asked to do a report of the suit property in the year 2021 (PEXH11) returning a value of Kshs. 192,700Million due to the rubbles.
 20. On cross examination PW2 stated that he had used a comparative market approach analysis in his report. That a comparison is made of similar properties that are within the same location but which he had not identified in the report. That the properties had been inspected physically before the reports were prepared.
 21. With the above the Plaintiffs case was marked as closed.

Defendants Case

22. DW1 Jitendra Lakhamish Dedhia adopted his witness statement dated 12/8/2021. He also testified on behalf of the 2nd Defendant by dint of authority dated 24/04/23. He further produced the documents in the list of documents dated 12/8/2021 as DEXH1-78. He admitted Kwale/Galu Kinondo/1639,1636,1637 and 1638 were sold to Sampa Investment Limited. That at the time of purchase he was not aware that there was a judgement that cancelled the titles to the property. That the property was sold to him by Coastland Properties Limited in 2013. Referring to page 53 of the Plaintiffs bundle of documents and the copy of the green card for parcel 55 opened on 15/11/74 the witness read through the entries 1 - 5 culminating into the subdivisions.
23. On cross examination by Mr Olendo, the witness testified that Coastlands Properties Limited was registered in the year 2006. That he traded with the company. He had registered the company on behalf of Rajesh Shah and Meena Shah his British friends. That the instructions were verbal. That he only registered the company but did not purchase any property on their behalf. That Coastlands Properties Limited had purchased the suit property from Omar Mwatayari. He admitted that at the time of both transactions he was a director of the company and that Coastland Properties was aware of the case against Mwatayari. That he was only a conduit as a trustee and that's why the transactions happened while he was acting on behalf of the directors. He insisted that he had been given clean titles to the suit properties
24. On cross examination by Ms Kiti the witness testified that as per the green card on page 53 of the Plaintiff's bundle, Coastlands Properties Limited did the subdivision of the suit property on



17/6/2006 and sold them to Sampa Investments the plaintiffs. That due diligence was done at the lands office.

25. On re-examination DW1 clarified that Coastland Properties Limited was registered on 24/2/2006 and the directors were Jitendra Dhodhia and Subash Lahkamshi. That there is a notice of change of directors dated 8/4/2006 and Rajesh and Meena were registered as directors on 23/2/2007. He stated that he was not involved in the payment for the suit property by the plaintiffs. The property was bought in 2013 and sold in 2016 after it had accrued interest. The defence case was marked as closed at this juncture.

3rd Parties Case

26. DW2 Susan Mueni Land Registrar Kwale relied on the list of documents dated 2/9/2022 which were produced as DW2Exh 1-9. The witness highlighted that the land was originally allocated by the adjudication officer to Omar Mwatayari who subdivided it into 733 & 734. That the subdivision was cancelled by a court order in case number 276 & 277 of 2004. That in 2006 Omar transferred the property to Coastland properties who subdivided the land into 4 portions being 1635,1637,1638 & 1639. On 2/12/2020 a decree was registered in 276 & 277 of 2004 cancelling the title of Omar Mwatayari and Coastland properties in favour of Coast Beach Properties. That the court disregarded the subdivision of the 4 properties and the land reverted back to Galu/Kinondo/55 which was the reason why the lands office had the green cards opened because of the judgement. That to date the green cards for 733 & 734 are in the names of Coast Beach Property Limited and Vipul Kumar. That before registration of the 2020 decree the suit property was subdivided into 4 portions by Coastland Property in 2006 and who in 2013 transferred them to Summer Property Company. That to date the 4 subdivisions do not stand.
27. On cross examination by Mr Olendo the witness testified that the parcel file she possessed has the subdivisions 1634 & 1635 but the rest of the documents were missing. That the parcel had an entry in error but it is not explained how the same came about.
28. On cross examination by Mr Nyaanga the witness testified that there was no evidence of how the land moved from Omar Mwatayari to Coastland Beach Properties Ltd. That the same was through a court order but the records are not at the lands office. The witness stated that she had the green cards for 733 & 734 which indicates the subdivision for 733 happened in 1984. That there is no record showing transfer from Omar Mwatayari to the Defendants and no history exists between the said parties save for the court order. The third parties case was marked as closed at this juncture.

Submissions

29. Parties filed and exchanged submissions as summarised herebelow;-

Plaintiffs Submissions

30. The following issues were outlined in the discussion forming the submissions;-
- a. The Defendants defrauded the Plaintiffs
 - b. The Plaintiff's entitlement to compensation of Kshs 227,700,000.00/- being the value of the suit property as at the year 2021
 - c. The Plaintiffs entitlement to compensation of USD 55,100.00 and Kshs 102,000/- being fees paid for various services rendered to the Plaintiff in relation to the suit property



- d. Loss of business opportunity worth USD 12,395,829.00
 - e. General and exemplary damages and
 - f. Costs of the suit
31. On whether the Defendants defrauded the Plaintiff, it is submitted that the Defendants feigned ignorance of the ongoing court case touching on the suit property Kwale/Galu Kinondo/55 and further indulged in several actions like changing the directorship of the company they held so as engage in the fraudulent sale of the property to the Plaintiff. The Plaintiff states that it has met the standard and onus of proof and discharged the obligation thereof. Reference is made to the following authorities, LWN V PLM& 3 Others [2021] eKLR, Urmilla W/O Mahendra Shah V Barclays Bank International Limited & Another [1979] KLR 76[1976-80] IKLR 116B and in Jose Estates Limited V Muthumu Farm Ltd & 2 Others [2019] eKLR where the court established that fraud must be specifically pleaded and stated on the face of pleadings and proven to a standard slightly higher than that of beyond reasonable doubt.
32. The Plaintiff contends that fraud in the instant suit was both participatory and imputed against the Defendants jointly and severally. That the Defendants not only participated in the fraudulent dealings but was also aware of the same and condoned it and further benefitted from the same. It is further submitted that the fraud alleged in this instance has been proved through the evidence of the Plaintiff in her testimony before court. It is averred that a total of Kshs 79 million has been spent on the purchase of the property. That the Plaintiff was in occupation until when the notice to vacate and demolish was served and implemented. That DW1 in his testimony admitted to having sold the suit properties to the Plaintiff and which emanated from subdivision of the disputed parcel.
33. It is submitted that the doctrine of lis pendens dispossesses the Defendants of pleading ignorance of the pending court cases. The Defendants went ahead with transacting over the suit property with the full knowledge that the same had a pending dispute before court. That DW1 in his cross examination confirmed that Coastland Property Limited was aware of the court cases. The Plaintiff highlights the failure by the Defendants to produce a certificate of transfer of shares as required by law rendering appointment of directors Rajesh and Meena not lawfully recognised as agents. The Plaintiff submits that since the seller of the land made false representation it is guilty of fraudulent misrepresentation, the purchaser is entitled to repudiate the contract as was the case in the Court of Appeal in Shaffique Alibhai V Karim Jamal [2018] eKLR.
34. It is further submitted that the funds for purchase of the suit property from the Plaintiff were paid to the 2nd Defendant in his personal account and not to the 1st Defendant as a company. That DW1 admitted to being the Director of both the 1st Defendant and Coastland Properties Limited. In summary, it is submitted that the court has been led into evidence that confirms the defendants were engaged in a fraudulent scheme and lacked proper titles to pass on to the Plaintiff. That besides the fraudulent inducement, the Defendants breached the warranties outlined in the agreement between them and the Plaintiff.
35. On damages, it is submitted that assessment of damages recoverable by the purchaser upon breach by seller of land was discussed in Joseph Kang'ethe Irungu Versus Peter Ng'ang'a Muchoki [2018] eKLR where the court opined that the measure of damage is similar to the loss incurred by the purchaser as a result of repudiation of the contract. The Plaintiff submits that two valuations of the suit property were carried out one in 2019 before demolition of the property and the other in 2021 after the demolition. That in 2019 the property was valued at Kshs 170,000,000 and the developments at Kshs 30,000,000/-. The valuation report was produced as Pexh10. That the valuation conducted on 10/5/2021 after the



demolition of the houses valued the property at Kshs 192,700,000/-. That the plaintiff is entitled to Kshs 222,700,000 as award under damages being value of the land and the demolitions. That the Defendants should also pay the amount used for consultancy by the firm of Jones Langi Lassalle Kenya limited as per the feasibility report being 55,000 dollars as PExh13 and Kshs 102,000/- PExh18 legal fees. That the plaintiff was anticipating Kshs 1,000,000/- which would be earnings for use of the property for 5 years.

PARA 36.

The Plaintiff further submitted on general damages for fraudulent inducement and invited the court to exercise its discretion on award of the same. They however proposed a sum of Kshs 100,000,000/- as being reasonable.

1st & 2nd Defendants Submissions

37. The 1st and 2nd Defendants highlighted the following as the issues not in dispute;
- a. The 1st Defendant conducted due diligence at the time of purchasing the suit properties in 2013, which revealed that coastland properties limited, the vendor was the registered owner with no encumbrance and/or court order
 - b. That the Plaintiff conducted due diligence at the time of the purchasing the suit properties from the 1st Defendant in 2016 which revealed the 1st defendant as registered owner with no encumbrance and/or court orders
 - c. The suit properties were sub divided by Coastland Suit Properties Limited in 2006 and not the Defendants herein
 - d. None of the defendants herein was a party in MOMBASA HCC NO 276 and 277 of 2004
 - e. At all material times to this suit the 2nd and 3rd Defendants/Applicants were directors of the 1st defendant
 - f. The parties to the sale of the suit properties were the 1st Defendant and the Plaintiff/ Respondent
 - g. The 2nd and 3rd Defendants/Applicants were not privy to the agreement for sale between the 1st Defendant and the Plaintiff.
38. The Defendants highlighted the following as the issues for determination; -
- a. Whether or not the 2nd & 3rd Defendants were privy to the sale agreement between the Plaintiff and the 1st Defendant
 - b. Whether the Defendants fraudulently sold the suit property to the Plaintiff
 - c. Whether the Plaintiff is entitled to indemnity and if so from whom
 - d. Whether the Plaintiff is entitled to the prayers sought against the Defendants
39. On whether or not the 2nd and 3rd Defendants were privy to the sale agreement between the Plaintiff and the 1st Defendant. It is submitted that at all material times the 2nd and 3rd Defendants were merely directors of the 1st Defendant and no evidence has been adduced to the contrary. That the sale agreement was between the 1st Defendant and the Plaintiff and as such the 2nd and 3rd Defendants were not parties to the agreement and which forms the substratum of the suit before court. it is urged that the 2nd and 3rd Defendants are improperly joined as parties to this suit based on three arguments namely Doctrine of privity of contract based on ADC V Lengetia Limited & Jack Mwangi [1985] eKLR;



Secondly the 2nd and 3rd Defendants as directors of the 1st Defendant are separate distinct legal persons from the 1st Defendant based on the case of Salomon Versus Salomon & Co Ltd [1896] UKHL [1897] AC 22 and Thirdly that the directors of a corporation for all intents and purposes are its agents and that agents of a disclosed principle cannot be sued as was held by the Court of Appeal in Victor Ombachi & Another V Nurtun Bates Limited [2013] eKLR

40. On whether the Defendants fraudulently sold the suit property to the Plaintiff, it is submitted that fraud must be pleaded and strictly proved. Reference is made to several authorities in relation to proof of fraud and which include the supreme court decision in Fanikiwa Limited & 3 Others Versus Sirikwa Squatters Group & 17 Others SC Petition No 32[036] of 2022. The Defendants submit that in the instant case the Plaintiffs only basis for alleging fraud revolves around the allegation that the Defendants were aware of Mombasa HCC No 276 & 277 of 2004. That the Plaintiff has however not demonstrated that the Defendants were aware of the pendency of the suit and as such the court should find that the Plaintiff has failed to prove that the Defendants were involved in any fraud and warrant being regarded as an innocent purchaser for value.
41. It is further submitted that the 1st Defendant purchased the suit properties for valuable consideration after conducting due diligence and following the due process of the law. The Defendants maintain that the 1st Defendant was a bonafide purchaser for value and place reliance in the case of Dina Management Ltd V County Government of Mombasa & 5 Others [Petition 8[E010] of 2021] [2023] and in Samuel Kamere Versus Lands Registrar Kajiado Civil Appeal No 28 of 2005[2015] eKLR.
42. On whether the Plaintiff is entitled to be indemnified and if so by whom, it is submitted that both the Plaintiff and the Defendants have confirmed they carried out due diligence before engaging in the transactions over the suit property. That it is now apparent that there could be two different green cards both emanating from the lands registry in Kwale over the suit property. That the registrar could not explain how and when the impugned sub divisions Kwale/Galu Kinondo/733 and 734 came into being. That based on this the Plaintiffs only recourse was against 1st third party as provided for under Section 81 of the Land Registration Act and the court's decision in Westend Butchery Limited Versus Arthi Highway Developers Limited & 6 Others [2012] eKLR.
43. On whether the Plaintiff is entitled to compensation, loss of earning, general and exemplary damages it is submitted that indeed the Plaintiff is entitled to compensation for loss of the suit properties. That it is the 1st 3rd party to compensate the plaintiff. At paragraph 142 of the submissions the defendants state that a claim for damages or indemnity against the government on matters concerning land registration arises when a title holder suffers any damages emanating from either negligence, mistake or fraud on the part of the registrar while undertaking the process of registration/ rectification of title.
44. On general and exemplary damages, it is submitted that these are not to be awarded for breach of contract given that the contract is ascertainable. That the Plaintiff has also not adduced any evidence and/or special circumstances to justify an award of general and/or punitive damages. That the claim for future potential earnings falls in the category of special damages and which the Plaintiff has not particularly proved. That the claim for compensation of general and exemplary damages, loss of potential earnings must fail. The Defendants lastly pray that the suit against them is dismissed with costs.

1st and 2ⁿ 3rd Parties Submissions

45. The 3rd parties submissions identified the following issues for determination;



- I. Whether the court order restricting any dealings on the suit property is effective as against the 3rd party
 - II. Whether the defendants have a case against the 3rd party
 - III. Whether the plaintiff is entitled to compensation as sought
46. On the first issue for determination it is submitted that at the time of effecting the subdivisions of the suit property, the 3rd party was not informed of any existing court order. That the same were perhaps not appropriately served upon the office of the Land Registrar Kwale or registered. That since there was nothing to impede the 3rd party office from effecting any further dealings in the subject property the 3rd party hence effected its role and mandate lawfully and regularly and devoid of any alleged conspiracy. That the office of the Land Registrar was never a party in civil suit No. 276 and 277 and were therefore not aware of any suit at the Court of Appeal.
47. The 3rd party's refer to entry 5 and 6 of the certified copy of the green card and state that the suit property was sold to Coast Land Properties who then subdivided it into 4 portions and sold the same to the 1st Defendant. That at no point was any order registered against the title. The suit property was transferred to the Plaintiff in 2016 and it was not until the year 2020 that entry No. 7 which was a court order was registered against the title. It is submitted that the subdivision of the suit property was undertaken under the instruction of the owner of the property at that time being Coastland Properties Ltd. That the 3rd party was not involved in any fraud as alleged and the Defendants have failed to prove the said aspect of fraud on the 3rd parties.
48. On whether the Plaintiff is entitled to compensation as sought, it is submitted that the loss incurred by the Plaintiff is as a result of its own actions and misrepresentation by the Defendants. That the same would have been evaded had they carried out proper due diligence. That the Defendants cannot feign ignorance of the court cases preceding the purchase and sale of the suit property as they were parties in the same. That the Defendants are therefore guilty of material non-disclosure to the Plaintiff and are trying to lay the blame on the 3rd parties. That the actions undertaken by the Land Registrar in all the transactions were procedural, regular, lawful and within their statutory mandate. The court is urged to dismiss the case against the 3rd party.

Issues for Determination

49. After a careful consideration of the pleadings, the testimonies, documentary evidence, submissions and case law relied upon to support the positions of the various parties in this suit, the following issues fall for this court's consideration; -
1. Whether the Defendants fraudulently sold the suit property to the plaintiffs
 2. Is there a cause of action against the 2nd and 3rd Defendants.
 3. Is the plaintiff entitled to the reliefs sought?
 4. Who is liable for the costs of the suit?

Analysis and Discussion of the Issues

50. The facts of the case before the court are already well enumerated. It is not in dispute that the Plaintiff bought the suit properties from the 1st Defendant Summer Properties Company Limited (which I will refer to as Summer Properties). Indeed, DW1 Jitendra Lakhamsh Dandhia admitted to this in his evidence in chief. This is also supported by Agreement of Sale dated 9th June 2016 between Summer



Properties Company Limited and Sampa Investments Limited for the suit properties (PEX 5). The sale culminated into the registration of the Plaintiff as proprietor of the suit properties on 10th August 2016 and titles issued. This is also not in dispute. The question to ponder is whether the sell transaction between the Plaintiff and the 1st Defendant was fraudulent?

Whether the Defendants fraudulently sold the suit property to the Plaintiff

51. The Plaintiff's main issue against the Defendants is that the Defendants fraudulently sold the suit properties when the same were not available for sale. It is also averred at paragraph 15 of the Plaintiff that having the knowledge of the existing legal dispute and court orders barring any transaction on the suit properties they failed to disclose the said details proceeded to sell the properties free from any encumbrances. Further due to their fraudulent action the Court of Appeal ordered eviction of Coastland Properties from the suit premises and their agents or anyone claiming under them, which they also failed to disclose causing them loss.
52. I find it necessary to reproduce the particulars of fraud as listed under paragraph 15 of the Plaintiff;
- a. Sub dividing land parcel No. Kwale Galu Kinondo 55 into Kwale/Galu Kinondo/1636-1639 against a court order restricting any dealing on the suit property
 - b. Constructing on the suit parcel of land against a court order restricting any dealing on the suit parcel of land.
 - c. Registering different companies where they are beneficiaries with the sole aim of transferring the titles of the suit properties in an attempt to defeat justice and or existing court orders.
 - d. Offering for sale land parcel Kwale/Galu Kinondo/1636-39 against a court order restricting any dealings on the suit land parcel.
 - e. Selling and transferring the suit parcel of land Kwale/Galu/Kinondo/1636- 39 to the plaintiff against an existing court order restricting any dealings on the suit parcel of land.
 - f. Feigning ignorance of the existing court orders
 - g. Failing to disclose the existence of the court orders restricting any dealing on the suit parcel of land to the plaintiff
 - h. Selling the suit property contrary to the principles of good faith while fully aware of the pending Court case.
 - i. Acting with impunity and in contempt of the proceedings pending before.
53. He who alleges must prove. The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya which states as follows: -
1. 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'
54. Consequently it was incumbent upon the Plaintiff to prove that the Defendants committed the acts of fraud as listed hereinbefore. It is however noteworthy the particulars are intertwined. I have also seen the Defendants submissions that the particulars do not meet the threshold as to specificity. In my view the same have been pleaded and should suffice provided that they are proved to the required standard.



55. It is trite that the burden of proof for fraud is slightly higher than that of a balance of probabilities. In *Denis Noel Mukhulo Ochwada and Another vs Elizabeth Murungari Njoroge & Another* Court of Appeal 298 of 2014 Nairobi, the court reiterated the position taken in *R.G Patel vs Laelji Makayi* Court of Appeal for Eastern Africa where it was stated that;
- Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
56. The court also noted the case law cited by both counsel affirming the foregoing on pleading fraud and the standard of proof.
57. The Plaintiff’s case is that the Defendants sub divided land parcel No. Kwale/Galu Kinondo/55 into Kwale/Galu Kinondo/1636-1639 against a court order restricting any dealing on the suit property. The court notes that from the proceedings the history of the suit properties begins with the title Kwale Galu Kinondo/55 which was registered on adjudication in favour of Said Mwatayari in 1974. Evidence in this regard has been led by the Plaintiff where the 4 titles issued on 10.8.16 are endorsed ‘Subdivision of Plot No.55’. DW2 the Land Registrar also confirmed from the parcel file the genesis of the subdivision of the suit properties as Kwale Galu Kinondo/55. It is therefore not an issue to belabour.
58. Based on the Plaintiffs claim, the issue is who subdivided the suit properties. The Plaintiff states in its pleadings and through the evidence of PW1 that it is the Defendants who subdivided Kwale/ Galu Kinondo/55 into the four (4) suit properties herein. DW2 testifying on behalf of the 3rd Parties confirmed that it is Coastland Properties Limited who subdivided the land in the year 2006 creating 4 new parcels being Kwale/Galu Kinondo/1636-1639. This was evidenced in entry No. 6 made on 6/4/2006 where the title issued to Coastland Properties Ltd on 6/4/2006 was closed on subdivision of the 4 suit properties. DW1 did not deny that the said subdivision was undertaken by Coastland Properties Ltd. This is after Coastland purchased Kwale/Galu Kinondo/55 and then applied for the subdivision.
59. The Defendants while denying the particulars of fraud averred that he sold and transferred his shares to a new shareholder who was British way before Coastland Properties Ltd acquired the suit properties (see paragraph 6 of the 1st 2nd and 3rd Defence). All this is restated in DW1 witness statement herein and who is the 3rd Defendant giving evidence with authority of the other defendants which he adopted as evidence in chief. I hear the Defendants as saying that they did not participate in the subdivision as they were not Directors of CoastLand Properties Limited at the time.
60. In respect of the above DW1 testified in cross examination by Mr. Olendo for the Plaintiffs that he registered Coastland Properties Ltd in the year 2006 under his name and that of his brother Supesh. That the registration was for and on behalf of his friends Rajesh Shah and Meena Shah as a trustee. The witness admitted in cross examination by Mr. Olendo for the Plaintiff that he had no written instructions to undertake this as trustee since the instructions were verbal. There was therefore for me no documentary evidence in court to corroborate and convince the court that the witness registered Coastland Properties Ltd as trustee. The witness admitted in cross examination by Mr. Olendo that he was a Director of Coastland Properties Limited and was aware he could be deemed responsible for any issue arising.
61. I had to satisfy myself from the evidence that the 2nd and 3rd Defendants were indeed not directors at the time of subdivision and indeed if there was a transfer of the shares and at what point in time did this occur vis a vis the subdivisions herein. I looked for these registration documents as documented by the Registrar of Companies in the 1st 2nd and 3rd Defendant’s bundle (DEX 1-87) the court did not



come across the same. However at page 1 -3 of the Defendants bundle was produced a Mutation form listed as issued on 22/05/2006. DW1 upon being referred to the same by his counsel on record Mr. Nyaanga confirmed it was dated 17/6/2006. Indeed my perusal of the same shows it was indeed dated 17/06/2006 by Coastland Properties Ltd and signed.

62. The court had to also satisfy itself that at the said date 17/6/2006 the Defendants were not directors as raised in their defence and testimony. The date of the alleged transfer of shares to Meena and Rajesh by DW1 and his brother became pertinent. What then was the date of the alleged transfer of shares and or directorship? The Plaintiff produced the Articles of Association of CoastLand Properties Limited dated 24th February 2000 showing Jitendra Lakhmshi Dodhia and Subash Lakhmshi Dodhia as subscribers to the shares (see PEX 1) . They also submitted in evidence Notification of change of Directors (see PEX3). DW1 upon being shown the said Notification stated thus

I see PEX3 it's a Notification of Change of Directors its registered on 23/02/07'.

On being asked the import of the date of registration the witnesses stated thus

meaning before this date I was still director of Coastland Properties.'

63. The Defendants did not produce the above documents of transfer and it is not clear to the court why they were not produced and no reason came forth during the hearing. PW1 clarified in re-examination that as to the transfer of shares a document takes effect when it is registered and that is 23/02/2007.
64. Be that as it may the court also interrogated the said Notification above confirmed that it was paid for and registered on 23/02/07. In the same both Jitendra Lakhmshi Dodhia and Subash Lakhmshi Dodhia are stated to have resigned as Directors in favor of Meena Rajesh Shah and Rajesh Ramji Shah with effect from 8/7/2006. For me this change can only have legally occurred on the said date of registration because the date of registration is the effective date recognised in law. The Directors Lakhmshi Dodhia and Subash Lakhmshi Dodhia were still directors of Coastland Properties by 22/02/2007 which is a day before the alleged registration. The mutations for the subdivision of Kwalu/ Galu Kinondo/55, having been confirmed were dated 17/6/2006 and presented in the name of CoastLand Properties Limited it is this courts finding that the 3rd Defendant was a Director of the said company and was fully aware and participated in the Subdivision into the 4 portions being the suit properties.
65. The next question based on the particulars of fraud pleaded by the Plaintiff, is whether there existed litigation against the suit property and court order barring dealings on the land. If yes were the above Directors and or the company aware of the same? The Plaintiffs case is that the Defendants sold to them the suit properties in full knowledge of these facts but proceeded nevertheless to sell the same free from any encumbrance to defraud the Plaintiff of its money.
66. I have already noted elsewhere in this judgement that the existence of the litigation herein is not in dispute and has been proved by the Plaintiff as contained in the record of Appeal produced in evidence. According to PW1 the subdivisions were not supposed to have happened in the pendency of conservatory orders issued by the court on 16/06/2006 restricting dealings on the suit parcel of land. I noted the Plaint herein refers to orders made on 16/06/2006 (see paragraph 10) and Court of appeal orders of 6/7/2007.
67. Did the Plaintiff prove the existence of these orders? The courts answer is in the affirmative as seen in the record of Appeal produced by the Plaintiff. DW1 was referred to pages 102 -104 of the plaintiff



bundle. I note that this was a ruling delivered by the learned judge J.K. Sergon. The witness read out the following except at page 102

it is obvious that the court of Appeal restrained the respondents ie Omari Said Mwatayari(Plaintiff herein) and Coastland Properties Ltd (intended necessary Party) from interfering in any way with Kwale/Galu/55).’

68. The above therefore confirms the existence of the order.

69. Was Coastland Properties Ltd aware of the orders ? The learned judge in the same ruling at page 102 stated thus;-

The intended necessary party has stated that it was not aware of the existence of the existence of those orders. The record does not support those allegations.’ Indeed it is clear the Intended necessary Party referred to is Coastland Properties Ltd. DW1 was one of the directors as can be seen from my analysis hereinbefore.

70. This court in view of the above caption need not say more.

71. With regard to the orders issued on 16th June 2006 . DW1 was referred during cross examination by Mr. Olendo to page 81 of the Plaintiffs bundle. I note that these were proceedings of 16/06/2006 before Hon Justice Sergon. The witness confirmed preservatory orders were issued. Indeed my perusal of the same show the learned judge at the application of K.Shah for applicant issued preservatory orders in terms of prayer (b). Additionally, DW1 own admission was that;-

I was still a director. The record shows I was aware of the orders.’

72. The mutations for the subdivision of Kwale/ Galu Kinondo/55 we have already seen were confirmed as dated 17/6/2006. This is a day after the preservatory orders above. Meaning with the knowledge of the orders the Defendant still went ahead to undertake the subdivision herein. I further agree with the 3rd Party submission that defendants cannot feign ignorance of the court cases preceding the purchase and sale of the suit property as they were parties in the same.

73. I have noted that PW1 in cross examination by Mr. Nyaange on the orders obtained by K.Shah above stated that the same were granted as per order b). She admitted she did not obtain the said orders and therefore did not know what preservation order was being issued. It is trite that a "preservatory order" a court order issued to temporarily prevent any changes or transactions on a piece of land, essentially "preserving" the status quo of the property while a legal dispute regarding its ownership or usage is being resolved; it is essentially an interim injunction designed to protect the land from potential damage or alteration pending the final court decision.

74. The upshot of the foregoing is that the Plaintiff has proved to the required standard that the defendants were aware and subdivided parcel No. Kwale Galu Kinondo 55 into Kwale/Galu Kinondo/1636-1639 against a court order restricting any dealing on the suit property.

75. The discussion and findings above also speaks to and or addresses particulars d) e) and f) and I will not reinvent the wheel or risk repetition.

76. What about the particulars alleging that the Defendants failed to disclose the existence of the court orders restricting any dealing on the suit parcel of land to the plaintiff. It is not in dispute that there were arrangement between the Plaintiff and the 1st Defendant culminating into the sell, transfer and registration of the suit properties to the Plaintiff. PW1 testified in both her evidence in chief and cross examination that she took possession of the suit properties until 19th February 2021 when she



received a phone call from their caretaker that there were court orders issued over the property. It was her evidence in chief that they had not been made aware of the same initially. That auctioneers visited the property and destroyed everything. That later they found out that a court case had been running before court. PW1 clarified in cross examination that she disagreed with the claim that the problem started with Mwatayari. According to her the main issue is that the 1st and 2nd Defendants did not disclose about the rulings and had the same been disclosed the parties would not be in court litigating.

77. The court has already made a finding that Defendants were aware of the litigations and the emerging rulings and orders therefrom. These were specifically the 2nd and 3rd Defendants who were directors of Coastland Properties Limited. I think it is important at this point to also establish the linkage between Summer Properties and Coastland Properties Company Limited. Did the Plaintiff establish this connection? PW1 during cross examination reiterated that to her Summer Properties and Coastland were one and the same.
78. From the Defendants bundle at page 108-116 is the Agreement for sale between Coastland and summer. It is executed by Summer the common seal is witnessed by Vipul J. Sheth and Jitendra L.Ladhia as directors. These are the 2nd and 3rd Defendants in the present proceedings. The Plaintiffs did submit a search from Business Registration service showing as at 17/5/21 the same directors. For me as long as the 2nd and 3rd Defendants herein were directors of Summer properties Ltd, then there is a connection in the sense that they were Directors of Coastland properties Ltd. In any case DW1 admitted at cross examination that he was a Director of both Coastland and Summer and also a beneficiary of both companies.
79. Having settled the above, were Defendants obligated to make the disclosures of the litigations? PW1 evidence is that based on the agreement they ought to have made the said disclosures. I have seen the reference to the warranties at paragraph 15 (a-m) of the Plaintiffs submissions lifted as contained in the agreement of sale between the 1st Defendant and the Plaintiff dated 9/6/2016. Warranty (g) confirms the vendor is not engaged in or threatened by any litigation, arbitration or administrative proceedings relating to the property. I have already shown the Directors were aware of the litigation and orders therein and yet they proceeded to lie by giving a warranty that assured there was no litigation. PW1 says had she known she would not have purchased the land. What is the Defendants response?
80. DW1 evidence is that the 1st Defendant in 2016 sold to the Plaintiffs the parcels in good faith and for valuable consideration. That it is the government of Kenya who guarantee title that should be blamed and not the Defendants, there were two green cards, PW1 could no longer tell the genuine title. It is asserted that for all intents and purpose the 1st Defendant was a bonafide purchaser of value without any notice of any defect or claims. They shift blame to the 1st 3rd party as the custodian and guarantor of title under the torrens system of registration. I will now to proceed to interrogate if this defence is available to the Defendants.
81. The characteristics of a bonafide purchaser without notice have been a subject of a numerous litigations in our courts. Who is a bonafide purchaser?

Black's Law Dictionary, 8th edition defines "bona fide purchaser" as:

One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."



82. In the case of Lawrence Mukiri vs The Attorney General & 4 others (2013) eKLR the court defined a bona fide purchaser for value as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. That the purchaser must prove he holds a certificate of title, He purchased the property in good faith, He had no knowledge of the fraud, The Vendor had apparent valid title, He purchased without notice of any fraud and that he was not a party to any fraud. Also see Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR where the Court cited with authority the Ugandan Case of Katende Vs Haridar & Company Ltd (2008) 2EA 173. The case of Katende Vs Harridar has also been cited by the Defendants.
83. The burden of proof lay upon the Defendants to demonstrate to the court that it is a bona fide purchaser for value without notice, just as it was Plaintiff's responsibility to demonstrate that the Defendants committed the acts of fraud as particularised.
84. Did Summer honestly intend to buy the property in good faith from Coastlands Limited? I think my view of this given the circumstances of the case and the findings hereinabove, there cannot be any good faith on the part of the Defendants. A finding that the Defendants were aware of the litigation and failed to disclose, should take away the bonafides of the Defendants. Is good faith entailed in a vendor who just considered a profit to be made and nothing else? DW1 testified that they sold the land because there was a profit to be made due to the appreciation of the values over time. This appeared to me to have been the driving factor since had they disclosed litigations the plaintiff would not have purchased the same. I noted DW1 testimony that as long as the searches undertaken during due diligence showed clean title then there was nothing to stop parties from transacting. This is where the blame is being shifted to the 3rd Parties. For as long as the Defendants want to rely on the defence of good faith, this is reciprocal and they ought to have reciprocated the gesture by making the disclosure.
85. Let me now address the allegations that the different companies registered by the Defendants where they are beneficiaries was with the sole aim of transferring the titles of the suit properties in an attempt to defeat justice and or existing court orders. This also speaks to the issue whether the Defendants were bonafide purchasers. Firstly I have hereinabove addressed the lack of bonafides in the purpose of incorporating Summer Properties as a special purpose vehicle for the purchase of the land. And I'm not saying there is anything wrong in incorporating such vehicle it is allowed in the commercial cycles. It is the circumstances that surround the incorporation of this company that would make one antennae's stand. Firstly, the same Directors allegedly sought to exit the Directorship in 2006 amidst existing litigation surrounding the suit properties. The change of Directorship is registered in February 2007 but said to be effective from 8/7/2006. It then became very convenient for DW1 to testify they were not Directors effective 8/7/2006. I began to mule over why was this date would be significant to the Defendants? It has already been established that the mutations were effected on 17/6/2006. What a coincident that the same happened after the alleged exit of the Directors. Indeed the backdating would serve for their 'alibi' for lack of a better word.
86. Additionally DW1 contradicted himself by stating he was a mere trustee for Rajesh and Meena who were not in Kenya. Is this not a contradiction because if he was their trustee then they ought to have known through him. The witness could not produce any evidence that he was trustee since the instructions were verbal. The court never got to see any Board resolutions for this change of Directorship. The court never saw the consideration for these shares as observed by PW1 during cross examination. DW1 admitted in cross examination that looking at the transaction there is a lot that requires an explanation outside the documentation given. He had no evidence that he was their trustee. Infact this negates the assertion that a disclosed agent cannot bear liability.



87. But let me come to the purchase of the land by Summer Properties Company Ltd. It is trite that a bonafide purchaser is one who pays a consideration for the property. In this case it is DW1 evidence that the 1st Defendant bought the suit properties for valuable consideration in the sum of Kshs. 12,500,000 per parcel thus the cumulative sum of Kshs. 50 million in the year 2013 after doing due diligence and was satisfied that there existed no encumbrance or a court order in the register of the four parcels. The documents in support of the sale between Summer and Coastlands Limited were produced in evidence by DW1 (see page 70 – 99 of the Defendants bundle dated 12/8/2021). These included Sale agreement made on 10/10/2013, Transfer of Land from Coastland Properties Limited to Summer Properties Company Limited for suit properties all dated 30/10/2013 executed by Rajesh & Meena as Directors of Coastland and the 2nd & 3rd Defendants as directors of Summer. The transfers were registered on 8/11/2013 in the names of the 1st Defendant.
88. Was the consideration paid. Clause 3 of the agreement shows the agreed purchase price as Kshs.50 million, Kshs 5million being the deposit having been paid to the firm of Simani & Associates as stakeholders for the vendors and is acknowledged as having been paid. The balance was payable upon the requisite undertaking and registration of the transfer to the names of the purchaser. When asked by counsel for the Plaintiff about the evidence of payment of the purchase price from Summer to Coastland properties, DW1 stated they paid through a lawyer. He then stated Vipul paid money to Coastland Properties. The court was not seized of proof of these payments as having been paid through the firm of Simani & Associates or any other lawyer should there have been a change of lawyers. DW1 ultimately threw in the towel and admitted in cross examination that there was no single payment he paid as Director. In the absence of evidence on record that any consideration was paid following the alleged purchasethis court has no basis upon which to deem the 1st Defendant an innocent purchaser when there was no such purchase that took place.
89. DW1 position is that he was also not aware of any defects on the title held by Coastland or that it was marred by fraud. He believed that Rajesh and Meena transferred to him good title when he bought the property from Coastland Property. DW1 stated in cross examination by counsel for the Plaintiff that he was Director of Coastland at the time Coastlands bought the property from Mwatayari, though he did not sign the sale agreement. That though a director he did not donate a Power of Attorney to Rajesh and Meena to execute the agreement on behalf Coastlands. He admitted therefore they transacted without his authority as a director. To me this was an irregularity and good title cannot have passed. I have already made a finding elsewhere that he was not a trustee in the absence of documentation in this regard. Clearly there was an attempt to conceal the involvement of the 3rd and 2nd Defendant because of the litigation. Even the alleged payment of the Kshs. 21 million by Rajesh & Meena through the CBA (see page 58) for the land was to facilitate this disguise . I agree with PW1 assertion in cross examination that as at the date 30/3/2006 no document had been presented to indicate any change of Directors and jitendra and subesh were still directors.
90. Having made the above observations it is clear that Coastland property did not pass good title to Summer properties, Summer did not pay valuable consideration to warrant the court to accord them the defence of a bonafide purchaser.
91. The court is further emboldened and guided by the decision of the Court of Appeal which was affirmed by the Supreme Court of Kenya in SC Petition 8 (E010) of 2021 Dina Management Limited Vs County Government of Mombasa & 5 Others where the Supreme Court of Kenya pronounced thus; -
- (111) Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered



owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the *Constitution*.’

- (108) Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to property. In the case of *Funzi Development Ltd & Others Vs. County Council of Kwale*, Msa Civil Appeal No. 252 of 2005 (2014) eKLR the Court Appeal which decision this court affirmed stated that; -

.... A registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.’

92. The above addresses the Defendants contention that their title was indefeasible and can only be defeated and or impeached on the basis of fraud for which the owner is proved to have had knowledge of. I have already made a finding that the Plaintiff has proved fraud and misrepresentation. And even where the same is not proved the title could be impeached for the irregularities and illegalities under the provisions of 26 (1)(b) of the *Land Registration Act 2012*.

93. But what about the allegations levelled against the 1st third party? DW1 told the court during cross examination that he was deceived by the Registrar and not Meena & Rajesh since there was no encumbrance or restriction in the parcel register. That both lawyers relied on returns of the due diligence from the land office during the sale transaction between the Plaintiff and the 1st Defendant. Counsel for the Defendant invited this court to invoke the provisions of section 81 (1)a and b and 83 on Rectification and Indemnity.

94. The provisions above provide as follows;-

81. Right to indemnity.

- (1) Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of—
 - (a) any rectification of the register under this Act; or
 - (b) any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under this Act, shall be entitled to indemnity.
- (2) No indemnity shall be payable under this Act to any person who has caused or substantially contributed to the damage by fraud or negligence, or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who caused or substantially contributed to the damage.

83. Procedure for claiming indemnity.

- (1) The Court may, on the application of any interested party, determine whether a right of indemnity has arisen under this Part and, award indemnity, and may add any costs and expenses properly incurred in relation to the matter.
- (2) A person claiming indemnity under section 81 shall apply to the Chief Land Registrar in the prescribed manner for investigation and consideration.
- (3) Any person who is aggrieved with the decision of the Chief Land Registrar may appeal to the Court against the decision in the prescribed manner.



95. It is submitted that the Plaintiff suffered loss as a consequence of nullification of title to the suit properties which was not in the hands of the Defendants but the 1st 3rd party as the custodian and guarantor of all documents and records in the land registry. My understanding of the above provisions is that such indemnity is only available to an innocent party. The Defendants were not innocent and they were part of the whole scheme that resulted into the cancellation of the titles. The rectification was by order of court and cannot be termed as an error either. DW1 testified in cross examination that it was not the mistake of Sampa Investments that caused the cancellation. Even if we were to look at the Plaintiff as the innocent party, to look away at the actions of the Defendants would be to go against the very spirit of the above provisions that frown upon fraudulent actions.
96. I have already pointed elsewhere in this judgement that amidst the fraudulent actions highlighted in my discussions there is no way the Defendants can escape liability by shifting the blame to the third parties. DW1 acknowledged that the land registrar receives documents for registration from the people who are transacting. He conceded he sold the land to the Plaintiffs and who gave him their money. He agreed that there was a profit margin of Kshs. 29 million Summer Properties made. He agreed his name stood out in all the transactions. To me it would be a travesty of justice to let the Defendants Scott free and this would be unjust enrichment. I would also be constrained to shift this burden to the taxpayer knowing very well this money ended up in the pockets of private individuals. Let those who benefitted carry their cross.
97. The court is reminded of the case of Samuel Kamau Macharia Vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR where Kuloba j in explaining the concept of unjust enrichment had this to say;-

....., indeed, as a remedy attracting wrong, unjust enrichment was well-known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of Judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and Briggs, J A, in the case of Saleh bin Ghaleb v Hussein al Qu'aiti , [1957] EA 55, at p 73, where one finds this passage, vis, “so far as the allowances are concerned, this was a clear case of unjust enrichment” leading to a suffering of wrongful loss of which equity would provide a remedy. Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff’s expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice: “Woe unto the day when it is lost sight of in Kenya, which would also be contrary to the spirit of Section 3(c) of the *Judicature Act*. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights” on the basis of technical objections and artificial distinctions oblivious to justice and substance.’

98. Consequently I decline the invitation to order indemnification under the above provisions of the law.

Is there a cause of action against the 2nd and 3rd Defendants. Can they escape personal liability

99. The Defendants argue that the 2nd and 3rd Defendants are improperly joined as parties to this suit firstly for the reasons that the sell agreement which is the substratum of the plaintiff claim was between the Plaintiff and the 1st Defendant which is a legal person distinct from its directors who were not privy to it. Further that the directors were mere agents and that agents of a disclosed principle cannot be sued as was held by the Court of Appeal in Victor Ombachi & Another V Nurtun Bates Limited [2013] eKLR



100. Having looked at the matter in totality, to me the question I must pose is have the circumstances of the instant case allowed lifting of the corporate veil to attach personal responsibility to the 2nd and 3rd Defendants. Fraud is considered a primary ground for lifting the corporate veil, meaning that if a company is using its structure to perpetrate fraud, a court may disregard the separate legal entity and hold the individuals behind the company personally liable. In such cases, the members cannot use Salomon principle to escape from the liability.
101. Justice Wananda J.R. Anuro cited various authorities enumerating and cementing the above position in the case of *Jepkemoi v Zaburi Enterprises Company Ltd & 2 others (Miscellaneous Civil Application 43 of 2023)* [2024] KEHC 2343 (KLR) (8 March 2024) (Ruling) thus:-

Regarding the circumstances under which the corporate veil may be lifted, Halsbury's Laws of England, 4th Edition, Vol. 7 (1), Paragraph 90 states as follows: "Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced".

18. In the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* [2013] eKLR, Mabeya J held as follows; "I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon* [1897] A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity." (emphasis is mine).
19. In the case of *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Ano* [2014] eKLR, the Court held as follows; "It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd V Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the



company as a vehicle to commit fraud or other criminal activities” (emphasis is mine).

20. Ringera, J (as he then was) in *Ultimate Laboratories v Tasha Bioservice Limited* Nairobi H.C.C.C No. 1287 of 2000, stated on lifting of the corporate veil that;“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the *Companies Act* is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct” (emphasis is mine).

102. The learned judge proceeded to hold as follows;-

It is therefore evident that in a case such as the instant one, the corporate veil will only be lifted where it is demonstrated that the actions of the directors or shareholders smacks of bad faith and that the corporate veil is being used as a mask to fraudulently shield such directors or shareholders from execution of the decree. The veil may therefore be pierced where it appears that the business of the company has for instance been carried on with intent to defraud creditors of any other person or for any fraudulent purpose. Only where justice of the case demands should the corporate veil be disregarded and lifted.’

103. The court is therefore emboldened by the above authorities. I have already expressed myself in the analysis above why the 2nd and 3rd Defendant cannot escape. I will not risk repeating myself the companies were misused into perpetrating fraud and to defeat justice. This is a perfect case where justice of the case demands the corporate veil to be lifted.
104. What then are the consequences of the several findings of the court. This leads me to the prayers sought by the Plaintiff.

Whether the Plaintiff is entitled to the prayers sought

105. The prayers sought by the Plaintiff have been set out at the opening paragraph of this judgement. Based on my foregoing discussions I would not hesitate to grant prayer (a) of the Plaintiff.
106. Prayer b) seeks compensation for the suit property at market rate of Kshs 222,700,000/-. Firstly I will observe that the purchase price of the suit properties is not a disputed fact and as agreed in the sale agreement being Kshs. 79,000,000/-. Each title at Kshs. 19,750,000/- PW1 produced in evidence receipts as PEX 6a,b, for Kshs 15,800,000 and 63,200,000. It is admitted in evidence by DW1 that the money was received through the firm of Mohamed Madhani which firm distributed the same to the Directors of the 1st Defendant. Based on the findings of the court I would not hesitate to order a refund of this specific sum. I must now proceed to the issue of the claim at market value.
107. It was PW1 evidence that they undertook two valuations for the land in the year 2019 and 2021. The valuation reports dated 10/5/2019 and 10/5/21 respectively were produced in evidence by PW2 Edwin Mutwiri a valuer and Director of Ultimate Valuers Limited as PEX 10 and 11. It was his evidence that in 2019 the property was developed and thus returned a value of Kshs.200 million while the valuation in 2021 returned a value of Kshs 192,700,000. According to PW2 he considered the land a re-development site since the earlier developments were just but rubble after the auctioneers moved in. That he thus considered more the value of the land which had now appreciated.



108. The valuation at market value pleaded is contested by the Defendants. It is asserted that the market price of Kshs. 222,700,000 for loss of the suit properties is unjustifiable as against the purchase price herein considering only a lapse of 5 years since purchase and which cannot justify 100% appreciation. That the valuer did not lead any evidence of comparables used to arrive at the valuation. On the other hand the Plaintiffs contended that the Defendants didn't produce any valuation to counter the Plaintiffs reports which remains the only source of facts. I will right away state that the burden of proof was upon the Plaintiff to prove the 100% appreciation of the suit properties.
109. During cross examination PW2 was referred to both valuation reports in regard to the method of valuation. He stated the parameters used were to compare properties that had changed hands in the location. While the witness confirmed this method was deployed, he admitted he did not identify the said properties he used as comparables in his reports. The witness clarified in reexamination that it was not a requirement to quote the comparables. I did not buy this argument. For me disclosure of the comparables was critical. If the method is to compare then it can only make sense when what has been compared against is disclosed. The court cannot just accept that comparables were used in the absence of evidence. For the reason that there was nothing against which to authenticate the value returned and I will not accept the figures returned as they lack no basis.
110. On the Kshs. 30 million forming the value of the demolitions, I will not belabour the point. This is special damages and ought to have been specifically pleaded and proved -see the case of Equity Bank Ltd vs Gerald Wangomb'e Thuni [2015] eKLR) and the Court Appeal decision in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177. No evidence of the costs of renovations was availed to the court. I have also noted that Counsel for the Plaintiff may have tactfully failed to address the court on this item. Clearly this head cannot be granted.
111. The court has also been invited to award compensation for the cost of feasibility study undertaken by Jones Lang Lassalle Kenya Limited at the cost of US\$55,100 and legal fees of Kshs 102,000 as well as the lost business opportunity in the sum of US\$12,395,829. The court has noted that from the proceedings that the report on loss of opportunity based on the consultant Jones Lang and projection of income from Dusit , agreement with the Financial Advisory services were marked for identification. Mr. Olande appearing for the Plaintiffs on 27/4/23 informed the court that they would not be calling the expert witnesses the Plaintiff had intended to call. Counsel proceeded to close the Plaintiffs case. What should the court do in such circumstances?
112. The Court of Appeal in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR pronounced itself thus;-
21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
 22.Until a document marked for identification is formally produced, it is of very little, if any, evidential value.
 23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows



that the trial court relied on the document “MFI 2” that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on “MFI 2” which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.
113. Guided by the above dictum this court finds there was no evidence before court to support the prayers c) and d) of the Plaint and the Plaintiff is not entitled to the same.
114. Is the Plaintiff entitled to general and exemplary damages for fraud and deceit? It is submitted by the Plaintiff that if prayers in b), c) and d) were to fail under the head of breach of contract they cannot fail under prayer e) together with a discretionary award that the court would estimate in favor of the Plaintiff. The Plaintiff prays for Kshs.100,000,000/- under this head. On the other hand counsel for the Defendants posits that the general rule is that these are not to be awarded for breach of contract given that the contract amount or value is ascertainable. That in any event the Plaintiff did not adduce any evidence and/ or special circumstances to justify an award of general damages and or punitive damages.
115. The Court of Appeal in the case of Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR stated that:

Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendants conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

116. In *Gichaba v Lexis Investment Limited (Civil Appeal 131 of 2019)* [2024] KEHC 479 (KLR) (29 January 2024) (Judgment) the court cited several authorities on general matters damages and exemplary damages;-
 59. The law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.
 61. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And in *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also *Provincial Insurance Co. EA Ltd v Mordechai Mwanga Nandwa*, (KSM Civil Appeal No 179 of 1995,)



117. Arising from the above case law therefore I must state that I see no justification to award general damages in addition to the purchase price of the suit properties.
118. On exemplary damages I'm satisfied that the Defendants actions were carefully orchestrated to defraud the Plaintiff and must be punished. The Kshs.100,000,000/- is not justified at all. What I see is an attempt by the Plaintiff to recover the prayers c) and d) of the Plaint which the court has declined to grant above. In my view an award of Kshs. 500,000 based on the caselaw cited by counsel for the Plaintiff should suffice. /=
119. Before I get into the conclusion and disposition, I must explain the delay in the delivery of this judgement. On 6/5/24 this court scheduled the judgement herein for 30/7/24. However before the said date of delivery the court lost its laptop through an intrusion at its residence, lost a number of rulings that it had prepared for delivery before this date. I therefore had to work backwards and rewrite the same resulting into a backlog. Thereafter the court was on transfer to Siaya law courts and had to finalise partly heard cases before reporting to the new station in January 2025. The court also prioritised the preparation of rulings in active files to avoid inconveniencing litigants and advocates by carrying active files to the new station. I wish to extend my sincere gratitude for the indulgence accorded by counsel in this matter.
120. The court further discloses that today while uploading this judgement, the court noted an upload in the CTS by the firm of Nyaanga & Mugisha Advocates for the Defendants. This is a letter dated 25/02/25 addressed to the Deputy Registrar. The letter was informing the court of a judgement delivered in the court of appeal on 24/02/2025. The letter proposes that the Plaintiffs suit has been overtaken by events. The court notes that the judgement of the court of appeal was not attached. However even if the same was attached, there was no formal application moving the court to any action. The court proceeded to deliver the judgement herein electronically.

Conclusion and Disposition

121. The upshot of the foregoing is that I find the Plaintiff has proved its claim against the Defendants to the required standard. Judgement is therefore entered in the following terms;-
- a. A declaration that the Defendants fraudulently sold to the Plaintiff Land Kwale/Galu Kinondo/1636-1639 when the same was not available for sale.
 - b. The Defendants be jointly and/or severally ordered to compensate the Plaintiff Kshs. 79,000,000/- for the suit property Kwale/Galu Kinondo/1636-1639 being the purchase price paid with interest at court rates from the date of judgement until payment in full.
 - c. Exemplary damages for fraud and deceit in the sum of Kshs.500,000/-.
 - d. The above amounts are payable within 90 days of the date of this judgement.
 - e. There shall be no orders against the 3rd Party's.
 - f. Costs of the suit are awarded to the Plaintiff under the provisions of section 27 of the *Civil Procedure Act*.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 27TH DAY OF FEBRUARY 2025.

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HON. A.E DENA

JUDGE

27/2/2025

