



**Kamau & 2 others v Thome Farmers No.5 Limited & 3 others (Civil Appeal
131 of 2019) [2024] KECA 1740 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1740 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 131 OF 2019
MA WARSAME, M NGUGI & JM MATIVO, JJA
DECEMBER 6, 2024**

BETWEEN

**KENNETH CHEGE KAMAU 1ST APPELLANT
MINNIE NJERI KAMAU 2ND APPELLANT
JOHN NJUGUNA 3RD APPELLANT**

AND

**THOME FARMERS NO.5 LIMITED 1ST RESPONDENT
GEORGE MWANGI MUCHERU 2ND RESPONDENT
SIPHIRAH WAMBUI MWANGI 3RD RESPONDENT
JORETH LIMITED 4TH RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court
at Nairobi (Obaga J.) dated 7th February, 2019 in ELC NO. 131 of 2006)*

JUDGMENT

1. In their capacity as the administrators of the estate of one Jackson Kamau Gaichinga (deceased), the appellants filed suit claiming that they were entitled to L.R. No. 13330/345 situate in Thome Estate, off Thika Road. They alleged in their amended plaint dated 14th April 2015 that the deceased, who died on 14th December, 1996, was a member of the 1st respondent, Thome Farmers No.5 Limited, a land buying company. They averred that the 1st respondent had entered into an informal agreement with the 4th respondent, Joreth Limited, for purchase of two parcels of land, L.R. No. 4920/3 and 4921/3, which were later amalgamated and became L.R. No. 13330.
2. It was their averment further that the 1st respondent was allowed to subdivide the property and it settled its members on the two parcels. They contended that the deceased was entitled to one share, which



was equivalent to one plot of half an acre, and that he was allocated plot number 456 which he took possession of. It was their case that this plot number 456 is now registered as L.R. No. 13330/345 (hereafter ‘the suit property’) in the names of the 2nd and 3rd respondents.

3. The appellants further alleged that in 2006, the 1st appellant discovered that the 2nd and 3rd respondent were constructing on the suit property; and that the 4th respondent had advertised the plot for sale in 2006 and it had been purchased by the 2nd and 3rd respondent. It was their case that the 4th respondent had no authority to sell the suit property as it had knowledge that it had been sold to the deceased, who had taken possession. They contended that the transfer of the suit property to the 2nd and 3rd respondent by the 4th respondent was fraudulent, void and illegal, and they sought the following orders from the court:
 - i. A declaration that L.R No.13330/345 also known as plot No.456 Thome Farmers No.5 Limited belongs to the deceased – Jackson Kamau Gaichinga and that the plaintiffs and the beneficiaries to the estate are entitled to beneficial ownership of the same;
 - ii. A declaration that the sale and transfer dated 25th September 2006 of the suit property LR No.13330/345 (also known as plot No.456 in Thome Farmers No.5 Limited by the 4th defendant to the 2nd and 3rd defendants was fraudulent, illegal null and void and an order that the registration of the 2nd and 3rd defendants as proprietors of the suit property LR No.13330/345 be cancelled forthwith and the plaintiffs be registered as proprietors of the suit property forthwith.
 - iii. In the alternative the defendants do pay compensation to the plaintiffs, equivalent to the current market value of the suit property to be based on a valuation to be undertaken and tendered in court at the hearing of this suit.
 - iv. A permanent injunction restraining the 2nd, 3rd and 4th defendants whether by themselves, their servants, employees and or/ agents howsoever from entering, developing, alienating remaining thereon, disposing, trespassing on the suit premises namely L.R No.13330/345, Plot No.456 and order of eviction of the 2nd and 3rd defendants from the suit property forthwith.
 - v. General damages.
4. In their amended statement of defence dated 11th May 2016, the 2nd and 3rd respondent averred that they had entered into a sale agreement with the 4th respondent with respect to the suit property on 4th May 2006. That at the time, there was no-one in occupation of the suit property. That if the appellants had suffered any loss, then their claim could only be against the 1st respondent whom they alleged the deceased had entered into a sale agreement with.
5. In its statement of defence dated 22nd March 2013, the 4th respondent stated that it was the registered owner of L.R Nos. 4920/3 and 4921/3 which were later amalgamated and became L.R No. 13330; that the property, which had been subdivided into plots, was invaded by squatters sometime in 1992, as a result of which it filed a suit- Civil Suit No. 6206 of 1992- Joreth Limited v Lewis Kibue & Others- for their eviction; and that the suit was settled by a consent order under the terms of which claimants were required to pay a sum of Kshs. 200,000 within a period of six (6) months for the plots they claimed they were entitled to.
6. The 4th respondent averred that it thereafter placed advertisements in newspapers calling upon persons interested in taking advantage of the consent to pay a sum of Ksh 200,000 so that they could have the plots that they occupied transferred to them. Thereafter, in 2006, the 4th respondent advertised the



- remaining plots for sale. It averred that the 1st respondent is a stranger to it, and that as the registered proprietor, it had the right to transfer the suit property to the 2nd and 3rd respondent.
7. In the judgment dated 7th February, 2019, the trial court found that the appellants had not proved their claim on a balance of probabilities. It noted that while they were claiming damages of Kshs. 70,000,000, the value of the suit property without any buildings, there was no basis upon which it could order the 1st respondent to pay them. Further, that they had not established anything fraudulent on the part of the 2nd, 3rd and 4th respondents. It therefore found no merit in the suit and dismissed it with costs to the respondents.
 8. Dissatisfied with the judgment, the appellants have filed the present appeal in which they raise six grounds of appeal in their memorandum of appeal dated 4th April 2019. They impugn the judgment on the basis that the trial court erred in: finding that it was difficult to appreciate that plot no. 456 in Thome Farmers No. 5 Limited is what became known as L.R. No. 13330/345; making the said finding while there was no ambiguity with respect to the physical location of the suit property; finding that the 2nd and 3rd respondent would not have known that the appellant had an interest in the suit property; finding that the appellants should have been vigilant in following up the deceased's title, a finding that was not supported by the evidence; and failing to take into account the detailed explanation and unrebutted evidence set out in the affidavit of Joseph Wambaa dated 2nd April 2007 which set out the nexus between the 1st and 4th respondent over the suit property as a result of which the trial court made contradictory findings on the said relationship, to the detriment of the appellants. Finally, the appellants contend that the judgment of the trial court was against the weight of evidence. They ask this Court to set aside the decision and substitute it with the prayers sought in the amended plaint dated 14th April 2015.
 9. As this is a first appeal, we are under a duty to re-evaluate the evidence presented before the trial court and reach our own conclusions. In doing so, we must bear in mind that we have not had the advantage of seeing and hearing the witnesses, which the trial court had- see *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123.
 10. The appellants' case was presented through two witnesses. PW1, Kenneth Chege Kamau, the 1st appellant, testified that his father, Jackson Kamau Gaichinga (deceased), purchased a share in the 1st respondent in 1984 from Mahe Company. The deceased paid Kshs. 7,000 on 3rd June 1984 and was given a share certificate bearing his name. After balloting was carried out, he was given plot No. 456, equivalent to a half acre of land, located off Thika Road. The deceased fenced the plot with barbed wire, and there was a house for a worker who used to cultivate the plot. When the deceased and the worker died, the plot was neglected. The 1st appellant testified that he re-fenced the plot sometime in 2002-2003 and allowed a neighbour to graze livestock on and take care of it. In 2006, while driving on Thika Road, he saw people digging trenches on the plot. He reported the incident to the chief and came to learn that the 2nd and 3rd respondent were alleging to be the owners, so he filed suit to claim the land.
 11. It was the 1st appellant's testimony further that he learnt from the firm of Kimani Kahiro Advocates that there were advertisements in the press asking plot owners to pay Kshs.200,000 to the 4th respondent, and that those who did not pay up had their plots sold to other persons. He testified that he had not seen the advertisement, which were made after the death of the deceased, and that there was no advertisement in the Kenya Gazette.
 12. The appellants produced in support of their case a share certificate in the name of the deceased which the 1st appellant testified had been issued by the 1st respondent. He asserted that the sale to the 2nd and 3rd respondent was illegal as the land was not available for sale; and that the 2nd and 3rd respondent had



not done due diligence otherwise they would have noticed that there was someone in possession of the suit property. The appellants denied that the 1st respondent was a non-existent entity, referring to a letter from A.K. Magugu dated 26th February 1993 in support of their contention that there was a relationship between the 1st and the 4th respondent. He further asserted that plot No. 456 is what became L.R No. 133330/345, but conceded that the plot was not registered in the name of the person who sold the share to the deceased.

13. James Muhia Kemita (PW2), a practicing valuer, produced a valuation report in respect of the suit property, without the development on it, which he valued at Kshs. 70 million.
14. At the hearing of the suit, the trial court permitted the appellants to rely on an affidavit sworn by one Joseph Wambaa on 2nd April 2007, filed in the suit in support of an application for an injunction. The purpose of reliance on this affidavit was to show that the land of which the suit property formed a part had been sold by the 4th respondent to the 1st respondent. In this affidavit, Mr. Wambaa, who described himself as a director of the 1st respondent, annexed to his affidavit a resolution by the 4th respondent to sell L.R. Nos. 4920/3 and 4921/3 to the 1st respondent. He averred, however, that no sale agreement was entered into between the 1st and 4th respondents, nor was a purchase price agreed upon.
15. Nonetheless, according to Mr. Wambaa, the 1st respondent made payments to individual directors of the 4th respondent between October 1975 and February 1977. He alleged that it was on the basis of trust and understanding that the 1st respondent was allowed to take possession and subdivide the land. Thereafter, however, the 4th respondent filed Civil Suit No. 6206 of 1992- Joreth Limited v Lewis Kibue & Others-against shareholders of the 1st respondent, alleging that they were trespassers, and seeking their eviction.
16. His averment, in support of the appellants' case, was that even though the 4th respondent was the registered owner of the suit property, it had no legal right to sell it to the 2nd and 3rd respondent. He also annexed a letter dated 26th February 1993 from A.K. Magugu in which Mr. Magugu described himself as the Chairman of the 4th respondent and dissociated himself from the suit against the 1st respondent and its shareholders. We note that the 1st respondent did not file a defence or participate in any way in the suit, nor was Mr. Wambaa called as a witness for the appellants.
17. The case of the 2nd and 3rd respondent, who are husband and wife, was presented by the 2nd respondent, George Mwangi Mucheru. He testified that on 7th April 2006, he saw an advertisement in the daily newspapers in which the 4th respondent directed interested buyers of plots to the firm of Kimani Kahiro & Co. Advocates. He visited the law firm and later the site of the plot he was interested in which, after due diligence, he established was registered in the name of the 4th respondent. They entered into a sale agreement with the 4th respondent for the suit property at the price of Kshs.2.8 million, which they paid in two instalments of Kshs. 1.8 and 1 million respectively. The property was transferred to them by the 4th respondent by a transfer in their favour prepared by the firm of Njeri Kariuki Advocates. They also received a title to the suit property on 13th October 2006, and they then constructed four- storey rental flats. It was their testimony that there was no fence or other structure on the suit property when they took possession. They started construction in December 2006, and it was while constructing the 2nd floor that some people claimed that they were the owners of the suit property, but did not produce any documents in support of their claim.
18. Robertson Nderitu Mwihu, a farm manager for the 4th respondent, presented its case. The gist of its case was that, as set out in his statement dated 15th October 2014, the suit property belonged to the 4th respondent and it had sold it to the 2nd and 3rd respondent. Mr. Mwihu denied that there was any relationship between the 1st and 4th respondent, but confirmed that the directors of the 4th respondent



were initially Duncan Ndegwa, Arthur Magugu and Njenga Karume and, after the demise of Mr. Magugu, Mrs. Magugu became a director of the 4th respondent. He also acknowledged that there were receipts issued by the 1st respondent to the deceased, Jackson Gaichinga Kamau.

19. Mr. Mwihu reiterated that the 4th respondent was the registered owner of L. R. No. 13330 measuring 154.4 hectares; that the title was a result of amalgamation of L.R. No. 4920/3 and 4921/3; and that the property had never been registered in the name of the 1st respondent. The 4th respondent's position therefore was that any share that the deceased bought in the 1st respondent would not have any bearing whatsoever on 'the 4th respondent as the 4th respondent did not at any time sell L.R No. 13330 to the 1st respondent.
20. It was the 4th respondent's case further that sometime in 1992, some squatters entered upon its land as a result of which it filed HCCC No. 6206 of 1992- Joreth Limited v Lewis Kibue & Others. A consent order was entered into in the suit on 20th July 2003 under which it was agreed that those who had any claim over the property the subject of the suit, L.R No. 13330 or any portion of it, would pay a sum of Kshs.200,000 in order to have their respective portions transferred to them. Mr. Mwihu testified that on 23rd July 2005, the 4th respondent caused an advertisement to be placed in the Daily Nation newspaper calling for individuals who wished to take advantage of the consent order to do so within 30 days from 23rd July 2005; that the notice further indicated that any person who did not comply with the consent order within the thirty days would have the offer withdrawn; that on 7th April 2006, the 4th respondent placed another notice in the Daily Nation advertising various parcels, including the suit property, for sale; and that it was following this advertisement that the 4th respondent entered into a sale agreement dated 4th May 2006 with the 2nd and 3rd respondents and subsequently executed a transfer in their favour. The 4th respondent contended therefore that as the registered owner of the suit property, it had the legal right to transfer the suit property to the 2nd and 3rd respondent.
21. At the hearing of the appeal, the appellants were represented by learned counsel, Mr. King'ara, who highlighted their submissions dated 27th November 2019 and supplementary submissions dated 23rd August 2023. The 2nd and 3rd respondent, represented by Mr. Gachuhi, filed submissions dated 4th February, 2020. The 4th respondent, represented by learned counsel, Mr. Maina, filed submissions dated 1st February, 2024. In their respective submissions, the parties address themselves to four main issues which roughly correspond to the appellants' six grounds of appeal. We shall consider the respective submissions of the parties on each of these issues as we analyse and make a determination thereon against the evidence before the trial court.
22. The first issue relates to the finding of the trial court that there was no evidence to show that plot number 456, which the appellants alleged had been sold to the deceased by the 1st respondent, is what became, upon registration, the suit property, L.R No. 13330/345. The appellants submit that this was pleaded in their witness statements; that in his response in cross-examination, DW2 stated that the suit property is a result of the subdivision of L.R. 13330; and that the 1st respondent's register showed the deceased as the allottee of plot No. 456. They note further that the sale agreement between the 2nd, 3rd and 4th respondents identifies the plot for sale as 'plot No. 456 which said plot has now been designated on the approved survey plan (as) land reference number 13330/345'.
23. In their response on this issue, the 2nd and 3rd respondent submit that while the appellants alleged that plot no. 456 is what became L. R. No.13330/345, they did not provide any material evidence to prove the claim, nor did the 1st appellant refer to the purported register of the 1st respondent in his testimony. Further, that the 1st appellant did not show the connection between the said register and the actual subdivision of the 4th respondent's parcel, L. R. No. 13330.



24. They submit therefore that the trial court made no error in its finding that other than the appellants' word, there was no other evidence that plot no.456, alleged to have been allotted to the deceased by the 1st respondent, is the plot which was finally registered as the suit property. They assert that the 4th respondent having denied the appellants' assertion that plot no. 456 is the same as L. R. No. 13330/345, it was incumbent upon the appellants to prove their claim by adducing material evidence, which they did not do.
25. On its part, the 4th respondent submits that the trial court was correct in holding that it was difficult to appreciate that plot no. 456 under the 1st respondent is what became L.R. No. 13330/345. It observes that the appellants only produced a list of shareholders of the 1st respondent, detailing their names, identification numbers and a plot number to prove that indeed, plot no. 456 is in fact L.R. No. 13330/345. The 4th respondent submits that the appellants could have produced, inter alia, a cadastral or survey map showing the location of plot no. 456, or called, as a witness, the person who pin-pointed to them plot no. 456 to be the suit property.
26. We have considered this issue, the evidence before the trial court, and the submissions of the parties thereon. In support of their claim that plot no. 456, which they claim was allocated to the deceased by the 1st respondent, was what became, upon registration, L.R. No. 13330/345, the appellants have relied on a register of the 1st respondent indicating that the deceased was allotted plot no. 456; the advertisement dated 7th April 2006 by the 4th respondent which indicates that L.R. No. 13330/345 was plot no. 456; and the sale agreement between the 2nd and 3rd respondent, on the one hand, and the 4th respondent, on the other, which indicates that the suit property was plot no. 456, registered as L. R. No. 13330/345.
27. We agree with the finding of the trial court that other than the 1st appellant's evidence claiming that L.R. No. 13330/345 was the same as plot no. 456, there was no other tangible evidence making this connection. Put differently, was there anything before the trial court showing that plot no. 456 in the 1st respondent's register corresponded with plot no. 456 or L.R. No. 13330/345 in the 4th respondent's records? In a subdivision of over 600 half-acre parcels, it is a truism to say that there is bound to be a plot no. 456. Documentary evidence, perhaps in the form of subdivision schemes by the 1st or 4th respondent, would have helped to locate the plot claimed by the appellants vis a vis the suit property. We would, in the absence of such evidence, find no basis for interfering with the decision of the trial court on this issue.
28. The second issue is whether the trial court was correct in finding that the 2nd and 3rd respondent were not aware that the suit property belonged to the deceased; and in also finding that they had carried out due diligence before purchasing the suit property. The appellants impugn the trial court's findings that the 2nd and 3rd respondent did not know of the deceased's claim to the suit property as they purchased it from the 4th respondent after it had placed press advertisements of the intended sale of the suit property, among other land parcels.
29. They also contend that the court erred in finding that the 2nd and 3rd respondent carried out due diligence and ascertained that the suit property was in the name of the 4th respondent, and they would not have known that the deceased had an interest in the suit property. The appellants contend that these findings by the trial court were erroneous as the 1st appellant testified that the suit property had a workman's house; that he had re-fenced the plot in 2002-2003; and that a neighbour had been permitted to graze his cows on the plot and take care of it.
30. In their response, the 2nd and 3rd respondent note the 1st appellant's testimony that a caretaker used to look after the property after the death of the deceased, and that after the death of this caretaker, the



property was left neglected. They submit therefore that it was clear that when they purchased the suit property in 2006, there was no-one in occupation, and the land was vacant. They submit, further, that there was no caveat or restriction placed upon the suit property that would have made them aware of the appellants' claim in respect of the suit property.

31. The 4th respondent agrees with the submissions of the 2nd and 3rd respondent on this issue. It submits that conducting a search at the Lands Registry in order to verify ownership of any property not only ranks in priority when ascertaining ownership, but that it is also the best practice. It submits further that it held a valid title deed, the mother title to L.R. No. 13330, and, consequently, all subdivisions thereof, such as the suit property. It is its case that this is what the 2nd and 3rd respondent relied on when they decided to purchase the suit property from it. Further, that this is what constitutes due diligence.
32. It is its submission further that the suit property was vacant at the time of purchase, and neither the appellants nor the deceased had a registered title to it. That as the suit property was registered in its name, it had a right and was able to transfer it to the 2nd and 3rd respondent. The 4th respondent relies in support of this submission on section 26 of the *Land Registration Act*.
33. The 4th respondent submits that it did not enter into any agreement with the deceased or with the 1st respondent for sale of the suit property, and the appellants should pursue the 1st respondent for compensation in damages for purporting to sell to them a parcel of land which did not belong to it.
34. Regarding the appellants' contentions that they had fenced the land, the 4th respondent submits that these claims were not proved in court, nor do they assist the appellants as a fence is not evidence of ownership.
35. We have considered the submissions of the parties on this issue.

In making our determination thereon, we consider first the facts on the basis of which the trial court was called upon to determine the issue. The appellants' evidence was that the deceased had purchased a share in the 1st respondent in 1984, equivalent to a half acre. He had fenced the plot and had a worker's house and a caretaker on the land. He died in December 1996, and his caretaker also died, though the date of his demise is not indicated. The 1st appellant contends that he re-fenced the plot between 2002 and 2003. The 2nd and 3rd respondent maintain that the plot was vacant, and there was no fence, when they responded to the advertisement by the 4th respondent and entered into an agreement for sale of the suit property.
36. On this point, the trial court was faced with the 1st appellant's oral evidence against that of the 2nd respondent, but with the latter's evidence bolstered by the documentary evidence relating to the purchase of the suit property by the 2nd and 3rd respondent. Other than the 1st appellant's word, there was no evidence that the deceased or the appellants were in possession of the suit property, or that they had fenced it or constructed a worker's house on it. Indeed, the evidence shows that the appellants only came to know that the property had been sold to the 2nd and 3rd respondent in late 2006, when these respondents started construction after purchasing the suit property from the 4th respondent. On the facts, the trial court cannot be faulted for finding that the 2nd and 3rd respondent were not aware of the appellants' claim to the suit property.
37. In any event, however, can the 2nd and 3rd respondent be said not to have conducted due diligence before purchasing the suit property? Their evidence is that they saw an advertisement by the 4th respondent offering properties, among them the suit property, for sale. They were directed to the 4th respondent's advocates, Kimani Kahiro & Co. Advocates. They established that the property was registered in the name of the 4th respondent.



38. The appellants do not dispute that the 4th respondent was the registered proprietor of the suit property. Section 24 of the [Land Registration Act](#) provides as follows:

Subject to this Act—

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

39. Thus, the 4th respondent was the only party, as the registered proprietor of the suit property, which could properly deal with it. Under section 26 of the said Act:

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

40. Given the facts on the ground, the registration particulars of the suit property, and the law, and in the absence of fraud or illegality on the part of the 4th respondent, we are satisfied that the trial court properly found that the 2nd and 3rd respondent conducted due diligence before entering into an agreement for sale of the suit property.

41. The third issue is whether the trial court erred in finding that the appellants were bound by the consent order entered into in respect of the suit property, among other parcels, and in finding that the appellants should have been vigilant and noted the advertisements by the 4th respondent for those claiming to have purchased plots from the 1st respondent to pay Kshs 200,000 for the said plots. The appellants note that the trial court found that the 4th respondent was aware that there were members of the 1st respondent who were interested in the properties; that it had, after filing suit in 1992, called upon those wishing to take advantage of the consent filed in that suit to pay additional amounts and have the plots they occupied transferred to them; that it recognised that the 4th respondent was aware that there were members of the 1st respondent in occupation of or with an interest in the suit property; and that the deceased fell in this category. The appellants submit that since the 1st respondent's register showed that plot no. 456 belonged to the deceased, this confirms that the 4th respondent was aware or ought to have been aware of that fact.

42. The appellants further submit that the trial court erred in finding that the members of the 1st respondent were bound by the consent order recorded in a suit to which they were not parties. Regarding the advertisement of the suit property, among others, for sale, the appellants submit that the advertisements cannot be presumed to have been read by every citizen; that the 1st appellant denied ever having seen the notices; and he was also unaware of the consent order in HCCC No. 6206 of 1992, to which his father was not a party, nor were the notices addressed to anyone specific.

43. The appellants submit that since the 4th respondent was aware that the suit property belonged to the deceased, it should have made him directly aware of the action they wanted to take with respect to it. They contend further that the court erred in dismissing their submission that placing the advertisement in the daily press instead of the Kenya Gazette was not official communication. They contend that



- the finding of the trial court that the 4th respondent's actions in advertising for members of the 1st respondent to take advantage of the consent order was as a result of 'the inner conscience which was pricking the officials because they knew they had already taken money from Thome Farmers and they would not leave its members empty handed' confirmed that the judge was fully aware that the 4th respondent had sold land to Thome Farmers and had taken money for the land.
44. It is the appellants' submission that this finding was an indication that the 4th respondent was alive to the fact that it did not have an unfettered right to sell the suit property. Their contention is that the trial court's finding, ultimately, that the sale of the suit property to the 2nd and 3rd respondent, without the knowledge of the appellants or the deceased, was justified, was a misdirection that was detrimental to them.
45. The appellants cite the affidavit of Joseph Wambaa sworn on 2nd April 2007 together with annexures thereto which they submit contains detailed testimony relating to the sale transaction between the 1st and the 4th respondents. They submit that the trial court failed to give due consideration to Mr. Wambaa's averments which, in their view, painted a complete picture of the relationship, nexus and transactions between the 1st and 4th respondent. They submit that had the court properly considered the averments, it would not have found that the transfer from the 4th respondent to the 2nd and 3rd respondent was not fraudulent as the deal between the 1st and 4th respondent was not sealed. Further, that the finding that the owners of plot no. 456 did not respond to the chance given to them by the 4th respondent was based on the presumption that such owners or their legal representatives were aware of such chance being given to them, which the appellants had shown they were not aware of.
46. In response to this issue, the 2nd and 3rd respondent submit that it was proper for the 4th respondent to advertise the consent order asking those claiming through the 1st respondent to pay Kshs 200,000 in the daily newspapers instead of the Kenya Gazette as daily newspapers have a wider coverage. Regarding the relationship between the 1st and 4th respondent and whether there was a sale agreement between them in respect of L. R. No. 13330, the 2nd and 3rd respondent observe that the appellants allege that they had bought land from the 1st respondent, which had bought land from the 4th respondent; that though Mr. Wambaa, on whose affidavit the appellants rely, alleged that there was a sale agreement between the 1st and 4th respondent, it is clear that there was no such sale agreement as is required under the *Law of Contract Act* indicating that the 4th respondent had agreed to sell L. R. No. 13330 to the 1st respondent. They submit that all that the appellants presented before the trial court was a resolution which, at most, could only have amounted to an intention to sell, which legally should have later been reduced to a written agreement indicating the sale price, how payment was to be made, and the size of land to be sold.
47. On its part, the 4th respondent submits that it was the order of the court in HCCC No. 6206 of 1992 that it should advertise in the daily press that members or shareholders of the 1st respondent, that is those in possession of parcels purportedly sold to them by the 1st respondent, should take advantage of the consent order and pay Kshs. 200,000 within a period of six months from the date of the advertisement. It submits that it complied with the order as was demonstrated in its evidence, and a majority of those who had trespassed on its property complied with the order. It is its submission that had the appellants been in possession or occupation of the suit property, they would have known about the consent order. Its submission therefore is that the trial court was right in holding that the appellants should have been vigilant to follow up on the issue of title.
48. Regarding the appellants' contention that the trial court failed to note the averments in the affidavit sworn by Mr. Wambaa, the 4th respondent submits that the trial court did make reference to the said affidavit; that it noted that Mr. Arthur Magugu was a director in both the 1st and 4th respondent; and



that there had been a proposed sale of L. R. No. 13330 by the 4th respondent to the 1st respondent. It submits, further, that the trial court noted that the proposed sale saw the purported and innocent purchase of various subdivisions of LR. No. 13330 by the 1st respondent's shareholders; and that the proposed sales did not materialise as the 1st respondent did not have the legal right to sell the parcels of land as it was not the registered owner.

49. We have considered the evidence on record and the submissions of the parties on this issue. First, we observe that in his affidavit, Mr. Wambaa, who described himself as a director of the 1st respondent, expressly avers that there was no sale agreement entered into between the 1st respondent and the 4th respondent; and that there was no agreement with respect to the purchase price of the property, or the timelines within which the transaction would be commenced and completed. Other than that averment regarding events in the 1970s, there is no evidence that such a transaction was contemplated.
50. Then there are the letters bearing diverse dates in the 1970s, annexed to the affidavit of Mr. Wambaa. These letters show payments from the National Bank of Kenya to individual directors of the 4th respondent, apparently on the instructions of the 1st respondent. We are unable to find that these payments constituted payment to the 4th respondent by the 1st respondent for L. R. No. 13330.
51. In his letter dated 26th February, 1993, Mr. A.K Magugu, who asserted that he was a Director and Chairman of the 4th respondent, dissociated himself from the suit filed by the 4th respondent against the 1st respondent and its members. The tenor of his letter suggests that there may have been a proposal to sell the land to the 1st respondent, and perhaps, as the trial court suggests, he may have had an attack of conscience regarding the shareholders of the 1st respondent. The attack of conscience by Mr. Magugu, and perhaps the 4th respondent and its directors, may be what resulted in the consent in HCCC No. 6202 of 1992. As part of the consent, the 4th respondent placed the advertisements in the press, to which the 2nd and 3rd respondent responded and purchased the suit property. We have in evidence the sale agreement dated 4th May 2006 for the sale of the suit property L.R No. 13330/345 from the 4th respondent to the 2nd and 3rd respondent.
52. Unfortunately for the appellants, they did not see the advertisement, and therefore did not take advantage of the offer by the 4th respondent to regularize the purported 'sale' by the 1st respondent upon payment of Kshs 200,000 to the 4th respondent.
53. We are therefore satisfied that on the evidence before it, the trial court properly reached the conclusion that the appellants did not prove their claim before the trial court. We find no basis to fault the conclusions reached by the trial court, and we dismiss the appellants' appeal with costs to the 2nd, 3rd and 4th respondents.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL



I certify that this is
a true copy of the original.

Signed

DEPUTY REGISTRAR

