



**Darelle Limited v ASL Limited & 2 others (Civil Appeal
403 of 2017) [2022] KECA 468 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KECA 468 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 403 OF 2017
W KARANJA, F SICHALE & A MBOGHOLI-MSAGHA, JJA
MARCH 18, 2022**

BETWEEN

DARELLE LIMITED APPELLANT

AND

ASL LIMITED 1ST RESPONDENT

JOHNSTONE KIPLIMO CHEMOS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(An appeal against the Judgment and Decree of the Environment & Land Court
at Nairobi (Gacheru, J). dated 29th May 2015 IN ELC Case No. 567 of 2008)*

JUDGMENT

1. Darelle Limited (the appellant herein), has filed this appeal against the judgment of Gacheru J. dated 29th May 2015.
2. The appeal arises from two suits that had been filed at the Environment and Land Court in Nairobi sometimes in the year 2008, in which the appellant had sought, *inter alia*, judgment against the respondents for a declaration that it was the lawful owner of all that property known as L.R No. 209/11151 (hereinafter the suit property), as the bonafide purchaser for value without notice.
3. The appellant had further in the alternative, sought an order that the 2nd respondent makes an immediate refund of the sum of Kshs 60,000,000, being the purchase price of the suit property.
4. The 1st respondent had also filed suit against the 2nd and 3rd respondents seeking, *inter alia*, a declaration that it was the lawful owner of the suit property. The two suits were subsequently consolidated on 13th November 2009, as they related to the same property.



5. The matter was heard by Gacheru, J. who in a judgment delivered on 29th May 2015, allowed the 1st respondent's claim with costs against the 2nd and 3rd respondents but dismissed the appellant's claim in its entirety with costs as against the 2nd respondent.
6. The appellant was aggrieved by the aforesaid judgment thus provoking the instant appeal vide a Notice of Appeal dated 3rd June 2015 and a Memorandum of Appeal dated 1st December 2017 raising 14 grounds of appeal which we shall advert to later.
7. The brief facts in this appeal are that the 1st respondent was the registered proprietor of the suit property situate in the Upper Hill area of Nairobi, having bought the same from Post Bank Credit Limited in exercise of its statutory power of sale, following a default by the Chargor, Soy Developers Limited (the original owners of the suit property).
8. That, sometimes in the year 2007, the 1st respondent was informed that the 2nd respondent was claiming to be the owner of the suit property and was offering the same for sale on the basis of a Certificate of Title issued in his name; that to protect its interest, the 1st respondent on 28th August 2007, wrote to the Chief Land Registrar and brought to her attention of the fact that there was a parallel title circulating in respect of the suit property. The 1st respondent further sought to know whether the title held by the 2nd respondent was valid.
9. In a ruling delivered on 15th November 2007 and after hearing the competing claims by the parties, the Registrar held that the 1st respondent's title was the only genuine title and that the 1st respondent was the owner of the suit property. The Registrar's ruling did not however deter the 2nd respondent from continuing to offer the suit property for sale culminating with the 1st respondent instituting Nairobi High Court ELC Case No. 24 of 2008, seeking, *inter alia*, cancellation of the Certificate of Title held by the 2nd respondent.
10. By a letter dated 15th September 2008, the appellant's advocates wrote to the 1st respondent, claiming that the appellant was the proprietor of the suit property by virtue of a transfer from the 2nd respondent registered on 11th July 2008.
11. Subsequently thereafter, the appellant instituted ELC case No. 567 of 2008, against the 1st and 2nd respondents seeking, *inter alia*, a declaration that it was the lawful owner of the suit property. As stated above, the two suits were subsequently consolidated on 13th January 2009.
12. The appeal was urged by way of written submissions with oral highlights by the parties on 24th November 2021. Learned counsel, Mr. Mbaluto appeared for the appellant whereas Miss. Ondari appeared for the 1st respondent. Mr. Motari appeared for the 3rd respondent. There was no appearance for the 2nd respondent and Miss Ondari informed us that the 2nd respondent did not participate in the trial at the High Court.
13. The appellant condensed its 14 grounds of appeal into the following 3 broad thematic areas:
 1. The excluded documentary evidence of the appellant-ground 14.
 2. The evaluation of the authenticity of the titles and other documents-grounds 2,3,4 and 5.
 3. The propriety of the ruling and reconstruction of deed file-grounds 6,7,8,9,10 and 11."



14. With regard to the first issue, it was submitted that one of the appellant's key witness (his lawyer), Mr. Aryn Mussa had sought to buttress his testimony by relying on copies of documents which the 1st and 3rd respondents objected to. The then trial judge (Kimondo, J.) after hearing arguments from both sides delivered a ruling upholding the objection. Following the decision of Kimondo, J. the appellant served a Notice to produce under Section 69 of the *Evidence Act* so as to be able to rely on the secondary evidence. Upon resumption of the trial before Gacheru, J. a fresh attempt was made to rely upon the impugned documents. It was contended that the learned judge erred in holding, *inter alia*, that the said issues had been substantively dealt with by Kimondo, J. instead of satisfying herself whether or not a Notice to produce had been served.
15. With regard to the 2nd issue, it was submitted that the 1st respondent's witness George Gachihi (PW1), had confirmed that the genuineness of the 1st respondent's title was based on a Deed File which had been reconstructed based on a copy of the title provided pursuant to the authority of the Principal Registrar. We were urged to find that the same was of no probative value as it was based on a copy of the 1st respondent's own document and that as such, it was an error for the learned judge to have relied on the evidence of this witness. It was further submitted that construction of the Deed File was illegal and was wrongly upheld by the trial court.
16. It was further submitted that PW1 had denounced signatures appearing on the appellant's title and confirmed those in the document held by the 1st respondent and that probed further, he accepted and properly so, that the right person to confirm their individual signatures were the named individuals themselves, thus Mr. Gachanja, Mr. Okungu and Mr. Gicheha (all of whom were within the jurisdiction but were not called as witnesses) and that for the learned judge to have relied on this testimony as to the authenticity of their signatures was yet another error. With regard to PW1's own signature, it was submitted that it was not known what his genuine signature was either at the time when the titles were issued or during the trial as there was no independent contemporaneous evidence as to what his exact signature was at the material time.
17. With regard to PW2, one Mr. Kamuyu who denounced the document of search relied upon by the appellant, it was submitted that it was indeed true that the signature in his witness statement differed from that shown in the Certificate of Search and that the signature on the witness statement differed with what appeared on his identity card; that Mr. Kamuyu had confirmed that he had used different signatures at various times and that apart from saying that what was in his witness statement was his current signature, he could not prove what his current signature was or what it was as at 2007. Consequently, as a result of these affirmations and denunciations, it was erroneous for the trial judge to have accepted blindly that the signature on the Certificate of Search was not that of P.W.2.
18. Finally, as regards the credibility of the witnesses from the land's office, it was submitted they were openly partisan as they were so willing to testify on behalf of the 1st respondent but required a court order to compel them to assist the appellant's expert witness and that such hostility was not taken into consideration by the learned judge.
19. In conclusion, it was submitted that the appellant had unsuccessfully argued that both the ruling of the Principal Registrar of Titles as well as authorization for reconstruction of the Deed File on the basis of a copy supplied by the 1st respondent, were *ultra vires* the Registration of Titles Act which the learned judge failed to examine adequately or at all.
20. We were urged to find that on proper evaluation of all the evidence on record, it was more likely than not that both grants held by the appellant and the 1st respondent respectively emanated from the Land's Registry.



21. On the other hand, it was submitted for the 1st respondent that the appellant's contention that the learned judge erred in finding that it's witness Mr. Aryn Mussa was precluded from producing the documents referred to at paragraphs 3 to 6 of his witness statement was misconceived; that Mr. Mussa had confirmed that the said documents at page 1 to 17 of his statement were obtained from Pauvri Rawal, the 2nd respondent's advocates; that Mr. Mussa was neither the maker of the documents or recipient of documents from the maker; that the documents had not been certified as true copies of the original and further that Mr. Mussa did not demonstrate why the makers of the documents could not be called to produce them. It was for the above reasons that the 1st and 3rd respondents objected to the production of the same, which objection was upheld by Kimondo, J. It was further contended that in spite of obtaining leave to appeal against the aforesaid decision, no appeal was filed against the decision; and that, when the appellant attempted to introduce the very same documents before Gacheru, J. who took over the matter from Kimondo, J. she rightly held that allowing the application would be tantamount to reviewing the decision of Kimondo, J. The appellant again intimated that it would pursue an appeal against the said ruling but failed to do so.
22. With regard to grounds 2,3,4 and 5 of appeal and the appellant's contention that the learned judge failed to undertake an objective analysis of the authenticity of the titles and other documents, it was submitted by the 1st respondent that this contention lacked merit on the grounds, *inter alia*, that having analyzed the evidence, the Judge concluded as follows:
- “...it is evident that the grant held by Darelle Limited has entries that were not attested, entered or signed by officers from the land's office. The Court will find and hold that these documents therefore did not emanate from the land's office as was held by the Chief Land's Registrar in her ruling dated 15th November.”
23. It was thus submitted that the said finding was consistent with the evidence of DW3 (Elmand Ouma Apunda), who testified that based on the documents held by Kenya Revenue Authority, the 2nd respondent was born in 1978 and that as at the year 1992 when the suit property was allegedly transferred to him, he was only 14 years old and had no capacity to own property in his own name; that this evidence was not challenged by the appellant and that as such, it was evident from the foregoing that the learned judge properly evaluated the evidence and arrived at the correct conclusion.
24. With regard to the appellant's contention that the learned judge failed to consider and independently evaluate the reports by hand writing experts, it was submitted that apart from the irregularities in the signatures on the appellant's documents pointed out by officers from the Lands office and the two document examiners, the learned judge undertook a visual analysis of the appellant's grant. It was further submitted that the appellant had the burden under Section 70 of the [Evidence Act](#) to prove that its Certificate of Title was issued and signed by the officers from the Lands office, a burden it failed to discharge; that the 1st respondent proved that its documents were genuine through the evidence of officers from the Land's office and document examiners and as such, the learned judge properly considered the evidence and reached the correct conclusion.
25. Regarding the reconstruction of the Deed File, it was submitted that the Registrar had examined the documents supplied by the parties laying claim to the suit property and that in a ruling of 15th November, 2007, she had found that the 1st respondent was the genuine owner. This was before the Deed file was reconstructed on 3rd April 2008, meaning that the ownership by the 1st respondent had already been ascertained prior to the reconstruction of the Deed File and that it was therefore not true that there was no independent way of ascertaining the validity of the title other than by using the reconstructed Deed File.



26. As regards grounds 6,7,8,9, 10 and 11 of appeal and the ruling by the Land Registrar, it was submitted that the proceedings before the High Court were not an appeal against the ruling by the Registrar; that no prayer was sought by the appellant to set aside the ruling by the Registrar and that in the circumstances, the Court could not interfere with or invalidate the said ruling. Further, the learned judge had undertaken her own inquiry on the validity of the two Certificates of Titles independent of the finding by the Registrar and found that the 1st respondent was the lawful proprietor of the suit property.
27. On the other hand, it was submitted for the 3rd respondent that from the analysis of the evidence submitted, evidence from the Ministry of Lands Housing and Urban Development officials confirmed that the only title issued in respect of the suit property was that held by the 1st respondent and that their signatures as appearing on the appellant's title and searches were forgeries, a fact confirmed by the document examiner (Jacob Odour who testified as PW3), that in the ruling delivered on 15th November 2007, the Chief Land Registrar held that the 2nd respondent's title did not emanate from the Land's office and that the appellant did not call evidence to rebut the testimony of the said land officers and as such, the appellant failed to prove on a balance of probabilities or at all that its title was issued by the Land's office.
28. Regarding the ruling by the Land Registrar, it was submitted that the 1st respondent's parcel file was reconstructed vide the Principal Registrar of Title's ruling, upon calling evidence available from the 1st respondent which was an administrative decision.
29. As regards the alleged exclusion of evidence and or documents intended to be relied upon by the appellant, it was submitted that there was an objection as to the authenticity and hence admissibility of the said documents and Kimondo, J. made a ruling upholding the objection. The appellant did not appeal against the said ruling.
30. We have considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by rule 29 of the Court of Appeal Rules, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123*.
31. With regard to the first issue namely; the alleged excluded documentary evidence, it is indeed not in dispute that one of the appellant's witness Aryn Mussa had sought to produce some documents in pages 1 to 17 of his witness statement dated 21st May 2012, Aryn Mussa had obtained the documents from one Pauvri Rawal who was the 2nd respondent's advocate in the transaction. The 1st and 3rd respondents raised an objection on the grounds, *inter alia*, that Aryn Mussa was not the maker of the documents. The trial court upheld the objection.
32. In a ruling delivered on 25th July 2012, Kimondo, J rendered himself, *inter alia*, thus:
- “Mr. Aryn Mussa is an Advocate. He was engaged in a conveyance on behalf of Darelle Limited. ___He is not the maker of the documents at pages 1 to 17 annexed to his statement. Some of the documents were made by other persons other than Johnston Chemos whom he says gave him the documents. The documents are copies. There is no evidence for example that the person issued with a letter of allotment Benjamin Kositany is dead and cannot testify. The copies are not certified copies. They go to the root of the claim and cross claims between the parties. At the point Mr. Mousa sought to produce he had not laid a foundation to enable him produce the secondary copies.”
- (Emphasis supplied).



Again the learned judge went on to say as follows:

“I am not saying the documents at pages 1 to 17 are not admissible at this point or at all. But I am saying that considering the hearsay rule and the provisions I have referred and the likely prejudice to the other parties, and the fact that the documents are contested and at the heart of the action, the present witness cannot produce the documents at pages 1 to 17 of his statement.”

33. Despite the appellant seeking and obtaining leave to appeal against the aforesaid ruling, no appeal was filed. It is also not in dispute that when the parties appeared before Gacheru, J. on 15th April 2013, the appellant again sought to introduce the same documents whereupon in a short ruling delivered on 16th April 2013, Gacheru, J. disallowed the appellant’s application holding, *inter alia*, that the issues raised by the appellant had been substantially dealt with by Kimondo, J and that allowing the application would be tantamount to reviewing Kimondo, J’s ruling, whereupon the appellant again indicated that it would pursue an appeal against the said ruling which appeal they never pursued.
34. In our considered opinion the appellant having been granted leave to appeal against the aforesaid decision by Kimondo, J, and having failed to appeal against the same, the appellant cannot now seek to challenge the same in the present appeal. It is also instructive to note that the appellant was given a chance by Kimondo, J to remedy the situation when the learned judge in his ruling stated, *inter alia*, thus: “I am not saying the documents at pages 1 to 17 are not admissible at this point or at all”.
35. The appellant however did not remedy the situation but instead indicated that it would file an appeal against the aforesaid decision which appeal they did not file to date.
36. Regarding the Notice to Produce that was issued to the 3rd respondent, it is our considered opinion that the issue was “neither here nor there” since the 3rd respondent issued a Notice of Non-Production of documents dated 13 August 2012, indicating that they were not in possession or control of the documents specified in the Notice to Produce since the documents sought did not emanate from the land offices and were forgeries. The 3rd respondent could not produce documents not in its possession. In any event, this did not change the fact that the appellant’s witness (Amin Mussa) could not produce the documents in contention, as a part from the fact that they were copies, he was not the maker and neither was the person who handed him the documents called as a witness. Consequently, this ground is without merit and the same must fail.
37. The other issue is as regards the evaluation of the authenticity of the titles and other documents produced by the parties. It is indeed not in dispute that both the appellant and the 1st respondent held titles in respect of the suit property and both claimed to be lawful proprietors of the suit property. It was the appellant’s contention that on or about 13th June 2008, a Company known as Imaran Limited and the 2nd respondent had entered into a sale agreement pursuant to which the 2nd respondent agreed to sell the suit property to Imaran Limited for a sum of Kshs 60,000,000 which transfer would be drawn in favour of Imaran Limited and/or its nominee as directed by Imaran Limited.
38. The 1st respondent on the other hand contended that it was registered as proprietor of the suit property on 5th April 2006, having purchased the same from Post Bank Credit Limited who held a charge over the land from Soy Developers Limited, the original owners of the land.
39. PW1 George Gichimu Gachihi a Senior Registrar of Titles denied having ever signed the Grant held by the appellant in respect of the suit property. He further testified that conditions in a grant are issued by the Commissioner of Lands who executes the same and that it was only the Commissioner of Lands who had the authority to vary the special conditions and not the Registrar.



40. With regard to entry No. 5 in the Grant which was a transfer in favour of the appellant for Kshs 60,000,000, it was his evidence that the same was a forgery and that he did not sign it. It was his further evidence that the signature of Mr. Gachanja (the then Commissioner of Lands), Mr. Murage and Mrs Okungu were all forgeries as he was familiar with their signatures. Regarding the grant held by the 1st respondent on the other hand, it was his evidence that the same was original and a genuine title from the Registrar of Titles and that the one held by the appellant was an imitation of the original.
41. PW2 Joseph Wangombe Kamuyu a Registrar of Titles at the Ministry of Lands on the other had testified that the document at page 35 of the appellant's document was a letter and not a certificate of search as contended by the appellant. He disowned the certification on the extreme left purportedly done by him.
42. PW3 Chief Inspector Jacob Odour attached to Forensic Documents Examination Center and the Deputy Head of Section testified, *inter alia*, that signatures in the copy of the search dated 27th November 2007, in comparison with the witness statement by PW1 (George Gichimu Gachihi) of 17th July 2012 were forgeries. He further testified that the signature of PW1 at page 81 of Mr. Aryn Mussa's statement was also a forgery.
43. The learned judge while analyzing the evidence of these witnesses stated, *inter alia*, as follows:

“The second issue for determination is whether the Land Registrars or officers from the Land's Office signed the documents produced in Court by either ASL Limited and or Darelle Limited. In answering this issue, the court will rely on the evidence of PW1 George Gichimu Gachuhi, PW2 Joseph Odour a Document Examiner, DW2 Antipus Nyanjwa, a Document Examiner, 2DW2, Enock Ogeto Otwori and 2DW4 Elizabeth Gicheha.”

The documents in issue are the two Grants one held by ASL limited and the other by Darelle limited and the letter from the Ministry of Lands allegedly signed by E Otwori, for Commissioner of Lands issued to Paury Rawal Advocate, confirming that from the records held by the Ministry, the land in question belonged to Johnstone Kiplimo Chemos.

PW1 testified in court and alleged that the signatures on the grant produced by ASL limited were genuine signatures by the persons who are alleged to have signed them. He testified that the signatures by the Commissioner of Lands, Wilson Gachanja was his genuine signature and also the signature of the Registrar of Titles, Mr. Murage was also a genuine signature. It was his evidence that he had worked with the officers above named and he was familiar with their signatures. He also confirmed that the signatures in entries No 2,3 and 4 in the Grant held by ASL were for Elizabeth Gicheha and were genuine signatures. M/S Elizabeth Gicheha testified that she indeed signed the Grant held by ASL Limited on entries No. 2,3 and 4. The evidence of the two witnesses was further supported by the evidence of the document examiner PW4 Jacob Odour.

However, PW1, PW2 and 2DW4 denied that they ever signed the Grant held by Darelle Limited. PW2, Joseph Kamuyu told the Court that he did not sign the search in respect of Darelle Limited title dated 17th July 2008. The document examiners PW4 and DW2 confirmed that the said signature of Joseph Kamuyu on the search dated 17th July 2008 was a forgery. I have also looked at the three sets of Grants produced by Darelle limited the entries on the said copies of Grant are of different fonts and a casual look from a layman's eye would show that they are made by different hands. The three copies of the Grant are not same copies from one initial Grant. It therefore means Darelle Limited had three different sets of copies of Grant for the same suit land. That raises doubt as to the genuineness of the



Grant held by Darelle Limited and gives credit to the evidence of the officers from the lands office that they never signed for the entries on Darelle Ltd.'s Grant.

Further, 2 DW2 Enock Ogeto Otworu testified that he did not author the letter dated 30th November 2007 and he did not sign the same. His evidence was supported by the documents examiner. 2DW1 Jacob Mogeni Odouru who told the court that he examined the signature on the letter dated 30th November 2007 alleged signed by E. Otworu and he found no similarities with the known signatures of the said E. Otworu-2DW2.

Further from the ruling of the Chief Land's Registrar issued on 15th November 2007, she held that the documents held by Darelle Limited did not emanate from the lands office. The report from the document examiner called by Darelle Limited confirmed that the search dated 17th July 2008 was a forgery and PW1 denied registering the transfer to Darelle Limited. From the above analysis, I will concur with the submissions made by the plaintiff herein and 2nd defendant that the evidence of the makers of documents carries a lot of weight.....”

(Emphasis Supplied).

The learned judge further went on to state:

“The witnesses herein gave evidence that they signed the entries on the Grant held by ASL limited but denied signing the entries on the Grant held by Darelle Limited. That evidence was supported by document examiner in their reports. I find no reasons to doubt the evidence of the officials from the lands office and the document examiners report. The Court being guided by the available evidence therefore finds that the Grant held by ASL limited has entries that were attested and entered and signed by the officials from the lands office specifically PW1, PW2 and 2DW4. I will therefore proceed to hold so.

However, it is evident that the Grant held by Darelle Limited has entries that were not attested, entered, or signed by the officers from the lands office. The Court will find and hold that these documents therefore did not emanate from the lands office as was held by the Chief Land Registrar in her ruling dated 15th November 2007.”

44. In our view, nobody could have said better than the learned trial judge who had the opportunity of seeing the witnesses testify and was therefore able to observe their demeanor.

45. Contrary to the appellant's contention that the witnesses from the land's office were not credible, the learned judge elaborately considered the evidence of these witnesses as evidenced by the above reproduced passage and even independently analyzed the evidence before her when she stated:

“I have also looked at the three sets of Grants produced by Darelle limited the entries on the said copies of Grant are of different fonts and a casual look from a layman's eye would show that they are made by different hands. The three copies of the Grant are not same copies from one initial Grant. It therefore means Darelle limited had three different sets of copies of Grant for the same suit land. That raises doubt as to the genuineness of the Grant held by Darelle limited and gives credit to the evidence of the officers from the lands office that they never signed for the entries on Darelle Ltd.'s Grant.”

46. The only evidence that was tendered by the appellant to rebut the evidence of these witnesses was that by DW2 Antipus Nyanjwa, who testified, *inter alia*, that the signatures in dispute were heavily disguised and lacked consistency of general resemblance. This did not help matters as the evidence



of the officials from the Ministry of Lands remained uncontroverted. This evidence was further corroborated by the evidence of the 3rd respondent's witnesses Chief Inspector Jacob Mogeni Odour, Enock Oget Otworu and Elizabeth Gicheru who all testified that the signatures in the documents held by the appellant were forgeries and that further the said documents did not emanate from the lands office. No evidence was tendered by the appellant to prove the contrary.

47. Additionally, the 2nd respondent who allegedly transferred the suit property to the appellant never participated in these proceedings (either at the trial court or before us) to shed more light on the circumstances surrounding the purported transfer to the appellant save for filing a defence and counterclaim.
48. From the circumstances of this case and the appellant having failed to discharge its evidential burden, we have no reason to fault the learned judge for the holding and conclusion that she arrived at on this issue. It is trite law that he who alleges must prove. Consequently, nothing turns on this ground of appeal and the same must as well fail.
49. The other issue that was raised by the appellant was the propriety of the ruling and reconstruction of the Deed File. It was submitted for the appellant that the learned judge failed to examine adequately or at all the actual terms and the relevant provision of the *Registration of Titles Act*. Nothing could be far from the truth. The learned judge while addressing this issue stated as follows in her judgment:

“ The court has considered the provisions of Section 65 (1) (b) of RTA (now repealed) and finds that indeed the Registrar had the power to conduct investigations, for the purpose of confirming authenticity of documents and entries, cancelling entries and correction of instruments. The Chief Land Registrar summoned the parties herein after receipt of a complaint. She issued a ruling and the ruling was not appealed against. This Court would find no reason to fault the said ruling as submitted by counsel for the 1st defendant.”

50. Consequently, nothing turns on this ground of appeal and the same must as well fall by the wayside.
51. Before we conclude, we would like to say a few things as regards the conduct of the 2nd respondent herein. It is indeed not in dispute that save for filing defence and counterclaim on 14th April 2008, the 2nd respondent never participated in these proceedings. DW3, Elmand Ouma Apunda an officer with Kenya Revenue Authority testified that the 2nd respondent was born in 1978 and his National Identification Card No. was xxxxxxxx. The evidence of this witness was never rebutted by the appellant. This means that as at 21st October 1992, when the suit property was allegedly transferred to him, he was 14 years old and therefore a minor with no capacity to own property in his own name. There was also ample evidence that the 2nd respondent had fraudulently attempted to transfer the suit property to several persons/ entities among them Galana Oil Kenya Limited sometimes in the year 2007. It is also not in dispute that on 27th May 2009, one Staley Keter Kemboi had written to the Criminal Investigations Department against the 2nd respondent over suspected fraud in respect of the suit property. There was also undisputed evidence that as at 11th July 2008, when the suit property was allegedly transferred to the appellant by the 2nd respondent, there was an injunction in place in ELC civil suit No. 24 of 2008 issued on 8th April 2008, restraining the 2nd respondent from, *inter alia*, transferring or dealing with the suit property pending the hearing and determination of that suit. The injunctive order was within the 2nd respondent's knowledge and as such the said transfer was effected in contravention of a court order. Further the appellant's own witness Aryn Mussa while being cross examined on 3rd December 2013, by Mr. Motari for the 3rd respondent stated: “the vendor Chemos did not disclose there were proceedings. He misled us.....”



52. The 2nd respondent's conduct in this matter smacks of him as very dishonest, deceitful and fraudulent person. The fact that he did not take part in these proceedings was not a coincidence. It was deliberate. We will say no more regarding this issue.
53. Finally, the appellant in its plaint dated 24th October 2008, had sought an alternative prayer for the 2nd respondent to make an immediate refund of the sum of Kshs 60,000,000 being the purchase price of the suit property.
54. The learned judge in her judgment at page 51 stated, *inter alia*, as follows:

“ having now found and held that Darelle Ltd cannot successfully seek for indemnity from the 2nd defendant, the court finds that the only option available for Darelle Ltd is to seek for refund of the purchase price from Johnstone Kiplimo Chemos.”
55. The learned judge despite the above holding and despite the same having been expressly pleaded for did not however grant the said prayer. The learned judge therefore fell into error by not granting this prayer.
56. Accordingly, and for the reasons aforesaid and having found that the Grant held by the appellant was fraudulent and that further the transfer in respect of the suit property to the appellant by the 2nd respondent was fraudulent, illegal null and void *ab initio*, the appellant's appeal against the 1st and the 3rd respondents is without merit and the same is hereby dismissed in its entirety with costs to the 1st and 3rd respondents.
57. The 2nd respondent Johnstone Kiplimo Chemos shall make an immediate refund of the sum of Kshs 60,000,000, being the purchase price of the suit property to the appellant.
58. The costs of this appeal as against the appellant shall be borne by the 2nd respondent. The appellant's appeal only succeeds to that extent.
59. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

