IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GITHINJI, NAMBUYE & MWILU, JJA)

CIVIL APPEAL NO. 123 OF 2007

BETWEEN

JOHN KAMUNYA…….....1ST APPLICANT

ESTHER NJOKI KAMUNYA.....2ND APPLICANT

AND

JOHN NGINYI MUCHIRI …….....1ST RESPONDENT

JOB GICHURU NJOROGE..... 2 ND RESPONDENT

STEPHEN NGUGI KARIUKI.....3 RD RESPONDENT

LYDIA JOB WAIRIMU.....4TH RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Nakuru (Musinga, J) Dated 28th April, 2005

in

Nakuru H.C.C.C. No. 583 of 1996)

****

JUDGMENT OF THE COURT

Background Information.

The first respondent ***John Nginyi Muchiri*** moved to the High Court at Nakuru and filed HCCC No.583 of 1996 vide a plaint dated and filed on the 19th day of November, 1996 against one ***Saul Korir Kiptalam*** (***Saul),*** now deceased and ***John Kamunya Mutai*** the 1st appellant.

The 1st respondent sought and successfully obtained an injunctive relief on the 24th day of March, 1997, first to restrain the 1st appellant and ***Saul*** the deceased from cultivating and or doing any other act on the land then known as parcel No.33 Cedar Post 713; and two, to restrain them from interfering with the first respondent's possession of the subject land. These orders were later extended with the consent of the

parties on the 10th and 17th June, 1998 to last till the disposal of the main suit. Meanwhile, the 1st appellant and the deceased **Saul** responded to that claim vide a joint defence dated the 28th day of April, 1997 and filed on the 19th day of April 1997.

Amendment of plaint.

The 1st respondent presented to court an application to amend the plaint on the 17th day of June, 1998. The application was subsequently amended to reflect the 1st respondent's deposition that he had then been granted letters of administration *Ad colligenda Bona* to the estate of the deceased vide *succession cause No. 149 as the administrator of the estate of Saul the deceased and he exhibited a copy of letters marked JNIIJ"*. The reason for seeking leave to amend was because ***Saul,*** the deceased, had passed on and there was need to join his legal representative to the proceedings.

Second, it had transpired through the testimony of the 1st appellant during the first set of the hearing which commenced on the 4th day of February, 1998 that in fact ***Saul*** the deceased had divested himself of the suit title to ***Job*** the 2nd respondent who in turn had subdivided it and then shared portions to himself and the 2nd appellant and the 3rd and 4th respondents. There was therefore need to join these parties to the litigation.

Though the amended chamber summons had sought two prayers from court namely, to amend and then further amend, it is only the prayer to amend which was allowed by consent on the 19th day of May, 1999. The 1st respondent was directed to file his amended plaint within fourteen (14) days which he did on the 11th day of June, 1999. The 2nd appellant, 2nd, 3rd and 4th respondents had corresponding leave to file their defences within 14 days of service.

Salient features of the amended plaint.

The amended plaint brought on board ***John Kamunya*** (the 1st appellant), ***Job Gichuru Njoroge, (***2nd respondent), ***Esther Njoki Kamunya***(2nd appellant) , ***Stephen Ngugi Kariuki*** (3rd respondent) and ***Lydia Job Wairimu (***4th respondent*)* as the 1st, 2nd, 3rd, 4th and 5th defendants respectively. The names of ***Saul Kiptalam Korir*** and ***Alex Kibore*** were conspicuously left out.

Paragraphs 3,4,5,6 and 7 contained the original claim laid by the 1st respondent against the deceased Saul and the 1st appellant, that by reason of the agreements dated the 7th day of August, 1985 and 9th November, 1985, the 1st respondent had purchased the whole suit land; paid the full purchase price and took possession of the whole land.

In Paragraphs 7A, 7B, 7C, 7D and 7E, in summary, the first respondent sought to fault the divestation of title to the entire original suit land from ***Saul*** the deceased, to **Job Gichuru Njoroge** the 2nd respondent and then the resulting subdivision of the title into parcel number 138, 139, 140 and 141 and had them registered as 138 in the name of ***Job Gichuru Njoroge*** (0.1848Ha); 139,- Job ***Gichuru Njoroge*** (0.405Ha); 140 ***Job Gichuru Njoorge, Stephen Ngugi Kariuki*** and ***Lydia Job Wairimu*** (0.405 Ha) and 141- ***Job Gichuru Njoroge & Esther Njoki Kamunya*** (0.405 Ha). It was the 1st respondent's case that all these acts were done in cahoots with ***Saul*** the deceased, appellants and the 2nd, 3rd and 4th respondents purposely to defeat the suit and frustrate his case; that the transactions done as from 14th November, 1996 when the title deed was issued in the deceased's name were all null and void as they were in breach and contempt of court orders/or did not comply with the requirement of the Land Control Act; that he was entitled to the whole of parcel No.133, currently number 138-141 by adverse possession having been in un-interrupted but open occupation from 1985 todate.

In consequence thereof, the 1st respondent sought from the court a declaration that he was the lawful owner of land parcel No. 33 Cedar Post 713, now parcel No. Nakuru/Cedar Lodge Block 138, 139, 140 &

141 by sale and or adverse possession; an order that the apparent sale of the land by the deceased to the 1st appellant and any other person was null and void as the deceased did not have title to pass; an order that the transfer of the land from the deceased to the 4th, 2nd defendant and his apparent sub division and transfer of title into Nos. 138-141 was null and void for want of Land Control Boards' consent and/or contempt of court and/or want of capacity on the 1st defendant's deceased part; an order that title Nos Nakuru Cedar lodge block 138-141 be cancelled and the whole original No. Nakuru Cedar Lodge block 133 be issued to the 1st respondent; an order of eviction of the 2nd appellant and the 2nd, 3rd and 4th respondents from the suit premises.

Leave to defend.

On the 30th day of June, 1999 the firm of Karanja Mbugua & Company Advocates indicated as appearing for all the defendants ***John Kamunya, Job Gichuru Njoorge, Esther Njoki Kamunya, Stephen Ngugi Kariuki and Lydia Job Wairimu*** as the 1st, 2nd, 3rd, 4th and 5th as the then 5th defendants respectively, filed a memorandum of appearance. On the 19th day of July, 1999 the first respondent filed a request for judgment as against all the named respondents who had allegedly failed to file their defences on time. This request was endorsed on the court record on 20th July, 1999. The appellants, 2nd, 3rd and 4th respondents respectively filed an application dated 18th day of January, 2000 unsuccessfully seeking orders that the court be pleased to set aside the said interlocutory judgment and grant them leave to file an amended defence which request was declined.

Salient features of the original joint defence.

In the joint defence the 1st appellant and ***Saul*** denied the alleged sell of the entire suit land to the 1st respondent; admitted sale of a total of 1.5 acres of land comprised in LR. Number 33 Cedar Post 713 for Kshs. 26,000.00 only; contended that they did not obtain the requisite consent of the area Land Control Board within the stipulated time thereby rendering the mentioned transaction null and void; admitted allowing the 1st respondent temporary possession of the 1½ acres of land sold to him by the said ***Saul*** on the 7th day of August, 1985 pending the obtaining of the area Land Control Boards' consent; **Saul** the deceased retained 2 acres of land comprised in LR. No. 33 Cedar Lodge 173 for his own benefit; he had sold 1 acre of the land to the 1st appellant leaving a balance of 1 acre to his benefit (Saul's); that the 1 acre bought by the 1st appellant was quite distinct and different from the 1½ acres of land purchased by the 1st respondent; the said ***Saul*** as the registered proprietor of land known as LR. No. Nakuru Cedar Lodge/33 measuring 1.4 HA had the necessary title to pass to another and specifically to the 1st appellant.

In consequence thereof, the 1st appellant and ***Saul the deceased*** sought from the court an order of dismissal of the 1st respondent's claim as against them.

The 1st respondent put in a reply to defence dated the 2nd day of May, 1997, joining issues with the joint statement of defence.

Formal Proof.

During the hearing by way of formal proof before ***Musinga, J,*** (as he then was) the 1st respondent gave evidence which was mainly a reiteration of the content of the amended plaint already highlighted above.

It was the 1st respondent's further evidence that he had never himself sub-divided the land; he learned of the subdivision through the testimony of the first appellant; following advice from court, he carried out a search, confirmed the existence of the subdivision and then amended his claim accordingly. Lastly that ***Saul*** the deceased passed on in the course of the proceedings, he (1st respondent) applied for letters of administration in succession cause No. 149 of 1998; had the citation advertised in the newspaper; nobody came forward to take out letters of administration in respect of the deceased hence these being granted to him.

The 1st appellant who was party to the joint defence elected not to offer any evidence.

Decision of the High Court.

At the conclusion of the formal proof both learned counsel made oral submissions to court. The learned Judge assessed, evaluated and analized all the facts before him and ruled against the appellants and the 2nd, 3rd and 4th respondents in the impugned judgment dated the 28th day of April, 2005.

Appellant's grounds of Appeal.

The appellants were aggrieved. They have put forth sixteen (16) grounds of appeal. That the learned Judge erred in law and in fact and misdirected himself on the evidence:

1.In holding that there was a valid sale agreement between the 1st respondent and Saul Korir Kiptalam (deceased) for sale of 3½ acres whereas there was none.

2.In holding that the 1st respondent was entitled to 3½ acres wherein, his own evidence was to the effect that he bought 1½ and ½ an acre a total of 2 acres.

3.In holding that the Land Control Board consent was for 3½ acres whereas there was no evidence in support of that finding.

4.In failing to find that evidence adduced by the 1st respondent contradicted the documents produced by him and therefore his whole evidence ought not to have been relied on but rather disregarded.

5.By declaring the 1st respondent as the lawful owner of land parcel number 33 Cedar Post 713 Now parcel No. Nakuru/Cedar/Lodge Block 138,139,140 and 141 notwithstanding, that the 1st respondents prayer was to the effect that a declaration be made that he is the lawful owner of land parcel No.33 Cedar Post 713 now Parcel No. Nakuru/Cedar/Lodge Block 138,139,140 and 141 by sale and or adverse possession yet a claim for adverse possession and one by way of sale do not and cannot co-exist.

6.In law when he allowed the 1st respondents prayer and dismissed the appellants submission which were to the effect that a claim under adverse possession as provided for under order XXXVI rule 3D can only be brought and or instituted by way of an originating summons and not by a plaint as was done by the 1st respondent.

7.By allowing the 1st respondent to continue the suit on behalf of the appellants notwithstanding that the 1st respondent had no capacity to continue the suit on behalf of the deceased as he does not fall under the ambit of persons contemplated as beneficiaries within the meaning of section 29 of the law of succession Act Cap 160 which procedure as adopted by the learned Judge was un procedural.

8.In failing to find that evidence adduced by the 1st respondent contradicted the document produced by him and therefore his whole evidence ought not to have been relied on.

9.By ordering specific performance of (an) agreement which prayers and (had) not been specifically pleaded for.

10.In cancelling the appellants title where as there was no evidence or proof in support of allegation of fraud on the part of the appellants.

11.In holding that the appellants title was fraudulently obtained.

12.In holding that the appellants did not obtain Land Control Board consent whereas such allegation was neither pleaded nor proved.

13.In shifting the burden of proof to the appellants.

14.On holding that the registration of the 2nd appellant was fraudulent while the evidence adduced by the 1st respondent did not meet the required standard of proof.

15.In holding that the deceased Saul Korir Kiptalam had no transferable interest in the suit land which he could transfer to the appellants which principle was legally unsound.

16.In misdirecting himself on the evidence adduced before him and therefore arrived at a wrong conclusion in ordering cancellation of title held by the 2nd appellant and eviction of the 1st appellant from the suit property.

In consequence thereof, the appellants prayed for orders that the appeal be allowed with costs. The decision of the superior court be set aside and the first respondent's suit in the superior court be dismissed.

Appellant's submission.

Mr. Karanja Mbugua learned counsel for the appellant urged us to fault the learned trial judges findings on the grounds that the 1st respondent's claim of entitlement to the suit land by way of sale could never co-exist with a claim of entitlement by way of adverse possession; the 1st respondent ***Muchiri*** failed to demonstrate the existence of a valid Land Control Board consent to the alleged transaction between him and the deceased ***Saul Korir Kiptalam;*** the injunctive relief initially issued in favour of ***Muchiri*** as against the 1st appellant ***Kamunya*** and the late ***Saul Kiptalam*** long before the 2nd appellant, 2nd, 3rd 4th respondents were brought into the proceedings could not operate subsequently to bind them. The learned Judge, argued ***Mr. Karanja,*** fell into an error when he granted an interlocutory judgment in a non monetary claim; when he issued an interlocutory judgment against the 2nd appellant, ***Esther***, the 2nd, 3rd and 4th respondents ***Job***, ***Stephen and Lydia*** when these had not yet even been served with summons to enter appearance; when he allowed the 1st respondents' move to bring on board one ***Alex Kibore*** as a personal representative of the deceased ***Saul Korir Kiptalam*** in the absence of proof that the said ***Alex Kibore*** in fact had a grant of representation to the estate of the said ***Saul Korir Kiptalam;*** when he allowed the 1st respondent ***Muchiri*** to use a limited grant *Ad colligenda* bona both to prosecute and defend the proceedings; when he introduced issues of fraud *suo moto;* and when he made an order for costs against the 1st appellant and yet no specific relief had been pleaded as against the 1st appellant.

In addition to the above, ***Mr. Karanja Mbugua*** urged us to find that the alleged sale of the original suit land Plot. No.33 Cedar post by ***Saul*** the deceased to the 1st respondent was of no consequence as at the time it was sold, the title was still held in the name of the Settlement Fund Trustees; the original owner ***Saul Korir Kiptalam*** only became an owner upon obtaining transfer from the Settlement Fund Trustees and this is the time when he purported to sell to **Kamunya** the first appellant and when that sale was blocked the deceased sold to ***Job Gichuru Njoroge*** who later subdivided it into four portions and transferred to ***Esther, Stephen*** and ***Lydia*** the 2nd appellant , 3rd and 4th respondents. To ***Mr. Karanja Mbugua,*** if any party trespassed on the rights of the first respondent, it must be the deceased party ***Saul Korir Kiptalam*** and ***Job Gichuru Njoroge,*** who were necessary parties both in the High Court proceedings and this appeal and in the absence of their proper representation in these proceedings the 1st respondent ***Muchiri*** stands non suited. It was ***Job*** who received title in his name before the death of ***Saul Korir Kiptalam***. He was a material link to ***Saul***. Saul died before the conclusion of the High Court proceedings and he was not substituted.

Lastly, ***Karanja Mbugua*** reiterated that the 1st appellant ***Kamunya*** should have been dropped from the proceedings the moment the 1st respondent realized that he was never sold the land. The 2nd appellant,

2nd, 3rd and 4th respondents should have been served with summons to enter appearance as they had been brought into the proceedings subsequently and were therefore unprocedurally not only enjoined to the proceedings but also retained in the said proceedings and ultimately judgment erroneously entered against them.

1st Respondent's submission.

In response to the appellant's submissions ***Mr. David Ikua*** learned counsel for the 1st respondent ***Muchiri*** urged that this appeal is an exercise in futility since the High Court's judgment had already been fully executed; all the titles affected by these proceedings with the exception of title for the 2nd appellant had all been cancelled and new ones issued in the name of the 1st respondent ***Muchiri.***

Further that the learned trial Judge's judgment is faultless as it is undisputed that there was an agreement of sale of land between the deceased ***Saul Korir Kiptalam*** and the 1st respondent; consent of the area Land Control Board was duly obtained; there is no fault in the mode of pleading for the reliefs sought as these had been pleaded in the alternative and the learned trial Judge rightly weighed the facts on the record and settled for the correct relief for the 1st respondent; we should ignore the appellant's plea that the provisions of **order 20 rule 5A** of the civil procedure Rules had been flauted as they did not raise that issue in the course of the proceedings.

Turning to the issue of fraud, ***Mr. Ikua*** conceded that indeed the issue of fraud had not been pleaded but to ***Mr. Ikua***, the learned judge rightly employed the use of word "***fraud"*** not in the strict sense of the word as it is employed in the civil procedure Rules, but specifically to describe the transaction culminating in the movement of the title to the original suit property from the deceased ***Saul Korir Kiptalam*** to the 2nd appellant , 2nd, 3rd and 4th respondents, which transaction was effected during the pendency of an injunctive relief on the one hand and on the other hand, for the reason that the said transaction did not receive the blessings of the area Land Control Board.

As for the complaint on failure to serve the 2nd appellant and the 2nd, 3rd and 4th respondents with summons to enter appearance, it was ***Mr. Ikua's*** contention that the issue never arose at the trial; the 2nd appellant, 2nd 3rd and 4th respondents applied for leave to file a defence which when declined they never appealed against that decision. As for the issue of letters of representation *ad colligenda bona*, it was ***Mr. Ikua's*** contention that no substitution was effected and lastly that the grant of representation is still in force. As for costs awarded in favour of the 1st respondent, it was ***Mr. Ikua's*** contention that these were properly awarded considering that the complaining parties participated in the proceedings; the 1st appellant had a defence on record; they declined to offer evidence on oath, their title holdings had been acquired in contempt of the injunctive order granted by the High Court.

4th Respondent's Submission.

Mr. Waihiga Waitindi on the other hand supported the appeal; adopted and reiterated ***Mr. Karanja Mbugua's*** submission on the grounds that ***Job,*** the then 2nd respondent was not in the proceedings as at the time the injunctive relief was granted; it is ***Job*** who obtained the transfer of the whole of the original suit title, subdivided it and transferred portions to the 2nd appellant, himself, the 3rd and 4th respondents; there is nothing on record to show that ***Job*** and the subsequent beneficiaries of his transfers were aware of the existence of the injunctive relief; the only person affected by the injunctive relief was the 1st appellant but who received no transfer of title in his name; he was therefore not party to the transactions leading to the divestation of title from either ***Saul Kiptalam*** to ***Job*** or from ***Job*** to the 2nd appellant and the 3rd and 4th respondents.

Further that neither the deceased **Saul Korir Kiptalam** or the second respondent could be faulted in dealing with the suit property in the manner done as the injunctive relief then in force only prohibited interference with the 1st respondents occupation and use and nothing inhibiting divestation and transfer to

a 3rd party. It was ***Mr. Waitindi's*** further argument that the learned trial Judge did not at all consider the position of an innocent purchaser for value without notice as there is nothing to show that the original title was tainted in any way.

Turning to the issue of nullity of the proceedings, ***Mr. Waitindi*** argued that the root courses of the litigation were the actions complained of the deceased ***Saul Korir Kiplatam; Saul*** passed on in the course of the proceedings, his actions provided nexus between him and the said ***Job*** on the one hand, and the rest of the parties to the litigation herein on the other hand; when ***Saul*** passed on the cause of action survived him; the 1st respondent was duty bound to ensure the presence of ***Saul*** in the proceedings through a proper legal representative so appointed if he wanted to succeed in his claim; the first respondent instead of doing just that, sought to confuse the issues by appointing himself to defend his own claim. It is therefore ***Mr. Waitindi's*** contention that in the absence of a finding of liability flowing from ***Saul*** in favour of the 1st respondent, the reliefs granted to the 1st respondent by the court have no legs to stand on and are therefore unsupportable; lastly that reliefs laid by the 1st respondent of entitlement by both sale and adverse possession are unsupportable as they do not mutually co-exist in one pleading.

1st Respondent's Response to the 4th Respondents Submission.

In response to the 4th respondent's submission, ***Mr. David Ikua*** reiterated his earlier stand, that the 2nd appellant, 2nd, 3rd and 4th respondents had no defence on record; the injunctive order in force enjoined all parties to the litigation to maintain the status quo and the 2nd appellant, 2nd 3rd and 4th respondents had to bear the penal consequences for violating that order.

Mandate of the Court.

This is a first appeal. Our mandate is as set out in **Article 164(3)** of the Kenya Constitution 2010. **Section 78** of the Civil Procedure Act Cap 21 Laws of Kenya, rule 29(1) of the Court of Appeal Rules, that is to re-appraise; re-assess and re-analize the evidence on record before us and arrive at our own conclusion on the matter and give reasons either way. See the case of ***Sumaria & Another versus Allied Industries Limited [2007] 2KLR1*** for the proposition that on a first appeal the court is obligated to reconsider the evidence, re-evaluate it and make its own conclusion, the only caveat being that in the discharge of its aforesaid mandate, it should be slow in moving to interfere with a finding of fact by a trial court unless, (a) it was based on no evidence,

(b) it was based on a misapprehension of the evidence or (c) the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he did. See also the decision in the case of ***Musera versus Mwechelesi & another [2007] 2KLR 159*** wherein, this Court reiterated that an appellate court should be slow to interfere with the trial Judges findings unless it was satisfied that either there was absolutely no evidence to support the findings or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.

Clustered Issues for Determination.

We have on our own revisited the entire record before us, re-evaluated, re-assessed and re-analized it in the light of the rival arguments set out above and in our opinion, the issues that commend themselves to us for determination in the disposal of this appeal are as hereunder:-

(1)Whether the deceased had title to pass to the 1st respondent as at the time of the execution of the alleged agreements of sale between Saul the deceased and the 1st respondent.

(2)What was the scope or parameters of the injunctive relief that was issued herein in favour of the 1st respondent?

(3)Can the first respondent's entitlement to the original suit property by way of sale co-exist with

his alternative claim of entitlement to the same suit property by way of adverse possession?

(4)Did the alleged sale transaction between the late Saul Korir Kiptalam and the first respondent John Nginyi receive the blessings of the area Land Control Board?

(5)Did Saul the deceased have title in the suit property to pass on to one Job Gichuru Njoroge the 2nd respondent?

(6)Did the transactions mentioned in number 4 and 5 above receive the area Land Control Board blessing?

(7)Did the said Job have title in the suit land to pass to the 2nd appellant, 3rd and 4th respondents?

(8)Are the second appellant, 2nd, 3rd and 4th respondents innocent purchasers for value without notice?

*(9)Was **Job Gichuru Njoroge** a necessary party in the proceedings before the High Court and in this appeal?*

(10)Did the learned trial Judge fall into an error when he granted the relief of an interlocutory judgment in a none monetary claim in favour of the 1st respondent John Nginyi Muchiri?

(11)The response to the issue in number ten (10) above notwithstanding, what were the parameters or scope of the said interlocutory judgment?

(12)Was one Alex Kibore a necessary party to the litigation culminating in this appeal? and if so was he procedurally brought on board into the litigation culminating in this appeal?

If Alex Kibore was never procedurally introduced into the High Court proceedings, was never appointed as a personal representative to the estate of the deceased Saul and considering that 1st respondent admitted that he was granted a grant of representation to the estate of Saul the deceased estate, was that appointment procedural for purposes of these proceedings in the High Court on the one hand and the appellate proceedings herein?

(13)Was the learned trial Judge in order when he suo moto introduced the issue of fraud at the judgment stage and made it a central issue in arriving at his conclusion in favour of the 1st respondent John Nginyi Muchuri?

(14)Was the entire trial of the 1st respondent's claim John Nginyi Muchiri flawed and therefore a nullity ab initio?

(15)Does the alleged execution and or satisfaction of the decree resulting from the impugned judgment make the determination of this appeal an exercise in futility?.

(16)Is the order on costs granted in favour of the first respondent John Nginyi Muchiri maintainable?

(17)What final order commends itself to us in the disposal of this appeal?

The Determination.

Determination of 1st issue.

It is undisputed that as at the time the alleged sale transaction between the 1st respondent and ***Saul*** the

deceased took place, title to the suit land was still vested in the Settlement Fund Trustees. This was a Fund established under **section 167 (2**) of the Agriculture Act **Cap 318** of the laws of Kenya. It provides:-

> ***"The Settlement Fund Trustee, shall by that name be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and for and in connection with the purpose of this part, may purchase, hold, manage and dispose of movable and immovable property, and may enter into such contracts as it may deem necessary or expedient."***

The powers donated by this provision is what enabled the Settlement Fund Trustee (S.F.T.) to both acquire and sell the suit land to ***Saul*** the deceased through a mortgage installment repayment scheme. It is apparent that before one could access the benefits of the land sold through this arrangement one had the obligation of offloading the loan. We have no doubt this is the reason as to why both ***Saul*** the deceased and the 1st respondent made efforts to pay off the mortgage to the Settlement Fund Trustees.

From the testimony of the 1st respondent, it is after he had cleared the Settlement Fund Trustees loan that the land was transferred to ***Saul*** the deceased. It is therefore safe for us to say that as long as the mortgage loan on the suit land remained unpaid, ***Saul*** the deceased only had a beneficial interest in the land. Full title entitlement was contingent upon him clearing the mortgage loan which would then have entitled him to a transfer from the Settlement Fund Trustees to his name. This exercise took place on 14th November, 1996 as borne out by the contents of the copy of the green card exhibited on the record. It therefore follows that ***Saul*** the deceased legally acquired title and the free will to deal with the suit land as his own from that date. We also think that this is the reason as to why the Settlement Fund Trustees officials never transferred the deceased's interest in the suit land to the 1st respondent direct although there it is evidenced that the 1st respondent had been making payment towards the mortgage loan liquidation. The 1st respondent complained in his testimony that the Settlement Fund Trustees employees were aware that he had purchased the deceased ***Saul's*** entire interest in the suit land and yet they went ahead to transfer the land to ***Saul*** the deceased without any reference to him. We believe it was because there was no contractual obligation between the 1st respondent and the Settlement

Fund Trustees. It is therefore safe to say that no contractual relationship with regard to the suit land could have legally been created as between the 1st respondent and ***Saul*** the deceased until and after ***Saul*** the deceased had fulfilled his indebtedness to the Settlement Fund Trustees, causing the title to the suit land to be transferred into his name as an owner before he could exercise his free will as to its disposal. It therefore follows that in this regard ***Saul*** the deceased had no legally transferable interests in the suit land as at the time he purported to enter into an agreement for sale of the suit land with the 1st respondent. Nothing therefore turns on the two agreements that the 1st respondent relied upon to move to Court to seek remedy for his alleged grievances as against ***Saul*** the deceased. ***Saul*** the deceased could therefore legally avoid that obligation and divest the title to any other 3rd party as he did.

<u>Determination of the second issue.</u>

The injunctive relief was sought and granted in favour of the 1st respondent as against the deceased ***Saul Korir Kiptalam*** and the 1st appellant, the then only two defendants to the 1st respondent's claim in the High Court. On the 24th March, 1997. the resulting orders read thus:-

> "***That the defendants by themselves, servants and or authorized agents be and are hereby restrained from cultivating or doing any other act on to the land known as parcel No.33 Ceda Post 713 until hearing and determination of this suit.***
>
> ***(2) That the defendants be and are hereby restrained from interfering with the plaintiffs possession of the subject matter herein until determination of the suit."***

Our take on the orders as framed is that the addressees of the injunctive relief were only two namely, the deceased ***Saul*** and the 1s appellant ***Kamunya.*** The two were specifically restrained from cultivating the suit land and secondly from dispossessing the first respondent of the said suit land. From this, there is no way the phrase "***from doing any other act"*** can be read in isolation of the main two acts restrained herein namely "***cultivation"*** and "***dispossession***. We appreciate that the injunctive orders remained alive upto the hearing date as the 1st appellant's application to have them stayed, discharged or varied was never heard and determined. When the 1st respondent sought to cite the two original defendants for contempt of court he complained of interference with cultivation rights. This status prevailed until the commencement of the hearing of the suit on 4th February, 1998. It is therefore our finding that the scope of the injunctive orders granted in the High Court in favour of the 1st respondent as against Saul the deceased and the 1st appellant did not extend to bind any other party beyond the two original defendants.

As for the 2nd appellant ***Esther;*** the 2nd respondent ***Job,*** 3rd respondent ***Stephen*** and 4th respondent ***Lydia,*** we find these were brought on board much later through the amended plaint. They were never served with summons to enter appearance. They were thus not properly enjoined into the proceedings at the High Court. Their improper enjoining to the proceedings not withstanding; no injunctive relief was sought and granted against them after being brought on board. This being the correct position, we find that these persons were never parties to the injunctive relief granted by the High Court in favour of the 1st respondent. As such no penal consequences should have flowed from those orders to bar them from participating in the proceedings then pending in the High Court.

Determination of the 3rd issue.

There is no doubt that the additional claim of entitlement by way of adverse possession was laid in a plaint.

> In the case of ***Bwana versus Said [1991] KLR 454,*** this Court ruled *inter alia* that "***the proper procedure for asserting entitlement by way of adverse possession was vide an originating summons under order 36 rule 3D as it was then (now order 37) and secondly that it was not possible to correct the position by converting the action into a claim by way of an originating summons as there is no provision in the civil procedure Rules by which this could be done."(Emphasis ours)***

In ***Ngati Co-operative Society Limited versus Leididi and 15 others Nakuru CA No.64 of 2004 (UR)*** the proceedings had been commenced by a plaint, a defence was filed introducing a counter claim containing a claim for entitlement by way of adverse possession. The trial Judge declined to accede to an application to strike out the claim by way of adverse possession on account of failure to present it by way of originating summons which in law was the correct procedure for presenting such a claim.

On appeal, this Court drew inspiration from the decision in the case of ***Kulsumbhai versus Abdul Hussein [1957] EA 699*** in which the decision in the case of ***Giles No.(2) [1890] 43CH.D391*** was cited for the proposition that... "***when it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue other courts by ordinary suit";*** the decision in the case of ***Kibiriti versus Kibiriti [1983]1KLR38*** for the proposition that "***the procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question***. Lastly the decision in the case of ***Wakf Commission versus Mohammed Bunumeya and another [1984]*** civil appeal No.83 of 1983 for the proposition that a complicated dispute was appropriate for a court action in a usual way and could not be resolved on an originating summons.

On the strength of the above propositions, this Court in the ***Ng'aiti Farmers Cooperative Society Limited case (supra)*** made, *inter alia,* the following observations:

> "*The suit which gave rise to that appeal raised complex and contentious issues of law and fact,*

it took many days spread over four

(4) years to hear, many witnesses were called to testify and several exhibits were produced, the suit property was not less than 16,000 acres and had over 3,600 settlers in occupation. Such a suit could not be resolved by an originating summons."

On the strength of the principles of law cited and the observations made above, this Court in the ***Nga'iti co-operative Society Limited*** case (supra) delivered itself, *inter alia*, thus:-

> ***"We have anxiously considered the authority cited by Mr. Kahiga in urging us to fault, the procedure adopted by the respondents in mounting the counter claim, but we are satisfied that it was not fatal to the claim. In reaching this conclusion we are guided by the decision of the predecessor of this Court in Boyes versus Gathure [1969] EA 385 in which it was held that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the appellant."(Emphasis ours)***
>
> When raised before him, the learned trial judge herein had this to say:-
>
> ***"I have considered all the pleadings, evidence and submission that were tendered before this Court. Let me start by considering the last point of submission that was raised by Mr. Karanja regarding the claim to the suit premises by way of adverse possession.***
>
> ***It is trite law that such proceedings can only be instituted by way of an originating summons and not by way of a plaint. In ABU Bakar Herezo Bwana versus Twahir Mohamed Salim & 2 others it was held that while there existed jurisdiction under order XXXVI rule 10 of the civil procedure Rules to continue proceedings began by originating summons as if they had been commenced by a plaint in an appropriate case there did not exist any jurisdiction for the reverse procedure, that is to say to continue proceedings began by plaint as though they were commenced by an originating summons.***
>
> ***However, a look at the plaintiff's first prayer shows that he sought a declaration that he is the lawful owner of "land parcel No33 Cedar Post 713 now parcel Nos "Nakuru Cedar Lodge Block 138,139,140 & 141 by sale and or adverse possession"***
>
> ***The claim is not therefore entirely premised on adverse possession. If that was the only ground upon which the claim was based, I would right away have held that the suit was incurably defective but that is not the case. The plaintiff gave evidence that he purchased the suit land and occupied the same for over 12 years before the 1st defendant trespassed thereon."***

From the above observation, it is our finding that the learned trial Judge gave the right approach to the issue raised of adverse possession but failed to make a finding as to whether the claim in the manner framed was severable or not. Bearing in mind the provisions of **order 36** Civil Procedure Rules as it was then and Order 37 as it is now as well as principles of case law sampled above, we wish to reiterate that the correct position in law in so far as pleading of a claim for adverse possession is concerned is that, a claim for adverse possession can only be presented to court by way of an originating summons. Such a procedure is designed to deal with less complex and uncontentious matters. Where issues turn out to be complex and highly contentious the court has jurisdiction to covert an originating summons into a suit and allow parties to adduce "*viva voce"* evidence.

Applying the above observations as well as principles of case law to the rival arguments herein on this issue, we are satisfied that indeed the two subject claims, one for entitlement by way of sale and another by way of adverse possession though laid in one pleading, are severable. One had to give way to the other and the learned trial Judge should have ruled so. This is because the issues in controversy in the litigation culminating in this appeal were complex as they involved ownership of land, production of documents, issues as to whether the various sales were valid or not. They were therefore not ideal for disposal by way of an originating summons. They were properly laid by way of a plaint. As for the alternative claim of

adverse possession, we find that this was just an appendage as it had not supportable averments in the body of the plaint and it had not been laid in a counter claim. It was therefore severable. We so find it and hereby sever it. Its severance will have no effect on the main claim which still has feet to stand on.

Determination of the 4th issue.

The law as it was then on matters of Land Control Board consents was as set out in **section 6** of the repealed Land Control Act Cap 302 Laws of Kenya.

It simply provided that any transaction relating to Land such as sale is void for all purposes unless the Land Control Board for the Land control area or division in which the land is situated has given consent in respect of that transaction in accordance with this Act. Section 8 of the repealed Act made provision that an application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto. According to the provisal to this section, the High Court had liberty to extend that period where it considered that there was sufficient reason so to do upon such conditions , if any as it my think fit. The area Land Control Board had a discretion either to give or refuse its consent to the controlled transaction and subject to any appeal conferred by the then said Act, the land control Board's decision was final and conclusive and could not be questioned in any court.

Paragraph 3 of the original plaint indicated clearly that the alleged sell of the suit land was reduced into writing on the 7th day of August, 1985 and 9th November, 1985.

Paragraph 4 of the original plaint, and the amended plaint all aver that the area Land Control Board consent had been obtained but there is no mention as to the date on which it was so obtained.

In the application for the interim injunctive relief there is mention of due compliance with all legal requirements without specifically mentioning the area land control board consent. None was annexed to the affidavit in support of the injunctive application. The deceased ***Saul Korir Kiptalam*** in his replying affidavit in opposition to the application for injunction denied selling the whole land to the 1st respondent nor transferring any portion thereof to the 1st respondent. There is no mention of the granting of a consent by the area Land Control Board. All that the deceased exhibited were the sale agreement and a copy of the title deed issued on the 14th day of November, 1996. In the 1st respondent's affidavit in response to the deceased's' replying affidavit, there is no mention of the area Land Control Board consent save that there was complaint that the deceaseds' move to obtain the title from the SFT well knowing that the 1st respondent had purchased all the land was fraudulent. Annexed to his replying affidavit were receipts for the payment of SFT dues, one in the 1st respondent's name while the rest were in the deceased's name. Also annexed was the alleged sell agreement.

Paragraph 4 of the joint defence filed by the first appellant and the deceased ***Saul*** read thus in part.:

> ***"Pursuant to the foregoing transaction, the first defendant and the plaintiff did not obtain the land control board consent within the required time under the law consequent upon which the transaction was rendered null and void..."***

In his reply to the said joint defence, the first respondent did not specifically controvert the content of paragraph 4 of the joint defence save that he joined issue with that joint defence.

In his first testimony in court when the hearing of the suit first commenced on 4th February, 1998 before ***Rimita, J*** (as he then was) the 1st respondent had this to say about consent of the area land control board:-

> ***"We went for consent of the relevant land control board. We obtained consent dated 7th February, 1986. I wish to produce a copy (produced and marked Exh.4)***

....

The transfer was never done. The settlement officers have been telling me that my file was missing. I was later given a copy addressed to the secretary land control board. The letter is dated 13th August, 1985. I wish to produce the same (produced and marked Exh no.5).

In his evidence before ***D. Musinga, J.*** (as he then was) on 9th December, 2003 when the trial resumed "*de novo*"; the 1st respondent had this to say about the land control board consent:-

"I went to the land control board for consent. I have the application P.Exh no.5. I got the consent on 21st January, 1986 Pexh.6"

The learned judge in his assessment had this to observe:-

"On 21/1/1986 Bahati land control board gave its consent to the said transaction and the letter of consent was produced as P.

Exh.6."

On our own, we wish to reiterate the earlier observation that in all the depositions of either party with regard to all the interlocutory applications determined before the commencement of the trial, neither party exhibited either an application for consent or consent of the area land control board in accordance with the law. These were introduced for the first time during the testimony of the 1st respondent who does not mention when he accessed them. It appears that the learned trial Judge did not go through the earlier testimony and compare it with the current one that had taken place before him. Had he done so, he would have had an opportunity to ask the 1st respondent to clarify the discrepancy between his first testimony where he had said the consent was granted on 7th February, 1986 and the later testimony where he testified that the consent was given to him on 21st January, 1986. In the absence of such a clarification, we have no alternative but to hold that the 1st respondent gave contradictory evidence as regards the dates on which the land control board consent was allegedly given, with the result that he could not be believed on the topic of discussion, to wit, the obtaining of the requisite Land Control Board consent.

During the hearing of the appeal we perused copies of both the application for consent and a copy of the alleged consent on record which were very faint. We called for clearer copies which were forwarded to us by learned counsel ***Mr. Ikua*** vide his letter of 2nd December, 2014. We have perused these as well and we find that they are almost similar with those found on the record and therefore not of much help to us. There is an undated notification to the parties that the application for consent would be considered on 21st January, 1986. Copies of the application signed by the parties is not exhibited. P. Exhibit 5 was dated the 13th August 1985 and yet it was purporting to forward an application which had not yet come into being as the one exhibited as Exh.6 appears to have been dated 7th December, 1985 but it is not clear. All in all we find the document illegible and not of much help. This coupled with the 1st respondent's failure to exhibit them at the earliest opportunity when his title was challenged and also on account of his contradictory evidence when he gave evidence on oath giving two dates as the dates when the consent was obtained 7th February 1986 & 21st January, 1986 casts doubt as to the authenticity of the said documents leading to the only plausible conclusion that there is doubt as to whether the land control board consent to the subject transaction as between the deceased ***Saul Kiptalam Korir*** and the 1st respondent was ever obtained at all.

Determination of the 5th issue.

The injunctive relief granted in favour of the 1st respondent by the High Court was earlier in time than the divestation of title to the suit land from ***Saul*** the deceased to ***Job.*** It was also correctly submitted that by this time ***Saul*** the deceased was aware that there was ongoing litigation over the subject suit land. But as

opined elsewhere in this judgment the injunctive relief then in place only cushioned the 1st respondent against acts of interference with his cultivational and possessory rights. We still reiterate that there was no order restraining divestation or parting with title. On this account only, we find that the deceased as the title holder was not prevented from parting with it on account of the injunctive order then in existence. Although one may say that it was imprudent of him to take such a risk as he did in the wake of ongoing litigation over the same suit land, he could only reasonably do so if he wanted to steal a match against his opponent which he did in the case.

Determination of the 6th issue.

On the basis of our reasoning with regard to issue number 5 above, it could be said that the divestation of title from ***Saul*** the deceased was tainted by reason of knowledge on his part that indeed there was ongoing litigation over ownership of the same save that we reiterate our earlier stand that the injunctive relief granted did not prohibit divestation of title by ***Saul*** from himself to any 3rd party. Neither did it bind ***Job*** who had not yet been brought on board in the High Court proceedings. On this account, we find that the deceased ***Saul*** had a good title to pass to ***Job*** the 2nd respondent.

Determination of the 7th issue

All that we have on the record are the averments of the 1st respondent set out in paragraphs 7A, 7B, 7C and 7D all to the effect that all those transactions stood faulted on two fronts, first that they stood tainted as they were executed during the pendency of litigation over the original suit land on the one hand and the subsistence of the injunctive relief on the other hand; and **two,** that they did not receive the blessing of the area Land control board.

In his first testimony to court, the 1st respondent never mentioned these transactions because, as he explained later on in his affidavit in support of his application to amend of 18th January, 1999 he was not aware of them. He only came to learn of happenings in relation to them during the testimony of the 1st appellant at the first trial. In his formal proof the 1st respondent had this to say:-

> ***"...Some body went to the Lands Registry and transferred the property into his name. He is known as Job Gichuru Njoroge. He then sub divided the land. The transfer was done on 26th September, 1997. I produce the green card marked as P.Exh.7. He subdivided and got 4 titles.***
>
> ***....***
>
> ***I have never sub-divided the land. I got the information in court when the first defendant testified that he had a title to the land and we were directed to do a search. That is why I amended the plaint and joined all the parties."***

In the course of assessment of the facts, the learned trial Judge had this to say.

> ***"Those transaction either or*** (sic) ***meanwhile, the title deed for the parcel of land which was now registered as Nakuru Cedar Lodge parcel No.33 was on the 14th November, 1996 issued in the name of Mr. Kiptalam while the suit was pending in Court or (***sic), ***Mr.***
>
> ***Kiptalam transferred the said parcel of land to the second defendant Job Gichuru Njoroge. That was done on 26th September, 1997. The green card (P.Exh 7) showed that clearly. John Gichuru Njoroge then subdivided the land into four parcels as follows:-***
>
> ***(i)Nakuru/Cedar Lodge/138 registered in the name of the second defendant (John Gichuru Njoroge (see P.Exh8)***
>
> ***(ii)Nakuru/cedar lodge/139 registered in the name of the second defendant (see P.Exh.9)***

(iii)Nakuru /cedar lodge/140 registered in the name of the second, fourth and fifth defendants (See P.Exh.10)

(iv)Nakuru/cedar lodge/141 registered in the names of the second and third defendant (see P.Exh 11)

The above titles were issued fraudulently as no consent of the land control board was obtained."

Our take on the above is that, although the 1st respondent pleaded in his amended plaint that the above transactions contravened the provisions of the Land Control Act as it was then, there is nothing in his evidence to show that he had first hand knowledge of this.

The learned judge however did believe the 1st respondent's pleading and testimony as the truth in drawing out his conclusion on the matter. On our own, we have seen no documents evidencing that the area land control board either sanctioned or did not sanction the above transactions. Such evidence could have been adduced through the testimony of the 2nd appellant, 2nd, 3rd and 4th respondents and on official of the area Land Control Board's office. In the absence of such testimony, we cannot conclusively say that there was or there was no Land control board consent sanctioning the divestation of title to the suit land from **Saul** the deceased to **Job** the 2nd respondent.

Determination of the 8th issue.

On the basis of the reasoning with regard to issue number 7 above, we are unable to make any conclusive pronouncement with regard to whether the 2nd appellant, 2nd, 3rd and 4th respondents were innocent purchasers for value or not as they never tendered evidence to show how they came to acquire the titles to the suit plots. The 1st respondent who testified said that he did not know how the transactions leading to the divestation of the suit land from ***Saul*** the deceased to ***Job*** the 2nd respondent took place. He heard of it in court. There is therefore no basis for us to conclude as to whether they were or were not innocent purchasers for value on account of inadequacy of evidence in this regard

Determination of the 9th issue.

Our response to the 9th issue is in the positive because ***Job*** is the party that was needed to provide a link between ***Saul*** the deceased as well as the 2nd appellant, 3rd and 4th respondents to the 1st respondent's claim. ***Job's*** presence was necessary both at the trial and at this appellate stage of the proceedings. It is unfortunate that the 1st respondent did not find it fit to substitute him. Without him the 1st respondents claim against the 2nd appellant, 3rd and 4th respondents hangs in the air and therefore unsustainable as it has no feet on which to stand.

Determination of the 10th issue.

We have on record a further amended plaint dated 18th January, 1999. We have failed to trace on the record the court's endorsement making this further amended plaint a pleading. As mentioned earlier on, the amended application for leave to amend sought two substantive prayers, that is for leave to amend and then further amend. Also as observed earlier on, only leave to amend was granted. Upon filing of the amended plaint, the 2nd appellant, 2nd, 3rd and 4th respondents had 14 days to respond thereto but they did not. Since these were being brought on board for the first time the first respondent ought to have complied with the law by applying for and serving on these new entrants with summons to enter appearance in obedience to the prerequisite in order 1 rule 10(4) of the civil procedure Rules as it was then. It provided:-

"Where a defendant is added or substituted, the plaint shall unless, the court otherwise directs be amended in such manner as may be necessary and amended copies of the summons and the plaint shall be served on the new defendants(s) and if the court thinks fit on the original

defendant (s) as well"

We have not traced on the record any amended copy of the summons to enter appearance and the accompanying return of service evidencing service of these on the 2nd appellant, 2nd, 3rd and 4th respondents. There is however a memorandum of appearance by ***Mr. Karanja Mbugua*** dated the 29th day of June, 1999 filed in court on the 30th day of June, 1999 and endorsed on the court record on the 1st day of July, 1999.

It is undisputed that the 2nd, 3rd and 4th respondents unsuccessfully moved the Court to set aside the interlocutory judgment. The learned judge gave reasons for declining that request namely, one of the parties had been playing games; it had taken them eight (8) months to seek leave to defend with no reasonable explanation; they had acted in breach of court orders when they subdivided the suit land and transferred it to themselves; a party who acts in contravention of a court order cannot be allowed to benefit from his wrong and lastly, there was no good defence to the 1st respondents claim.

We have considered the above reasoning of the learned Judge in line with the applicable law and it is our finding that the learned trial Judge who declined the said relief fell into an error because **first,** the 1st appellant who already had a defence on the record should not have been shut out of the proceedings by the refusal to set aside the interlocutory judgment erroneously entered against him because, since he had not withdrawn his joint defence, he had an election either to amend it or leave it intact and proceed to trial with it; since the title to the suit land was not in his name there is no way he could have strictly been said to have been party to the subdivision and transfer of the suit land to 3rd parties; the 1st respondent's allegations that all of them were in cahoots could not hold as there were no facts before the trial judge to back up this assertion, more so when the 1st appellant himself was not shown to have been a party. The 1st appellant was therefore wrongly excluded from fully participating in the proceedings on account of him having allegedly flauted a court order.

Second, the 1st respondent ought to have complied with the mandatory provisions of **order 1 rule 10(4)** (supra) which obligated him to move the court to have the summons to enter appearance amended to reflect the presence of the 2nd appellant, 2nd, 3rd and 4th respondents in the proceedings, have these served on them to invite them procedurally to join the proceedings. It is only after taking this procedural step that the 1st respondent could properly have moved the court to foreclose these intended parties out of the proceedings after the expiry of the time line within which to intervene had lapsed. In the absence of such compliance, we have no hesitation in stating that the 2nd appellant, 2nd, 3rd and 4th respondents were unprocedurally brought into the litigation culminating in this appeal. It mattered not that the advocate then on record for the 1st appellant purported to be on record for them and even erroneously filed an appearance on their behalf.

Third, we note that **order 1 rule 10 (4)** (supra) allowed the court to direct otherwise. The court could have directed that summons to enter appearance be dispensed with but it did not and this noncompliance was fatal and goes to taint the rest of the proceedings that took place against these parties from then hence forth.

Fourth, our construction of **order IXA rules 5(supra)** is that procedure under this rule is preserved for claims drawn with a claim for recovery of pecuniary damages or for detention of goods. None of these two prerequisites applied to the 1st respondents claim then as laid or as it is before us on appeal. We are therefore in agreement with

Mr. Karanja Mbugua's contention that both the request for interlocutory judgment as well as the entry for the same were misplaced and amounted to an exercise in futility, notwithstanding that they allegedly conferred a benefit on the 1st respondent currently under challenge.

Fifth, one of the reasons for the granting of the interlocutory judgment in favour of the 1st respondent was because his opponents had violated a court order preserving the suit property in his favour. As assessed

above, the injunctive orders granted by the High Court were directed to and could only have operated to bind the 1st appellant and the deceased ***Saul*** who were the only defendants then participating in the proceedings. The alleged breach by way of subdivision could only have been carried out by a title holder who was by then ***Saul*** the deceased. The documents traced on the record do not indicate that the late ***Saul*** did the subdivision and transfer. They show that all he did was to divest himself of the title to one ***Job***, the 2nd respondent who then subdivided and transferred to the 2nd appellant and the 2nd, 3rd and 4th respondents. The 1st appellant featured nowhere in those documents. He could only therefore have been affected by allegation of conspiracy with both ***Saul*** the deceased and the 2nd respondent, a matter not borne out by the record. With regard to the disobedience of the injunctive relief by ***Job,*** we find this not made out as the said injunctive relief was never directed at ***Job*** at any one particular time and he could not have possibly breached that which did not bind him.

Six, we have perused the intended defence. We do not agree with the findings of the trial Judge that it was a sham and a mere denial. It raised the issue of whether ***Saul*** the deceased could have been described in the amended plaint as an adult when he was already dead to the knowledge of the 1st respondent as at the time of the amendment, the issue of intention to raise a preliminary objection as to the competence of the suit and also the issue of putting the 1st respondent to strict proof and assertions that the purported sell of the suit land between the 1st respondent and the late ***Saul Korir Kiptalam*** was null and void could not be said to have been a mere denial. It is trite that a party raising even one bona fide issue in his defence is entitled to a right of to defend. By a bona fide triable issue, is not meant one that must succeed, but one in which a court of law properly so directing its mind to it will find merit in calling for a response to it from the opposing party. We therefore find that it was not true as found by the learned trial Judge that the intended defence was a mere denial. The 2nd appellant 2nd, 3rd and 4th respondents should have been given an opportunity to defend the 1st respondent's claim on its merits.

Determination of the 11th issue.

As for the scope of the said interlocutory judgment, we reiterate our earlier position that it was misplaced because, it did not lie in the first instance because the relief sought by the 1st respondent as laid out in his then operative amended plaint, did not fall into the category of reliefs capable of being granted under order IXA rule 5(supra) namely, a claim for recovery of pecuniary damages or detained goods. The 1st respondent's claim was clearly one of entitlement to land by either sale and purchase or by adverse possession.

Determination of the 1st limb of the 12th issue.

Turning to the issue of one ***Alex Kibore,*** it is evident from the record that he appeared in the proceedings for the first time when the 1st respondent made a move to bring him on board as a personal representative of ***Saul*** the deceased, the original first defendant. It was on the 15th day of July, 1998 when the trial court was informed that there was an application to amend the plaint on account of death of a party. The trial court then gave instructions that the alleged representative of the estate of the deceased be sought and brought in court before further proceedings could take place and on that account stood over the matter generally.

The application to amend the plaint was dated the 18th day of June, 1998. It specified clearly vide *ground (i) that the first defendant was dead and it was necessary to join a representative of his estate.* Paragraph 5 of the supporting affidavit also deposed that *the 1st defendant was dead and the 1st respondent wished to join Alex Kibore, his relative to represent his interests.*

No paragraph in the supporting affidavit to the application to amend sought to introduce the mentioned draft further amended plaint, neither is one such draft further amended plaint traced on the record amongst the annextures that were meant to support that application. There was no entry on the record allowing the application of 18th day of June, 1998 as drawn. We have no doubt that this is the reason why

that application was amended because had it been allowed as drawn then it would have become spent and once spent any possibility of a further amendment would have been ruled out.

The amended application was filed in court on the 18th day of January, 1999. Substantive prayers 1 and 2 indicate that the 1st respondent sought to *amend his plaint and substitute and add new parties thereto and that the annexed draft further amended plaint be deemed as having been filed and the same be served upon new parties together with summons."*

Grounds (i) and (ii) in the body of the amended application and Paragraph 5 of the further supporting affidavit were similar in content as the previous ones. It is however paragraph 6 of the further supporting affidavit which was disimilar in content as it deposed *that the 1st defendant was dead and the 1st respondent had been appointed vide succession cause No.149 as the administrator of his estate and attached a copy of letters marked JNIII.*

There is neither paragraph in the further affidavit introducing an annexed draft further amended plaint nor was a copy thereof exhibited or traced on the record. We have however traced on the record a further amended plaint bearing a court stamp showing that it was filed in court on the 18th day of January, 1999. This is the pleading that purported to introduced ***Alex Kibore*** as a 3rd defendant in his capacity as a legal representative of the deceased ***Saul Korir Kiptalam.*** Entries at its bottom indicate clearly that the original plaint was dated the 19th day of November, 1996. Then it underwent an amendment at Nakuru on the 18th day of June, 1998, the date the application for amendment was dated and presumably filed. It is the same date that we have said that we have not traced its endorsement on the record by the court allowing the application to amend as drawn. Had this been the correct position then the court could not possibly have been informed on the 15th July, 1998 that there was pending hearing an application for amendment of the plaint.

Also had there been an amendment effected on the 18th day of June, 1998, then there would have been no way the application for amendment of plaint could have undergone an amendment itself vide its amended application dated 18th January, 1999 following an order of court made on 18th December, 1998 granting the 1st respondent leave to amend his application for amendment. This was followed up by the entries made on the 19th January, 1999 when learned counsel for the 1st respondent informed the court that he had amended the application for leave to amend the plaint. It was opposed by the appellants' counsel resulting in a merit disposal of the said application for amendment by way of consent of the parties endorsed by the court on 19th May, 1999. It reads:-

> ***"By consent, the plaintiff is at liberty to file the amended plaint and file the same within 14 days. The defendants will respond upon service."***

As already mentioned above, the 1st respondent sought two substantive prayers in his amended application to amend. In the first prayer (1) he sought to amend his plaint and substitute new parties, whereas in the second prayer (2) he sought orders that the annexed draft further amended plaint be deemed to have been duly filed and the same be served upon the parties together with the summons. In the manner the consent order of 19th May, 1999 aforesaid set out was framed, prayer 2 of the amended application which sought to introduce the further amended plaint was never allowed. On this account, we make no hesitation in finding that the purported further amended plaint purportedly filed on 19th January, 1999 and forming part of the record is not properly on the court record. We reiterate that this was the purported pleading that sought to introduce ***Alex Kibore*** as a party to the proceedings, a party intended to step into the shoes of the deceased ***Saul Korir Kiptalam*** as a personal representative. Once thrown out, ***Alex Kibore's*** presence in the proceedings before the High Court goes with it.

Determination of the 2nd limb of the 12th issue.

A survey of the salient features of the amended plaint as at the date of the trial and its subsequent conclusion evidently clearly shows that the major complaint put forth by the first respondent was directed

at the actions of the deceased S***aul Korir Kiptalam.*** Both the 1st respondent and his learned counsel then on record for him were fully aware of the fact that the deceased had passed on before the conclusion of the trial and was therefore incapable of physically responding to those complaints in court. There is no single pleading in the amended plaint indicative of the said deceased having been succeeded by any legal representative in any succession proceedings; as to who this successor was for purposes of prosecution of the 1st respondents claim against him in these proceedings; nor was there any indication that it was in fact the 1st respondent who had succeeded the said deceased and was in effect prosecuting the suit both in his own favour and as against himself as the personal representative of the deceased.

In his oral testimony in court, the first respondent had, *inter alia,* this to say:-

> ***"The first defendant passed away while the case was going on. I filed succession cause No.149 of 1998. The citation was advertised in the East African Standard of 1st August, 1998. I produce the news papers as P. Exh 12. Since then nobody came forward to take out letters of administration in respect of the Estate of the deceased. I was granted a limited grant dated 26.10.1998. I produced it as P.exh.13."***

In their submissions to the trial Judge, ***Mr. Ikua*** urged that the 1st respondent's claim was well laid and he was therefore entitled to judgment in his favour, where as ***Mr. Karanja Mbugua*** urged that it was unprocedural for the 1st respondent to obtain a grant of representation to prosecute the suit in his favour and as against himself on behalf of the deceased. In response thereto ***Mr. Ikua*** invited the High Court to be guided by the averments in paragraph 3 of the further amended plaint vide which the 3rd defendant therein ***Alex Kibore*** had been introduced as a representative of the estate of the deceased; and that it was not true that the 1st respondent had become a representative of the deceased as had been claimed by ***Mr. Karanja Mbugua.***

From the above, the 1st respondent's own admission in his testimony on oath that he had been granted letters of administration *ad colligenda bona* to the estate of the late ***Saul Korir Kiptalam,*** leaves no doubt in our mind that ***Alex Kibore*** was never a necessary party to the proceedings before the High Court because, **one,** he was never properly introduced into the High Court proceedings by a valid pleading duly accepted and endorsed by the said Court**; two,** no basis was shown for the choice of him as a proper legal representative of the deceased; **three,** no basis was shown that he had been clothed with legal capacity to so act in place of the deceased. It is therefore safe to conclude that even if we had found that the further amended plaint was a proper pleading, this would not have aided the 1st respondent's cause in these proceeding as there was no demonstration that ***Alex Kibore*** had a grant of representation to the deceased's estate. The upshot of the above is that, the only proof as to who actually succeeded **Saul** the deceased for purposes of the proceedings culminating in this appeal is the testimony of the 1st respondent. That it is him who was granted letters of administration *ad colligenda bona*, and that it is him who stepped into the shoes of the deceased for purposes of the prosecution of the High Court proceedings. As to whether this was procedural or not will be dealt with under issue number 14.

Determination of the 13th Issue.

It is trite that **Order 6 rule 4 (1)** of the Civil Procedure Code as it was then and now **order 2 rule 4 (1)** provided and still provides specifically that matters of fraud have to be specifically pleaded. Herein neither the original plaint nor the holding amended plaint raised the issue of fraud. The issue of fraud featured for the first time in ground (ii) in the body of the application to amend the plaint dated 18th June, 1998 when the appellant stated that:-

> "***After filing the suit and before its conclusion the Land herein has been fraudulently purposely transferred to 3rd parties to defeat the claim and frustrate any judgment that the court may give"***

When cross-examined in his formal proof the 1st respondent had this to say:-

"I have not pleaded fraud against the 4th defendant."

The learned trial Judge when assessing evidence had this to say:-

> ***"All the above titles were issued fraudulently as no consent of the area land control board was obtained. They were also issued when the suit was already pending in court without the plaintiff's knowledge.***
>
> ***....***
>
> ***It is not clear how the second defendant John (Job) Gichuru Njoroge entered into the land but even if it was the first defendant who purported to sell the same to him; that was unlawful and fraudulent because the plaintiff had already acquired the entire parcel of land and occupied the same except that the deceased had not transferred the land to him.***
>
> ***...***
>
> ***The title deeds to the four aforesaid parcels of land were issued fraudulently because the second defendant had not lawfully acquired ownership of the original parcel of land before he could purport to sub-devide the same and transfer to the other parties."***

Mr. Ikua urged us to ignore the learned trial Judge's innocent use of the words ***"fraudulently***" as these were simply meant to deplore the manner in which the title moved from the deceased's name into the name of the 2nd respondent and then from the name of the 2nd respondent into the names of the 2nd appellant and the 3rd and 4th respondents.

Mr. Karanja Mbugua on the other hand urged us to address this issue specifically as has been raised in grounds 10, 11 and 14 of the appellants' grounds of appeal. To ***Mr. Karanja***, the learned trial Judge fell into an error when he employed the issue of the word "***fraud"*** as an entitling factor in favour of the 1st respondent, when in fact there was no evidence or proof in support of the allegation of fraud on the part of the appellants. Further, that the judge misdirected himself when he held that the appellant's title was fraudulently obtained and lastly that the learned Judge misdirected himself on evidence in holding that the registration of the 2nd appellant was fraudulent while the evidence adduced by the 1st respondent was that he did not know how the title moved from **Saul** the deceased to the 2nd respondent and then from the 2nd respondent to the appellant and then 3rd and 4th respondents.

Turning to the law on presentation of issues before court, we state that there is now a wealth of case law on this. The path is well beaten. Generally the law as we know it is that courts would only determine a case on the issues that flow from the pleadings and that judgment, would be pronounced on the issues arising from the pleadings or from issues framed for court's determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of the case. See the case of ***Chalicha FCA Limited versus Odhiambo & 9 others [1987]KLR182*** for the proposition that a case must be decided on the issues on the record and the court has no power to make an order, unless by consent, which is outside the pleadings; the decision in the case of ***Galaxy Paints Co. Ltd versus Falcon Guards Ltd EALR [2000]2EA 385*** for the proposition that the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination; the decision in the case of ***Anthony Francis Wareham & others versus Kenya Post Office Savings Bank CA 5& 48 of 2002 (UR)*** for the proposition that a court of law should not make any finding, in matters not pleaded or grant any relief which is not sought by a party in the pleadings; and lastly the decision in the case of ***Green Field Investment Limited versus Baber Alibhai Mawji*** **civil appeal No. 155 of 2004 (UR)** for the proposition that a court of law cannot pick issues literally from the air and purport to make determination on them. It is the pleadings which determine the issues for determination.

The only exception to the above obtaining position is where, as in the decision in the case of ***Odd Jobs versus Mobile [1970]EA 476*** wherein, it was held *inter alia* that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial the issue has been left to the court for decision. See also the decision in the case of ***Chumo Arap Songok Rotich [2006] eKLR*** for the proposition that parties to a suit are bound by the pleadings and the courts have to pronounce judgment only on the issue arising from the pleadings unless a matter has been canvassed before it by parties and made an issue in the suit through the evidence adduced and submission of the parties.

Applying the above principles to the rival arguments on the regularity of the learned trial judge's *suo moto* introduction of the issue of "***fraud***" in his judgment, we find that the law is clear as put by ***Mr. Karanja*** that matters of "***fraud"*** must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine. In view of the principles of case law outlined above, we agree with the submission of ***Mr. Karanja*** that the learned trial Judge fell into an error when he *suo moto* introduced and used matters of alleged fraudulent conduct on the part of the appellants and the 2nd, 3rd and 4th respondents to determine the issue in favour of the 1st respondent, when these had not been specifically pleaded, and two, when this had not been raised at the trial court and then left for the court's decision.

Determination of the 14th issue.

Incompetence of the impugned judgment arises from issues touching on the regularity of the proceedings undertaken before the High Court after the demise of the original 1st defendant ***Saul Korir Kiptalam*** on the one hand, and on the other hand the regularity of the procedure employed by the court to enjoin the 2nd appellant, 2nd, 3rd and 4th respondents into those proceedings and then the subsequent entry of judgment against them. It is undisputed that the transaction that led to the litigation culminating in this appeal was allegedly undertaken by the 1st respondent and the deceased way back in the year 1985, by which time the deceased only held a beneficial interest in the suit land as the title to the same was by then held by the Settlement Fund Trustees. It was not until 14th November, 1996 when title passed on to the deceased. There appears to have been an apprehension that the deceased was about to divest the said title from himself to the 1st appellant which apprehension prompted the 1st respondent to file suit on 19th November, 1996 as against the deceased and 1st appellant; and then moved swiftly to obtain an injunctive relief on 24th March, 1997 to prevent interference with the 1st respondent's use and possession of the suit property or a portion of it. granted According to the 1st respondent the injunctive relief also covered dealings with the title.

It is also undisputed that during the pendency of the litigation in the High Court title moved from the deceased to one ***Job Gichuru Njoroge*** in unclear circumstances as we have no record of this transaction. ***Job Gichuru Njoroge*** subdivided the land and transferred portions to himself and the 2nd appellant, 3rd and 4th respondents. Apparently, the 1st respondent was not aware of this until the 1st appellant gave his testimony in court and revealed that he had not handled the title to the suit land in any way. It therefore became necessary for the 1st respondent to amend his plaint to bring on board the beneficiaries of the subsequent transfer, sub division and transfers. The obvious link between the 1st respondent and these third parties was none other than the deceased. The 1st respondent therefore had no direct contractual relationship with the third parties. It is in the course of undertaking this exercise that it came to light that the deceased had passed on. Since the cause of action survived the deceased a need also arose to have him substituted.

The first attempt at substitution arose when the 1st respondent presented an application to introduce one ***Alex Kibore*** as a personal representative of ***Saul*** the decaesed. As mentioned earlier on, it is not clear from the scanty information on the record as to why and when ***Alex Kibore*** was picked on as a possible legal representative for the deceased. There was no mention that he had a grant of representation to the estate of the deceased. ***Alex Kibore*** ought to have been brought on board by the further amended plaint which though it appears to have been filed in court we have ruled that it is of no consequence because

one, the 1st respondent sought to introduce it vide the application to amend of 18th June, 1998 which we have ruled, was never allowed because it was subsequently amended by the one dated 18th January, 1999. **Two**, although the 1st respondent had sought leave to amend and further amend in the amended application, the order of 15th May, 1999 only allowed one slot for amendment. It is this slot which introduced the amended plaint dated 3rd June, 1999 and filed on 10th June, 1999 on the basis of which the trial was concluded. This amended plaint did not bring in the name of ***Alex Kibore.*** It however mentioned ***Saul*** the deceased as the 1st defendant. It has no mention any where in its body of any complaint directed at a personal representative of the deceased. Although the numbering of the defendants was altered in the amended plaint, there was still reference to and complaints directed at ***Saul*** the deceased. The deceaseds' presence in the litigation was thus kept alive up to its conclusion.

As observed earlier on, it is not clear as to how one ***Alex Kibore*** had been identified and picked upon as ***Saul's*** personal representative. It is also not clear as to whether the said ***Alex Kibore*** had accessed a grant of representation to the estate of the decaesed or not. He fizzled out of the proceedings when the further amended plaint was not allowed to pass by the order on amendment of 19th May, 1999. It is therefore not true as contended by ***Mr. Ikua*** that both pleadings are alive and are worthy of consideration. The discounting of ***Alex Kibore*** from the citation leaves the 1st respondent as the only possible candidate for the position of a legal representative. He himself gave evidence on oath saying that he had indeed sought and had been granted a temporary grant *ad colligenda bona* whose copy he tendered in evidence. We reproduced above what the 1st respondent, *inter alia,* stated in his testimony.

The publication notice exhibited indicated that the citation had been taken out at large. The citation indicated clearly that if no person came forward to claim the right to legal representation to the deceased's estate, then the 1st respondent would proceed to apply for the same, and that is exactly what he did, borne out by the presence of P Exh.13, a limited grant of letters of Administration *ad colligenda bona,* issued under **section 67(1)** of the Law of Succession Act, issued on the 26th day of October, 1998.

Section 67(1) of the Act excempts publication in the Kenya gazette of applications for such a limited grant. **Rule 36(1) (2)** of the Probate and Administration Rules sets out parameters in respect of which such a limited grant can be applied for. It reads:-

> 36 (1) "***Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet, the necessity of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona "****defunti"* ***of the estate of the deceased.***
>
> ***(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made."***

There are two prerequisites that a beneficiary of such a grant ought to meet, namely, that he must be a person who would otherwise have been entitled by law to apply for such a grant of representation; and **two** it must be limited for purposes of collection and preservation of the estate of a deceased person. **Section 66** of the Act sets out persons who, subject to the discretion of the court would be eligible for the grant of representation to the estate of a deceased person. These are listed as a spouse, a beneficiary, a public trustee and a creditor. Of course the 1st respondent was neither of these. He was thus not entitled to apply for such a grant in law in the first instance. Secondly, what was required of him in the wake of the pending litigation was not to collect and preserve the estate of the deceased as there was none to be collected and preserved but to identify some one to step into the shoes of the deceased to enable him 1st respondent prosecute his (1st respondent) claim against such a representative. In view of the above, we find the procedure employed by the 1st respondent faulty.

The correct procedure the 1st respondent should have employed should have been that which is stipulated

in **rules 14 and 16** of the **Fifth Schedule of the Act.** These provide:

> ***"14. When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or a person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.***
>
> ***16. Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit."***

The procedure for so applying is set out in rule 12 of the Probate and Administration Rules. This provides

> ***"12. An application for a grant of representation to be limited in any of the several respects described in the Fifth Schedule to the Act shall be by petition in the appropriate Form and shall be supported by such evidence by affidavit in Form 19 as is required by these Rules including such evidence as is sufficient to establish the existence of the facts and circumstances relative to the particular respect in which the grant is to be limited."***

The 1st respondent appears to have invoked the citation provision provided for under rules 21, 22, of the **Probate and Administration Rules.** A reading of these reveals that the citor (the person taking out the citation) has first of all to identify a person to be cited (the citee); who must be a person who would have himself been entitled to apply for a grant of representation. The procedure employed by the first respondent fell short of this in that he issued a citation at large, a process not permitted by the rules; and second, he could not claim to have been a person otherwise entitled to be issued with a grant of representation to the estate of the deceased as he does not fall into the categories of persons entitled to so apply under section 66 of the Act.

We have noted from the newspaper advertisement that the date when the deceased ***Saul*** passed on was not indicated. If by any chance a year had lapsed then the 1st respondent ought to have complied with the prerequisites for substitution under the procedure set out in **Order 23 rule 4(1) (2) (3) of the Civil Procedure Code** namely, identification of the legal representative, application to join such a legal representative to the proceedings within one year of the death. In the absence of such a remedial step shown to have been taken within one year of death the suit abates. Herein the date of death of ***Saul*** the deceased is not known. There is no demonstration of an application to substitute having been effected within one year of the death or to substitute at all after the 1st respondent's move to introduce the further amended plaint was not granted. There is therefore nothing on the record to show that the 1st respondent's suit had not abated as against ***Saul*** the deceased as at the time he erroneously obtained a grant of representation to the deceased estate and then purported to prosecute the case by him when he gave his testimony in court.

Lastly on this, considering the manner of the framing of the amended plaint and the revealation by the 1st respondent at the trial that he was the one who had been granted the letters of administration *ad colligenda bona* to represent the interests of the deceased, the learned trial Judge ought to have complied with the provisions of **order 23 rule 5 of the Civil Procedure Code** by inquiring as to whether the 1st respondent had properly been appointed as a legal representative to the estate of the deceased ; and **two** whether he had been properly so joined to the proceedings as such legal representative. Had the learned trial Judge done so, we have no doubt that he would have realized that the entire process was flawed.

On the second aspect of the 14th issue, we wish to adopt our earlier assessment and findings when dealing

with issues as to the regularity and or procedurality of the entry of the interlocutory judgment in favour of the 1st respondent as against the 2nd appellant, 2nd, 3rd and 4th respondents and state that 1st respondent's claim against the 2nd appellant, 2nd, 3rd and 4th respondent was not well founded. Reason is that; one, since these had not been properly introduced into the proceedings, no claims could hold against them. Two, there was no contractual relationship between the 1st respondent and them. The cause of action against them therefore cannot lie or be continued in the absence of the continued subsistence of the claim of the 1st respondent as against **Saul** the deceased, as it was ***Saul*** the deceased who provided the chain or contractual link between them and the 1st respondent. The moment the 1st respondent's case against the deceased faltered, it also faltered as against those who were 3rd parties to the 1st respondent's claim. T**hree,** the documentary evidence exhibited indicate that the link between these and the deceased was ***Job Gichuru Njoroge***. It follows that the continued presence of ***Job*** in the litigation was crucial to the success of the 1st respondent's case as against them. We were told through ***Karanja Mbugua's*** submissions that ***Job*** passed on during the pendence of the appeal. He was never substituted. He is the one who passed on title to these other third parties. Once the appeal against him abated the 1st respondent's claim against them lost feet on which to stand.

The question we ask ourselves is, what is the fate of the 1st respondent's claim in the circumstances displayed above?

The position in law on matters of nullity and irregularity has now crystallized.

In ***Mac Foy versus United Africa Co. Limited [1961] 3ALLER 1169*** at page 1172 paragraph 1 ***Lord Denning*** (as he then was) had this to say:-

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so...."***

Since the decision in the case of ***Mac Foy (supra)*** this Court has numerously not only frowned on acts of illegalities but also gone a head to pronounce that these should neither be allowed to pass nor be perpetuated.

In the case of ***Yalwala versus Indimuli & another [1989] eKLR*** this Court faulted and rendered the exparte proceedings null and void *ab initio* on account of failure to effect proper service of the summons to enter appearance on the defendants; the decision in ***National Bank of Kenya Ltd versus Wilson Ndolo Ayah [2009] eKLR*** wherein this Court was categorical that it is a public policy that citizens obey the law of the land. Likewise it is good policy that courts enforce the law and avoid perpetration of acts of illegality; that allowing such acts to stand is in effect a perpetuation of the illegality; and lastly, that, it is a public policy that courts of law should not aid in the perpetration of the illegality. Lastly in the case of ***Suleiman Said Shabhal versus Independent Electoral & Boundaries Commission and 3 others [2014] eKLR*** while drawing inspiration from the decision in ***Mac Foy (supra)*** the Court had this to reiterate:-

> ***"Lord Dening distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularly is not void but voidable. An act that is voidable is void until it is made or declared void. It ceases to have effect after it is declared void. It is not void ab initio. What has been done or accomplished pursuant to that act is not affected by the declaration. On the other hand a nullity is really something that is void, a nothing right from the beginning."***

On the basis of the principles set out above, we have no hesitation in stating, firstly that the entire proceedings conducted in the High Court one year after the death of ***Saul*** the deceased and in the absence of an order for substitution was nothing but an exercise in futility and therefore a nullity. Secondly, likewise the proceedings against the 2nd appellant, 2nd, 3rd and 4th respondents were also nullities and void as initiated because these as opined earlier on were not properly invited to join the then ongoing litigation. Thirdly, also the demise of ***Job*** during the pendency of the appeal and in the absence of substitution renders the appeal against ***Job*** and those claiming title through him incurably faulty in the

circumstances.

Determination of the 15th issue.

This now brings us to the question what becomes of the decree allegedly executed either partially or fully. Our take on this is that once the proceedings giving rise to the decree are found to have been a nullity the order operates to nullify any action and or any benefit that may have flawed or flows from such a decree. The parties are restored to the position in which they were before the demise of ***Saul*** the deceased as regards the 1st respondent's claim as against ***Saul*** the deceased on the one hand, and as at the date the 1st respondent ought to have amended the summons to enter appearance and served these together with the amended plaint on the 2nd appellant; 2nd, 3rd and 4th respondents. Failure to comply with this requirement rendered the 1st respondent's claim as against these parties fatally defective and therefore unenforceable against them.

Determination of the 16th issue.

This relates to the issues as to who should bear the costs of the litigation both here and the court below. The law is clear on this. **Section 27(1)** of the **Civil Procedure Act** Cap 21 Laws of Kenya provides:-

> ***27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.***
>
> ***Provided that the costs of any action, cause of other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

This provision has been construed on numerous occasions by courts of this jurisdiction and parameters regarding the exercise of the court's discretion in awarding or withholding costs clearly delineated.

(ii) Power of the Court of Appeal to award costs:

Rule 31 of the **Court of Appeal Rules, 2010** gives power to the Court to award costs in the following terms. It reads:-

> ***"31. On any appeal, the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."***

As a general rule, the award of costs follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in litigation. See

Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR **(Civil Appeal 85 of 2006) this Court stated that:**

Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule.

In the decision cited above, the Court drew strength from the pronouncements of the Court in **DevramDattan v Dawda[1949] EACA 35** where it was held that:

> **"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts....If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."**

As we have already stated above, the award of costs is therefore an exercise of a court's discretion, and the court of appeal, in interfering with the exercise of that jurisdiction of the judge appealed from, ought to satisfy itself that the exercise of jurisdiction was improper before it interferes.

1. ***In James Koskei Chirchir –vs- Chairman Board of Governors Eldoret Polytechnic- Civil Appeal No. 211 of 2005,*** this Court held:-

> ***"Notwithstanding the provisions of section 27, above, costs are generally a matter within the discretion of the court. The court did not, however, explain why it denied the appellant his costs before the trial court. In the absence of any explanation in that regard we think that the learned Judge of the superior court erred in denying the appellant the costs of the suit before the trial court"***

Where there is sufficient reason why a trial court awarded costs, then the appellate court will not interfere with that award as was the case in ***S.K. Njuguna & another v John Kiarie Waweru & another [2009] eKLR (CIVIL APPEAL 219 OF 2008)*** where the Court stated that:

> ***We reiterate that the issue of costs is in the discretion of the court and in this appeal we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed***

(See also see ***Kiska Ltd versus De Angelis [1969] EA 6*** for the proposition that a successful party in any litigation should be awarded costs, *de bene esse* **and Mariga versus Musila [1984] KLR 251** for the proposition that under the **Civil Procedure Act section 27,** costs are in the discretion of the court and, subject to the proviso in that section that the costs shall follow the event unless the judge shall for good reason otherwise order, there is no principle which requires that a judge in a case must direct that the successful defendant shall receive his costs from the unsuccessful defendant unless the lower court had not exercised its discretion judicially, the appellate Court would not interfere with its decision regarding the costs.

Applying the above principles to the rival arguments herein, as to which party should bear the costs of the litigation, for the reasons and findings made above in the disposal of this appeal we find that there is justification for us to interfere with the leaned trial Judge's order on costs, for the reason, one, that we have already faulted the entire trial as being flawed, hence there is no way the orders for costs can stand. **Two,** we agree with ***Mr. Karanja's*** contention that the moment the 1st respondent realized that the 1st appellant had not beneffited from the subdivision of the title to the suit land from ***Saul*** the deceased and in the absence of demonstration by way of evidence that the 1st appellant was involved in that divestation exercise the order for costs should not have been made and directed as against him. **Three,** we have already ruled that the 2nd appellant, 2nd, 3rd and 4th respondents were not properly invited and enjoined to the proceedings before the High Court. Therefore, where the entire process of the litigation against a party is flawed, there is no way an order of costs against such a party not properly so joined to the proceedings can be sustained.

Determination of the 17th issue.

From the foregoing, we find that the suit as amended and the proceedings were incompetent. The order that commends itself to us is that there is merit in this appeal. It is accordingly allowed. We set aside judgment and decree of the High Court made on the 28th day of April, 2005 and dismiss the suit.

As a consequential order, we order that the four cancelled title deeds be restored in the name of the previous registered owners. Further the registration of the 1st respondent ***John Nginyi Muchiri*** as the proprietor of the four sub-divisions in execution of the decree is cancelled.

Dated and Delivered at Nakuru this 26th day of March, 2015.

E.M.GITHINJI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

P.M. MWILU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR