



Supeyo & another (Suing as the administrators of the Estate of Keziah Gathoni Supeyo) v Millenium Dream Homes Limited & 3 others (Environment & Land Case 615 of 2017) [2025] KEELC 825 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 615 OF 2017
LC KOMINGOI, J
FEBRUARY 20, 2025**

BETWEEN

REBECCA NADUPOI SUPEYO & ISSAC TIPANKO SUPEYO (SUING AS THE ADMINISTRATORS OF THE ESTATE OF KEZIAH GATHONI SUPEYO) PLAINTIFF

AND

MILLENIUM DREAM HOMES LIMITED 1ST DEFENDANT

WONDERS VALLEY LIMITED 2ND DEFENDANT

JOSEPH GREGORY NYAMU 3RD DEFENDANT

ATTORNEY GENERAL (SUED ON BEHALF OF THE LAND REGISTRAR, NGONG' LANDS REGISTRY AND THE CHIEF LAND REGISTRAR, NGONG' LANDS REGISTRY) 4TH DEFENDANT

JUDGMENT

1. This suit was first filed in the year 2010, vide the Complaint dated 28th April 2010 at the Machakos High Court as Case No. 82 of 2010. At first, the suit was only between the Plaintiff and the 1st Defendant. The Plaintiff claimed that, her property known as Kajiado/Olchoro Onyore/5722 (herein after referred to as “the suit property”) which was a subdivision of Kajiado/Olchoro Onyore/4912 was fraudulently and/or by misrepresentation transferred to the 1st Defendant on 6th June 2001 without a sale agreement, payment of the purchase price or any other legal requirements. She averred that efforts to have the 1st Defendant surrender the title back to her had been futile. She sought an injunction restraining any dealings on the suit property, an order cancelling the said title registered in the 1st Defendant’s name and that the title be registered to her. She also sought for mesne profits among other prayers.



2. The Plaintiff was Amended on 20th May 2013 to include an averment that sometime in the year 2000, she was approached by a person well known to her who proposed that parcel Kajiado/Olchoro Onyore/4912 be subdivided into two parcels because he had a potential buyer. They jointly engaged the services of a surveyor and the said parcel was subdivided. However, little did she know that the said person was one of the Directors of the 1st Defendant. That, he and the surveyor thus conspired to fraudulently, irregularly and unprocedurally transfer the suit property to the 1st Defendant without her knowledge or consent.
3. In the Further Amended Plaintiff dated 13th September 2016 the Plaintiff joined the 2nd, 3rd and 4th Defendants to the suit. Here, she claimed that sometime in May 2001, she decided to subdivide her parcel of land Kajiado/Olchoro Onyore/4912 into two parcels; (Kajiado/Olchoro Onyore/5721 and Kajiado/Olchoro Onyore/5722) with the aim of selling one of them. She then engaged services of the 3rd Defendant to facilitate this. Once the subdivision was complete, he gave her the title deed for parcel 5721 but retained the title deed for parcel 5722 while looking for a buyer. He would later inform her that he had found a potential buyer who desired to develop a golf course on the suit property. It is her case that the negotiations were at the initial stages. The Plaintiff claims that this was a misrepresentation by the 3rd Defendant because there was never such a buyer but he instead transferred the suit property to his company, the 1st Defendant without any agreement.
4. In 2008, she placed a caution against the suit property and was surprised to see a caveat emptor in the Daily Nation Newspaper sometime in September 2013 by the 2nd Defendant against the suit property claiming to be the registered owner. She attempted to conduct a search of the suit property to ascertain the status, but the search was declined by the Lands Registry on grounds that she did not have the original title. This transfer to the 2nd defendant was therefore illegally done because the Plaintiff was not aware of any alleged transaction between her and the 1st and 3rd defendants. The transfer from the 1st Defendant to the 2nd defendant was consequently irregular and unprocedural and she had suffered great loss following these actions because she had been dispossessed of her property. She thus prayed for:
 - a. An order that during the pendency of the suit the property known as Kajiado/Olchoro-Onyore/5722 be preserved and not be sub-divided, sold charged or transferred or dealt with in any manner howsoever by the 2nd Defendant, itself, agents and/or servants until further orders of the court;Alternatively,
 - b. An injunction do issue restraining the 2nd Defendant whether by itself, servants, agents or any other surrogate from putting up for sale, subdividing of or dealing in any way whatsoever with the said property pending the hearing and determination of this suit or until further orders of the court;
 - c. A declaration that the title deed to the defendants for LR. Kajiado/Olchore-Onyore/5722 is ineffectual, null and void ab initio and incapable of conferring any proprietary rights;
 - d. An order directing the 4th Defendant, District Land Registrar to rectify the register by cancelling the 2nd Defendant as the proprietor of LR. Kajiado/Olchoro-Onyore/5722;
 - e. An order directing the 4th Defendant, District Land Registrar to rectify the register by amending the same to have the Plaintiff as the absolute proprietor of LR. Kajiado/Olchoro-Onyore/5722; within ninety (90) days from the date of this Judgement.



- f. A declaration that the alleged registration of the Defendant as owner of the suit premises was illegal, null and void ab initio;
 - g. An order cancelling the Registration of the 2nd Defendant Wonders Valley View Limited as the proprietor of LR. Kajiado/O1choro-Onyore/5722;
 - h. Mesne profits from 2001 till date of the cancellation of the registration of the 2nd proprietor at a rate to be determined by the court;
 - i. Costs of this suit;
 - j. Any other relief that this Hon. Court shall deem fit and expedient to grant.
5. The 1st Defendant in its Defence and Counterclaim dated 11th October 2010 denied this allegation stating that the sale and transfer of the suit property from the Plaintiff to the 1st defendant was undertaken legally and procedurally by both parties and all necessary documents duly obtained and executed. The 1st defendant claimed that the Plaintiff was only out to extort it by seeking to get more money out of a transaction that had already been finalised. The 1st defendant also claimed that it was wrong for the Plaintiff who had greatly benefited from it in several ways including having school fees for her children who were studying abroad catered for. The 1st defendant in its Counterclaim sought;
- i. The Defendant reiterates the contents of the defence as enumerated and counterclaims for the removal by an order of court of the caution maliciously registered a caveat over LR NO. KAJIADO/OLCHORO ONYORE/5722 together with the damages incurred due to the unlawful registration of the caveat to date.
 - ii. The Defendant avers that the Plaintiff is not entitled to any mesne profits and reiterates that the Plaintiff has breached its right to quiet possession and occupation and as a result of the actions by the Plaintiff, the Defendants have suffered loss and damages.
 - iii. The Defendant avers that the Plaintiff has endeavoured to be used to peddle rumours and innuendos that have no basis and/or foundation whatsoever.
 - iv. The Defendant states that he has suffered loss and damages as a result of the reckless and indifferent falsehoods and misrepresentations being perpetrated by the Plaintiff.
 - v. The Defendant avers that as the registered proprietors of the suit land, they are entitled not only to quiet possession but also to occupation of the land and the Plaintiff's actions constitute trespass and unlawful intrusion.
 - vi. The Defendant further avers that the time the Plaintiff registered the caveat the Plaintiff had no registrable interest in the land and the acceptance of the caveat cannot in law create any such interest in favour of the Plaintiff.
 - vii. The suit is bad in law and is statute barred.
- The 1st Defendant prays that the Plaintiff's suit be dismissed with costs and it be awarded General damages for loss and injury plus costs of the suit.
6. The 2nd Defendant in its statement of defence dated 30th May 2017 contested the Plaintiff's allegations on the grounds that prior to the purchase of the suit property, they carried out due diligence and thus acquired the property legally and their acquisition was protected by law. They thus sought for dismissal of the suit against them.
7. The 4th defendant did not file any statement of defence.



Evidence of the Plaintiffs

8. PW1, Isaac Tipanko Supeyo the fourth son, of the late Keziah Gathoni Supeyo and one of the Administrators of her Estate, adopted his witness statement dated 12th March 2020 as part of his evidence.
9. Upon production of the late Keziah's witness statements and bundle of documents as evidence, counsel for the Defendants objected to production of some of the documents on the grounds that they ought to be produced by their makers as it would be against the rules of fair trial as well rules of evidence. Reference was made to Articles 25(c), 50(2) and 50(4) of *the Constitution*, as well as Section 33 of the *Evidence Act*.
10. Counsel for the Plaintiff asked the court to overrule the objection on the grounds that the documents in contention had been in possession of the defendants and the objection to their production was never raised. He also submitted that, the makers of some of the documents in contention had since passed away and PW1 being one of the Administrators had the legal right to produce them in court. He prayed that the objection be found to be without merit since it was within the provisions of Section 35 of the *Evidence Act* and lack of their production would prejudice the Plaintiff's right to a fair trial.
11. The court allowed production of the documents which were not in contention, as well as documentary evidence of documents whose original copies were unavailable. And by consent the parties agreed to production of the following uncontested documents: Copy of the title deed for LR No.Kajiado/Olchorro-Onyore 5722; Copy of the register; Mutation form; Copy of Daily Nation Newspaper containing the caveat emptor; Copy of proceedings before the Land Disputes Tribunal; Letter from Judges and Magistrates Vetting Board to the Land Registrar.
12. On cross examination he stated that the events leading to this suit began in the year 2001 when he was 30 years old. He confirmed that the original land was subdivided into two portions and a title deed for one of the parcels issued to his mother. Upon following up with the Land Registrar, he was informed that both titles were ready, and when they inquired from the 3rd Defendant, he confirmed that he had the title deed for the other parcel of land; Kajiado/Olchorro-onyore 5722. The surveyor also confirmed that position but the 3rd Defendant never handed it over to the deceased plaintiff.
13. On being questioned about the sale, PW1 stated that his mother never sold the land to the 3rd Defendant and that the document dated 14th September 2000 bearing two signatures including one that was purportedly his mother's signature was false. He also stated that it was his first time to see that document because it was not produced before the elders when the 3rd Defendant appeared before them. He however confirmed that his late mother's statement to the Tribunal dated 3rd December 2009 indicated that she transferred the suit property to the 1st defendant. He also stated that the 3rd Defendant did not appear before the Land Disputes Tribunal.
14. On being asked about the transfer, he stated that they realised there was fraud sometime in 2010 adding that the alleged transfer took place within a day which was peculiar. This is because the 3rd defendant who was well known to them had in the past purchased land from them and the transfer and titles were not issued within a day. He however stated that, he had no evidence of fraud or collusion between the 3rd Defendant and the Land registrar.
15. He confirmed that there was contradiction in his late mother's witness statement dated 6th March 2012 which indicated that the decision to subdivide was from the 3rd Defendant, while the statement dated 13th September 2016 showed that she was the one who decided to subdivide, Kajiado/Olchorro-onyore/ 4912 in 2001 with the intention of developing and/or selling it. For that reason, the 3rd



- Defendant retained the title while looking for a buyer. He maintained that, his late mother never sold the land and the signatures on the documents were forgeries, although he did not have expert opinion to prove so. He also confirmed that in his witness statement he had indicated that the 3rd Defendant was his late mother's advocate.
16. He further stated that he did not know the 2nd Defendant other than the fact that they purchased the suit property from the 1st Defendant hence the reason they were enjoined in this suit. He stated that as per the entries on the green card, the suit property had already been sold to the 2nd Defendant.
 17. On re-examination he reiterated that if the land had been sold, then they would not have asked for the title neither would they have filed the complaint at the Land Disputes Tribunal. He also reiterated that his mother neither entered into a sale agreement with either the 1st or 3rd Defendants nor executed any transfer documents.
 18. After the testimony of PW1, counsel for the Plaintiff sought leave to file further witness statements. Counsel for the Defendants objected to this, but the Court allowed the oral application on grounds of a fair trial and fair hearing.
 19. On 28th April 2022 when this matter came up for further hearing, Mr. Kemboy representing the Plaintiffs sought an adjournment on the grounds that the 2nd Defendant served their documents the evening prior to the hearing and he had not had an opportunity to review them. Counsel for the Defendants objected to this application for adjournment.
 20. Upon consideration of parties' submissions, the Court declined to grant the adjournment, ordered that the said documents to be expunged from record and directed the hearing to proceed.
 21. Counsel for the Plaintiff sought stay of the ruling and proceedings pending appeal of that ruling. However, the Court declined to grant the orders sought on grounds that they were akin to an adjournment, which the court had already pronounced itself on.
 22. Dissatisfied with these directions, Counsel for the Plaintiffs sought to withdraw from representing his clients on the grounds that the court seemed to have a problem with him. Following this turn of events, the court deemed it fit to adjourn the matter to another date.
 23. Consequently, counsel for the Plaintiff filed an application for recusal, which was declined for lack of merit on the 17th November 2022. Nonetheless, on 24th November 2022, Hon. Justice M.N. Gicheru recused himself, and this matter was moved to this court. The hearing then proceeded from where it had reached.
 24. PW2, Rebacca Nadupoi Supeyo adopted her witness statement dated 19th April 2022 as part of her evidence and produced the bundle of documents as exhibits.
 25. On cross examination she stated that although she was not in the country at the time of the alleged transfer, it was illegally undertaken. She was aware of this because between the year 1997 to 2014 when she was out of the Country, she would still visit her home and her mother appraised her of all the issues regarding the suit property. She was aware of the fact that there were 29 acres of land that had earlier been sold to the 3rd defendant. She stated that when the subdivision, which appears to have been initiated by her mother, was carried out she was not present but had been informed by her mother that the instructions to subdivide were given to the 3rd Defendant, who was a close family friend. She however, could neither confirm nor refute whether her mother had paid for the instructions. She also confirmed that since there was trust between her mother and the 3rd Defendant, it was possible that some things were done without documentation.



26. When asked about the signature on the verifying affidavit on page 77 of the Plaintiff's bundle of documents, she stated that the signature appeared to be her mother's. She confirmed that the witness statement indicated "caution fraudulently lifted" because the caution which had been placed by her mother was lifted without her consent. She also confirmed that the presentation book showed that Kshs. 2,000,000 was paid to Keziah Gathoni for Kajiado/Olchorro-onyore/5722 the suit property. She stated that, this was false because the only payment made was for 29 acres which had initially been sold to the 3rd defendant. Therefore, the schedule of payments produced by the 1st and 3rd defendants were never received by her mother. Similarly, the handwriting and signature on the alleged sale agreement was not her mother's although she did not have an expert report to confirm this.
27. She confirmed that her mother filed the suit in 2010 because she had been following up the matter with the 3rd Defendant who was like a father to them. And when the matter was first filed in Machakos High court, there was only one Defendant. On being asked about her mother's statement to the Tribunal which reads "I transferred title number 5722 to the 1st and 3rd Defendants," she contested this and stated; "I dispute that she transferred voluntarily." She however confirmed that the sale agreement dated 14th September 2000 stated that her mother had agreed to process all the title documents including the title"
28. On the issue of limitation of time, she stated that the suit was not time barred because her mother discovered of the fraud and transfer in the year 2008. And while confirming that her mother's witness statement showed that she desired to sell the land, she questioned the subdivision process and the transfer because it was not transparent. She confirmed that her mother subdivided the original land which gave rise to two parcels; the suit property being one of them. She stated that her mother was a good record keeper and that is how they were in possession of all the documents they had.
29. She stated that she was aware that the 2nd Defendant was enjoined in this suit because it purchased the suit property from the 1st defendant hence it is the current registered owner. She stated that the documents produced by the 2nd Defendant showed that the 1st defendant was the owner of the suit property from 6th June 2001. That there was a caution placed by the deceased plaintiff sometime in 2008 which was lifted by the Land Registrar on 24th April 2013. She also confirmed that there was evidence of a sale agreement between the 1st and 2nd defendant dated 9th June 2011 for Kshs. 50,000,000, consent from Land control board dated 16th April 2013, an executed transfer from the 1st defendant to the 2nd Defendant and a Title issued in the 2nd Defendant's name on the 26th April 2013. She also confirmed that from documents presented it appeared that the 2nd Defendant purchased the suit property.
30. On re-examination she confirmed that she had not seen the original sale agreement produced by the 1st and 3rd defendants and she had also never seen an acknowledgement by her mother of the Kshs. 2,000,000. She also stated that the 3rd Defendant never paid her Tuition while she was undertaking her studies in the United States of America. She contested the allegation that her mother had signed the sale agreement and Transfer. She also pointed out that there were no witnesses to witness the signing of the said agreement. She also stated that the schedule of payments did not bear her mother's signatures acknowledging the payments.
31. On the allegation that there was a cheque dated 25th April 2005 to her mother for Kshs. 200,000 towards Mila's fees, she stated that in 2005, Mila who is her sister was still in Kenya. She said she was not aware the 1st defendant paid her school fees.



32. She maintained, that how the land changed hands from her mother to the 1st Defendant is the issue. She also stated that, when the land was sold to the 2nd Defendant on 24th April 2013, this suit was pending in court, after a caution was removed on the same date.

Evidence of the Defendants

33. DW1, Emmanuel Karisa Kenga, a forensic document examiner produced his report dated 14th May 2020 as an exhibit. He testified that he had over thirty (30) years' experience as a document examiner. In this particular case, he stated that compared the deceased's plaintiff's known signature against the questioned signatures using a microscope and magnifying glasses. He found that the signatures were made by the same author who was the late Keziah Gathoni Supeyo.
34. On cross examination he confirmed that he was the one who conducted the forensic analysis. He stated that from the comparison chart, the signatures were similar and made by the same author although he did not examine the signature on the letter of complaint to the Land Disputes Tribunal although he compared both known and disputed signatures. He reiterated that he had over 30 years of experience and had presented forensic reports both locally and internationally and he could not recall a situation where a court had not relied on his report. He recounted that some of the principles of document examination involved considering whether the document was the original or copy of the original; legibility of the document; number of specimen signatures provided.
35. He confirmed that he undertook the analysis on the basis of instructions received from M/S Ondieki & Ondieki Advocates and the documents reviewed were: the sale agreement; transfer forms (although the court notes that no transfer forms have been adduced as evidence); and the mutation forms marked as disputed. He also stated that he could not confirm whether the sale agreement he received was the original or copy of the original. He also confirmed that he worked on the acknowledgment note dated 14th September 2000 although he equally could not recall whether the document was an original or a copy of the original. He also confirmed that he did not work on transfer forms but on the mutation forms which he also could not recall whether they were copies of original documents.
36. He stated that clear photocopies of documents could be used in examining as long as the copies were not manipulated because it was the appearance of the signature that mattered and not its age. While confirming that the sale agreement was a photocopy, he acknowledged the possibility of the ink being compromised, adding that it was not possible to tell the age of the ink on the document. He also confirmed that he did not go to the extent of determining the age of the paper when he conducted the examination in the year 2020 and by this time, Keziah Gathoni had already passed on. He could not get the specimen signatures.
37. On re-examination he confirmed that a photocopy of a document can be examined and an opinion formed as long as the document is not manipulated and from the copies he examined, there was no evidence of manipulation. He indicated that the documents he examined were clear which included the sale agreement dated 14th September 2000 which signature was compared against Keziah Gathoni's known signatures on her supporting affidavit, verifying affidavit and witness statement dated 13th September 2016.
38. DW2 Joseph Gregory Nyamu, the 3rd Defendant adopted his witness statements dated 29th December 2012, 19th May 2017 and 11th February 2021 and his Affidavits as his primary evidence and produced his bundle of documents as exhibits. He testified that the Plaintiff entered into a sale agreement with the 1st defendant and the suit property was lawfully registered to them.



39. He stated that when the suit was filed in 2010 it only had the 1st Defendant and the 2nd, 3rd and 4th Defendants were enjoined in the Amended Plaintiff pointing out that the late Keziah Gathoni in her claim to the Land Disputes Tribunal acknowledged that she transferred the suit property to the 1st Defendant. He also stated that the signatures on the mutation form had been confirmed to be hers by the Document Examiner. He further stated that transaction was duly undertaken such as signing of the sale agreement, executing mutation forms and transfer documents and acknowledgment receipt of Kshs. 200,000 as part of the consideration as per the record of payment although she did not always sign for the moneys received. He also confirmed that prior to this, he had purchased 29 acres of land from her. He indicated that the suit property was sold to the 2nd defendant in the year 2013 to protect his interests because the Plaintiff was in the process of acquiring another title. Further that, there was no inhibition stopping or forbidding any dealings on the title. He thus sought that in the Counterclaim be granted.
40. On cross examination by the Plaintiff's counsel, he confirmed that he was the Director of the 1st Defendant which sold the suit property to the 2nd Defendant.
41. He confirmed that as per the search there was a caution placed by Keziah Gathoni dated 3rd July 2008, but that at this time she did not have any interest on the suit property having sold it in 2001. He claimed that by the time the suit was filed in 2010, the Plaintiff was aware that the 1st Defendant was the owner because she had sold it to them and was receiving payments for the same. He confirmed that by the letter dated 26th February 2012, the Land Registrar wrote to the Deceased Plaintiff asking her to lift the caution and the postal address used was 57217-00200 Nairobi which he confirmed was the same address on the 2nd Defendant's bundle of documents and not the postal address in the mutation form. The property was then transferred to the 2nd defendant after the caution was lifted and there was no illegality in the transaction.
42. On further cross examination he stated that he joined the legal profession in the year 1972 and joined HHM Advocates in the year 1989 and that he did not represent the Plaintiff at any point. However, he confirmed that the handwritten agreement dated 14th September 2000 was written by him although he could not recall where he was when he drafted it. He also acknowledged that it did not indicate the land reference number of the land being sold. He confirmed that by that time, there was no land in existence measuring 200 acres and the LR No. Kajiado/Olchorre-onyore 4912 for the suit property was equally non-existent. He also confirmed that the documents did not show when the Kshs. 200,000 was received and from who.
43. He went on to confirm that by the year 2000 he had been a practicing advocate for about 28 years and that the usual sale agreements were different from what was produced as the memorandum note in this transaction. He stated that the Plaintiff had sold other parcels of land in the same manner and was therefore aware of what she was doing and competent to get into the agreement. He also confirmed that the completion date was neither indicated, nor was the first instalment dated. There was no indication of when the last instalment was to be paid.
44. On being asked about the purchase price of the suit property, he stated that it was Kshs. 30,000,000. And when counsel indicated that the Kshs. 200,000 that was allegedly paid was only 0.6% of the purchase price DW2 claimed, that was survey fees and not the deposit. He also indicated that the sale in agreement in question was not a standard sale agreement and did not have to conform to Law Society of Kenya conditions of sale. He also stated that the Plaintiff was to execute the necessary transfer documents although the agreement did not list the said documents. He confirmed that the first signature on the memorandum note was Keziah Gathoni's and the one below was his.



45. He went on to state that when he initially purchased the 29 acres of land, he later discovered that he had overpaid the purchase price by Kshs. 800,000 in the 1990s. However, this information was not captured in any of the records or documents produced by the defendant. He also confirmed that the schedule of payments produced as evidence was prepared and handwritten by him, save for the Plaintiff's signature. That the schedule of payments was the plaintiff's acknowledgement of money received for the purchase of the suit property which he kept updating as and when payments were made. He indicated that the purchase price was Kshs. 150,000 per acre as per the agreement although there were payments dating back to 12th May 2000 which were all apparently payments towards the suit property. He confirmed that the Memorandum note dated 14th September 2000 did not indicate that there was any agreement entered into on the 9th September 2000. He was put to task on the balance brought forward of Kshs. 800,000, as the first entry showed that the price paid was USD 1500 and Kshs. 100,000 and not the Kshs. 800,000 to which he responded that there was no need to indicate that since they were both aware.
46. He also confirmed that at no point in the Plaintiff's documents did she acknowledge receiving money from him and that save for the schedule of payments, there was no other evidence of the monies paid because they were all paid in cash and was mostly done on the weekends. He also confirmed that there were entries of payments of Kshs. 10,000, 20,000 on diverse dates between 7th July 2000 and 19th August 2000 which he stated that he would either give the plaintiff's son to deliver or personally deliver at Kiserian where the Plaintiff had a shop.
47. As to the chronology of dates appearing on the schedule, he stated that they were not sequential because there are times when he would take a while before recording the payments. He acknowledged that from 8th June 2000 to 7th July 2007 the schedule did not have the Plaintiff's signature acknowledging receipt. On being questioned about the authenticity of the date indicated as 29th February 2006 which was not a leap year where the Plaintiff apparently received Kshs. 10,000, he stated that it was probably a mistake. He also confirmed that the date 31st November 2006 was also a mistake. He also confirmed that the entry dated 14th October 2003 was also erroneous. He indicated that the entry dated 9th April 2001 of Kshs. 300,000 was paid both in cash and by a banker's cheque although he could not remember the specific details of the payments. He did not have copy of the cheque. He also acknowledged that he did not have evidence of the cheque of the entry dated 25th April 2005 of Kshs. 200,000. As per his testimony, he had paid approximately Kshs. 6,000,000 of the purchase price by 7th July 2007. He later stated that as of 6th June 2001 he had paid Kshs. 20,000,000.
48. He confirmed that the registry documents dated 6th June 2001, did not bear the Plaintiff's signature, nor was there evidence of stamp duty paid and he stated that he was not sure whether the 1st Defendant was exempted from paying stamp duty. He confirmed that the mutation was registered on 6th June 2001 and title issued on the same day. On the issue of the consent from Land Control Board he stated that he "believed" it was obtained by the Plaintiff. He stated that they asked the Land Registrar to produce those documents in court but apparently they indicated that some of the documents were misplaced during the relocation of the Land registry to Ngong'. This was not substantiated.
49. In the Supplementary documents dated 26th April 2022 he affirmed that there was a transfer from the 1st defendant to the 2nd defendant but the transfer from the Deceased Plaintiff to the 1st defendant was not produced as exhibit. His explanation was that it was probably at the Lands Registry.
50. He confirmed that by when this matter was referred to the Land Disputes Tribunal in 2008 he did not attend the Tribunal because it did not have jurisdiction.



51. On re-examination he stated that the transaction began in the year 2000 and the allegation of fraud was brought in the year 2017 and was later deleted by the Plaintiff in the further Amended Plaintiff and no particulars of fraud were outlined. He also indicated that the Land Registrar confirmed that he received all the transfer documents before the title was registered in the 1st Defendant's name. He also stated that there was neither a restriction nor caveat against the title to prevent any dealings with it. He stated that he disposed of it because the suit had taken long to be prosecuted.
52. DW3 Joseph Mulinge Munguti, a former Land registrar at Kajiado Land Registry adopted his witness statement dated 15th May 2012 as part of his evidence. He testified that on 6th June 2001, he was the Land Registrar in Kajiado and he received all documents pertaining to the suit property from the late Keziah Gathoni to transfer the suit property. Later, when the Registry was relocated to Ngong' some of the documents pertaining to this transfer were misplaced. He stated that he visited the Ngong' registry to follow up on the same and that is the information that was given to him.
53. On cross examination he stated that he worked at the Kajiado registry between the year 2001 and 2002 and had been transferred to several areas among them Embu, Meru, Kiambu, Nakuru and Thika. He stated that he was familiar with the late Keziah Gathoni who used to visit the land registry together her children and the surveyor and at times with other women. At that time her children were young. Her intention was to sell land parcel Kajiado/Olchorro-onyore 4912. He further stated that she took all the necessary documents to the Land registry. He stated that she was selling her land to Millennium Dream Homes Limited for Kshs. 2,000,000 and title was issued in the 1st Defendant's favour on the 6th June 2001. He confirmed that the signature on the Title deed was his. He indicated that the process of transfer was duly followed from subdivision of the land, to new numbers being issued by the land registrar, seeking consent to transfer, then the land being transferred and registered in the name of the new owner.
54. He confirmed that entries number 69 to 89 in the Presentation Book on page 132-133 of the 1st and 3rd Defendant's bundle were all done on the same day. Entry no. 83 that is the transfer of land from Keziah Gathoni had the same entry date as the one on entry number 69. He stated that entry no. 69 on the presentation book is not legible.
55. On re-examination he confirmed that Keziah Gathoni presented all the documents for transfer and that entries number 66 to 89 were entries of 6th June 2001 and entry number 90 were entered on the 7th June 2001. He stated that entry number 69 was probably a mistake. He confirmed that the signature on the 1st defendant's title was his and that the Deceased Plaintiff had all necessary documents for subdivision of land parcel No. Kajiado/Olchorro-onyore 4912 and the consequent transfer. He also indicated that Keziah Gathoni had sold most of her land to other people.
56. DW4 Leonard Njagi Rucha an employee of the 2nd defendant adopted his witness statement dated 3rd October 2017 as part of his evidence and produced his bundle of documents dated 3rd October 2017 and 26th April 2021 as his exhibits. He stated that he was familiar with the suit and was competent to testify regarding the suit property. He stated that the 2nd Defendant was enjoined in the suit in 2017, following the Amended Plaintiff dated 24th April 2017.
57. He testified that they were informed of the sale of the suit property by agents who directed them M/S to Kipkenda & Co. Advocates who were the vendor's Advocates. They undertook due diligence and executed a sale agreement dated 9th June 2011. He stated that as per the search dated 7th June 2011 the suit property was registered in the name of the 1st defendant and the search confirmed that the suit property had been in the 1st Defendant's name for ten (10) years. He stated that the search also showed that there was a caution placed by Keziah Gathoni on 3rd July 2008 claiming proprietor's interest. They



brought this to the attention of M/S Kipkenda & Co. Advocates who stated that they were not aware of the caution and would approach the Land Registrar to have it lifted. On 28th January 2012, the Land Registrar wrote a letter to Keziah Gathoni and the caution was consequently removed and the transfer effected in favour of the 2nd Defendant.

58. The suit property was purchased for Kshs. 50,000,000 and the same was paid in full. A deposit of Kshs. 35,000,000 was paid. The balance of Kshs. 15,000,000 was deposited in an escrow account pending completion and the stamp duty of Kshs. 2,140,000 equally paid. The property was then transferred from the 1st Defendant and title registered in the 2nd defendant's name on 26th April 2013.
59. When purchasing the property they were not aware of the pendency of this suit. The 2nd Defendant took possession and sometime in the year 2017 they saw some people putting up beacons on the suit property. They conducted a search and confirmed that the suit property was still in its name although there was a forged green card which had been introduced. The 2nd Defendant then put up a caveat emptor, dated 27th September 2013. He indicated the title dated 2001 in Keziah Gathoni's name was fraudulently acquired because at that time the property belonged to the 1st defendant. When they purchased the suit property, they were not aware of any illegality and they acquired it legally. As such, the suit against the 2nd Defendant should be dismissed.
60. On cross examination, he stated that the 2nd Defendant was incorporated on 6th September 2011 and the sale agreement was entered on 9th June 2011. On being asked about this discrepancy, he stated that he was not conversant with company registration procedures and could not respond to that. He also indicated that he started working there in 2013. He confirmed that the documents showed that Kshs. 14,500,000 was transferred to the vendor's Advocates instead of the remaining Kshs. 15 million. He could not explain where the balance went.
61. He confirmed that the 2nd defendant conducted due diligence before purchasing the suit property such as the search dated 7th June 2011. He confirmed that the search showed that there was a caution placed by Keziah Gathoni on 3rd July 2008 which the 1st defendant's advocates undertook to have lifted and it was eventually lifted on 24th April 2013. After its removal, the application to transfer the suit property was made and title issued on 26th April 2013. He stated that the 2nd Defendant had no knowledge of this suit during the transaction.
62. On re-examination he stated that there was no discrepancy between the date their title was issued and details on the green card. He also confirmed that the caution placed in 2008 by Keziah Gathoni was lifted by the Land Registrar. He also confirmed that the sale agreement was entered into by both parties who had capacity to transact.
63. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiffs' submissions

64. On whether the suit is time barred on the claim of fraud and recovery of land as raised by the 1st, 2nd and 3rd Defendants, Counsel submitted that while Section 4(2) of the *Limitation of Actions Act* prescribed that an action founded on fraud should be commenced within three years of the discovery of the same, Section 26 of the *Limitation of Actions Act* was categorical on the period of limitation only begins to run after discovery of the fraud. And in this case, the Plaintiff discovered the fraud in the year 2008 and a caution lodged in the same year. Subsequently, this suit was lodged in Machakos on 28th April 2010. As such, neither the time period of three years nor twelve years had lapsed.



65. On whether there was a valid sale agreement between the Plaintiff and the 1st and 3rd Defendants dated 14th September 2000, counsel submitted that the handwritten document produced had several inconsistencies, among them that it did not describe the parcel of land being purchased, the said property was not in existence at the time, the mode of payment was not indicated and the price on that document was for survey fees of Kshs. 200,000, and it did not contain the seal of the 1st Defendant save for the 3rd defendant's signature who was its Director. Furthermore, the late Keziah maintained that she neither entered into a sale agreement with the 1st and 3rd Defendants nor received any purchase price for the same. And the schedule of payment produced by the Defendants was also marred with inconsistencies such as alleged payment of purchase price in May, June and September, prior to execution of the purported sale agreement. Counsel also indicated that the dates on the payment schedule included weekends and public holidays which was inconsistent with the 3rd Defendant's testimony that he made the payments in person on weekdays. It was also not clear why the 3rd defendant would pay in cash instead of having a clear paper trail such as bank transfers or cheques. And that he also did not produce bank statements to prove withdrawal of the money nor did he explain why he was the one making the payments and not the 1st Defendant who was the purported buyer. Counsel also pointed out that a tabulation of the receipts produced was Kshs. 6,332,500 and not Kshs. 30,000,000 as indicated on the alleged sale agreement, which meant that payment of the purchase price was incomplete to date. Counsel also submitted that the evidence of the former Assistant Land Registrar, Kajiado Lands Registrar confirmed that the parallel titles produced bore his signature. Adding that the report produced by the document examiner Mr. Emmanuel Kenga was also full of inexplicable procedural flaws such as not taking the actual signature of the late Keziah during her lifetime for comparison with the purported signature on the sale agreement. It was thus of no probative value while citing the Court of Appeal case of *Ogla Jemeli Barng'tuny vs Shirji Naran Virji* [2021] eKLR where Mr. Kenga's specimen signatures were equally discredited in that case.
66. In supporting the submission that the concept of absolute and indefeasible ownership could not stand where the title was not acquired procedurally, counsel highlighted that the sale agreement did not have the Land Control Board consent, there was no evidence of duly executed transfer forms, there was equally no evidence of payment of stamp duty and the presentation book produced as evidence had discrepancies in the entries and dates. Therefore, that title should be cancelled for not having been properly acquired as was held by the Supreme Court in *Dina Management Ltd vs County Government of Mombasa & 5 others* [2023] KESC 30 (KLR).
67. On whether the transfer and purchase of the property from the 1st Defendant to the 2nd Defendant was legal, counsel submitted that having outlined why the 1st Defendant's title was not regular meant that no legal title could be passed to any other entity. He also submitted that it was clear that the property was disposed of during the pendency of the suit contrary to the doctrine of *lis pendens* as was held by the late J. Onguto's holding in the case of *Ciena Plains Company Ltd & 2 others vs Ecobank Kenya Ltd* [2017] eKLR and the Court of Appeal in *Naftali Ruthi Kinyua vs Patrick Thuita Gachue & another* [2015] eKLR. Counsel also pointed out that the sale took place when the 3rd Defendant was facing charges before the Judges and Magistrates Vetting Board in relation to the suit property. And if the 2nd Defendant had conducted due diligence, it would not have purchased a property that not only had a caution lodged against it, but also had an active case in Court making reference to the Court of Appeal in *Emmanuel Ngade Nyoka vs Kitheka Mutisya Ngata* [2017] eKLR and could thus not invoke the doctrine of *bonafide purchaser for value*. Counsel also pointed out that it was peculiar how the 2nd Defendant purchased the suit property on 9th June 2011 while it came into existence/ was incorporated on 6th September 2011. Counsel also highlighted that it was deceitful of the 2nd Defendant to feign ignorance of the pending suit while the final purchase price was made while they were parties to the



suit. Counsel submitted that a pre-incorporation contract had no legal validity because a contractual capacity would only exist upon incorporation as was held by Justice Havelock in *Impak Holdings Company Ltd vs Come-Cons Africa Ltd & another* [2013] eKLR.

68. On the issue of costs, counsel submitted that as costs follow the event and the Plaintiff had proved her case on the required threshold, she was thus entitled to the costs of the suit together with the other prayers sought.

The 1st and 3rd Defendants' submissions

69. On the issue of fraud and misrepresentation, counsel submitted that other than mentioning the issue of fraud in a paragraph, the Plaintiff did not produce evidence to prove the same citing the holding in the cases of *Ratilal Patel vs Lalji Makanji* [1959] eKLR 314 and *Vijay Morjaria vs Nansigh Madhusingh Darbar* (2000) eKLR. Adding, that fraud and misrepresentation were not sufficient grounds to impeach a title under Section 143 of the Registered *Land Act* which was the Act in existence at the time and that the DW3 in his testimony confirmed that the late Keziah transferred the suit property to the 1st defendant. Counsel also submitted that the Plaintiff never produced evidence that the title for property Kajiado/Olchoro Onyore/4912 ever left her possession and was in the Defendants' possession at any time. Therefore, the allegation of fraud could not be substantiated because it means that she is the one who caused the land to be subdivided and transferred to the Defendants.
70. On the issue of limitation of time, counsel submitted that the suit was time barred because it was filed in the year 2010 after she discovered trespassers on her land in 2008. This was beyond the three year period because according to Counsel for the Defendant's fraud could only have commenced in May 2001 upon subdivision of the property adding that the suit was also contrary to Sections 27, 28 and 143(2) of the Registered *Land Act* as well as Section 107(1) of the *Land Registration Act*. Therefore, the suit should be dismissed.
71. Counsel also submitted that that the Amended Further Plaint dated 14th September 2016 was filed without leave of Court, Counsel for the Plaintiff contested this allegation by indicating that leave was duly sought and granted.
72. On the doctrine of *lis pendens*, counsel submitted that this doctrine applied to Transfer of Property Act transactions which had since been repealed and was not applicable to the Registered *Land Act* transactions. Therefore, the Land Registrar had the power under Section 71 of the Registered *Land Act* to lift a caution which was incompetent. Counsel further submitted that in the Plaintiff's Land Dispute Tribunal's claim she admitted to having transferred the suit property 5722 to the 1st Defendant and in the submissions to the Law Society of Kenya she admitted to having subdivided parcel 4912 to 5721 and 5722 (the suit property). He also submitted that there was a sale agreement between the Plaintiff and the 1st Defendant and thus the Plaintiff's claim was unmerited and she had not proved any of the allegations.
73. Counsel submitted that the Plaintiff's evidence did not prove any of the allegations pointing out that PW1 testified that the 3rd defendant was not the family lawyer which further extinguished the claim that the fraud was perpetrated by the 3rd defendant as the family lawyer. Further, this transaction took place while PW2 was in the USA for further studies which means her statement was hearsay and of no probative value.
74. Counsel also submitted that at the time of entering into the Memorandum of Sale in the year 2000, the law in place allowed parties to enter into such agreements and be signed by the party to be charged or by some person authorised to sign it. And duly paid for the property as per the schedule



of payments noting that the late Keziah had severally admitted to having transferred the property to the 1st defendant. Counsel thus submitted that the registration of title could not be challenged on the grounds that the registry could not trace the relevant documents because the former Assistant land registrar had testified to having seen all the relevant documents prior to the transfer.

75. As such, the Plaintiff had not discharged her burden of proof and the suit should be dismissed with costs to the 1st and 3rd Defendants.

The 2nd Defendant's Submissions.

76. On whether the 2nd Defendant held a valid title to the suit property, counsel submitted that the 1st Defendant's title was in existence from the year 2001 and the 2nd Defendant came upon the land in 2011. And by the time it was joined in the suit in 2017, the suit had been in existence in court from the year 2010 and they had been the legal proprietors of the suit property from the year 2013. Counsel pointed out that in 2011 when the 2nd Defendant's interest in the land began, there was a caution against the land which was later lifted and the transaction concluded in the year 2013. Counsel submitted that due diligence was undertaken before completing the transaction and it was clear that the caution was procedurally lifted. That if the suit property had been purchased fraudulently, the 2nd Defendant had all the time to dispose it off between the year 2013 and 2017. Counsel also submitted that it was on record that the Plaintiff subdivided the land with an intention to sell it to and actually sold it off to the 3rd Defendant as per the memorandum of sale produced as evidence. Counsel also pointed out that the former land registrar had confirmed that the suit property was legally sold off using all requisite documents.
77. Counsel went on to submit that fraud against the 2nd Defendant neither having been pleaded nor evidenced, meant that the 2nd Defendant duly purchased the suit was property as an innocent purchaser and was legally entitled to it. Reference was made to the following cases on the issue of innocent purchaser: *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] KECA 24 (KLR) and *Dina Management vs County Government of Mombasa & others*.
78. On the issue of capacity to contract, Counsel submitted that in 2011, one had to first reserve a name prior to registration. If the 2nd Defendant's Directors chose to enter into the agreement on the basis of the reserved name, and the seller did not have an objection to it, then a third party cannot raise an objection to the validity of such a contract. Adding that it was not an issue for determination as long as the contract was valid citing *Anne Wanjiku Gathumbi vs Joseph Mwangi Mwai Thika* ELC 73 of 2012. Counsel thus prayed for dismissal of the suit against the 2nd Defendant.

The 4th Defendant's Submissions.

It appears the 4th Defendant did not file any submissions.

The Plaintiff's supplementary submissions

79. In a rejoinder, counsel for the Plaintiff rehashed that the note was indefinite and deficient and should not be held as a valid memorandum for disposition of land. Counsel added that the issue of defeasibility of title whether in RLA or RTA was defeasible on account of fraud, illegality, mistake or misrepresentation citing the Court of Appeal in *Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others* (2019) eKLR.
80. On the doctrine of *lis pendens*, counsel once again submitted that the doctrine is a common law doctrine which is unaffected by statute citing the Court of Appeal in *Margaret Wairimu Warima vs Phylis Wanjiru Thairu & 2 others* [2017] eKLR



Analysis and Determination

81. I have considered the pleadings, the evidence on record, the written submissions, the statutes and the authorities cited. The issues for determination are:
- i. Whether property Kajiado/Olchoro Onyore/5722 was regularly and procedurally transferred to the 1st Defendant;
 - ii. Whether the Plaintiff is entitled to the prayers sought;
 - iii. Whether the 1st and 3rd Defendants are entitled to the prayers sought in their counterclaim;
 - iv. Whether the suit against the 2nd defendant should be dismissed as sought
 - v. Who should bear costs of the suit?
82. While there are several inconsistencies in this suit regarding how the suit property changed hands from the Deceased Plaintiff, the late Keziah Gathoni Supeyo to the 1st Defendant, it is not in contention that property Kajiado/Olchoro Onyore/4912 belonged to the Plaintiff. This property was subdivided into two parcels namely Kajiado/Olchoro Onyore/ 5721 and Kajiado/Olchoro Onyore/5722 (the suit property) in the year 2001. To support this, the Plaintiff produced mutation form dated 15th May 2001, which shows that the survey was conducted on 5th October 2000. The former Land Registrar Kajiado who testified as DW3 also confirmed this position and its accuracy.
83. The Plaintiff also acknowledged that she had intentions of selling property, Kajiado/Olchoro Onyore/5722 upon its subdivision. In her witness statement dated 12th April 2017, she claimed that the 3rd defendant was known to her because she had earlier sold 29 acres of her land to him. This was acknowledged by the 3rd defendant in his testimony. So when she decided to subdivide parcel No.4912 she asked the 3rd Defendant to undertake the subdivision and they instructed a surveyor by the name Joseph Kaboi. The subdivision was successfully undertaken and the 3rd defendant gave her title for parcel 5721. He however proposed to keep the tile for parcel 5722 to expedite the disposal process once he got a buyer. She claims that she did not have any suspicions because he was a respected advocate and well known to her. And around this time he informed her that he had found a buyer who wanted to develop a golf course on the suit property. However, she never met the said buyer. It was until sometime in 2008 when she noticed strangers on her land and they claimed that they were the owners of the suit property. The said strangers were from the 1st defendant. Following this, she learnt that the suit property was allegedly transferred to the 1st defendant in 2001 without her consent or her signing any documents. And as per the records at the Lands registry, it was transferred for a consideration of Kshs. 2,000,000 which she claimed she did not receive. She thus put a caution against the suit property and filed a complaint at the Land Disputes Tribunal Ngong against the 1st defendant. It was following this complaint that she learnt that the 1st defendant was the 3rd defendant's company. The 3rd defendant however never honoured summons to appear before the Tribunal. By this time he was a Judge of the Court of Appeal.
84. DW2 Joseph Gregory Nyamu testified on 5th October 2023. He told the court that he relies on the sale agreement dated 14th September 2000 between himself and the deceased plaintiff (Keziah Gathoni Supeyo). The same is on page 155 of the 1st and 3rd Defendant's Trial Bundle.

The same reads;

“I Keziah Supeyo has agreed to sell to Millenium Dream Homes Ltd 200 acres of my land at Olootepes at Kshs.150,000/= per acre. I acknowledge receipt of Kshs.100,000/=



being additional survey fee. I had previously received Kshs.100,000 in connection with the previous survey. I have agreed to process all the documents including the title.”

Dated at Nairobi this 4th day of September 2000.

Signed

Signed “

85. From the above, it is clear that the land is not described. It is not clear from what land the 200 acres was to be hived from. The purchase price is not stated. The completion period is not mentioned. It is not clear whether the Kshs.200,000/= was part of the deposit of the purchase price.

86. When cross-examined by Mr. Kemboi for the Plaintiff, DW2 stated that he is the one who wrote the agreement. He said it was in the form of a note and it is signed by himself and Keziah Gathoni Supeyo. He admitted that it does not state when the Kshs.200,000/= was received. He also admitted that the said agreement did not conform with the Law Society of Kenya conditions of sale but that it complied with the law.

The same does not state that the purchase price was to be paid in instalments. The said sale Agreement does not spell out the rights and obligations of each party.

87. He also admitted that he had previously purchased 29 acres from the plaintiff thought he had over paid by Kshs. 800,000/=. He maintained that the plaintiff was competent to handle this transaction. It was DW2’s testimony that by the year 2000, Sections 3(3) of the Law of Contract Act had not come into operation hence this note was valid.

88. The signature said to be Keziah Gathoni Supeyo’s has been contested by PW1 and PW2.

DW1, Emmanuel Karisa Kenga a Forensic Document Examiner produced his report dated 14th May 2020 as an exhibit in this case. It states that the signature on the sale agreement is that of the deceased plaintiff.

89. In this particular case, the forensic examiner DW1 did not have specimen signatures from the Keziah Gathoni. What was used were signatures picked from different documents such as Affidavits, and which were copies of the original and not the original documents. For courts to rely on expert opinions, it would require a high degree of certainty. I am of the view that an expert opinion without proper and accurate specimens would be akin to speculation rather than evidence-based or factual. On the issue of veracity of such opinions, the Court of Appeal in *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] KECA 130 held: “...We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so...”

90. Similarly, Justice Mativo in *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* [2016] eKLR held that:

“...The fundamental characteristic of expert evidence is that it is opinion evidence. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert’s opinions are well founded.



While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value. This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence.

It is important to bear in mind the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account...

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.” An expert report is therefore only as good as the assumptions on which it is based.”

91. I am persuaded that the forensic report placed before this court and DW1’s evidence falls short of the test for admission of such evidence. However, be that as it may, the onus was on the Plaintiff who claimed invalidity of the signature on the sale agreement to prove that the said signature was indeed not hers. This is articulated under Section 109 of the *Evidence Act* which provides that: “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.” I will leave it at that.
92. The next step is to consider whether the process that led to the transfer and eventual registration of the suit property in favour of the 1st Defendant was legal, regular and procedural.
93. It is not in contention that the subdivision process was proper as both parties have admitted. What would follow after executing a valid written sale agreement, would be seeking consent from Land Control Board to transfer, obtaining the actual consent, executing the transfer documents, conducting valuation for stamp duty, payment of stamp duty, lodging all these documents at the Lands Registry, and finally getting a title deed in favour of the 1st Defendant. Other than the contested memorandum of sale none of the other requisite documents for transfer of land were produced as evidence. No copies of consent from the Land Control Board, executed transfer forms, receipt for stamp duty, were produced. What the Court has been told is that the said documents were misplaced in the Lands Registry. What this court is being asked to do, is to believe that the transfer was procedural but has not been given evidence to prove that fact. I want to believe that the 3rd Defendant who is not only a seasoned advocate



but has been a member of the bench is cognisant of the value of the standard of proof in civil cases. This is also anchored in Section 107 of the Evidence Act which provides:

“

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“Section 109 goes further to stipulate that: The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

94. On proving a case on the required threshold, Justice Sila Munyao in *Mikuro v Moruri & 2 others* [2024] KEELC 5464 (KLR) held:

“... I have also found out that save for mere word of mouth there is nothing tangible that supports the contention of the 2nd defendant that the plaintiff appeared before him and executed the charge in his presence. It was of course submitted by counsel for the 2nd and 3rd defendant, that the 2nd defendant is not an ordinary witness as he serves as the Solicitor General. Whether or not the 2nd defendant is the Solicitor General of this country counts for nothing on his credibility as a witness. Just because one holds a high public position does not by itself mean that such person is a credible witness. In fact, the office or position that one holds is completely immaterial. In law, all parties and all witnesses are put on an equal footing regardless of their offices or positions, a bearing so succinctly put by the Constitution at Article 159 (2) (a) which provides that justice shall be done to all irrespective of status. The law is blind to status. It puts out social pedigrees and stratifications aside and treats all equally. In law, the most impecunious and the richest are on equal ground. There is nothing like high and mighty in law. Even a priest or judge appearing in court as a party or witness is stripped of his robe...”

95. The evidence before the Court such as the presentation book also falls short of meeting the probative value. An example is the copy of the presentation book on Page 132 and 133 of the 1st and 3rd Defendants’ bundle of documents. The said book has unclear entries which DW3 could also not confirm. Entry number 71 (which is evident has some alterations) on page 132 shows that there was a mutation by Keziah Gathoni Supeyo. On page 133 there is an entry which shows that Kshs. 2,000,000 was paid for property known as Kajjado/Olchoro Onyore/5722. However, going by the sale agreement produced by the 1st and 3rd Defendant the property was allegedly purchased for Kshs. 30,000,000. Additionally, the 1st and 3rd Defendants claim that by the year 2007, the late Keziah Gathoni had received a total of Kshs. 6,000,000 for the property. However, save for the schedule of payments adduced as evidence, there was no evidence of the alleged cheques that were used to pay or any bank statements. Counsel for the Plaintiff questioned the said schedule as some dates were non-existent such as 29th February 2006 and 31st November 2006 which DW2 acknowledged stating that it must have been erroneous. DW2 was also questioned on the chronology of dates indicated and he stated that he did not record all the payments as and when they were made which explains why the dates were not in order.



96. So, what this Court has been provided with, is a title deed. And, whereas a certificate of title is proof of ownership as provided by Section 26 of the *Land Registration Act*, the said title ought to have been procedurally procured and the process of acquisition should be seamless and without any shadow of doubt on its credibility. This was the holding of the Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR where it was stated; “... We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”
97. From the foregoing, this Court is not satisfied that the suit property was procedurally and regularly transferred to the 1st Defendant. As I have already outlined, there are glaring evidential gaps that have failed to satisfy the validity of the transaction, such as lack of evidence of the transfer and inconsistencies in the payments of the purchase price.
98. DW 2 produced a schedule of payments in pages 156-162 of the Trial bundle. He admitted that he is the one who wrote but the expected the deceased plaintiff to keep a similar record. The acknowledgements are not signed by the deceased plaintiff. It is not clear when this record was made.
99. When cross-examined by the plaintiff’s counsel, DW2 admitted there was a mistake in the sequence of payments. This explanation was that he would record later after making payments.
100. The transfer from the plaintiff to the 1st defendant was not produced. The stamp duty was not paid. DW2 was not sure if the 1st defendant was exempt from paying stamp duty. Other crucial documents are missing like application for consent, consent from the Land Control Board and the consent to sub-divide and transfer.
101. DW2 Joseph Mulinge Munguti appeared to state that he was presented with all the documents before he effected transfer in favour of the 1st Defendant. He stated the documents could not be retrieved after the registry was moved to Ngong. This appears to be more of an excuse than the truth. I highly doubt that the DW3 saw all the requisite documents, necessary to effect transfer in favour of the 1st Defendant.
102. This suit has been pending for more than twenty (20) years. What could have been more important than to expend all the necessary resources to ensure that the said documents were retrieved by all means. The only logical conclusion is that these documents did not exist. The deceased plaintiff has maintained that she did not sign any transfer in favour of the 1st defendant.

I find that there was no proof of Consideration for the purported contract which vitiated the contract hence the same was rendered null and void.

In the case of *Esther Kabugi Njuguna Vs. Martha Chebet & 3 Others* (2020) eKLR ; Mutungi J observed thus;

“Having found and held that there was no proof of payment of the purchase price to the plaintiff and/or that the plaintiff had signed the transfer of the suit land in favour of the 1st defendant, it follows that the sale transaction was voidable on account of lack of consideration and that the transfer effected in favour of the 1st defendant was ineffectual and could not confer any interest.....”

103. It is the plaintiff’s case that there is no evidence of any executed transfer from the plaintiff to the 1st defendant.



Section 110(1) of the Registered *Land Act* (Repealed) required a person executing an instrument to appear before the Land Registration and unless known to the land Registrar had to be accompanied by a credible witness for the purpose of establishing his identity.

104. DW3 only produced a presentation book which shows the plaintiff presented a transfer in favour of the 1st defendant for Kshs.2, million. DW2 told the court that the purchase price was Kshs.30, million. There is doubt that any transfer was executed by the deceased plaintiff in favour of the 1st defendant. The deceased plaintiff's version of events is what most likely happened. That upon sub-division, DW2 kept the two titles and later in collusion with DW3 had the suit property transferred in favour of the 1st Defendant.
105. What explanation can an experienced Advocate offer that he drew up a sale agreement like a lay man. It does not make sense at all.
106. The 1st and 3rd defendants' argument is that the fraud has not been proved at all. I am cautious of the fact that the standard of proof is higher in fraud cases than on a balance of probabilities. However I find that the missing ingredients in the sale agreement, the missing transfers and other relevant documents confirm that the transfer in favour of the 1st defendant was fraudulently undertaken. I find that the particulars of fraud have been undertaken. By writing "I have transferred to the 1st defendant," the deceased plaintiff who was a layman may have meant something else.
107. The Deceased plaintiff denied that she transferred the suit property to the 1st defendant. From the foregoing I find that the suit property was irregularly and unprocedurally transferred to the 1st defendant.
108. From the above findings it means the title registered in the name of 1st defendant on 6th June 2001 was null and void abinitio. This means they could not benefit from an illegality perpetuated by the 3rd defendant. Furthermore no resolution was produced to show that the 1st defendant had agreed to borrow money from the 3rd defendant to purchase the suit property.
109. It therefore goes without saying that the 1st and 3rd defendants are not entitled to the prayers in the counter claim.
110. This means the plaintiffs would be entitled to the reliefs sought in the plaint which I would enumerate later on in this Judgement.
111. It is not in dispute that the 1st defendant decided to dispose of the suit property during the pendency of this suit. This is against the doctrine of *lis pendens*. The explanation given by the 3rd defendant was that there was no inhibition barring any dealings on the suit property. The 1st and 3rd defendants were aware of the pending suit. The Doctrine of *lis pendens* is to ensure the subject matter in dispute is preserved until the hearing and determination of the suit.

The court of Appeal in *Anne Jepkemboi Ngeny Vs. Joseph Tireito & Another* (2021) eKLR addressed itself on the doctrine of *lis pendens* thus;

“... In Civil Appeal Number 44 of 2014, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR, the Court address the issue of *lis pendens* as follows;

“Black’s Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending...



The actions of the appellant and the 2nd respondent of proceeding to alienate the property and having it registered in their names during the pendency of the litigation process, ran afoul of the doctrine of lis pendens and was also tantamount to contempt of court... Under the circumstances, the learned Judge cannot be faulted for cancelling the Title deeds and ordering the retransfer of the properties to the 1st respondent...”

112. The legal effect of the lis pendens principle was extensively discussed by the Court of Appeal in *Naftali Ruthi Kinyua Vs. Patrick Thuita Gachure & Another* (2015) eKLR, where the court stated;

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant’s alienating before the judgement or decree, and would be driven to commence his proceedings de novo subject again to defeat by the same course of proceeding”.

Similarly in the *In Re Estate of Solomon Muchiri Macharia* (2016) eKLR Mativo J (as he then was) stated thus;

“The doctrine of his lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court in which a dispute on rights or interest in immovable property is pending by private dealings which may remove the subject matter of litigation from the ambit of the courts power to decide a pending issue or frustrate its decree”.

The learned Judge also quoted Mulla’s transfer of property Act, 6th Edition where the Authors stated at page 241 that;

“The effect of the maxim is not to annul the conveyance but only to render it subservient to the rights of the parties subject to litigation”.

113. It was therefore lack of good faith in the part of the 1st and 3rd defendants to dispose of the suit property in 2013 during the pendency of this suit.
114. It is DW4’s evidence that when they did a search at the Land Registry they noticed that there was a caution placed in favour of Keziah Gathoni Supeyo who claimed proprietors interest. It was his testimony that they brought their concern to the vendor’s Advocates who assured them that the same would be removed.
115. The notice to remove the said caution is said to have been sent to Keziah Gathoni Supeyo but through the wrong address. This means the caution was removed without her being notified in order to defend her case. DW 4 maintained they were not all aware of this pending suit. The caution should have however raised an alert. It ought to have intensified its due diligence but it did not. Be that as it may, I find that it may have been a victim in these circumstances.

However it ought to claim from the 1st Defendant for any loss. Given that the 1st defendant had no valid title to pass to the 2nd Defendant, it means they did not obtain a good title from the 1st defendant. The sale to the 2nd Defendant was merely to defeat the plaintiffs in interest on the suit property.

116. From the above evidence produced, three things emerge from this transaction. First, the sale agreement was executed on the 9th of June 2011 while DW4 indicated that the company was incorporated on 6th September 2011 and the CR12 produced in court confirmed this. This then means that the sale



agreement was entered into by a non-existent entity, which negates the contract. This was the holding of Justice Kizito in *Melt Grand Ltd v Bio Foods Products Ltd* [2024] KEHC 4938 (KLR) where it stated;

- “ 17. It also lacked in respect to legality as a company cannot contract before it is formed. There was nothing to enforce.
18. The general proposition in law is that a company is born mature. It cannot be said to be a minor. Therefore, it is responsible for its acts immediately it is born for then it attains legal personality after incorporation.
19. This principle was aptly articulated by Lord MacNaghten in his celebrated sentiments in the locus classicus decision of the House of Lords in *Salomon v Salomon & Co Ltd* [1897] AC 22 at 51 – 54 as follows; “The company attains maturity on its birth. There is no period of minority – no interval of incapacity. . .
22. Therefore, corporate personality that is the common denominator for companies cannot not be assumed before incorporation since before then, there is no company in existence.”

117. From the foregoing, can the 2nd defendant thus claim to be a bona fide purchaser for value? The issue of bona fide purchaser for value was put to rest by the Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) where it stated;

“

“ 92. On the same issue, the Court of Appeal in *Samuel Kamere Vs, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

...

94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

...

111. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser...”

As stated earlier, the 2nd Defendant failed to prove that is a bona fide purchaser for value as stated in the *Dina Management Case*. The 2nd Defendant’s title can be impeachable.



118. Before I conclude this matter I am of the view that the death of Isaac Tipanko Supeyo (PW 1) meant that the surviving Administrator, Rebecca Nadupoi Supeyo (PW2) could continue with completion of the distribution of the estate of the deceased (Keziah Gathoni Supeyo). His death does not affect this suit at all and there was no need to substitute him. In any case he had already testified.
119. In conclusion I find that the suit property belonged to Keziah Gathoni Supeyo as at 6th June 2001 and any transactions thereafter are illegal and or irregular.
120. I find that the plaintiff has proved their case against the defendants on a balance of probabilities. As the court was not guided on mesne profits, I decline to award any.
121. Accordingly Judgement is entered in favour of the plaintiffs as against the defendants jointly and severally as follows;
- a. That a declaration is hereby issued that the title deed to the defendants for LR. Kajiado/Olchore-Onyore/5722 is ineffectual, null and void ab initio and incapable of conferring any proprietary rights;
 - b. That an order is hereby issued directing the 4th Defendant, the Land Registrar, Kajiado North to rectify the register by cancelling the 1st Defendant as the proprietor of LR. Kajiado/Olchore-Onyore/5722 within Ninety (90) days from the date of this Judgement.
 - c. That an order is hereby issued directing the 4th Defendant, Land Registrar, Kajiado North to rectify the register by amending the same to have the Plaintiff as the absolute proprietor of LR. Kajiado/Olchore-Onyore/5722 within Ninety (90) days from the date of this Judgement.
 - d. That a declaration is hereby issued that the alleged registration of the 1st Defendant as owner of the suit property was illegal, null and void ab initio;
 - e. That an order is hereby issued cancelling the Registration of the 2nd Defendant Wonders Valley View Limited, as the proprietor of LR. Kajiado/Olchore-Onyore/5722 within Ninety (90) days from the date of this Judgement.
 - f. That Costs of this suit shall be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF FEBRUARY 2025.

L. KOMINGOI

JUDGE.

In the presence of:

Mrs. Okina for Mr. Kemboi for the Plaintiffs.

Mr. Ondieki with Prof. Migai Aketch and Ms. Naliaka for the 1st, 3rd Defendants.

Mr. Namada for the 2nd Defendant.

Mutisya – Court Assistant.

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