



Kimuri Housing Company Limited v Kahinga & 5 others; Oakwood Springs Estate Association & another (Interested Parties) (Civil Suit 189 of 2015) [2023] KEELC 16623 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 189 OF 2015
JA MOGENI, J
MARCH 27, 2023**

BETWEEN

KIMURI HOUSING COMPANY LIMITED PLAINTIFF

AND

DAVID WAWERU KAHINGA 1ST DEFENDANT

CHRISTINE IMBOSA MBOGUA 2ND DEFENDANT

MARY CONSTANTIA COFFEILD (BEING ADMINISTRATOR/EXECUTOR OF THE ESTATE OF MAUDE LAURENCIA SULLIVAN) 3RD DEFENDANT

DIRECTOR OF SURVEY 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

HON ATTORNEY GENERAL 6TH DEFENDANT

AND

OAKWOOD SPRINGS ESTATE ASSOCIATION INTERESTED PARTY

ANNE WANGECHI GITHINJI INTERESTED PARTY

JUDGMENT

1. By a further further amended Plaintiff dated 17/02/2022, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a. A declaration that the purported sale and transfer of Land L.R. No. 7969 (I.R. 8607) to the 1st Defendant and 2nd Defendant was un-procedural and illegal.



- b. An order compelling the Defendants to execute and deliver up to the Plaintiff for registration a transfer and all other relevant documents thereto in respect of property known as L.R. No. 7969(I.R. 8607) to facilitate transfer of the said property to the Plaintiff within 14 days of the order hereof and in default thereof, the Land Registrar to execute the Transfers and all other documents necessary to transfer ownership of the suit property to the Plaintiff at the Defendants costs.
- c. A permanent injunction to restrain the 1st and 2nd defendants whether by themselves, their agents or servants from selling, alienating, trespassing, charging or in any other way interfering with the Plaintiff's quiet possession of parcel of Land L.R. No. 7969 (I.R. 8607) or any sub-division thereof.
- d. A permanent injunction to restrain the 6th Defendant from approving the subdivision plans presented for approval by the 1st and 2nd Defendants.
- e. A permanent injunction to restrain the 4th and 5th Defendant from issuing titles arising from subdivision of land parcel L.R. No. 7969 (I.R. 8607) as proposed by the 1st and 2nd Defendants.
- f. A declaration that the Plaintiff is the bona fide beneficial owner as a purchaser for value of L.R No. 7969 (I.R. 8607).
- g. A declaration that any title held by the First and Second Defendants to the effect that it relates to LR. No. 7969(IR No. 8607) is fraudulent, null and void and an order for cancellation and/or nullification of the said title do hereby issue.
- h. A mandatory order that the first and second defendants, their agents, servants and/or employees or any third parties occupying any portion of the suit property LR 7969(IR 8607) on the strength of the 1st and 2nd Defendants purported ownership of the suit property to the Plaintiff and demolish any structure(s) and/or building(s) erected thereon and in default of the such vacating and/or demolition, the plaintiff be at liberty to evict and/or demolish such structures erected on the suit property at the 1st, 2nd and/or such third parties occupants costs.
 - i. General damages.
 - j. Costs of the suit.
 - k. Any other relief that the court may deem it.

The Plaintiff's case

2. The Plaintiff initiated this suit on 6/03/2015. It was the plaintiff's case that at all material times, it has been in quiet, peaceful, and uninterrupted possession of the suit property and carried out developments on it. They allege that on or about 15/11/2005, the Plaintiff purchased from Maude Laurencia Sullivan (hereinafter referred to as the "deceased") all that parcel of land known as L.R. No. 7969(IR 8607) measuring 10.21 acres located in Ruaraka within Nairobi at a consideration of Kshs. 45,000,000/-.



3. It is their contention that suit property was charged to Fidelity Commercial Limited Bank (hereinafter called the “Bank”) which had already commenced recovery proceedings under its statutory power of sale through Keysian Auctioneers on 17/10/2005. It was an express term of the agreement for sale that part of the purchase price was to be utilized to pay the Bank to redeem the vendor’s account with the said Bank and obtain the discharge of charge for the property. That in the performance of the contract, the Plaintiff paid (over a period of time) the agreed purchase price of Kshs. 45,000,000.00 where Kshs. 5,000,000/- was paid to the Bank and the remainder to Mr. P.J. Kakad who was acting for the Vendor and later on her Estate.
4. They contend that on or about 3/12/2012, the Plaintiff obtained the subdivision approval from the Director of City Planning & Architecture, Nairobi to subdivide the 10-acre suit property into 107, 40x 80 plots. That over a period of time, the Plaintiff has sold some of their acre plots to third parties who have developed the same.
5. The Plaintiff avers that on or about 1/08/2006, the deceased passed on before executing the transfer documents in its favour. On or about 14/02/2007, the 3rd, 4th and 5th Defendants were issued with Grant of Probate of Written Will to the estate of the deceased pursuant to succession cause no. 3094 of 2006, the suit is however ongoing as there was an objection raised by Johnie Sullivan.
6. It is the Plaintiff’s contention that in completion of the sale, the deceased’s advocates and the 3rd,4th and 5th Defendants forwarded to the Plaintiff the following completion documents; rent clearance certificate, letter of consent from the commissioner of lands, grant of probate of written will, a transfer duly executed by the 3rd,4th and 5th Defendants and discharge of charge duly executed by the bank.
7. The Plaintiff further asserts that it has been regularly paying rates in respect of the suit property as and when they fall due which payments are acknowledged by the relevant authorities.
8. That the 3rd,4th and 5th Defendants have been awaiting the confirmation of grant in succession cause no. 3094 of 2006 in order to facilitate the transfer of the suit property.
9. The Plaintiff contends that on or about 4/03/2015, the 1st Defendant in the company of about 20 goons invaded the undeveloped part of the suit property and chased away the Plaintiff’s workers. That the said hired goons blocked the third parties who have purchased the sub-division from accessing their homes. That on the same day, the Plaintiff reported the matter to the police only for the 1st defendant to produce a fraudulent and forged title to the property (which indicated that the 1st and 2nd defendants were the registered proprietors of the suit property). That further, the 6th defendant has issued two original titles in respect of the same property.
10. That the 1st and 2nd defendants unlawfully, procedurally, fraudulently, and deceitfully obtained another title in respect to the suit property. That the 6th and 7th defendants conspired with the 1st and 2nd defendants to fraudulently obtain title of the suit property having known that the purported sale and transfer is tainted with illegality.
11. The plaintiff listed the particulars of fraud, illegality and forgery as follows: Filing a fictitious claim against the plaintiff herein knowing that the claim is bona fide with intention to fraudulently and unlawfully obtain a judgment and decree against the Plaintiff, unlawfully obtaining orders from this Court with intention to defraud the Plaintiff, fraudulent execution of the decree and orders obtained by fraud upon Court and the Plaintiff, presenting and or causing a transfer of the suit property to the 1st and 2nd defendants having known that the transfer is tainted with illegality, whereas there has been no Confirmation of Grant in HC Succession Cause No. 3094 of 2006, the title purports to have entry on registration of the Grant, the Probate and Administration Cause Number registered as Entry No. 16



is missing, the late Johnie Michael Sullivan has never been an administrator or executor, the Discharge of Charge purported to have been registered as entry number 17 has never been registered, the 1st and 2nd Defendants never purchased the property from the deceased or estate of the deceased, at the time of death of the deceased, the suit property did not form part of the estate and the 5th, 7th Defendant, Chief Land Registrar, acted illegally and fraudulently in purporting to register a non-existent discharge of charge and transfer on 5/02/2010.

12. The Plaintiff alleges to have immediately lodged a complaint regarding the new entries and transfer of the title with Criminal Investigations Department of the National Police Service of Kenya.
13. It is the Plaintiff's contention that that the 1st and 2nd defendants are trespassers and have illegally laid claim over ownership of the property. That during the pendency of this suit, the 1st and 2nd plaintiff have embarked on the process developing and subdividing the suit property. The 1st and 2nd plaintiffs have submitted a subdivision plan to the director of survey for approval to facilitate the issuance of titles to smaller plots. That if this happens, the plaintiff search for justice would be compromised and unfairly defeated. Further, that unless the 1st and 2nd Defendants are permanently restrained the Plaintiff will suffer irreparable harm.

Plaintiff's Evidence

14. PW1 – Margaret Wambui Ngugi testified that she is a business lady, and she is a managing director of the Plaintiff company. She adopted her witness statement dated 21/10/2021 and the list of documents listed from page 37-38 as her evidence in chief. She testified that the suit property is LR 7969 and that she purchased it in 2005 from Sullivan before she passed on for Kshs. 45 million. She died on 1/08/2006. That by the time she passed on, she had not finalized the transaction. Later there was a succession cause and she was given a confirmation of grant, but she never transferred the property because the file at Land's office could not be found. She applied for another file, and they got gazetted. The property was not finalizing transfer to Kimuri. That she was given all the documents. She subdivided the land in 2005 because this was the agreement.
15. She testified that there is a criminal case on the matter. The land registrar even gave evidence and denied there being a title for David Waweru. The defendants are still using the suit property and selling the plots, there are very few remaining. The sellers do not know the 1st and 2nd defendants.
16. In cross-examination, she testified that she has never booked the transfer because there was a case, so the Plaintiff is not the registered owner. For the missing file, it is the Sullivan family who applied for reconstruction. In her testimony that she paid Kshs. 45 million and that she has produced the agreement before the court.
17. It is the plaintiff's evidence that at the time the property was sold, it was charged to Fidelity, and she has the original discharge. Her complaint against the 4th and 5th defendants is that they issued another title in relation to the suit property. In the criminal matter, the land registrar confirmed that the second title is a forgery. In relation to the 4th defendant, she is not aware if the director of survey issued any documents. She confirmed that the people who were sold to the suit property are in occupation, but she does not know the numbers. Her sub-division gave her 103 plots and she has sold about 50 plots or thereabout. She testified that she is not aware of the plots grabbed or the ones which have been built on in respect of the suit before this court is for LR 7969. Those who occupy the plots are aware of the case. She added that she has an approved subdivision survey plan. She is aware the chief registrar has disowned the certificate of the 1st and 2nd defendants.



18. PW1 further testified that the Sullivan family gave her all the documents relating to the family. She would not transfer because the mother passed on. In the succession, they could not include the property but could sign the transfer. Occupation of the 1st defendant and the 2nd defendant has a link to the 3rd defendant because they were claiming that Johnie's son sold it to them. The Administrator to the Estate of the Sullivan, Mary had signed the transfers. She only wants them to sign the transfer. She has no case against Mary.
19. In re-examination, it was her evidence that by the time Mrs. Sullivan passed in 2006, she had not given her the title and signed transfer because they had not finished paying. By 2015, when she came to court, the family had given her every document including confirmation of grant. She testified that she did not go to the suit property because the occupants are very hostile. The 50 people she sold the plots to do not have the documents because there were encroachers and the people, she sold to are demanding their documents. That until the property is registered, she needs the assistance of the Sullivan family to sign the transfers.
20. PW1 was recalled. She testified that she has sued David Kahinga Waweru. The Property she is claiming is no. 7969. The registered owner is the 1st defendant. She has all the documents though she did not transfer the title in her name. The registered owner is Maude Sullivan. She deponed that Mr. Waweru is a fraudster, and she knows him from when he stayed there. He had rented a servant's quarter. There was no transfer from the registered owner to his name. She added that she paid all the monies, but she has not registered the property in her name yet.
21. It was her testimony that she has never been sued in any succession cause or for any orders. There is family cause no. 23 of 2008. The agreement stated that the family was to get some two plots. See page 49, paragraph 7. She testified that she has the original although she did not carry it to court. That the Sullivans are the ones to transfer the property not Mr. Waweru.
22. In re-examination, it was her evidence that she attached the documents which show the owners as Maude Sullivan. Mr. Waweru had rented a small servant's quarter in one of the family's houses. He resided there even after PW1 had purchased the land. It is her evidence that Johnny Michael Sullivan is the one who took the case of succession in court, and he was not the administrator of the estate. Further, that it is not true that PW1 was sued by the administrators of the estate.
23. PW-2 – Jane Bridget Laetitia Randall testified that she is a farmer, and she lives at Lang'ata. She confirmed that she wrote the witness statement on page 32-36 on 17/11/2021. She also confirmed that her grandmother is Maude Sullivan, her mother is Mary Cofield and that she is alive and is 90 years old. She confirmed that she was aware about the sale of LR 7969 sold to Kimuri Housing in 2005. By 2006, there was a sale agreement showing how the property was to be paid for. As per the 1st installment, the property was given to the plaintiff to sub-divide. At the time of death of Maude, there was a balance of Kshs. 8 million. By Maude's death, her grandmother left a will with 3 executors, Eric Derek Sullivan, George Lovelace Sullivan and Mary Cofield.
24. It was her evidence that R.J Kakad was their lawyer and he applied for succession cause no. 3094 of 2006. The Kshs. 8 million was finally paid and Kimuri Housing was given all documents. The transfer that the Plaintiff has was signed by the 3 Executors. Kimuri was unable to make the transfer. The grant was confirmed on 15/06/2015, the Plaintiff tried to register the transfer but there was a suit filed which meant that the suit property could not be transferred.
25. She further testified that there are now 2 executors who have passed on, Eric Derek Sullivan passed on 27/05/2013 and the 2nd Executor George Lovelace Sullivan passed on 16/01/2016. She agrees that there is only one executor who is alive, and she went and has now been confirmed as the only executor



who is alive. According to what she has seen from the 1st and 2nd defendants stating that they bought the property from Johny Sullivan for Kshs. 100 million, it is PW2's evidence that this is not true because he was not the owner of the property. He was not an executor of Maude's will. It came to their notice that Johny was trying to extract some money from the plaintiff. In the succession case, counsel Kakad had put in an application for a grant to Johny and never was 100 million paid to him. The criminal case is part heard and she is not privy to what was testified.

26. In cross-examination, PW2 testified that there were trespassers when the property was sold. In the will, the property is not reflected because it is not part of her property. She added that she did not appear in the sale agreement, but she was a witness in the bank transaction. She knew about the sale. When her grandmother passed on, the transfer had not been effected. The Kshs. 8 million was paid on 28/04/2005. Three executors signed the transfer. John Michael Sullivan is known to her. He is her uncle. He never sold the property, and he was aware that this property had been sold in 2005.
27. It is her testimony that she is aware that prayer no. b, the plaintiff company is seeking an order to compel the 3rd defendant to transfer the property, but this is not proper because the 3rd defendant has obtained a confirmation that she is now the only surviving executor for the estate. The family was granted two plots as per the sale agreement, but they visited the place, and they could not trace the Oakwood allocations.
28. In re-examination, it was her evidence that in December 2021, the only surviving executor was now confirmed as sole surviving executor and so the family are ready to give assistance that would enable the plaintiff to get her property.
29. With that evidence, the Plaintiff closed its case.

Defendants' Case

30. The 1st Defendant entered appearance and filed a statement of defence dated 29/11/2021 and 14/03/2022. The 2nd Defendant did not enter appearance or file a defence. The 3rd Defendant entered appearance on 4/02/2021 and filed a statement of defence dated 26/11/2021. The Attorney General entered appearance for the 5th, 6th and 7th Defendants on 27/05/2016. However, if he filed any defence in the matter, the same was not in the file and/or on the CTS platform. The court only found the witness statements filed in the matter on behalf of the 5th, 6th and 7th Defendants.

1st Defendant's case

31. It is the 1st Defendant's case that he denies that the plaintiff has been in quiet, peaceful, and uninterrupted possession of the suit property and carried out developments thereon.
32. He further denies that the plaintiff purchased from Maude Laurencia Sullivan all that parcel of land known as L.R. 7969 (I.R. 8607 measuring 10.21 acres located in Ruaraka, within Nairobi at a sum of Kshs. 45, 000, 000/-. He also denies that the suit property was under statutory by fidelity bank for recovery of the loan under statutory power of sale.
33. He denies that there were ever approved sub - divisions from city planning into authorized or approved plots for sale and or developed any infrastructure over the entire land. He avers that the 1st defendant shall prove that the entire land (L.R. NO. 7969) belongs to him to the exclusion of the plaintiff.
34. The 1st defendant specified that L.R. 7969 (I.R. 8607) has never been owned by the said plaintiff at all and denies that there was ever transfer of the suit land or even an attempt to lodge the same at lands ministry.



35. The 1st defendant alleges that the plaintiff did not purchase, transfer, or own the suit land. He avers that the title to the property is in his name.
36. The 1st defendant avers the property was never owned by the plaintiff as it was subject to succession in cause No. 3094 of 2006 and that there is undisclosed suit against the plaintiff.
37. Further to the above, that the plaintiff has never participated at all and the record at the ministry of land do not show any participation of the plaintiff by way of transfer at all.
38. The defendant denies ever hiring goons as he is the owner of the property transferred to him together with all particulars of the land from the previous registered owner who is since deceased.
39. The 1st defendant denies ever forging the signature belonging to the plaintiff and aver that the allegations contained in the particulars of forgery & fraud are strange as the owner of the said signature has never complained at all.
40. The 1st defendant denies that the transfer entries at lands office in respect to L.R. NO. 7969. (L.R. 8607) were not forged at all. That he is not a trespasser but the owner of the L.R. NO. 7969 and shall proof that he is the registered owner jointly with the 2nd defendant Christine Imbosa Mbogua who has never been served with summons to enter appearance even after the further, further amendment.
41. The 1st defendant contends that the plaintiff is the one who tried to commit fraud, forgery but did not succeed especially when the defendants realized. That the defendant cannot be restrained as he is the owner of the property that is L.R. No. 7969 and that he has never transacted or stolen what belongs the plaintiff at all.
42. The 1st Defendant contends that the plaintiff could not sell what it did not have and receive money because it has never owned all or any portion of L.R.NO. 7969, and that he shall prove that any monies received by the plaintiff's agents may have been received by false pretenses because it has no title to pass and that this suit is a cover up.
43. Lastly, the 1st defendant prays that this suit be dismissed with costs to him.

3rd Defendant's case

44. The 3rd Defendant denies each and every allegation contained in the Further Amended Plaintiff.
45. It is the 3rd defendant's case that she is an executrix to the estate of the Late Maude Laurencia Sullivan pursuant to a Grant of Probate confirmed on the 17th of June 2015. The other executors to the said estate namely, Adolph Lovelace Sullivan and Eric Derrick Sullivan, the 3rd and 4th Defendants herein have since passed on and Mary Constantia Cofield is the only remaining executrix to the said estate.
46. She further avers as follows:-
 - a. The Registered Owner of the Property known as Land Reference Number 7969 (IR No. 8607) is Maude Sullivan who died on the 1st of August 2006.
 - b. On the 22nd of December 2003, a loan of Kenya Shillings Eight Million (8,000,000/=) from Fidelity Commercial Bank in favor of M. Sullivan & Company, the guarantor being Maude Sullivan.
 - c. That due to unforeseeable circumstances the company fell into financial difficulties and the bank sought to exercise its statutory power of sale.



- d. The Bank and Maude Sullivan negotiated, and it was agreed that the Property be sold by Private Treaty.
 - e. On the 15th of November 2005, Maude Sullivan got into an Agreement with the Plaintiff for the sale and Purchase of the Suit Property at a consideration of Kshs. 45,000,000/= together with the buildings and improvements thereon.
 - f. Part of the purchase price was to be utilized to pay the amounts outstanding to Fidelity Commercial Bank, which was done, and a discharge of Charge was subsequently issued.
 - g. The Plaintiff paid the entire purchase price of Kenya Shillings Forty-Five Million (45,000,000/=) over time as agreed.
 - h. After the discharge of charge, the original title was forwarded to the Plaintiffs Advocates in the transaction M/s Kirundi and Co Advocates from M/s P.I Kakad Advocates, who acted for the Vendor, Maude Sullivan in the transaction.
 - i. Unfortunately, Maude Sullivan died on the 1st of August 2006 before the transfer in favor of the Plaintiff was executed and her estate sought a grant of probate as she left a valid will dated 17th April 1999.
 - j. A Confirmation of the Grant of Probate was issued on the 17th of June 2015 in High Court at Nairobi Succession Cause Number 3094 of 2006.
 - k. The executors to the estate then executed the transfer in favor of the Plaintiff upon the confirmation of Grant.
 - l. However, the Plaintiff was unable to effect transfer as the Deed File was missing and/or lost at the Ministry of Lands.
 - m. The 5th Defendant applied for the reconstruction of the Deed File which has since been reconstructed.
47. The 3rd Defendant contends that the Plaintiff took possession of the suit property after the execution of the Sale Agreement dated 15th of November 2005 and has since developed the said property and sold off portions to third parties.
48. She admits that she is an executrix of the estate of the Late Maude Sullivan pursuant to a Grant of Probate granted on 14th of February 2007 and confirmed on the 17th of June 2015 in High Court at Nairobi Succession Cause Number 3094 of 2006.
49. She further avers that on or about 7th of July 2008, Johnie Michael Sullivan applied for a Grant of Probate of Written Will de bonis non administratis in High Court Succession Cause No. 3094 of 2008 without the Knowledge of the 5th Defendant on the grounds that the suit property was unadministered and which was granted to him on the 6th of October 2008. Upon learning of the Grant of Probate of Written Will de bonis non administratis, the 5th Defendant and other executors applied for revocation of the de bonis non administratis on the 22nd of July 2009.
50. The 3rd Defendant avers that the executors of the estate of Maude Sullivan applied for confirmation of the Grant of Probate issued on the 14th of February 2007. Johnie Michael Sullivan died on the 27th



day of October 2013 and therefore the confirmation for Grant of Probate stood unchallenged and was confirmed on the 17th of June 2015.

51. The 3rd Defendant avers that the payment of rates due on the Property is indeed one of the obligations that the Plaintiff took up upon purchasing the suit property and taking up possession of the Property.
52. She admits that she is aware that goons associated with the 1st Defendant invaded the property alleging that the land belongs to him. That she is aware that goons associated with the 1st Defendant invaded the property alleging that the land belongs to him.
53. The 3rd Defendant contends that being that the late Maude Sullivan is the registered proprietor of land, it is indeed only through fraud, illegality and forgery on the part of the 1st and 2nd Defendants in collusion with the 6th and 7th Defendants that the 1st and 2nd Defendants allegedly hold title to land. The 3rd Defendant reiterates that the land was sold in its entirety to the Plaintiff who holds all the completion documents including the Original Title and a valid transfer executed in its favor.
54. The 3rd Defendant avers that the suit property was sold to the Plaintiff and not the 1st or 2nd Defendants and as such they ought to be restrained from interfering with the Plaintiff's title to the property.
55. She avers that she has not engaged in any illegal activities pertaining the suit Property. She therefore prays for the following orders: A Declaration that the Plaintiff is the beneficial owner of all that Property known as Land Reference Number 7969(1.R. 8607), a Declaration that the Title held by the 1st and 2nd Defendants is fraudulent, an order for the cancellation of the title that was issued to the 1st Defendant in respect of the suit property and for the issuance of a new title for the said parcel of land in favor of the Plaintiff and the 1st and 2nd Defendant do bear the costs of this suit.

Defendant's Evidence

56. When the matter came up for hearing, the 1st Defendant was not present in Court. His counsel informed the court to rely on the documents and pleadings they have filed in this case. He then proceeded to close the 1st Defendant's case.
57. There was no appearance for the 2nd Defendant despite service as see in the Affidavit of service dated 15/06/2022. The 2nd Defendant was served on 8/06/2022.
58. DW-3 – Mary Constantia Cofield confirmed that she signed a witness statement on 26/11/2021 and she adopted it as her evidence in chief. She also produced the Bundle of documents as exhibits. DW-3 -Exh1. She testified that Maude Sullivan was her mother, and she was the sole property owner, and she sold the property to Margaret which is Kimuri Housing Company Limited.
59. It is her evidence that Maude signed the document for Kimuri Housing, the sale agreement and she died in 2006 on 1st August. DW-3 filed a case in court for executing her estate. She is the executor trustee. Her mother only sold the property to Kimuri and gave her possession and at the time, there was no one on the property. The other executors have passed away and now it is only herself as the executor. The plaintiff was unable to do the transfer because it was said the file was lost. So, she applied for the reconstruction of the deed file, and it was gazetted. She does not know the 1st and 2nd defendants neither the interest they have in the suit property. She has her passport no. 577233355 which shows that she is a British citizen. She got a rectification of the grant, and she would like to have it produced in court since it is rectified. The document was admitted.
60. In cross-examination, DW3 testified that the title LR 7969, the agreement was signed to Margaret-Kimuri Housing property. She is not aware of any transfer to David Waweru. She never sued the



- Plaintiff for trespass, case no. 23 of 2008. They never sued the Plaintiff in Kenya. She paid slowly; it was paid through the lawyer.
61. She further testified that in respect of the estate of Maude, her estate was never sold to 1st defendant if there was any sale, it is a forgery. That she made an application for reconstruction of the deed file and at the point of reconstruction the name of David Kahinga never came up. She added that she knows Johnny Michael Sullivan, but he never dealt with Sullivan property. He was not an executor. He was never a registered owner of the suit property. She has not come across of any document where John Sullivan sold any property to the 1st defendant. Whatever grant he tried to obtain, they revoked it.
 62. It is her evidence that Kimuri paid in full, and the property belongs to the plaintiff. If she sold the property, it is her business. She has lived in Kenya most of her life. She moved to Great Britain in the 70s. she confirmed that Jane is her daughter. The property was sold, and possession passed on in 2005. Kimuri Housing does not owe her mum's estate any money. The monies paid is as per the tabulation provided by PW2. She was not part of what of what Johny was doing. She did not know about a trespass case. She was only dealing with Kimuri. She was not aware of anybody else owning the land. There are criminal proceedings against Waweru. She is aware that the lands registrar has stated that the 2nd title by 1st defendant is a forgery. She has never met this, David Waweru. That she appreciates that until the land is transferred and registered, the estate is bound to assist her. She did not know David and the land is owned by Kimuri Housing.
 63. In re-examination, DW3 testified that the land was sold to Kimuri Estate where Margaret is from. The money was paid through the lawyer for the estate. At page 59 of the Plaintiff's bundle, there is a schedule of payment for the suit property. Further, there are a few plots that Margaret is to pay her some two plots though she is negotiating for more. Case no. 23 of 2008 did not included her. She has no knowledge of it. She confirmed that Jane is her daughter and she has given her a power of attorney. Her mother or her estate did not benefit from Kshs. 100 million from any one not even Waweru. Johny was not an executor.
 64. With that evidence, the 3rd Defendant close her case.
 65. DW4- Caroline Nabalyo Kituyi testified that she works with Ministry of Lands as a Principal Lands Officer based at Ngong Registry. She has worked for the past 16 years. She recorded a statement dated 12/07/2022, which she adopted as her evidence in chief. She is conversant with the dispute before the court.
 66. In cross-examination, she testified that she has been working at the land's office since May 25/2006. By the time she did this statement, she was working at Ngong registry and the file for this case is at Ardhi house with the chief land registrar. She recorded the statement because she had handled this matter before. The transfer of LR 7969 which is well known, the witness was shown both title copies, at page 1, 1st defendant's title, is true but it is not a document produced by the land registry. Entry no. 16 is a grant of letters of administration. Entry no. 17 and no. 18 are contentious. The entries show an alleged discharge of a charge. She does not know if there was a charge. Unless there is a transfer by a charge, there cannot be a transfer. That unless she peruses the proper title, she cannot know if there was a charge.
 67. She testified that there is a charge at Entry No. 14 which is at page 70. It is charged to Fidelity Bank. When she looks at the contested charge entry no. 17, she cannot compare a fake title copy with the correct copy. The entry no. 16 is a certificate of death which was registered on 7/02/2007. She added that the file is at Ardhi house. She was transferred to Ngong registry on 25/05/2022. The original title



is at the land's registry. She does not have a copy of the original documents but if she called upon, she could produce.

68. It is her testimony that the land's office keeps a copy of the original title. The original title is kept by the owner or estate of the deceased. She is aware that the plaintiff has the original documents. The 1st defendant's title on page 1-8 of the 1st defendant's documents and she has a problem with that title. The plaintiff's title at page 70-74 is the title that she sees as the proper title. From paragraph no. 6 of her statement, she analyzed the 1st defendant's title which is fake. The paragraphs 7 analyzes the plaintiff's title. She testified that she was here because she recorded a statement with regard to the two titles in 2017. She is familiar with what is before the court. From the records they hold at the land's office, the proper title is the copy at page 70-74 of the plaintiff's bundle. The last entry was the certificate of death of Maude Laurencia Sullivan. The entry no. 16 of the 1st defendant's title shows a different handwriting. She indicated that from her statement that the handwriting from entry no. 16 was not familiar. The 1st defendant's title entry no. 17 is a discharge. For the plaintiff's title, entry no. 14 shows the land had a charge. She testified that she is aware that the estate is holding the charge and discharge of charge including original title. She is not aware what documents were used for discharge of charge by the 1st defendant. Entry no. 17 shows that the administrator is John Michael Sullivan in the 1st defendant's title. She is not aware that John Sullivan is not an administrator however she knows entry no. 13 to 17 are contested. The last entry is for transfer on the 1st defendant copy of title, but these records are NOT at the land's registry, so she did not agree that the 1st defendant is the registered owner.
69. In re-examination, DW4 testified that at page 8 of the 1st defendant's bundle, entry no. 16 shows the registrar who signed the entry as herself, but she never signed that entry. It is her testimony that she is before the court because she works under the office of the chief land registrar, and she was here because at the time of this case she was at central registry, and she handled this case. That she is familiar with it.
70. With that evidence, the 4th Defendant closed her case.
71. DW5- George Gichimo Gachihi testified that he works at the AG's office as a deputy chief state counsel. He stated that he has worked at the AG's office for the last 9 years. Before he joined the AG, he was working with Ministry of Lands and Physical Planning for 20 years. It was his testimony that he recorded a statement dated 12/07/2022 and he adopted the same as his evidence in chief.
72. In cross-examination, he confirmed that he recorded the statement on 12/07/2022, the day before DW5 came to court to give his testimony. He added that he cannot recall when he was informed that this matter was coming up in court, but it should be last month. That he was called to record a statement, but he had recorded a statement with the police, and it is in respect of LR No. 7969. He stated that he is conversant with the issues about that IR number. There are 18 entries. His personal number was registrar no. 018. He testified that he sees his number at entry no. 018 and entry no. 17. The names are GG Gachihi the date of entry no. 17 and 18 is 5/02/2010. At the time, he was working with Ministry of Lands as a Land Registrar. He used to sign such kind of documents. The signature is not his signature. The procedure for receiving documents for registration are documents are received at the registry centers, then the documents are later marked with registry files (deed file) and the documents are then forwarded to the entry's officers for investigation and then entries are then made.
73. It was DW5's evidence that it may be difficult to get such a book because the 1st entry was done in 1952 and the book is like a movement register. It will be hard to trace 1952-53 registries. Entry no. 16 was effected on 7/02/2007 in the plaintiff's bundle page 74. In the 1st defendant's bundle, the entry is not very clear. Entry no. 15 does not resemble in the plaintiff's bundle page 74 is a caveat by Paul Mungai Kimani, in the 1st defendant's bundle entry no. 15 is registration of a certificate of death of Maude



- Sullivan. He did not know who Sullivan was. When there is a death the registration entry no. 15 in the 1st defendant's bundle would be proper. The administrator can transfer the property to the buyer they have the capacity. He does not know whether the transfer was effected.
74. He testified that the records would be found at the land's registry, and he cannot have access if he did not work there. He was transferred 9 years ago. There is no evidence on record about Kimuri Housing. Kimuri has no capacity to claim ownership. There is no evidence showing Kimuri Housing. He added that he appeared in the criminal matter as a land registrar then. He was told to give his specimen signatures; he can't remember telling the court that signature changes. Signatures change from time to time. In 2010, he was working at Ardhi house. He even changed his signature due to these forgeries. The entries here he can confirm were made by people who are not known since he was familiar with all those who made entries. He added that he has demonstrated the procedure used for registration. The documents are forwarded to registrar to reconfirm. Entry no. 15 is a caveat, the entry is not signed by the registrar so it may not have been registered.
75. In cross-examination, he testified that entry no. 15 does not make the entire document a nullity, the failure to sign does not make it not authentic. He stated that he has had to change his signature many times due to forgery. The stamp is not patented. This is not the stamp he was using. He is here to give evidence because there is a signature resembling his and he recorded a statement. He did not need to look at records at land's office to clearly see that this is not his signature. At paragraph 10 of his witness statement, he stands by that. He would not know if the owners have sold the land.
76. In re-examination, it was DW5's testimony that entries 17 and 18 were not entered and registered by him. In his opinion, they are outright forgeries. The writings are alien to him. The Plaintiff's bundle at page 73 entry no. 10 refers to Maude Sullivan and that the transfer was made in 1964. Entry no. 16 at page 13, he cannot confirm the entry. He did not lose his stamp. At entry no. 17 and 18, the stamp impression on the 1st defendant's documents is an imitation. The entry no. 17 and 18 is a forgery and therefore there is no transfer to speak about.
77. With that evidence, the 4th to 6th defendants closed their case.
78. IP2 – Ann Wangechi Githinji adopted her witness statement dated 14/06/2022 and a bundle of documents as her evidence in chief. The bundle is dated 29/11/2021, 2nd IPEXh.1. It was her testimony that she knows the Plaintiff and PW1 as one of the directors. The directors were introduced to me who have purchased the parcel of land. She testified that she bought Plot No. 100, in favour of herself, she entered into the agreement on 18/06/2013. The purchase price was Kshs. 5 million. She entered into the agreement before the suit was filed. She further added that she has developed her residence and she resides on the said property. She added that she has added value to the property. That when she learnt about the suit, she approached to be enjoined since she had purchased innocently and undergoing construction. There was no protest. She therefore decided to be enjoined, the transfer was supposed to have happened in 90 days and so their rights have been infringed. She testified that the estate is known as Oakwood Spring Estate Association with over 30 tenants who had settled by the time she joined them. Despite being a bona fide purchaser, the 1st interested party had left out her name, so she sought to be enjoined. The 1st defendant is aware that the Plaintiff has sold the property to 3rd parties, see Replying Affidavit dated 13/04/2005 and at paragraph 8, he states so. So, there is a 3rd portion undisputed by both parties. He stated that a third of the portion is duly sold and they are entitled to their parcel. She seeks that the matter is expedited and that they are recognized as innocent purchasers. If there is any further delay or part to be extracted and their title processed.
79. In cross-examination, IP2 testified that she has registered her interest. She has not filed any claim. She believes Kimuri bought the land. She did not know whether Kimuri should transfer the property if



- there is a dispute. It is her testimony that they are not accusing Kimuri. They can only say this process needs to be expedited. She has possession, she took possession on April 2013 when she got there approximately 30 houses were constructed.
80. She testified that she is aware there is a dispute on ownership. Since 2015 there are developments on the suit property, there are a few that are not developed. From what she has gathered, Oakwood Springs is for members who were sold to land by the Plaintiff. Kimuri was the owner of the entire property. She is replying to the deponent; the plaintiff has not agreed that she only owns a third it was in reference to the affidavit of the 1st defendant.
81. She further testified that she entered into an agreement for a plot no. 100. That she has never seen the original title. She purchased property when title was under process. She is not able to confirm if the title was issued, she only saw papers of succession. The administrators of the Estate were the family. Her agreement is for Kshs. 5 million, the only thing she was waiting for was a title. She has the agreement for 2015 and the same is annexed. She has heard of the name of the 1st defendant when she got ceased of the court documents. She purchased land in 2013 from a person who they believe is a bona fide purchaser. What she wants is justice to prevail.
82. IP2's evidence is that her claim before the court is not secured, she only filed an affidavit. She has no claim in the case. She has no claim against the Sullivans. Her interest is based on sale agreement dated 18/06/2013. Kimuri Housing vs Anne Wangechi and the acreage is 10.21 and she is aware that the whole land has been sub-divided, and her interest is the delineated plot no. 100. She is aware that the whole land has been subdivided. The registered proprietor was Maude Laurencia Sullivan who owned 10.21 acres and sold the same to the plaintiff.
83. She added that she was not aware of any sale of the property between the 3rd defendant and the 1st defendant. She has no transactions with the 1st and/or 2nd defendants. She saw the sale agreement between Kimuri and Maude Laurencia Sullivan. She testified that she did due diligence, the documents were the sale agreement as mentioned at paragraph 2. She showed them a succession document in respect of Maude Laurencia Sullivan, and she also had a map. The sale agreement at paragraph 2.3, she was aware that the vendor was selling as a beneficial owner. At paragraph 4, the completion date was 90 days from the date of issuance of deed plan or issuance of title. Paragraph 12 talks about disputes, they have not referred any dispute to any court. She was shown the property and given vacant possession. She has never dealt or called the ministry of lands. Without a title being procured, a deed plan would not be issued. In respect that the succession documents she verified their authenticity. The letter of administration which she was shown in respect of Maude Sullivan. She added that she carried out verification and they were authentic.
84. In re-examination, she came as an interested party and her participation has not been challenged. None has objected to the authenticity of her sale agreement. She is here to register her interest for her plot no. 100. She is here for the court to rescue her as an interested party.
85. With that evidence, the 2nd Interested Party closed her case.

Submissions

86. After hearing closed, all parties were given the opportunity to file their written submissions which I have considered. The Plaintiff filed their submissions on 4/11/2022, the 1st Defendant filed his submissions on 22/12/2022, the 3rd Defendant filed her submissions on 25/01/2023 and the 2nd interested party filed her submissions on 29/01/2023.



Issues for determination

87. Have considered the pleadings, the submissions and the evidence adduced and the exhibits thereto, I find that the following issues stand out for determination: -
- i. Whether the Plaintiff is the bona fide owner of the suit property.
 - ii. Whether the Plaintiff is entitled to the prayers sought in the further amended plaint.
 - iii. Who shall bear the costs of the suit.

Analysis and determination

Whether the Plaintiff is the bona fide owner of the suit property

88. The evidence table by the Plaintiff was that the Plaintiff company bought the suit property from one Maude Sullivan (deceased) in 2005 for a consideration of Kshs. 45 million but by the time the deceased passed away in 2006, the suit property had not been transferred in favour of the Plaintiff. Further evidence was that after the deceased passed on, she started to deal with the executors of the estate of the deceased as well as their advocates P.J Kakad & Co. Advocates.
89. The Plaintiff produced a provisional certificate of title for Title I.R No. 8607 dated 25/04/2000. Evidence before this Court indicate that a grant was issued and registered in the name of one John Walter Lenon. A transfer to Maude Laurencia Sullivan was registered in 24/11/1964 and a provisional certificate of title was subsequently issued on 25/04/2000. Maude Laurencia Sullivan thereafter entered into an agreement dated 15/11/2005 for transfer of the suit property with the Plaintiff. The Plaintiff also produced an undated duly executed transfer document in favour of the Plaintiff. The Plaintiff produced a charge and a discharge of charge by Fidelity Bank, proof of payment for the purchase of the suit property, death certificate of Maude Sullivan, Grant of Probate of written will, notification of approval, application for development and approved subdivision plan from the ministry of lands, consent to transfer, rent clearance certificate, confirmed grant among other documents in support of her claim.
90. The 1st Defendant on the other hand claims that he is the owner of the suit property together with the 2nd Defendant as the suit property was transferred to him on 5/02/2010 by one John Michael Sullivan. That he bequeathed the suit property to him and the 2nd Defendant as a gift and transferred it before he died years later on 27/10/2013. He claims to have been living on the suit property since 2010 and has sold a few plots to other people.
91. The 1st Defendant produced a copy of the title deed for LR No. 7969 and a copy of search for LR No. 7969 dated 3/03/2015 among other documents in support of his claim.
92. The gist of the matter before me is that both the Plaintiff and the 1st and 2nd Defendants claim the title to the suit property. At the moment, the 1st Defendant has produced a copy of title that indicates that him and the 2nd Defendant are registered as the proprietors of the title to the suit property. The Plaintiff claims that she is the owner of the suit property by virtue of a sale agreement dated 15/11/2005 and on the hand, the 1st Defendant claims to have been bequeathed the suit property as a gift in 2010 by one John Michael Sullivan.
93. From the records before this court, the Plaintiff's claim emanates from one Maude Sullivan whose ownership of the suit property was registered on 24/11/1964. I have seen the copy of the title document



and the same is indicated on Entry no. 10. It was the plaintiff's claim that the suit property was charged to Fidelity Bank, the same is also indicated on Entry no. 14, and that the said bank had already commenced recovery proceedings under its statutory power of sale, as evidenced by the notification of sale dated 17/10/2005 at page 39 of the Plaintiff's bundle. That it was an express term of the agreement for sale that part of the purchase price was to be utilized to pay the Bank to redeem the vendor's account with the said Bank and obtain the discharge of charge for the property. The same has been evidenced by a copy of a discharge of charge produced at page 57-58 of the Plaintiff's bundle and registered on 5/02/2010 as Entry no. 17 as seen at page 95 of the Plaintiff's bundle. However, the same evidence indicates that the 1st and 2nd Defendants were thereafter registered as the owners of the suit property on the same day.

94. The Plaintiff contends that she paid Kshs. 45 million over a period of time in the performance of her contract and that they even obtained subdivision approvals and that they have even sold some of their plots to third parties who have developed the same.
95. The Court notes that the sale agreement relied on by the Plaintiff was reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides that;
- 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- a. the contract upon which the suit is founded—
 - b. is in writing.
 - c. (is signed by all the parties thereto; and
 - d. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

96. The Court has carefully perused the sale agreement dated 15/11/2005 produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the sale agreement contains the names of the parties, the property size, and the consideration thereto. A look at the said sale agreement confirms that the same is a valid agreement which is enforceable by the parties. See the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No.956 of 1991, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

97. Additionally, Article 40 of *the Constitution* guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.
98. Furthermore, evidence tendered before this Court started at the root of title/ownership. The Plaintiff demonstrated that the late Maude Sullivan was the registered owner of the suit property since 24/1/1964 and thereafter entered into an agreement for the sale of the same with the Plaintiff Company. She produced evidence demonstrating that the vendor confirmed receipt of payment of



consideration as per letter dated 2/10/2008, various cheques drawn in favour of P.J Kakad Advocate and Sullivan & Co. 1971, consent to transfer dated 14/07/2010 and rent clearance certificate dated 7/07/2010. The Court finds that this was a valid contract.

99. I note that 1st and 2nd Defendants have not successfully challenged the validity of any of the Plaintiff's documents. The evidence given by the 3rd Defendant, 4th and 5th Defendants ideally corroborate the Plaintiff's case.
100. Furthermore, the 1st Defendant only filed a defence where they made general denial. He never came to court to give evidence. In the case of CMC Aviation Ltd – Vs- Cruisair Ltd (No 1) 1978 KLR 103; [1976-1980]I KLR 835, Madan J (as he then was) stated as follows:-

“Pleadings contain the averments of the parties concerned. Until they are proved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that is truth.”

101. The 1st and 2nd Defendants having not adduced any evidence to controvert the Plaintiff's evidence, I find that the evidence of the Plaintiff remains uncontroverted as far as the validity of the sale agreement dated 15/11/2005. The evidence is credible.
102. The 1st Defendant only produced copy of the title for the suit property and a search that indicates that the 1st and 2nd defendants are the registered owners. His copy of the title and the one produced by the Plaintiff have some inconsistencies. The entries do not tally.
103. As things stand, the Plaintiff relies on the sale agreement dated 15/11/2005 among other documents in a bid to lay claim on the suit property whereas the 1st Defendant only has a copy of the title.
104. The 1st Defendant claimed that the suit property was bequeathed to him as a gift. However, his evidence demonstrates that the suit property was transferred to the 1st and 2nd Defendant for Kshs. 100 million. Entry no. 16 of the 1st Defendant's bundle indicates that John Michael Sullivan was issued with a grant of probate in the estate of Maude Sullivan as an administrator and that the same was registered on 1/07/2009. He failed to produce a copy of the confirmation of grant to support the same. The same has been challenged by the Plaintiff. PW2 testified that John Michael was not an executor of Maude's estate. That there is only one sole executor of the estate of the deceased. DW3 also testified that John Michael Sullivan was not an executor and that the estate of Maude Sullivan never benefited from Kshs. 100 million from any one and not even from the 1st Defendant. That John was never a registered owner of the suit property and that if he had any grant, the same was revoked. Evidence before this court established that Johnie Michael Sullivan applied for a grant of probate of written will de bonis non administratis in Succession Cause No. 3094 of 2008 and that the grant was issued on 6/10/2008 and that the executors of the estate of Muade Sullivan applied for revocation of the grant on 22/07/2009. Johnie Sullivan died on 27/10/2013. That the confirmation of grant of probate stood unchallenged and was confirmed on 17/06/2015.
105. In addition to the above, DW4 testified that the entry that purports to transfer the suit property to the 1st and 2nd Defendants does not appear in the records at the Land's registry. She further confirmed that she never signed entry no. 16 as seen on the 1st Defendant's title in his bundle of documents. The said



entry purports to register the grants of letters of administration to one John Michael Sullivan. On the same breath, DW5 testified that the signature on entry no. 17 and 18 of the title on the 1st Defendant's bundle is not his signature. That the stamp on entry no. 17 and 18 of the 1st defendant's bundle is an imitation.

106. From the evidence on record, I am inclined to believe the testimony given DW4 wherein she testified that the form the records they hold in the Land's Office, the proper title is the copy at page 70 -74 of the Plaintiff's bundle.
107. There are many pointers to the fact that the allegations and subsequent registration of the 1st and 2nd Defendants of the owners of the suit property is suspect. The documents produced in evidence by the 1st defendant are not sufficient. The 1st and 2nd Defendant may be the alleged registered owners of the suit property, but the 1st defendant has failed to convince this court how they obtained the same.
108. The position of the holder of a title deed over a parcel of land is well stated in Section 26(1) of the [Land Registration Act](#) which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, ... and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
109. In this particular suit, it is alleged by the Plaintiff that the 1st and the 2nd Defendants' Certificate of title was acquired illegally and unprocedurally. I have raised several issues in the manner in which the 1st Defendant acquired the title which point to illegality. I seek to rely on the following observation of the court in the case of Daudi Kiptugen versus Commissioner of Lands & 4 Others (2015) eKLR:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

110. Section 26 does provide at Subsection (1) that the Certificate of title is to be taken as prima facie evidence of proprietorship, but it will be seen that such title, is subject to challenge if, the same was acquired through fraud or misrepresentation to which the party is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In my view,



when title is being attacked under Subsection (1) (b), it is not necessary for it to be proved that the title holder is a party to the vitiating factors mentioned therein. In the circumstances of this case, it is apparent to me, that the title herein was acquired unprocedurally and therefore it is not a legal title.

111. Overall, this court finds that the Plaintiff is the rightful and bona fide owner of the suit property and the Certificate of title purportedly registered in the names of the 1st and 2nd Defendants over the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally. I shall therefore grant prayer (f).

Whether the Plaintiff is entitled to the prayers sought in the further further amended plaint

112. Regarding the second issue as to whether the Plaintiff is entitled to the prayers sought. A conspectus of the orders that the Plaintiff seek is a declaration that the purported sale and transfer of the suit property to the 1st and 2nd defendants was unprocedural and illegal and an order compelling the defendants to execute and deliver up to the Plaintiff for registration a transfer. The Plaintiff also seeks a permanent injunction, a declaration that any title held by the 1st and 2nd defendants is fraudulent, null and void and a mandatory order against the Defendants. Rather generally, the Plaintiff seeks general damages, costs and any other relief this court may deem fit to grant.
113. To begin with, the Court notes that the provisional certificate of title in this dispute was issued under the Registration of Titles Act (repealed). Although it has been held time without end that the certificate of title is “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.
114. Indeed, the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the *Land Registration Act*. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26(1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
115. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, held as follows:
- ‘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.’



116. Section 80 (1) of the [Land Registration Act](#) provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

117. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

118. That said and done, there is no doubt that the grant to the 1st and 2nd Defendants was irregular. The 1st Defendant did not demonstrate that he was bequeathed the suit property as a gift or that John Sullivan was ever issued a confirmation of grant thereby making him an administrator of the suit property and/or that John Sullivan was ever the registered owner of the suit property. Furthermore, the Plaintiff alleged that the 3rd Defendant has been awaiting the confirmation of grant in succession cause no. 3094 of 2006 in order to facilitate the transfer of the suit property. The 3rd Defendant and PW2 have both confirmed that the confirmation of grant of probate stood unchallenged and was confirmed on 17/06/2015. I have no hesitation that they can now execute the transfer as has been sought by the Plaintiff. I therefore hold that the Plaintiff has proved her case on a balance of probabilities and is entitled to prayers (a), (b) and (g) sought in the further amended plaint.

119. The principles that guide the court in granting an order of injunction are set out in the celebrated case of *Giella V Cassman Brown & Company Limited* 1973. E.A 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

120. From the Plaintiff's evidence stated above, without repeating the same, it is my finding that they have met the threshold for the grant of an injunction. I therefore grant prayers (c), (d) and (e). Similarly, the Plaintiff is entitled to a mandatory order of eviction in the event that the Defendants do not vacate the suit property. I also grant prayer (h).

121. The Plaintiff claimed general damages, but she did not plead further on this prayer. It is trite law that what is pleaded must be proved during the trial. The prayer for damages claimed by the plaintiff in the further amended plaint is neither pleaded, nor was evidence adduced in support of the same. I decline to award any such damages to the plaintiff.

SUBDIVISION - Who shall bear the costs of the suit

122. Costs generally follow the event, and in this instant case, since the Plaintiff has been inconvenienced with the 1st and 2nd Defendants' acts culminating in filing this suit. The 1st and 2nd Defendants have created this mess and I therefore find that the Plaintiff is indeed entitled to costs of the suit and will award it to them.

Disposal orders

123. The upshot of the foregoing is that the plaintiff has proved their case on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendants in terms of prayers (a), (h) and (j)



of the further Amended Plaint dated 17/02/2022. More particularly, costs of this suit shall be borne by the 1st and 2nd Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF MARCH 2023

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MOGENI J

JUDGE

In the virtual presence of:

Mr Ogeto for the 1st Plaintiff

Mr Kimani holding brief for Mr Njenga for the Plaintiff

Mr. Sagana for the 3rd Defendant

Ms. Mureithi for the 2nd Interested Party

Mr Allan Kamau for the 6th Defendant

Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

