



**Redeemed Gospel Church Meru & another v Mwirebua & 2 others;
Muthuri & another (Third party) (Environment & Land Case
E003 of 2023) [2023] KEELC 21117 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21117 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E003 OF 2023**

CK NZILI, J

OCTOBER 25, 2023

BETWEEN

REDEEMED GOSPEL CHURCH MERU 1ST PLAINTIFF

**ESTHER WANJIRU M'IMATHIU (REGISTERED TRUSTEE OF THE 1ST
PLAINTIFF) 2ND PLAINTIFF**

AND

ANN MWARI MWIREBUA 1ST DEFENDANT

**GLADYS KAROKI MWIREBUA (AS THE ADMINISTRATRIX OF THE ESTATE
OF DAVID MWIREBUA BARETHI (DECEASED)) 2ND DEFENDANT**

JANE KATHAMBI 3RD DEFENDANT

AND

JEDIEL MUTHURI THIRD PARTY

LAND REGISTRAR MERU THIRD PARTY

JUDGMENT

1. By a plaint dated 8.10.2020, the 1st plaintiff, a registered Christian Church under the *Societies Act* (Cap 108) Laws of Kenya, brought the suit through the 2nd plaintiff, its registered trustee. The plaintiffs averred that by an agreement dated 8.1.2010, the 2nd plaintiff, in her capacity as the trustee of the 1st plaintiff, bought L.R No. Ntima/Igoki/4254 measuring 0.336 acres from the 1st defendant, then the registered owner of the land for Kshs.1.300,000/=, which she paid in full and was later issued with a title deed on 10.12.2009.



2. The plaintiffs averred that when they bought the land, it had not been disclosed to them on a pending Meru High Court Succession Case No. 3 of 1985 relating to the suit land. They termed themselves as bonafide purchasers for value without knowledge. Consequently, the plaintiffs averred that they embarked on developing the suit land to its value of Kshs.31,000,000 at 5.2.2020.
3. It was averred that in the impugned Succession Case No. 3 of 1985, the defendants jointly and severally conspired to change the distribution of their deceased father's estate and allocated the suit premises to third parties instead of the person who initially sold and transferred the land to them.
4. Further, the plaintiffs averred that the defendants knew of their possession, occupation, existence, and developments at and in the suit land as one of the county's most prominent Christian Churches. The plaintiffs prayed that the court declare them as the bonafide owner of the suit land, that any purported transmission of the land to someone else was malafide and illegal ab initio, and that the title to the land should not be affected by any change out of the succession cause and that it should remain in the name of the 1st plaintiff. A list of documents dated 8.10.2022 accompanied the plaint, a case summary, a list of issues, and witness statements dated 23.9.2021.
5. Through a statement of defense dated 2.4.2021, the 1st defendant denied the plaintiffs' claim. She averred that the 2nd plaintiff was never a trustee of the 1st plaintiff or that she ever entered into a sale agreement with her. Further, the 1st defendant averred that the Succession Case No. 3 of 1985 had been finalized and was not going on when the sale and transfer took place, only to be reopened in 2013, of which the 2nd plaintiff was advised to cease any developments on the suit land until the family dispute was resolved.
6. The 1st defendant averred that the estate distribution was done afresh and the suit land rights awarded to third parties, and therefore, she was unable to understand why the court decided to give the land to some other persons. Additionally, the 1st defendant averred that the plaintiffs were aware of the case but never challenged the same. She denied the alleged conspiracy in distributing the land in the family between the beneficiaries, which she termed as equitable. Regarding the value of the plaintiffs' development, the 1st defendant averred that the plaintiffs were warned against any developments since the succession cause had reopened, but out of sheer negligence, they proceeded to put up expensive buildings against her will and that of her family.
7. The 1st defendant averred that the re-distribution of the deceased father's estate was beyond her control; hence, the issue of a bonafide purchaser could not arise. Moreover, the 1st defendant averred that the suit land had been transferred to her by the then administrator and, therefore, was unaware of any faults or irregularities in the transfer. As a bonafide owner, she then innocently sold the same to the 2nd plaintiff and not the 1st plaintiff as indicated in the sale agreement, which title was cautioned by the beneficiaries with effect from 2010. She nevertheless denied signing the sale agreement dated 16.7.2018 or being aware of the developments thereon.
8. The 1st defendant averred that any development was made by force and against her will and that of the family, given the probate cause was on the verge of redistributing the estate, facts well within the plaintiffs' knowledge. The 1st defendant averred that she had no relationship with the 1st plaintiff regarding the suit land; hence, its construction and developments on the suit land were irregular and illegal, since her consent or permission was neither sought nor was she aware of the construction and that any alleged loss could only be visited upon the 2nd plaintiff. Lastly, the 1st defendant averred that the probate court determined the ownership of the suit land, and if the property was sold unprocedurally, then the parties shall revert to the terms of the agreement dated 8.1.2010. The defense was accompanied by a witness statement dated 9.5.2022.



9. The 2nd and 3rd defendants filed a written statement of defense and counterclaim dated 12.3.2021, accompanied by a list of witness statements and a bundle of documents. They denied that the 1st plaintiff was a party to the alleged sale or that the 2nd plaintiff was ever, as described, a trustee of the 1st plaintiff in the alleged sale agreement, which sale they termed as fraudulent, malafide, or entered into without proper and thorough due diligence; otherwise the plaintiffs would have discovered that he 1st defendant had no good title on the land to pass to them.
10. Additionally, the 2nd and 3rd defendants averred that the plaintiffs were aware of the existence of the probate cause at the time of the alleged transaction going by the citation in the succession cause; therefore, any dealing with the said property amounted to intermeddling with the estate of the deceased; making the plaintiffs incapable of being bonafide purchasers for value without knowledge.
11. The 2nd and 3rd defendants averred that such a transaction was marred with fraud and intermeddling, more so the subsequent developments thereon, which were illegal since orders had been issued by the High Court stopping any dealings on the land. It was averred that the probate case had been documented way before the alleged transaction on the land and, therefore, any dealings on the land should have waited until the confirmation of the grant; otherwise, the status of the plaintiffs could not override the law and would not have been used as an excuse for trespassing and intermeddling with the estate of the deceased during the pendency of the succession cause. Therefore, the 2nd and 3rd defendants denied that the plaintiffs were bonafide purchasers for value, mainly due to the fraud and illegalities in the alleged transaction.
12. By way of a counterclaim, the 2nd and 3rd defendants averred that at all material times, the suit land belonged to the estate of their late father, David Mwirebua Barethi, and under Meru High Court Succession Cause No. 3 of 1985, L.R No. Ntima/Igoki/775 was transferred to their mother and brother, jointly held in trust for all the estate's beneficiaries built in 2009; their mother passed on, leaving their brother as the sole trustee.
13. The 2nd and 3rd defendants averred that their brother illegally transferred all the properties held in trust to his name, among them the suit land in 2009 and that on 23.11.2009, he transferred the suit land to the 1st defendant as a gift, while aware of the then ongoing proceedings in Succession Cause No. 3 of 1985. They averred that the 1st defendant after that transferred the suit property to the 2nd plaintiff on 10.12.2009. Therefore, the 2nd and 3rd defendants averred that the 1st defendant had no good title from their brother, who was holding it in trust and, therefore, was not authorized to transfer it. Consequently, the 1st defendant could not transfer the same to a third party.
14. The 2nd and 3rd defendants averred that after their mother passed on, any dealings over the suit land were all marred with irregularities and fraud due to the ongoing succession cause, for lack of administrators, due to intermeddling, for lack of confirmation of grant and illegally obtaining title deed before confirmation of grant occurred on 12.3.2020 when the property was allocated to the 3rd defendant and two other persons as the rightful beneficiaries of the deceased's estate. They averred that the beneficiaries or administrators could not access the suit land.
15. The 3rd defendant averred that as a result of the plaintiffs' predatory and exploitative conduct, she, alongside the other beneficiaries of the land, had suffered loss and damage for they were unable to access, develop, or use the land as collateral and have been subjected to loss of profits, malice, threats, intimidation, coercion, and undue influence, yet, they were bonafide land owners with exclusive tenant rights to the land. The 2nd and 3rd defendants sought against the plaintiff a declaration that they were the bonafide owners of the land, revocation of the title held by the plaintiffs prohibitory and permanent injunction, and an order directing the land registrar to register the land in the name of the 3rd defendant



and a title deed to issue. The defense and counterclaim were accompanied by a witness statement and list of documents dated 3.8.2021.

16. Following leave of court on 10.5.2022, the 2nd and 3rd defendants also took out a third party's notice under Order 1 Rule 15 of the Civil Procedure Rules against Jediel Muthuuri and the land registrar Meru dated 16.5.2022, on the basis that in the event of being held liable to the plaintiffs' claim, the two be found able out of indemnity and or contribution. None of the third parties appeared, and directions were issued on 31.10.2022, for the issue of liability between the 2nd and 3rd defendants to be determined during the hearing.
17. At the trial, Rev. Dr. Kiome Cyrus Mwiti testified as PW 1 and adopted a witness statement dated 23.9.2021 as his evidence in chief. He told the court that he was a pastor of the board of management of the church when the land was sourced, bought, and transferred to the 2nd plaintiff since there were some pending issues with the church's trustees at the national headquarters. PW1 said that the land was transferred in the name of the 2nd plaintiff as a board secretary of the 1st plaintiff. He testified that the process of acquiring the land was open and lawful, after which the construction of the main altar started immediately, with no objection to the transaction or stoppage of the developments by the defendants.
18. PW 1 told the court that the suit property was legally bought after due diligence was conducted before the sale and the transfer. He produced a copy of the green card as P. Exh No. (1) Judgment in Meru High Court Succession Case No. 3 of 1985 as P. Exh No. (2) minutes by the church committee meeting dated 14.12.2020 as P. Exh No. (3), church registration certificate serial No. 7447 as P. Exh No. (4), sale agreement dated 16.7.2018 as P. Exh No. (5), a land sale agreement dated 8.6.2010 as P. Exh No. (6) and a valuation report dated 5.2.2020 as P. Exh No. (7).
19. In cross-examination by the 1st defendant's counsel, PW 1 told the court that the church was involved in the earlier sale agreement through both the 2nd plaintiff and the 1st defendant, though the church at the time did not appear on the sale agreement for convenience purposes. He admitted that there were subdivisions to the suit land in 2009 and a caution placed over the title in 2010 by Gladys Kaloki, alleging a beneficial interest, followed by inhibition orders in 2019. PW 1 denied being privy to the succession cause when the land was sold, transferred, and developed until 2020; otherwise, the developments on the land commenced the same year the land was bought. PW 1 denied that any notice or order was served upon them to stop the construction, yet the land was adjacent to that of the 1st defendant. PW 1 refuted allegations that the 2nd defendant approached them to stop the development of the land and insisted that they only came to court when it became clear that they could not register the land under the church's name.
20. PW 1 denied that their church officials were parties to the succession cause. Cross-examined by the 2nd & 3rd defendants, PW 1 said that as the manager of the church affairs, he had delegated his duties to the 2nd plaintiff, who was then the church treasurer as indicated in the minutes of 14.1.2020, hence the reason that he was not a signatory to the 1st sale agreement. He clarified that no official transfer was executed between the plaintiffs and that all the developments on the land were undertaken on the strength of the land being in the name of the 2nd plaintiff, on behalf of the church. PW 1 was emphatic that other than the minutes authorizing the 2nd plaintiff to buy and or acquire the land on behalf of the 1st plaintiff, no other authority was issued to her. PW 1 said that though they were aware of the succession cause and the caution, no court order had stopped them from developing the land. He denied that the plaintiffs were privy to the pending succession cause; otherwise, they could not have appealed against the decision if they were not party. In re-examination, PW 1 told the court that the 2nd plaintiff and the 1st defendant were members of the 1st plaintiff when the transaction occurred.



21. Esther Wanjiru M'Imathiu, the 2nd plaintiff, testified as PW 2 and adopted her witness statement dated 13.7.2022 as her evidence in chief. Her testimony was that the church operated from a rental house, and a need arose to purchase its land as the membership increased. As a church member, PW2 said that the 1st defendant offered to sell a portion of her plot to them, which was unanimously endorsed by the church membership. PW 2 told the court at the time that the church at its national headquarters was undergoing some leadership crisis, and the local leadership asked her to step in as a trustee for the local church during the transaction with the 1st defendant. She said that after all the payments were made to the 1st defendant, a title deed was processed in her name so she could later transfer the land to the 1st plaintiff. PW 1 told the court that she did all this in utmost good faith and trust of the church, and so was the 1st defendant, who had processed the transaction even before signing the sale agreement. Her evidence was that developments on the land by the 1st plaintiff started immediately after the transfer with no obstruction, objection, or opposition from anybody.
22. PW 1 told the court that while transferring the land to the church, she came across a caution from one Gladys Karoki Mwirebua. Her evidence was that the church had conducted an official search at the lands office and established that the owner was the 1st defendant and on the status at the ground, hence forming an honest opinion that the land was free from any encumbrances.
23. In cross-examination, PW 2 admitted that though P. Exh No. 2 was silent on whether she was buying the land on behalf of the 1st plaintiff; the same was clarified in P. Exh. No. (5) over and above authorizing the church to commence developments thereon. In her view, PW 2 insisted that she never misled the church to commence immense developments on the land since the land was in her name, only for her to learn about the caution in 2015, when she received a letter to that effect. PW 2 said there was no need to involve the 1st defendant in the P. Exh No. (5), since the title deed was already under her name. Her testimony was that she had acted in good faith as a member, official, and trustee of the church in 2010.
24. PW 2 denied that she was at the time aware of succession wrangles involving the defendants over the family land. Further, PW 2 stated that as a church treasurer at the time, she could transact on behalf of the church, for she was a signatory to the cheques. Regarding the transfer and issuance of the title deed before the sale agreement was signed, PW 2 denied any fraud, for the 2nd defendant acted out of trust that the church would pay her the consideration. PW 2 said that she eventually surrendered the original title deed to the church since she was relocating to Kiambu in 2014.
25. PW 2 told the court that she conducted due diligence before purchasing the land and was confident that the 1st defendant had inherited the land from her late father. She said that she believed all that the 1st defendant had disclosed regarding the land, hence why she entered into the sale agreement with her, given that the seller was also a church member. PW 2 stated that none of the 1st defendant's family members had objected to the sale at the time, and none so far had demanded the surrender of the title deed to them for cancellation.
26. Samuel Murithi Rainkanga testified as PW 3 and adopted his witness statement dated 23.9.2021, as his evidence in chief. As an elder of the church, he told the court that the church had occupied the land from 2010 to the present and has built a modern-story church building. Regarding the land registration in the church's name, PW 3 testified that PW 2, a church member, had bought the land as a trustee. PW 3 said that the church had invested in the land since it had been assured that PW 2 would transfer the land to it, which was to be done as a follow-up to P.Exh No. (5) where he was a witness to the sale agreement. He denied that a court order was served upon the church to stop the developments on the land. PW 3 also confirmed that the 1st defendant used to be a member of the 1st plaintiff when she sold the land to the 2nd plaintiff.



27. Timothy Patrick, a land valuer, testified as PW 4 and produced a valuation report dated 4.2.2020, showing the value of the church buildings on the suitland as Kshs.31,000,000/=. PW 4 confirmed that the official search indicated that the land belonged to the 2nd plaintiff, whereas the developments belonged to the 1st plaintiff. His evidence was that the official search certificate clearly showed a dispute as per the caution and an inhibition order issued in Succession Cause No. 3 of 1985.
28. Ann Mwari Mirebua, the 1st defendant, testified ad D.W. 1 and adopted her witness statement dated 12.5.2022 as her evidence in chief. She testified that L.R. no. 4254 was transferred to her by the 1st third party, an administrator in Succession Cause No. 3 of 1985, as a subdivision of L.R. No. 775, originally owned by her late father, Daudi Mwirebua. She admitted that she sold the land to the 2nd plaintiff before the land was subjected to a fresh re-distribution in favor of the 2nd and 3rd defendants. Her testimony was that none of her siblings objected to the sale to the 2nd plaintiff in 2010, and issues only arose after the 2nd and 3rd defendants filed an objection in the succession cause. Her evidence was that there was no fraud or knowledge of any existing dispute both when she acquired the title and when she sold and transferred the land to the 2nd plaintiff, given the caution came to the knowledge much later.
29. D.W. 1 told the court that she was a neighbor and a church member of the 1st plaintiff. She denied giving any consent or approval to the church to put up buildings on the land or being party to the construction. D.W. 1 said that she had warned the plaintiffs of the pending family dispute and a court order in 2017, though she had no powers to stop the construction. She believed that since the plaintiffs ignored her warnings, they were not entitled to compensation from her. In cross-examination, D.W. 1 told the court that Jediel Muthuri was a trustee of the land when he transferred the land to her but could not confirm if all the family members were involved in the process or were agreeable to the proposal. D.W. 1, however, said there was nothing sinister in the land transfer to her name since he was an authorized administrator as per the grant, and her mother had passed on at the time of the transfer. D.W. 1 admitted receiving the consideration from the 2nd plaintiff as per the agreed installments. She confirmed that when she released the title to the 2nd plaintiff, Kshs.500,000/= had already been paid to her.
30. Similarly, D.W. 1 stated that there was nothing wrong with transferring the land to the 2nd plaintiff, her friend, before the consideration was cleared since four of her family members were also involved in the transaction, save for those who went to object before the court. Regarding the family meeting held on 3.3.2020, D.W. 1 told the court that she participated in it, including signing a consent, despite knowing that the plaintiffs owned the land. She termed the error as a misunderstanding, given that she had lawfully acquired the land in the 1st instance and lawfully transferred it to the 2nd plaintiff. She expressed her willingness to compensate the plaintiffs for the same since it was now decreed to the 3rd defendant. In cross-examination, D.W. 1 told the court she needed the money from the 2nd plaintiff to pay for her medical bills and that she never objected to the developments on the land by the 1st plaintiff. She insisted that she rightly sold and transferred the land to the 2nd plaintiff.
31. In re-examination, D.W. 1 told the court that she had not discussed any proposal to compensate the church for its development on the land with the rest of her siblings, some of whom were not party to the suit. On her part, D.W. 1 told the court that save for her pension dues, she had no alternative land to offer to the plaintiffs, equivalent to the value of Kshs.31,000,000/=. She, however, confirmed receiving Kshs.1,300,000/= as consideration for the plot from the 2nd plaintiff.
32. Gladys Karoki Mwirebua testified as D.W. 2. She adopted her witness statement dated 18.8.2021, as her evidence in chief. She testified that she was one of the beneficiaries and administratrix of the estate of the late David Mwirebua Barethi (deceased), who died on 5.7.1982 and owned L.R. No. Ntima/



- Igoki/775, which had been subdivided into several parcels, including the suit land. Her evidence was that the suit land was illegally subdivided and transferred to the 1st third party and later to the 1st defendant following the death of her mother, a co-trustee to the deceased father's estate. D.W. 2 told the court that the 1st defendant and the 1st third party knew of the ongoing succession cause as of 23.11.2009 and 10.12.2010. Her evidence was that the 1st defendant had no good title to pass to the 2nd plaintiff due to the trusteeship, and so was the 2nd plaintiff's title.
33. Further, D.W. 2 stated that on 31.5.2018, the probate court appointed her an administratrix of the estate and directed Jediel Muthuri, the 1st third party, to deliver to her all the title documents to the properties held in trust and for the family to decide on the distribution which they did on 12.3.2020 and decided the suit land to go to the 3rd defendant and the children of their late sister, Rebecca Kithira, which they have been unable to access from the plaintiffs. D.W. 2 produced a copy of the green card for the suit land as D. Exh no. (1), judgment in the succession case as D. Exh No. (2) copy of the consent as D. Exh No. (3) copy of the consent order as D. Exh No. (4) and lastly, a copy of the order dated 12.3.2020 as D. Exh No. (5).
34. In cross-examination, D.W. 2 testified that when the initial grant was applied for and issued, she was in college, though aware of the cause. She told the court that she placed the caution on the land when she noticed a fence around the plot and when their brother Jediel opted out of family meetings called to discuss the properties' distribution following their mother's death in 2009. D.W. 2 said she was against the transfers since her consent and that of her other family members had not been sought and obtained before the transfers occurred.
35. D.W. 2 told the court that it was only after the official search that the Land Fraud Unit of the Criminal Investigative Department commenced investigations following her report that she came to know about the plaintiffs. Further, D.W. 2 testified that she had seen the 1st plaintiff's signpost next to the land and a building coming up, but fearing for her life, she never attempted to confront the plaintiffs.
36. As to the delay in filing the suit, D.W. 2 told the court that between 2010 – and 2015, she was looking for the probate file. She said the family members signed the consent for the land to revert to the original owner so that each estate's beneficiaries could acquire a portion based on where one was occupying on the ground. D.W. 2 clarified that PW 2 had allowed the church to develop the land before the re-distribution occurred in 201,8. However, ordinarily, the 1st plaintiff should have approached the family since nobody knew that the 1st plaintiff had bought the land from the 2nd plaintiff, yet this was what the 3rd defendant was entitled to.
37. In cross-examination, D.W. 2 told the court that the initial administrators to the estate had subdivided L.R. No. 775 to the estate on a year she could not remember, out of a confirmed grant of letters of administration. She denied the two were her late mother and brother, yet D. Exh No. (1) showed the said facts. She termed the same as fraudulently done, going by the entries in D. Exh No. (1). D.W. 2 admitted that the 2nd plaintiff had been a registered owner of the suit land for the last 14 years, while other title deeds out of the subdivisions still existed, including her share as L.R. No. 4250 and 4254, in favor of the 1st defendant, but who should only be entitled to L.R. no. 4253. She denied that Jediel Muthuri had a right to gift the 1st defendant any land.
38. Jane Kathambi testified as D.W. 3 and adopted her witness statement dated 12.3.2021, as her evidence in chief. She reiterated the evidence in chief of D.W. 2, save to add that though the suit land was decreed to her and the children of her deceased sister by the probate court, they could not access the said property, for the plaintiffs had refused to hand over vacant possession. D.W. 3 told the court the probate court decree had not been appealed against by anyone and that other than this portion, she



- had no other entitlement from her deceased father's estate. She denied that the consent was a collusion by the family to deny the plaintiffs land, which they had lawfully acquired or developed.
39. D.W. 3 told the court that her efforts to reach out to the 1st plaintiff in the past were futile. Hence, she was not bothered by whatever might become of their developments on her land since the plaintiffs ignored the opportunity given to them by their probate court for a possible out-of-court settlement before the judgment was delivered. D.W. 3 termed the plaintiffs as ignorant of the law and court orders in that the buildings currently were three times more than what was there during the probate cause, which they put up contrary to the existing orders of maintenance of status quo. She denied that the plaintiffs were entitled to any compensation from her. In cross-examination by the plaintiffs, D.W. 3 told the court that her late mother and brother were their trustees and not administrators of the estate in the initial confirmed grant. She told the court that the initial trustees subdivided L.R. No.775 into 10 portions where Jediel acquired 2 plots, Franklin (3), Ann (1), Gladys (1), Mbaya (1), and Jane (1).
 40. D.W. 3 denied that D.W. 1 had disclosed the sale of the suit land to the plaintiffs as part of her share of the estate. According to DW3, the 2nd grant was issued ten years after the 1st one. She said the suit land was yet to be transferred to her name and those of her late sister's children.
 41. Further, D.W. 3 testified that the 2nd grant gave the 1st defendant L.R. No.4253. Regarding how the plaintiffs acquired the suit land, D.W. 3 told the court the process was illegal or fraudulent, since the family had not sat and agreed on the same. She confirmed that she was still available in the country then but only put up a caution once the fencing started on the land. According to her, the probate court had stopped the plaintiffs from developing the land, which order they ignored. D.W. 3 said the land was registered in her brother's name without the court's and her siblings' approval since the mother had passed on. Her evidence was that the 1st defendant had not been given the suit land in the initial grant.
 42. Answering questions posed by the court, D.W. 3 told the court that she was 59 years old and had witnessed the 1st plaintiff's buildings going up in 2014. Even though DW 3 reported the matter to the CID, she told the court that she neither had no Occurrence Book Number to that effect, nor was she aware of the recommendations or actions taken by the police following her complaint in 2012, over any illegalities or irregularities by the 1st and 2nd third parties. Similarly, D.W. 3 told the court that she had not sought the stoppage of the developments on the land, eviction, or demolition orders. Additionally, D.W. 3 told the court that she had prayed for mesne profits, though she did not know the value of the suit land.
 43. By written submissions dated 8.8.2023, the plaintiffs submitted that the 1st defendant and the 2nd plaintiff used to be good friends and active members of the 1st plaintiff and agreed to enter into a sale agreement for the suit land, with the 2nd plaintiff acting as a trustee for the land in favor of the church in good faith.
 44. Following the transfer, the 1st plaintiff submitted in 2010, it proceeded to develop the suit premises holistically and with no malice whatsoever, had conducted due diligence that the property was free from any encumbrances until the 2nd defendant filed two applications on 25.8.2015 and 14.9.2016 and later on applied for the revocation of the initial confirmed grant of 1.12.1988, on 8.11.2017.
 45. The plaintiffs submitted that other than the revocation of the grant, the distribution of any part of the estate has never been voided or annulled, even in the judgment and ruling dated 13.5.2018 and 21.2.2019 by the probate court. Relying on Section 93 of the *Law of Succession Act*, the plaintiffs submitted that the previous transfer could not be invalidated by a subsequent revocation by reason only that a purchaser had notice that all debts, liabilities, funeral and or administration expenses dates and legacies of the deceased had not been discharged or provided for.



46. The plaintiffs submitted that since they were not beneficiaries to the deceased's estate, they had no locus standi in the succession cause, and their only cause was this case under Article 162 (2) (b) of the Constitution as read together with the Environment and Land Case Act. Reliance was placed on Chege Njuguna (Deceased) NRB Succession Cause No. 832 of 1993.
47. It was submitted that the 1st defendant was an absolute owner of the suit land as her share of the estate of the deceased with the knowledge of all the beneficiaries, including the 2nd and 3rd defendants, who voluntarily chose to sell her share to the plaintiffs; unfortunately in a twist of events, the plaintiffs submitted that out of the re-distribution, the 1st defendant was allotted L.R. No. 4253 instead of what she had already sold to them.
48. By written submissions dated 29.8.2023, the 2nd and 3rd defendants isolated two issues for determination. On whether the 1st plaintiff has locus standi, the 2nd and 3rd defendants submitted that Jediel Muthuri and Grace Mukoruguru Mwirebua had been appointed trustees for the estate in the succession cause in favor of the beneficiaries, which was reiterated by Hon. Justice Mabeya in D. Exh No. (3) on 31.5.2018. The 2nd and 3rd defendants submitted that P. Exh No. 6 had no bearing on the 1st plaintiff since it lacked the consideration paid and other essential features of a valid sale agreement.
49. Further, the 2nd and 3rd defendants submitted that the 1st plaintiff was a stranger to the proceedings and the exhibits produced; the reliefs sought could not be granted. Reliance was placed on Daniel Otieno Mogere vs. South Nyanza Sugar Co. Ltd (2018) eKLR, on the proposition that evidence, however strong, which does not align with the pleadings, must be disregarded.
50. On whether the 2nd plaintiff's title to the land was obtained lawfully, the 2nd and 3rd defendants submitted that it was acquired fraudulently and through illegalities and hence was impeachable under Section 26 of the Land Registration Act given the pendency of the succession cause, which was concluded in 2020. It is submitted that going by the sale agreement, transfer and issuance of title had occurred before the 1st installment was paid. Additionally, the 2nd and 3rd defendants submitted that D. Exh No. (1) showed that between 10.11.2009 and 10.12.2009, the suit property changed ownership in a record three times, which hurried transfers reek of malafides and fraud, more so when the property was held in trust by the 1st third party, in favor of the defendants. The 2nd and 3rd defendants relied on the nemo dat quod non habet principle to the extent that the purchase of a possession from someone with no ownership right to it also denied the purchaser any ownership title.
51. As to the bonafide purchaser, the 2nd & 3rd defendants relying on Lawrence Mukiri vs. A.G. & others (2013) eKLR, submitted that the 2nd plaintiff had failed the test for she did not purchase the suit property in good faith, she knew about the fraud, she knew the vendor had no good title. She was, therefore, party to the fraud, all evidenced in the speed and manner of the transaction as alluded to above. Furthermore, the 2nd and 3rd defendants submitted that the 2nd plaintiff failed to lead evidence on the alleged due diligence she had undertaken since D.W. 1 admitted that she was aware of the pending succession cause. Relying on Mbiri Kamau (Representative of ACK Katharaini (church) vs Munyangia Njoka & others (2021) eKLR, the 2nd & 3rd defendants submitted that the 2nd plaintiff had failed to go beyond the title deed to prove the legality of how she acquired the land and show that the acquisition as legal, formal and free of any encumbrances including any interests. To this end, the 2nd and 3rd defendants submitted that the 2nd plaintiff did not even produce the title deed, official search certificate, transfer forms, or any legal documents other than the green card and the sale agreement.
52. The 2nd and 3rd defendants submitted that the plaintiffs were merely inviting the court to sit on an appeal against the decision of the High Court, which allocated the subject land to the 3rd defendant and the children of Rebecca Kithira. The 2nd and 3rd defendants termed this a dangerous invitation,



especially since the plaintiffs knew about the cause but never applied to vary, review, or appeal against the decision. The 2nd and 3rd defendants submitted that this court cannot sit and overturn a decision of another superior court without embarrassing the judicial system by putting two courts of the same status against each other.

53. On whether the counterclaim had been proved, the 2nd and 3rd defendants submitted that since their counterclaim was undefended save for the evidence tendered, the court, guided by Mulla 4th edition Vol. II at page 1085 and Halsbury Laws of England 10 edition volume 42, should enter final judgment since the 2nd and 3rd defendants had proved the issue of trust; hence, the sale and transfer to the 1st defendant and eventually the 2nd plaintiff was fraudulent. Reliance was placed on *Dina Management Ltd vs. County Government of Mombasa & 5 others* Petition 8 (E010 of 2021) (2023) KESC 30 (KLR) (21st April 2023) Judgment, and found that Jediel Muthuri did not acquire the title regularly. Therefore, the 2nd and 3rd defendants submitted that the title to property held by the 2nd plaintiff was not protectable under Article 40 of *the Constitution*, and she cannot benefit from the doctrine of a bonafide purchaser.
54. The court has carefully reviewed the pleadings, evidence tendered, written submissions, and the law. The issues calling for the court's determination are:-
- i. If the suit land in 2010 was subject to trusteeship in favor of the defendants.
 - ii. If the 1st defendant acquired the land lawfully from the 1st third party.
 - iii. If the 2nd plaintiff had the authority to and acted as a trustee of the 1st plaintiff in the sale and transfer of the suit land.
 - iv. If the plaintiffs were bonafide purchasers for value without knowledge.
 - v. If the sale and transfer between the 2nd plaintiff and the 1st defendant was fraudulent, illegal, or irregular.
 - vi. If the 2nd and 3rd defendants have a valid counterclaim against the plaintiffs and the third parties given Order 7 Rule 8 Civil Procedure Rules.
 - vii. If the issues before court were determined in the probate court.
 - viii. If the 2nd and 3rd defendants pleaded and proved any indemnity or contribution against the 1st and 2nd third parties.
 - ix. If the plaintiffs are entitled to the reliefs sought.
 - x. If the 2nd and 3rd defendants are entitled to the reliefs in both the counterclaim and the third-party notices.
 - xi. What is the order as to costs?
55. In trite law, parties are bound by their pleadings, and issues flow from them. See *IEBC vs Stephen Mutinda Mule & 3 others* (2014) eKLR, *Raila Odinga vs IEBC & 2 others* (2017) eKLR. In this suit, the primary pleadings are the plaint dated 18.10.2020, the 1st defendant's defense dated 12.4.2021, the 2nd and 3rd defendants' defense and counterclaim dated 12.3.2021 and the third-party notices dated 16.5.2022. On top of the pleadings, parties filed a list of issues dated 22.9.2021, for the plaintiffs and the 2nd and 3rd defendants' list dated 3.8.2021.



56. The plaintiffs claim that on 8.1.2010, the 2nd plaintiff, as a trustee of the 1st plaintiff, entered into a sale agreement with the 1st defendant to purchase LR No. Ntima/Igoki/4254 for Kshs. 1,300,000/= it was the plaintiff's evidence that the land in the name of the 2nd plaintiff in trust was transferred and ultimately registered on 10.12.2009, following which they embarked on developing the land.
57. The plaintiffs averred that the defendants while aware of the foregoing jointly and severally conspired to re-distribute the land as part of the deceased's estate and allocated it to the 2nd and 3rd defendants. The plaintiffs sought declaratory reliefs that they were bonafide purchasers for value that the suit land should not have been affected by any change out of the succession cause.
58. The 1st defendant, in her defense and testimony, admitted that the succession cause had been finalized when she acquired the land as a gift from the 1st third party. Further, she submitted that she subsequently sold and transferred the land to the 2nd plaintiff, for consideration before the succession cause was reopened in 2013. She averred and testified that she had notified the plaintiffs of the family dispute and warned them to stop any developments until the resolution of the succession cause. Instead, DW 1 testified that the plaintiffs put up expensive buildings against the family's will.
59. The 1st defendant averred and testified that the fresh redistribution of the estate rightly awarded the 3rd defendant the suit land. She averred that the plaintiffs knew the succession cause but failed to challenge it. The 1st defendant denied any conspiracy since the family equitably shared the estate. Additionally, the 1st defendant averred and testified that the re-distribution by the probate court was beyond her control, and the issue of bonafide purchaser did not arise. Moreover, the 1st defendant averred and testified that she was unaware of any faults, irregularities, or fraud in the land transfer and was a bonafide owner who innocently acquired, sold and transferred the land to the 2nd plaintiff.
60. The 1st defendant denied signing any alleged agreement on 16.7.2018 with the 1st plaintiff and instead claimed that if she ever signed any, that must have been by force, against her will and that of her family, given the estate was at the verge of re-distribution, facts well with the knowledge of the plaintiffs.
61. The 1st defendant termed the 1st plaintiff as a stranger to her, its constructions and developments on the suit land as irregular and illegal, for her consent or permission to develop was not sought, and therefore, she could not be liable for the alleged losses, which the 2nd plaintiff should meet.
62. Lastly, the 1st defendant averred and testified that the issue of ownership of the land was determined in the succession cause, and if she had unprocedurally acquired, sold and transferred the land to the 2nd plaintiff, then the parties ought to revert to the terms of the sale agreement made on 8.1.2010.
63. On the other hand, the 2nd and 3rd defendants denied that the 1st plaintiff was a party to the alleged sale or was represented in the sale by the 2nd plaintiff as its trustee. They termed the sale and transfer as fraudulent and marred with malafides, since the 1st defendant could not pass a good title, it amounted to intermeddling with the property of a deceased, a court order had stopped it; it should have awaited the outcome of the succession proceedings and that the 2nd plaintiff was not a bonafide purchaser for value without knowledge, since the property was under trusteeship.
64. In the third-party notice, the 2nd and 3rd defendants had claimed indemnity and or contribution against the third parties, if they were found liable to the plaintiffs' claim. Strangely, no contributory or indemnity had been sought against the 1st defendant, yet she was the common denominator in the transaction. Again, no particulars were pleaded in the third-party notice on how the third parties contributed to the transaction's fraud, illegality, and or irregularity. Further, no particulars of fraud, irregularity, and illegality were pleaded of the manner in which the land moved from the name of the



- deceased to the name of the 1st third party, to the name of the 1st defendant, and eventually to the 2nd plaintiff.
65. It is trite law that fraud and misrepresentation must be specifically pleaded and proved. The court cannot infer it. See *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 others* (2015) eKLR, *Virjay Morjaria vs Nansingh Madhusingh Darbar & another* (2000) eKLR, The onus was on the 2nd and 3rd defendants to prove fraud, illegality and irregularity on the part of the plaintiffs, the 1st defendant and the third parties. Other than D. Exh No's (1), (2) – (4), no forensic or investigative report was produced showing that the transfer described above, its registration, and title deed issuance from the initial L.R. No. 775 to the suit land was tainted with fraud, irregularities, and misrepresentation.
66. D. Exh (1) shows that the suit land came under the name of the 1st third party on 10.11.2009, and a title deed was issued thereto on 11.11.2009 in favor of the 1st third party. Entry No. 1 thereof was made on 13.2.1990. It shows that the land was registered in joint proprietorship on 13.2.1990 in the names of Grace Mukoruguru M'Mwirebua and Jediel Muthuri. It is not indicated anywhere in the said exhibit that the suit land was held in trust for the defendants at the time. The operative law then was Sections 102 and 103 of the Registered *Land Act* now (repealed), by Sections 91 of the *Land Registration Act*. The effect was that on the death of a joint owner, the property would vest on the surviving proprietor, who would have all the rights to transfer the property to himself and other surviving joint proprietors.
67. Therefore, going by the copy of records produced as D. Exh No. (1), the register was opened on 13.2.1990, L.R. No. Ntima/Igoki/4254 became a jointly owned property by the 1st third party and his mother (deceased). So, if a death certificate was produced before the 2nd third party in law, the 2nd third party was entitled to replace the names of Grace Mukoruguru M'Mwirebua with those of the 1st third party based on the doctrine of survivorship. See *Isabella Chelagat vs Samuel Tirop Rotich & others* (2012) eKLR.
68. The 1st defendant pleaded that she was unaware of any irregularities, illegalities, or fraud in the manner she was gifted and registered as the owner of the suitland on 23.11.2009. She described herself as a bonafide owner of the land who innocently sold and transferred the land to the 2nd plaintiff by an agreement dated 8.1.2010. The 2nd and 3rd defendants did not respond or deny paragraph 13 of the 1st defendant's defense dated 12.4.2021.
69. Similarly, the 2nd and 3rd defendants did not deny the contents of paragraph 6 of the 1st defendant's defense that the succession cause had been finalized when the transfer to the 1st defendant took place and the sale and transfer to the 2nd plaintiff. The 2nd and 3rd defendants averred and testified that as of 13.2.1990, 1.11.2009, and 10.12.2009, the succession cause had been reopened, court orders had been issued against the plaintiffs, and the 1st defendant was aware of the pendency of the dispute. In other words, the defendants invoked the doctrine of *lis pendens*. He who alleges must prove. D. Exh No. (2). It indicates that the 2nd defendant filed her applications on 25.8.2016 and 14.9.2016, the two were compromised on 13.6.2017. The application for the revocation of the grant was made on 8.11.2017. There is no indication in P. Exh No's. (1) and D. Exh No. (2), that an order had been made against the surviving joint proprietor, the 1st third party, between 13.2.1990 and 2009, restraining or barring him from transferring or dealing with the suit land. Even though the defendants alleged the existence of a court order stopping the 1st third party regarding the suit land, none was availed before this court. The caution appearing in the certificate of search was registered on 2.6.2010, while the inhibition orders were registered against the title on 16.12.2019. The order for the maintenance of the status quo was issued in 2020. These developments were long after the plaintiffs had acquired the land from the 1st defendant.



70. To my mind, by 13.2.1990, the suit property had passed from the surviving joint proprietor to the 1st defendant and lastly, to the 2nd plaintiff. How and in which manner the doctrine of lis pendens applied, or the alleged court order was brought to the knowledge of the 2nd plaintiff, and the 1st defendant as to the irregularity or illegality of the transaction of the suitland was not proved by the defendants.
71. The 1st defendant admitted that she signed P. Exh No. (2) and received the monies from the 2nd plaintiff for the suitland. She never objected to the production of P. Exh No. (5), which she signed on 16.7.2018. The signature appearing therein was the same as the one appearing in P. Exh No. (2).
72. The 1st defendant averred in paragraph 14 of her defense dated 12.4.2021 that she was unaware of any sale agreement with the 1st plaintiff or the 1st plaintiff's developments on the land. She alleged the second agreement was made by force, against her will and that of her family. Again, the 1st defendant averred that the 2nd sale agreement was made on the verge of the conclusion of the succession cause.
73. The 1st defendant did not call any evidence to challenge P. Exh No. (5) or her alleged appearance before the lawyers who had prepared and witnessed the sale agreement. D. Exh No. (3) was executed by the defendants and the 1st third party on 2.1.2020 long after D.W. 1 had signed P. Exh No. (5). The minutes dated 24.1.2020 were also signed by the defendants long after the 1st defendant signed P. Exh No. (5). The 1st defendant knew she had already signed two sale agreements with the plaintiffs.
74. Therefore, the 1st defendant is estopped from denying obvious facts. She knew she had sold the gifted portion, yet she chose to renege on her words, deeds and conduct before 2.1.2020. DW 1 appeared very economical with the truth before this court. Given her antecedent character, her evidence regarding what she did before and after 2.1.2020 remains not only unbelievable but also false.
75. When the consent and the minutes were presented before the probate court, the 1st defendant knew, and the other defendants were privy to the plaintiffs' developments and occupation of the suit land. The probate court had directed the defendants and the 1st third party to make full disclosure about any third parties in occupation of the parcels of land of the estate of the deceased. The 1st, 2nd, and 3rd defendants deliberately and mischievously failed to make those disclosures and avail the certificates of search. The 2nd defendant had already placed a caution on the suit land. She did not disclose those facts before the probate court. Her evidence before this court must, therefore, be taken with caution.
76. Section 120 of the *Evidence Act* provides that when a person has, by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representatives to deny the truth of that thing. In *Serah Njeri Mwobi vs John Kimani Njoroge* (2013) eKLR, the court held that the doctrine of estoppel was among the principles of law precluding a person from asserting something contrary to what was implied by his or her previous action or statement. The court cited with approval *First Assurance Co. Ltd* (2008) eKLR on the elements to be established for the doctrine to apply.
77. In this suit, the 1st defendant has admitted entering the 1st sale agreement with the 2nd plaintiff. DW 1 did not dispute that she used to be a member of the 1st plaintiff. She did not refute the evidence of PW 1, 2, and 3 that she used to be a church member and a neighbor. PW 2 told the court they were also close friends with the 1st defendant, who was privy to the intention of the 1st plaintiff to purchase church land.
78. Additionally, P. Exh No. (5) was signed by the 1st defendant in 2018 before her lawyers. The 1st defendant had pleaded duress and or undue influence. Evidence was never led to show that either the signature appearing on P. Exh No. (5) was a forgery and or was procured through duress or force. P. Exh



- No. (5) referred to the sale agreement dated 8.1.2010. It quoted the 1st defendant's I.D. card number and the consideration she had received from the 2nd plaintiff in 2010. It confirmed that the said funds were from the 1st plaintiff. In the sale agreement, the 2nd plaintiff had admitted that the land she had bought in 2010 was occupied and developed by the 1st plaintiff and was purely registered under the 2nd plaintiff's name as a trustee for the church. The same law firm which had drawn the 1st agreement was the one that prepared and witnessed the 2nd sale agreement. The 1st defendant did not summon the said law firm to refute signing and or make any objections against it for procuring the sale agreement through force or duress.
79. The 2nd sale agreement was in line with the [Law of Contract Act](#) and Sections 38 – 43 of the [Land Act](#). The 1st defendant had put into possession the 2nd plaintiff and, by extension, the 1st plaintiff in 2010. The plaintiffs proceeded to develop the suit land without any objection from the 1st defendant until 2015 on the belief that the sale and transfer were above board.
80. The counterclaim by the 2nd and 3rd defendants was filed on 17.1.2022 for the land recovery. A claim for land recovery may not be brought 12 years after the cause of action. The sale occurred on 8.1.2010 so 12 years elapsed on 8.1.2022.
81. Under the doctrine of constructive trust and proprietary estoppel, the 1st defendant, who put the plaintiffs into possession and allowed them to develop the land, is barred from asserting any claim or denying that the title had legally passed to the 2nd plaintiff. For the 1st defendant to plead that the probate court had determined ownership of the land in favor of the 3rd defendant rightly and that she did not understand why the said court failed to allocate her the portion was not only misleading but showed that the 1st defendant in signing the consent order, which was eventually presented to the probate court for endorsement, she had done so with a sole reason of assisting or seeking the assistance of the family and in particular the 2nd & 3rd defendants and the 1st third party to avoid, ignore and or walk out of her earlier representations or conduct through the two sale agreements.
82. The probate court had given the beneficiaries time to amicably discuss the matter. The defendants signed the consent without the plaintiffs, yet they knew that the 1st defendant had sold, transferred the land or put the plaintiffs into possession. See *Macharia Mwangi Miana & others vs Kagiri* (2014) eKLR.
83. The 2nd and 3rd defendants used the consent to aid the 1st defendant in avoiding her obligations and to deny the plaintiffs their right to possess and own the portion. No evidence was produced before this court to show that the probate court determined the ownership of this particular portion of the land over the rights of the plaintiffs. The plaintiffs were not beneficiaries or dependants of the deceased. It is this court which has jurisdiction to determine third-party rights to an estate. The mandate of a probate court is limited to the distribution of the deceased's assets. Where disputes arise out of ownership, Rule 41 (3) of the Probate and Administration Rules, Article 162 (2) (b) of [the Constitution](#), and the [Environment and Land Court Act](#) provides that such disputes such as those of creditors and third parties to an estate be handled by this court. See in the *Re-estate of Kimani Kinuthia* (2008) eKLR, *Re-estate of Richard Karanja Javan* (2014) eKLR in the *Re-Estate of James Muiruri Kamau (deceased)* (2018) eKLR in the *estate of Henry Njau Ngotho (deceased)* (2020) eKLR and in *Re-Estate of Stone Kathali Muinde (deceased)* (2016) eKLR.
84. Jurisdiction is everything. It either it exists or not. It cannot be conferred through the consent of parties. Other than distributing the suit land to the 3rd defendant and her sister's children, the probate court did not pronounce itself on the rights of the 2nd plaintiff, who held a valid title issued by the 2nd third party. It is this court that can recall, cancel, and or invalidate a title under Sections 24, 25, 26, 27, and 80 of the [Land Registration Act](#). The 3rd defendant did not produce any title deed on the suit issued on her



- behalf following the decree by the probate court. The 2nd and 3rd defendants pleaded with this court to revoke the title to the suit land and direct the land registrar to issue a fresh title deed in their favour.
85. If it was true as pleaded that the probate court had pronounced itself on such issues, on ownership, then the 2nd and 3rd defendants would not be seeking such reliefs before this court. In the *Re-estate of Alice Mumbua Mutua (deceased) (2017) eKLR*, the court held that disputes arising after the confirmation of the grant, ought to be determined outside the probate court since the legal infrastructure to do so fell on a different forum and that the probate court was *functus officio* or bereft of jurisdiction. See *David Ngugi Kamau & others vs. Waithira Mohoyo & 4 others (2021) eKLR*.
86. Regarding whether the 2nd plaintiff had authority to buy the land on behalf of the 1st plaintiff, PW 1 and PW2 produced P. Exh No's. (2) and (5). The 1st defendant also confirmed that she was paid all her money by the 2nd plaintiff, following which she willingly transferred the land to the 2nd plaintiff. Minutes were also produced by the 1st plaintiff confirming the manner and the basis on which the land was acquired and developed by the 2nd plaintiff. The defendants did not dispute that all the developments on the land belonged to the 1st plaintiff. The 1st defendant never complained that the 2nd plaintiff misled her in buying the land on behalf of the 1st plaintiff. The source of funds to purchase the land belonged to the 1st plaintiff. This was not disputed by the defendants.
87. In *Twalib Hatayan Twalib Hatayan & another vs Said Saggar Ahmed AlHeidy & others (2015) eKLR*, the Court of Appeal observed that a resulting trust would arise where monies used to purchase properties from a different party apart from the one the property was registered in favor of.
88. PW 1, PW 2 and PW 3 confirmed that the source of money to purchase the suit land belonged to the church and not the 2nd plaintiff. P. Exh No. 7 showed that the 1st plaintiff has made extensive developments on the suit land though registered in the name of the 2nd plaintiff. No evidence was tendered by the defendants that they ever stopped or blocked the 1st plaintiff from accessing, utilizing, and or developing the land between 2010 and March 2020. Additionally, the 2nd and 3rd defendants did not cite the plaintiffs as intermeddlers of the deceased's estate in the succession cause between 2010 and March 2020. The plaintiffs led evidence indicating that there was an intended trust between themselves while purchasing the suit land. The ingredients to finding such a trust were discussed in *Heartbeat Ltd vs. Ng'ambwa Heartbeat Community Children Home and Rescue Centre (2018) eKLR*. The court cited approval *Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR*, that the court will not imply a trust save to give effect to the intention of the parties, which intention must be established through evidence before a trust could be implied. The court cited with approval *Juletabi African Adventure Ltd and another vs Cristopher Michael Lockley Civil Appeal No. 75 of (2016)* that trust is proved through evidence.
89. From the plaintiff's evidence, I have no doubt in my mind that the 2nd plaintiff and the 1st defendant were one-time members of the 1st plaintiff who bought land to put up a church. The 1st defendant had offered to sell and transfer the land through the 2nd plaintiff. The 2nd plaintiff was entrusted with the duty and the funds to acquire the land on behalf of the 1st plaintiff. PW (5) testified that he surrendered the original title deed to the 1st plaintiff in 2013 such clear evidence of trusteeship was not challenged by the defendants. The 2nd plaintiff acted in a fiduciary capacity and later on expressed her desire to transfer the land to the 1st plaintiff only to find a caution lodged against the title by the 2nd and 3rd defendants. The presumption of a resulting trust has not been rebutted in any way through the testimony by the defendants. See *Mombasa Bricks & Tile Ltd and 5 others vs. Arvind Shah & 7 others (2019) eKLR*.
90. On whether the plaintiffs were bonafide purchasers for value without notice, for one to qualify as a bonafide purchaser, the court in *Dima Management vs County Government of Mombasa (supra)*



discussed what was expected of a diligent purchaser. P. Exh (1) and D. Exh No. (2) were a clear proof that the suit property as of 13.2.1990 was under the joint proprietorship of the 1st third party together with his late mother. The 2nd and 3rd defendants pleaded that the title was held in trust for them. No evidence was produced to show that the the property was held in such a trust. The 2nd and 3rd defendants did not avail the initial confirmed grant and the proceedings leading to the revocation. The copy of the records produced as D. Exh No. 2 related to LR No. 4254. It indicated the property as held in joint proprietorship. The alleged trust by the defendants was missing. The court cannot infer trust without evidence being led to that effect. The suit land was separate from L.R. No. 775, which formed part of the deceased's estate.

91. D.W. 1, 2, and 3 were evasive in cross-examination on whether other (10) sub-divisions from L.R. No. 775 were challenged or affected in the re-distribution, following the reopening of the succession cause. Before this court, evidence was never led that the 1st third party held the suit land in 13.2.1990 in another capacity save for what was in the copy of the records, which in law is deemed as prima facie evidence of proprietorship.
92. In *Dima (supra)*, the court cited *Katende vs Harinda and Co. Ltd (2008) ed E. A 173*, that a bonafide purchaser was the one who honestly intended to purchase a property offered for sale and never intended to acquire it wrongly. The 1st plaintiff has pleaded that the 2nd plaintiff held the title they had bought in good faith; they paid consideration and it did not know about the alleged fraud or illegality; the 1st defendant had a valid title; they purchased the property without notice of any fraud or illegality; that they were not party to any fraud and that they carried out the necessary due diligence which established that the 1st defendant was the lawful owner. See *Samuel Kamere vs Land Registrar Kajiando (2015) eKLR* and *Munyu Maina vs Hiram Gathiha Maina (2013) ekLR*.
93. The root of the title to the suit land was indicated in the copy of records produced by the plaintiffs. The court has already established that the title register was opened on 13.2.1990. Beyond that, no evidence was tendered by the defendants to impeach the title held by the 1st defendant, which she eventually transferred to the 2nd plaintiff. The counterclaim by the 2nd and 3rd defendants was not against the 1st defendant but against the plaintiffs alone. The third-party notices were also deliberately made against Jediel Muthuri and the land registrar, without involving the 1st defendant, yet she was the key player in the transaction.
94. The 2nd and 3rd defendants tendered no evidence showing that the transfer to the 1st defendant was tainted with any irregularities, illegalities, or fraud, and if so, their nature. Fraud must be pleaded and proved to the required standards. The 2nd and 3rd defendants tendered no evidence against the plaintiffs, the 1st defendant and the third parties conduct as being illegal, fraudulent and or unlawful
95. The counterclaim by the 2nd and 3rd defendants omitted the names of the other beneficiaries to the suit land. The children of the late Rebecca were not joined as parties to the counterclaim. The land registrar and Jediel Muthuri were conveniently left out in the counterclaim, only to be brought on board as third parties. The reliefs sought against them in the third-party notice were entirely at variance with what the 2nd and 3rd defendants have sought in the counterclaim.
96. Order 7 Rule 1 (5) of the Civil Procedure Rules requires a verifying affidavit to accompany a counterclaim. The one accompanying the counterclaim dated 12.3.2021 was only signed by the 3rd defendant. There was no attached authority duly signed by the 2nd defendant authorizing the 3rd defendant to swear and plead on her behalf. The 3rd defendant was not an administrator of the deceased sister's estate. The 3rd defendant cannot verify the correctness of the counterclaim. My finding is that



the counterclaim offended Order 7 Rule 5 (a) as read together with Order 4 Rule (1) (2) of the Civil Procedure Rules.

97. The 2nd defendant pleaded that the suit land belonged to her and the children of the late Rebecca Kathira. As indicated above, the said children were not named or impleaded as parties to the suit, especially the counterclaim. There was also no evidence that the 2nd defendant had authority from them or the capacity to represent the estate of the late Rebecca Kithira and the beneficiaries to the said estate. In the absence of an authority to act or letters of administration to represent the said estate, this court still finds the 2nd defendant's counterclaim incompetent. See *Nahyer Sharif Hassan Alwi vs Housing Finance Company of Kenya & others* CC NO. 269 of 2009.
98. On the questions of fraud, illegality, and irregularities in the transfer of the suit land to the 1st defendant and subsequently to the 2nd plaintiff, as indicated above, the 2nd and 3rd defendants' defense and counterclaim was built on the false premise that there was trusteeship, due diligence was not conducted; the 1st defendant had no good title to pass; the transaction was undertaken during the pendency of a succession cause; the plaintiffs were not bonafide purchasers for value; the plaintiffs were trespassers and or intermeddlers of the estate of a deceased person and lastly; that the transaction was tainted with fraud and illegalities. The burden was on the 2nd & 3rd defendants to prove that L.R. No. 4254 was held in trust for all the beneficiaries of the estate of David Mwirebua Barethi and that as of 2009, the 1st third party was only a sole trustee but was not a surviving joint proprietor as indicated in D. Exh No. (2). No forensic and or investigative report was produced by DW 1, D.W. 2, and D.W. 3 to show that the registration as per entries numbers 1-8 in D. Exh No. (1) were irregular, illegal, and or fraudulent. Fraud cannot be inferred. It must be proved on a standard higher than an ordinary suit as held in *Virjay Morjaria* (supra).
99. Other than D. Exh No. (1), nothing was availed before this court by the defendants showing the suit land was held in trust, and was not a joint proprietorship. So, the evidence by D.W. 2 and 4 was not based on any credible documentary evidence. Without evidence, my finding is that the 2nd & 3rd defendants' defence and counterclaim were based on a false premise. The 2nd and 3rd defendants did not substantiate the said defense and or prove the counterclaim to the required standard of proof.
100. On indemnity and or contribution against the 1st and 2nd third parties, other than filing the third-party notices and seeking directions that the issue of liability be determined at the hearing, the 2nd and 3rd defendants failed to advance any specific claims or evidence showing how the third parties acted in cohort with the plaintiffs and the 1st defendant to defeat the alleged trusteeship. The dates, events, and particulars of the breach of trust and the statutory obligation by the 2nd third party were not pleaded or proved through cogent or tangible evidence.
101. No evidence was availed to show that the third parties were ever served with the mandatory statutory notices alongside the 1st defendant and the plaintiffs as formal complaints for intermeddling with a deceased person's property. If the 2nd defendant was issued with the letters of administration, none was availed before this court. No evidence was tendered that the 2nd defendant applied for the recall of the title deed held by the 2nd plaintiff through the 2nd third party. Additionally, no occurrence book/ records and or recommendations were availed to show that the plaintiffs, the 1st defendant, and the third parties were investigated and or perhaps found culpable of fraud or illegality.
102. Under Section 53 of the Act, any person suffering damage due to the rectification of a land register is entitled to be indemnified for any loss. This only applies where there is fraud on the part of the land registrar. The indemnity is not payable under the Act if the party claiming for it was careless or party



to the fraud. The evidential burden lay with the 2nd and 3rd defendants to prove fraud or illegality on the part of the third parties, to be entitled to indemnity and/or contribution.

103. In my view, no evidence was tendered by the 2nd and 3rd defendants to show how the third parties caused or privy to the illegalities or fraud in the manner that the 1st defendant and the 2nd plaintiff acquired the suit land. No loss or damage was proved against the third parties to warrant the 1st and 2nd third parties to shoulder any liability. See Samuel Kamere vs Land Registrar Kajiado (supra).
104. Looking at the totality of the evidence produced in support of the plaint. The plaintiffs have proved their claim to the required standard to be entitled to the reliefs sought. I find the defense and counterclaim by the 1st, 2nd, and 3rd defendants incompetent and unmerited. The third-party notice lacks merits. The 2nd and 3rd defendant's counterclaim and third-party notice are hereby dismissed with costs to the plaintiffs. The plaintiff's suit is allowed. A declaration is hereby issued that the suit land belongs to the plaintiffs, having been lawfully and legally acquired by the 2nd plaintiff in trust for the 1st plaintiff.
105. Costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 25TH DAY OF OCTOBER 2023**

HON. CK NZILI

JUDGE

