



**Sairowua v Ologeso & another (Environment & Land Case E017 of 2021)
[2023] KEELC 20885 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E017 OF 2021
CG MBOGO, J
OCTOBER 24, 2023**

BETWEEN

REPES SAIROWUA PLAINTIFF

AND

NAREYIOEN OLOGESO 1ST DEFENDANT

DAVID MUTUTO MUMO 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 18th August, 2021 seeking judgment against the defendants for: -
 1. That the issuance of the title deed to the 1st defendant over CisMara/Olkinyei/790 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st defendant in the first instance.
 2. A declaration that the transfer and issuance of title deed over CisMara/Olkinyei/790 to the 2nd defendant was null and void and ineffectual to confer a good title upon him.
 3. An order of rectification of the Lands register directed to District Land Registrar Narok North/South/East/West by cancellation of the title deed over CisMara/Olkinyei/790 and certificate of title issued to the 2nd defendant so as to the suit property to the plaintiff.
 4. An order of permanent injunction against the 1st and 2nd defendants by themselves, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, developing or in any other manner howsoever from dealing with CisMara/Olkinyei/790.
 5. General damages as against the defendants.
 6. Any other order this court may deem fit and just to grant in the circumstances.
 7. Costs and interest of this suit.



2. In the plaint, the plaintiff stated that at all material times, he was the registered proprietor of the parcel of land known as CisMara/Olkinyei/790 (suit land) as per the certificate of title issued on 26th May, 2011 and that on 2nd October, 2013, the 1st defendant transferred the suit land to herself pursuant to a fake court order dated 20th September, 2013.
3. The plaintiff further stated that a perusal of the green card reveals that the 1st defendant deceitfully transferred the suit land to herself on 2nd October, 2013 and instantaneously transferred the same to the 2nd defendant on 17th October, 2013. That on 17th October, 2012, the 2nd defendant procured and was issued with a title deed in respect of the suit land and it is astonishing the rate at which the property changed hands which is evident of a fraudulent scheme.
4. The plaintiff pleaded particulars of fraud and misrepresentation as follows: -
 1. Transferring and depriving the plaintiff of his parcel of land through an elaborate and orchestrated fraudulent scheme.
 2. Conspiring and brought into shame and disrepute the honour and dignity and judicial authority with a view to defraud the plaintiff of his lawful parcel of land.
 3. Effecting registration and transfer of the suit property based on a fake and forged court order.
 4. Falsifying court documents to confer a benefit irregularly and illegally.
5. The plaintiff further stated that the 2nd defendant financed and facilitated the transfer of the suit land with full knowledge and participation of the fraud for the reason that the 1st defendant did not have a good title. Further, that since the title deed was not acquired through the proper process, the title itself cannot be said to be a good title and subsequent transfer to the 2nd defendant cannot legitimize the fraud. Also, that the 1st defendant in her replying affidavit sworn on 15th July, 2014 in Nakuru ELC No. 606 of 2013 deponed that she had no knowledge and neither did she authorize the firm of Ogotu & Company Advocates to file Nakuru High Court Succession Cause No. 254 of 2013 from which the fake order was allegedly issued.
6. The plaintiff further stated that the 1st defendant had used the fake court order to confer herself a benefit and in Narok CMCC Case No. 90 of 2018 formerly Nakuru ELC No. 606 of 2013, the court revoked the title in respect of parcel no. CisMara/Olkinyei/793 one of the suit properties the 1st defendant had unlawfully and fraudulently transferred to herself.
7. On 21st July, 2022, the 2nd defendant filed his statement of defence and counter claim dated 4th July, 2022. While denying the contents of the plaint, the 2nd defendant contended that the 1st defendant died several years ago which fact the plaintiff is aware of and cannot therefore be sued in her individual capacity without establishing who her legal administrators are. Further, that the suit land formed part of Olkinyei Group Ranch whose membership included the 1st defendant's deceased husband who died on 3rd May, 1982 and who at the time of his death, was the registered proprietor of the suit land.
8. The 2nd defendant contended that the plaintiff fraudulently acquired the title over the suit land as he did not take out letters of administration and did not have the legal capacity to transact on behalf of the estate of Memaneushei Ologeso.
9. The 2nd defendant pleaded particulars of fraud and misrepresentation on the part of the plaintiff as follows: -



- i. Knowingly and without claim of right transferring the suit property without petitioning court for grant of letters of administration in respect to the estate of Memaneushei Ologeso, the late husband to the 1st defendant.
 - ii. Removing the name of Memaneushei Ologeso (deceased) from the register without following due process under the *Law of Succession Act* cap 160 Laws of Kenya.
 - iii. Mischievously dispossessing the lawful dependants of Memaneushei Ologeso (deceased) among them the 1st defendant of their kin's parcel of land CisMara/Olkinyei/790.
 - iv. Unlawfully intermeddling with the property of Memaneushei Ologeso (deceased).
10. The 2nd defendant further stated that he was the registered proprietor on 17th October, 2013 and not the year 2012 and that he is a bonafide purchaser of the suit land and CisMara/Olkinyei/793 having purchased the same from the 1st defendant for a sum of Kshs. 50,000/- per acre pursuant to an agreement for sale. He further contended that he paid a total of Kshs. 17,000,000/- in respect of the both the suit land and CisMara/Olkinyei/793 to the 1st defendant through her advocates Lel & Associates Advocates who carried out the entire conveyance and gave him title deeds issued by the District Land Registrar who never raised issues as to the validity of the said title deeds.
 11. The 2nd defendant further stated that he was an innocent purchaser for value without due notice of any defect of the title and that he was not privy or involved in any fraud. Also, that it is the plaintiff's title that was not acquired through proper process having transferred it to themselves from Olkinyei Group Ranch.
 12. The 2nd defendant in his counter claim, filed a suit against the 1st defendant-Lel & Associates Advocates, the 2nd defendant in the counter claim is deceased, the 3rd defendant being the plaintiff in the main suit, the fourth defendant as the District Land Registrar and the Attorney General as the fifth defendant.
 13. In his counter claim, the 2nd defendant counter claims Kshs. 8,500,000 paid to the firm of Lel & Associates Advocates (1st defendant in the counter claim) being the full purchase price of the suit land as it is the law firm that conducted the entire conveyance, transferred and procured title deed of the suit land.
 14. The 2nd defendant therefore prays for dismissal of the plaintiff's suit against him with costs and an award be made for the plaintiff in the counter claim against the defendants in the counter claim for: -
 - a. Kshs. 8,500,000 against the 1st and 2nd defendants being the entire purchase price for parcel of land CisMara/Olkinyei/790;
 - b. Interest on (a) at court rate from October 2013 until payment in full;
 - c. A declaration that the registration and transfer of the suit property CisMara/Olkinyei/790 from Olkinyei Group Ranch to Ntalameya Logesa and then to 3rd defendant in the counter claim was irregular for want of letters of administration in the estate of Mamaneushei Ologeso who was the first owner of the land having been a member of Olkinyei Group Ranch;
 - d. A declaration that the 4th defendant in the counter claim breached and or contravened his mandate and authority donated by Section 2,12 and 13 of the *Land Registration Act* 2012 by registering Ntalameya Logesa and the 3rd defendant in the counter claim as registered proprietors of CisMara/Olkinyei/790 on 26th May 2011;



- e. An order do issue directed to the 4th defendant to cancel entries numbers 2,3 and 4 on the green card and rectifying the title.
 - f. General damages.
 - g. Punitive damages to be paid to the plaintiff by the defendants in the counter claim.
 - h. Costs of suit.
15. On 14th September, 2022, the plaintiff filed his reply to the 2nd defendant's statement of defence and counter claim dated 9th September, 2022. In response to the defence, the plaintiff stated that the death of a person would call for production of documentary evidence and that Memaneushei Olorgeso has never been the registered proprietor of the suit land. Also, that the representatives of the estate of the late Memaneushei Olorgeso have not challenged the validity of the plaintiff's title and that he is a victim of a fraudulent scheme orchestrated and masterminded by the defendants.
16. The plaintiff further stated that the court will only enjoin a person as defendant if the court feels that the plaintiff has a claim against such person and in this case, the plaintiff has no claim against the 1st, 4th and 5th defendants in the counterclaim as the dispute herein is a pure contest of ownership of title of the suit land on the question whether the 1st defendant had a good title to pass to the 2nd defendant.
17. Further, he stated that the 1st, 4th and 5th defendants in the counter claim are not defendants in this suit and that if the 2nd defendant has an issue with the 1st defendant and other third parties, it was only prudent that he files a suit against them instead of convoluting the plaintiff's suit.
18. On 2nd November, 2022, the 4th and 5th defendants in the counter claim filed their statement of defence to counter claim dated 19th October, 2022. The 4th and 5th defendants stated that if it is true that the 2nd defendant is deceased, the suit as against the 2nd defendant abated and hence any claim in the absence of substitution is bad in law, defective and a nullity. Further, that nothing is counter-claimed as against the 4th and 5th defendants as payment was made between the 1st and 2nd defendant and as such, they are strangers to the transaction.
19. The 4th and 5th defendants while denying the contents of the counter claim, further stated that if indeed the 2nd defendant was the registered owner, then the transaction was done in accordance with the statutory duty of the 4th defendant in effecting registration upon presentation of transfer documents. Also, that the breach of statutory duty under paragraph (d) is misplaced, frivolous and no relief can be sought in the absence of proper pleadings and well particularized actions and that the plaintiff's claim for general and punitive damages are an illegality as no particular of illegality and irregularity has been pleaded.
20. On 16th November, 2022, the 1st defendant to the counter claim filed his written statement of defence dated 14th November, 2022. The 1st defendant stated that his role in the land transaction between the plaintiff in the counter claim and Nareiyon Olorgeso (1st defendant) was strictly that of a transacting advocate and maintained that all the purchase proceeds paid into the Advocate-Client less his legal fees was disbursed into the account of the 1st defendant. Also, that part of the sale proceeds received from the plaintiff in the counter claim was paid to the commission agents.
21. The 1st defendant further stated that he had no personal stake or interest in the proceeds of sale and that the ownership documents availed to him at the time of the transaction was in his professional opinion proper. Further, that apart from witnessing and appending his signatures to the agreements for sale and the conveyancing instruments, he had no role in the process of seeking and obtaining the



- requisite consents to transfer the suit land from the name of the 2nd defendant to the plaintiff in the counter claim.
22. The 1st defendant in the counter claim further stated that having paid the purchase proceeds to the 2nd defendant, he cannot assume liability or obligation to indemnify or refund the plaintiff the sum of Kshs. 8,500,000/- and that the suit does not disclose a sustainable cause of action against him.
 23. On 6th December, 2022, the 2nd defendant (plaintiff in the counter claim) filed his reply to the 1st defendant in the counter claim written statement of defence dated 18th November, 2022. The 2nd defendant stated in response thereto that the 1st defendant is a professional charged with the duty to protect parties' interest and he cannot reduce himself to a mere conduit of receiving and disbursing payments. Further, that with regard to the commission agents, there was no agreement of the same that has been exhibited and it is unclear who availed the ownership documents to him.
 24. Further, that the 1st defendant has not demonstrated any cogent steps made to authenticate the documentation availed to him that informed his opinion and the question that beg is, who lodged the completion documents at the land registry for transfer? The 2nd defendant also questioned who verified the letters of administration from Nakuru High Court and stated that the 1st defendant has failed to lay bare the actual recipients of the sum of Kshs. 8,500,000/-.
 25. In conclusion, the 2nd defendant stated that he has a cause of action against the 1st defendant that is lawful, just and proper on all legal and factual facets.
 26. On the same date, the 2nd defendant also filed a reply to the 4th and 5th defendant's statement of defence dated 20th November, 2022. In response thereto, the 2nd defendant stated that the 4th defendant is the custodian of all land records in Narok on behalf of the government and by registration of the 2nd defendant's interest, he was guaranteed that the title and the process of acquisition was genuine, verified and authentic. Also, that the prayers in the counter claim against the 4th and 5th defendants are proper as they are premised on statutory duties of the 4th defendant and he need not particularize or plead the statutory breach and or its breach as the court is mandated to take judicial notice of the same.
 27. The plaintiff's case proceeded for hearing on 21st February, 2023 where the plaintiff while adopting his witness statement dated 18th August, 2021 as his evidence in chief, asked the court to look at the filed list of documents. Amongst the documents are; a certificate of title issued on 26th May, 2011 produced as P. Exhibit No. 1 and a copy of the green card as P. Exhibit No. 2 showing that the land has never been registered in the name of Nemamushei Olorgesio.
 28. The plaintiff further testified that together with another person, they bought the suit land from Ntalameya Olorgesio which is divided into two parcels; 793 and 790. He further testified that he learnt that the suit land had been sold and that is when he decided to investigate. Further, that he reported the matter to the CID Narok and thereafter went to see advocate Mbugua where they got the orders said to be from a Succession Court. The said court order dated 20th September, 2013 was produced as P. Exhibit No. 3. The plaintiff produced orders of letters of administration ad litem dated 11th September, 2013 and the supporting affidavit sworn on 11th September, 2013, consent of the estate of Ntalameya Olorgesio dated 4th September, 2013 as p. exhibit No. 6 and 7 respectively. He also produced a certificate of death of Ntalameya Olorgesio dated 13th April, 2022 (year not clear) as P. Exhibit No. 8 whose serial is No. B No. 798888 and a consent in respect of the estate of Memaniushei Olorgesio as P. Exhibit No. 9 dated 11th September, 2013.
 29. The plaintiff further testified that after getting the papers (sic) from Nakuru, he instructed an Advocate to act for him and he recalled the CID carrying out investigations regarding the owners of the identity



- cards in question. Further, that there was a print out of Nareyio marked as PMFI 10 and another print out in respect of ID card No. 0190341 marked as PMFI 11. As regards the death certificate of Mumaneushei Ologeso the same is B. No. 798888 produced as P. Exhibit No. 12. That regarding the court order from the High Court in Nakuru, he was not a party in the case even though it has his names as one of the respondents and that he got an affidavit sworn on 15th July, 2014 from advocate Mbugua which he produced as P. Exhibit No. 13.
30. The plaintiff testified that ownership of the suit land is in the name of the 2nd defendant as per the copy of the official search produced as P. Exhibit No. 14 even though he has the original title. Further, that one Kesonchia filed his own case against the change of ownership as can be seen from the annexed copy of the judgement in Narok Civil case No. 90 of 2018- produced as P. Exhibit No. 15.
 31. It was the plaintiff's testimony that Ntalameya Ologeso was not his father but that he only bought land from him. Also, that it is not true as the 2nd defendant alleges that the land belonged to Memaneushei Ologeso and that he had the property registered in his name without obtaining letters of administration.
 32. On cross examination, the plaintiff testified that he does not know when he was born but that his national Identity Card (ID) shows that he was born on 1st January, 1985. Also, that he does not know how to read and write but as per his ID, he is 38 years. Further, that he acquired the land at the age of 26 in the year 2011 having bought the land in question from one Ntalameya Ologeso at Kshs. 15,000/- per acre but that he did not bring the sale agreement between them to court. He further testified that the acreage of the suit land is 170 acres and he paid a total of kshs. 2,500,000/ and that he did not produce transfer documents. Also, that apart from the suit land, he owns other parcels of land. He further testified that he does not remember the date when he entered into a sale agreement with Ntalameya Ologeso but that there was the Land Control Board Consent which he left at home.
 33. The plaintiff further testified that Ntalameyo Ologeso is no longer alive and that he last saw him in the year 2011.
 34. The plaintiff produced the certificate of death of Ntalameya Ologeso with serial number 798888. With regard to the succession case filed at the Nakuru High Court, the plaintiff testified that he was not told if the court papers bear the name of the 2nd defendant but that he knows one Kosenchia who filed case number 90/2018 in respect of the land that he had purchased and got judgment in his favour. It was his testimony that he met Kosenchia while he was in the process of buying his land. He admitted that his statement shows that he got registered as proprietor of the land on 26th May, 2011 and agreed that his plaint does not show that he bought the land from Ntalameya Ologeso for kshs. 2,500,000/-. He also admitted that the name of the first proprietor of the suit land was Olkinyei Group Ranch but that Ntalameya Ologeso had informed him that he was a member of Olkinyei Group Ranch. Also, he admitted that the title deed does not show how he came to own the suit land.
 35. On further cross examination, the plaintiff testified that he knows an advocate by the name of Lel or Kilele and has no complaint against him in his suit as he does not own anything in the suit land.
 36. On re-examination, the plaintiff testified that the name Repes was wrongly indicated in his identity card number as Lepes and his ID number is 2462561 which is the same one appearing in his title document. He reaffirmed his position that he bought the land from Ntalameya Ologeso and that the family of Ntalameya Ologeso has never complained about his ownership of the suit land.
 37. With regard to the 1st defendant in the counter claim, the plaintiff testified that he was not the one who has sued Mr Lel in this suit but he has only sued those who defrauded him of his land as Mr Lel did



not sign any transaction documents between him and the late Ntalemeya. Also, that the documents that he has produced are the ones that he gave his advocate.

38. The plaintiff's case proceeded for further hearing on 27th April, 2023 where Isaac Mwendwa Titus (PW1)-the in charge of Registration of Persons, Narok County testified that his duties include identification of Kenyans of 18 years and above upon which they are registered and issued with identity cards. It was his testimony that he was requested to produce print outs of Identity cards number 001910341, 0190341 and 0910341 where he proceeded to their headquarters in Nairobi and he was able to get 2 print outs and one record of identity card. That the first identity card number 001910341 belongs to Josiah Kararu Wariungi, identity card no. 0190341 belongs to Titus Katungu Kivite and identity card number 0910341 belongs to Nillawua Ole Lelit.
39. With regard to Titus Katungu Kivite, he testified that he was first registered when he attained the age of 18 as register number 13A A with the identity card number 0190341. Further, that the record is retained by their office whenever one is registered and that when one applies for second generation identity card, they keep the record in form of a print out. He produced the two as P. Exhibit No. 15(a) and (b) respectively.
40. With regard to Nillawua Ole Lelit, PW1 testified that his identity card number is 0910341 which is in form number 136A (register) and produced the two as P. Exhibit No. 16 (a) and (b) respectively. With regard to identity card number 001910341 for Josiah Kararu Wariungi, PW1 testified that he has the register number 136A for his identity card number but he does not have his print out for the reason that the said Josiah has not applied for the 2nd generation identity card and hence they cannot retrieve his print out. It was his testimony that most people in Narok have not applied for second generation identity cards or that they could be deceased. Also, that the identity card is active in their data base. He produced form 136 A as P. Exhibit No. 17.
41. PW1 further testified that it is not possible for 2 people or more to own the same identity card number because they identify people through finger prints and not names as the finger prints are distinct and the system cannot allow it. He wrote a letter to court dated 26th April, 2023 to forward the details and produced it as P. Exhibit no. 18.
42. On cross examination, PW1 testified that he has worked in the Department of Registration of persons for about 29 to 30 years and from his experience, the identity card number does not change. That what changes is the serial number of the identity card and that the slash 63 in the first-generation identity cards was due to issuance of the same in batches which was from the year 1978 up to the year 1993. Also, that none of the identity card numbers given belong to Nareiyon Olorgeso as the number belong to men.
43. While being referred to the sale agreement dated 7th October, 2013 between Nareiyon Olorgeso and David Mututo Mumo, PW1 testified that the seller is Nareiyon Olorgeso holder of identity card number 0190341 and according to their record, the true holder of the number 0190341 is Titus Katungu Kivite. Further, while being referred to a copy of the title deed for Cis Mara/Olkinyei/790, PW1 testified that the title deed is registered in the name of Nareiyon Olorgeso and the identity card number shown on the title deed is 0910341 which as per their records, the true owner of the identity card is Nillawua Ole Lelit. While being referred to the agency agreement filed by the 1st defendant in the counter claim dated 4th October, 2013, the parties to the agreement being Nareiyon Olorgeso of Identity card number 0190341 and Bernard Nzumo Mulinge, the identity card 0190341 belongs to Titus Katungu Kivite and not Nareiyon Olorgeso.



44. It was the testimony of PW1 that the documents shown to him i.e. title deed for Cis Mara/Olkinyei /790, the agency agreement dated 4th October, 2013 and the sale agreement dated 7th October, 2013 do not bear the identity card for Nareiyon Olorgeso.
45. On further cross examination, PW1 while being referred to P. Exhibit No. 15 (a) and (b), testified that the individual number on 15 (a) is 00190341 and not number 0190341. Further, that in P. Exhibit No. 15 (b) the individual number 019341. Also, that the number for Titus Kalungu Kavite is 00190341 and not 0190341. He further testified that there is no likelihood of an identity card number 0190341 in their records.
46. On re-examination, PW1 testified that the relationship between 00190341 and 0190341 is that the one with 7 digits belonged to the 7 million series. Titus Kalungu Kavite applied earlier on than Josiah who is in the 8 million series. Also, that 00190341 and 0190341 belong to the same person and that form number 136 A is filled by hand and is not computer generated but the print out is computer generated.
47. On 27th April, 2023, the 2nd defendant (plaintiff in the counterclaim) case proceeded for hearing where the 2nd defendant who while adopting his witness statement as his evidence in chief dated 4th July, 2022 testified that he does not know the plaintiff in this case. He produced the documents in his list of documents dated 4th July, 2022 which included the front page of title deed for Cis Mara/Olkinyei/790 registered in the name of Naireyon Olorgeso ID no. 0910341, the front page of parcel no. 793 registered in the name of Naireyon Olorgeso of the same identity card number, a copy of the location map showing the 2 parcels of land, a sale agreement dated 7th October, 2013, a letter dated 30th October, 2014 from Lel Associates acknowledging receipt of kshs. 14,278,545.00/-, various payment receipts and bank transfer to Lel and Associates, a copy of title for parcel no. 790, a green card showing the 2nd defendant as the registered owner, a letter dated 8th May, 2021 from Ayieko Kangethe Associates to the Chief of Olkinyei location and a letter dated 10th May, 2021 from the Chief Olkinyei confirming the death of Nareiyon Olorgeso which he produced as D. Exhibit Nos. 1 to 9 respectively.
48. The 2nd defendant also filed a further list of documents on 6th October, 2022 which include a letter dated 26th September, 2022, a letter dated 29th September, 2022 from the County Coordinator Civil Registration Services Narok and a valuation report for the suit land by the valuer, Narok County which documents he produced as D. Exhibit Nos. 9 to 12 respectively. He later filed an amended supplementary list of documents dated 14th April, 2023 containing 11 documents which include a charge sheet in Criminal case no. 764 of 2014 Republic –Vs-Tipapa Ole Letoluo alias Kerunga, certified copies of the proceedings in the same case, a certified copy of the ruling dated 10th February, 2020 in the case, a court receipt for certified copies of the proceedings, Olkinyei Group Ranch area list allocation (Adjudication Register), a letter from his advocates dated 20th March, 2023 to the Secretary National Registration Bureau, a certified copy of National Identity card number 3231712, Serial Number 235582228 in the name of Nareiyon Olorgeso, a copy of death certificate S.N 0803273 for Nareiyon Olorgeso, a letter dated 11th April, 2023 from the secretary National Registration Bureau to his advocates, a sworn affidavit by Naolamala Letoluo dated 9th February, 2023 and a sworn affidavit by Lemontoi Ole Letoluo dated 9th February, 2023 which he produced the said documents as D. Exhibits No. 13 to 23 respectively.
49. It was the 2nd defendant's evidence that he executed the sale agreement for the 2 parcels of land and that he did not meet, see or interact with Nareiyon Olorgeso. It was his testimony that he engaged an Advocate who acted for both the seller and the buyer and which Advocate is Mr. Kilele of Lel and Associates Advocates as he was out of the country. Further, that he asked for searches and copies of the titles for the parcels and they were availed to him by one Nzomo.



50. He further testified that the suit land was in the name of Nareiyon Ologreso which title was issued on 2nd October, 2013. It was his testimony that he later on saw the parcels of land whose acreage was 70 and negotiated on the price of kshs. 50,000/- per acre and he paid kshs. 8,500,000/- for the same. Further, that since he was out of the country, he was sent a sale agreement which he signed and emailed back (Exhibit No. 1) to Nzomo. Also, that he was given an account domiciled at Barclays Bank in the name of Lel and Associates advocates whose account number is 0411061744 where he remitted the money which was kshs. 17,000,000/- for both parcels of land. Further, that the firm of Lel Associates Advocates acknowledged receipt of the money and they also wrote reminders to remit the balance of the purchase price after one title was delayed. Further, that he was issued with title deeds and searches dated 18th October, 2013 showing that he was the registered owner of the two parcels of land. Further, that by a copy of the green card produced, in entry number 7 and 8, the seller of the land is Nareiyon Ologreso.
51. With regard to the agency agreement dated 4th October, 2013 in the 1st defendant's (1st defendant in the counter claim) list of documents, it was his testimony that he did not have any agents' names therein. Further, he testified that the agency agreement is between Nareiyon Ologreso, Bernard Nzomo Mulinge and Levin Kimeu and the identity card for Nareiyon Ologreso is 0190341 but he was not aware if she had agents. Also, that he did not pay to any of the seller's agents himself but remitted the money to the Advocate. He further testified that when he was given copies of the title deed and search, he did not demand for the identity card of the seller. Further, that the identity card number in the copy of the title deed he was given before the sale agreement is 0919341 while the one that he has produced is 32317128 with the date of issue being 26th November, 2013 which by this time, he had gotten his title deed dated 17th October, 2013 and it appears that the seller obtained her identity card after he got his title deed.
52. The 2nd defendant further testified that his co-defendant sued by the plaintiff died on 26th October, 2018 whose certificate of death is serial number 0703273. Further, that by the time, they were sued, the 1st defendant had already passed on and that the suit land was also allocated to Ntalameya Ologreso who had also already passed on as the register indicates that he was dead. It was also his evidence that the register was compiled on 30th April, 2009 and it is not possible for the plaintiff to have purchased the land from a dead person.
53. On cross examination, the 2nd defendant testified that in the main claim, the parties are Repes Sairowua against Nareiyon Ologreso and David Mututo Mumo and, in his counter claim, he is faulting the plaintiff for suing a deceased person. He also admitted to have sued the same deceased person in his counter claim and not her legal representative. Also, that as per prayer (c) in his counter claim, he has introduced a person by the name of Mamaneushei as the suit land initially belonged to Mamaneushei. He agreed that the adjudication register shows that parcel no. 790 belongs to Ntalameya Ologreso according to the list he produced which documents do not show that the property at one time belonged to Mamaneushei. Also, that he has sought for rectification of entries in numbers 2,3 and 4 and if the said entries are rectified, the original owner will be Olkinyei Group Ranch. Further, that the estate of Ntalameya will not be condemned unheard because he could not sell land when he is deceased.
54. The 2nd defendant also agreed that he has not made any complaint against the plaintiff as he never met him while he was in the process of purchasing the suit land. Also, that Lel and Associates Advocates never told him that the plaintiff was a beneficiary of the money that he sent. He also agreed to have carried out due diligence before he purchased the property but he did not have a copy of certificate of search in 2013 and did not produce it. Also, that his identity card number 9939057 is correctly captured on his title.



55. The 2nd defendant also admitted as having heard from the evidence of PW1, that the ID card number 0910341 never at any time belonged to Nareiyon and that the entries in the ID card of Nareiyon are wrong. Also, that in the green card, entry No. 5 shows entry number 0910341 of Nareiyon Olorgeso which entry number 5 was made on 2nd October, 2013 and title deed was issued on the same day. Also, that entry number 7 was made on 17th October, 2013 and the period between the two entries is 15 days. He further admitted to have purchased properties before and that there are statutory documents that must be produced. Further, that as per the sale agreement of 7th October, 2013, Nareiyon Olorgeso sold the land within five days after which he obtained the title deed. He agreed with PW1 that ID No. 0910341 does not belong to Nareiyon and that the Land Registrar should have not transferred the suit land.
56. The 2nd defendant also admitted not to have not produced an application for consent from the Land Control Board while the land is agricultural land and being a controlled transaction, the Land Registrar ought to have demanded for the consent from the Land Control Board. He further admitted not to have produced the transfer instrument for the suit land and agreed that entry number 7 could not have been made without the transfer forms and the consent from the Land Control Board. Also, that the identity card of Nareiyon number 32317128 that he has produced has an original which is available. He testified that Nareiyon was born on 1st July, 1942 and that the registration had reached 32317128 in 2013. Also, that he was born in the year 1968 and in effect, Nareiyon had no ID card before the year 2013.
57. The 2nd defendant further testified that he has not produced a print out to show that the ID card belongs to Nareiyon but that it is his testimony that her original ID card is available. Further, that her certificate of death was issued on 2nd November, 2018 and that she died on 26th October, 2018 whereas the registration was done on 31st October, 2018. Also, that he was not aware of surrender of the identity card before the certificate of death is issued as he was not familiar with the process. He agreed that the government collects money during conveyancing but he has not produced documents to show that he paid stamp duty. He also admitted that his Advocate wrote to the chief of Olkinyei on 4th May, 2021 and there was a reply from the chief which showed that Nareiyon Olorgeso died in 2019 which contradicts the certificate of death that shows that she died in October, 2018. Further, that as per the letter dated 29th September, 2022 with the reference being Nareiyon Olorgeso Id No. 0910341, the second paragraph shows that the person named died on 26th October, 2018 which is in respect of Nareiyon of ID No. 0910341 and not the one of ID No. 32317128.
58. The 2nd defendant also agreed that as per the attached charge sheet in Criminal Case No. 764/2014, neither Nareiyon nor Repes Sairowua are parties to the case which relates to Nakuru High Court Succession Cause No. 253 and 254 of 2013. He also did not know if the order in the 2 succession causes was the one that surrendered the suit land from Nareiyon to the plaintiff. Also, that entry No. 5 refers to a court order and paragraph 5 of his witness statement shows that Bernard Mulinge informed him that Nareiyon Olorgeso was a beneficiary of the suit land and parcel no. 793 and which she wanted to dispose. Further, that it shows that Mamaneushei was the husband of Nareiyon and that the suit land has never belonged to Mamaneushei. Further, that the affidavit of Nareiyon (P.Exhibit No. 13) shows at paragraph 4 she has deposed that Mamaneushei was her husband who died on 3rd May, 1982 and has not mentioned Ntalemeya as her husband. Further, that paragraph 10 of the affidavit shows that she has never instructed any Advocate to file for succession cause and at paragraph 9, she has never applied for letters of administration ad litem. Also, that she has never filed for succession cause at Nakuru and that she had never applied to have the property transferred from the plaintiff to herself but the Land Registrar acting on the orders, captured in entry number 5 transferred the suit property from



- the plaintiff to Nareiyon. He agreed that Ntalameya Ole Ologeso is deceased as per the entry in B No. 298888 of the certificate of death issued on 13th April, 2005.
59. While being referred to the plaintiff's list of documents dated 19th September, 2022, with regard to Mamaneushei Ologeso, he testified that the B number 7 is 798888 which is the same number but for a different person for the entry number 270400587 and that the certificates of death for Ntalameya and Mamaneushei are the same as they bear the same date and entries. Further, he admitted to have never met Nareiyon and according to the entries in the green card for the suit land, the name appearing is his. Also, that he does not have the property number belonging to the plaintiff and whereas as he has produced a list of members of Olkinyei Group Ranch, he is not a member of the said Group Ranch. He also admitted that people share names and not ID numbers and agreed that Ntalameya died before 2009. He also did not know if Olkinyei Group Ranch had been registered as per the certificate of death that shows that the date of death was in the year 1975.
60. The 2nd defendant further testified that he has alleged particulars of fraud on the part of the plaintiff but he has not produced documents to show fraud on his part. Also, that he does not know the relationship between Ntalameya and the plaintiff and it is his testimony that Ntalameya is the father of the plaintiff. Also, that he would be surprised to learn that there is an original certificate of title in the name of the plaintiff issued on 26th May, 2011 which was issued earlier than his certificate of title.
61. On further cross examination, the 2nd defendant testified that he never knew Kilele Advocate before the transaction but that he was the transacting Advocate in the sale agreement. He also admitted to have conducted due diligence through Bernard Nzomo. He further testified that the registered owner of the property was Nareiyon Ologeso and that the 1st defendant in the counter claim sent the agreement to him before the search. Further, that he agreed with the terms of the sale which was kshs. 8,500,000/- to be paid through Lel and Associates Advocates and that he got a title deed from the firm of Kilele. He further testified that he could recall signing the transfer form and he would like to be declared as the owner of the property or be refunded the money. It was his testimony that it was the Advocate to conduct due diligence in respect of Nareiyon ID card and that Kimeu Nzomo knew that he needed farms to grow maize. Also, that there was no written undertaking by the Advocate to remit the money to Nareiyon and that it was only recently that he heard of a complaint through the grapevine that the family of Nareiyon never received the purchase price. According to him, he has sued the Advocate because he carried out a fraudulent transaction as he was supposed to conduct due diligence for him and that he has only seen 2 pages of bank transfers for only kshs. 2,000,00/-.
62. On re-examination, the 2nd defendant testified that he has produced a copy of Nareiyon's identity card and a covering letter from the Secretary of National Registration of persons. Further, that in his prayers in the counterclaim he has sued Mamaneushei who was the owner of parcel no. 793. Further, that as the letter from the Chief of Olkinyei location dated 21st July, 2021, it shows that the said Nareiyon died sometime in 2019 but the Chief could not be able to confirm the exact date of death.
63. On 14th June, 2023, the 1st defendant in the counter claim while adopting his witness statement dated 20th February, 2023 as his evidence in chief testified that he transacted a sale agreement between Nareiyon Ologeso and David Mututo Mumo on 7th October, 2013 for two parcels of land; Cis mara/Olkinyei/790 and Cis Mara/Olkinyei/793 which were registered in the name of the vendor-Nareiyon at the time of the transaction. Further, that the purchase price was kshs. 17,000,000/- for the 2 parcels and his role apart from witnessing the agreement, was to oversee payment through his client's account to the agents of the registered proprietor and the commission agents who were entitled to a percentage in their commission. The 1st defendant in the counter claim further testified that the first was the agency agreement executed on 4th October, 2013 between the registered proprietor and the 2 agents,



- one Bernard Nzomo Mulinge and David Kimeu which he produced as D.Exhibit No. 24 and the sale agreement dated 7th October, 2013 which he produced as Exhibit No.25. Also, that there was a letter of authority executed by the registered proprietor authorizing transfer of payment into the account of her nephew, one Philip Memusi Patial on 7th October, 2013 which account was 2023994667 at Barclays Bank, Narok Branch produced as D.Exhibit no. 26.
64. The 1st defendant in the counter claim further testified that he witnessed the signing of the application for Land Control Board consents and the transfer forms which he produced as D. Exhibit No. 27 and D. Exhibit No. 28. Further, that during the time of the purchase, the plaintiff was out of the country and an email copy was sent to him for his execution and return upon execution and that the vendor was present in person in his office. It was also his testimony that he emailed to the purchaser the application for Land Control Board consent and the transfer form. Further, that the parties identified themselves to him through the ID cards but the vendor had a waiting card and the information that he got from them was that the original ID card got lost and was awaiting reissue. Further, that the identity card number in the waiting form was serial No. 235044168 whose id number was 0910341 produced as D. Exhibit No. 29. It was his evidence that the funds were wired to his office as per the agreement and the transmission was through RTGS which was done in form of cheque deposits to the agents for purposes of accounting. He produced the same as D. Exhibit No. 30, 31 (a), (b) and (c) respectively. It was his evidence that he received the funds and disbursed them to the 2nd defendant in the counter claim through the authorized agent and that the plaintiff in the counter claim was issued with 2 title deeds in respect of the suit land and CisMara/Olkinyei/793.
65. The 1st defendant in the counter claim produced a search issued on 18th October, 2013 confirming issuance of a title deed in the name of the 2nd defendant as D. Exhibit No. 32, stamp duty paid on 17th October, 2013 in respect of the 2 parcels assessed at kshs. 20,000/- produced as D. Exhibit No. 33. It was his testimony that he discharged all the duties required of him by doing what was humanly possible based on the identity waiting card, the search certificates and the original title deeds in the name of the vendor which were presented to him before the agreement. Also, he confirmed that the transfer into the names of the plaintiff in the counter claim has not been challenged by the family of the registered proprietor who received the funds and whose accounts the funds were disbursed.
66. On cross examination, the 1st defendant in the counter claim testified that the green card (Exhibit No. 2) reads that as at 26th May, 2011 the registered owner of the suit land was the plaintiff and that entry number 4 of D. Exhibit No. 4 shows that the plaintiff was issued with a green card. That in entry number 5 of 2nd October, 2013 the name of Nareiyon Olongeso is captured with entry number 6 of 2nd October, 2013 showing a title deed issued to her. Further, that in entry number 5, there is an entry of “see a court order” which in the order of entry, the property changed ownership from the plaintiff to Nareiyon Olorgeso which court order is marked as P. Exhibit No. 3. Further that the said order number 2 authorized the transfer of Cis Mara/Olkinyei/790 and 793 to Nareiyon which was as a result of the court order of 27th September, 2013.
67. He testified that order number 2 of the succession cause, orders the Land Registrar to transfer the two parcels fraudulently transferred to Nareiyon. That being familiar with the law of succession, he knows when temporary letters of administration are issued, as in P. Exhibit No. 4 which is Succession Cause Number 254 of 2013 in respect of the estate of Ntalemeya Olorgeso, the petitioner is Nareiyon Olorgeso who sought for letters of administration ad litem limited to filing a suit without powers of distributing an estate and as such she had no power to distribute the estate.
68. The 1st defendant in the counter claim further testified that in P. Exhibit No. 13 the affidavit sworn on 15th July, 2014 under paragraphs 9,10 and 11, Nareiyon denies ever filing letters of administration



- ad litem or any suit. He further agreed that he drafted a sale agreement between Nareiyon and the 2nd defendant. Also, that Nareiyon went to his office and she had a waiting form for her id card which he made a copy. He also agreed to have heard PW1 mention that the ID number 0910341 does not belong to Nareiyon and that the application for Land Control Board consent was signed in his office by the vendor-Nareiyon. Further, that the last paragraph in his statement shows that he did not play any role in the process of seeking and obtaining the requisite consents to transfer the land as after witnessing the forms, he did not present the documents to the land's office.
69. With regard to the document dated 7th October, 2013 of the suit land, the 1st defendant in the counter claim admitted that it has his signature and rubber stamp. Also, that it is in respect of transferring the suit land and one Kileliai Ole Sururu is transferring to Nareiyon but according to the green card one Kileliai does not appear therein. He agreed that the transfer document was lodged at the Land Registrar's office on 3rd October, 2013 and that the Land Registrar signed it on the same day. Also, that according to the green card, the suit land was already in the name of Nareiyon on 2nd October, 2013. Further, that the second transfer form transferred the suit land from Nareiyon Olorgeso to David Mumo and the number 790 is superimposed with a pen. During this time, the id number of Nareiyon is now 0190341 as entered in the document. He testified that the fingerprint in the document dated 17th October, 2013 belongs to Nareiyon and the signature of the transferee is one David Mumo and he could be able to tell the 2nd defendant's signature from the witness statement dated 4th July, 2022.
70. With regard to the agency agreement dated 4th October, 2014, it was his testimony that he could not be able to tell whether there are similarities with the second signature of Nzomo and that of David Mumo. He further agreed that there is no signature of the Land Registrar in the document dated 17th October, 2023. Also, that he was required to produce KRA receipt whose stamp duty was paid on 17th October, 2013 which he produced for parcel number 793 and that there is no KRA receipt for the suit land.
71. The 1st defendant in the counter claim further testified that Tipapa Ole Letomu, the accused person in Criminal No. 764/2014 was one of the witnesses in the transaction and he represented him at the time of plea taking and whose charge had 8 counts. He agreed that under Section 26 of the [Land Registration Act](#), a certificate of title is prima facie proof of ownership but the title can be challenged in law and that one cannot pass title to a purchaser if the title is bad. He also informed the court that the plaintiff is unknown to him. Also, he admitted not to have produced the consent to transfer and evidence of payment of the stamp duty of the suit land.
72. On further cross examination, the 1st defendant in the counter claim testified that his role was to prepare the transaction documents and ensure that the vendor is paid although he was instructed by the vendor and the purchaser but that was not captured in the agreement. He agreed that in respect of the suit land, he received a total of kshs. 8,500,000 from the 2nd defendant and that the ownership documents were availed to him by Nareiyon which included an original title deed and an official search. He admitted not to have produced the said certificate of search that Nareiyon availed to him and restated that his role was limited to drafting the transaction documents which he surrendered the said documents to persons who were not his employees.
73. He further testified that the persons whom he surrendered the documents to later brought a title deed and a search certificate in the name of the 2nd defendant. He informed the court that there was no negligence on his part and that the said persons were Bernard Mulinge Nzomo and David Kimeu. He further testified that the transfer instrument is in his supplementary list of documents and he could see the signature of the 2nd defendant and another signature in the application for Land Control Board on the part of the purchaser and the two signatures appear identical purportedly done by the 2nd



- defendant. Also, that the sale agreement in the 2nd defendant's bundle of documents bears the signature of the 2nd defendant which is similar to the signature in the K-Rep Bank and Barclays Bank receipts.
74. With regard to the signatures in RTGS for Stanbic Bank, it was his testimony that he could not be able to tell if these signatures bear semblance to the first 2 signatures that he has identified. While he was not sure whether he received the amended notice to produce, he testified that he has produced proof that the money that he received was received by the agent of Nareiyon and that of the kshs. 8,500,000/- he remitted all the money that he received.
75. The 1st defendant in the counter claim further testified that he could not confirm if the identity card in the agency agreement belonged to Nareiyon but admitted that there was a typo where 1 comes before 9 instead of after 9. Further, that the ID number written is 01910341 and that the correct number should be 0919341. He could not also be able to tell if Nareiyon's ID card issued on 26th November, 2013 was issued pursuant to the waiting card. He further testified that when he asked Nareiyon if she wanted to receive the money, she replied that she did not have an ID card and a bank account and, that she intended that the money be paid to her nephew. Further, that in her letter of authorization, she authorized him to pay Philip Patial and no family member has gone to him complaining of non-payment.
76. On re-examination, the 1st defendant in the counter claim testified that entry number 5 in the green card shows that Nareiyon was the owner of the suit land as at the time of the transaction and he was not aware of the succession causes. Further, that he was not expected to go beyond the proprietorship of the suit land and that the waiting card that was presented to him was good for the transaction which number was reflected on the ID card. He testified that he could not be able to tell the variation of the ID number in the waiting card and the agency agreement due to a typo. He informed the court once again that his role was to prepare the agreement and witness the execution of the conveyancing instruments i.e. application for consent and transfer form. Also, that he acted under the authority of the 2nd defendant to hand over the said instruments to his agents and there was no negligence on his part. Further, that the instrument was signed by the purchaser (2nd defendant) through email who has not disputed the title deed in his name and Nareiyon's family has never complained of non-payment.
77. Further defence hearing proceeded on 12th July, 2023 where Levy Mulei Kimuu (DW1) while adopting his witness statement dated 20th February, 2023 as his evidence in chief testified that his role in the transaction in this matter was that of an agent to the 2nd defendant and also for the seller, one Nareiyon Ologeso. He further testified that he witnessed the sale agreement for the buyers as a witness and signed a formal agency agreement with the seller for a commission. The agency agreement was produced as D. Exhibit No. 24 dated 4th October, 2013. Further, that in the agency agreement, there was another person known as Bernard Mulinge. It was his evidence that he dealt with two parcels of land i.e. the suit land and Cis Mara/Olkinyei/793 and each measured approximately 170 acres. Further, that the seller was asking for kshs. 35,000/- per acre and they got a buyer for kshs. 50,000/-. Also, that their commission was kshs. 15,000/- per acre. He testified that the 2nd defendant directed him to carry out a search on his behalf and he sent the search certificate to him through fax in South Africa and thereafter, the 2nd defendant asked him to get an Advocate through whom he would do the transaction.
78. He further testified that he got Mr Lel and that Nareiyon had a waiting card for her ID card. Further, that the 2nd defendant paid the purchase price through Lel and Associates, the transfer was done and title deeds were issued in the name of the 2nd defendant. Also, that Lel and Associates would send documents to the 2nd defendant to sign and send back. He testified that Nareiyon received the purchase price from Lel through Patian who was her relative and she never complained to him of having never



received the purchase price. In conclusion, he testified that Lel and Associates discharged their duty in terms of the process and he was paid his commission by Lel and Associates.

79. On cross examination, he testified that he has worked for Narok County Government as a Physical Planner since the year 2004. It was his evidence that the agency agreement was signed in 2013 and that he is not a registered estate agent and neither is he a registered commission agent but that he came into the transaction as a friend of the 2nd defendant. It was his evidence that he earned kshs. 5,100,000/- as commission which he earned the money at a personal level. Also, that the agency agreement was prepared by Lel and Associates.
80. DW1 further testified that Nareyon's ID Number is captured as 0190341 but that he did not see the original identity card for Nareyon cited in the agreement. Further, that he got to know of Nareyon through Patian and Tipapa Letuluo. Further, that Tipapa Letuluo and Philip Memusi Patian together with Bernard Nzomo introduced him to Nareiyon Olorgesio and that he never knew of Tipapa Letuluo before but he knew of the other two. He testified that he heard that Philip Memusi was a nephew of Nareiyon and that Tipapa was the son in law to Nareiyon as well. He informed the court that he saw a copy of the title but he did not have with him the certificate of search that he conducted.
81. DW1 admitted to have interacted with Nareiyon Olorgesio at the office of Lel & Associates Advocates on 4th October, 2013 when they signed the agency agreement and that she was over 60 years when he saw her, she spoke to him in Maasai language through her son in law. It was his testimony that he knew the 2nd defendant for a long time before the agreement when he was working in Kitui and that the 2nd defendant visited the suit land after he paid the 1st instalment. Also, that the 2nd defendant never met Nareiyon at any given time as he was the one who conducted the search. Further, that he identified an Advocate to carry out the search and after he confirmed that the search was clean, he approached Lel and Associates to carry out the transaction. Further, that Nareiyon was present when the sale agreement was drawn which is dated 7th October, 2013 and he was equally present to witness it. Further, that the ID Number for Nareyon that is indicated in the agreement is 0190341 and the 2nd defendant was not there when the agreement was drawn. Also, that the agreement was sent to the 2nd defendant and that it is the Advocate who can confirm when the sale agreement was sent to the 2nd defendant.
82. DW1 further testified that he is conversant with the process of transfer of a freehold which the 1st defendant in the counter claim lodged the documents for them to be transferred in the name of the 2nd defendant. Also, that he had known the 2nd defendant about 6 months prior.
83. On further cross examination, DW1 testified that he is an employee of the County Government on permanent and pensionable terms and other than the agreement, he has never been an estate agent or received other commission. He informed the court that Nareiyon was selling the land at kshs. 35,000/- per acre which they sold at kshs. 50,000/- per acre. That, Nareiyon got the kshs. 35,000/- that she asked for and that he did not receive any money from both the seller and the purchaser. Also, that the kshs. 15,000/- was a tip that together with his colleague, agreed as the selling price to the 2nd defendant.
84. DW1 further testified that his statement shows the ID number of Nareiyon as 0910341 and in the agency agreement of 4th October, 2013, Nareiyon's ID number is 0910341 which are different. He agreed that people share names and not ID numbers according to the Registrar of Persons, Nareiyon's ID No. is 32317128 with serial number 235582282. He agreed that the ID number that he used in the agency and sale agreements do not belong to Nareiyon. He also agreed that the ID numbers that he used in the transaction did not belong to Nareiyon as Nareiyon's ID number was issued on 26th November, 2013 and there is disparity in the number of the ID given. Further, that he met Nareiyon



- on 4th October, 2013 when they were doing the agency and sale agreements during which time he met Nareiyon's son in law who regulated the sale price after which he brought the mother-Nareiyon. Also, that by the time he met Nareiyon, he had seen the title and done the search and that he did not bother to ask Nareiyon to identify herself by producing her ID card and neither did he make a copy of her waiting card.
85. DW1 further testified that the picture in the title was Nareiyon's as the passport photos were pinned to the title. Also, that Nareiyon was present at the time of signing the agreement but he did not see her receiving the money as the money was paid to Patian.
86. DW1 denied that colluded to defraud his friend the 2nd defendant as he saw Nareiyon sign the transfer form, gave out her passport photos and her titles. Also, he could not remember when the consent of the Land Control Board was obtained but that a copy of the application was sent to the 2nd defendant by Bernard. Further, that he did not know Tipapa Lotuluo before but he had known Philip for several months as he was working with Bernard and whom he heard that Philip was a nephew to Nareiyon who neither signed the agency or sale agreement. He testified that he heard that Tipapa was criminally charged in this court and that the 2nd defendant's title for the suit land and parcel no. 793 are being challenged. Further, that the 2nd defendant was not in Kenya to sign the sale agreement and he did not see him sign the same. Also, he could not confirm if Nareiyon appeared before the Land Control Board for consent. Further, that whereas he heard that Nareiyon did not have a Bank account, he did not know why she did not open a bank account for herself using her finger print. In conclusion, DW1 testified that Bernard collected the title deed from the lands' office on behalf of the 2nd defendant.
87. On re-examination, DW1 testified that he was acting as a commission agent and there was no law to bar him to act as such. Further, that the 2nd defendant was known to him for a long time and he contacted him when an opportunity for purchase of land arose. He testified that he witnessed the agreement after the 2nd defendant signed it which agreement was sent to him through email. Also, that Lel and Associates drew the documents and Tipapa Leluluo and Philip Patian lodged the said documents at the lands Office. Further, that the ID card for Nareiyon Ologeso was issued on 26th October, 2013 and the sale agreement was drawn on 7th October, 2013 which letter preceded the ID card. Further, that Nareiyon had a waiting card and that the number in the waiting card was included in the sale agreement. He restated that the purchase price was kshs. 50,000/- which Nareiyon was aware of and that she agreed with him that out of it was a commission. Also, that the 2nd defendant was also aware of the commission and he negotiated the purchase price with Nareiyon's son in law which was brought to the attention of Nareiyon who signed the sale agreement.
88. DW1 further testified that he was not a party to a fraudulent scheme, that he was not charged and neither was Mr Lel charged in any criminal case. Also, that the Land Control Board consent was obtained and the transfer instruments were executed by both parties. Further, that he conducted the search of the suit land prior to engaging Lel and Associates which property was registered under the name of Nareiyon Ologeso. Further, that he presented the document to Mr Lel and Nareiyon did not have a bank account but she instructed her nephew to receive the payment. Also, that he was not aware of the fraudulent scheme and neither was Mr Kilele. Further, that the 1st instalment was paid on 7th October, 2013 upon signing of the agreements and that neither Nareiyon nor her family have complained to him of non-payment of the purchase price.



89. On 8th August, 2023, the plaintiff filed his written submissions dated 25th July, 2023 raising the following issues for determination: -
1. Whether the transfer and registration of the suit property to the 1st defendant and 2nd defendant was fraudulent, irregular, null and void?
 2. Whether the 2nd defendant acquired a better title?
 3. Whether the court can order for the rectification of the register?
90. On the first issue, the plaintiff submitted that the defendants unprocedurally and through corrupt means fraudulently deprived him of his lawful entitlement of the suit land by obtaining a bogus order in a succession cause for the reason that under the Law of Succession, the said court order was irregular and could not at that stage purport to distribute an estate of a deceased person. The plaintiff relied on the cases of *Babola Mkalindi versus Michael Seth Kiseme & 2 Others* [2012] eKLR, *Jackson Gathumbi Mutuota versus Mwiki Company Limited & Another* [2022] eKLR, *Arthi Highway Developers Limited versus West End Butchery Limited & 6 Others* [2015] eKLR and *Macfoy versus United Africa Co. Limited* (1961) 3 All ER, 1169.
91. The plaintiff further submitted that under Section 26 (1) of the *Land Registration Act*, the doctrine of indefeasibility of title as established under the Torrens System of registration is that the title of a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to be a party to. The plaintiff relied on the cases of *Munyu Maina versus Gathitha Maina* [2013] eKLR, *Republic versus Minister for Transport & Communication & 5 Others Ex parte Waa Ship Garbage Collector & 15 Others* Mombasa HCMCA No. 617 of 2003 [2006] 1KLR (E&L) 563, *Alberta Mae Gacci versus Attorney General & 4 Others* [2006] eKLR, *Elijah Makweri Nyangw'ra versus Stephen Mungai Njuguna & Another* [2013] eKLR and *Alice Chemutai Too versus Nickson Kipkurui Korir & 2 Others* [2015] eKLR.
92. On the second issue, the plaintiff submitted that the transfer of the suit land to the 2nd defendant is shrouded with mystery and fraud as could be seen from the evidence of PW1. Also, that the 2nd defendant in his testimony adduced evidence to the effect that he never met or dealt with the 1st defendant in person and that he entrusted the transaction to the transacting advocates and the brokers. Also, that it is baffling that the 1st defendant was able to execute a sale agreement and other instruments of transfer using her waiting card which was a scheme to defraud the plaintiff. The plaintiff submitted that the transfer form is witnessed and bears the stamp of the 1st defendant in the counter claim and in the green card, it does not reflect the suit land having been owned by Mr. Kiliyai Ole Siololo at any one given time. To buttress this submission, the plaintiff relied on the case of *Funzi Development Limited & others versus County Council of Kwale*, Mombasa Civil Appeal No. 252 of 2005 [2014] eKLR.
93. The plaintiff further submitted that supposing the suit land belonged to Ntalameya Olorgesio, it emerges that Section 55 of the *Law of Succession Act* was not complied with before the property was transferred to the 1st defendant in the main suit. Hence the said registration to Nareyioen Olorgesio was a nullity as the estate of a deceased person could only have been dealt with in the manner prescribed by the *Law of Succession Act*. Also, that an inspection of the green card confirms that the suit land was never owned by Ntalameya Olorgesio.
94. On the third issue, the plaintiff submitted that this court is empowered under Section 80 (1) of the *Land Registration Act* to 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.



95. On 16th August, 2023, the 2nd defendant (plaintiff in the counter claim) filed his written submissions dated 10th August, 2023. The 2nd defendant raised eight issues for determination as listed hereunder: -
1. Was Ntalameya Olorgeso a member of Olkinyei Group Ranch and owner of share number 790 which gave rise to parcel Cis-Mara/Olkinyei/790?
 2. What was the relation between Ntalameya Olorgeso, Memaneushei Olorgeso who was the owner of share number 793 which gave rise to parcel Cis-Mara/Olkinyei/793 and Nareiyan Olorgeso?
 3. Whether Cis-Mara/Olkinyei/790 was fraudulently and illegally transferred to the plaintiff Repes Sairowua and whether the transfer and registration of the said land effected on the register of titles on 26.5.2011 was illegal, null and void and should be cancelled.
 4. Whether the prayers sought by the plaintiff in the plain dated 18th August, 2021 against the 1st and 2nd defendants' issue?
 5. Whether the transfer of Cis-Mara/Olkinyei/790 from the plaintiff Repes Sairowua vide court order issued in Succession Cause No. 253 of 2013 (consolidated) with 254 of 2013 on 27th September, 2013 was legal.
 6. Whether the transfer of Cis-Mara/Olkinyei/790 from Nareiyan Olorgeso to David Mututo Mumo was legal.
 7. Whether the prayers sought by the 2nd defendant/plaintiff in the counterclaim dated 4th July 2022 against the 1st-5th defendants can issue.
 8. Whether the 2nd defendant/plaintiff in the counterclaim is a bonafide purchaser for value?
96. On the first issue, the 2nd defendant submitted that he has proved that Ntalameya Olorgeso was a member of the group ranch having owned share number 790 which gave rise to the suit land, a fact which was proven by the affidavits of Lemontoi Ole Letoluo and Noolamala Ene Letoluo, the biological daughter of Ntalameya Olorgeso and by a copy of the green card produced by the plaintiff in entries no. 1 and 2.
97. On the second issue, the 2nd defendant submitted that Ntalameya and Memaneushei Olorgeso were brothers and members of Olkinyei Group Ranch and the said Ntalameya was the husband to Nareiyan Olorgeso. Further, that Ntalameya passed on before Memaneushei and as per the African traditions, Nareiyan got married to Memaneushei though they never sired any children and Memaneushei equally died leaving Nareiyan a widow for the second time.
98. On the third issue, the 2nd defendant submitted that the suit land was illegally transferred to the plaintiff for the reason that from the evidence tendered by the plaintiff, Ntalameya was already deceased in the year 2011 and at the time the plaintiff was the registered proprietor, letters of administration had not been taken out in respect of the deceased estate and nobody had the right to dispose or interfere with the property whatsoever. He further submitted that the adjudication process was completed in the year 2009 by which time the adjudication register marked Ntalameya Olorgeso as deceased which fact is deponed in the affidavit of Lemontoi Letoluo. Further, that the plaintiff in his oral testimony conceded that he did not have an agreement for the sale of land executed between him and Ntalameya Olrgeso,



- he never attended the Land Control Board for consent to transfer the land and he did not produce any executed transfer instrument.
99. The 2nd defendant submitted that the title held by the plaintiff was illegally and unprocedurally acquired and is for impeachment. The 2nd defendant relied on the case of Bahola Mkalindi versus Michael Seth Kseme & 2 Others [2012] eKLR.
 100. On the fourth issue, the 2nd defendant submitted that all the prayers sought by the plaintiff cannot issue for lack of locus standi as the plaintiff's name ought to have been registered as a proprietor of the suit land in the first instance.
 101. On the fifth issue, the 2nd defendant submitted that there is no legal transfer of the suit land from the plaintiff to Nareiyon and from a copy of the green card, it is clear that the alleged transfer was due to a court order as indicated in the consideration and remarks section of the green card.
 102. The 2nd defendant submitted that Nareiyon Olorgeso having been a wife to Ntalameya Olorgeso, she was his dependant by virtue of Section 29 of the Law of Succession Act and was entitled to his estate. Also, that it is clear that due to one reason or another, Nareiyon never took out letters of administration in respect of the estate of Ntalameya and this fact does not dispossess her of her inheritance. He further submitted that Section 32 of the Law of Succession Act provides for excluded property in cases of intestacy and that Nareiyon deposed in her affidavit that at no time did she file for letters of administration nor obtain any court orders in respect of the suit land. The 2nd defendant submitted that Nareiyon was the rightful dependant and beneficiary to the suit land and due to her age and illiteracy, a conspiracy was hatched by fraudsters who forged documents using her name and ended up transferring the suit land to him and she was not a party to the scheme.
 103. As to the validity of the title deed held by the 2nd defendant, he submitted that the correct legal position is that the registration of the plaintiff, the 1st and 2nd defendant contravened the provisions of Section 45 of the Law of Succession Act on intermeddling with the property of a deceased person.
 104. On the sixth issue, the 2nd defendant submitted that he can benefit from two things which is either to get his money back or get the land as it has been proven that the suit land never belonged to Nareiyon Olorgeso. Further, that Mr. Lel proceeded to transact on the basis of a waiting card without police abstract to ascertain that the identity card was indeed lost as a waiting card is not a form of identification. Also, that he never conducted his own search as a matter of due diligence. The 2nd defendant further submitted that it is not disputed that Mr. Lel received a total of Kshs. 17,000,000/- and in this case, Kshs. 8,500,000/- in October 2013 and has also not demonstrated that he directly paid any part of the purchase price to Nareiyon Olorgeso.
 105. On prayer (a) and (b) of his counterclaim, the 2nd defendant submitted that Mr. Lel did not carry out basic due diligence expected of a conveyancing advocate and owed him a duty of care. Also, that in the unfortunate event that this court proceeds to declare his title irregular and cancel it, he is entitled to a refund of the purchase price plus interest from the advocate. Further, that having proved that Nareiyon is deceased, the 2nd defendant's suit against her abates and only the 1st defendant in the counter claim is liable.
 106. With regard to prayer (c) of his counter claim, the 2nd defendant submitted that having considered the totality of the evidence adduced by the parties and the rules regarding the transfer of land after the adjudication process, he urged this court not to pronounce itself on the said prayer.
 107. The 2nd defendant also withdrew prayer (d) of his prayers in the counter claim and urged this court not to pronounce itself on the same. Further, the 2nd defendant submitted that he has demonstrated that



- the title held by the plaintiff was irregularly issued and urged this court to exercise the power conferred to it under Section 26 of the [Land Registration Act](#). Further, that the general principle is that the award of damages being discretionary, he urged this court to exercise discretion in favour of the 2nd defendant.
108. On the seventh issue, the 2nd defendant submitted that he is a bona fide purchaser for value without notice and has absolute unqualified and answerable defence against claim of any prior equitable owner. He submitted that he purchased the property in good faith, had no knowledge of fraud, he purchased for valuable consideration, the vendor had apparent good title and that he was not a party to any fraud.
109. In conclusion, the 2nd defendant submitted that he has ably demonstrated his innocence in the alleged fraud against him by the plaintiff. Further, that he has demonstrated that he indeed parted with a cool KShs. 17,000,000/- for an investment he was made to believe was legitimate and that he brought in other parties who the plaintiff avoided to shed light in what happened for the court to wholesomely appreciate the transaction.
110. On 5th October, 2023, the 1st defendant in the counterclaim filed his written submissions dated 2nd October, 2023 and raised two issues for determination as listed below: -
- a. Whether the 1st defendant carried out due diligence for the plaintiff.
 - b. Whether the plaintiff was satisfied with the transaction at the time of execution.
111. On the first issue, the 1st defendant in the counter claim submitted that the seller availed her certificate of title as her proof of ownership and since the same was not in question, the purchaser was satisfied with the document. Further, that he carried out an official search to confirm the entry of the seller's name on the green card which showed the seller as the absolute owner of the suit land. He submitted that since there was no contention as to the ownership at the time of the transaction, the certificate of title was valid proof of ownership and the agreement and transfer was conducted lawfully.
112. The 1st defendant in the counter claim further submitted that the extent of his instructions given to him by the plaintiff in the counter claim through his agents as the transacting advocates were specific and limited and maintains that he discharged all the duties owed to the purchaser in accordance with the law including exercising due diligence. Further, that his instructions were limited to verifying the ownership documents, witnessing the sale agreements as well as the application for the Land Control Board consent and he had no role in the process of paying the requisite stamp duty and overseeing the transfer of the property into the names of the plaintiff in the counterclaim.
113. The 1st defendant in the counter claim further submitted that having demonstrated that all the proceeds deposited in his account was transferred to the seller's nephew bank account and, there being no complaint that the money was never received by the family or the administrator of the estate of the deceased, there was no justification to join him in the suit.
114. On the second issue, the 1st defendant in the counter claim submitted that the doctrine of estoppel precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination which this case falls under that doctrine. Further, that the plaintiff in the counter claim cannot purport to claim that the transactions had shortcomings or it did not follow the laid procedures while at the time of transacting, he was quite contented with the transaction. Reliance was placed in the cases of *Pickard versus Sears* 112 E.R. 179 and [Central London Property Trust Limited versus High Tree House Limited](#) [1947] K-B. 130.



115. I have carefully analysed and considered the pleadings, the evidence tendered and the written submissions filed by all the parties together with the authorities cited and I am of considered view that the issues for determination by this court are as listed by below: -
1. Who is the rightful and lawful owner of the suit land?
 2. Whether the plaintiff and the 2nd defendant proved the allegations of fraud.
 3. Whether the plaintiff and the 2nd defendant are entitled to the prayers sought in the plaint and counter claim respectively.
 4. Who is to bear costs.
116. On the first issue, it was the plaintiff's case that he bought the suit land together with someone by the name of Kosenchia who purchased parcel no. 793 from Ntalameya Olorgeso sometime back in the year 2011. In his evidence, he informed the court that he bought the land at Kshs. 2,500,000/- and each acre was selling at Kshs. 15,000/- which he paid in cash. He also testified that during the time of the purchase, together with Ntalameya, they entered into a written sale agreement and also executed the transfer instruments which unfortunately, he did not produce (them) in court as he had left them at home.
117. During cross examination, the plaintiff could not explain how the said Ntalameya sold him the suit land whereas as per the area list bearing the signature of the District Land Adjudication Officer - Narok South, the records shows Ntalameya as deceased. It was also the plaintiff's case that he last saw Ntalameya sometime in the year 2011 during the time of the transaction.
118. Even though the plaintiff produced a copy of the title to the suit land, the process of acquisition was not clear. It was upon the plaintiff to go beyond the production of a certificate of title and show how the process in which he acquired the same more so when the validity of the title has been challenged. There was no agreement for sale, there were no transfer and application for consent to transfer. Interestingly and as it could be seen right from the plaint, the evidence and the written submissions, the plaintiff was mute on the process of how he acquired the suit land through purchase and was swift in attacking the title held by the 2nd defendant.
119. My attention was drawn to P. Exhibit No.2 which is a copy of the green card. It appears that the suit land was first registered on 10th June, 2009 with Olkinyei Group Ranch as the registered owner. On 26th May, 2011, Ntalameya Olorgeso was registered as the owner of the suit land but the title deed was not issued. On the same date, the plaintiff was registered as the proprietor and a title deed issued thereon. It defeats logic that Ntalameya Olorgeso and the plaintiff were registered as the owners of the suit land, whereas there is a known procedure when it comes to registration of titles and, it could not be possible to have the process done in a single day.
120. Section 107 of the [Evidence Act](#), provides: -
- “ 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”



121. In the absence of documents supporting the plaintiff's claim of ownership through purchase, I am not persuaded that the plaintiff is the lawful owner of the suit land. In the case of *Munyu Maina versus Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”(with emphasis)

122. On the other hand, the 2nd defendant laid claim of the suit land through his counter claim. He produced evidence through documentation showing the procedure he followed in acquiring the property. There was overwhelming evidence showing that the process of acquisition was tainted with fraud. More importantly I noted that both the plaintiff and the 2nd defendant did not call the ‘key witnesses’ who in my view would have shed light on the process of acquisition of the land. The 2nd defendant in his submissions seemed to have resigned to fate on the fact that he knew based on the evidence that had been tendered, that the suit land sold to him was all fraud. He sought to rely on the affidavit of Noolamala Ene Letoluo and Lemontoi Ole Letoluo who in their affidavits deponed that the suit land was fraudulently transferred to the 2nd defendant. I fail to understand why the 2nd defendant did not call them as witnesses.

123. A scrutiny of the documents presented by the 2nd defendant, more particularly during cross examination leave no doubt that serious fraud and illegalities were committed in the process culminating in the transfer of the suit land to the 2nd defendant's name. It is not clear whether the 2nd defendant was involved in committing fraud himself, but the documents used in the issuance of the title were a sham. From the fake ID card said to belong to the vendor-Nareiyan Ologeso and the certificate of title registered in her name, to the application for consent to transfer at the Land Control Board and transfer forms (both lacking/not produced), to payment of stamp duty (also not produced) and to the eventual issuance of a title that was not procured legally.

124. Section 26 of the *Land Registration Act* provides that:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.” (Emphasis is mine)



125. Under the above provision of the law, a certificate of title issued by Registrar shall be taken by all courts to be conclusive evidence of proprietorship. Nonetheless, the section provides that the title of that proprietor is subject to challenge under the following circumstances: -

- (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.

126. In the case of *Elijah Makeri Nyangw'ara versus Stephen Mungai Njuguna & Another* [2013] eKLR, the court held, inter alia: -

“...is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy 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, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

127. It is also not in dispute that Ntalameya Ologeso is deceased, a fact which the plaintiff and the 2nd defendant are both agreed on. It followed therefore that the law prescribing disposal of a deceased's property, would have kicked in, following his demise before any disposition in land could take place.

128. The *Law of Succession Act* at Section 45 provides that:

- “(1)) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

129. Section 45 of the *Law of Succession Act* speaks to the illegality of the acts of both the plaintiff and the 2nd defendant and further supports the proposition that the title to the suit land was initially illegally acquired by the plaintiff and subsequently by the 1st and 2nd defendant who had no legal authority to deal with the property of the deceased.



130. On the second issue whether the plaintiff and the 2nd defendant proved the allegations of fraud, it has been stated over again that fraud is a serious allegation which must be strictly proved. In the case of *Ratlal Gordhanbhai Patel versus Lalji Makonji*, Civil App.No.70 of 1956, the Court held that: -
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required”.
131. The plaintiff pleaded particulars of fraud and misrepresentation in paragraph 8 of his plaint. On this, the plaintiff successfully demonstrated the fraudulent actions surrounding the 2nd defendant’s acquisition of the suit land. In fact, it came out clearly through the testimony and evidence of PW1. However, the plaintiff has not exactly pointed out any fraudulent activity said to have been carried out by the 2nd defendant himself and as such has not proved fraud.
132. The 2nd defendant also pleaded particulars of fraud on the part of the plaintiff in his statement of defence. I do not think I need to repeat myself on this issue as well. In the absence of evidence showing how the plaintiff acquired the suit land, this court concludes that the plaintiff engaged in fraud knowing very well that Ntalameya was deceased. He did not take out letters of administration and without any explanation whatsoever, managed to have the suit land registered in his name on the same date that the deceased was registered. However, the 2nd defendant in my view also ought to have exercised and or carried out due diligence. He admitted never to have met or interacted with Nareiyon-Vendor and only visited the suit property upon payment of the 1st instalment. Save for paying the purchase price, the 2nd defendant largely left the responsibility of the transaction to his so called agents/trusted friends. He did not carry out a search himself, he did not see the vendor himself and he was not keen to question the authenticity or otherwise.
133. It is also baffling that whereas he admitted to having owned property before and being familiar with land transactions, he did not question the speed with which he acquired the title. Could it be that he was also aware of the fraudulent activities taking place? It has been said over time that, in any sale transaction, the buyer ought to be vigilant and exercise caution because the object of purchase ultimately belongs to him and so are the risks. In my view, I find the 2nd defendant was careless and indifferent especially where huge sums of money such as is claimed was involved. In other words, he was not a bona fide purchaser for value.
134. It would also not serve justice if I do not mention the conduct of the 1st defendant in the counter claim. In his defence and the evidence adduced, he maintained that his role was restricted to drafting the agency and sale agreement, witness the same by stamping and appending his signature thereon. He admitted that he did not conduct an official search of the title and neither did he present the instruments necessary for registration. It was his evidence that to the best of his knowledge, the transaction was proper as he has not received any complaint from the vendor’s family.
135. In deciding whether the 1st defendant in the counter claim committed an act which constitutes negligence, it is important to address the degree and the circumstances surrounding the whole issue. The starting point is there is no specific provision in the *Advocates Act* setting out the standard of duty required by an Advocate in the discharge of his professional duties but generally the law recognizes that an Advocate may be liable to his client for negligence. In my view it is not enough to prove that the Advocate was ignorant of a procedure stipulated in law or had made an error of judgement, but the error must be one that ordinarily a competent and skilled advocate exercising due care would not have made or shown it.



136. In this case, the 1st defendant in the counter claim referred to himself as a transacting advocate with limited instructions. In such circumstances, the advocate had a duty to consider in his role of a conveyancing advocate which he ought to have conducted with great care and skill. Sadly, he did not conduct an official search and instead, relied on the search (not produced) supplied to by the agents, to draft an agreement with the identification details of the vendor being allegedly sourced from or relied on a waiting card. The 1st defendant in the counter claim did not even seek police abstract to support this claim of a lost ID. The law is that an advocate who holds himself out to his client as having adequate skills and knowledge, to conduct the transaction instructed by his client and fails to use proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss. However, when the obligation becomes impossible to perform not because of lack of skill or care, then the advocate is not liable. What the advocate is required where he has been entrusted with the management of a client's instructions is to follow or pursue ordinary and accustomed course in the conduct of that transaction. What is expected of an advocate is that he would be honest, faithful and diligent in the discharge of his instructions. Having said the above, I am mindful of the fact that neither the 1st defendant in the counter claim nor the 2nd defendant tendered evidence of the terms of service or terms of engagement with respect to the transaction relating to the suit land and as such it would not be possible to assess the damages.
137. The 1st defendant in the counter claim provided evidence to the effect that the monies received in his client account was disbursed to the vendor's account. The 2nd defendant did not counter this evidence and he would not qualify of a refund because the monies were not utilized by the 1st defendant save his legal fees and the agents' commission.
138. On the third issue, it is my finding that having established that the plaintiff is not the rightful and lawful owner of the suit land and having established that it was not possible in the absence of lack of letters of administration for the said Nareyon to sell the suit land to the 2nd defendant, neither the plaintiff nor the 2nd defendant are entitled to the prayers sought in the plaint and counter claim respectively.
139. Section 80 of the [Land Registration Act](#) provides:
- “(1) 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;
 - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
140. Pursuant to the above provision of the law, the only order commending itself for issuance is that of rectification of the title to reflect the first registration of the suit land. As such, the 4th defendant is hereby directed to cancel the certificate of titles issued to the plaintiff and the 2nd defendant. The 4th defendant in the counter claim is hereby directed to amend the register by including Olkinyei Group Ranch as the registered owner of the suit land pending proof of confirmation of grant by the estate of the late Ntalameya Ologeso. The plaint dated 18th August 2021 is dismissed. The counter claim dated 4th July 2022 is also dismissed. I further direct that each party shall bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 24TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.



JUDGE

24/10/2023.

In the presence of:

CA:Meyoki

