



Gupta (Suing as the personal representative of the Estate of Dr Rawal Kumar Gupta - Deceased) v Wanjohi & 2 others (Environment & Land Case 142 of 2012) [2023] KEELC 21053 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 142 OF 2012**

**LL NAIKUNI, J
OCTOBER 16, 2023**

BETWEEN

SHARDA GUPTA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DR RAWAL KUMAR GUPTA - DECEASED) PLAINTIFF

AND

ENG ISAAC G WANJOHI 1ST DEFENDANT

RASHID M KHERI 2ND DEFENDANT

OMAR MZARUBA MWISHEE 3RD DEFENDANT

RULING

I. Preliminaries

1. The Judgment before this Honourable Court pertains to a suit instituted by Sharda Gupta (suing as the personal representative of the estate of Dr. Pawan Kumar Gupta (Hereinafter referred to as “The Deceased”) the Plaintiff herein through a further (further) Amended Plaint dated 4th October, 2021 and filed against the Engineer Isaac G. Wanjohi, Rashid M. Kheri and Omari Mzaruba Mwishee the Defendants herein.
2. From the very onset, I must admit that the suit is rather complex and convoluted case marred with too many intricacies of Claims and Counter Claims by the 1st, 2nd and 3rd Defendants herein. Mainly, the pith and substance of the subject matter is on a claim of ownership to the suit property by three different proprietors. Upon service of the pleadings and summons to enter appearance the Defendants entered appearance and filed their respective defences and Counter - claim; on 24th October, 2012 the 1st Defendant filed his Defence and Counter - claim, and introduced one Omari Mzaruba Mwishee as 1st Defendant in the Counter - claim. In subsequent pleadings, Omari Mwaruba Mwishee has been referred to as the 3rd Defendant.



3. This Honourable Court takes cognizance of the original Plaint that was filed on 23rd July, 2012 against Engineer Isaac G. Wanjohi. It was seeking for a declaration that the Plaintiff was the registered proprietor of Land Reference Numbers Kwale/Galu Kinondo/1912 (Hereinafter referred to as “The Suit Land”) among other reliefs. On 6th August, 2012, the Plaint was amended to include the 2nd Defendant, Rashid Mohammed Kheri, who had sold the suit property Kwale/Galu Kinondo/1912 to the Plaintiff. On 8th November, 2012, the Amended Plaint was further amended whereupon the Plaintiff sought a refund of a sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eight Three Hundred (Kshs. 8, 254,283.00.00/-) from the 2nd Defendant being a refund of the purchase price of the suit property in the sum of Kenya Five Million Five Hundred Thousand (Kshs. 5, 500,000.00/=) and Kenya Shillings Two Million Seven Fifty-Four Thousand Two Eighty-Three Hundred (Kshs. 2, 754, 283.00/=) being cost of construction of the perimeter wall and casuarina trees planted thereon. The Plaintiff, Dr. Pawan Kumar Gupta passed away on 17th March, 2021. This happened after he had testified in chief. The Legal Administratrix of the deceased estate Sharda Gupta made an application dated 25th October, 2021 to be substituted in place of the deceased Plaintiff. The application was allowed by consent on 28th October, 2021. The Plaint was amended on 4th October, 2021 to reflect the changes.
4. On 27th October, 2016, upon all parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010 with regard to the Pre - trial conference, the suit was fixed for full trial on the 21st February, 2017. Accordingly, the matter proceeded on for full trial vide adducing of “viva voce” evidence with the Plaintiff’s witness PW – 1 testifying and closed his case on 21st February, 2017. On 22nd May, 2017 the 2nd and 3rd Defendants called their witnesses. On 27th May, 2022, they also closed their cases.

II. The Plaintiff’s case

5. The Plaintiff prayed for Judgment against the 1st, 2nd and 3rd Defendants jointly and severally for:-
 - a. A declaration that the deceased’s Plaintiff’s estate is the registered proprietor of Kwale/Galu Kinondo/1912.
 - b. A declaration that the Title Deed, if any held by the 1st Defendant is illegal, null and void.
 - c. A permanent injunction restraining the 1st Defendant by himself, his agents, servants and/ or employees from demolishing the perimeter wall, uprooting the casuarina trees alienating, disposing of or undertaking any other activity on the suit property.
 - d. Any other relief that this Honourable Court may deem fit to grant.
 - e. A refund of a sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eight Three Hundred (Kshs. 8, 254,283.00.00/-) from the 2nd Defendant as stated in paragraph 8 B above.
 - f. Alternatively, an Order against the 2nd Defendant to pay and refund to the Plaintiff deceased’s estate all the expenses and costs related to the transaction over Kwale/Galu Kinondo/1912 to be assessed by the Court.
 - g. Costs of this suit.
6. The Plaintiff was described as a female adult of sound mind working for gain and residing in Diani. The Plaintiff brought this suit as the Legal Representative of the Estate of Dr. Pawan Kumar Gupta (Deceased) pursuant to Grant of Letters of Administration with a Written Will dated 14th September, 2021.



7. Based on the filed pleadings, the Plaintiff claimed that at all material times, the deceased Plaintiff was and is still the legal registered proprietor of the suit land - all that piece of land known as Land Reference number Kwale/Galu/Kinondo/1912 measuring approximately 0.49 Hectares. The Plaintiff stated that the deceased and the 2nd Defendant one Rashid Mohammed Kheri duly executed a Sale Agreement, terms and conditions stipulated thereof dated 21st July, 2011. On 17th October, 2011, the deceased was issued with a Certificate of Title Deed in his names. Immediately, he took possession of the suit property and caused some development in form of constructing a perimeter wall and planting of some Casuarina trees. On 11th June 2012, the 1st Defendant wrote to the deceased alleging that he was the registered proprietor of the suit property.
8. Further, the 1st Defendant notified the deceased through a Notice to demolish the perimeter wall erected on the suit property, uproot the Casuarina trees planted therein and to vacate the suit property. The 1st Defendant averred that he was the registered proprietor of a piece of land known as Land Reference Numbers Galu/Kinondo/708 and whose Certificate of Title Deed was being held by a financial institution – the National Bank of Kenya Limited.
9. According to the Plaintiff, the 1st Defendant further alleged that his land known as Land Reference numbers Galu Kinondo/708 was purportedly sub - divided into three parcels, namely Land Reference numbers Kwale/Galu Kinondo 1910, Kwale/Galu Kinondo/1911 and Kwale /Galu Kinondo 1912. The Plaintiff stated that the 1st Defendant had no right whatsoever over the suit property, the Plaintiff being an innocent purchaser for value on notice of the suit property. The Plaintiff contended that the 1st Defendant's demands amounted to intimidation and the Defendant. Hence, he urged Court to have the 1st Defendant be restrained forthwith.
10. The Plaintiff further stated that the 2nd Defendant fraudulently misrepresented himself to the him that he was the registered proprietor of all that property known as Kwale/Galu Kinondo/1912 knowing very well that he had no capacity to sell the property.
11. The Plaintiff raised the following particulars of fraud and misrepresentation meted by the 2nd Defendant:-
 - a. Misrepresenting himself to the Plaintiff that he was the proprietor of the suit property
 - b. Entering into a Sale Agreement with the Plaintiff purporting to be the proprietor of the suit property
 - c. Transferring the Title to the Plaintiff.
 - d. Receiving the purchase price amounting to a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000.00).
12. According to the Plaintiff, in view of the foregoing, the estate of the deceased Plaintiff had suffered and continued to suffer loss and damage. This was taking that the deceased had now been notified by the 1st Defendant while claiming proprietorship of the entire parcel known as Land Reference Numbers Galu Kinondo/708, to uproot the casuarinas trees planted therein. Therefore, the Plaintiff's claim against the 2nd Defendant was for a refund of the purchase price an amount of the sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000.00/=) and a further sum of Kenya Shillings Two Million Seven Fifty Four Thousand Two Eighty Three Hundred (Kshs 2,754,283.00/=) being the cost of the construction of the perimeter wall and of the casuarina trees planted therein. The Plaintiff averred that there was no other suit pending in any court between the Plaintiff and the Defendants with respect to the subject matter herein, save for "Mombasa HCCC No. 594 of 2011 Rashid Mohamed



Kheri – Versus - Dr. Pawan Kumar Gupta which suit was marked as settled on 27th March, 2012. The cause of action arose in Kwale within the Jurisdiction of this Honourable Court.

13. The Plaintiff responded to the 2nd Defendant's Defence and Counter - claim through a reply to Statement of Defence dated 6th August, 2013 and filed in Court on 7th August, 2013 thus:
 - i. The Plaintiff averred that the 2nd Defendant's Defence and Counterclaim were hollow, a sham and contained mere denials to the Plaintiff's suit.
 - ii. The Plaintiff denied each and every singular allegation/denial contained in paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the Defence and Counterclaim. In further response thereto, the Plaintiff reiterated the contents of the Counterclaim.
 - iii. In response to paragraph 12 of the Defence to Counterclaim the Plaintiff reiterated that the 2nd Defendant was not a purchaser of all that parcel of land known as Land Reference numbers Galu/Kinondo/708, which he later sub - divided to conceal the fraud, for value without notice of the Plaintiff's actual and legal possession of the suit premises. Further, the Plaintiff averred that the 2nd Defendant was not a purchaser for value or at all.
 - iv. The Plaintiff averred that the 2nd Defendant was not entitled to the prayer sought at paragraph 16 of the Defence to Counterclaim.
14. The Plaintiff responded to the 3rd Defendant's Defense and Counter - claim through a reply to defence dated 6th August, 2013 and filed on 7th August, 2013 where the Plaintiff deponed that:-
 - a. Save what was expressly admitted, the Plaintiff joined issue with the 3rd Defendant's Defence and Counterclaim.
 - b. The Plaintiff's paragraph 6 of the Defence to the Counterclaim.
 - c. In response to paragraph 7, the Plaintiff reiterated his claim and averred that the 3rd Defendant failed to carry out proper due diligence of a purchaser of land by ignoring the actual situation of the suit property which was that the Plaintiff was in actual possession of the suit land. The 3rd Defendant was made aware of the fact that the Plaintiff was the owner of the suit property long before he completed paying the purported purchase price to the 2nd Defendant.
 - d. In response to paragraph 8, the Plaintiff reiterated that the 3rd Defendant had notice of the fact that the Plaintiff was the real owner of the suit land long before he paid the purported value and that the Plaintiff had actual possession of the suit premises.
 - e. In response to paragraph 9, the Plaintiff reiterated that because the 3rd Defendant was a beneficiary of fraud, was not an innocent purchaser for value without notice, and confirmed that the Plaintiff was in occupation of suit land before taking possession and erecting a wall and other developments, he never held a valid title to the suit land. Accordingly, he was a trespasser and held the parcel of land in trust for the Plaintiff.
15. The Plaintiff prayed that Judgment be entered against the 1st, 2nd & 3rd Defendants jointly and severally as prayed in the Plaint.
16. On 21st February, 2017, as indicated the hearing for the Plaintiff's case commenced whereby he summoned two witnesses – PW – 1 & 2. The PW - 1 testified as follows:-



A. Examination in Chief of PW - 1 Dr. Prawn Kumar Gupta by Umara Advocate

17. He testified and sworn in English language. He told the court that until the year 2014, he had been practicing medicine. They had some property and he lived in Diani Beach Plot No. 1336 Beach road, Diani. He was the Plaintiff in this case. He met the 1st Defendant vaguely in the office of O.C.P.D. Diani. The 2nd Defendant was well known to him having met him in October 2011 brought by some foreigners wanting to sell a plot No. 1912 in Galu Kinondo about 1.5 acres with no documentation. The 3rd Defendant was not known to him. He went to see the plot owned by the 2nd Defendant with the two brothers. He liked the plot. PW – 1 asked the 2nd Defendant to bring the title. After 2 days the 2nd Defendant brought the original title (witness shown copy of title deed on page 13 of List of Documents).
18. He testified that he told the 2nd Defendant to visit an advocate, Lynette Oketch. They agreed on the purchase price at a sum of Kenya Shillings Five Million Two hundred and fifty Thousand (Kshs. 5,250,000/-). He conducted an official search on page 17 which he produced and marked as Plaintiff's exhibit No. 1. The search was dated 14th July, 2011 which showed the proprietor as Rashid Mohamed Kheri, the 2nd Defendant herein. They went back to the Advocate and prepared a sale agreement dated 21st July, 2011; he produced the sale agreement as Exhibit No. 2. The purchase price was a sum of Kenya Shillings Five Million Two hundred and fifty Thousand (Kshs. 5,250,000/-) to be payable at once but he told the 2nd Defendant that he would pay in November 2011.
19. He stated that he was to pay a deposit of a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) which he paid. The balance was to be paid at a later date. They signed the agreement after he paid the 2nd Defendant. The transfer dated 5th October, 2011 (at page 7) was signed by all the parties. The transfer was marked as Exhibit No. 3. The title deed on page 13 was marked as Exhibit No. 3 and the title deed was marked as exhibit No. 4. The property was Land Reference numbers Kwale/Galu Kinondo/1912 measuring 0.49 ha. The property was transferred to his name and a title deed at page 12 issued which was produced as Exhibit 5.
20. According to the witness, he visited the property after purchasing and transferring it in his name. The property was vacant. It was a bush with no developments. The 2nd Defendant showed him the boundaries. There were works on the right side. The witness was shown a Plaint in HCCC 594/11 in 2nd Defendant's list of Documents) in that case, the 2nd Defendant was demanding for a sum of Kenya Shillings Five Million Five Hundred (Kshs. 5,500,000/=). It was the balance of the purchase according to him but he had already paid him a deposit of a sum of Kenya Shillings One Million (Kshs. 1,000,000/=). He told the court that in his further list of documents, he had an application for funds transfer in favour of M/s Stephen Odiaga & Company Advocates. The purpose was for the purchase of Plot No. 1912, Galu Kinondo. It was for transfer of a sum of Kenya Shilling Five Million Four Eighty Thousand (Kshs. 5,480,000/=).
21. PW - 1 told the court that Stephen Odiaga & Co. Advocates were receiving the cash on behalf of the 2nd Defendant. After he paid the balance of the purchase, the civil case No. 594 of 2011 was finalized. Funds transfer produced and marked as Exhibit 6. Upon visiting the property, he sank a shallow well and got consent to put up a perimeter wall and planted Casuarina trees. He paid a sum of Kenya Shillings Forty Thousand (Kshs. 40,000/=) for the water shallow well. He also paid rates. Later he got a letter from the 1st Defendant Engineer Isaac G. Wanjohi. The letter dated 11th June, 2012 was at page 36. The reference was the ownership of Galu/Kinondo/708, which the 1st Defendant claimed to be his property. The witness was not aware when he purchased Plot No. 1912. There was no mention of Plot No. 708 anywhere. The letter was marked Exhibit No. 7.



22. Prior to the demand, he had not met the 1st Defendant. Later he met the 1st Defendant at the office of the DCIO, Kwale. Mohamed Rashid Kheri also came to the office of the DCIO, and agreed to refund his money. He was surprised that the 1st Defendant wanted to refund him. He was not aware that the property was charged to a bank. When he was buying, he was not aware that Plot No. 1912 was a sub-division of Plot Galu/ Kinondo/708. He had not trespassed on the 1st Defendant's plot.
23. He testified that he had never met Omar Mzaruba Mwishee, the 3rd Defendant. He had sued Eng. Isaac Wanjohi because he was claiming rights to the witness's property and he had sued the 2nd Defendant to get his money back together with damages.

B. Cross examination of PW - 1 by Mr. Oddiaga Advocate for 2nd Defendant: -

24. He commenced his testimony by telling the court that he used to practice medicine. He was a medical doctor by profession. He had lived in Diani for 44 years. He was approached to buy land. The people who came with the 2nd Defendant were Juma and Juma, he did not know their second names. He was not looking for land. A friend of the PW – 1 from Singapore requested him to look for him a beach plot. He did not agree to buy the plot for the first time. He told them he would write to his friend. In the meantime, he carried out his due diligence by applying out for an official search. He then agreed to buy it. They agreed on the purchase price. He conducted an official search and confirmed the ownership at the Kwale Land Registry. The owner was Mohamed Rashid Kheri, the 2nd Defendant.
25. He testified that he was satisfied with what the search paper showed. The agreement for sale was signed/ executed before he conducted the official search. When they signed the agreement he paid the 2nd Defendant a sum of Kenya Shillings One Million (Kshs. 1,000,000/-). He told the buyer that he would pay the balance in November 2011. Regarding the balance, paragraph 5 of the sale agreement stated that payment was to be made by 31st December, 2011. He paid the said in cash and cheque in the presence of the Advocate. When he paid the deposit, PW – 1's Advocate was given the original document title deed, transfer and application to the Land Control Board (LCB). He did not commence the process of conveyancing the property into his names. He went to the District Officer who was the chairman of the Land Control Board.
26. He stated that the transfer was done on 17th October, 2011. He presented the documents to the lands registry and the title deed was issued to him. By this time, he had not completed payment but he had issued him with a postdated cheque of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-). He got the title in his name. The cheque for a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) could not be deposited as it was over the bank's requirements of a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) and he asked it to be returned as he had transferred the funds into his Advocates account.
27. When referred to the letter on page 41 of the 2nd Defendant's list of documents) and was asked if the same was true that he received, the witness was unable to answer.
28. The witness further stated that he was not aware of the Civil Case HCCC no. 594 of 2011 - Rashid Mohamed Kheri – Versus - Dr. Pawan Kumar Gupta". He had never been sued. He paid the buyer as per the agreement. He received a letter from Eng. Isaac Wanjohi, the 1st Defendant. He did not write to the 2nd Defendant above Wanjohi's letter. When he finally paid the balance of the purchase price, he had not taken the plot. Before getting the letter from Eng. Wanjohi he had taken possession. He told the court that he was claiming ownership while in possession of the suit property.
29. He confirmed to the court that the 2nd Defendant was the owner of the suit property according to records. He had already surrendered the title deed on the advice of the DCIO. As of the day he testified



the suit property was not in his name as he realized there was fraud and he returned the original title documents. He had no knowledge of whether or not Case No. HCCC. 594/11 had been finalized or not.

C. Cross Examination of PW - 1 by Dr. Kuria - Advocate, (SC):-

30. He confirmed that the sale of that property was a fraud. The 2nd Defendant was the one who perpetrated that fraud as he did not own that property that he purported to sell to him. With reference to page 21 of the 1st Defendant's documents, he told the court that he received the letter dated 11th June, 2012 and also the one dated 23rd July, 2012 (the witness read a letter dated 23rd July, 2012). He admitted that Plot No. 1912 was non-existent. It was a bogus plot.
31. When shown page 28 of the Plaintiff's documents, he told the court that entry no. 1 was opened on 15th November, 1974. According to the document the registered owner was Isaac Wanjohi. At page 30, entry no. 1 was Isaac Wanjohi while entry no. 9 was Rashid Mohamed Kheri and he was the person who purportedly sold to him. The plot No. was Galu/Kinondo/708. The title deed at page 19 known as Kwale/Galu Kinondo/1912 is a bogus title. In the 1st Defendant's list of document, the land certificate on page 1 was not preceded by the name Kwale. The 2nd Defendant Rashid told him there were 3 plots out of Plot No. 708.
32. The witness further told the court that the official search on page 17 of his bundle of documents was a bogus search. At page 9, the title deed was from the certificate and it was bogus. Paragraph 10 and 11 of the Plaintiff in HCCC 594 of 2011 which was at page 19 of the 2nd Defendant's list of documents, shows that he had been sued. The Plaintiff was dated 9th November, 2011 as at that date he had not paid him a sum of Kenya Shillings Four Million Two Hundred and Fifty Thousand (Kshs 4,250,000/-).
33. He testified that the title in his name was on page 19 of his list of documents and it indicated that he was registered on 7th October, 2011 when the sum of a sum of Kenya Shillings Four Million Two Hundred and Fifty Thousand (Kshs. 4,250,000/-) had not been paid. He processed the documents in the 2nd Defendant's presence and his advocates were aware. He was not part of the fraud. The bogus plot was part of a bigger land Plot No. 708. There was no perimeter wall when he visited. It was a bush, there were no crops and there was nobody on the plot except a lady who told him that he had been lost as the plot belonged to Mr. Isaac Wanjohi (the witness was shown letter dated 11th June, 2012 on page 21 of the 1st Defendant's documents).
34. The witness reiterated that there was no perimeter wall constructed by the 1st Defendant. He had not seen the statement at page 20. He was not aware of the case shown at page 38 of the bundle of documents on page 36 was a letter from the manager legal services of the National Bank of Kenya. He was not aware that he had bought the plot based on the documents he saw.

D. Cross Examination of PW - 1 by Siminyu Advocate for 1st Defendant in the Counter Claim: -

35. He told the court that he was buying Plot No. Kwale/Galu/Kinondo/1912. He was not buying Plot No. 708, he did his due diligence on his part and was satisfied that the land existed. Page 30 of his documents was a green card which was certified. Entry No. 9 was Rashid Mohamed Kheri. The citation was Kwale/Galu/Kinondo and that was what he bought.
36. On part A of the property section Page 23 and 24 originated from the Kwale registry. Entry No. 3 was Dr. Pawan Kumar Gupta, himself. He realized the papers were bogus when he received the letter from Mr. Isaac Wanjohi and when a lady staying near the plot told him so. This was in June 2012. He informed the DCIO who directed him to get a photocopy of the green card. He made a formal



complaint to the police and which was entered on the Occurrence Book. The complaint was against Mr. Mohamed Rashid Kheri. Both Mr. Wanjohi and him lodged a complaint.

37. The witness told the court that he did not know whom Mr. Wanjohi complained against. He was the one who instituted this suit. The further Amended Plaintiff was filed on 8th November, 2012. He did not have a current search. Paragraph 3 of the Amended Plaintiff stated that at all material times, he was and was still the registered owner. On Paragraph 7, he had not amended the Plaintiff. Mohamed Rashid was arrested and charged and he testified as a police witness. He stated that he did not know him. He did not know the outcome of that case; he did not know whether the accused person was acquitted or not.

E. Re - Examination of PW - 1 by Umara Advocate:-

38. He reiterated that the official search was dated 14th July, 2011. He conducted the search before entering into an agreement. The sale agreement was executed on 21st July, 2011. He only sued Isaac Wanjohi and Mohamed Rashid Kheri. He did not know Omari Mzaruba Mwishee, the 3rd Defendant. He was buying Plot No. 1912 and not Plot No. 708. At the time of buying Plot No. 1912, he was not aware of the existence of Plot No. 708. At the time he filed the suit he was still the registered owner and he had the original title. He had not done a fresh search to confirm the current position. He no longer had the original title because he had surrendered it to the DCIO and the lands office. He had claimed from Mohamed Rashid as per the prayers in the Amended Plaintiff.
39. The Advocate for the Plaintiff, Mrs. Umara Advocate marked the close of the case by the Plaintiff.

III. The 1st Defendant's case

40. The 1st Defendant is described as a male adult of sound mind working for gain and residing in Nairobi within the Republic of Kenya. The 1st Defendant filed a statement of defence dated 24th November, 2015 where he admitted the contents of paragraph 10 to the extent that the same was merely descriptive of the party. He denied the contents of paragraph 11 and stated that he was a stranger to the averments in paragraph 14 and the particulars of fraud thereto of the counter-claim particularized under 14 (a-f).
41. He denied the contents of paragraph 15 in toto. He averred that the contents of paragraphs 16, 17, 19 and 22 of the Counter-claim touched on the 2nd and 3rd Defendants. He denied paragraphs 18, 20 and 21 in their entirety.
42. The 1st Defendant also filed an Amended Defence and Counter claim dated 19th January, 2022 where he averred that:-
- a. The Plaintiff was a female adult of sound mind residing and working for gain in Diani within Kwale District. She was the legal representative of the estate of Dr. Prawan Kumar Gupta (Deceased) pursuant to Grant of Letters of Administration with written Will dated 14th September, 2021.
 - b. The 1st Defendant purchased Galu/Kinondo/708 (which the Defendants refer to as Kwale/ Galu/Kinondo/708) in the year 1974 and was registered and issued with a Land Certificate on 22nd March, 1975.
 - c. The 1st Defendant averred that he had been in possession of the suit property ever since and at all material times through his licensees. At first, the suit property was not fenced until sometimes in the year 2002 when the Plaintiff put up a wooden fence and between the years 2006-2008 when he put up a stone perimeter wall around the property. After putting up a perimeter fence, his caretakers remained on the suit property and still was there to date.



- d. He caused it to be charged vide a Charge dated 6th June, 1975 and a Further Charge dated 10th July, 1979, he charged land known as LR. No. Galu/Kinondo/708 to the National Bank of Kenya Limited to secure payment of the said facilities. At all materials times and to date, the said Original Land Certificate was still in the custody of the said Bank. Further, the Bank had not parted with possession of the said title document nor had it sold the said Galu/Kinondo/708 property at a public auction or at all to any person.
- e. On diverse dates between 26th September, 2006 and 29th September, 2006, the 3rd Defendant, who knew that the 1st Defendant was the proprietor of the suit property, forged a purported Transfer by Chargee in Exercise of Power of Sale dated 26th September, 2006 purporting to have purchased land known as LR. No. Galu/Kinondo/708 from the Bank, whereby on 29th September, 2006, he was issued with a “title deed” on the same date. The 1st Defendant averred that the “title deed” issued to the 3rd Defendant was bad and void in law for being tainted with fraud and forgery.
- f. He relied on particulars of fraud on the part of the 3rd Defendant:
 - i. The 3rd Defendant who knew or ought to have known that the National Bank of Kenya Limited was the holder of the Charge and had not exercised the statutory power of sale purported to be a buyer of the suit property which the said Bank never set out to sell;
 - ii. forging a purported Transfer by Chargee in Exercise of Power of Sale with intention to procure himself to be registered as the owner of the 1st Defendant's property, while he knew that National Bank of Kenya Limited did not sell and he did not purchase the suit property at all;
 - iii. procuring the Land Registrar to create records to accommodate the forged purported transfer by Chargee and a new registration of the suit property;
 - iv. presenting the forged Transfer by Chargee in Exercise of Power of Sale to the Kwale District Land Registrar and procuring himself to be registered and be issued with a title deed knowing too well that his actions were fraudulent;
 - v. transferring the said land known as LR. No. Galu/Kinondo/708 to the Plaintiff while he knew he had no capacity to transfer the property;
 - vi. misrepresenting that he was the legitimate owner of Galu/Kinondo/ 708 and the title he was holding was genuine facts he knew were not true.
- g. On or about 14th June, 2010, the 3rd Defendant purported to transfer the bad title to the 2nd Defendant who was issued with a “title deed” on the same day. The Plaintiff averred that the 2nd Defendant was a beneficiary of the fraud and he acquired a bad title incapable of conferring on him any interest in the said Galu/Kinondo/708. Further, by the time the 2nd Defendant procured himself to be registered as an owner of the 1st Defendant's property, the Defendant had already built a perimeter wall around the property-5 years before. The 2nd Defendant, who was also informed by the 1st Defendant's licensees that the property belonged to the 1st Defendant at the very first time he visited the property, ought to have carried out due diligence to confirm the real owner of the property now that he already had information that was contrary to what was contained in the documents he may have received from the Lands Office.
- h. Further, the 1st Defendant averred that the Plaintiff had or ought to have had notice of the fraud perpetrated on him had he been diligent enough. According to the Green Card's Registration



Section at the bottom of the relevant pages, at the time of his purported registration as proprietor, that is insertion made in which similar to the description on the top left of the page wherein all the entries were typed. Immediately or soon thereafter, the insertion done by hand. This latter development was not in tandem with the description given on the top left of the page which showed the description as Galu/ Kinondo/ 708. He ought to have questioned this disparity. He was deemed to have had actual notice of every entry in the register within the meaning of Section 29 of the Land Registration Act. He was not an innocent purchaser for value without notice of the 2nd Defendant's fraud and the 1st Defendant's possession and actual possession of the suit property.

- i. Without prejudice to (16) above, and in the alternative, the 2nd Defendant knowingly and fraudulently procured the change of the records so as to conceal the fraud when he purported to subdivide the suit property three months later. Despite all these glaring disparities and with intention to make more money fraudulently, the 2nd Defendant subdivided Galu/ Kinondo/708 into three portions-1910, 1911 and 1912 with prefixes Kwale/ Galu Kinondo/ ... and was issued with "title deeds" for the sub - divisions 3 months later on 21st September, 2010. He "sold" parcel number Kwale/ Galu Kinondo/ 1912 to the Plaintiff who was issued with a "title deed" on 17th October,2011. At the time of the sub division, he must have visited the suit property and found the 1st Defendant being in actual occupation and possession. There was already a stone perimeter wall on the suit property.
- j. The 1st Defendant relied on the following particulars of fraud on the part of the 2nd Defendant:
 - i. knowingly procuring a change of records to change the description of the suit property to conceal his fraudulent intentions;
 - ii. knowingly and with intend to defraud, subdividing the suit property into other portions;
 - iii. knowingly and with intend to defraud, offering the subdivisions for sale;
 - iv. transferring Kwale/ Galu Kinondo/ 1912 whilst he knew he had no legal capacity to sell and he held a bad title to the same.
- k. The 1st Defendant averred that the 2nd Defendant's title to Galu/ Kinondo/ 708 was defective, bad in law, null and void and was incapable of being transferred to the 2nd Defendant and or the 3rd Defendant and if it was, then the 2nd and 3rd Defendants acquired bad titles. They were beneficiaries of fraud. Accordingly, the 1st Defendant averred that the titles acquired by the Plaintiff, 2nd and 3rd Defendants were all null and void, should be cancelled and the records rectified to reflect the 1st Defendant as the owner of all that parcel of land known was Galu/ Kinondo/708.
- l. The 1st Defendant averred that the Plaintiff was not a purchaser for value without notice. He deliberately shut his eyes to the physical occupation of the entire suit property. The 1st Defendant informed and advised the Plaintiff not to pay the purchase price of the Kwale/Galu Kinondo/1912 because it was the 1st Defendant's property. The caretakers of the 1st Defendant also did inform the Plaintiff of the same the very first time he visited the property. He built a perimeter wall within the 1st Defendant's wall. He broke part of the 1st Defendant's stone wall to gain access. The Plaintiff ignored the "caveat emptor" maxim. He failed to carry out due diligence expected of a purchaser of land especially in Coast Province, where carrying out of an official search at the Lands Office was not enough. A visit on the ground was necessary



before parting with a whopping sum of Kenya Shillings Five Million Two Hundred Thousand (Kshs. 5, 200,000/=). Such a visit would have called for an inquiry on the part of the Plaintiff. He ought to have questioned or chose to ignore the disparity in the description of the land on the Registration Section of the Green Card (as shown in paragraph 16 above). He too was deemed to have had actual notice of every entry in the register within the meaning of the provision of Section 29 of the [Land Registration Act](#). He was the author and perfecter of his own misfortune.

- m. The 1st Defendant averred that after he reported the fraud to the police at Kwale, the 2nd Respondent was charged with three counts of fraud and forgery. The case was still pending. Further, the Land Registrar, Kwale District placed restrictions on all the said three (3) sub - divisions, that is LR. No. Kwale/Galu/Kinondo/ 1910, 1911 and 1912 respectively. The 1st Defendant contended that this was a confirmation that there was fraud and forgery on the part of the 2nd Defendant in the first place when he procured to be registered as the owner of the suit property. Further, where title to a parcel of land is obtained by way of fraud or misrepresentation, then such title is invalid and cannot form the basis for any future transactions. As such, the 2nd Defendant's title was/ is invalid and void; he could not have legally transferred a good title whilst he held a bad title and did not have legal capacity to pass good title to anybody. As a result, the purported transfer to the 3rd Defendant was equally void and so was the transfer to the Plaintiff. The Plaintiff could not, therefore, purport to have benefited from the fraud.
- n. The purported registration and issuance of title deed in respect of Kwale/Galu/Kinondo/ 1912 was illegal, null and void for non-compliance with the provisions of the [Land Control Act](#), Cap 302 Laws of Kenya.
- o. Accordingly, the Plaintiff was holding Kwale/Galu Kinondo/ 1912 and the 2nd Defendant was holding Kwale/Galu Kinondo 1911 and 1912 in trust for the 1st Defendant within the meaning of the provision of Section 28(b) of the [Land Registration Act](#). They were trespassers on the larger Galu/Kinondo/708 from which their "purported" parcels of land were created. Further, the 1st Defendant's rights to Galu/Kinondo/708 were overriding rights within the meaning of the provision of Section 30 (g) of the Registered [Land Act](#), Cap 300, which was in registration, as a person in actual possession and occupation before the Plaintiff and the 2nd Defendants' trespass.
- p. The 1st Defendant prayed for Judgment against all the Defendants jointly and severally in the following terms:-
 - a. A declaration that the Deceased obtained registration of Land Reference Number Galu/Kinondo/708 (also referred to as Land Reference numbers Kwale/ Galu Kinondo/708) fraudulently.
 - b. A declaration that the Deceased's purported title was bad, defective, null and void in law and was incapable of conferring any lawful interest to the 2nd and 3rd Defendants.
 - c. A declaration that the Plaintiff was holding all that parcel Known Land Reference Numbers Kwale Galu/ Kinondo/1912 and the 2nd Defendant was holding Land Reference numbers Kwale/ Galu Kinondo/1911 and Land Reference Numbers Kwale/Galu Kinondo1911 in trust for the 1st Defendant.



- d. A declaration that the Plaintiff and the 2nd Defendant were trespassers on all that parcel of Land Reference Numbers Galu/Kinondo/708.
- e. A permanent injunction restraining the Plaintiff, by himself or his agents, or servants from being on, selling, alienating, charging or in any way parting with possession and interfering with the 1st Defendant's quiet possession of the said Land Reference numbers Kwale/ Galu Kinondo/ 1910 and Kwale/Galu Kinondo/1911.
- f. A permanent injunction restraining the 2nd Defendant, by himself or his agents, or servants from being on, selling, alienating, charging or in any way parting with possession and interfering with the 1st Defendant's quiet possession of the said Land Reference numbers Kwale/Galu Kinondo/1912.
- g. An order that the Plaintiff gives the 1st Defendant vacant possession of the purported Land Reference Numbers Kwale/Galu Kinondo/ 1912, that forms part of the 1st Defendant's parcel of land known as land Reference numbers Galu/Kinondo/708.
- h. Mesne profits.
- i. General Damages.
- j. An order directing the Land Registrar, Kwale District to cancel the registration and titles issued to both the Plaintiff and the 2nd Defendants and re-open the 1st Defendant's title for all that parcel of land known as Land Reference Numbers Galu/Kinondo/708.
- k. Costs together with interest until payment in full.

43. On 22nd May, 2017 the 1st Defendant called his first witness DW 1. He testified as follows:-

A. Examination in chief of DW - 1 by Dr. Kuria Advocate (SC)

44. He was sworn and testified in English language. He told the court that he was Patrick Maina Thuku. He was aware of the Civil case "HCCC No. 594 of 2011, Rashid Mohamed Kheri – Versus - Pawan Gupta. The suit property was Plot No. Kwale/Galu Kinondo/1912. The last entry on the file indicated that the matter was settled. Costs in the cause. He produced the file as an exhibit -File marked D. Exhibit 1. There was no cross examination by both Mrs. Umara Advocate and Mr. Oddiaga Advocate.

A. Examination in chief of DW 2 by Dr. Kuria Advocate (SC)

45. He was sworn and testified in English language. He told the court that he was Paul Chelanga. He was the Recoveries Manager at the National Bank of Kenya, Head Office, Nairobi. He recorded a statement and filed it on 8th November, 2013 which he adopted as his evidence in chief. The name of their customer was Eng. Isaac Wanjohi, the 1st Defendant in this suit. The 1st Defendant borrowed money using security Plot No. Galu/Kinondo/708 measuring 0.7 ha. When he borrowed, the title was kept by National Bank of Kenya. The title deed was in their custody. DW – 2 had the original copy. He produced a certified copy as an exhibit D -2. The 1st Defendant first borrowed on 6th June, 1975 the sum of Kenya Shillings Fourteen Thousand (Kshs. 14,000/=).

46. He stated that, his second borrowing was by further charge dated 10th July, 1979. He had the original and certified copy of the further charge which he produced and marked as D - 3. The 1st Defendant had been heir good client. He had been enjoying various facilities. They had not had any problems with him as a customer. At page 26 of the Bundle of documents was a transfer by charge in exercise



of power of sale. The transfer by charge reads Kwale/Galu Kinondo/70 while the title deed was Galu/Kinondo/708.

47. He further told the Court that the purported transferor was the National Bank of Kenya Limited and the transferee was Omar Mzaruba Mwishee. The transfer never bore a personal number and a signature. He had never seen him. It was witnessed by an Advocate unknown to them. When a customer defaulted, the bank issued a 30 days' notice, 90 days statutory Notice and another 40 days' notice. They had never issued any notice in respect to this property. At page 7 of the 1st Defendant's bundle was a register at the Lands Office showing a charge dated 16th August, 1975. Entry No. 2 dated 19th November, 1979 was a further charge for a sum of Kenya Shillings Sixteen Thousand (Kshs. 16,000/-) dated 10th July, 1979. The date in entry No. 2 corresponded with the date of the further charge.
48. He told the court that at page 14 of the bundle of documents there was Land Registration for Plot no. Kwale/Kinondo/1912. They did not have a title deed with that registration number. As far as they were concerned their title and security were intact, while the others were fraudulent. At Page 36 of the Bundle was a letter written by the Bank to the D.C.I.O., Kwale. At Page 27 was a purported letter from the National Bank to the District Land Registrar Kwale. When they sold property, they give the buyer the documents, they never write or send documents to the Land Registrar.

B. Cross examination of DW - 2 by Mrs. Umara Advocate.

49. He confirmed that this charge had not been discharged. The 1st Defendant had paid the loan in full. The 1st Defendant had other loan facilities though not related to these properties. They held on the documents until the customer came for them. The transfer by charge at Page 26 bore a stamp and signed. It was also signed by an Advocate who was a stranger to the bank and not in their panel. The letter at page 27 was in their letterhead but was poorly done. He confirmed Zipporah K. Mogaka was a Legal Manager at that time. He was not a handwriting expert. He had worked with these officers.
50. He stated that M/s. Mogaka's signature was familiar to him. This was not her signature. The letter at page 36 emanated from their office. He had a file copy. Mrs. Gitonga joined the Bank around the year 2003; around the year 2006 M/s. Mogaka was the Legal Service Manager and Mr. Gitonga was a Legal Officer at that department.

C. Cross Examination of DW - 2 by Mr. Oddiaga Advocate: -

51. DW – 2 reiterated that he had worked with National Bank of Kenya from 1st October, 1996. He had not come with Mr. Isaac Wanjohi's file. He only came with the title and further charge. He had come to court with all the security documents. He did not have the charge dated 6th June, 1975. The impression he had on the document was that it had not been discharged. If a charge was discharged, an entry was made and he would have a copy of the discharge. Currently one would also require a consent from the Land Control Board.
52. He further went ahead to explain to the court that he did not have consent for both the charge and further charge. He did not know the practice in the year 1975 if consent was required for discharge. In his statement, he had not stated that the loan had been paid in full. He did not have the records in court showing that he had paid the loan in full. He confirmed that the letter dated 22nd August, 2012 at page 36 came from the bank. The letter does not state that Mr. Wanjohi had paid the loan in full.
53. At page 37 of the Defendants list of documents was a letter from the bank to Mssrs. Kamau Kuria & Kiraitu Advocate. The letter did not indicate that the loan had been paid in full. The letter referred to the two facilities of a sum of Kenya Shillings Fourteen Thousand (Kshs 14,000/-) and Kenya Shillings



Sixteen Thousand (Kshs 16,000/-). Paragraph 2 confirmed that the bank was still holding the title documents. He had no knowledge of the charge sheet at Page 38 of the bundle of documents neither did he know of the outcome of that came. He was not a witness, he only dealt with loan recoveries on bad debts. He was the custodian of the documents and he kept a movement record for the documents which were up to date. He had the record for the Land Reference numbers Galu/Kinondo/708. The record had communications and internal memos.

54. He reaffirmed that the title at page 28 of the 1st Defendant's documents was issued by Kwale Land Registrar. He worked with M/s. Mogaka. She was the Legal Officer but rose to the rank of General Manager.

D. Re - Examination of DW - 2 by Dr. Kuria Advocate (SC): -

55. The document at page 1 was owned by Isaac G. Wanjohi. While the title deed at page 28 was in name of OMARI MZARUBA MWISHEE. The Land Certificate is for land known as LR no. Galu/Kinondo/708 while the title deed at page 26 is Land Refrence No. Kwale/Galu/Kinondo/708. They had never had custody of the document at page 28. It was true that police officers were investigating the matter relating to the property they were holding.

A. Examination in Chief of DW - 3 by Dr. Kuria Advocate (SC):

56. Sworn and testified in Kiswahili language. She told the court that she was Imelda Khakavu a.k.a Mama Titi. She confirmed that she recorded a statement which he adopted as his evidence in chief.

B. Cross examination of DW - 3 by Mrs. Umara Advocate

57. In the statement she stated that she knew Dr. Kumar and Eng. Wanjohi who had sent her money for building stones. The Plot No. 708 was Eng. Wanjohi. Eng. Wanjohi had put up a fence on two sides only. Dr. Kumar also out up a fence within the same plot. His wall was all round. There was no borehole in that plot. He was not aware if Dr. Kumar had dug a borehole. He had no knowledge of what was inside the Plot after the property was fenced.
58. He stated that there were no trees thereon. When Dr. Kumar came, she told him not to cause any development as the Plot was Eng. Wanjohi. It was Rashid and him. Dr. Kumar told her that Rashid sold the Plot to him. When they were removing squatters, one of the squatters informed them that the land belonged to Rashid. He knew the chief of that area. He knew Kumar bought the plot from Rashid. He did not know the size of the parcel of land Dr. Kumar purchased.

C. Cross examination of DW - 3 by Mr. Oddiaga Advocate

59. She told the court that she had heard a rumor that Rashid wanted to buy that plot. She came to know of Rashid when he visited the land. He wanted to buy the plot but the witness did not know the purchaser. She had bought land severally and she knew that when one wanted to buy land they had to carry out a search at Land's office to know who owned it. She did not know if Rashid did a search on that land. She knew Eng. Wanjohi from the year 1993. She was his caretaker and Eng. Wanjohi used to pay her. She had no knowledge of what the Engineer had done with his plot. Whether Eng. Wanjohi had borrowed a loan using that land as security was not known to her as she had not seen any loan documents.
60. DW – 3 testified that she could not tell the relationship between Wanjohi and the bank. She was not aware that there was a criminal case over the same piece of land. She reported that Dr. Kumar had trespassed on the land. She did not know what had happened with that case.



D. Re examination of DW - 3 by Dr. Kuria Advocate (SC)

61. She reiterated that she assisted Eng. Wanjohi to put up a perimeter wall. There was no fence before that. There was one squatter named Emmanuel who was staying there. A purchaser went to see land before he was buying. Dr. Kumar first came into the land in the year 2007. She tried to talk to him. She also talked to Eng. Wanjohi who told her to report the issue to the police. Dr. Kumar had said that he had bought the land. He broke the gate and entered the parcel of land and built another wall. The witness told Rashid the land belonged to Eng. Wanjohi. There was nobody occupying the land. Kumar removed part of the wall. The witness was still keeping an eye on the Plot on behalf of Eng. Wanjohi as a caretaker.

E. Examination in chief of DW - 4 by Dr. Kuria SC - Advocate

62. DW – 4 was sworn and testified in Kiswahili. He told the court that he was Emmanuel Nzioki, he stated that he filed a statement dated 7th August, 2013 which he adopted as his evidence in chief.

F. Cross examination of DW 4 by Mrs. Umara Advocate

63. He testified that he had known Eng. Wanjohi since the year 1978. His Plot was No. 708. Eng. Wanjohi was tilling the plot. He also knew Dr. Kumar for a long time. Dr. Kumar put up a perimeter wall on two sides. The witness was tilling that the part Dr. Kumar had not fenced. He had not entered the premises since Dr. Kumar fenced it. Dr. Kumar demolished the fence that was put up earlier. In that plot, there was a perimeter wall. He was a squatter inside that plot. They were given notice. He knew the plot belonged to Eng. Wanjohi.

G. Cross Examined of DW - 4 by Mr. Oddiaga Advocate

64. The witness told the court that that Emmanuel G.N. Langi and Emmanuel Nzioki was one person who was him. He had stated that he had known Eng. Wanjohi for over 30 years and had stayed in his land as a squatter since the year 1972 but others came and occupied other parts of the suit property. Eng. Wanjohi came to the land in the year 1978. The suit property was not his home just where he worked. Eng. Wanjohi told him to look after the plot though he would not pay the witness. The engineer never showed him the documents for the land.
65. He testified that Eng. Wanjohi told him the plot number and showed him the beacons. He was not aware of the Engineer's occupation. When notice was given, they were 42 squatters in the suit property. Eng. Wanjohi never showed him the title deed for that land. He later told the witness the title was in the bank. He came to know Rashid when Rashid visited the suit property and claimed it to be his. The witness had never gone to the Lands office. He did not know Omar Mzarabu Mwishee. He had never been called to court to give evidence over the suit land.

H. Re - Examination of DW - 4 by Dr. Kuria Advocate (SC)

66. He confirmed that the land had been fenced on the backside in the year 2006. Dr. Kumar came with his people and broke the gate. They made another gate. He talked to Dr. Kumar and told him that the land belonged to Eng. Wanjohi. He did not remember when he first met Rashid. He also told him the land belonged to Eng. Wanjohi. He proceeded to give him the engineer's number. They talked and Rashid told him that the land was his.



I. Examination in Chief of DW - 5 by Dr. Kuria Advocate (SC).-

67. He was sworn and testified in English language. He told the court that he was Engineer Isaac G. Wanjohi and he had signed a witness statement filed on 7th August, 2013 which he adopted as his evidence in chief. He also produced his bundle of documents dated 24th October, 2012. The first document was the Land Certificate for land known as LR No. Galu/Kinondo/708 in his name which was issued on 22nd March, 1975 at Kwale. At page 5 of the Bundle is a Green card opened on 15th November, 1974 for land known as LR. No. Galu/Kinondo/708 of 0.7 ha and the first entry is by him. Entry No. 2 was issuance of Land Certificate on 22nd March, 1975. This document was kept at Land Registry, Kwale. Entry No. 3 which was cancelled. It was in the name of Omari Mzaruba Mwishee, the 3rd Defendant.
68. He told the court that he had never had any dealings with Omari Mzaruba Mwishee as he did not know him. Entry No. 4 was a title deed issued on 29th September, 2006. It was also cancelled. Entry No. 5 of 29th September, 2006. Entry Numbers 3 & 4 entered by error. Entry No. 6 withdrawal of Entry No. 5 above. Entry No. 7 Omari Mwamba Mwishee on 29th September, 2006. Entry No. 8 Title issued on 29.9.06. Entry No. 9 14.10 Rashid Mohamed Kheri, the 2nd Defendant.
69. He told the court that at page 9 of his bundle of documents was a document in respect of LR No. Galu/Kinondo/708 which land belonged to him. The name below has an additional name as LR. No. Kwale/Galu/Kinondo/708. Page 1 described his property as LR. No. Galu/Kinondo/708 and at page 9 it was LR. No. Kwale/Kinondo/708. The Land Registrar has never told him about change of name. He had never been told to replace the land certificate. At page 9, entry No.10 dated 14th June, 2010; Title Deed No.226000 was issued but not shown to who the title was issued to. Entry No.11 title closed on sub-Division-New Numbers 1910,1911 and 1912.
70. He told the court that he had never sub - divided his land. Entry No. 12 of 27th June 2012, was Restriction under Section 136. It was a certified true copy of the original. The Land Registrar Kwale supplied this document on 27th June, 2012. By June, he charged his title to the bank in years 1975 and 1979 and he kept on over the years the overdraft facilities on site. He would visit his land regularly and he had engaged the services of some caretakers.
71. He testified that squatters occupied the land and he removed them. He fenced the suit property around the year 2005 with wooden posts. The wooden posts fell off and he erected a masonry wall and in February 2012, his caretaker contacted him informing him that a stranger had entered his land. He asked the caretaker to proceed to Diani Police Station and file a complaint. He also asked them to get him the telephone number of the person who was entering the land they gave him the telephone Number of Dr. Kumar, the Plaintiff in this Case. He talked to the Plaintiff over the phone and told him that he was the owner of the land and wanted to know why he was entering it without his permission.
72. The Plaintiff told him that the land belonged to him because he was at the point buying it from Rashid. The witness advised the Plaintiff not to proceed with the sale as the land belonged to him and he had title for it. The Plaintiff wanted the title but the witness told him that the title was at the bank. The Plaintiff demolished the masonry wall that the witness had erected and made a complaint to the police. The Plaintiff proceeded to file this case. His caretakers were still on the land. page 7 of his bundle of documents was the encumbrances section. Entry No.1, 16th August, 1975, charge for a sum of Kenya Shillings Fourteen Thousand (Kshs. 14,000/=) Entry No.2-19th November, 1979 Further charge for a sum of Kenya Shillings Sixteen Thousand (Kshs. 16,000/=)



73. The witness told the court that his title was still in the bank. He had not discharged it. Entry 3 of 29th June, 2006 was unknown to him. His property had not been sold by him or the bank. At page 26 was a transfer by charge in exercise of the power of sale of land known as Land Reference No. Kwale/Galu/Kinondo/708, the parcel of land was not his land. That document came from the lands office. At page 21 – 22 was a letter dated 11th June, 2012 that he wrote to the Plaintiff. The Plaintiff did not reply to this letter. Page 23 – 24 was another letter he wrote to the Plaintiff although the Plaintiff never reduced his request in writing.
74. According to the witness, page 11 of the bundle was a Green card opened on 21st September, 2010 for title KWALE/GALU KINONDO being a sub-division of plot No.708. Entry 1 of 21st September, 2010, Rashid Mohamed Kheri.
75. He testified that Entry 2 was a title deed no. 226243; Entry 3 Restriction for land known as Land Reference Numbers Kwale/Galu/Kinondo/1910. This purports to have sub divided his plot to Rashid. Page 13 was for Plot No. 1911 from the same land. Page 14 was another Green Card for 1912 measuring 0.49 ha.; Entry No. 3 of 17th October, 2011 was an entry for the Plaintiff and Entry No. 4 was the title issued. He became aware when the Plaintiff came into the land and demolished the wall. At page 16 was his letter dated 2nd May, 2005 to Mama Titi who was Mrs Imelda Khakaeu aka Mama Titi (DW 3). At page 17 was a notice he gave to Emmanuel Nzioki who was his caretaker of the suit property and all Squatters.
76. The witness referred the Court to page 18 which was a letter from him to Imelda Khakaeu Tony, indicating that people were entering his land; page 19 was a letter he requested from National Bank of Kenya; at page 20 was his statement to the police dated 23rd February, 2012. Since the invasion of his land, nobody had been charged with the invasion. With reference to page 25 he told the court that it was a letter from DCIO, Kwale to Manager, National Bank of Kenya; page 27 was a letter dated 26th September, 2006 purportedly from National Bank to the District Land Registrar, on land known as Land Reference number Kwale/Galu/Kinondo/708.
77. He averred that he obtained this document from the land's office Kwale. He did not have information that Omari Mwaruba Mwishee used his title. Page 28 was the title deed for land known as Land Reference numbers Kwale/Galu/Kinondo/708 for 0.7 ha; page 36 was a letter dated 22nd August, 2012 signed by D.W. Gitonga (Mrs.) Manager Legal Services to the DCIO, Kwale who he knew. At page 37 was a letter dated 3rd September 2012 written by National Bank to Kamau Kuria and Kiraitu Advocates. Page 38 was a charge sheet for criminal case No.873 of 2012, against Omari Mzaruba Mwishee for forgery. He was listed amongst the witnesses and he travelled from Kwale and gave evidence. He produced the documents to support his case. His property still remains L.R No. Galu/Kinondo/708. It has never been sub-divided.
78. The witness further told the court that the National Bank had never registered a discharge. He was seeking the prayers in his defence and counter claim dated 22nd October, 2012. In his supplementary list of documents filed on 8th November, 2013 was a charge and further charge which is reflected at page 7 of his bundle of documents but not at page 6. Documents produced as follows: Page 16 – Exhibit 4 Page 17 – Exhibit 5 Page 18 - Exhibit 6 Page 20 – Exhibit 7 Page 21 – Exhibit 8 Page 23 – Exhibit 9 Page 38 – Exhibit 10 Page 39 – Exhibit 11

J. Cross Examination of DW - 5 by Mrs. Umara Advocate

79. The witness could not remember the person who sold him the land Reference No. Galu/Kinondo/708. He did not have a sale agreement as it was a long time ago when he acquired it. He took



possession of the property in the year 1975. It was -bushy. The last overdraft he took was a further charge in the year 1979. He did not have a consent to change the property. The charge was in the bank but he had his copy. He finalized payment of the overdraft facility but he did not produce the statements. He happened to discharge because it was convenient to him.

80. He testified that he had not paid any rates. He had not received any demands to pay the rates over those years. It was an agricultural land. He said Mr. Kumar, the Plaintiff, had forged the title because the bank did not do it. He did not get an expert to confirm the forgery of which came to his knowledge in the year 2012. He was struggling to get the squatters out of his land. It is Mr. Kumar who filed this case. There were 15 – 18 squatters on the land. There was one letter he wrote to the caretaker and the squatters. The chief assisted him to get the squatters out. He did put a notice/caveat to state that the land was not for sale.
81. He knew Gitahi whose land was Plot No. Galu/Kinondo/209. He was on his left hand side as one faced the sea. The next one was Simon Mbugua. His informers/caretakers lived on the property and Imelda ran a business nearby. Both Imelda and Emmanuel reported the matter to the police on 9th February, 2012. The Plaintiff's crime was one on trespass and demolishing the wall. He did not know if he had been charged. A shallow water well could be dug in 3 days to one week. The Casurina trees were small. The wall was put up and they demolished it.
82. He told the court that his caretaker told him when this was done. He travelled to the land soon thereafter. Mr. Omar Mwishee was charged in Court, but was not sure if he was acquitted or not. He was aware that one must sign and stamp the title deed by the Land Registrar. Page 2 of the Plaintiff's document was an agreement for sale. Page 7 was a transfer which is signed and stamped by the Land Registrar. It bore the Registrar's stamp. Page 13-14 was a Title Deed with a stamp of one A.A Mutua. Page 17 was Certificate of official search. Page 19 was Title Deed. It was signed by Land Registrar and stamped.
83. He had no current search for Plot No. 708. There was no encumbrances at page 21. Page 15 had no entry on the encumbrance section. He did not list the particulars of fraud against Dr. Kumar. The title showed that 0.49 ha had been transferred to the Plaintiff. His land was LR. Galu/Kinondo/708 was 0.7 ha. The Plaintiff was holding a different Title but the land was the same on the ground. It was sitting on his.

K. Cross Examination of DW - 5 By Mr. Oddiaga Advocate

84. He told the court that he acquired the land by buying it around the year 1974. At page 16 of his bundle of documents, his plot was shown as LR. Kwale/Galu/Kinondo/708. He occupied LR. Galu/Kinondo/708. Both documents referred to the same land. He was referring to the same land when he wrote the letter of 2nd May, 2005. The description was given by the Land Registry. The name in his land was LR Galu/Kinondo/708. At page 28 was the Title deed for LR. No. Kwale/Galu/kinondo/708. The description was given by the land Registry. He got the document from the Land Registry. Document No.1 was the land certificate, he could not see the signature in the copy document.
85. He stated that he got the original Certificate of title from the Land's office. It was brought to him by a close friend. He must have signed for it. He had collected other title documents. One normally signs for it. One does not participate in the preparation of the documents. The preparation was done by the land registry. At page 28 of his bundle is a title deed, it was the Certificate of Title for his land. He got the document at page 28 from the Land Registry. He was not the one who went for it, hence he was not in a position to know how that person got it. The title deed was not signed by the 2nd Defendant.



86. He testified that at page 32 was also a Title Deed which he obtained from Kwale land Registry through a 3rd party. Pages 5-15 are copies of the Green Card which he produced from the Land Registry through his agent. He could not see the signature of the 2nd Defendant. The documents were signed by different parties at different times. The 2nd Defendant was not the custodian of the Green Cards. The documents that were there originally were his and the beneficiary of the subsequent documents must have participated. If anybody went to the Land Registry after 29th September 2006 the person could have gotten documents in the name of Omari Mwaruba Mwishee.
87. He told the court that they must have all worked together in collusion. He did not have a search in his name. He had not written any letter to the Land Registrar. He brought the matter to the attention to the National Bank of Kenya, but he did not have a letter.
88. He took an overdraft not a loan. He had an account, although he never produced his statements in his bundle of documents because it was irrelevant to his case. What was relevant was whether his title was still in the bank. He did not know the 2nd Defendant. The facility he took in the year 1979 was still valid. The facility available was for a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/-). At page 74 of the 2nd Defendant's document was a transfer from Omari Mzaruba Mwishee to Rashid Mohamed Kheri. At page 76 was a letter of consent to transfer of land known as LR. No. Kwale/Galu Kinondo /708. Pages 77-78 was application for consent. Pages 80 was a receipt for clearance certificate. Page 81 was a receipt for rates for a sum of Kenya Shillings Thirty Six Thousand Seven Fifty Hundred (Kshs. 36,750/=). Page 82 was a clearance certificate. Pages 83 to 84 were receipts issued by Kwale Registry.
89. The witness testified that he did not say there was no consent to charge. If a consent was required at that time it was obtained. Whatever was required was done legally. He had never been a civil servant. He knew many civil servants including George Kamau Gitahi who invited him to buy it. He did not go to the land board to buy the suit property. He did not have a consent form Land Control Board to charge. The opinion formed was that Mwishee could have perpetrated the fraud alone. He did not have a consent from the Land Control Board to charge.
90. He told the court that he knew Damaris Gitonga. She worked at National Bank of Kenya. He knew Zipporah K. Mogaka. She was senior to Damaris Gitonga at National Bank of Kenya. In the letter at page 36, D.W. Gitonga mentioned Zipporah K. Mogaka. That confirmed that M/s. Mogaka was known by the Bank as she worked there. He testified in a criminal case although he did know the outcome.

L. Cross Examination of DW - 5 By Mr. Siminyu

91. He testified that he acquired the land in the year 1974. He believed it was originally a settlement scheme. He believed he had bought it from an allottee but his name was entered in the register as the first owner. His agent must have organized a sale agreement. He left the details to his friend who told him there was an opportunity. He sent him a sum of Kenya Shillings Three Thousand (Kshs. 3,000/-). He got his title deed in 1975. He carried out a search but he never had any in court as evidence. The custodian of the documents at the Land Registry was the Registrar. The Land Registrar was the one who issued him the title document. It was the Land Registrar who also issued the Title Deed in name of Omari Mzaruba Mwishee. He did not leave Nairobi to come and process the preparation of the documents. His title was for LR. No. Galu/Kinondo/708 which was privity for lands in all that area.
92. He explained to the court that the title deed in the 3rd Defendant's name was LR. No. Kwale/Galu/Kinondo/708 which was different from his. He realized this in the year 2012. In his letter dated 2nd May,



- 2005 (page 16), he referred to as Land Reference No. Kwale/Galu/Kinondo/708. He realized that his property had problems in the year 2008 when a police officer approached him. The 3rd Defendant got the Title on 29th September, 2006. He did not hear from the Police again neither did he carry out a search. One would be wrong to think that the bank had sold the land to the 3rd Defendant.
93. He was told that somebody was attempting to steal it. He did not see a threat to put a caveat. He did nothing because he did not know that he owned it. He was told that he bought through a public auction organized by National Bank of Kenya. If the letter at page 27 was genuine, he would have received several copies. He could not have had anything to Counter it. He involved the police for help. The police arrested someone and charged him. He was not aware whether Zipporah Mogaka was investigated or not. At page 28, was a title deed for Omari Mwaruba Mwisheee. It did not have his signature. He got them from the Land Registry at Kwale. At page 5-part A, the Registration Section is Galu/Kinondo. Entry No.5 of 29th September, 2006 was in name of Omari Mzaruba Mwishee.
94. According to the witness he got this document from the Kwale Land Registry. He did not make the Land Certificate in page 1. It was made by the Land Registry. He made a complaint to the police and a “Criminal Case number 873 of 2012 Republic – Versus - Omari Mzaruba Mwishee was instituted. He testified in that case. Zipporah was not charged and nobody from the bank testified. He had no knowledge whether anybody from Kwale Land Registry testified. He did not know the outcome of the case. He wanted to get the proceedings but he did not get them. One could not be wrong if they said that he was selective in bringing documents.
95. He told the court that at page 36 of his documents, paragraph 3, of the letter says the letter dated 26th September, 2006 was fraudulent. There was nothing specific on the letter for it to be said to be fraudulent. No report from a handwriting expert was shown to indicate the signature was fraudulent. His title was still in the bank and he was still enjoying financial facility. The 1975 and 1979 charge were still intact.

M. Cross Examination of DW - 5 By Mr. Siminyu Advocate for the 3rd Defendant

96. He told the court that he believed that the Land Registrar was in charge of the Land Registry. He did not think the 3rd Defendant had powers in the land registry. The title in the 3rd Defendant’s name could not have come from the Kwale Land Registry. He did not have documents to show that the 3rd Defendant was not issued with the Title from the Kwale Land Registry. The Plot was land known as Land Reference No. Galu/Kinondo/708.
97. He recognized the letter at page 16, there was a mistake as Kwale should have been there. When he testified in chief, he confirmed that he referred to the letter. He could not remember telling the Court there was a mistake in the letter. He personally purchased the property. He did not have the name of the person who he purchased from. A friend of his called George Githae who was working in the Ministry of Lands told him there was an opportunity to buy land in Kwale. He sent him cash being a sum of Kenya Shillings Three Thousand (Kshs. 3,000/-) and he got the title and he charged it.
98. He went on to state that Mr. Githae was his friend and he acted for him. At page 20 of 1st Defendants documents filed on 24th October, 2012 was a statement stating that he sent Mr. Githae the cash for a plot on the second row. He did not show the CID officer the title as it was in the National Bank. He had no idea of the Mzungu who had brought the land. He knew it was false. Zipporah Mogaka of the National Bank and him met whenever he had issues with the bank. He knew Zipporah Mogaka was a senior person in the bank. He did not know if she had been investigated or if she recorded a statement with the police.



99. The witness stated that he could not remember when he got the document at page 5. It was dated 26th June, 2012, the green card at page 5 forms part of his documents. It showed that it was certified by the Land Registrar Kwale. It was only them who could confirm if it came from there. He had seen entry No. 7 dated 29th September, 2006 in the name of Omari Mzaruba Mwishee as the proprietor. He did not visit Kwale Land Registry. He was aware that there was a criminal case in Kwale against the 3rd Defendant. He was a witness but not aware of Zipporah appeared to testify. He did not know the outcome of the Criminal Case No. 873 of 2012 Republic- Versus - Omari Mzaruba Mwishee.
100. He told the court that the value of the suit property was about Kenya Shillings Eight Million (Kshs. 8,000,000/-). He had been the owner of the suit land since the year 1974. He did not know if the Land Registrar or anybody from the Kwale Registry testified. He would be surprised if they did not testify. The criminal case touched on his property. He followed up with the police. He had not seen the proceedings in the 3rd Defendant's documents. He had no knowledge of whether the bank officials had testified in the criminal case. The bank did not play any role in the transfer of his property/land. He did not know whether anybody had been investigated in the bank. There were letters from National Bank, the purported transfer was alleged to have been by the charge but was a forgery. The letter on page 36 stated that the letter allegedly signed by Zipporah Mogaka was fraudulent. There existed a fraudulent title in the name of the 3rd Defendant.
101. He told the court that his title was for land known as Land Reference No. Galu/Kinondo/708, while the fraudulent title Land Reference No. Kwale/Galu Kinondo/708. At page 3 of this documents was a charge, which had no stamp from the Land Registry. He got the title in the year 1974. It was never necessary to conduct an official search. He only confirmed ownership on 27th June, 2012.

N. Re - Examination of DW - 5 by Dr. Kuria Advocate (SC)

102. The witness confirmed that at page 1 of the 1st Defendant's document was a land certificate in his name. His land had never changed. It was Land Reference No. Galu/Kinondo/708 since he had acquired it. The letter at page 25 of the document was written by DCIO Kwale, Mr. Mwenda Ethaiba. The piece of land described was not that of his land. In his statement at page 20, he reported the title Land Reference No. Galu/Kinondo/708. The police officers got the Land Reference number wrong as well as his name. At page 18 of the proceedings in Criminal case No. 873 of 2012, DW - 6 was a corporal Boniface Mukala, he was investigating Land Reference No. Kwale/Galu/Kinondo/708 which was not his land. At page 20, he complained that his Land Reference No. Galu/Kinondo/708 was being encroached. At page 5 of the proceedings, he was DW - 1 and he testified. At page 10 is DW 2, Rashid Mohamed Kheri. At page 11, DW - 3 was Dr. Kumar Gupta, the Plaintiff in this case. At page 17 was DW - 4 Surayani Yusuf Juma and DW - 5, Baruku Juma. He stated that page 18 was corporal Boniface Mukala. He confirmed that there was no officer from National Bank who testified.
103. He told the court that at Page 36 of his bundle of documents was a letter by Mr. Gitonga addressed to the DCIO, Land Reference No. Kwale/Galu/Kinondo/708. The letter at page 25 was from the DCIO Kwale to the Manager National Bank. He made a report about Land Reference No. Galu/Kinondo/708. The DCIO was misleading to quote Land Reference No. Kwale/Galu Kinondo/708.
104. He confirmed that the only document he gave the bank was over Land Reference No. Galu/Kinondo/708 not Land Reference No. Kwale/Galu Kinondo/708. At page 5 of the 1st Defendant's document was green card for Land Reference No. Galu/Kinondo/708. Entry No.1 was Isaac Wanjohi G., dated 15th November, 1974. Item 2 was land certificate to him at page 1. Item 7 was 3rd Defendants name Omari Mzaruba Mwishee. He had not dealt with Omari Mwishee, he did not know him. Item No.8 was a purported title deed was issued. He had never defaulted in the payment of the loan and



the bank never exercised its power of sale. At page 16 was his letter dated 2nd May, 2005. He had stated the correct position. At page 17 was a letter he correctly stated the land as Land Reference No. Galu/Kinondo/708. At page 27 was over Land Reference No. Kwale/Galu Kinondo/708. This did not concern his land. It is purported to have been signed by Zipporah Mogaka.

105. At page 26 was a transfer by charge in exercise of power of sale over Land Reference No. Kwale/Galu Kinondo/708, which was not his land. At page 28 was a title deed for Land Reference No. Kwale/Galu Kinondo/708 in name of 3rd Defendant. He had never sold his land to the 3rd Defendant. In the criminal case at Kwale, he gave evidence as a witness. The decision as to which witness to call was not taken by him. At page 38, was a charge sheet. The charge related to a purported transfer by the bank. No witness was called by the bank to testify. It was not over his land.

A. Examination in Chief of DW - 6 by Dr. Kuria Advocate (SC)

106. He told the court that he was Eric Dick James Safari, the current County Land Registrar for the County of Kwale. He was an Advocate with a diploma of law from the Kenya School of Law and a Masters of Arts in Political Science. He had worked in the Land Registrar Kwale since July 2018. He was employed as a Land Adjudication Officer in October 2006 and re - designated as a Land Registration Officer in February 2012. He had served as a Land Registrar from the year 2012. He could see the 1st Defendant's bundle of documents filed on 24th October, 2012; the Land Certificate for the land was Land Reference Numbers Galu/Kinondo/708. Initially, the numbering of titles were as per this land certificate, Galu/Kinondo/.
107. He testified that he had the extract of title (the Green card) in respect of the land in question. According to the Green card, the first allottee of the plot No.708 is one Isaac Wanjohi G. who was registered on 15th November, 1974. The first registrations in Kwale ranged from the year 1970's. This particular piece of land arose from a land adjudication process. In the Green Card for the land known as Land Reference No. Galu/Kinondo/708 , the 1st allottee was Isaac Wanjohi who was issued with Land certificate on 22nd March, 1975. On 29th September, 2006, there was a transfer to Oman Nzaruba Mwishe. On 14th June, 2010, the Land was transferred to Rashid Mohamed Kheri. On 22nd July, 2016, there was an entry cancelling all other entries and reinstating the land to Entry No. 1 and 2 . This means the land went back to Isaac Wanjohi G. The name described in the Green Card was Land Reference No. Galu/Kinondo/708.
108. The witness was stood down and directed to file and serve all the parties. He could see the 1st Defendant supplementary list of documents dated 12th September, 2019 and filed on 17th September, 2019. He confirmed that pages 1 to 36 constituted the parcel file in Kwale registry in respect of the parcel Land Reference No. Galu/Kinondo/708. He had been a Land Registrar at Kwale since April 2018. An adjudication Record was the final document that was produced once the adjudication process is complete. The document was forward in triplicate for production of title deed.
109. In the Adjudication Record, the Land Owner was one Isaac Wanjohi G., who is the 1st Defendant. Once the Registrar received this record, he opened a Green card and issued a Title deed to the Land owner appearing in the Adjudication Record. At page 1 was a certified copy of the Green card. The green card was opened on 15th November, 1974 and it was in relation to the property Land Reference No. Galu/Kinondo/708. At page 1, there is an official rubber stamp of Kwale Land Registry. He was the one who certified this document on 19th July, 2019. There has been no change since he stamped it. The first owner appearing was Isaac Wanjohi G. He was issued with a Land certificate on 22nd March, 1975. If somebody was to do a search, currently the search would indicate Isaac Wanjohi Gathungwa



- as the owner of the property. At page 16 of the bundle was a certified copy of a letter of consent dated 18th June, 1975. The consent was addressed to Mr. Isaac Wanjohi G.
110. He told the court that Paragraph 2 was the nature of transaction of parcel Land Reference No. Galu/Kinondo/708. Paragraph 2 (c) was a charge while paragraph (d) was names of parties from Mr. Isaac Wanjohi G. to the National Bank of Kenya Limited. He could see at page 2 of the parcel file was a certified copy of the Green card which showed the encumbrance section where there was a charge dated 16th August, 1975 to the National Bank of Kenya Limited for a sum of Kenya Shillings Fourteen Thousand (Kshs 14,000/=). Entry No. 2 shows a further charge dated 19th November, 1979 to National Bank of Kenya Limited for Kenya Shillings Sixteen Thousand (Kshs 16,000/=). At page 28 was a certified copy of charge document for Land Reference No. Galu/Kinondo/708. The parties who executed were the Chargor - Isaac Wanjohi and the Chargee, the National Bank of Kenya Limited. At page 30 was a certified copy of further charge for Land Reference No. Galu/ Kinondo/708. At page 12 of the bundle was a certified copy of a Land certificate pertaining to Land Reference No. Kwale/Galu/Kinondo/708 registered to Isaac Wanjohi Gathungwa. The Green Card on Page 1 was indicated as Land Reference No. Galu/Kinondo/708 while the one at Page 12 is indicated as Land Reference No. Kwale/Galu/Kinondo/708. The difference was that the word Kwale was not appearing on the Green card as it did on document page 12.
111. He told the court that at page 26 of the 1st Defendant's first bundle is a transfer by Chargee in exercise of power of sale. The property is given as Land Reference No. Kwale/Galu Kinondo/708. The Green card in their custody concerned parcel Land Reference No. Galu/Kinondo/708. The charge was over Galu/Kinondo/708 and not Land Reference No. Kwale/Galu/Kinondo/708. At page 1 of the 1st Defendant's supplementary bundle, item number 2 was Land Certificate issued. They issued title to the Land owner when a land owner sold his property and a transfer was registered, the title deed is cancelled and retained in the parcel file. From the entries appearing on the Green card, it appears that some transactions occurred although they were later cancelled and the first ownership restored. Entry No. 7 reflected that Omari Mzaruba Mwishee and had been cancelled.
112. According to the witness, Omari Mwaruba was the 3rd Defendant. At page 26 of the 1st Defendant's bundle of documents filed on 24th October, 2012, was a transfer by the Chargee in exercise of Power of sale. The transferee was Omari Mzaruba Mwishee and the transferor was National Bank of Kenya Limited. The title indicated was Land Reference No. Kwale/Galu Kinondo/708 and not Land Reference No. Galu/Kinondo/708. According to the documents in the parcel file the description of the property the Chargee was different. At page 17 to 20 of first defendant's supplementary bundle related to Land Reference No. Galu Kinondo/708 paragraph 1 was the name of registered proprietor Eng. Isaac Wanjohi G. The proposed charge appearing in paragraph 2 was National Bank of Kenya Limited. At page 18, Paragraph 9 was executed by National Bank of Kenya Limited as Chargee and the signature of the Chargor affirming was Mr. Wanjohi.
113. At page 19 was an application for Land Control Board consent. Paragraph 5 described the property as Land Reference No. Galu/Kinondo/708. At Paragraph 3 was a Charge. At page 20 was the parties to the application. It was signed by Mbage Nganga and Isaac Wanjohi. At page 16 of the supplementary bundle was a Letter of Consent in respect of the charge of the year 1975 while page 22 was the consent in respect of the Charge for the year 1979. At page 25 was a certified copy of Letter of consent for Land Reference No. Kwale/Galu Kinondo/708.
114. He told the court that the description of the land differed with that in the Parcel file. At page 4 of the supplementary list was a certified copy of a Green card relating to Land Reference No. Kwale/Galu Kinondo/1910. This Green Card appeared to have been cancelled. At page 5 related to Land



Reference No. Kwale/Galu Kinondo/1911 and appeared to have been cancelled. At page 6 related to Parcel No. Kwale/Galu Kinondo/1912. Page 8 is a certified copy of title deed for Title No. Kwale/Galu Kinondo/708. Page 9 showed that the document was opened on 15th November, 1974. It appears two parallel titles were opened on 15th November, 1974. One for Land Reference No. Galu Kinondo/708 and another for Land Reference No. Kwale/Galu Kinondo/708.

115. There was no Adjudication record for the property described as Land Reference No. Kwale/Galu Kinondo/708. In the original bundle of 1st Defendant's document was a copy of land Certificate relating to parcel No. Galu/Kinondo/708 in the name of Isaac Wanjohi G. as appeared in the Adjudication Record at page 23. At page 3 indicated a charge dated 6th June, 1975 to National Bank of Kenya to a sum of Kenya Shillings Fourteen Thousand (Kshs. 14,000/=) and further charge dated 10th July, 1979 to National Bank of Kenya for a sum of Kenya Shillings Sixteen Thousand (Kshs 16,000/=). Pages 4 to 6 of the parcel file were purported sub - divisions of title Land Reference No. Kwale/Galu Kinondo/708 into three (3) plot bearing numbers 1910, 1911 and 1912. There was no parallel sub - divisions for title Land Reference No. Galu/Kinondo/708. Item No. 8 at page 1 of the supplementary bundle read entries numbers 1 and 2 reinstated. The signature and stamp was for a Land Registrar by the name A.N. Njoroge dated 22nd July, 2016.
116. He told the court that by then, he was working in Mombasa Land Registry and not Kwale. The parcel file he held was the one he found when he was transferred to Kwale. As a Land Registrar among his duties were registration of Land instruments which included the issuance of titles, registration of charges and discharges among others. From the record at page 2, he never saw any discharge of the charges of the year 1975 and 1979.

B. Cross Examination of DW - 6 by Mrs. Umara – Advocate

117. The witness confirmed that he was the custodian of the documents in the land registry. Once transfer documents had been duly executed accompanied by the original title deed, payment of stamp duty and registration fees and Letter of Consent from the Land Control Board, the Registrar proceeded to effect the transfer by cancelling the original title and issuing a new title to the transferee. All these processes were done by the Land Registrar not a lay person.
118. He told the court that they compared the transfer presented to them, the name appearing on the transfer documents and the name appearing on the original title that had been surrendered together with the names of the owner appearing on the green card. There could not be transfer of land without there being an original title. He could see page 7 of the Plaintiff's bundle of documents filed on 23rd July, 2012, it was a transfer dated 5th October, 2011. It appeared to be signed by a Land registrar Mr. Evans Mwarwanga. He was aware that Mr. Evans Mwarwanga was a Land Registrar at Kwale. At page 6 was a copy of a title deed issued on 29th September, 2006 referring to Land Reference No. Kwale/Galu Kinondo/708. It is issued to Omari Mzaruba Mwishee, the 3rd Defendant herein. He confirmed it was serialized. He could see the title deed dated 21st September, 2010 at page 13 was issued to Rashid Mohamed Kheri and it is signed. At page 17 was a search dated 14th July, 2021. The signature appeared to be of Evans Mwarwanga. It confirmed transfer was done on 21st September, 2010 and title deed issued and the property registered in name of Rashid Mohamed Kheri. An official search came from their end. The certificate of official search from the Registry confirmed ownership of any piece of land from the search. The property Land Reference No. Kwale/Galu Kinondo/708 was registered in the name of Rashid Mohamed Kheri, the 2nd Defendant. At page 19 was a title deed issued on 17th October, 2011 to Dr. Pawan Kumar Gupta and signed by the Land Registrar and serialized. At page 23 was a Green card for Land Reference No. Kwale/Galu Kinondo/708 registered in name of Pawan Kumar and signed by the Land Registrar.



119. According to the witness at page 30 showed entries No.1, a charge dated 16th August, 1975 entry number 2 was a further charge dated 19th November, 1979 entry No.3 which was cancelled. An entry that read discharge in pursuant with Section 77(4) of RLA, Cap 300.
120. The 4th entry read “entry No.3 entered by error”. Entry No.5 read entry No. C4 above withdrawn. It meant that the property was discharged and was ready for further alienation or further transfer. At page 26 was a confirmation of a Green card from this copy. Entry No.11 showed that the title was closed on sub - division on 21st September, 2010. It appeared it was signed and certified by the Land Registrar.
121. From the Green card, title Land Reference No. Kwale/Galu Kinondo/708 and the sub - divisions were cancelled and title reinstated to Isaac Wanjohi. He was not sure if the Registrar received the original titles from the Plaintiff. He only relied on the parcel file. At page 23 of the 1st Defendant’s bundle was a copy of adjudication Record signed by the Executive Officer paragraph 6 showed the Land owner as Isaac Wanjohi Gathungwa. The contents of Paragraphs 9 and 10 were blank. Paragraph 11 stated that there was Chairman but without a name. Page 24 was only signed when there was an objection. The document was not signed by Mr. Isaac Wanjohi and was not witnessed.
122. There was only one Green Card for Land Reference No. Galu Kinondo/708 and there was only one registered owner Isaac Wanjohi G. which happened on 15th November, 1974. All the others were just irregular transactions that occurred. He was issued with title on 22nd March, 1975. They did not have any other green card opened on 15th November, 1974.
123. He told the court at page 28 of the 1st Defendant’s original bundle of document was a title in name of Omari Mzaruba Mwishee registered on 29th September, 2006. Page 29 it showed the green card extract was opened on 15th November, 1974. This showed when the titles of that area were opened. It does not indicate when the title was issued. It only showed that the title was issued to Omari Mzaruba Mwishee on 29th September, 2006. He could see the signature of a registrar from the document it was issued by a Land registrar. At page 1 of the 1st Defendant’s supplementary bundle of documents, entries could not be cancelled simply because somebody had written a letter. The due process was notifying the parties upon investigation and if fraud was established, the Registrar could exercise his power or by a court order.
124. He told the court he was not aware if the Registrar notified the parties in this case. He was not aware if there were any court orders or injunctions prohibiting dealings on the land. He could see page 3, entry No. 3, the proprietorship section. Entry No. 12 dated 27th June, 2012 was a Restriction. He was not sure if it was signed by the Land Registrar. He could see the restriction on page 4 which was also not signed. The Registrar could not cancel a title via a letter.

C. Cross Examination of DW - 6 by Mr. Odiagga Advocate

125. The supplementary bundle never contained any other correspondences. The bundle contained all the entries as per the Green Card, in the parcel file, They had cancelled title issued in the name of Rashid Mohamed Kheri, the 2nd Defendant. He had records showing sub - divisions and titles issued. They were Land Reference No. Kwale/Galu Kinondo/1910, 1911 and 1912. He confirmed all the titles were issued to Rashid Mohamed Kheri, upon surrender of original title Land Reference No. Kwale/Galu Kinondo/708. All the titles were issued by the Kwale Lands office.
126. He told the court that he had not seen any correspondence calling Rashid Mohamed Kheri before the cancellation was effected. Page 1 entry 1 – 9 then No. 8 were not in order. Page 3 which started with entry no. 9 was an error. Entry No. 10 was a title deed issued to Rashid Mohamed Kheri which was later cancelled. There was also an entry that title was enclosed on sub - division which was also cancelled.



There was a problem with the numbering if one looked at the dates. Entry No. 8 should have come after entry No. 11. He could see the 1st Defendant's document filed on 24th October, 2012. Page 5, Entry no. 8 was issuance of title to Omar Mzaruba Mwishee. The 1st Entry in the supplementary list was issuance of title deed. There was no second Entry. Entry No.8 in the year 2012 Green card never showed that anything was cancelled in year 2012. The import of the provision of Section 136 of the RLA gave the Registrar discretion when there was suspected forgeries and he would place restriction prohibiting any dealings. At page 7 of the 2012 documents, Entry No.12 it was a Restriction which was not signed. An un signed entry was not considered as an entry.

127. He told the court that in the supplementary list Page 4 was a title of Plot No.1910 which was cancelled. Entry No.8 on the Green Card for Land Reference No. Galu Kinondo/708 cancelled Land Reference No. Kwale/Galu Kinondo/1910-1912. Plot No.1910 was opened on 21st September, 2010. The cancellation in plot No.708 showed that these titles were cancelled when entries No 1 and 2 were reinstated. There was no entry in Plot 1910 the reason being it was already for canceled.
128. There was noting to support the cancellation. The same applied to Plots No.1911 and 1912 which were also canceled. When the adjudication section was started, it was named Land Reference No. Galu/ Kinondo, but the insertion of Kwale came later on. They were referring to one and the same land; when issuing titles today they would use Land Reference No. Kwale/Galu/Kinondo. At page 12 of the supplementary bundle was a land certificate for title Land Reference No. Kwale/Galu Kinondo/708 in the name of Isaac Wanjohi G. but cancelled. In the process of discharge, they relied on documents brought to them. In this case, he had not seen any documents of discharge from the bank. The letter from the bank was talking of a fraudulent transfer. That is the document they used to effect the transfer. At the time, the office was satisfied that the documents were authentic. He had not seen any correspondence in the file calling for the original titles from the 2nd Defendants. He would summon the parties for a hearing before cancelling a title. If there were allegations of fraud, he would refer to the relevant authorities. In this case, he had not seen any correspondence.

D. Cross Examination of DW - 6 by Mr. Siminyu Advocate

129. The witness told the court that page 1 of the supplementary list, Omar Mzaruba Mwishee became owner and was issued with title deed on 29th September, 2006. The title was at page 9 of the Plaintiff's documents filed on 23rd July, 2012. It was signed by the Land Registrar. This title (at page 9) was transferred to Rashid Mohamed Kheri. It was from that title that generated titles numbers 1910, 1911 and 1912 respectively. Before a transfer was reflected, one had to be satisfied with the documents presented. He supposed that the Land Registrar satisfied himself before effecting the transfer. They received the letter from 22nd August, 2012 from the bank. From the record the transfer was effected on 14th June, 2010. From the records the cancellation was done on 22nd July, 2016. He had not seen any correspondence summoning the parties before the cancellation. By the time of the cancellation, the property had changed into several hands. At Pages 1, 3 and 4 of the Supplementary documents were certified by him. At Page 2 was not certified but he could confirm it was genuine. Entry No.7 & 8 at page 1 were cancelled. There was no narrative why Entry No.7 & 8 were cancelled.

E. Re - Examination by DW - 6 by Dr. Kuria Advocate (SC)

130. According to the witness, at pages 28 to 30 of the Supplementary documents, the property that was charged to the National Bank was Land Reference No. Galu Kinondo/708 and not Land Reference No. Kwale/Galu Kinondo/708. Mr. Mwishee, the 3rd Defendant herein, claimed to have obtained the title over Land Reference No. Kwale/Galu Kinondo/708 through statutory power of sale. At page 26 of the 1st Defendants original documents was a transfer by the Chargee in exercise of power of sale.



Before a Land Registrar registers a document, he/she looks at the parcel file. The description of the property should match the one charged and the one transferred by statutory power of sale. Whoever registered the transfer was wrong as it did not match the description. The Land Registrar had to look at the records.

131. The Land Registrar would look at the property that was Registered. Had he done that, he would have discovered some discrepancy that the property was Land Reference Number Galu Kinondo/708 was not the same as Land Reference Numbers Kwale/Galu Kinondo/708. The parcel file all the time contained the documents he produced in court. There were several discrepancies. At Page 1 of the supplementary documents followed a catalogue of mistakes. He could see a lot of cancellations. If these people did a search, the property would be Land Reference Numbers Galu Kinondo/708 and not Land Reference No. Kwale/Galu Kinondo/708. The bank had the custody of the original title to Land Reference numbers Galu Kinondo/708.
132. After reading that letter – at Page 36 - there would have been no doubt that the bank was holding the original title. The supplementary documents had the same letter which stated that the bank had not exercised its statutory power of sale. It was alleged that the sub - division was done because there was statutory power of sale. The Land Registrar had no alternative than effect the cancellation of the purported titles.

A. Examination in chief of DW - 7 by Dr. Kuria Advocate (SC)

133. DW – 7 was sworn and testified in English. She told the court that she was Wanjiku Gitonga. She filed a witness statement on 13th February, 2019. She was an advocate of the High Court of Kenya currently in private practice. Prior to June 2014, she was the Manager Legal Services at National Bank of Kenya. Her duties were execution of security documents, charge instruments, realization of security, debt collection, among others. She was referred to Paragraph 3 of her statement and read it out. The letter was at page 36 of 1st Defendants bundle of documents. At page 25 was the letter she was replying to and was received on 27th July, 2012. The letter was addressed to the Manager, National Bank of Kenya, attention to the Head of Legal Services. It was from the DCIO Kwale. At page 36 there was a response by her.
134. She told the court that the documents at page 1 was a certified copy of the Land Certificate of title No. Galu/Kinondo/708 in name of Isaac Wanjohi Gathungu. It was issued in Kwale on 22nd March, 1975. It was certified by the Manager Harambee Avenue where the documents was held on 13th August, 2012. The letter at page 25 dated 26th July, 2012 referred to Land Reference No. No. Kwale/Galu Kinondo/708 while the Land certificate held and from the Bank referred to title No. Galu/Kinondo/708. On page 26, there was a transfer by the Chargee in exercise of power of sale over Title No. Kwale/Galu /Kinondo/708. The bank was holding title of property known as Title No. Galu/Kinondo/708. In her letter at page 36, she pointed out that the bank did not have the Power of General Attorney. The document was signed by one Japheth Wanyonyi who was a stranger to the bank. The stamp embossed thereon was not familiar to them.
135. She told the court that, it was also pointed out that the bank had not exercised its power to sale. At page 27 was a letter Ref. NBK/DTC/HO/EOE/4260 dated 26th September, 2006 addressed to the District Land Registrar Kwale over Title No. Kwale/Galu Kinondo/708 and enclosed Discharge of Charge documents and deed instrument.
136. It indicated to have been signed by Zipporah Mogaka. The Title by the bank was not Land Reference No. Kwale/Galu Kinondo/708 but Land Reference No. Galu/Kinondo/708. The letter stated that it



was disclosing a discharge of charge, but the documents enclosed was a transfer by Chargor in exercise of power of sale (see page 26).

137. Secondly, the letter at page 27 was asking the Land Registrar to transfer the land to Omari Mzariba Mwishee and yet the bank had not exercised its statutory power of sale and therefore had no power to do that. The letter at page 27 was purportedly signed by Zipporah K. Mogaka, Manager Legal Services. Although she was the Manager Legal Services, this was not her signature. At page 32 there was a title deed for title Number Kwale/Galu Kinondo/1912 in the names of RASHID MOHAMED KHERI a holder of the national identity card bearing numbers 9770771 issued by District Land Registrar Kwale on 21st September, 2010.
138. The acreage is 0.49 Ha. She was not aware of any sub – division. Indeed, the owner had not requested for any sub - division and the bank had not exercised its power of sale. The document on page 28 was for a Title deed for Land Reference Number Kwale/Galu Kinondo/708 in the name of OMARI MZARUBA MWISHEE issued on 29th September, 2006 which the bank had never held. She presumed this was as a result of the alleged transfer on page 26 but the bank had not released the title in respect of Land Reference No. Galu/Kinondo/708. At page 37 was a letter by her to Kamau Kuria and Co. Advocates. It was dated 3rd September, 2012 and refers to Mombasa ELC No.142 of 2012.

B. Cross Examination of DW - 7 by Mrs. Umara Advocate.

139. She confirmed that she worked at the bank in the year 2012. She did not have the original title documents. The same was with the bank where she was no longer an employee. The bank did not report to the Banking Fraud Unit neither did the bank carry out investigations. She was familiar with the signature of Zipporah Mogaka. They did not report to the Banking Fraud Unit but to their investigating unit. She was not aware whether there was an expert on document examination engaged. She left the bank in the year 2014. By then the security had not been discharged. When she left the bank, she did not know what was transferred. She was the head of legal services. She did not know how much the 1st Defendant owed the bank. That was for the credit manager. She did not have the Letter of Offer but it was at Harambee Avenue Branch. She did not know which branch held this facility. The bank did not exercise its power to sale. She was not lying under oath.

C. Cross Examination of DW - 7 by Mr. Oddiaga Advocate

140. The witness told the court that she had distinguished the two titles. The title that the Bank was holding was Title No. Galu/Kinondo/708 while title No. Kwale/Galu Kinondo/708 was a different citation. Both of them were issued by the District Land Registrar Kwale, on different dates. She received a letter dated 26th July, 2012 from DCIO Kwale which prompted her to do the response. She did not deal with customers' files unless they were referred to her. In this case, they wrote to the Chief Branch Manager, Harambee Avenue Branch who allowed them to have access to the securities in respect of the client. There was a folder for securities for Isaac G. Wanjohi.
141. She told the court that she accessed the folder for security and studied it. She wrote her letter dated 3rd September, 2012 after going through the folder of securities. She never dealt with customers file. When one went through the securities, there was the securities register and the custodian of the securities maintained entries of what was transpiring in respect of a title for a customer. What she accessed was the securities folder to verify the security held by the bank and to verify if they had been any transaction regarding that security. If the customer had paid his debt and requested for the title, then there would be a discharge of charge. From the folder, there would be the title, earlier and latest entries. The entries would also be endorse in the title if there had been any activities.



142. She reiterated that she saw the title and relayed the information to Messrs. Kamau Kuria & Kiraitu Advocates on record for the 1st Defendant. The entries on the title was a Charge for a sum of Kenya Shillings Fourteen Thousand (Kshs. 14,000/=) and a further charge for a sum of Kenya Shillings Sixteen (Kshs. 16,000/=). There was no other activity. There were no entries showing that there was any other borrowing on this title. She could not recall if there was any other entry other than the charge and further charge. There were no other document that was attached to this particular title. She could not know how Mr. Wanjohi obtained the facility but the security was at Harambee Avenue Branch.
143. She told the court that in her letter dated 22nd August, 2012, she copied the same to the Manager, Ukunda Branch. She did not undertake any other action apart from writing these letters. She did not write to the Land Registrar Kwale because the bank had the title documents. She did not write when there was wrong citation. At page 25, the owner was stated as being Isaac Njoroge Wanjohi who was not their customer.
144. She stated that she responded to the request in the letter. She supplied what they had. She knew Zipporah Mogaka who was her boss at National Bank of Kenya but she had since retired. She was also a lawyer in practice. The witness stated that the signature in the letter was not that of Zipporah. Nothing was done to subject that signature to forensic investigation.

D. Cross Examination by DW - 7 by Mr. Siminyu Advocate

145. She stated that she signed the letter on page 36. She joined the bank in September 1999. By the time she was leaving, it was after 14 ½ years. The stamp at page 26 was not that of the bank. She had no documents to confirm that the stamp was not of the bank. The General Manager Human Resources was the one that employed the staff. She did not have any record with her from the General Manager Human Resources to verify that Japheth Wanyonyi was an employee of the Bank. They wrote letters on letter – head and the copies were received on the delivery book. There were also copies on the file. The letter dated 22nd August, 2012 went to DCIO, Kwale. She did not have the file copy with the letter head. The signature on page 27 was not Zipporah's. She had no document from Zipporah to show her signature. She was not an expert but she knew Zipporah's signature.
146. She stated that she received the letter dated 26th July, 2012 and they supplied the documents. She never followed on whether people were charged. She never testified in the criminal case. Eng. Wanjohi was a frequent borrower from the bank. She did not know if he was borrowing on the title Kwale/Galu Kinondo/708. But she was certain he borrowed on title number Galu/Kinondo/708. She could see the letter at page 16 by I.G Wanjohi dated 2nd May, 2005 addressed to Mama Titi. It referred to plot No. Kwale/Galu Kinondo/708. The one at the bank was title No. Galu/Kinondo/708.
147. The Learned Counsel indicated that marked the close of the 1st Defendant's case.

IV. The 2nd Defendant's Case

148. The 2nd Defendant was described as amale adult of sound mind working and carrying on business in Ukunda Kwale County. The 2nd Defendant denied the contents of Paragraph 3 in totality. Further, the 2nd Defendant vehemently refuted the contents of paragraph 4 of the Further Amended Plaintiff. The 2nd Defendant was a stranger to the averments of paragraphs 5 and 6 of the further Amended Plaintiff. The 2nd Defendant was a total stranger to the contents of paragraphs 6A and 6B of the Further Amended Plaintiff and the same are denied in their entirety to the extent that the same relate/or refer to the 1st Defendant.



149. According to 2nd Defendant the contents of paragraph 7 were denied. The 2nd Defendant totally denied the contents of paragraph 8 of the Further Amended Plaintiff and he particularly denies all the particulars of fraud and misrepresentation particularized in paragraph 8(a to d). The 2nd Defendant avers that the averments in paragraph 8A of the Further Amended Plaintiff touches the 1st Defendant only and has nothing to do with him either legally or Constitutionally.
150. The 2nd Defendant stated that he reserved the right to raise a Preliminary Objection on point of law to the whole suit. This would be on grounds “inter-alia” that:-
- a. the Plaintiff lacked “the locus standi” to sue the 2nd Defendant since the 2nd Defendant was the rightful registered owner, had all ownership documents to wit Title Deed.
 - b. the Plaintiff had already conducted an official search and confirmed ownership of the suit property to the 2nd Defendant and thereby they entered into a genuine sale agreement.
 - c. Besides, the plot or suit property was available. Thus, the issue of refunding the sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) could not stand all.
151. On 27th May, 2022, the hearing for the 2nd Defendant commenced whereby he summoned two witnesses – the DW 1 and 3. They testified as follows:-

A. Examination in Chief of DW - 1 for the 2nd Defendant by Ms. Mwanzia Advocate.

152. He was sworn and testified. He told the court that he was Rashid Mohamed E. Kheri, the 2nd Defendant herein. He was born in the year 1969. He was a resident of Mavungo. He was a business man and a Land Agent/Broker. He recorded his witness statement on 30th July, 2023 and 12th August, 2013. He filed a Statement for the Defence and Counter claim in this suit by the Plaintiff. The 2nd Defendant bought the property – Kwale/Galu/Kinondo/708 - from Mr. Omar Mzaruba Mwishee, the 3rd Defendant herein. He caused this Plot to be sub – divided into 3 portions namely Plot No. 1910, 1911 and 1912 respectively. He knew the Plaintiff – Dr. Pawan Kumar Gupta. He approached the witness with a desire to buy a plot. He had a plot which was for sale. Eventually, they entered into sale agreement and he sold Plot No. 1912 to him. The Plaintiff paid up and the Plot was transferred to him as he became the title holder.
153. The other two Plots Numbers 1910 and 1911 remained in the names of the witness. He told the court that he was not aware of the Plaintiff’s case and for the refund of the money for sale for Plot No. 1912. On his part they conducted good business. The Plaintiff had the land while the witness had the money. From the official search, it reflected the estate of the deceased were the owners of the suit land. He denied the allegations on the fraud of the title stating that he was the owner of the land. He believed that he had sold a good title deed. He conducted a search when he was doing the purchase from the 3rd Defendant. By then the Plot No. 708 was for the 3rd Defendant and he had a title deed. He produced these documents in the list of documents dated 30th July, 2023 and 1st and 2nd Defendant Exhibits by 1 to 14 of the supplementary list dated 12th August, 2012 of documents marked as 2nd Defendant Exhibit 14.
154. He denied that the Plaintiff incurred any costs of being a sum of Kenya Shillings Two Million Seven Seventy Four Thousand Two Fifty Three Hundred (Kshs. 2,774,253/-) from building the perimeter wall and planting of trees. By the time they were building the wall there was already there were no trees planted. He followed the due process to the sub-division and selling to the Plaintiff. The land measured 1 ¼ acres. It was later on that he came to know Eng. Isaac G. Wanjohi, the 1st Defendant herein. He was



aware of his claim in the Counter claim. This was to the effect that the Parcel No. 708 was his before the sub - division.

B. Cross examination of DW - 1 for the 2nd Defendant by Ms. Umara Advocate

155. He testified that he sold the land to Dr. Kumar. They entered into a sale agreement for the purchase price of a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/-). When they went to Court the price increased by a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-) Before then, Plot No. 708 belonged to him. He bought it from the 3rd Defendant and did the due diligence at the Land Registry Offices. After the sale of Plot 1912-he built a perimeter walls-3; on the 4th side there was an occupant. He never planted trees on it. He had started building a shallow water well but he was not sure whether he completed. He had never had any access to the land.
156. He confirmed that he was informed by his advocates that there was a person claiming legal ownership of the land. He received a demand letter on the claims for refund of the purchase price. He was aware that the family was demanding for refund and for the development of the 3 perimeter wall. He was aware they were claiming he sold land obtained through fraudulent means. He was aware that Engineer Wanjohi had filed a Counter claim against the Plaintiff and himself. He was aware that the Plaintiff had filed a claim against him for payment. He was ready to pay.

C. Cross examination of DW - 1 for the 2nd Defendant by Mr Kheri Advocate

157. While making reference to the 2nd Paragraph, he stated that it was not true that he never followed the due process before he bought the Plot No.708 nor causing the sub-division of the said Parcel. With reference to parcel bundle of documents dated 12th September, 2019, the Green Card – Item number of Parcel No. 708, that is Land Reference No. Galu/Kinondo/708. He had seen and fully understood it. He had also seen the title deed for Land Reference No. Kwale/Kinondo/708 dated 29th September, 2006. He confirmed there was a difference. However to him this was caused by the office and at the end of the same Green Card it was written as Land Reference Kwale/Kinondo/708. He confirmed it had several cancellations. Further, it was his confirmation that the document item on page 23 being the official search referred to the land as Land Reference No. Galu/Kinondo/708.
158. According to the witness, from the Green Card was opened on 15th November, 1974. He denied that the register was for Land Reference No. Galu/Kinondo/708 but was Land Reference No. Kwale/Kinondo/708. He confirmed there were charges of the property. The title on the 1st charge Land Reference No. Galu/Kinondo/708 was on 6th June, 1975 as shown from the green card at page 28. The 2nd charge at Page 30 was for title deed Land Reference No. Galu/Kinondo/708 of 19th November, 1979. At page 22, he saw a Letter of Consent from the Land Control Board for the 2nd charge for 18th September, 1979, The title used was for Land Reference No. Galu/Kinondo/708. He also saw at page 16, it was for the parcel number Land Reference No. Galu/Kinondo/708. He denied that his title dated 29th September, 2006 was not known by the Land Registry. He told the court that he had an official search for his title deed.
159. He produced his title deed in support of his case. He held it was not fraudulently acquired. It was not fake. It was correct he had seen the title held by Isaac Wanjohi Gathungu for Land Reference No. Kwale/Kinondo/708 was issued on 22nd March, 1975 (See page 12). It was dated 22nd October, 2012 – the Green Card Item No. 1 dated 15th January, 1974 – Issac Wanjohi G.. Item No. 9 was dated 14th June, 2010. It was in the name of Rashid Mohammed Kheri and it was described as Land Reference No. Galu/Kinondo/708. He denied all these allegation as he had gotten all these documents from the



Land Registrar. It is that office that gave them the title for Land Reference No. Galu/Kinondo/708. He bought land which was 2 ¼ acres with no perimeter wall.

160. He denied the aversion of Imelda Kakovu that the plot had a wall when he acquired it. There was none. It was not true he had been warned that land belonged to 1st Defendant and thus not to it yet he still bought it. There was no construction going on it. He bought the Land Number 708 for a sum of Kenya Shillings Seven Hundred and Fifty Thousand (Kshs. 750,000/-). This was countered as he was He was referred to page 26 of the 2nd Defendants bundle of documents. It was the sale agreement which showed the considerations for Plot 708 to the 3rd Defendant was at a sum of Kenya Shillings Thirty Thousand (Kshs 30,000/-). He informed the 3rd Defendant got the property by way of Statutory Power of sale from a bank – public sale. He denied that the 3rd Defendant and himself acquired the title by false pretenses.
161. He refuted that he had been avoiding mentioning Land Reference No. Galu/Kinondo as he knew it was fake as the correct land reference was Land Reference No. Kwale/Kinondo as far as he was concerned. On that, he stated that it would be well answered by the Land Registrar. He denied that when they were signing the transfer for Plot No. 708 it was fake as he had a proper title deed. The documents were not fraudulently drafted or made.

D. Cross Examination of Mr. Kheri- By Mr. Siminyu Advocate

162. He confirmed to the court that he bought the land from Omar Mzaruba Mwishee. The land was Land Reference No. Kwale/Galu/Kinondo/708. When he bought the land he conducted a search, caused a transfer which was at pages 74 and 75 of the 2nd Defendant's bundle of documents and the land was properly transferred. He had never received any information indicating that the documents were fake.
163. The transfer form showed their photographs. From the Plaintiff's bundle the title was in the name of the owner Omar Mzariba Mwishee. No information was fake. He sold it to him. He bought it from the bank through public auction before exercising the statutory power of sale. It was National Bank of Kenya that sold the land to Omar Mzaruba Mwishee. He saw the documents and he had never doubted Omar. The land he bought was Land Reference No. Kwale/Galu/Kinondo/708. He caused it to be sub-divided in the same year. He did not work at the Land Registry. Indeed, the Land Registrar was the custodian of all records. The parcel had been described twice – (a) Land Reference No. Galu/Kinondo/708 and (b) Land Reference No. Kwale Galu/Kinondo/708. He did not know when or whether this changed at all.
164. He told the court while making reference to the documents of the 1st Defendant claimed that the title dated 22nd March, 1957 for Land Reference No. Galu/Kinondo/708 was in the name of Isaac Wanjohi G. But while writing a letter dated 21st June, 2005 to Mama Titi, Eng. Wanjohi described it as Land Reference No. Kwale Galu/Kinondo/708. He was aware that the 3rd Defendant had been charged in a criminal case 873 of 2012 in Kwale over the same Parcel No. 708 contrary to the provision of Section 357 (a) – the witness referred to the charge sheet. He was a witness in the case. The Judgement was delivered on 8th September, 2016. The 3rd Defendant was acquitted under Section 215 of C.P.C.
165. The witness told the court that he had never been charged with regards to the land.

D. Re - Examination of Mr. Kheri by Ms. Mwanzia Advocate

166. He confirmed that there had never been any cases preferred against him over the parcel of land. The agreed price for the land was Kenya Shillings Seven Hundred and Fifty Thousand (Kshs. 750,000/=). He sold the said piece of land to Dr. Kumar for a sum of Kenya Shillings Five Million Five Hundred



Thousand (Kshs 5,500,000/-). He never obtained the purchase price by false pretense. It was the agreed price. When buying the Plot there were no perimeter walls on the land. The 3rd Defendant was issued with title on 29th September, 2006 for Land Reference No. Kwale/ Kinondo/708.

167. He told the court while making reference to the Green Card that the 1st entry was made on 15th November, 1974 for Mr. Wanjohi. Entry No. 7 was dated 29th September, 2006 for Omar Mzarube. Entry no. 14 was made on 14th June, 2010. They were the same entry as it was in the title deed. The two land references; Kwale/Kinondo/708; and Galu/Kinondo/708 were one and the same parcels.
168. He told the court that he did not owe Dr. Kumar any money, when the Plaintiff said he wanted the money back and he got the land as per the terms and conditions of the sale agreement.
169. On 27th May, 2022, Ms. Mwanzia advocate marked the close of the 2nd Defendant's case.

V. The 3rd Defendant's case

170. The 3rd Defendant was described as a male adult of sound mind residing and working for gain in Diani, in the County of Kwale. The 3rd Defendant was joined in this suit by the 1st Defendant pursuant to the Counter - claim dated 22nd October, 2012. The 3rd Defendant filed a Defence and Counter Claim denying the Plaintiff's claim claiming to be the owner of the land. Despite of all efforts made, the 3rd Defendant failed to testify. On 3rd November, 2022, Mr. Siminyu Advocate was compelled to mark the close of the 3rd Defendant's case.

VI. Submissions

171. On 3rd November, 2022 after both parties closed their case, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that they all complied accordingly, the Honourable court reserved a date to deliver its judgement on notice to all the parties.

A. The Written Submissions by the Plaintiff

172. On 19th December, 2022, the Learned Counsels for the Plaintiff through the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Co. Advocates filed their written submissions dated the same date. Mrs. Umara Advocate commenced her submissions by rehashing on all the detailed background of this suit. The Learned Counsel stated that the original Plaint was filed on 23rd July, 2012 against Eng. Isaac Wanjohi for a declaration that the Plaintiff was the registered proprietor of Land Reference No. Kwale/Galu Kinondo/1912 among other reliefs.
173. On 6th August, 2012, the Plaint was amended to include the 2nd Defendant Rashid Mohammed Kheri, who had sold the suit property Land Reference No. Kwale/ Galu Kinondo/1912 to the Plaintiff. The Plaintiff pleaded particulars of fraud and misrepresentation on the part of the 2nd Defendant and added an alternative prayer for an order against the 2nd Defendant for a refund of the expenses and costs related to the transaction over the suit property. The Plaint was further amended on 8th November, 2012 whereupon the Plaintiff sought a refund of a sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eighty Three Hundred (Kshs.8,254,283.00/=) from the 2nd Defendant being a refund of the purchase price of the suit property in the sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000.00/=) and a sum of Kenya Shillings Two Million Seven Fifty Four Thousand Two Eighty Three Hundred (Kshs. 2,754,283.00/=) being the cost of construction of the perimeter wall and casuarina trees planted thereon.
174. On 24th October, 2012, the 1st Defendant filed his Defence and Counterclaim, and introduced one Omari Mzaruba Mwishee as 1st Defendant in the Counterclaim. In subsequent pleadings, Omari



- Mwaruba Mwishee has been referred to as the 3rd Defendant. As fate would have it, the Plaintiff, Dr. Pawan Kumar Gupta passed away on 17th March, 2021. This was after he had testified in chief. The Legal Administratrix of the deceased estate Sharda Gupta made an application dated 25th October, 2021 to be substituted in place of the deceased. The application was allowed by consent on 28th October, 2021. The Plaintiff was amended on 4th October, 2021 to reflect the changes.
175. The Learned Counsel further guided the Honourable Court through the background of the case being on or about 21st July, 2011, the 2nd Defendant, Rashid Mohamed Kheri agreed to sell a Plot to the deceased Plaintiff. Dr Pawan Kumar Gupta, for a consideration of a sum of Kenya Shillings Five Million Two Fifty Thousand (Kshs. 5,250,000/=) Plaintiff Exhibit - 1; 50,000/=.The parties sealed the agreement, but subsequently changed their minds and proceed with the sale of the property in the sum of Kenya Shillings Five Million Four Eighty Thousand (Kshs. 5,480,000/=).
176. On or about 17th October, 2011, the property was transferred to the deceased, before the full purchase price had been paid. In a bid to recover the purchase price, the 2nd Defendant filed a Civil suit against the Plaintiff in MSA HC 594 OF 2011. This suit was settled upon payment of the sum of Kenya Shillings Four Million Four Eighty Thousand (Kshs. 4,480,000) and a further payment of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/=) Plaintiff Exhibit - 2. Upon transfer of the property, the deceased plaintiff planted casuarina trees and erected a boundary wall along the property at a cost of a sum of Kenya Shillings Two Million Seven Fifty Four Thousand Two Eighty Three Hundred (Kshs. 2,754,283.00/=). On or about 11th June, 2012, the Plaintiff received a letter from the 1st Defendant claiming ownership of Land Reference No. Galu/Kinondo/708, and issued to the Plaintiff 14 days' notice to uproot the casuarina trees planted on the property and to further demolish the perimeter wall erected thereon – Plaintiff Exhibit - 3.
177. The Learned Counsel submitted that a demand notice issued to the 2nd Defendant by the plaintiff dated 18th June, 2012 did not elicit any response and the Plaintiff filed this suit to protect his interests – Plaintiff Exhibit 4. The 1st Defendant filed his defence dated 22nd October, 2012 together with a Counter - Claim where he introduced Omari Mzaruba Mwishee as a Defendant in the counterclaim.
178. The Learned Counsel narrated to the Honourable Court that the Plaintiff had filed the following documents:
- i. Dated 26th July, 2012 Plaintiff. Amended on 6th August, 2012. Further amended on 29th October, 2012. Further Further amended on 4th October, 2021.
 - ii. Statement dated 20th July, 2012. Further statement dated 29th October, 2012.
 - iii. Documents dated 20th July, 2012. Further list of documents dated 29th October, 2012.
 - iv. Dated 2nd November, 2012 reply to 2nd Defendant's defence.
 - v. Dated 2nd November, 2012 Reply to the 1st Defendant's defence and defence to counterclaim.
 - vi. Dated 2nd November, 2012 Notice of claim against co-Defendant.
 - vii. Dated 4th July, 2013 Plaintiff's case summary.
 - viii. Dated 4th July, 2013 Plaintiff list of issues.
179. The Learned Counsel averred that by a Plaintiff dated 20th July, 2012, the Plaintiff filed suit against the 2nd Defendant Eng. Isaac G. Wanjohi seeking a declaration that the Plaintiff was the registered proprietor of the property known as Kwale/Galu Kinondo/1912, that the title deed held by the Defendant from demolishing the perimeter wall and or uprooting the casuarina trees. On or about 6th August,



2012, the Plaintiff amended his Complaint and brought in Rashid Mohammed Kheri as a 2nd Defendant. The Plaintiff's claim against the 2nd Defendant was for a refund of sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eighty Three Hundred (Kshs.8,254,283.00/=) as outlined in Paragraphs 8, 8A and 8B of the Amended Complaint. The Complaint was further amended on 8th January, 2012 whereupon the Plaintiff prayed for Judgment in the sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eighty Three Hundred (Kshs.8,254,283.00/=) from the 2nd Defendant.

180. On 21st February, 2017, the Plaintiff (PW - 1) Dr. Pawan Kumar proceeded to give his evidence in chief. He informed the court that the 2nd Defendant visited his office with two other gentlemen. The purpose of the visit was to sell a plot known as Galu/ Kwale/Kinondo/1912. Pursuant to that, the Plaintiff conducted a search which was produced as Plaintiff's Exhibit-1. The official search confirmed that the property was registered in the name of the 2nd Defendant. The Plaintiff confirmed that they visited the suit property before conducting a search. The parties thereafter entered into a sale Agreement dated 21st July 2011 Plaintiff Exhibit - 2. The purchase price was in the sum of Kenya Shillings Five Million Two Fifty Thousand (Kshs. 5,250,000/-) A deposit of a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00/=) was to be paid at the time of execution of the agreement, and the balance was to be paid on or before 31st December, 2011. The Plaintiff stated that he paid the deposit as agreed; but failed to pay the balance, which culminated to the 2nd Defendant suing him in MSA HC NO.594 OF 2011, which suit was settled on 27th March, 2012 after he paid the full purchase price Plaintiff Exhibit 6.
181. The Plaintiff averred that the title was in the name of the 2nd Defendant, having been registered as the proprietor on 21st September, 2010 - Plaintiff Exhibit - 4. The parties signed the transfer documents - Plaintiff Exhibit - 3 and thereafter, the property was transferred to the Plaintiff and registered in the Plaintiff's name - Plaintiff Exhibit - 5. It was the Plaintiff's testimony that he once again visited the suit property after the transfer. That there were no developments nor occupation on the suit property. The Plaintiff confirmed that he saw the boundaries and beacons, and a few kiosks on the right side of the property. Thus, the Plaintiff informed the court that upon registration, as the proprietor of the suit property, he commenced construction of a water well, planted casuarina trees and sought permission to construct a perimeter wall, which developments costs him approximately a sum of Kenya Shillings Three Million (Kshs. 3, 000, 000.00/=). The Plaintiff averred that during this period, he did not get any interference from any person.
182. Subsequently, the Plaintiff informed the court that sometime in June 2012, he received a letter from the 1st Defendant dated 11th July, 2012. The 1st Defendant, in his aforesaid letter, claimed legal ownership of Land Reference No. Galu/Kindondo/708. The Plaintiff was given 14 days to uproot the casuarina trees - Plaintiff Exhibit - 7. It was the Plaintiff's contention that he was not aware of the existence of Plot No.708 during the transaction. Faced with the threat of losing his property, the Plaintiff decided to file this suit against the parties. During both examination in chief and cross examination, the Plaintiff stated that he bought Plot No. Kwale/Galu Kinondo/1912 from the 2nd Defendant for value without notice pursuant to a search dated 14th June, 2011. He stated that he had to surrender the original title to plot No. Kwale/Galu Kinondo/1912 to the District Land Registrar, Kwale, for further investigation after the 1st Defendant alleged fraudulent activities on the property. The Plaintiff reiterated that at the time of purchase of Plot land reference numbers Kwale/Galu Kinondo/1912, he was not aware of the existence of Plot land reference numbers Galu Kinondo/708, since the property which he bought was registered in the name of the 2nd Defendant. The Plaintiff closed his case on 21st February, 2017. As fate would have it, on 17th March, 2021, the Plaintiff passed away and on 25th October, 2021, an application was filed in court for leave to substitute the Plaintiff with the Legal representative of his estate. On 28th October, 2021, the application was allowed, and the Complaint was further further amended on 4th November, 2021.



183. According to the Learned Counsel, the 1st Defendant's case was that the Engineer Isaac G. Wanjohi filed a Statement of Defence and Counter Claim dated 22nd October, 2012 and in Court on 24th October, 2012. He introduced Omari Mzaruba Mwishee who has all along been referred to as the 3rd Defendant. In his defence, the 1st Defendant alleged that the Plaintiff's suit was founded on his own wrong doing, and that the Plaintiff's title was bad and void in court, being a product of an illegal sub division of the mother title known as Land Reference numbers Galu Kinondo/708. From the pleadings, the 1st Defendant did not allege any fraud on the part of the Plaintiff, save to state that the Plaintiff was not a purchaser for value without notice and further, that the Plaintiff held the plot known as Land Reference No. Kwale/Galu Kinondo/1912 in trust for the 1st Defendant. The 1st Defendant therefore prayed for a declaration that the Plaintiff was a trespasser on Land Reference Numbers Galu/Kinondo/708, for vacant possession of the property and for cancellation of the title.
184. The Learned Counsel contended that the Plaintiff filed a reply to the 1st Defendant's Defence and Counter claim on 2nd November, 2012 denying the allegations raised in the Counter claim. The Plaintiff further filed a Notice of Claim against Co -Defendant, the 2nd Defendant for reliefs and remedies sought in the notice dated 2nd November, 2012.
185. According to the Learned Counsel, the 1st Defendant's evidence who called five (5) witnesses DW – 2, Paul Chelanga testified that he was the 1st Defendant borrowed money from the Bank and issued the property known as on 6th June, 1975 for the sum of Kenya Shillings Fourteen Thousand (Kshs.14,000.00/=) and a further charge of Kenya Shillings Sixteen Thousand (Kshs.16,000.00/=) on 10th July, 1979. On cross examination, the witness stated that he joined the bank in the year 1995 and that he had not brought the entire file with him to court. the witness did not produce the charge dated 6th June, 1975, neither had he seen the charge document. The witness did not have copies of the consent to charge the property, nor did he confirm whether the loan had been repaid in full. The witness confirmed that the letter from the legal services manager (Page 37 of the 1st Defendant's documents) did not confirm whether the 1st Defendant had repaid the loan in full, neither did the letter from the 1st Defendants advocate. Although the witness stated in his statement that the letter dated 26th September, 2006 purportedly signed by one M/s. Zipporah Mogaka was fraudulent, no hand writing expert was brought to court to confirm this. The 1st Defendant in his testimony informed the court that he did not have a debt in the bank, neither had he discharged the property. The 1st Defendant did not produce the original charge document.
186. On cross examination, the 1st Defendant was unable to inform the court how he acquired the property known as Land Reference numbers Galu/Kinondo/708. He never produced copies of the Sale Agreement, transfer documents and or payment receipts. The 1st Defendant had not visited the suit property since the year 1975. Although the 1st Defendant stated in his statement that the last overdraft was taken on 10th July, 1979, no consent to charge was availed in court. The witness informed the court that he did not finalize payment of the overdraft facility, nor had the charge been discharged. It was further confirmed on cross examination that no Rates Clearance Certificate had been availed and further, the witness stated that no demand for payment of rates had been received from the relevant authority. The witness informed the court that he did not have a letter or notice allegedly written to squatters on his property as stated in paragraph 5 of his statement. The witness could not verify the number of squatters on the property. When asked whether he put up a notice or a caveat emptor on the property, the witness confirmed the negative. On cross examination by the Counsel for the 2nd Defendant, the 1st Defendant stated on the suit property. Neither did he write to the National bank of Kenya informing them on a consent from the land control board to charge the property.



187. The Learned Counsel informed Court that the 1st Defendant called the Kwale District Land Registrar as a witness. The Land Registrar informed the court that on 22nd July, 2016, all entries were cancelled, and entry number 1 and 2 reinstated. The reinstated entries reinstated the 1st Defendant as the proprietor of Galu/Kinondo/708. Parties objected to the production of the green card, which had not been supplied to the parties. These documents were thereafter filed by the 1st Defendant on 17th September, 2019. The court was called upon to note that the entries numbers 3 - 9 in the proprietorship section and the reinstatement of entries number 1 and 2 on 22nd July, 2016 was done during the pendency of the suit and without leave of the court. The witness testified as follows:-
- a. Referring to pages 23 - 24 of the supplementary list of documents dated 12th September, 2019, he informed the court that after the land adjudication, the Land Registrar opens a green card and issues a title to the land owner. In the instant case, the card was opened on 15th November, 1974 for Land Reference numbers Galu/Kinondo/708. On 22nd March, 1975 the land owner was issued with a land certificate.
 - b. He confirmed to the court that page 24 of the adjudication record was not signed by the Director of Land Adjudication, or the Adjudication Officer as required. Neither was it signed by the landowner nor witnessed at page 23 as required.
 - c. That the process of cancellation of a Title required the Land Registrar to notify the parties, investigate the subject to confirm reasons thereof and thereafter exercise the power to deregister or by a court order.
 - d. The Land Registrar testified that he cancelled the entries without following the above procedures. The cancellation was as a result of a letter dated 22nd August, 2012 received from the manager legal services, National bank of Kenya.
 - e. On further cross examination by the 2nd Defendant's counsel, the Land Registrar stated that the three Plots Numbers Kwale/ Galu/Kinondo/1910, 1911 and 1912 were all issued to the 2nd Defendant upon surrender of the Land Reference numbers Kwale/Galu Kinondo/708. All these were issued by Kwale Lands office.
 - f. The witness confirmed that he did not see any correspondence calling the 2nd Defendant with regard to his title. That the green card filed by the 2nd Defendant entry no. 8 did not appear in the year 2012 green card, neither did it show that there was a cancellation.
 - g. The Land Registrar testified that the 3rd Defendant (Omar Mwishee) became the proprietor of Galu/Kinondo/708 on 29th September, 2006. This was the title that was issued to the 3rd Defendant, and signed by the Land Registrar . It was the same title that was transferred to the 2nd Defendant that generated the three sub-divisions. He affirmed that from the records, the Land Registrar was satisfied hence effected the transfer on 29th September, 2006 to the 3rd Defendant (Omar Mwishee) and to the 2nd Defendant on 14th June, 2010.
188. The Learned Counsel guided the Honourable Court through the 2nd Defendant's defence submitting that the Plaintiff's claim against the 2nd Defendant was for the refund of a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) being the sum paid towards the purchase of Plot Kwale/Galu/Kinondo/1912 and a further sum of Kenya Shillings Two Million Seven Fifty Four Thousand Two Eighty Three Hundred (Kshs. 2,754,283.00/=) being the cost of construction of the perimeter wall, drilling the well and casuarina trees planted on the suit property. The Plaintiff had stated in his pleadings that the 2nd Defendant fraudulently misrepresented himself to the deceased Plaintiff that he was the registered proprietor of all that parcel know as Land Reference numbers Kwale/ Galu



Kinondo/1912 knowing very well that he had no capacity to sell the property. The 2nd Defendant denied all those allegations in his defence.

189. According to the 2nd Defendant's evidence was that he sold plot land reference numbers Kwale/Galu Kinondo/1912 to the Plaintiff and got his full pay amounting to a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/-). He sold the property because he was the registered proprietor and the conducted official search at the lands registry confirmed this. This property had been purchased from Omari Mwishe (3rd Defendant) who was the registered proprietor of the said parcel Land Reference numbers Kwale/Galu Kinondo/708. The 2nd Defendant confirmed that he entered into a sale agreement with the Plaintiff for the sale of Kwale/Galu Kinondo/1912 for a consideration and that at the time of sale, there was no perimeter wall around the property. The 2nd Defendant being the registered proprietor, honestly believed that he was transferring a clean title to the Plaintiff. The 2nd Defendant informed the court that even at the time of giving evidence in court, he had not received any letter from the Land Registrar to the effect that the transfer of Galu/Kinondo/708 was irregular or fraudulent.
190. According to the Learned counsel, the 1st Defendant had failed to prosecute the Counterclaim. The Plaintiff denied all the allegations outlined in the Counter claim and prayed that the Counter claim against him be dismissed with costs. The Plaintiff herein submitted that fraud was a question of evidence. Fraudulent conduct must be distinctly alleged and proved. General allegations were insufficient to amount to an averment of fraud of which any court ought to take notice. The Plaintiff in the Counterclaim did not prove or produce any evidence of attendant inference of fraud on the part of the deceased Plaintiff and the Counterclaim against the Plaintiff ought to fail. The Plaintiff filed a Notice of claim against Co - Ddefendant dated 2nd November, 2012, claiming against Rashid Mohamed Kheri indemnity and or contribution in full as the court may decide in the event that the court finds in favour of the Counter - claim.
191. The Learned Counsel submitted that on the issue of whether the 2nd Defendant was the registered proprietor of the property known as LR. No. Kwale/Galu Kinondo/1912;
- a. The Certificate of official search dated 14th July, 2011 (annexed at page 17 of the Plaintiff's list of documents dated 20th July, 2012) confirmed that the property known as Kwale/Galu Kinondo/1912 was registered in the name of Rashid Mohammed Kheri on 21st September, 2010 and a title deed issued on the same day.
 - b. A copy of the green card (annexed at page 17 of the Plaintiff's documents dated 20th July, 2012) entry number 9 dated 14th June, 2010 confirmed that the 2nd Defendant was the registered proprietor. The green card was certified as a true copy of the original by the Land Registrar Kwale on 27th June, 2012.
192. On whether the Plaintiff was an innocent purchaser for value of the suit property known as Land Reference numbers Kwale/Galu Kinondo/1912, the Learned Counsel referred the Honourable Court to the Black's Law Dictionary 8th Edition, which defines a bona fide purchaser as:
- “one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims”
- A bona fide purchaser of land has absolute and unqualified and answerable defense against a claim of any prior equitable owner.



193. The Learned Counsel argued that before the deceased purchased the property, he carried out a search as stated in paragraph 51 (a-b) above. Having confirmed that the suit property was indeed registered in the name of the 2nd Defendant, he entered into a sale agreement dated 21st July, 2011 annexed at page 2-6 of the Plaintiff's list of documents. The deceased paid the afore stated purchase price to the Vendor, the 2nd Defendant herein. This was confirmed by the 2nd Defendant in his evidence. A copy of the transfer of a sum of Kenya Shillings Five Million Four Eighty Thousand (Kshs.5,480,000/=) dated 16th December, 2011 and a cheque for a sum of Kenya Shillings Twenty Thousand (Kshs.20,000/=) were annexed in the Plaintiff's further list of documents dated 29th October, 2012.
194. At the time of the purchase, there was no encumbrance on the suit property. The Plaintiff and the 2nd Defendant both confirmed that they visited the property. It was the Learned Counsel's contention that the deceased Plaintiff was an innocent purchaser for value of the suit property. To buttress her point she cited that case of "Katende – Versus - Haridas & Co. Ltd (2008) 2 EA" the Court of Appeal of Uganda stated that a bonafide purchaser was a person who honestly intends to purchase the property offered for sale and did not intend to acquire it wrongly. That for a purchaser to successfully rely on this doctrine, he must prove that:
- a. He holds a certificate of Title
 - b. He purchased the property in good faith
 - c. He had no knowledge of the fraud
 - d. He purchased for valuable consideration
 - e. The vendors had apparent valid Title
 - f. He purchased without notice of any fraud
 - g. He was not party to any fraud.
195. The Learned Counsel further submitted that the deceased Plaintiff had proved the above. The vendor had a valid title, pursuant to the search conducted in the registry, the Plaintiff had no knowledge of fraud whatsoever. The Plaintiff personally inquired into the title of the Vendor, the 2nd Defendant and confirmed that the Vendor was the registered proprietor of the Land Reference numbers Kwale/Galu Kinondo/1912, leading into the purchase and transfer of the property to the Plaintiff.
196. To strengthen on her argument, she referred the Honorable Court to the provision of Section 26 (1) & (2) of the *Land Registration Act*, No. 3 of 2012. The Learned Counsel submitted that the Land Registrar made entries into the register, sealed and signed the Title which confirmed that the plaintiff was the registered proprietor of the Land Reference numbers Kwale/Galu Kinondo/1912.
197. On whether the 2nd Defendant fraudulently misrepresented himself to the Plaintiff, the Learned Counsel argued that he was not aware of the existence of the Land Reference numbers Galu/ Kinondo/708 at the time of purchase. He only became aware of the claim by the 1st Defendant when he received a notice from the 1st Defendant claiming to be the registered proprietor of Land Reference numbers Kwale/Galu Kinondo/708, who further alleged that Land Reference numbers Kwale/ Galu Kinondo/1912 was a result of an irregular sub-division of Land Reference numbers Galu/ Kinondo/708. Should the court find that indeed there was an irregular sub-division, then the Learned Counsel submitted that there was misrepresentation by the 2nd defendant.
198. On whether the 1st Defendant held the original title of the parcel known as Land Reference numbers Galu/ Kinondo/708, the Learned Counsel intimated that in the demand letter dated 11th June, 2012



addressed to the plaintiff by the 1st defendant (Item 3 in the Plaintiff's further list of documents dated 29th October, 2012) the 1st Defendant claimed ownership of the Land Reference numbers Galu/Kinondo/708. Paragraph 5 of the 1st Defendant's defence refers to the property known as Land Reference numbers Kwale/ Galu/ Kinondo/ 708. Paragraph 3 of the 1st Defendant's witness statement refers to Land Reference numbers Galu/Kinondo/708. The copy of the title deed dated 2006 in the name of Omari Mwaruba Mwishee (annexed in the 2nd Defendant's further list of documents dated 12th August, 2013) refers to Land Reference No. Kwale/Galu/Kinondo/708. 1st Defendant witness, Mr. Safari, the Land Registrar confirmed that the title issued on 29th September 2006 was for Land Reference numbers Kwale/Galu/Kinondo/708 to Omari Mwaruba Mwishee. It was issued by the Land Registrar and that the last page was serialized. The Land Registrar affirmed, during cross examination by the Plaintiffs' counsel that at page 30 of the Plaintiffs list of documents dated 20th July, 2012, the property was free from any encumbrance and was ready for transfer. A continuation of the entries in the green card at page 27 entry number 11 in the said list of documents indicated that the title was closed on subdivision on 21st September, 2010. The Land Registrar confirmed that there were two parallel green cards emanating from the registry but could not ascertain which green card was the original one.

199. On the issue of whether the 2nd Defendant should refund to the Plaintiff the sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5, 500,000/=) being the purchase price of Land Reference No. Kwale/ Galu /Kinondo /1912 and a sum of Kenya Shillings Two Million Seven Fifty Four Thousand Two Eighty Three Hundred (Kshs. 2,754,283/-) being cost of improvement thereon, she submitted that it was not in dispute that the Plaintiff paid these monies to the 2nd Defendant towards purchase of Land Reference No. Kwale/Galu Kinondo/1912. The 2nd Defendant in his evidence informed the court that at the time of sale of that he built a perimeter wall, planted casuarina trees and sank a water well. It was this boundary wall that the 1st Defendant directed the Plaintiff to bring down. The 1st Defendant further wanted the Plaintiff to uproot the casuarina trees.
200. The Learned Counsel submitted that the Plaintiff purchased the suit property for consideration without notice, and put up developments thereon. In the unlikely event that the Plaintiff's suit was dismissed, the Plaintiff had pleaded for a refund of the sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eighty Three Hundred (Kshs. 8,254,283/-) to be refunded by the 2nd Defendant being expenses and costs related to the transaction over the land Land Reference Numbers Kwale/ Galu/Kinondo/1912.
201. On whether the Plaintiff should hand over vacant possession, the Learned Counsel averred that from the evidence adduced in court, it was confirmed that the Plaintiff conducted due diligence before purchase of the property. A copy of the search certificate was obtained which confirmed that the 2nd Defendant was the registered proprietor of Land Reference No. Kwale/Galu Kinondo/1912. The Plaintiff paid the consideration and the property was registered in his name, whereupon he took possession and proceeded with developments thereon. Although the 1st defendant lays claim over the suit property, the plaintiff avers that he is lawfully registered as the proprietor of Land Reference numbers Kwale/Galu Kinondo/1912 and cannot be compelled to hand over vacant possession.
202. On the issue of whether the Land Registrar Kwale had authority to cancel entries in the register, the Learned Counsel argued that at the time of filing suit on 20th July, 2012, the green card, annexed at page 23-35 of the Plaintiffs list of documents, had the following entries at page 29. Entry No. 8 dated 29th September, 2006 - Title issued to Omari Mzaruba Mwishee. Entry No.9 dated 14th June, 2010- Transfer to Rashid Mohamed Kheri. Page 27 was a continuation of the entries. Entry No. 10- Title Deed issued



- to Rashid Mohamed Kheri. Entry No. 11 dated 21st September, 2010: Title closed on subdivision, New No's 1910, 1911 and 1912. Entry No. 12- Restriction under Section 136 (1).
203. The Learned Counsel urged the Honourable Court to take note that a copy of this green card was certified by the Land registrar on 27th September, 2012. The matter proceeded for hearing and the Plaintiff produced the above documents as filed in his list of documents. Upon sub-division and close of the register, the 2nd Defendant sold sub-division of the Land Reference Numbers Kwale/ Galu Kinondo /1912 to the Plaintiff. Title Deed dated 17th October, 2011 was issued to the Plaintiff (annexed at page 19 of the Plaintiff's documents) On 27th June, 2012 a restriction was registered under the provision of Section 136 (C). The property had no encumbrance. All the parties to the suit were aware of these titles and the 1st Defendant filed the copies of the green cards in his list of documents dated 22nd October, 2012 from pages 4-15.
204. The Plaintiff and the 2nd Defendant's advocates were therefore taken by surprise during the hearing of the 1st Defendant's case, when witness number 6, the Kwale Land Registrar, Mr. Safari produced copies of the green card which had not been brought to the attention of the parties. The witness was stepped down to allow the 1st Defendant's advocate to file a supplementary list of documents, which was done on 17th September, 2019. On 19th January, 2021 the Land Registrar, D. Safari proceeded with his evidence. He produced copies of the green card for Land Reference numbers Galu/ Kinondo /708 which had the following entries at the proprietorship section. Page 1-Entry No. 8 dated 22nd July, 2016- necessitated Entry No. 1 and 2. This entry effectively reinstated the 1st Defendant as the proprietor of Galu/ Kinondo/708. Page 3 - Was again proprietorship section. This showed that the entries number 10 and 11 were cancelled. Pages 4-7 the whole sections have been cancelled, including the restriction placed therein on 21st September, 2015. The date of cancellation and reasons for cancellation was not given.
205. According to the Learned Counsel, the provision of Section 80 (1) of the [Land Registration Act](#) (2012) was clear on the legal powers for the cancellation of titles.
206. The Learned Counsel further reiterated that the Land Registrar, Kwale, acted contrary to the provisions of Sections 14, 24, 25, 26 and 79 of the [Land Registration Act](#). The Land Registrar's powers were limited to rectification of errors, mistakes and omissions that did not materially affect the interests of the proprietorship. Section 14 of the Act gives the general powers of Land Registrars. Section 24 vests absolute ownership of land to a registered proprietor, Section 25 provides for the rights of a proprietor, Section 26 confirms that a Certificate of Title issued by the Registrar upon registration is conclusive evidence of ownership while Section 79 provides that the Registrar may rectify the register of omissions or errors not materially affecting the interests of any proprietor, by consent of both parties, to rectify a dimension or area shown if upon survey, there is an error, where the document has been obtained by fraud or upon proof of change of name of the proprietor. Section 79 (4) provides for the procedure to be followed before rectifying the register. The parties must be notified and the matter raised must be heard.
207. Further the Learned Counsel averred that the Land Registrar did not notify the parties before cancelling the title(s). It was further submitted that the Land Registrar cancelled the titles despite the fact that the matter was still pending in court and an injunction was in force prohibiting dealings on the land pending final determination of the suit. The cancellation of title materially affects a proprietor's rights. It was only the court that has powers to divert the cancellation of a register under the provision of Section 80 (1) of the [Land Registration Act](#). The Courts have upheld the sanctity of title holding that it was only where the registered owner is proved to have acquired title fraudulently would the title be impacted.



208. To buttress on this point, the Learned Counsel relied on the case of “David Peterson Kiengo & 2 others others – Versus - Kariariuki Thuo (2012)eKLR” where it was observed that:

“.....Indefeasibility of title is the basis for land registration. The state maintains a central register of land title holding which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring interest.”

209. She further cited the case of:- “Sabina Nyambura Githina & another – Versus - The Land Registrar, Thika & 4 Others (2021) eKLR” found that the Petitioner’s right to property had been violated, and that the Land Registrar’s actions in cancelling the entries on the register without notice to the parties and without following the process set out by law contravened the Petitioner’s right to fair Administrative Action. The court noted as follows:

“.....there is no doubt that a Land Registrar has no power to cancel registration of a person’s title and the same can only be done by a Court of law or competent tribunal. Purporting to cancel any registration therefore is acting ultra vires. As a party has the right under the Constitution to be afforded fair administrative action, that is fair, reasonable and be given prior Notice, the court finds and holds that the 1st Petitioner was not accorded a fair administrative action.”

210. She reiterated that the evidence on record showed that the property known as Kwale/Galu Kinondo/1912 as registered in the name of the Plaintiff. Therefore the Plaintiff was entitled to the protection under the provision of Sections 24, 25 and 26 of the Land Registration Act.

211. On whether the Plaintiff was entitled to the Reliefs sought, the Learned Counsel emphasized and asserted that from the evidence adduced and authorities relied on, the Plaintiff had proved her case and that the Plaintiff was “the prima facie” registered owner of the suit property. The Plaintiff entered into a valid sale agreement which had the legal effect that the title acquired is protected under the provisions of Sections 25 & 26 of the Land Registration Act (2012).

212. In conclusion, the Learned Counsel guided the Honourable Court to the provision of Section 27 of the Civil Procedure Act, Cap. 21 which provides that costs follow the event. That costs should be awarded to the successful party, though this is discretionary. The Learned Counsel stressed that the Plaintiff had proved her case on the required standard of balance of probabilities against the 1st, 2nd and 3rd Defendants. The Learned Counsel on behalf of the Plaintiff prayed for Judgment as prayed in the Further Amended Plaint. The Plaintiff further prayed that the Counter claim against the deceased Estate be dismissed with costs.

B. The written submissions by the 1st Defendant

213. On 7th February, 2023, the Leraned Counsel for the 1st Defendant through the Law firm of Messrs. Kamau Kuria & Company Advocates filed their written submission dated 6th February, 2023. Dr. Kamau Kuria, Senior Counsel, commenced his submissions by providing the Honourable Court with a detailed background of the matter as instituted by the Plaintiff and defended by the Defendants herein through the appropriate filed pleadings. He underscored the fact that pursuant to the directions



given by this Honourable Court on 3rd November, 2022, the Plaintiff filed his submissions within 21 days after which the Respondents filed their submissions within 21 days after being served with the Plaintiff's submissions. The court further directed that parties highlight their respective submissions on 7th February 2023.

214. The Counsel held that these submissions were in two parts. The 1st part was where the 1st Defendant states his case whilst on the 2nd part he responds to the submissions by the Plaintiff. The Learned Counsel averred that before the Honourable Court was the Further Further Amended Plaint dated 4th November, 2021 in which the Plaintiff sought for the following orders:
- a. A declaration that the Plaintiff is the registered proprietor of Kwale/GaluKinondo/1912.
 - b. A declaration that the title deed, if any held by the 1st Defendant is illegal, null and void.
 - c. A permanent injunction restraining the 1st defendant by himself, his agents, servants and/or employees from demolishing the perimeter wall, uprooting the casuarina trees, alienating, disposing of or undertaking any other activity on the suit property.
 - d. Any other relief that this Honourable court may deem fit to grant.
 - e. Kshs 8,254,283 from the 2nd Defendant
 - f. Alternatively an order against the 2nd Defendant to pay and refund to the plaintiff all the expenses and costs related to the transaction over Kwale/Galu Kinondo/1912 to be assessed by the court.
 - g. Costs of the suit.
215. The said Further Further Amended Plaint was opposed by the 1st Defendant through his amended Defence and Counter - Claim dated 19th January, 2022. In his Counterclaim he sought for Judgment against the 2nd and 3rd Defendants jointly and severally in the following terms:
- a. A declaration that the deceased 1st Defendant obtained registration of Kwale/Galu/Kinondo/708 fraudulently.
 - b. A declaration that the deceased 1st Defendant purported title was bad, defective, null and void in law and was incapable of conferring any lawful interest to the 2nd and 3rd Defendants.
 - c. A declaration that the Plaintiff is holding Kwale/Galu/Kinondo/1912 and the 2nd Defendant is holding Kwale/Galu/Kinondo/1911 and Kwale/Galu/Kinondo/1910 in trust for the Plaintiff.
 - d. A declaration that the 2nd and 3rd Defendants are trespassers on Galu/Kinondo/708.
 - e. A permanent injunction restraining the 2nd Defendant, by himself or his agents or servants from being on, selling, alienating, charging or in any way parting with possession and interfering with the plaintiff's quiet possession of the said Kwale/Galu/Kinondo/1910 and Kwale/Galu/Kinondo/1911.
 - f. A permanent injunction restraining the 3rd Defendant by himself or his agents or servants from being on, selling, alienating, charging or in any way parting with possession and interfering with the Plaintiff's quiet possession of the said Kwale/Galu/Kinondo/1910 and Kwale/Galu/Kinondo/1912.



- g. An order that the 3rd Defendant gives the Plaintiff vacant possession of the purported Kwale/Galu/Kinondo/1912, that forms part of the Plaintiff's Galu/Kinondo/708.
 - h. Mesne profits.
 - i. General damages.
 - j. An order directing the Land Registrar, Kwale District to cancel the registration and titles issued to both the 2nd and 3rd Defendants and reopen the plaintiff's title Galu/Kinondo/708.
 - k. Costs together with interest until payment in full.
216. According to the Learned Counsel, the 1st Defendant's case in sum was that the suit property was land Reference numbers Galu/Kinondo/708 and its had never been known as Land Reference numbers Kwale/GaluKinindo/708 as the Plaintiff and 2nd and 3rd Defendants claim. The truth about the actual suit property was discernable from the documents which were produced by the 1st Defendant and Mr. Eric James Safari, the Land Registrar, of the County of Kwale; and as explained by Mr. Paul Cheranga and Dorcas Wangari Gitonga the two officers from the National Bank of Kenya which held the original Land Certificate issued on 22nd March, 1975 to the 1st Defendant herein.
217. The Learned Counsel held that the 3rd, 2nd Defendants and the Plaintiff conspired to deprive the 1st Defendant of his title through tricks namely;
- a. Creating a false title known as Kwale/GaluKinondo/708 and disguising it as land Reference numbers Galu/Kinondo/708;
 - b. Pretending that the National Bank of Kenya to which Galu/Kinondo/708 was charged in the years 1975 and 1979 exercised a statutory power of sale over a property known as Kwale/GaluKinondo/708 which is allegedly the same as the former;
 - c. The 2nd Defendant purported to subdivide the property known as Kwale/Galu/Kinondo/708; the plaintiff was purportedly sold the parcel known as Kwale/Galu/Kinondo/912;
218. When the 3rd Defendant who did not give evidence purported to buy the property known as Land Reference numbers Kwale/Galu/Kinondo/912, he met the caretakers of Galu/Kinondo/708 namely Imelda a.k.a Mama Titi and Emmanuel who told him that the property belonged to the 1st Defendant and warned him from buying it but he nonetheless went ahead and got a title for the non-existent land. Similarly, when the Plaintiff visited the land in the year 2012 he was told by Imelda, Emmanuel and the 1st Defendant himself that the land belonged to the 1st Defendant who was in occupation but he ignored what they told him about the possession and ownership. The 1st Defendant and his 5 witnesses were witnesses of the truth; whilst the Plaintiff and the 2nd Defendant told lies because the 3rd Defendant elected not to give evidence, the evidence of the 1st Defendant was uncontroverted and he had proved his case on a balance of probabilities.
219. The Learned Counsel submitted that when a person like the 2nd and 3rd Defendants and the Plaintiff get registered fraudulently as proprietors of land they became constructive trustees. They held the legal estate upon trust for the true owner. The 2nd and 3rd Defendants with the Plaintiff obtained their purported titles in contravention of the provisions of Section 26 of the *Land Registration Act*, 2012. The 1st Defendant was entitled to the relief he was seeking in the Counterclaim.



220. To buttress on his argument, the Learned Counsel referred Court to the case to which the reasoning of the Privy Council was in:- “Macfoy -Versus - United Africa Company Ltd (1961) 3 All ER 1179” applies in that if the 1st action is wrong all the subsequent actions were wrong.

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

221. The Counsel further cited the case of:- “Chrispine Otieno Caleb – Versus - Attorney General [2014] eKLR”, if a party like the 3rd Defendant elected not to give evidence, he admitted the case of the one who gives evidence. The 3rd Defendant was the alleged buyer of Land Reference number Kwale/Galu/Kinondo/708 through exercise of a purported statutory power of sale. The Counsel averred that since he did not have a good title and did not give evidence there were no titles which were acquired by the 3rd Defendant and the Plaintiff. The Plaintiff, 2nd and 3rd Defendants were not bona fide purchasers partly because they ignored the true registered owner of the suit land and shut their eyes to the occupation of the land by the 1st Defendant. The Learned Counsel urged Court to have the Plaintiff’s suit to be dismissed with cost whilst the 1st Defendant’s Counter claim be found to be meritorious and it be allowed as prayed.

222. On the pleadings, the Learned Counsel submitted that the Amended Defence and Counterclaim amended on 19th January, 2022 had two (2) components. The 1st component was on the 1st Defendant’s defence to the Plaintiff’s claim. In it the case pleaded as follows:

- a. the Plaintiff’s claim was bad in law for being founded on his own wrong and also the wrongs of the 1st and 2nd Defendants taking the form of forging the titles of the suit property and basing it on the forgeries. Please see Paragraphs 3, 4, 7 and 8 of that amended defence.
- b. the Plaintiff purported to buy it when the 1st Defendant/Plaintiff was and always was in possession of the suit property and despite the 1st Defendant/Plaintiff informing him that he was the owner of the property which has a stone perimeter wall. See Paragraph 7 of the Defence;
- c. the Plaintiff purported to buy it after ignoring the information conveyed to him by the 1st Defendant’s caretaker that the property belongs to the 1st Defendant and purported to build his purported perimeter wall inside the 1st Defendant’s property which had a stone perimeter wall enclosing it;
- d. the Plaintiff was not a bona fide purchaser for value without notice of encumbrances;
- e. the Plaintiff purported to purchase the suit property after ignoring the 1st Defendant’s occupation of the suit property within the meaning of the provision of Section 30 (g) of the repealed Registered [Land Act](#), Cap 300;
- f. the Plaintiff got a bad title because of the overriding interest of the 1st Defendant within the meaning of the said repealed Registered [Land Act](#), Cap 300 (now Repealed).

223. The 2nd pleading took the form of the Amended Counterclaim in which the Plaintiff was the 1st Defendant whilst the 2nd and 3rd Defendants remained as the Defendants they were in the Further Amended Plaint. This was a more detailed pleading than the defence. The Learned Counsel provided the following history of the suit property:



- a. The 1st Defendant/Plaintiff was 1st registered as proprietor of the parcel of land known as Land Reference numbers Galu/Kinondo/708 whose description had not changed. Please see Paragraph 11 of the Defence and Counterclaim;
 - b. He averred that he had been in possession and still was in possession since he became the proprietor and describes the history of fencing it. Please see paragraph 12;
 - c. At Paragraph 12 he averred that he had charged the suit property twice in the years 1975 and 1979 to the National Bank of Kenya and that the original title was held by the said financial institution. Please see paragraph 13;
 - d. At Paragraph 14 the 1st Defendant averred that the Plaintiff, the 2nd and 3rd Defendants conspired to defraud him of his title and he gave the particulars of the fraud of each of them. Please see paragraphs on the particulars of fraud of the Defendants at paragraphs 14 to 18;
 - e. At Paragraphs 19 and 20 he stated that the Defendants were not bona fide purchasers for value of his property and they could only have purchased from him the holder of the title through his bank and was in possession of the suit property.
224. On the evidence, the Learned Counsel submitted that the Defendant testified as DW -1 and produced the following bundle of documents:
- a. a bundle filed on 24th October,2012 accompanied by a list dated 22nd October,2012 and the 1st Defendant's witness statement;
 - b. a supplementary list of documents accompanied by a list dated 17th September, 2019; which was produced by Mr. Eric James Safiri the Land Registrar Kwale.
225. The 1st Defendant called the following witnesses who testified on the basis of their written statements;
- a. Mrs. Imelda Khakavu Aka Mamatiti
 - b. Paul Cheranga; his statement was filed on 8th November, 2013.
 - c. Emmanuel Nzioki Langi
 - d. Dorcas Wangari Gitonga
226. The 1st Defendant's bundle of documents included among other documents a land certificate dated 22nd March, 1975 which was in his name - Isaac G. Wanjohi and described the suit property as being Land Reference numbers Galu/Kinondo/708. (Please see pages 1 to 4 of that bundle.) Page 3 of the bundle reflected the charges in favour of the National Bank of Kenya dated 6th June,1975 and the 2nd charge dated 19th July,1975. The bundle which Mr. Eric James Safiri, the Land Registrar produced contained a Letter of Consent dated 6th June,1975 and described the property charged as Land Reference numbers Galu/Kinondo/708. The application for consent at page 17 referred to the same suit property. The other application for consent of Land Control Board described the same property as Land Reference numbers Galu/Kinondo/708, see page 19. The Letter of Consent which was issued on 29th June, 1979 in respect of the 2nd charge describes the property as Land Reference numbers Galu/Kimondo/708. Please see page 22. The adjudication record in respect of the same parcel of and was at page 23 and described the same property as Land Reference Numbers Galu/Kinondo/708.The 1st charge of year 1975 which was to be found at page 28 showed that the National Bank of Kenya was land Reference numbers Galu/Kinondo/708. The 2nd charge which was created in 1979 described the property as Land Reference numbers Galu/Kinondo/708. Please see page 30. This



meant that any person undertaking an official search at any time after the year 1975 would know that the property was known as Land Reference numbers Galu/Kinondo/708 and not Land Reference Numbers Kwale/Glau Kinondo/708 as was being alleged by the 2nd and 3rd Defendants.

227. At page 26 of the 1st Defendant's bundle filed on 24th October, 2012 one found a document titled TRANSFER BY CHARGE IN EXERCISE OF STATUTORY POWER OF SALE showed that the property which was allegedly sold in exercise of a statutory power of sale was in respect of Land Reference numbers Kwale/Galu/Kinondo/708. It did not relate to the suit property of the 1st Defendant. The 1st Defendant's property had never been sold in exercise of the statutory power of sale and this was the evidence of:-
- a. The 1st Defendant;
 - b. Mr. Paul Cheranga who confirmed that the bank had never exercised the statutory power of sale; in paragraph 3 of his witness statement he described the suit property as the Land Reference numbers Galu/Kinondo/708;
 - c. Dorcas Wangari Gitonga, another officer from the same bank who testified that indeed what Mr. Paul Cheranga said was correct referred to a letter at page 36 which she wrote confirming that the original title document was held by the National Bank of Kenya. Her letter contained a typographical error in the reference;
 - d. Mr. Eric James Safiri, the Land Registrar, produced the bundle which showed that the fraudulent dealings with the suit property were cancelled. At page 1 of his bundle one found the correct description of the suit property as Land Reference numbers Galu/Kinondo/708 and that the 1st Defendant was the 1st proprietor and there had been no lawful dealings with that property, the 1st Defendant was the lawful proprietor.
228. As regards the possession of the land and entries into it, Mrs. Imelda Khakavu and Emmanuel Nziokl Langi (herein after referred to as Imelda and Emmanuel respectively) and the 1st Defendant testified on it and their evidence was not shaken by the cross examination, that evidence was briefly that:
- a. The 1st Defendant appointed them caretakers of the suit property and reported any activity on the land over a period of more than 30 years;
 - b. As of the year 2010 the suit property was surrounded by a stone perimeter wall;
 - c. The Plaintiff came to the land and they told him that the 1st Defendant was the owner of the land and had built the perimeter stone wall;
 - d. Emmanuel told the court that he was growing crops on the suit property as the 1st Defendant's licensee;
 - e. The Plaintiff was not a bona fide purchaser of land.
229. The Learned Counsel observed that the 3rd Defendant, Mr. Omari Mwiraruba Mwishee elected not to testify. He allegedly was the one who bought the land after a purported exercise of the statutory power of sale which National Bank of Kenya did not exercise. According to the evidence of Mr. Paul Cheranga and the 1st Defendant under the provision of Section 112 of the *Evidence Act*, Cap. 80 the facts of the alleged sale were within his special knowledge and he chose not to discharge the burden of proof. Section 112 of the *Evidence Act*, Cap. 80 provides as follows:

“ 112. Proof of special knowledge in civil proceedings.



In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

230. As seen above, the 3rd Defendant purportedly bought a non-existent parcel of land known as Land Reference Numbers Kwale/GaluKinondo/ 708 and not Land Reference Numbers Galu/ Kinondo/708 which belonged to the 1st Defendant. He chose to shut his eyes to the register as it was as shown by the Land Registrar and the charges. He was involved in a fraud and he knew it. It was the fraudulent title that he purported to sell to the 2nd Defendant who now purported to sub - divide the said title – Plot No. 708 - into the purported three sub - divisions known as Land Reference numbers Kwale/Galu/Kinondo/910 and 911 and 912 respectively, as seen above no such land existed according to the land register. All the documents in the parcel files showed that no such a piece of land existed.
231. According to the Learned Counsel, the consequences of the actions of omission and commission by the 3rd Defendant were two fold; the 1st one was that the evidence of the 1st Defendant became uncontroverted. To support this assertion, he relied on the case of:- “Chispine Otieno Caleb – Versus - Attorney General[2014] eKLR”, where the court held that the person who chooses not to testify failed to discharge the evidential burden of proof. The law was stated as follows:
- “I have considered the uncontroverted evidence of the Plaintiff. What are the consequences of a party failing to adduce evidence” In the case of Motex Knitwear Limited – Versus - Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesit, citing the case of Autar Singh Bahra and Another – Versus - Raju Govindji, HCCC No.548 of 1998 stated:
- “Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.
232. The evidence of the 2nd Defendant that he bought nonexistent land was not worthy of belief. The 1st Defendant urged this Honourable Court to reject it and accept the truth to be as told by the 1st Defendant and his five witnesses. The Plaintiff gave evidence and cross examination the 1st Defendant put his case and he did not have an answer to it. He did not deny that the stone perimeter walls there and he built his perimeter wall inside it, he did not deny that Emmanuel was using the land as the licensee of the 1st Defendant.
233. The Learned Counsel urged the Honourable Court to find as a fact that the Plaintiff, the 2nd and the 3rd Defendants were not witnesses of truth. They dealt with land other than the Land Reference numbers Galu/Kinondo/708. They decided to ignore the 1st Defendant’s possession of that property and his perimeter wall.
234. The Learned Counsel submitted that the law was that where a person obtained registration of himself as a proprietor through a fraud he became a constructive trustee. The authority for this proposition is Parker and Mellows, the Modern Law of Trusts, 9th Edition. The law is stated as follows:
- “From the earliest days equity has always been prepared to grant relief against fraudulent and unconscionable conduct and one aspect of this relief is the imposition of a constructive trust on any person who has obtained an advantage as a result of such conduct.”



235. The law is that no one can get a valid title if he/she ignores an overriding interest, the authority for this proposition is the Court of Appeal decision in “Civil Appeal No. 42 of 1998, Allan Kiama – Versus - Ndia Mathunya & 9 Others”. A copy of which was annexed to these submissions. At page 13 of that judgement Justice Madan stated as follows:

“For these reasons I consider that the Learned Judge was right when he said that the land was transferred to the appellant subject to the Respondent’s existing rights; the Respondents hold their existing rights. The situation should be restored by an order for rectification of the register in their favour, it is social justice.”

236. Additionally, the Learned Counsel referred Court to the provision of Section 30 of the repealed Registered Land Act, Cap 300 (Now Repealed) which was being interpreted read as follows:

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

- (a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (b) natural rights of light, air, water and support;
- (c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of Section 46;
- (e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
- (h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”

237. The Learned Counsel submitted that the provision was in force in both the years 2006 and 2010 when the 3rd Defendant and the Plaintiff purported to acquire rights over his property. The uncontroverted evidence of Imelda, Emmanuel and the 1st Defendant was that the 1st Defendant was in possession



of the suit property and further that the Plaintiff, 2nd and 3rd Defendants did not care about that occupation. The abovementioned provision has been replaced by Section 28 of the [Land Registration Act, 2012](#) and Sub – Section (h) was the equivalent of the former Sub – Section (g). The Learned Counsel urged this Honourable court to hold that in law there was no sub - division of Land Reference Numbers Galu/Kinondo/708 into three parcels so called Kwale/ GaluKinondo/1910,1911 and 1912 respectively.

238. Secondly, to the provision of Section 26 (1) & (2) of the [Land Registration Act, 2010](#) holds that no one could obtain a good title if he acted fraudulently. As the evidence above showed the Plaintiff, the 2nd and 3rd Defendants acted fraudulently. The purported titles they got were null and void. On this point, the Learned Counsel relied on the case of “Athi Highway Developers Ltd – Versus - West End Butchery Ltd & 6 Others (2015) eKLR”, the Court of Appeal upheld the cancellation of a title under the Registration of Titles Act which had been obtained fraudulently as in this case. In it the law was stated as follows:

“ 52. According to Black’s Law Dictionary,
“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional . As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

Section 2 of RTA also defines “Fraud” as follows:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose Interest he knowingly and wrongfully defeats by that registration.”

53. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford – Versus - Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune – Versus - Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence – Versus - Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy - Versus - Garrett (1878) 7 ch. D. 473 at



489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

239. The Learned Counsel submitted that he was a bona fide purchaser for value of the suit property. The transfer was duly registered. He was the owner of the suit property which was registered under his name. The Plaintiff had demonstrated that he knew that the disputed property formed a part of the 1st Defendant’s land. In knowing so and proceeding with the acquisition of the same, and then filing suit herein, he was seeking to benefit from his own wrong. The Plaintiff was founding his claim on his own wrong contrary to the maxim of law stated by Hon. Chief Justice Gicheru in the case of:- “Nabro Properties Ltd. – Versus - Sky Structures Ltd. (2002)2,KLR, 299, at 316”, where he stated the law as follows:-

“It Is a maxim of law recognized and established that no person shall take advantage of his own wrong; and this maxim which is based on elementary principles is fully recognized in courts of law and equity, and indeed admits of illustrations from every branch of legal procedure. The reasonableness of the rule being manifest- we may observe that a man shall not take advantage of his own wrong to gain the favourable Interpretation of the law.”

240. The Plaintiff, the 2nd and 3rd Defendants forged documents with a view to depriving the 1st Defendant of his land. They were basing their claims on their own wrongs. The court does not allow that to happen. This principle was recognized by Newbold Ag. P. in the case of:- “Chemilil Ltd. – Versus - Makongi (1967) EA at 166”, where he held that a party who refused to obtain Land Control Board’s Consent could not use that fact to his advantage as to do so would be to turn a statute into a new instrument of fraud. At page 168(h), the Judge stated as follows,

“In other words, Makongi had objected to the performance of formalities and yet based its claim upon the failure to perform them. This is nothing other than a plaintiff seeking to take advantage of his own wrong and using a statute as an instrument of fraud. But equity shall not permit such a course of conduct.”

241. The Learned Counsel submitted that as seen above, the 1st Defendant was the bona fide owner of the suit property, following transfer of the same to him.

242. The Learned Counsel further submitted that the Plaintiff had presented to this Honourable court for the reason given above and others which they give below. First, where the Plaintiff set out to summarize evidence of the 1st Defendant at pages 4 to 7 of his submissions. He selectively referred to only two witnesses out of the six (6) witnesses who gave evidence in support of his case. He referred to the evidence of the 1st Defendant himself and Mr. Eric James Safari, the Land Registrar. The Plaintiff found the evidence of the bank officers Paul Cheranga and Mrs. W. Gitonga and that of the caretakers Emelda and Emmanuel inconvenient to him. He had no answer to their evidence.

243. In considering whether or not the Plaintiff was a bona fide purchaser or not, he conveniently ignored the evidence by the Land Registrar which was produced by Mr. Eric James Safiri. The Plaintiff did not analyze the documents on record. He did not ask what property was charged to the National Bank of Kenya according to the charges and Land Control Board’s consent. There was produced by consent the proceedings of the criminal case which was preferred against the 3rd accused person, Omari Mwisaruba Mwishee, the 3rd Defendant herein and attempt was made to attach importance to the acquittal without noting that the prosecution did not call the Land Registrar Kwale and the officers of the National Bank of Kenya to come and testify. The charge sheet in respect of that case was to be found at pages 38 to 39 of the 1st Defendant’s bundle of documents filed in 2012; these charges could only be



sustained if the Land Registrar and bank officials testified and they did not do so. The prosecution's case had to be rejected and it was indeed rejected.

244. In conclusion, the Learned Counsel urged this Honourable Court to dismiss the Plaintiff's suit and allow the counterclaim as prayed.

C. The Written submissions by the 2nd Defendant

245. On 3rd February, 2023, the Learned Counsel for the 2nd Defendant through the Law firm of Messrs. Stephen Oddiaga & Company Advocate filed their written submissions dated the same date. M/s. Mwanzia Advocate submitted that before the Honourable Court for determination was the Plaintiff's suit seeking the following orders as per the further amended plaid dated 4th November 2021.
246. She provided Court with details of the pleadings filed by the 1st, 2nd and 3rd Defendants while in opposition to the suit instituted by the Plaintiff. The Learned Counsel, like all her Counter parts before provided Court with a brief background of the 2nd Defendant's case to wit that he purchased the property known as Land Reference numbers Kwale/Galu Kinondo/708 from Omari Mzaruba Mwishee, the 3rd Defendant herein. A copy of Title Deed of the suit property in the name of Omari Mzaruba Mwishee and issued on 29th September 2006 was produced by the 2nd Defendant as Exhibit No. 15. The 2nd Defendant had also visited the Lands Office at Kwale to ascertain the authenticity of the Title Deed, and the records at the lands office confirmed that indeed the 1st Defendant in the Counter-claim was the registered proprietor of the suit parcel of land known as land Reference numbers Kwale/Galu Kinondo/708. He further conducted a search on the Title and upon being satisfied that the said Omari was the registered proprietor, the 2nd Defendant proceeded to purchase the suit property and subsequently he was issued with Title Deed.
247. The 2nd Defendant now being the Registered proprietor of the suit property – Land Reference Numbers Kwale/Galu Kinondo/708, he was at liberty to use it as he pleased for his own benefit. Thus he decided to sub-divide it into three (3) sub-plots and he was issued with three (3) Title Deeds for the sub-divisions being Land Reference numbers Kwale/Galu Kinondo/1910; 1911 & 1912 respectively. The Title Deeds were produced as 2nd Defendant's Exhibits No.2, copies of the titles are on pages 5-16 of the 2nd Defendant's bundle of documents. All three Titles were issued to the 2nd Defendant on 21st September 2010.
248. The Learned Counsel further submitted that the 2nd Defendant sold one of the sub-divisions, being Land Reference numbers Kwale/Galu Kinondo/1912 to one Dr. Pawan Kumar Gupta, the deceased Plaintiff), whose estate is the Plaintiff in the main suit herein. The late Dr. Pawan Kumar caused the said sub-divided Plot No. 1912 to be registered in his name way before he had made full payment of the purchase price to the 2nd Defendant. Nonetheless, there was some delay in settling the outstanding balance of the purchase price. This necessitated the 2nd Defendant to file a suit against Dr. Kumar in the High Court at Mombasa being HCC NO.594 of 2011. Ultimately, the balance of the purchase price was made to the 2nd Defendant herein and that case was closed.
249. In the year 2012, upon receiving a demand letter from Eng. Isaac Wanjohi claiming ownership to the suit land, Dr. Kumar filed this instant suit. It was against the 2nd Defendant and Eng. Isaac G. Wanjohi (the 1st Defendant). The said Eng. Wanjohi filed his counter-claim with Rashid Kheri (as the 2nd Defendant), Dr. Kumar (as the 3rd Defendant) and Omari Mzaruba Mwashee was introduced as the 1st Defendant in the counter-claim.
250. According to the Learned Counsel, the Plaintiff in the counter-claim Eng. Isaac Wanjohi alleged that he was the proprietor of the parcel of land known as Land Reference numbers Galu/Kinondo/708, and



that he was issued with a Land Certificate on 22nd March,1975. He further alleged that vide a charge dated 6th June, 1975 and further charge dated 10th July,1979, the charged Galu/Kinondo/708 to the National Bank of Kenya Limited to secure payment of the aforesated facilities. He further alleged that the National Bank of Kenya had always been and still was in possession of the Original Title Deed, to wit Land Reference numbers Galu/Kinondo/708, and that the Bank had never exercised its statutory power of sale with regards to the said title.

251. The Plaintiff in the Counter-claim accused the 1st Defendant in the counter claim (Mr. Mwishee) of fraudulently forging Transfer by charge in exercise of power of sale documents, and causing himself to be registered as the owner of the suit property, and ultimately selling and transferring the suit property to the 2nd Defendant (Mr.Kheri). The Plaintiff in the Counter-claim further alleges that the transfer of the suit property from Mr.Mwishee to Mr. Kheri and ultimately transfer of sub-division No. 1912 from Mr. Kheri to Dr. Kumar were all void.
252. The Learned Counsel noted that finally with regards to the counter-claim, the plaintiff thereon accuses the defendants of fraudulently acquiring the property and he is thus seeking inter alia declaration that the defendants are trespassers and order for vacant possession of the suit property, Land Reference Numbers Galu/Kinondo/708. From the foregoing and taking into consideration the main suit and the Counterclaim, the 2nd Defendant had formulated the following three (3) as the issues for the determination by this Honourable Court. These were namely:
 253. Firstly, on whether the 2nd Defendant was a bona fide purchaser for value without Notice of the property No.Kwale/Galu Kinondo/708 and hence became the Registered proprietor of the said property. The Learned Counsel argued that the 2nd Defendant purchased Kwale/Galu Kinondo/708 from the 1st Defendant in the counter-claim (Mr.Mwishee). As per requirements, he carried out sufficient due diligence by obtaining an official search on the property and visiting lands office to ascertain that indeed the vendor was the registered proprietor. It is after he was satisfied that he went ahead to purchase.
 254. Thus, its was the 2nd Defendant's submission that he was a bona fide purchaser for value. The 2nd Defendant refuted the allegations by the Plaintiff, in the Counter Claim that he fraudulently misrepresented himself to the late Dr. Pawan Kumar that he was the registered proprietor of the property known as Kwale/Galu Kinondo/1912 and that he had no capacity to sell the property. Additionally, the 2nd Defendant vehemently refuted the particulars of fraud and representation as particularized under paragraph 8 of the further further Amended Plaint. On 21st May, 2017 Dr. Kumar testified and admitted that he carried out a search of the sub-division No. Kwale/Galu Kinondo/1912, the search confirmed that the 2nd Defendant was the registered owner of the parcel of land, and the Plaintiff produced a copy of the search as Plaintiff's Exhibit No.1. Further, Plaintiff's Exhibit No.4 is the title Deed to the said Plot No.1912 in the 2nd Defendant's name. Plaintiff also produced Exhibit 2 being the sale agreement. The full purchase price was paid to the 2nd Defendant of the purchase price and further purported expenses the Plaintiff was claiming to be refunded by the 2nd Defendant.
 255. According to the Learned Counsel, the Plaintiff submitted that he was the bona fide purchaser for value of the property No.Kwale/Galu Kinondo/708, that he subsequently subdivided into three portions and sold one of them to the plaintiff, and that no fraud and/or misrepresentation was involved whatsoever. To support his point, the 2nd Defendant relied on the provisions of Section 26(1) of the [Land Registration Act](#) and further Sections 24 and 25 of the same Act.
 256. The Learned Counsel submitted that pursuant to the above statutory provisions, he was the rightful registered proprietor of the suit property and that he was a bona fide purchaser for value who deserves



protection as he did not collude in any fraud to acquire the property neither was there any disclosure of fraud. To back her up, She relied on the case of “Lawrence P. Mukiri – Versus - Attorney General and 4 Others (2013) eKLR”, the court stated what amounted to bona fide purchaser for value thus,

“...A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.”

1. She further cited the case of “Arthi Highway Developers Ltd – Versus - West End Butchery Limited & Others” the Court of Appeal pronounced itself as follows;

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property.

The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

258. Further, she referred Court to the case of “Fletcher – Versus - Peck as cited in Eunice Grace Njambi Kamall & Another-vs-The Attorney General & 5 Others” Marshal J. had this to say:-

“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.”

259. According to the Learned Counsel all the above 3 cases are cited in the case of “Mbiiri Kamau (Representing A.C.K Kitharaini Church, the Church Commissioners for Kenya Trustees of the Anglican Church of Kenya) -Versus - Munyangia Njoka & 2 Others”. Just as was in the Plaintiff, the Plaintiff in the counter-claim (Mr. Isaac Wanjohi) alleged that the 2nd Defendant knowingly and fraudulently procured the Title of Parcel No. 708 and subsequently sub-divided the land with intend to conceal the fraud, the 2nd Defendant vehemently denied all the allegations of fraud and



misrepresentation by both plaintiffs in the main suit and in the counter-claim and specifically particulars thereon.

260. It was the Learned Counsel submission that the allegations were unsubstantiated as there was no single evidence adduced as proof of the same. All the witnesses of both Plaintiffs who testified did not bring forward any evidence in their testimony implicating the 2nd Defendant of the fraud and misrepresentation allegations. It is also worth to note that the 1st Defendant in the Counter-claim (Mr. Omari Mwishee) whom the 2nd Defendant was being accused of colluding with was charged with a criminal case at Kwale law Courts being CR. CASE No 873 of 2012 in which he was ultimately acquitted of the charges of forgery of transfer documents of the suit property herein.

261. The Learned Counsel relied on the Court of Appeal decision in the case of “Kuria Kiarie & 2 Others – Versus - Sammy Magera (2018) eKLR”, as cited in Dixon Okindo case, held that;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo_ - Versus - Ndolo(2008)1 KLR(G&F)742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the Dixon Okindo Mageto & another – Versus - Dinah Mageto that required in ordinary civil cases, namely proof upon a balance of one beyond a reasonable doubt as in criminal cases.” “..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

262. Further in the case of: “Joyce Kemunto Osoro (suing as the legal representative of Stephen Obonyo-deceased) – Versus - Attorney General & 9 Others (2020) eKLR” where the court held that;

“The title in the hands of an innocent third party can be impugned under Section 26(1)(b) of the *Land Registration Act* if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme”.

263. The Learned Counsel argued that it was a common ground that both the Plaintiff's suit and the counter-claim are founded on fraud as the cause of action, the Black's Law Dictionary defines fraud as follows;

“Fraud consists of some deceitful practice or willful devise, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.”

264. It is trite law that he who alleges must proof, both Plaintiffs in the main suit and in the counter-claim have a duty to proof the fraud and misrepresentation allegations that they have cited against the 2nd Defendant. The Learned Counsel submitted that that burden has not been discharged at all, the 2nd Defendant relies on his pleadings filed in court, in particular the defences and the exhibits adduced, further he relies on his oral evidence tendered on 27th May 2022. The Learned Counsel reiterated that he is a bona fide purchaser for value without notice of any fraud and/or misrepresentation. As per the legal requirements he carried out due diligence before purchasing the property No. Kwale/Galu Kinondo/708 there was no participation and/or collusion with the Vendor now (the 1st Defendant in the counter claim) or with any other person to fraudulently acquire the suit property. That the



- allegations of fraud and misrepresentation were merely baseless assertions, and that they ought to fail. The Learned Counsel urged the Honourable Court to hold that indeed the 2nd Defendant was a bona fide purchaser for value without notice and that he was the legal and rightful proprietor of the property No. Kwale/Galu Kinondo/708.
265. Secondly, whether pursuant to his rightful ownership he sub-divided the property into Nos. Kwale/Galu Kinondo/ 1910; 1911 and 1912; lawfully transferred Plot NO. Kwale/Galu Kinondo/1912 to Dr. Pawan Kumar (now deceased) and if the estate of Dr. Pawan Kumar has any claim against him. The Learned Counsel submitted that the 2nd Defendant, having rightfully procured ownership of the property No. Kwale/Galu Kinondo/708, he was therefore at liberty to enjoy use of his land. He proceeded and subdivided the land into three (3) portions and sold one to the Plaintiff (the late D. Kumar). He followed the due procedure with regards to the sub-division process and he was issued with Title deed for the sub-divisions.
266. That the sale and transfer to the late Dr. Kumar the sub-divided Land Reference No. Kwale/Galu Kinondo/1912 was lawful and proper as per the legal standards. The allegation by the Estate of Dr. Kumar that the 2nd Defendant fraudulently and through misrepresentation transferred the said parcel No. 1912 were baseless and unsubstantiated. Further, claim and Order for refund of the purchase price of parcel No. 1912 together with further incurred expenses totaling to a sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eighty Three Hundred (Kshs. 8,254,283/=) was outlandish and that claim ought to fail in entirety. Being a bona fide purchaser for value without notice, he passed a good title to the late Dr. Kumar, after having acquired good title from Mr. Omari Mwishee.
267. Thirdly, whether the 2nd Defendant rightly held the original Titles of the other two (2) subdivisions, Kwale/Galu Kinondo/1910 and Kwale/Galu Kinondo/1911. The Learned Counsel submitted that after sub-dividing the property No. Kwale/Galu Kinondo/708 into three (3) portions being Kwale/Galu Kinondo/1910, Kwale/Galu Kinondo/1912, he sold No. 1912 to the late Dr. Kumar, he rightly retained the other two titles. The Learned Counsel urged the court to find as such. The claim by the plaintiff in the counter-claim that the acquisition of plot No. 708 was fraudulent ought to fail. Further, the order seeking cancellation of the Title Deeds issued to the 2nd Defendant and to the late Dr. Kumar as pleaded by the Plaintiff in the Counterclaim Kwale/Galu Kinondo/708 should not be granted. The Plaintiff in the counter-claim had failed to discharge his duty of proving that the acquisition of parcel suit property was through fraud and misrepresentation. The Learned Counsel reiterated that allegations of fraud must be proved and the onus is bestowed upon the party alleging.
268. The Learned Counsel relied on the holding of A Visram J in the case of “Gladys Wanjiru Ngacha Versus - Teresa Chepsaat & 4 Others (2013)eKLR”, he held that;
- “It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati* (1984) KLR 425, at p.g. 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”. We find that the appellant did not prove fraud on the part of the respondents”.
269. In the above authority of “Gladys Wanjiru (supra)”, the case of “R.G. Patel -vs- Lalji Makani” is cited where 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, something more than a mere balance of probabilities is required.”



270. In view of the foregoing, the Learned Counsel emphasized that the 2nd Defendant rightfully holds the titles of the two (2) subdivisions.
271. In conclusion, the Learned Counsel submitted that on the issue of costs, both the Plaintiffs in the main suit and in the counter-claim had not been proved from their respective cases as against the 2nd Defendant. The Learned Counsel urged the court to find and hold as such and dismiss both cases with costs to the 2nd Defendant.

D. The written submissions of 3rd Defendant

272. On 3rd February, 2023, the Learned Counsel for the 3rd Defendant through the Law firm of Messrs. Oduor Siminyu & Company Advocates filed their written submissions dated 1st February, 2023. Mr. Siminyu Advocate commenced his submissions by stating that the Plaintiff on the 23rd July, 2012 filed this suit as against the 1st Defendant for a declaration that he was the registered proprietor of all that parcel known as land Reference Numbers Kwale/Galu Kinondo/ 708 among other reliefs. Subsequently, the Plaintiff was further amended and the 2nd Defendant introduced.
273. It was the 1st Defendant who on the 22nd October, 2012 in his Defence and Counter-claimed that he introduced the 3rd Defendant to this suit. Let it be known that the Plaintiff has no cause of action as against the 3rd Defendant. The 3rd Defendant filed his defence on the 25th November, 2015 together with his documents and witness statement. The 3rd Defendant further filed his supplementary list of documents on 2nd October, 2017. The 3rd Defendant had been described in the Counter-claim as the 1st Defendant but parties agreed by consent to have him referred to as the 3rd Defendant.
274. The Learned Counsel submitted on the following three (3) issues for the determination by Court. These were:-
275. Firstly, on whether the 3rd Defendant's title to Land Reference No. Kwale/Galu Kinondo/708 was a good title. The Learned Counsel submitted that the 3rd Defendant acquired the suit property through purchase from the Bank exercising its statutory power of sale. On the 26th September, 2006 through the Law firm of Messrs. Kirui Kibichy & Co. Advocates prepared a transfer of charge in exercise of sale was executed between the National Bank of Kenya Limited and the 3rd Defendant. This letter was found in the 1st Defendant's list of documents at page 26. The same was produced among other documents. At page 27 of the said list of documents, the bank wrote to the District Land Registrar- Kwale, advising him of the discharge of charge and the eventual registration in favour of the 3rd Defendant.
276. Eventually, on the 29th September, 2006 the Land Registrar Kwale went ahead to Register the transfer and issued a title in favour of the 3rd Defendant. The title was found at page 28 of the 1st Defendant's list of documents. The 3rd Defendant followed due process in acquiring the title. The Land Registrar who signed the title, was indicated was still serving as a Land Registrar though in a different station. Surprisingly, he was never called as a witness to give evidence. PW - 6 one Eric James Dick Safari, the Land Registrar in his testimony in court confirmed in cross-examination by Mrs. Umara the Plaintiff's advocate that the title was issued to the 3rd Defendant by the Registry Kwale. He further confirmed that all titles were issued by Kwale Lands Office.
277. At page 5 of the 1st Defendant's own list of documents, he produced a certified copy by the Green Card to which entry No. 3 made on 29th September, 2006 had the 3rd Defendant as the proprietor through a transfer by charge. Though several entries had been made on the Green Card, the Land Registrar- Kwale purported to cancel the 3rd and 4th entries without an order of court and retained the resultant entries thereto. To this far, the 3rd Defendant followed due process and thus his title was a good title.



278. Secondly, whether the allegations of fraud against the 3rd Defendant were proved to the required standards. The Learned Counsel relied on the provisions of Section 26 (1) of the Land Registration Act 2012. He intimated that on the 16th July, 2012, the 3rd Defendant was charged in court in Kwale criminal Case No. 873 of 2012 with the offence of;-
- (i) Forgery Contrary to 349 of the Penal Code Cap 63 Laws of Kenya.
 - (ii) Obtaining Registration by false pretense contrary to Section 320 of the Penal Code and;
 - (iii) Making a false document Contrary to Section 357(a) of the Penal Code.
279. According to the Learned Counsel, the charge sheet was found at page 38 of the 1st Defendant's list of documents as Exhibit No. 10. The 3rd Defendant went through trial in the Criminal Case and on 8th September, 2016. Subsequently, he was acquitted of the charges under the provision of Section 215 of the Criminal Procedure Code, CAP 75. The 3rd Defendant filed a supplementary list of documents dated 2nd October, 2017 which comprised of both proceedings and Judgement of the criminal case. The same were produced in court by an official from Kwale Court as 3rd Defendant's Exhibit No. 1. The standard of proof in criminal matters is higher than the Civil matter. Let it be known that the 3rd Defendant was acquitted in the Criminal Case. The state produced all the documents the 1st Defendant now relied on in this case but the evidence was not sufficient to procure a conviction.
280. The 1st Defendant also failed to call crucial witnesses to testify. Zipporah K. Mogaka from National Bank was never called as a witness. Despite calling DW - 7 Damaris Gitonga as a witness, she never had the original documents. She went further to confirm that inspite of all that happened, the bank never engaged any investigations. This simply prove how callous the bank was in handling this matter. The advocate who signed the transfer document was also never called as a witness to testify. DW - 7 did not also have a letter of offer from the bank in favour of the 1st Defendant. The 1st Defendant failed to prosecute his counter-claim. The particulars of fraud as against the 3rd Defendant were never proved.
281. To buttress on this point, the Learned Counsel referred Court to the case of” - “Central Bank of Kenya – Versus - Trust Bank Ltd & 4 Others (1996) eKLR”, where the Court had this to say:-
- “The appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in any ordinary civil case.
- In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence upon which the court would make a finding.”
282. No basis was ever laid to convince court. No evidence was presented to prove the 3rd Defendant participated in the conspiracy. No proper investigation report from the D.C.I land fraud unit was ever produced.
283. The Learned Counsel argued that in civil cases the onus is on the Plaintiff or any other Claimant to prove the position he/she claims on a balance of probability. Under the Evidence Act Section 107, 108 and 109 provides as follows;-
- “Section (107); Burden of proof.
- (1); Whoever desires any court to give Judgement as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exists.



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

Section (108); Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section (109); proof of particular fact.

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence. Unless it is provided by any law that the proof of fact shall lie on any particular person.”

284. The Learned Counsel submitted that the evidence by the 1st Defendant fell short in proving the fraud theory against the 3rd Defendant. It was not just enough to particularize and plead but concrete evidence was required. The Land Registrar who is the custodian of the land Registry Kwale failed to convince court on what document he relied on in effecting the transfer to the 3rd Defendant. The Land Registrar cancelled the 2nd and 3rd Defendants title in favour of the 1st Defendant despite there being injunctive court orders. He acted ultra vires. The 1st Defendant charged the suit property in the years 1975 and 1979 respectively. He never discharged the property. That itself was contrary to the provision of Section 69A of the ITPA (now repealed) that was applicable then, Section 69 A(1) provided as follows:-

- “69(A) A mortgagee shall not exercise the mortgagee's statutory power of sale unless
(1); and until;-
(a)
(b) some interest under the mortgage is in arrears and unpaid for two months after becoming due.

285. The Learned Counsel relied on the case of “Nancy Kahora Amadiva – Versus - Export Credit Limited & Another (2015) eKLR”, the court held as follows;-

“ There are also instances where a notice need not issue, where interest for more than 2 months is due and remains unpaid.....There is no evidence on record of payment having ever been made by the appellant to the respondent towards repayment of the money borrowed for more than two months. For this reason alone, no notice was issuable to the appellant as explained above and it does not behoove us to consider the issue any further.”

286. The Learned Counsel submitted that in their current case the 1st Defendant took a loan with the bank and never paid for over 27 years. No evidence that the amount was ever paid back. The 1st Defendant however confirmed that the said monies had never been paid or the charge discharged. Neither did the bank officials give any evidence on whether the same was paid back. From the foregoing this confirmed that the 1st Defendant fell short in proving his case on a balance of probability as against the 3rd Defendant.

287. Secondly, on whether the 1st Defendant was entitled to reliefs sought, the Learned Counsel asserted that the Plaintiff was involved in the transaction on plot No. Kwale/Galu Kinondo/708 procedurally through statutory sale by the bank. The transfer was done by the Land Registrar -Kwale upon satisfaction through the transfer documents that were availed. The transaction was above board. From



the evidence on record, the 1st Defendant failed to prove his case on a balance of probability. The 3rd Defendant went further to transfer the property to the 2nd Defendant. With the foregoing, the reliefs sought by the 1st Defendant fails. The Learned Counsel submitted that costs follow events and it was their prayer that costs of this suit be borne by the 1st Defendant.

288. In conclusion, the Learned Counsel submitted that from the evidence or record and testimonies of witnesses in court, it was obvious that the 1st Defendant failed to prove his case on a balance of probability. He equally failed to prosecute his Counter - Claim as against the 3rd Defendant. It was the humble prayer of the Learned Counsel that the counter-claim against the 3rd Defendant be dismissed with costs.

VII. Analysis and Determination

289. I have keenly assessed the filed pleadings by all the parties herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

290. The Court finds that issues for determination herein are as follows:

- a. Whether the suit by the parties herein through Plaintiff, the 1st & 3rd Defendants through further (further) Amended Plaintiff dated 14th November, 2021 and the Plaintiff in the Amended Counter claim dated 19th January, 2022?
- b. Who is the lawful owner of the suit property between the Plaintiff in the further (further) amended Plaintiff dated 4th November, 2021 and the 1st Defendant/Plaintiff in the Amended Counter claim dated 19th January, 2022?
- c. Whether the Plaintiff is entitled to the orders sought in further (further) amended Plaintiff dated 4th November, 2021 and the 1st Defendant/Plaintiff in the Amended Counter- claim dated 19th January, 2022?
- d. Who bears the costs of this suit?

Issue No. a). Who is the lawful owner of the suit property between the Plaintiff in the further (further) Amended Plaintiff dated 4th November, 2021 and the 1st Defendant/Plaintiff in the Amended Counter claim dated 19th January, 2022

291. As indicated, this is a rather complex matter where the main substratum of it is on the legal ownership to the suit property and compensation of the parties herein. From the very onset, the Honourable Court wishes not to extrapolate on the brief facts of the case as that task has been ably executed by all the Learned Counsels for the Plaintiff, 1st, 2nd and 3rd Defendants herein. Therefore, the Honourable Court will just proceed on analysis of the framed issues under this sub – heading. But before that, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.



292. I have noted that the Certificate of Title Deed for the suit land here was issued in the year 1975 under the Registered [Land Act](#), Cap. 300 (Now Repealed). Thus relevant provisions would be Sections 27, 28 and 143 of the RLA to wit:-

Section 27(a) “Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Section 28 of the Act provides that:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

Section 143 (1) of the Act provides thus:

“Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake

(2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default”

293. However, considering that the Act has now been repealed, and based on the saving Clause under Section 107 of the [Land Registration Act](#), No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the LRA , No. 3 of 2012 and the [Land Act](#), No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 (3) (c) of the [Interpretation and General Provisions Act](#), Cap. 2 which provides.

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

294. This position was upheld in the cases of “Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR” .

Having stated that, the Provisions of Section 7 of the [Land Act](#) No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya.

S. 7 Title to land may be acquired through:-

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;



- v. Settlement programs;
 - vi. Transmissions;
 - vii. Transfers;
 - viii. Long term leases exceeding Twenty one years created out private land; or
 - ix. Any other manner prescribed in the Act of Parliament.
295. By and large, in the instant case there exists five (5) separate Certificate of title deeds over the same parcel of land measuring 0.7HA (approximately 1.73 acres). These are namely Land Reference Galu/Kinondo/708 and Kwale/Kinondo/708. Eventually, there was a sub – division of LR. No. Kwale/Kinondo/708 into three portions of Land Reference No.. Kwale/Kinondo/1910; 1911 and 1912 respectively. The Plaintiff/Deceased, the 1st , 2nd and 3rd Defendant all claim to be the owners of some of these Certificate of titles. Therefore, as King Solomon did in the case of the two harlots claiming the living child in the Holy scriptures 1 Kings 3:16 to 28 (what has now come to be known as “the Solomonic wisdom”), this Honourable Court has the same daunting legal task to make a determination on the legitimacy and legality on the indefeasible ownership, rights and interest over all these parcels herein. That is the pith and substance of this Judgement. To do so, the Honourable Court is guided by the Court of appeal in the case of: “Munyu Maina – Versus - Hiram Gathiha 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.”
296. In order to move forward, there will be need to appreciate a few fundamental underlying issues with regard to this matter. To proceed smoothly on this dispute, the Honourable Court wishes to pose more intricate queries. These are:
- a. When was Kwale area where the suit land is situated declared a land Land Adjudication section and under what name was it?
 - b. What was the Land Reference numbers and the Certificate of Title that was issued for this suit land? Which particular title was charged with the financial institution?
 - c. Whether the financial institution exercised its power of sale in the ordinary manner to recover its outstanding debt as required by law? Who was the beneficiary to the Discharged property through public auction?
 - d. Whether the Land Registry as the custodian of land records followed the require procedure upon the Charged title being released to them. Were there any cases of fraudulent, irregularities and illegalities as far as these titles were concerned.
 - e. Whether the suit land was acquired through the bona fide purchasers for value on notice. Who exactly are the legally registered proprietors of the suit property.
297. Essentially, the evidence of DW – 6 the Land Registrar here – Mr. Eric James Safari summoned as a witness by 1st Defendant/Plaintiff – is critical. During examination in Chief and Cross examination he informed Court that the area of Kwale was declared as an adjudication section and the reference number



used then was Land Reference No. Galu/Kinondo and not Land Reference No. Kwale/Galu/Kinondo. Therefore, according to him the correct title for the area and as far as this matter is concerned was Land Reference No. Galu/Kinondo/708. From the evidence adduced, the green card for this area was opened on 15th November, 1974. Accordingly, the 1st Defendant has held that his title deed was Land Reference No. Galu/Kinondo/708 issued on 22nd March, 1975.

298. The first query here is who between the Plaintiff and 1st Defendant or the 2nd Defendant has certainly shown the root of their title? The Plaintiff has averred that the 2nd Defendant who was well known to him having met him in October 2011 sold to him Plot No. 1912 in Galu Kinondo about 1.5 acres with no documentation. Plot No. 1912 was purportedly from a sub-division of all that parcel of land known as Land Reference No. Kwale/Galu Kinondo/708 initially owned by the 3rd Defendant into three parcels namely Kwale/Galu Kinondo 1910, 1911 and 1912. The 3rd Defendant was not known to the Plaintiff. He went to see and liked the plot. The witness asked the 2nd Defendant to bring the title and after 2 days the 2nd Defendant brought the original title (witness shown copy of title deed on page 13 of List of Documents). Upon conducting due diligence through conducting an official search at the Land Registry, the title was found to be registered in the names of the 2nd Defendant. From there the usual conveyancing process commenced to its logical conclusion where the property was transferred to his names. The Plaintiff contended that he was an innocent purchaser for value of the suit property.
299. On the other hand, the 1st Defendant alleged he was the legal proprietor of a piece of land known as all that parcel known as Land Reference Numbers Galu/Kinondo/708. According to the evidence adduced here, the 1st Defendant/Plaintiff acquired it on 22nd March, 1975. Subsequently, he caused this title to be charged twice – on 6th June, 1975 for a sum of Kenya Shillings Fourteen Thousand (Kshs. 14, 000.00/=) and 10th July, 1979 for a sum of Kenya Shillings Sixteen Thousand (Kshs. 16, 000.00) with the financial institution trading in the names and style of the National Bank of Kenya. These facts were well corroborated by the witnesses and officials summons from the said bank. It was testified that when he borrowed, the title was kept by National Bank of Kenya. The title deed was in their custody and he had the original copy. He produced a certified copy as an exhibit D -2.
300. According to the 2nd Defendant, he bought all that property known as Land Reference No. Kwale/Galu/ Kinondo/708 from the 3rd Defendant. He caused it to be sub – divided into the three portions – 1910, 1911 and 1912. So when he was approached by Dr. Kumar who wanted a plot, he sold it to him. On his part they conducted good business and he had the land and he had the money; from the search it reflected the estates are the owners. He denied that the allegations on the fraud of the title stating that he was the owner of the land. He believed that he had sold a good title deed. He produced these documents in the list of documents dated 30th July, 2023 and 1st and 2nd Defendant Exhibits by 1 to 14 of the supplementary list dated 12th August, 2012 of documents marked as 2nd Defendant Exhibit 14.
301. Finally, the 3rd Defendant claimed to be the legal owner of all that parcel of land known as LR. No. Kwale/Kinondo/708 dated 29th September, 2006. According to him he acquired it through a public auction when the National Bank of Kenya exercised its statutory power of sale as the 1st Defendant was unable to service his charge and hence caused it to be disposed off. The 3rd Defendant stated that he got the property registered at the Land Registry into his name and was issued with a title deed. Later on he sold the property to the 2nd Defendant who after the sub – division sold it to the Plaintiff.
302. The officials from the National Bank of Kenya being witnesses on behalf of the 1st Defendant averred that they had never held a title to land known as Land Reference No. Kwale/Kinondo/708 but Land Reference No. Galu/Kinondo/708. To them the title belonged to the 1st Defendant who had been their regular and diligent customer for many years. They vehemently refuted having exercised statutory



power of sale over the property as though they never had a discharge of charge in Court. To them, the 1st Defendant had fully paid up the charges. They never knew nor dealt with the 3rd Defendant at all. They hasten to say that all the documents used by the 3rd Defendant were as result of forgery of signatures belonging to the bank officials. It is unfortunate they never engaged a hand writing document examiner but relied on their internal investigation mechanism. To them when a customer defaulted, they issued 30 days' notice, 90 days statutory Notice and another 40 days' notice. To the witnesses, they had never issued any notice in respect to this property. They told the court that at page 14 of the bundle of documents there was Land Registration for Plot no. Kwale/Galu Kinondo/1912. They did not have a title deed with that registration number. As far as they are concerned their title and security were intact, the others were fraudulent. At Page 36 of the Bundle was a letter written by the Bank to the D.C.I.O., Kwale. At Page 27 was a purported letter from National Bank to the District Land Registrar Kwale. When they sell property, they give the buyer the documents, they do not write or send documents to the Land Registrar. The 1st Defendant had other loan facilities though nor related to these properties. They hold the documents until the customer comes for them. The transfer by charge at Page 26 bears a stamp and signed. It was also signed by an advocate who was a stranger to the bank and not in our panel. The letter at page 27 was in their letterhead but was poorly done. As far as he was concerned the title was in their custody as the 1st Defendant had taken other facilities and used the suit property as collateral. The 1st Defendant produced his title deed issue on 22nd March, 1975 title number: Galu/Kinondo/708 to Isaac Wanjohi G.

303. According to the provision of Section 26 (1) of the [Land Registration Act](#) (2012), it provides as follows:

“ A Certificate of Title issued by the Registrar upon registration shall be taken by all courts as a prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except on grounds of fraud, misrepresentation, illegality and corrupt scheme.

Section 26(2) provides that

“certified copy of only registered instrument signed by the registrar, shall be received in evidence in the same manner as the original”.

304. In this regard, clearly, the ownership of the Certificate of title to the suit property are challenged. This was the reason the Plaintiff instituted this suit against the 1st and the 2nd Defendants. Subsequently, the 1st Defendant sued the 3rd Defendant. The Plaintiff averred that the registration of the suit property in favour of the 1st Defendant was fraudulently done and the same ought to be impeached. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR”, where the Court held that;

“ A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no



advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

305. The main question here is that out of all these titles which one is genuine and valid in law? It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of “Wreck Motors Enterprises – Versus - The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997”, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority’

306. The same position was held in the case of “Gitwany Investment ltd – Versus - Tajmal Ltd & 3 Others (2006) eKLR” where the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

307. In my view, I therefore find that the 1st Defendant’s title was first in time having been registered on 22nd March, 1975 and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”, then the 1st Defendant’s title for Land Reference No. Galu/Kinondo/708 with the deed with all indefeasible rights, title and interested vested in him being dated 22nd March, 1975. It means being the first in time as against the title being claimed by the Plaintiff and the 2nd Defendant to all that property known as Land Reference No. Kwale/Galu/Kinondo/708 and the resultant sub – divisions into numbers 1910, 1911 and 1912 respectively 1912.

308. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation. Balancing the two or three competing titles, it is my view that the 1st Defendant holds a good title to the suit property being there is not contrary evidence that the same was transferred as before alleged by the Plaintiff by virtue of the statutory power of sale by National Bank of Kenya due to default in payment of loan facility. The title that was passed to the Plaintiff by the 2nd Defendant in my view, in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the 3rd Defendant and the Land Registry, or both. The 1st Defendant in his claim has averred that the Plaintiff, the 2nd Defendant and the 3rd Defendant has fraudulently registered the suit property in their names.

309. Hence, the other heculian question is - Was the suit land therefore transferred fraudulently to the 3rd Defendant, the 2nd Defendant then the Plaintiff? ‘Fraud’ has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

310. Further from the Black’s Law Dictionary Ninth Edition at Page 731 also defines ‘fraud’ as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

311. With the definition of fraud in mind and having held that the 3rd Defendant, then the 2nd Defendant and passed on to the Plaintiff documents were forgeries based on the fact that the person that was alleged to have signed them was not called to authenticate the same and it is duly noted by this



Honourable Court that there are discrepancies in the title numbers. It then follows that there were deceitful acts of providing documents that were not genuine or whose authenticity is in doubt and that amounts to fraud.

312. Having carefully analyzed the available evidence, the Court finds and holds that the all the title deeds being held by the Plaintiff, the 2nd and the 3rd Defendants were as result and proct of fraudulent means. For this reasons, I discern that 1st Defendant herein is the lawful owner of the suit property with all the indefeasible rights, interest and title vested in him by law having satisfactorily explained the root of his title.

Issue No. b). Whether the Plaintiff is entitled to the orders sought in further (further) amended plaint dated 4th November, 2021 and the Plaintiff in the Amended Counter- claim dated 19th January, 2022

313. Under this Sub – heading, the provision of the *Land Act*, 2012 and The *Land Registration Act*, 2012 are very clear on the position of a holder of a title deed in respect of land. The registration of person as a proprietor vests in them the absolute rights and privileges.

24. Subject to this Act:-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

(1)“The rights of proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register”.

314. However this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures as stated out under the provision of Section 26(1) of the *Land Registration Act*, No, 3 of 2012.

315. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

316. The import of the provision of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that



title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

317. This Court having held and found that the transfer of the suit property to the 3rd Defendant, 2nd Defendant then subsequently the Plaintiff were as result or undertaken through fraud as the root of his title could not be explained, Honorable Court further finds that the titles held by the Defendants fall under the category of titles that must be impeached. The protection that was provided to the Plaintiff by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. See the case of “Alice Chemutai Too – Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

318. I reiterate that, the Court having found and held that the certificate of title held by the 3rd Defendant, 2nd Defendants and the Plaintiff was procured by fraud and therefore null and void must then determine whether the said title can be cancelled this evidence is supported by the Land Registrar, DW - 6 Mr. Safari, for the 1st Defendant testified that on 22nd July, 2016, there was an entry cancelling all other entries and reinstating the land to Entry No. 1 and 2. This means the land went back to Isaac G. Wanjohi. The name described in the Green Card was Land Reference No. Galu/Kinondo/708. DW - 6 could saw from the 1st Defendant supplementary list of documents dated 12th September, 2019 and filed on 17th September, 2019. He confirmed that at pages 1 to 36 constituted the parcel file in Kwale registry in respect of the parcel No. Galu/Kinondo/708. He had been a Land Registrar at Kwale since April 2018. An adjudication Record was the final document that is produced once the adjudication process is complete. The document is forward in triplicate for production of title deed.

319. Nonetheless, while fully agreeing with the submissions by the Learned Counsel for the Plaintiff, I dare say that perhaps the Land Registrar causing the cancellation of the title deeds entries on the basis of the detection of forgeries they acted “Ultra vires”. Legally speaking, the Land Registrar exceeded his legal mandate. That action was not provided for in law and hence I hold it was null and void. I am guided by the provision of Section 80 (1) of the [Land Registration Act](#) provides that:-

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

Sub section (2) states that:

“The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake.”

320. From the above provisions it is clear that it is only the Court that has the legal mandate and powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied



that any registration was obtained, made or omitted by fraud or mistake. The decision by the Land Registrar is nullified and set aside. Be that as it may, on the same breath this Court does not hesitate to state that it is satisfied that the Certificate of title held by the Plaintiff passed on from the 2nd and 3rd Defendants was procured by fraud and as such it is impeachable and ought to be cancelled. Further, this Court has already held and found that the 1st Defendant is the legal owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the Plaintiff and return the suit property to its rightfully owner who has demonstrated how he purchased or earned the same.

321. In order to maintain the balance of scale, the Plaintiff in the further (further) Amended Plaint dated 4th November, 2021 indeed was a bona fide and innocent purchaser for value on notice. As a law abiding citizen he conducted an official search and it should the property was registered in the names of the 2nd Defendant. Paradoxically, he was actually duped and conned his hard earned cash at the behest and/or collusion by the 2nd and 3rd Defendants and the officials of the Land Registry at Kwale. I will not hesitate to order that the estate of the deceased as they sought be refunded of a sum of Kenya Shillings Eight Million Two Fifty Four Thousand Two Eighty Three Hundred (Kshs. 8,254,283/-) from the 2nd Defendant as stated in Paragraph 8B in the Plaint. Being that the title passed to him was not a clean title, the same is granted. He ought to be refunded their monies by the 2nd Defendant herein.

322. The 1st Defendant/Plaintiff in the amended counter claim dated 19th January, 2022 amongst other prayers has also sought for mesne profits. The provision of Section 2 of the [Civil Procedure Act](#) Cap. 21 Laws of Kenya defines Mesne Profits as follows:-

“Mesne Profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

323. Further in the case of “Attorney General – Versus - Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

324. On the issue of whether there was trespass by the Defendants in the amended Counter claim dated 19th January, 2022 and if an Order of Permanent Injunction should Issue, this Honourable Court has held that the title by the Plaintiff which was passed to him by the 2nd Defendant who got it from the 3rd Defendant was obtained through fraudulent means and therefore the Plaintiff's stay and subsequent development of the suit property can be seen as trespass. Having found that the Defendants trespassed into the Plaintiff's land, the next issue is whether as a result of the same; the Defendants should be permanently restrained.

325. The Principles on Injunction were established in the celebrated case of “Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358”. The 1st Defendant/Plaintiff to the amended counter claim dated 19th January, 2022 produced a title document and demand letters to the effected of asking the 1st Defendant/Plaintiff in the main suit the 1st Defendant in the amended counter claim and the respective exhibits he produced in court, I hold that the Plaintiff has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and /



or anyone claiming under the defendants should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit land

326. The Honourable Court notes that 1st Defendant/Plaintiff had specifically pleaded Mesne profits. Further that the 1st Defendant/ Plaintiff has been in wrongful occupation of his property. Therefore the Court finds and holds that the 1st Defendant/Plaintiff is entitled to the prayers for mesne profits as pleaded. It is the Honourable Court's considered view that the 1st Defendant/ Plaintiff is entitled to the orders sought.
327. On the issue of whether the 1st Defendant/ Plaintiff is entitled to General Damages as sought. From the foregoing, it is clear that the 1st Defendant/Plaintiff is the absolute, rightful and indefeasible owner of the suit property herein, I have also held that the Defendants in the amended counter claim dated 19th January, 2022 are guilty of encroaching and trespassing onto the 1st Defendant/Plaintiff/Plaintiff's land. The said trespass whose magnitude was found to be 0.7 Ha, did deny the 1st Defendant/Plaintiff use, occupation, possession and enjoyment of said land. The Defendants on the other side have been cultivating and enjoying the use of the unlawful actions. It is this loss of use and all the incidental rights that have been infringed by the Defendants in the Amended Counter claim that the 1st Defendant/ Plaintiff now seeks compensation for.
328. In the case of "Duncan Nderitu Ndegwa – Versus - KP& LC Limited & Another (2013) eKLR" where P. Nyamweya J. held that: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”
329. In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-
- (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
 - (d) --
 - (e) --
330. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of "Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR" where it was held as follows:
- “The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the



costs of restoration, whichever is less See *Hostler – Versus – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).

331. Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved, however where a party claims for both mesne profits and damages for trespass the Court can only grant one. In this instant as the Court has already granted general damages for trespass, this prayer is therefore declined. See the case of “*Maina Kabuchwa -Versus - Gachuma Gacheru (2018) eKLR*”, where the Court held that:-

“Where a party claims for both mesne profits and damages for trespass, the Court can only grant one.”

332. From the evidence on record, the 1st Defendant/Plaintiff in the amended Counter claim dated 19th January, 2022 has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the 1st Defendant/Plaintiff and its members suffered for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the 1st Defendant/Plaintiff indeed suffered damages as a result of the 2nd and 3rd Defendants’ continued acts of trespass. For these basic reasoning, I will proceed and award him a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) as general damages.

Issue No. c). Who bears the costs of the suit and the counter claim?

333. It is trite law that the issue of Costs is at the discretion of the Court. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of “*Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180*, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

334. Additionally, the Supreme Court fortified this position in the case of “*Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR* thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

335. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case.



336. The outcome in the instant case is the 1st Defendant/Plaintiff - Engineer Isaac G. Wanjohi from the Defence and Counter Claim dated 19th January, 2022 herein has succeeded in establishing his case. For that very fundamental reason, therefore, the costs of this suit will be borne by the 2nd and 3rd Defendants herein.

VIII. Conclusion and Disposition

337. The Upshot, after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the 1st Defendant/Plaintiff in the amended Counter claim dated 19th January, 2022 has on balance and preponderance of probability established its case and is entitled to the prayers sought against the 2nd and 3rd Defendants. Therefore, for avoidance of any doubts, I proceed to specifically order:-

- a. That Judgement be and is hereby entered partially in favour of the Plaintiff deceased's estate of Dr, Pawan Kumar Gupta only in as far as the further (further) amended Plaint dated 4th November, 2021 and the subsequent claim is concerned strictly as against the 2nd and the 3rd Defendants only.
- b. That the Amended Counter Claim by the 1st Defendant/Plaintiff - Engineer Isaac G. Wanjohi, dated 19th January, 2022 and the claim by the 1st Defendant/Plaintiff, be and is found to have merit and is allowed in the following terms:-
- c. That Judgment be and is hereby entered in favour of the 1st Defendant/Plaintiff, Engineer Isaac G. Wanjohi in the amended Counter claim dated 19th January, 2022 and against the Plaintiff, 2nd and 3rd Defendants jointly and severally.
- d. That a permanent injunction is herein issued restraining the Plaintiff/Deceased's estate, the 2nd and 3rd Defendants to the Amended Counter Claim or any of them by themselves, their servants, employees and/or agents from dispossessing the 1st Defendant/Plaintiff's – Engineer Isaac G. Wanjohi of the suit property, entering into occupying, evicting the Plaintiffs' agents, employees and/or servants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any development or in any other way interfering with the property and/or the Plaintiffs' quiet possession and enjoyment of the suit property known as Land Reference No. Galu/Kinondo/708.
- e. That a declaration that the Plaintiff,/Deceased – Dr. Kumar Gupta's estate purported title to Land Reference No. Galu/Kinondo/708 be and is found to be illegal, Null and void and does not confer any proprietary interest upon the Dr. Pawan Kumar Gupta (Deceased) or any other person.
- f. That a declaration that the title deeds being held by Plaintiff/Deceased of all that parcel known as Land Reference Numbers Kwale/Galu Kinondo/ 1912 and by the 2nd Defendant of all that Land Reference numbers Kwale/Galu Kinondo 1911 and Land Reference numbers Kwale/Galu Kinondo/1911 is in trust for the Eng. Isaac G. Wanjohi in accordance with the provision of Section 26 (1) and (2) of the [Land Registration Act](#), No. 3 of 2012.
- g. That a declaration that the 2nd and 3rd Defendants are trespass onto all that parcel of land belonging to the 1st Defendant/Plaintiff, Eng. Isaac G. Wanjohi known as land Reference Numbers Galu/Kinondo/708.



- h. That an order that the 3rd Defendant gives the 1st Defendant, Eng. Isaac Wanjohi G. vacant possession of the purported Land Reference numbers Kwale/Galu Kinondo/ 1912, that forms part of the 1st Defendant's parcel of land known as Land Reference Numbers Galu/ Kinondo/708.
- i. That an Order be and is hereby made compelling the 2nd Defendant to pay and refund to the Plaintiff deceased's estate of Dr. Kumar Gupta all the expenses and costs related to the transaction over all that parcel of land known as Land Reference Numbers Kwale/ Galu Kinondo/1912 amounting to a sum of Kenya Shillings Eight Million Two Fifty-Four Thousand Two Eighty-Three Hundred (Kshs 8, 254,283.00) together with accrued interest at the market rate per annum from the 2nd Defendant.
- j. That an order be and is hereby made compelling the Land Registrar to hence forth cancel and/ or revoke all the Certificate of Title Deeds to all that parcel of land known as Land Reference Numbers Kwale/Galu/Kinondo. 1910; 1911 and 1912 having been acquired and/or procured through fraudulent, illegal and/or corruptly means contrary and pursuant to the provisions of Sections 26 (1) and 80 (1) of the [Land Registration Act](#), No. 3 of 2012.
- k. That the 2nd and 3rd Defendants in the Amended Counter Claim dated 19th January, 2022, to pay the 1st Defendant/Plaintiff, Engineer Isaac G. Wanjohi in the Amended Counter Claim dated 19th January, 2022 Kshs 600,000/- as general damages for trespass.
- l. That the Plaintiff/Deceased's prayer for mesne profits is declined.
- m. That the 1st Defendant/Plaintiff, Engineer Isaac G. Wanjohi in the Amended Counter Claim dated 19th January, 2022 is awarded the costs of the suit and the Amended Counter claim to be paid by the 2nd and 3rd Defendants jointly.

It is so ordered accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THROUGH MISCROFT TEAMS VIRTUALLY THIS 16TH DAY OF V OCTOBER , 2023.

.....
HON. JUSTICE L.L NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT, MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant
- b. Mr. Mutugi Advocate holding brief for M/s. Umara Advocate for the Plaintiff
- c. M/s. Nduta holding brief for Dr. Gibson Kamau Kuria Advocates for the 1st Defendant
- d. No appearance for the 2nd Defendant
- e. Mr. Siminyu Advocates for the 3rd Defendant

