



**Chebril (Suing as the Administrator of the Estate of Asha Jabril
Mohammed - Deceased) v Mburugu & 6 others (Environment & Land Case
001 of 2021) [2023] KEELC 22318 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 001 OF 2021
PM NJOROGE, J
DECEMBER 18, 2023**

BETWEEN

**MARYANN MOHAMMED CHEBRIL (SUING AS THE ADMINISTRATOR OF
THE ESTATE OF ASHA JABRIL MOHAMMED - DECEASED) PLAINTIFF**

AND

**MICHAEL KOOME MBURUGU 1ST DEFENDANT
ISIOLO COUNTY GOVERNMENT 2ND DEFENDANT
JEDIEL KIRIMI RUTERE 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT
THE NATIONAL LAND COMMISSION 5TH DEFENDANT
THE DIRECTOR OF SURVEY 6TH DEFENDANT
THE ATTORNEY GENERAL 7TH DEFENDANT**

JUDGMENT

1. The Amended Plaintiff in this suit is dated 2nd October, 2019. By and large the Plaintiffs suit is predicated upon the claims of fraud and misrepresentation by the 1st, 3rd, 5th and 6th defendants. The particulars of the claims and their basis are contained in paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the plaintiff. These paragraphs are reproduced here below; Particulars of fraud and misrepresentation by the 1st, 3rd, 4th & 6th defendants (and their basis – paragraphs 19 to 28 of the plaintiff)
 - a. That the 1st, 3rd and 4th Defendants having knowledge at all times the deceased was the registered owner of the suit property that the suit property was unalienated was alienated (Sic)and the



deceased was in possession of the Original Title LR No. 7918/107, still went ahead to register a new title unlawfully.

- b. That the 1st, 3rd and 4th defendants have fraudulently and with ill motives caused another title to be issued in favour of the 1st and 3rd Defendants in order to deprive the deceased estate their Constitutional rights to ownership of the suit property.
 - c. The 3rd Defendant fraudulently and purportedly registered himself as the proprietor of the suit property and having himself registered.
 - d. The 3rd Defendant falsely claiming to be the owner of the suit property while knowing very well that on 25th June, 1986 the suit property was already allocated to the deceased.
 - e. The 6th defendant resurveyed the suit property and gave way to a new number, Title Isiolo Township Block 4/144.
19. That no transfer was done in favour of the 1st Defendant by the 3rd Defendant in respect of the suit property is unlawful, illegal as the deceased had never executed any transfer in favour of the 3rd defendant.
 20. To uncover the true ownership of the suit property, the plaintiff decided to carry out her own investigations. By the letter dated from the District Surveyor, Isiolo County showed that there are two parcels of land, i.e. LR No. 7918/107 & LR No.7918/85 both of which describe the same spatial location on the physical ground which is Isiolo Township Block 4/144.
 21. The plaintiff state (Sic) that the 3rd Defendant had in collusion with the 4th defendant illegally and fraudulently issued Title Isiolo Township Block 4/144 on the basis that the suit property was alienated which is untrue as the original Title LR No. 7918/107, Isiolo has been in the custody of the Plaintiff.
 22. The Plaintiff further avers that having been in possession of the Title of the suit property and having her rights been registered on or about the year 1996 as the registered proprietor of the suit property making her as the absolute and indefeasible owner subject to the provisions of Section 26 of the *Land Registration Act*, No. 3 of 2012.
 23. The Plaintiff therefore prays to this Honourable court to protect the deceased estate rights and interest as the registered owner of the suit property.
 24. The Plaintiff prays to the Honourable court to restrain the 1st defendant, his servants and/or agents from trespassing and/or continuing to trespass, alienating, entering, constructing, excavating, fencing, and/or erecting any structures or building thereon, committing acts of waste on Land reference known as Title LR No. 7918/107, Isiolo and or from interfering with the plaintiff's title and interest to the said property and/or from dealing with the said property in any way whatsoever.
 25. By reasons of the matters aforesaid, the 1st Defendant had interfered with the Plaintiff's use and enjoyment of the suit property and the plaintiff deceased estate has therefore suffered loss and damages and continues to suffer such loss and damages consequently, the plaintiff claims general damages against all the Defendants.
 26. Despite demand having been made and notice of intention to sue being given, the 1st Defendant has failed, refused and or neglected to heed the Plaintiff's demand.



27. There is no other suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendants over the subject matter herein.
 28. The suit property is located in Isiolo and the cause of action is within the jurisdiction of this Honourable Court.
2. The Plaintiff prays for judgment against the defendants for:
- a. A permanent injunction do issue restraining the 1st defendant, his servants and/or agents from trespassing and/or continuing to trespass, alienating, entering, constructing, excavating, fencing and/or erecting any structures or building thereon, committing acts of waste on Land Reference Known as Title Lr No. 7918/107, Isiolo and or from interfering with the Plaintiff's Title and interest to the said property and/or from dealing with the said property in any way whatsoever.
 - b. An order directing the 4th Defendant to recall, cancel and declare that the purported documents of title held by 3rd Defendant and subsequently transferred to the 1st Defendant as void ab initio and does not relate or affect the plaintiff's Title or parcel of land.
 - c. A mandatory injunction do issue to the 1st Defendant directing it to demolish all the structures building(Sic) on Lr No. 7918/107 Isiolo, at his own cost or in the alternative the plaintiff be at liberty to demolish the structures and the 1st Defendant to reimburse the Plaintiff all the cost incurred.
 - d. A declaration that the deceased Asha Jabril Mohamed was the bona fide title holder of Lr.No.7918/109 Isiolo and the 1st and 3rd Defendants have no rights whatsoever over the suit property.
 - e. A declaration that the allocation and registration of the suit property to the 3rd Defendant and subsequent transfer to the 1st Defendant as registered owner are fraudulent, illegal and hence null and void.
 - f. An order of eviction be issued against the 1st Defendant.
 - g. An order of cancellation of the resultant Title Isiolo Township Block 4/144 and an order for the amendment of the map to return land parcel number 7918/107.
 - h. General damages for trespass together with interest thereon and mesne profit.
 - i. Costs of this suit plus interest.
 - j. Such further or other relief as this Honourable Court may deem fit.
3. The 1st defendant opposed the plaint through a defence and counterclaim dated 23rd October, 2019. A conspectus of his case is contained in the counterclaim at paragraph 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of his counterclaim. The said paragraphs are reproduced in full here below;-
10. The Plaintiff in the Counter-Claim reiterates all the contents of paragraph 1-9 of the defence.
 11. The Plaintiff in the Counter-Claim avers that vide a sale agreement dated 4/10/2016, he purchased L.R No. Isiolo Township Block 4/144 (Hereinafter referred to as the suit land) for Kshs 13.7 Million, which consideration was paid in full to the 2nd defendant in the Counter-Claim.



12. The Plaintiff in the counterclaim avers that he conducted a due diligence over the said property by ascertaining from Isiolo Lands Registry that the 2nd defendant in the counterclaim was the registered owner of the suit property and an official search certificate was duly issued to the plaintiff in the counter-claim.
 13. The Plaintiff in the counterclaim avers that a transfer of lease was executed by the 2nd defendant in the counterclaim in favour of the plaintiff and that the 3rd defendant in the counterclaim consented to the change of ownership and the transfer of the suit land to the Plaintiff. The Plaintiff in the counterclaim therefore got registered as the proprietor of the suit land on 15/11/2016 and a certificate of lease was issued on the same day.
 14. The Plaintiff in the counterclaim avers that he charged the said property to M/S Bank Of Baroda (Kenya shillings) to secure repayment of Kshs. 9,400,000/= and the 3rd defendant, gave its consent to the charging of the property.
 15. The Plaintiff in the counterclaim avers that pursuant to clause 6 of the sale agreement aforesaid, the 2nd defendant granted the Plaintiff vacant possession of the suit property and the Plaintiff in the counter claim immediately started planning on how to develop the suit property.
 16. The Plaintiff in the counterclaim avers that building plans were prepared and presented to the 3rd defendant in the counter claim who approved the same thereby giving the plaintiff in the counter claim a go ahead to develop the suit land. The Plaintiff in the counter claim built a five (5) storied hotel on the suit land and on its completion the 3rd defendant issued the plaintiff with an occupation permit. The plaintiff runs an hotel enterprise on the suit land, christened “Daichii Hotel” The 3rd defendant granted the Plaintiff all the licenses to operate the said hotel.
 17. The Plaintiff in the counter claim avers that before the hotel was fully furnished and before commencing operations, the same was valued at Kshs. 78,000,000/= as at July 2018 and the plaintiff in the counter claim avers that the value of the said enterprise has increased in view of the services offered by the Hotel.
 18. The Plaintiff in the counter claim avers that at the time of the purchase of the suit land, the 2nd defendant herein was in exclusive, open and notorious possession of the suit land and with some developments thereon.
 19. The Plaintiff in the counter claim avers that before purchasing the suit land, the 2nd defendant in the counter claim had been in possession of the suit property for a continuous, exclusive, open and notorious period of more that Twelve (12) years.
 20. The Plaintiff in the counter claim avers that he is an innocent purchaser for value and without notice and that his ownership is protected by S.53 of the [Land Registration Act](#) No. 3 of 2012.
4. The 1st defendant in the counterclaim prays for orders:
- a. That the main suit be dismissed with costs.
 - b. That a declaration be issued that the Plaintiff in the Counterclaim is an innocent purchaser of LR. No. Isiolo Township Block 4/144, for value and without notice.
 - c. A declaration that the title No. Isiolo Township Block 4/144 is lawfully held and that the occupation thereof is lawful by the plaintiff in the counter-claim.
 - d. An order nullifying any title held by the 1st defendant in the counter-claim.



- In the alternative

- e. As against the 2nd & 3rd defendants in the counter claim jointly and severally, an order that they compensate the plaintiff in the counter claim for the value of the plot and the developments standing thereon at the prevailing market rates to be determined upon valuation of the same on delivery of judgment.
 - f. Costs of the Counter-Claim.
5. The 2nd defendant filed an amended defence dated 17th day of November, 2019. It is reproduced in full here below;

2nd Defendant's amended defence

1. The 2nd defendant denies all the contents of the amended plaint as if the same was set forth herein verbatim and transverse in seriatim.
2. The 2nd defendant admits the contents of paragraph 1,3,4,5,6,7,8 and 9 in so far as the same is only descriptive of the parties herein.
3. The 2nd defendant denies the contents of paragraph 2, 10,11,12,13,14,15,16 and 17 and puts the plaintiff to strict proof thereof.
 - a. The 2nd defendant denies that through its representatives and agents was party to the alienation of the suit property or at all, further states that if the suit party to the alienation of the suit property or at all, further states that if the suit property was alienated to the plaintiff as alleged, which is denied, the same was irregularly alienated, unlawful and did not vest any interest in the plaintiff.

The plaintiff denies the particulars of fraud and misrepresentation by 1st, 3rd, 4th and 6th defendants or any involvement thereto:-

- i. The second Defendant was not involved in any way in the process of alienation yet the property was trust land.
 - ii. The regime of law applicable to trust land was RLA and not RTA.
 - iii. The plaintiff's title is under the regime unknown to properties under trust land held by former County Councils.
 - iv. The plaintiff's title was issued in breach of Section 12 of the Grant Letters of Administration.
- b. The 2nd defendant avers in the alternative and without prejudice to the foregoing, if any title was issued to the plaintiff as alleged, which is denied, the conditions for which it was issued were breached by the plaintiff whereby the subsequent actions of the



second defendant in alienating the suit property to the third defendant was lawful.

Particulars thereto are further averred as follows:-

- i. The plaintiff failed to submit any plans for the development of the property within 6 months of its alienation to her, if at all.
 - ii. The plaintiff failed to undertake any development on the property to signify alienation of the same within 24 months, or at all.
 - iii. No land rates or rents were paid in respect of the property.
4. The 2nd defendant denies the contents of paragraph 18 and the particulars of fraud and misrepresentation and puts the plaintiff to strict proof thereof.
 5. The 2nd defendant denies the contents of paragraph 19, 20, 21, 22, 23, 24, 25 and 26 and puts the plaintiff to strict proof thereof.
 6. The 2nd defendant admits the contents of paragraph 27 and 28.
 7. The 2nd defendant avers that the plaintiff has no cause of action against the Isiolo County Government.
6. The 3rd defendant's defence is dated 10th August, 2017. It is reproduced in full here below:

3rd Defendant's Statement Of Defence

1. Save what is herein expressly admitted, the 3rd defendant denies each and every allegation contained in the plaint as if each was set out and denied seriatim.
2. The defendant does not dispute the contents of paragraphs 1, 3 and 4 of the plaint as far as they describe the parties to the proceedings. The defendant does not however admit the capacity of the plaintiff as pleaded in the paragraph 2 of the plaint. The defendant's address of service for the purposes of this suit shall be care of M/S MURANGO MWENDA & COMPANY, ADVOCATES, TEACHERS HOUSE, 2ND FLOOR, P.O BOX 1163 -60200, MERU, Email: murangomwenda@yahoo.com.
3. The defendant denies the allegations contained paragraphs 5, 6, 7,8,9,10,11 and 12 of the plaint and puts the plaintiff into strict proof thereof.
4. The defendant states that he was lawfully allocated and granted a 99 year lease by the County Council of Isiolo over L.R No. ISIOLO TOWNSHIP BLOCK 4/144.
5. The defendant lawfully acquired all interests and rights over the L.R ISIOLO TOWNSHIP BLOCK 4/144 and took possession and entered into occupation of the same in 1999, until the year 2016, when he sold and transferred the land to the 1st defendant, who is now the legally registered owner of the suit land.



6. Further and in the alternative, and without prejudice to what is pleaded here in above, the defendant states that he took possession, control, open and continuous occupation of the LR. NO. ISIOLO TOWNSHIP BLOCK 4/144 in the year 1999 until the year 2016 when he sold the land to the 1st defendant, a period in excess of 12 years. The plaintiff's title to the land, if any, was therefore extinguished upon expiry of 12 years by adverse possession and the plaintiff has no valid cause of action sustainable in court.
7. The jurisdiction of the court is admitted.
7. The defence of the 4th, 6th and 7th defendants is dated 16th august, 2019. It is reproduced in full here below:

4th, 6th And 7th Defendants Statement Of Defence

1. Save what is herein expressly admitted in the defence, the 4th, 6th, and 7th defendants deny all allegations of facts as set out in the plaint save to add that their address of service for the purpose of this suit shall be in the Office Of The Attorney General & Department Of Justice, Miriga Mieru Building, Opposite St.paul Methodist Church, P.o Box 51-60200 Meru.
2. The 4th, 6th and 7th defendants admit the contents of paragraphs 1 to 9 of the plaint the same being mere description of parties to this suit.
3. The 4th, 6th and 7th defendants have no knowledge of ownership of parcel of land LR.No. 7918/107 I.R No. 4321 situated at Isiolo town as alleged in paragraph 10 of the amended plaint and the plaintiff is put to strict proof thereof.
4. The 4th, 6th and 7th defendants in response to paragraph 11 of the amended plaint avers that they are strangers to the letter of allotment and the registration thereof and avers that if at all the same exist it did not follow the required procedure and hence invalid and illegal and the plaintiff is put to strict proof thereof.
5. The 4th, 6th and 7th defendants are strangers and have no knowledge of the letter dated 27th January 1987 as alleged in paragraph 12 of the amended plaint and puts the plaintiff to strict proof thereof.
6. The 4th, 6th and 7th defendants deny that the 1st defendant bought suit property from 3rd defendant as they were not parties to the purchase agreement hence puts the plaintiff to strict proof thereof.
7. The 4th, 6th and 7th defendants are strangers to the discovery by the plaintiff as alleged in paragraph 14 of the amended plaint and puts the plaintiff to strict proof thereof.
8. The 4th, 6th and 7th defendants are strangers to the demand notice issued to the 1st defendant by the plaintiff as alleged in paragraph 15 and puts the plaintiff to strict proof thereof.
9. The 4th, 6th and 7th defendants in response to paragraph 16 of the amended plaint reiterate the averment made in paragraph 3 above that they have no



knowledge of ownership of suit property hence puts the plaintiff to strict proof thereof.

10. The 4th, 6th and 7th defendants in response to paragraph 17 avers that they are not aware of any acts of 1st and 3rd defendants of taking possession of suit property as alleged and puts the plaintiff to strict proof thereof.
 11. The 4th, 6th and 7th defendants in response to paragraph 18 deny the allegations of fraud and misrepresentation and all particulars of the same are denied the plaintiff is put in strict proof thereof.
 12. The 4th, 6th and 7th defendants have no knowledge of transfer of suit property to 1st defendant by 3rd defendant as they were not parties to the same if at all it was done and puts the plaintiff to strict proof thereof.
 13. The 4th, 6th and 7th defendants are strangers to the investigations done by the plaintiff as set out in paragraph 20 of the amended plaintiff and puts the plaintiff to strict proof thereof.
 14. The 4th, 6th and 7th defendants deny having colluded with the 3rd defendant as alleged in paragraph 21 and avers that if at all any title was issued the same was done as per the law and the plaintiff is put to strict proof thereof.
 15. The 4th, 6th and 7th defendants are strangers and have no knowledge of when the plaintiff took possession as alleged in paragraph 22 and puts her to strict proof thereof.
 16. The 4th, 6th and 7th defendants in response to paragraph 23 of the plaint avers that they are not aware of any violators of rights of estate of the deceased as alleged and puts the plaintiff to strict proof thereof.
 17. The 4th, 6th and 7th defendants are strangers to allegations set out in paragraphs 24, 25 and 26 and puts the plaintiff to strict proof thereof.
 18. The 4th, 6th and 7th defendants admit the contents of paragraph 27.
 19. The 4th, 6th and 7th defendants aver that ELC Court at Chuka has no jurisdiction to hear this suit, the same lies with ELC Court at Meru.
8. The 5th defendant's defence is dated 28th day of September, 2020. It is reproduced here below in full:

Defence On Behalf Of The 5th Defendant

1. The 5th defendant is an Independent Commission established under Article 67 (1) of *the Constitution* and is operational by the *National Land Commission Act* No. 5 of 2012.
2. The 5th defendant following promulgation of the new Constitution and subsequent enactment of the *National Land Commission Act*, the 5th defendant took overall management of land administration from the defunct office of the Commissioner of Lands and has inherited all land administration records.



3. That in addition to the functions denoted to it under *the Constitution*, the 5th defendant has its fundamental functions, the management of public land on behalf of the National and County Governments.
 4. The contents of paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9, of the amended plaint are admitted in so far as the same are merely descriptive of the parties to the suit save that the 5th defendant's address for service for the purpose of this suit is care of Wambugu Charles-Advocate, C/O National Land Commission, ACK Gardens Annex, 7th Floor, 1st Ngong Avenue P. O Box 44417-00100, Nairobi.
 5. The 5th defendant admits the contents of paragraph 10 and 11 of the amended plaint and further wishes to state that and from the records available, the subject parcel was allocated to the plaintiff vide a letter of allotment dated 25th June, 1986.
 6. That in furtherance to the above, the plaintiff having duly satisfied the conditions of the allotment and payment of relevant fees received, a certificate of title was subsequently issued and registered to plaintiff herein on 25th December, 1967.
 7. The 5th defendant further notes that a subsequent allocation of the same subject parcel was done in the year 1999 to one Jediel Kirimi Rutere, the 3rd defendant herein and a certificate of title registered on 1st March, 2000.
 8. That the plaintiff was allotted the suit land and issued with a certificate of title as a conclusive proof of ownership in 1987, thus the Plaintiff's Certificate of Title was the first in time and must prevail because without any cancellation of the original title, the Plaintiff's Certificate of Title to the subject parcel still retains its validity.
 9. In further response to the paragraph above, the said reveals a case of double allocation and titling, with one registered under the Registered *Land Act* (Cap 300) and the other Registration of Titles Act (Cap 281).
 10. That it is however trite law, that ownership rights conferred under the first registration to an individual supersedes any other subsequent registration as dictated under Section 24, 25 and 30 of the *Land Registration Act*.
 11. Therefore, the subsequent allocation and registration to one Jediel Kirimi Rutere, the 3rd Defendant herein over the subject parcel was thus null ab initio.
 12. The Jurisdiction of the court is admitted.
9. PW1, Hezekiah Wilfred Muchae Kabue told the court that he worked for the department of Survey in the Ministry of Lands and Physical Planning and had worked there for 28 years. He said that his report showed that Parcel No. LR 7918/07 existed in the records held by the Director of Survey and was contained in Cadastral Plan No. F/R No. 114/112. It also had a deed plan dated 13/8/1987. He further testified that the same parcel of Land appeared in the R/M (Cadastral Map of Isiolo Township Block 4 Parcel No. 144. He explained that when this parcel of land was initially surveyed in 1968, it was named as LR 7918/107. However, when there was systematic conversion of the process from RTA to RLA registration regime in 1994, it was renamed as Isiolo Township Block IV/144 and had an acreage of 0.0288 Hectares.



10. Mr Muchae told the court that he had prepared his report at the request of Advocate Hassan Lakicha on behalf of the Plaintiff. The contents of the report were marked as Plaintiff's exhibits 1 (a) (b) (c) and (d). PW1, was categorical that Parcel No. 7918/107 and Parcel No. Isiolo Township 4/144 referred to the same Parcel of Land. He also reiterated that no other survey had been done concerning this parcel of land and added that no other party can obtain a title except the Original Owner.

11. During Cross –examination by the 1st defendant's advocate PW1 told the court that all planning should have been done at the instance of the Defunct Isiolo County Council. He also told the court before a survey had to be done there would have been an allocation letter from the Local Authority, in this case the defunct Isiolo County Council.

He agreed with the advocate that the Department of Surveys did not concern itself with ownership of Plots and added that is why the plans did not include the names of the allottees. PW1 told the court that he had not seen the initial allotment letter for the Parcel of Land. He agreed that a letter of allotment contained conditions which if not complied with could lead to cancellation of allotments. He also said that he was not aware if or if not the parcel of land had been allocated to a different person.

12. During cross-examination by the 3rd defendant's advocate, PW1 told the court that he had not seen any formal communication concerning change of numbers of the suit land but said that the change was necessitated by the conversion of numbering from the RTA regime to the RLA regime. He told the court that he would not be in a position to know if the Isiolo Land Registrar had received communication concerning the conversion. He said Plot No. 7918/107 was initially surveyed in 1959 and the next survey took place in 1968. He was categorical that no other survey had taken place.

13. PW2, William Ongare Otieno, told the court that he was an accountant and an auditor by profession with 12 years experience. He told the court that he had been requested by advocate Hassan Lakich to prepare an income and loss report regarding LR 7918/107, also known as Isiolo Township Block 4/144. He explained the issues he had taken into account before arriving at his final figure of Kshs. 8,447,836.102 and Miscellaneous expense of Kshs. 2,000,000/= being legal fees at Kshs. 1,500,000/= and Miscellaneous expenses at Kshs. 500,000/=.

During cross –examination by the advocate for the 3rd defendant he owned up to some annualies in his report including that he did not have a professional valuation report concerning the suit land. He told the court that anomalous figures could be struck out. He told the court that he had based his calculations on a value for the property of Kshs. 13,700,000 as in January, 2017. He arrived at an income loss of Kshs. 8,447,836.102 from 2017 to 2021. He also made provisions for legal fees at Kshs. 1,500,000 and Miscellaneous expenses at kshs. 500,000/=.

PW2, was at a loss to explain how he had arrived at a valuation of Kshs. 13,700,000/= at 2017. He could not satisfactorily explain why he had not visited the suit land before writing his report. He also admitted that he had not been provided with any development plans, had not factored in taxation and that he had assumed that the putative owner would have invested the sum of Kshs. 13,700,000/= in Treasury Bills. Of course, PW2 did not establish the basis upon which he used the sum of Kshs. 13,700,000/= as the starting point for his calculations concerning the presumed loss.

14. PW3, Ahmed Khadhar Mohamed told the court that he was an attorney of the plaintiff vide a Power of Attorney dated 27/2/2018 and confirmed that he was giving evidence on behalf of the Plaintiff. He told the court that the Plaintiff had filed a witness statement dated 8th March, 2017. He also testified that the plaintiff had filed a bundle of documents on 9/3/2017 and another bundle dated 2/10/2019 and filed on 3/10/2019. He also told the court that the plaintiff had filed an additional list of documents dated 10/3/2020 and filed on 11/3/2020. He asked the court to adopt the Plaintiff's Witness statement



as her evidence in this suit. He asked that the documents filed by the Plaintiff be admitted as exhibits as a bundle. The court marked this bundle as the Plaintiff's Exhibit No. 3. At this Juncture, Advocate Lakicha, the Plaintiff's Advocate asked that an additional list of documents filed on 26/11/2020 be included as part of Exhibit No. 3. As there was no opposition to this request, the additional list of documents was admitted as part of Exhibit No. 3.

15. In her witness statement, the Plaintiff, Maryann Mohamed Cheabril, states that she is the Administratrix of the estate of the late Asha Jabril Mohamed (deceased) vide Grant of Letters of Administration Intestate issued on 19th January, 2017 in the Chief Magistrate's Court at Isiolo. She says that on 25th June, 1986, her late Aunt Asha Jabril Mohamed was allotted Land Parcel No. 7918/107 situated in Isiolo by the County Council of Isiolo. She says that the family fenced off the parcel of land and adds that it was not developed. She says that on 22nd February, 2017 the 1st defendant unlawfully entered the said parcel of land, commenced construction thereon without any colour or right but with the authority of the 2nd defendant. She prays for compensation on general damages for trespass by the 1st defendant. She also prays for Orders as in her Pleat.
16. PW3 told the court that he was aware that the 1st defendant had filed a defence and a counterclaim. He says that the 1st defendant's claim to the suit land was defective as he bought the property when the plot was already registered in the name of Asha Jabril Mohammed whose title was issued in 1987. He told the court that he was not aware of when the 3rd defendant took forcible occupation of the land. He said that the plaintiff only came to know about it on 22/2/2017 when construction on the plot commenced. He said that he would not be in a position to know who was in possession of the suit land before 22/2/2017 but maintained that all the time the plot belonged to Asha's family by virtue of the title issued to Asha Jabril Mohammed.
17. During cross-examination by the 1st defendant's advocate, PW3 told the court that the initial allottee of the suit land was one Haji Ibrahim Omar. He admitted that he had not provided a copy of the County Council of Isiolo Minutes which gave the Plot to Haji Ibrahim Omar. He also testified that he had not provided copies of receipts for payment of rates by the said Haji Ibrahim Omar. He also said that he had no letter showing that Haji Ibrahim Omar had applied to be allocated with the plot by Isiolo County Council. He admitted that the letter of allotment refers to Plot No. 7918/85 but said that he was not aware of how the number of the plot was changed to LR 7918/107 through handwriting.
18. PW3 told the court that he was aware that the letter of allotment contained special conditions which required the allottee to mandatorily submit building plans within 6 months. He told the court that the plaintiff did not submit any plans. He however, told the court that he was not aware of the consequences attendant to non-conformity with the special conditions.
19. During cross-examination by the advocate for the 2nd defendant, PW3 told the court that it was true that he had not leveled any particulars of fraud or misrepresentation against the 2nd defendant, the County Government of Isiolo. He told the court that it was true that he was blaming only the 3rd and 4th defendants in his Amended Pleat.
20. During Cross-Examination by Advocate Murango Mwenda for the 3rd defendant, PW3 denied knowledge of the process that leads to issuance of letters of allocation. He told the court that he did not know how Asha Jabril Mohamed (deceased) got the letter of allotment. He also agreed that the affidavit of Asha Jabril Mohamed, at Page 25 of the paginated bundle was not dated. He also confirmed that paragraph 6 of the affidavit of Asha Jabril (deceased) had asked that the plot allocated to Haji be transferred to her. He said that he did not know if or if not this request had been placed before the County Council of Isiolo. He also said that since in 1985 the plot was registered in the name of Haji, he did not know how the plot was subsequently allocated to Asha Jabril (deceased). He told the court



that the property of a deceased person could not be transferred to another party before being subjected to a process of succession. He also said that he did not have any documents authorizing the transfer of the plot from Haji to Asha. He also agreed that the letter of allotment had the plot number inserted by hand. He however denied that this constituted a forgery.

21. PW3 agreed that the grant shown in the Certificate of Ownership shows that it was issued on 13th October, 2017 whereas the application for registration is dated 25th November, 1987 therefore suggesting that the grant was given before the application had been received. PW3 however, told the court that he could not explain that anomaly. He also agreed the fees receipt from the department of lands was dated 1st July, 1985 and that it indicated at the top that the Plot was number 7918/85. He also agreed that next to that number there was a handwritten insertion of the plot as number 7918/107.
He also agreed that the insertion was not counter signed. He also confirmed that the letter of allotment issued to Asha Jabril Mohamed (deceased) indicated that its area was 0.0206 Hectares whereas the area indicated in the grant was 0.0288 Hactares. He did not explain the anomaly.
22. Upon being asked to clarify whether he was claiming Parcel No.7918/85 or 7918/107 as both appeared in the letter of allotment, PW3 categorically stated that the two were not different Plots.
23. When being Cross-Examined by Advocate Kimathi, for the Attorney General, representing the 4th, 6th and 7th defendants PW3, agreed that Special Condition No.2 in the grant made it lawful for the 2nd defendant to rescind the grant if the Special Conditions were not observed. PW3 also agreed that Special Conditions No. 9 required that the land be developed before any approval to charge let or dispose of the land could be given.
24. During re-examination by Advocate Lakicha, his advocate, PW3, told the court that he was not aware if Haji Ibrahim Omar was issued with a letter of allotment. He also told the court that he could not explain the handwritten contradiction concerning if the grant was for Parcel No. 7918/85 or 7918/107. He told the court that he did not know how change of ownership from Haji Ibrahim Omar to Asha Jabril Mohamed occurred. PW3 was laconic that the deceased Asha Jabril Mohamed had not prepared any building plans. He was also laconic that Parcel Numbers 7918/85 and 7918/107 were one and the same plot.
25. DW1 Michael Koome Mburugu told the court that he wished to ask the court to adopt his witness statement dated 26/11/2019 as his evidence in this suit. He wished to produce the documents in his list of documents (containing 13 documents) as his exhibits. The documents are:
 1. Letter of allotment dated 1/3/1999.
 2. Lease dated 4/3/2006.
 3. Search certified dated 20/6/2012 and receipts dated 20/6/2012.
 4. Receipts dated 17/5/1999, 14/2/2000, 9/3/2000, 26/4/2000, 5/2/2008 and 2/3/2011.
 5. Certificate of lease dated 9/3/2000.
 6. Sale of Agreement dated 4/10/2016.
 7. Consent by 2nd defendant for transfer and charge.
 8. Certificate of lease issued on 15/11/2016.
 9. Certificate of occupation by 2nd defendant dated 16/8/2018.
 10. Single business permit for the period 24/8/2018 up to 31/12/2018.



11. Valuation report.
12. Approved building plans by 2nd defendants.
26. At this juncture, the Plaintiff's Advocate, Mr Lakicha objected to the production of the following documents and said that he would like to cross-examine the makers. The documents are:
 1. Document number 1 being the letter of allotment dated 1/3/1999.
 2. Document number 12 being the valuation report.
 3. Document number 7 being the Sale Agreement between the 1st defendant and the 3rd defendant.

The Plaintiff's Advocate told the court that he would also seek to cross examine the makers of the PDPs dated 30/1/1996 and 27/3/1997.

27. DW1 was stood down to allow the makers of the documents objected to by the Plaintiff's Advocate to come to court to produce them.
28. On 19/12/2022, the parties agreed to have DW1 testify and be cross-examined subject to the production of documents 1, 7 and 13 in the list of documents being produced by the makers later on. The court deemed the other documents as adopted as DW1 exhibits.
29. DW1 explained how he bought his Plot from DW3, how he did proper due diligence, including a search, how he and DW3 entered into a sale agreement, how all authorities for the transfer of the subject plot to him were obtained, how he was granted consent by the 2nd defendant to charge the property to obtain a Bank Loan and how the 2nd defendant approved his building plans and how on completion of his building he had been given an occupation certificate and a business permit. He was unequivocal that all pertinent procedures had been adhered to. He said that the documents he had produced affirmed this position.
30. During Cross-Examination by the Plaintiff's Advocate, DW1 agreed that the copy of title in the Plaintiffs list of documents indicated that the lease for Parcel No. 7918/107 was registered. He however denied knowledge of the existence of that lease at the time he purchased the suit land from the 3rd defendant.
31. DW2, Advocate Gregory Mutuma Muthuri, the advocate who prepared document No.7, the Sale Agreement. He confirmed that it related to Plot No. Isiolo Township Block 4/144 and said that the purchase price was Kshs. 13,700,000/=.
32. I note that the contracting parties DW1 and DW3 did not have any issues concerning their agreement. Cross examination by the advocates for the Plaintiff, and the 3rd defendant did not in any way impeach the propriety of the Sale Agreement.
33. DW3, David N. Arimi, a valuer told the court that he did a valuation of the suit property in 2018. He showed the court a valid practicing Certificate for the years 2018 when he did the valuation. He explained the Methodology he used to determine his valuation for the capital part of the improvement of the plot by the 1st defendant as Kshs. 58 Million and for the land component as Kshs. 15 Million to make a total of Kshs. 73 Million. DW3's report was marked as DW1's Exhibit No.12. Cross-examination by the Plaintiff's advocate did not diminish in any manner the credibility of DW3's report.
34. DW4, Roberts Juma Simiyu, told the court that he held the position of Assistant Director, Ministry of Lands Headquarters where he had worked for 25 years. He told the court that he had received



court summons to produce documents. He told the court that he had certified copies of the whole correspondence file that led to the issuance of the letter of allotment and the lease. He said that all the documents in the correspondence file had been certified as true copies of the originals. He asked the court to admit the documents. The documents were marked as DW1's Exhibit No. 4 as a bundle.

DW4 reaffirmed his evidence when he gave further evidence on 12th June, 2023. He was categorical that allocation could only commence at the Plots Allocation lever with the concurrence of the concerned local authority but never in any other manner. He said that the Ministry of Lands and Physical Planning was satisfied that the letter of allotment and the lease issued to the 3rd defendant were issued in conformity with all necessary procedures.

I opine that Cross-Examination of DW4 did not impeach the propriety of his evidence and the documents he produced.

35. DW5, Cheruiyot Mathew Kimutai, told the court that he was the County Physical Planning Officer and was testifying as a witness for the 2nd defendant, the County Government of Isiolo. DW5's evidence was not articulate in any manner except for confirming that there was a dispute concerning plot Numbers 7918/107 and Isiolo Township Block 4/144. He said that he was not in a position to state when the Survey concerning the disputed land, which he confirmed to relate to the same parcel of land on the ground was done. He said that as the County Government was unable to determine who the true owner of the disputed land parcel of land was, they (the County Government Operations) recommended that the dispute be escalated to court. He also said that since it is the Ministry of Lands that issues titles, it would be in a better position to explain various documents and to comment on the veracity of the two competing title documents. When he was asked by the 1st defendant's advocate his intimation that the 1st defendant's plans had not been approved, he changed his story when shown the building plans. He confirmed that the plans had indeed been approved by the local authority. By and large DW5 was evasive regarding questions concerning documents which ought to have been in the custody of the 2nd defendant, the County Government of Isiolo.
36. As DW1, Michael Koome Mburugu, had been stood down to allow documents which had been objected to by the plaintiffs advocate to be produced by the Makers, he was recalled to be cross-examined on 12th June, 2023. He generally re-affirmed the evidence he had given earlier. He said that he had sued the 2nd defendant in his counter claim because it had given all necessary consents concerning purchase of the suit property by himself, had approved his building plans, had given him an occupation certificate and had also given him a trading license. He also told the court that he felt that as the allocation to the third defendant was properly done, he did not blame him for any wrong doing.
37. Mr Kimathi, the advocate representing the 4th, 6th and 7th defendants told the court that he did not wish to cross-examine DW1. Mr Haji, the advocate for the 5th defendant, the National Land Commission, also told the court that he did not wish to cross-examine DW1.
38. DW6, Kirimi Jediel Rutere, the 3rd defendant, told the court that he was a retired civil servant and was an accountant by profession. He told the court that he resided in Isiolo.
He asked the court to adopt his witness statement dated 11/8/2017 as his evidence in this suit. The witness statement was adopted as his evidence. He also asked the court to admit his documents as were contained in his lists of documents dated 11/8/2017 and 17/3/2020.
39. At this juncture, the plaintiffs advocate Mr Lakicha objected to the production of the Minutes of the Works, Planning and Markets Committee dated 28/10/1991 and said that he would wish to cross-examine the Maker. He also objected to the production of a letter dated 24/10/1997 from Isiolo County Council. Despite protestation by Advocate Murango Mwenda, the 3rd defendant's advocate



that the Minutes of the Works, Town Planning and Markets Committee were public documents as envisaged by S 82, of the *Evidence Act*, the court overruled him and ordered that the Makers should come to court to produce them. DW6 continued to testify subject to the production of the 2 documents by the makers later on. Except for the 2 documents, the other documents were admitted as DW6's documents.

40. In his witness statement, DW6, says that he applied for a plot and was allocated one by the Isiolo County Council. He says that he followed all the right procedures, a letter of allotment was issued and a lease in his name was eventually issued to him. He says that the County Council showed him his plot which was vacant and he moved into it immediately after he received his letter of allotment. He says that he commenced a business of selling building materials until when he sold the plot to the 1st defendant. He said that the plot allocated to him, and which he sold to the 1st defendant was Isiolo Township Block 4/144. He told the court that the documents he had produced in court as exhibits supported his case. I opine that his cross-examination by the Plaintiff's Advocate did not in any material manner diminish the veracity of his evidence.
41. When cross-examined by advocate Ken Muriuki, the 2nd defendant's advocate, DW6 told the court that he only came to learn that there was another claimant to his plot after he had sold it to the 1st defendant. He told the court that leases were issued by the Commissioner of Lands and not by the Isiolo County Council, the Predecessor of the 2nd defendant.
42. During Cross –examination by advocate Benjamin Kimathi, the advocate for the 4th, 6th and 7th defendants, he agreed that letters of allotment contained conditions one of which absolved the government from any liability whatsoever in the event of prior commitments. He was unequivocal that he was not making any claim against the government
43. When cross-examined by advocate Haji, the 5th defendant's advocate, he told the court that he was not aware that there had to be a public notice for people to apply for plots before allocation was done. He told the court that he received a beacon certificate from the surveyor.
44. During re-examination by advocate Murango Mwenda, his advocate, DW6 told the court that the letter produced by the plaintiff which sought to deny that he owned his plot and which letter was dated 18th July, 2012 was addressed to an unknown Mr Nteere and not to himself. He said that his plot was Isiolo Township Block 4/144 and not LR 7918/107 which the plaintiff said belonged to her. He did not agree with the letter from the National Land Commission which suggested that as the title document held by the plaintiff preceded his, his title was secondary to the plaintiff's. He insisted that he had followed all the right procedures, had paid rent and rates to Isiolo County Council and had at all times held quiet possession of his plot until when he sold it to the 1st defendant.
45. On 26/7/2023, PW7, Solomon Marangu came to court to produce the minutes of the Works Town Planning and Committee of Isiolo County Council of 28/10/1997 as had been requested by the Plaintiff's advocate. He told the court that he was a retired employee of Isiolo County Council and that he was the Committee Clerk in 1991 when the impugned Committee Minutes were made. He said that as the Committee Clerk, he was authorized to sign the minutes. He told the court that the Minutes had his signature. He also told the court that he had also authored the letter dated 24/10/1997 whose production had been objected to by the plaintiff's advocate. The 2 documents were marked as DW3's Exhibit number 8 (Minutes) and number 9 (the letter).
46. I opine that subsequent Cross-Examination by advocates for the plaintiff, for the 2nd defendant, for the 3rd defendant, for the 4th, 6th and 7th defendants and for the 5th defendant did not impeach the credibility of the evidence proffered by DW7.



47. At this juncture a serious issue was raised by advocate Hassan Lakicha, the Plaintiff's Advocate. Advocate Lakicha told the court that a relative of the plaintiff, a Mr Roble Esa Musa, had complained that the 1st defendant had taken his photographs inside the court and that he felt threatened. Considering that extraneous shenanigans should not derail the expeditious hearing and determination of the suit, the court adjourned the hearing for 20 minutes and directed the parties to consult and to make a report to court after 20 minutes.
48. When the courts sitting resumed, Advocate Lakicha told the court that the parties had managed to go through the 1st defendant's telephone and that they had not found photos as complained. Advocate Lakicha told the court that he was withdrawing the complaint.
49. At this point, still on 26/7/2023, Advocate Kimathi, for the Attorney General for the 4th, 6th and 7th defendants made an oral application to be allowed to introduce new evidence. A similar oral application was made by Advocate Haji who represents the 5th defendant the National Land Commission. The court gave its ruling which dismissed the application on 2 main grounds. One that it was being brought to court when the plaintiff and the 1st and 3rd defendants had testified and closed their cases. Subsequently the plaintiff filed an application seeking inter alia, review of the court ruling and the recall of one of the 1st defendant's witnesses. Once again this court dismissed the plaintiff's application dated 28/8/2023.
50. The court notes that on 18/9/2023, the 1st defendants advocate Mr Mwirigi Kaburu and the 3rd defendant's Advocate Mr Murango Mwenda requested the court to pronounce itself to what they perceived blatant and egregious disobedience of a court order. They told the court that on 26/7/2023 the court had directed all the parties to concurrently file and exchange written submissions within 21 days of that day. They however said that although they had filed their submissions, the plaintiff's advocate had failed or refused to do so. In response, Advocate Lakicha told the court that he would file his submissions within 7 days. Although the court intimated that it would pronounce itself regarding the oral application concerning the apparent disobedience of a court order by the Plaintiff's Advocate, the court notes that the submissions were filed within the 7 days as requested by Advocate Lakicha. I, therefore, did not find the need for the court to pronounce itself regarding this matter, although I caution that no parties should disobey court orders.
51. The Plaintiff, the 1st defendant, the 2nd defendant and the 3rd defendant filed written submissions. The other defendants did not file submissions.
52. I opine that parties cannot introduce new evidence in their submissions. A court of law will ignore such evidence. However, parties are entitled to bring to the attention of the court valid and relevant points of law.
53. In his submissions the plaintiffs advocate raises two main points;
 - a. That the issuance of the plaintiff's title preceded issuance of the 3rd defendant's title which was the basis for the issuance by way of transfer of the 1st defendant title.
 - b. That the 1st, 3rd, 4th and 6th defendants had committed fraud through misrepresentation as they had a lease issued when they ought to have known that the plaintiff had already got a valid title to her land and therefore the 1st defendant was not a bonafide purchaser for value.
54. To buttress the plaintiffs assertions concerning the two issues, the plaintiff's advocate proffered the following cases:



- a. Ashmi Investment Limited Versus Riakina Limited & Another (Civil Appeal 384 of 2019 [2021] KECA 184 (KLR) 19 November, 2020 (Judgment). Neutral Citation: [2021] KECA 184 (KLR)
 - b. The Uganda court of Appeal Case of Katende Versus Haridar & Co. Ltd [2008] 2 EA 173.
 - c. Charles P. Chemutut Versus Peter Walker and 5 Others & 2Others, Malindi ELC Case No. 136 of 2018.
 - d. Chemei Investments Limited Versus the Attorney General & Others, Nairobi Petition No. 94.
 - e. Torino Enterprises Versus Hon. Attorney General –Supct, elk
 - f. Martha Chelal & Another Versus Elijah Kipkemoi Boiywo & 2 Others [2019] eKLR.
 - g. Arthi Highway Developers Limited Versus West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR.
 - h. Mary Wanjiru Kihugu & 6 Others Versus Ragency Cooperative Saving and Credit Society Limited [2021] eKLR.
 - i. Vijay Morjuria Versus Nansingh Madhusingh Darbor & Another [2000] eKLR.
 - j. Gladys Wanjiru Ngacha Versus Chepsat & 4 Others [2013] eKLR.
 - k. Hudani Versus Mukunya & 5 Others (Civil Appeal 353 of 2018 [2022] KECA 93 (KLR)
 - l. Wambui Versus Mwangi & 3 Others (Civil Appeal 465 of 2019 [2021] KECA 144 KLR.
55. The plaintiff's advocate submitted that the plaintiff has proved her case on a balance of probability and prays that her prayers in the plaint be granted.
56. The plaintiff's advocate further urges the court to find that the 1st and 3rd defendants have no cause of action against the plaintiff and that the 1st and 3rd defendants claim be dismissed with costs to the plaintiff.
57. A conspectus of the 1st defendant's submissions is as follows:
- a. The advocate for the 1st defendant submits that he is an innocent purchaser for value and, as such, his ownership is protected by law. To buttress this assertion, the advocate proffers the case of Dina Management Limited Versus County Government of Mombasa & 5 Others [2021] eKLR where the court of Appeal opined as follows: "...In Lawrence P. Mukiri Mungai, Attorney General and 4 Others [2017] eKLR, this court cited the case of Katende Versus Haridar & Company Limited [2008] 2 E.A 173 where the Court of Appeal in Uganda held that: "For the purposes of this Appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide 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 knowledge of any fraud; (g) he was not party to any fraud.
- The first defendant submits that the issuance of the 3rd defendant's title followed an elaborate procedure which involved all relevant government authorities including the County Government of Isiolo. He says that before he bought the plot, the seller, the 3rd defendant, had



been in occupation of the suit property for 17 years without objection from any quarter. He submits the transfer of the property to him by the 3rd defendant was procedurally correct and was done lawfully. He submits that the title held by the plaintiff was illegal and fraudulently obtained as there was no evidence that her plot had been allocated by the County Council of Isiolo. He says that the fact that the letter of allotment relied upon by the Plaintiff is for LR NO. 7918/85, which was altered with a pen to read 7918/107 is proof against the legal validity of the title. He says that the alterations and cancellations were not countersigned.

He also says fraud is evinced by the production of an uncertified copy of a statement of rates dated 10/10/85 in the name of Haji Ibrahim Omar. He says that the 10th day of October, 1985 was a public holiday and government offices do not open during national holidays.

The 1st defendant says that if it is true that LR.NO. 7918/107 was registered in the name of Haji Ibrahim Omar, in 1985, when was it transferred to the plaintiff, by who and where are the documents for such transfer?

- b. The 1st defendant submits that the issuance of the plaintiff's title documents was irregular as it was done under the wrong law. He says that the suit land was trust land and the applicable law was Section 115 of the repealed Constitution of Kenya. He proffers the case of *Funzi Island Development Ltd & 2 Others Versus County Council of Kwale & 2 Others* [2014] eKLR where the court of Appeal held as follows:

“ 41. Section 115 of the same Constitution vested all Trust Lands, as defined above in the County Councils within whose areas of Jurisdiction they were situate save for any body of water and any mineral oils. Section 117 authorized County Councils to set apart any trust land vested in them for use and occupation by, inter alia, “any person or persons for a purpose which in the opinion of that County Council is likely to benefit the persons ordinarily resident in that area”. The 1st defendant seems to suggest that the process of allocating and issuing a title to the plaintiff was not instigated by the County Council of Isiolo as required by the repealed constitution but was only done by the Lands authorities in Nairobi.

- c. The 1st defendant submits that the plaintiff led no evidence to prove the alleged fraud and has failed to discharge the burden of proof as required by Section 109 and 112 of the *Evidence Act*. He relies on the case of *Vijay Morjaria Versus Nansingh Madhusingh* for his assertion that allegations of fraud must be distinctly proved and cannot be inferred.

The 1st defendant submits that allegations of fraud must be pleaded and be strictly proved. For this assertion, the 1st defendant proffers the case of *Kinyanjui Kamau Versus George Kamau* [2015] eKLR where the court cited with approval the case of *Ndolo Versus Ndolo* (2008) IKLR (GXF) 742 where the court said: “...Since the respondent was making a serious charge of forgery & fraud, the standard of proof required of him was obviously higher than that required in ordinary Civil Cases, namely proof upon a balance of probabilities. In cases where fraud is alleged, it is not enough to simply infer fraud from facts.”

- d. The 1st defendant submits that the defences by the 4th, 5th and 6th defendants were inconsequential, as they did not call any evidence in support of their defences.



To buttress this assertion the 1st defendant's advocate proffered the case of Kenya Power & Lighting Company Versus Samuel Gathieri Cerere [2019] eKLR. He submits that the evidence adduced by the 1st defendant against them is uncontroverted and therefore unchallenged.

The 1st defendant submits that the plaintiff has failed to prove her case to the required standard and urges the court to dismiss it with costs.

58. A conspectus of the 2nd defendants submissions are as follows:

- a. The responsibility for issuing letters of allotment and leases belonged to the Ministry of Lands and Physical Planning and the National Land Commission.

This being the case, the Plaintiff could not sustain a claim against the County Government of Isiolo. Its advocate referred to the evidence of Mr Simiyu an Assistant Director of Land Administration who had affirmed in his evidence that the role of a local authority ended at the point of issuance of a letter of allotment.

- b. That the National Government and the National Land Commission which Commission managed public land on behalf of both the National and County Governments could confer titles only with the consent of the County Government in accordance with Article 67 (2) of *the Constitution* and Section 5 (2) of the *National Land Commission Act*. But since the main responsibility to issue titles fell upon the government and the National Land Commission, the 2nd defendant could not take responsibility for acts of double allocations.
- c. As the 1st defendant had filed a counter-claim instead of a Cross-Claim, his claim was bad in law as against the 2nd defendant. The 2nd defendant's advocate submitted that a counter claim could only be sustained against the plaintiff but not against the Co-defendants against whom a cross-claim should have been filed.
- d. As the plaintiff in her evidence had produced a letter of allotment which had certain conditions to be met within stipulated times and which the plaintiff had not complied with, the offer to her contained in the letter of allotment had lapsed and this gave the allocating authority, the County Council of Isiolo, the liberty to reallocate the plot. The advocate proffered as an authority Makueni ELC Case No.62 of 2017, Joseph Mutua Zakayo Versus the County Government of Makueni and 9 Others where the court held as follows:

“From the totality of the evidence, I am convinced that the lapse of the offer to Makenzi due to non-compliance, the plot was re-allocated to the plaintiff and even though he did not comply immediately, the lapse of his offer was waived by the County Governments conduct when it accepted the demanded payment on 5th November, 2002. DW3 confirmed that the County Council could re-allocate land if the original allottee failed to comply with the terms of allotment.”

59. The 2nd defendants' advocate submitted that the plaintiff had failed to prove its case against the 2nd defendant AND ALSO that the 1st defendant had also failed to prove his counterclaims against the 2nd defendant. Hence, the 2nd defendant's advocate prayed that the suit against the 2nd defendant be dismissed with costs.

60. A conspectus of the 3rd defendants submissions was as follows:

- a. The plaintiff could not donate her power of attorney to Ahmed Khadhar Mohammed. In support of this assertion the 1st defendants advocate proffered the case of Rebecca



Njeri Muturi Versus Violet Wambui Muturi [2019] eKLR which had cited with approval the Case of Re:estate Of Haji Mohamed (DCD) [2016] eKLR.

I note that this matter had been contested at the interlocutory stage and I will not say anything more about it. The 3rd defendant should have appealed against this court's ruling.

- b. The plaintiff had not lawfully and legally acquired her title as the applicable law at the time the plaintiff's lease is said to have been issued was the repealed Constitution of Kenya which vested all trust land in the County Councils within whose jurisdiction the land was situated. As the plaintiff's title was issued by an organ of the Central Government without reference to the County Council of Isiolo, the predecessor to the County Government of Isiolo, the 2nd defendant, the plaintiff's title was illegally and unlawfully issued and should not be upheld. The advocate strongly submitted that the 5th defendant and by extension its predecessor, the commissioner of lands could not purport to allocate land without the involvement of the relevant County Council. To buttress this assertion, the 1st defendant's advocate proffered the case of Kenya Hospital Limited Versus Awendo Town Council & 21 Others [2018] eKLR and the court of Appeal Case of Wreck Motor Enterprises Versus the Commissioner of Lands and 3 Others eKLR. The advocate submitted that mere production of title documents was not sufficient proof that a title document had legal validity. To support this assertion the advocate proffered the court of Appeal Case of George Mbiti Kiebia & Another Versus Isaya Theuri M'Lintari & Another [2014] eKLR.
- c. The 3rd defendants advocate proffered the case of R Versus Land Registrar Kilifi & Another Exparte Daniel Rici [2013] eKLR to buttress the assertion that: "A title deed is an end product of a process and that for the Title Deed to be protected by Article 40(1) of *the constitution*, the holder of the title has to establish that he followed the laid down procedure in acquiring it"
- d. The 3rd defendants advocate submits that the 3rd defendant's title was lawfully and legally acquired because after making his application to the County Council of Isiolo, it was approved and all procedures were adhered to with the concurrence of all relevant bodies before a letter of allotment and a lease was issued.
- e. The 3rd defendants advocate submits that the Plaintiff had not proved fraud against the 3rd defendant. He proffers the Case of Kuria Kiarie & 2 Others Versus Sammy Magera [2018] eKLR where the court of appeal held that: "It is trite law that any allegations of fraud must be pleaded and strictly proved. He says that the 2nd defendant, the County Government of Isiolo, in its defence denies knowledge and involvement of the alleged alienation of the suit land in favour of the plaintiff. He says that the 1st and 3rd defendants had demonstrated that they had adhered to all required rules regarding allocation of the suit land to the 3rd defendant and its eventual transfer to the 1st defendant.
- f. The 3rd defendant's advocate submits that the 3rd defendant had acquired title to the suit land through the doctrine of adverse possession as he had enjoyed quiet possession from the time he received a letter of allotment in 1999 up to the time he sold his plot to the 1st defendant until 2016 when he sold the plot to the 1st defendant. This was a period of 17 years, well above the threshold of 12 years.



- g. The 3rd defendant submits that the 1st defendant's counter-claim does not reveal any cause of action against the 3rd defendant, as the 3rd defendant had demonstrated that he was not to blame for the unfounded claims made by the plaintiff.
- h. Finally the 3rd defendant submits that for the submissions he has made, the plaintiff is not entitled to the reliefs sought.

Determination

- 61. In terms of Rule 21 (4) of the Civil Procedure Rules, I find that the court's duty is to determine if or if not the plaintiff has proved her case to the required standard to merit the grant of the prayers she seeks. It is also the duty of the court to determine if the 1st defendant counter's claim has been proved to merit the grant of the orders he seeks. I frame the main points of determinations as follows:
 - a. What is the status of the competing titles in this suit?
 - b. Was the allocation and registration of the suit property to the 3rd defendant and the subsequent transfer to the 1st defendant, illegal and hence null and void?

My decision and the reasons thereof will thereafter be shown.
- 63. I have considered the pleadings, the oral evidence, the authorities proffered by the parties and their submissions.

The authorities proffered by the parties to buttress their largely diametric and incongruent assertions are good authorities in their facts and circumstances.

However, not all cases are congruent to a degree of mathematical exactitude in their facts and circumstances.
- 64. The 1st, the 2nd, the 3rd, the 4th, the 5th and 6th defendants filed their defences. Except for the 5th defendant, all the other defendants opposed the plaintiff's claim. The 1st defendant filed a defence and counter claim.
- 65. In their defence, the 4th, 6th and 7th defendants denied knowledge of the Plaintiff's ownership of LR. No. 7918/107 Isiolo Town, which the plaintiff claims. They also deny that they colluded with the 3rd defendant to have him issued with a letter of allotment and a title. They pray for dismissal of the plaintiff's suit.
- 66. The 5th defendant in its defence constructively supports the plaintiff's case and paragraph 10 of its defence laconically states: "That it is however trite law that ownership rights conferred under the first registration to an individual supersedes any other subsequent registration as dictated under Section 24, 25 and 30 of the *Land Registration Act*."
- 67. I will first deal with this issue of one title taking priority over another on account of prior registration. The court would like to point out that when the two competing titles were issued the *Land Registration Act* cited by the 5th defendant was not in existence. I also need to point out that it is only when the impugned titles were issued under the same regime that the earlier title would be deemed to supersede the latter. In this case, one title was issued under the RTA and the other was issued under the RLA. The issue of supercession, therefore, does not arise. The process leading to the issuance of the title becomes crucial. I will, therefore outrightly dismiss this submission which has also been made by the plaintiff.



68. From a totality of the evidence proffered by the parties, I find that the plaintiff has not rendered evidence to show that the issuance of her letter of allotment and her title had been commenced by the defunct County Council of Isiolo as was required by Section 115 of the retired Constitution of Kenya which was veritably unequivocal that: “115 (1): All trust land should vest in the County Council within whose area of jurisdiction it is situated.” Indubitably the land in question was trust land. Therefore, any allocation or any other disposition without the instigation and concurrence of the County Council of Isiolo renders any letter of allotment or lease issued otherwise void ab initio.
69. It is taken for granted that parties are bound by their pleadings. I opine that parties must also be bound by their Oral evidence. PW3, the plaintiff’s key witness, in his oral evidence was unequivocal that after issuance of a letter of allotment and lease to the plaintiff, she never provided building plans and conducted construction within stipulated times. Even at the time of writing this judgment this has not been done. It is veritably pellucid that the grant issued under the Registration of Titles Act contained special condition Number 2 which required the plaintiff to provide building plans to the local authority within 6 months and erect approved structures within 24 months of the actual registration of the lease. The lease was registered on 13th October, 1987. Special condition No. 2 was unequivocal that failure to abide by the special condition would render the term contained in the grant lapsed. Therefore, in my view, by the time the suit land was allocated to the 3rd defendant, the plaintiff’s title had been rendered null and void by operation of the law.
70. Considering the totality of the evidence rendered by the parties, I find that the process leading to the issuance of a lease to the 3rd defendant was procedurally lawful, had involved the County Council of Isiolo, and had involved all relevant land authorities. I also find that the process that led to the transfer of the 3rd defendant’s lease to the 1st defendant was procedurally correct and had involved all necessary authorities. The 1st defendant had obtained approved building plans and had spent an amount of money, according to the valuation report provided, amounting close to Kshs. 73,000,000/= put up a building, which hosts, as a going concern, a hotel. I find that as the plaintiff’s key witness PW3 confirmed that the plaintiff was not in possession and had not even fenced it and that the 3rd defendant had quiet possession for 17 years before he transferred his lease to the 1st defendant, the 1st defendant’s evidence that he had conducted due diligence is credible. I uphold the legal validity of the 1st defendant’s title.
71. I find that the plaintiff has not tendered any evidence that allocation and the issuance of a lease and the subsequent transfer to the 1st defendant was fraudulent and therefore illegal. I also find that all the defendants had not committed any fraud and had not made any misrepresentation.
72. In the circumstances, I am inclined to dismiss the plaintiff’s suit in toto.
73. Regarding the 1st defendant’s counter-claim, I find that he has proved his case and I grant prayers (a) (b) and (c) in the counter-claim. Prayer (e) in the alternative is not granted.
74. In the fullness of the circumstances, I issue the following orders:-
- a. The plaintiff’s suit is hereby dismissed and her title (lease) over the suit land LR. NO. 7918/107 is hereby nullified.
 - b. It is hereby declared that the 1st defendant is an innocent purchaser of LR.NO. Isiolo Township Block 4/144 for value and without notice.



- c. It is hereby declared that Title No. Isiolo Township Block 4/144 is lawfully held by the 1st defendant and his occupation thereof is, Ipso Facto, Lawful.
- d. Costs for the suit and for the counterclaim are awarded to the defendants against the plaintiff in the main suit.

DELIVERED IN OPEN COURT AT ISIOLO THIS 18TH DAY OF DECEMBER, 2023 IN THE PRESENCE OF:

Court assistant: Balozi

Caleb Mwiti h/b Lakicha for the Plaintiff.

Mwirigi Kaburu for the 1st Defendant.

Ken Muriuki for the 2nd Defendant.

Murango Mwenda for the 3rd Defendant.

Other parties absent.

HON. JUSTICE P.M NJOROGE

JUDGE

