



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 373 OF 2009**

**RICHARD KIMANI.....PLAINTIFF**

**- VERSUS -**

**SWALEH MOHAMED MWAKURIWA.....1<sup>ST</sup> DEFENDANT**

**HAMISI AYUBU MWAMJITA.....2<sup>ND</sup> DEFENDANT**

**HASHIM GOT SAT.....3<sup>RD</sup> DEFENDANT**

**SHEKA LOVERIDGE.....4<sup>TH</sup> DEFENDANT**

**DR. KAWALJEET SIGN REKHI.....5<sup>TH</sup> DEFENDANT**

**THE HONORABLE ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

**I. THE PRELIMINARIES.**

1. Towards the end of the year 2009, which is close to twelve (12) years ago down the line, the Plaintiff instituted this case vide a Plaint dated 28<sup>th</sup> October, 2009. The suit was filed before this Honorable Court on 29<sup>th</sup> October 2009. The Plaintiff fully complied with all the provisions of the law being Order 11 of the Civil Procedure Rules 2010 on Case Management. He filed a list of documents, list of witnesses and their statements and other relevant documents pertaining to the matter including on the agreed issues by the parties hereof. Initially, at the commencement of the case the Plaintiff was represented by the law firm of Messrs. Kadima & Co. Advocates. Subsequently, the Plaintiff changed representation by engaging the law firm of Nyachoti & Company Advocates.

2. Upon obtaining the Summons to Enter Appearance on 30<sup>th</sup> October, 2009, the Plaintiff effected proper service of these pleadings upon all the Defendants. Pursuant to this, on 6<sup>th</sup> November, 2009, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>, Defendants vide the law firm of Messrs. Stephen Oddigga & Co. Advocates entered appearance. On 5<sup>th</sup> November, 2009 these law firm filed the Statement of Defence while on 20<sup>th</sup> November, 2009 the law firm of Messrs. J.O. Magolo and Company Advocates filed a Memo of Appearance and a statement of Defence for the 5<sup>th</sup> Defendant dated 13<sup>th</sup> November, 2009. They also filed a list of documents, a list of witness and statements by the witnesses thereof.

3. On 11<sup>th</sup> November, 2009 the Honorable Attorney General, filed their Memorandum of Appearance for the 6<sup>th</sup> Defendant while on 24<sup>th</sup> November, 2009, the 4<sup>th</sup> Defendant filed the statement of Defence dated 23<sup>rd</sup> November, 2009 respectively.

Consequently, upon the closure of pleadings and conducting of the Pre – trial session, the case was fixed for full trail. It run for a total period of three (3) calendar years commencing from the 24<sup>th</sup> July, 2018 with the Plaintiff’s case and closing down with the Defendant’s case on 26<sup>th</sup> July, 2021. Eventually, upon the closure on 14<sup>th</sup> December, 2021the Honorable Court directed all the parties hereof to tender their written submissions with a given time frame. Pursuant to that, the Honorable Court reserved 20<sup>th</sup> January, 2022 as the date to deliver its judgment accordingly.

4. As further valuable background, undoubtedly, it should be noted that this has been a highly sensitive, contested and volatile matter. The stakes have been extremely high. From the filed Plaint and in particular the averments made out under its Paragraph 9, and the subsequent evidence adduced in court, the Plaintiff averred that he was the lawful, absolute proprietor and owner to all that parcel of land known as Land Reference KWALE/GALU KINONDO/676 measuring Nought decimal nine (0.9) hectares (hereinafter referred to as “**The Suit land**” ).

Accordingly, it is indicative that whilst the allocation of the suit land was issued to the Plaintiff on 15<sup>th</sup> November, 1974, he was issued with the said Land Certificate on 6<sup>th</sup> December 1978.

5. From the trial, it was observed that, in the course of time the Plaintiff alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the parcel of suit land to the 5<sup>th</sup> Defendant vide a sale agreement dated 7<sup>th</sup> May, 2004. He further claimed that the 5<sup>th</sup> Defendant subsequently sold the suit land to the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant was the current occupant of the suit land. He also claimed that the 3<sup>rd</sup> Defendant – the then Land Registrar at Lands Registry Offices, Kwale as the custodian of all the records between the years 2003 and 2005 issued a second green card for the suit land and registered it in the names of the 4<sup>th</sup> Defendant.

6. As a result of the ostensible fraudulent transaction, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were arrested, detained and arraigned in Kwale Court – the Senior Magistrate's Courts Criminal case No. 772 of 2008 – and charged with the offence of making a document without authority contrary to Sections 357 (a) of the Penal Code Cap 63 of the Laws of Kenya. On 1<sup>st</sup> April 2010 all the accused persons were acquitted of all charges under the provision of Section 210 of the Criminal Procedure Rules.

The Defendants did mount such a spirited defence on all the allegations meted against them. Based on the Land Adjudication process that took place at Kinondu/Kwale adjudication Section, the Defendants brought out a strong defence on the root of title and completely disapproved the allegation of fraud and the credibility of the evidence by the Plaintiff, his documentary evidence and his witnesses. On this, they over relied on the Judgement delivered in favour of the accused persons who indeed were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the instant case, of the Sub – ordinate court to buttress their case.

7. Additionally, the Defence contended that, the 4<sup>th</sup> and 5<sup>th</sup> Defendants herein were the legal and absolute registered proprietors of the suit land and having acquired it as innocent bona fide purchasers for value without notice. They argued that while the Plaintiff was a stranger to the suit land, the 4<sup>th</sup> Defendant actually was in occupation of it for many years and had caused immense development thereon.

From the filed suit the Plaintiff sought for judgement against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants jointly and severally for:-

a) **General damages**

b) **Special damages Kshs. 150,800/=.**

c) **The 6<sup>th</sup> Defendant be ordered/directed to rectify the lands records, cancel the lands certificate issued to the 4<sup>th</sup> Defendant and the transaction be declared null and void *ab initio*.**

d) **Costs of the suit**

e) **Interest on (a) (b) (c) & (d) above at court rates.**

f) ***Any other relief that this Honorable Court may deem fit to grant.***

## **II. THE PLAINTIFF'S CASE**

8. On 24<sup>th</sup> July, 2018 the Plaintiff himself as PW – 1.

**PW – 1 MR. RICHARD KIMANI SWORN AND TESTIFIED IN KISWAHILI LANGUAGE.** PW - 1 stated that he acquired the property through the land adjudication process. The title was created vide the adjudication. He purchased it from Mr. Karaganya at a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=) in the year 1974 – PW-1 testified that the adjudication was never contested so he did not appear before the Land Adjudication Committee. Immediately, he acquired it he took possession and fenced it. PW - 1 stated that he was issued with a Land Certificate.

9. He held that he had the original certificate of title deed. He produced the original Certificate of title deed which was marked as Plaintiffs exhibit 1. He collected the certificate of title deed from the offices of the Land Registrar Kwale. PW -1 testified that before he had bought it, he had visited the lands on several occasions. He stated that in about the years 2003 and 2004 respectively there had been a publication of a gazettment by the Government of Kenya to the effect they had frozen all the land in the whole of the Kwale location. He informed court that this was the time his land transactions took place. He later found out that someone had illegally taken possession of his land. He reported the matter at the Criminal Investigation Division (CID) headquarters, Nairobi. He testified that he had a letter dated 6<sup>th</sup> July 2007 which was written to the Director of Land Adjudication and settlement and wished to produce it. Nonetheless, the production of the said letter was vehemently objected to by Mr. George Gilbert Advocate for the 5<sup>th</sup> Defendant on grounds that PW - 1 was not the marker to the letter. Therefore, the said exhibit was marked for identification.

10. According to the testimony by PW – 1, he reported the issue of taking over land by someone to the CID and there was instituted a Criminal Case being No. 772 of 2008 where he was the complainant. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were arrested arraigned in court, charges preferred against them case heard and judgment delivered. He held that in the bundle of the 5<sup>th</sup> Defendant's list of documents contained a copy of the judgment of the said criminal case No. 772 of 2008. PW-1 referred to the contents of paragraph 2 in which the Criminal Court was of the view that the prosecution ought to have called and/or summoned the Chief Land Registrar as a prosecution witness. PW-1 informed this court that the Criminal case in its judgment did not make a finding on the genuineness of the two (2) certificate of title deeds that were existing. He referred court to the Green Card which was document No. 3 in his list of documents. Also the 5<sup>th</sup>

Defendant's list of documents dated and filed on the 7<sup>th</sup> July 2014 had a Green Card which he wished to produce as an exhibit. From the said Green Card, he stated that his observations were that the 1<sup>st</sup> entry was for Hamisi Ayubu Mwanjita while the 2<sup>nd</sup> entry was for Swalehe Mohamed Mwakuriwa which were cancelled. He also noted that the signature on the document was by the same hand and writing since the year 1974 to 2004. It was one individual who had endorsed all the entries.

**11.** The PW - 1 testified that the certificate of title was opened in the year 1974 and issued in the year 1978. PW-1 produced a certificate copy of the judgment on the Criminal Case No. 772 of 2008 and marked as Plaintiff Exhibit – 2. The Green Card was produced and marked as Plaintiff Exhibit – 3. He held that the Land Registrar was party to this suit. PW - 1 contended that his complaint against the Defendants in this case was that they acquired the title deed to the suit land through fraudulent means.

**12.** PW-1 also produced the Green Card in his names and marked as Plaintiff Exhibit – 4. He noted that the green card had only two (2) entries – having been opened on 15<sup>th</sup> November, 1974. The 1<sup>st</sup> entry was in the names of Richard Kimani. The 2<sup>nd</sup> Entry was dated 6<sup>th</sup> December, 1978. He stated that the certificate of title deed was issued to him on 6<sup>th</sup> December, 1978 for a fees of Kenya Shillings Fifty (Kshs. 50/=). The 2<sup>nd</sup> title deed was in the names of Hamisi – the Plaintiff Exhibit No. 3 was issued much later 30 years down the line on 15<sup>th</sup> August, 2003. PW-1 pointed out that his title deed had been the one issued earlier. He urged court to reinstate the land to him as he was the bona fide owner of the title and land. He held that the 2<sup>nd</sup> owner had acquired it fraudulently. He informed court that he was not in possession of the land. Instead, he held that it was in possession of a person known as Love Ridge who was unknown to him. PW- 1 stated that he had neither transferred the land to anyone nor charged it as security.

**13.** PW-1 observed that this suit, had no Counter Claim challenging his title deed or any allegations of him having acquired it by fraudulent means. That was all.

On cross examination of PW – 1 by the Learned Counsel Hamisi for the 4<sup>th</sup> Defendant, PW - 1 stated that he first visited the property in the year 1974. By then, he held that he had already purchased the land. PW-1 stated that upon visiting the land in the year 2004, he found the original fence had been removed and there was a construction going on the suit land.

**14.** He carried out an investigation and found out that there had been a second title deed. He reported the matter to the police though he did not have the investigations report. PW-1 stated that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the accused persons in the Criminal Case. He stated that they had been charged with four (4) counts. PW - 1 responded by stating that the 1<sup>st</sup> Count was on making a document without authority, the 2<sup>nd</sup> charge was on forgery, the 3<sup>rd</sup> was on conspiracy to defraud while the 4<sup>th</sup> charge was on obtaining registration by false pretenses.

PW – 1 responded by stating that the case was decided and they were acquitted. He indicated that he had produced the copy of the judgment as Plaintiff Exhibit. He answered by stating that he acquired the land through adjudication process. He was the first to be issued with a title deed in the year 1974. He informed court that he resided in Nairobi. He affirmed that he was a holder of the National Identity Card bearing Nos. 3460462 The other particulars on it were – Nairobi was his District and Kibera was his location, Langata Karen and Hardy his Sub-location. He admitted that he never appeared before the Land Adjudication Committee. During the land adjudication process he was a resident of Nairobi. The payment was appended in the title deed for a sum of Kenya Shillings Sixty (Kshs. 60).

PW-1 stated that the land being adjudicated was big land. He stated that the Plaintiff Exhibit – 2, the judgment in Criminal Case No. 772 of 2008, on page 4 on the last paragraph, PW - 8 was Mr. Thomas Mararo Nyangau. In that case, PW - 1 confirmed that the witness that the land adjudication record was signed. He confirmed the Land Registrar also testified in the said case.

**16.** PW-1 testified that indeed the 3<sup>rd</sup> Defendant was an accused person in the criminal case and did testify there as he was referred to Page 7 of the Judgment in the criminal case. PW-1 answered by stating that he confirmed that in his evidence, the 3<sup>rd</sup> Defendant stated that his signature appeared on the entry of 15<sup>th</sup> November, 1997 yet he had not been there by then. PW-1 stated that he knew other people from that locality who had been given land during the land adjudication process one of them being the late Hon. Justice Mugo Waiyaki. PW - 1 stated that he erected a fence, landscaped the land and planted trees in the year 1978. He stated that from the year 1974 he kept on visiting the property and fencing was part of the development he undertook on it..

**17.** PW-1 stated that from the years 1978 to 2004, he visited the land severally and that was how he found out that there was an intruder undertaking construction work on the land. He held that the construction had been incomplete by then and only came to be completed when the matter and/or dispute was going on in court. He affirmed that his title deed was the 1<sup>st</sup> document in his list of documents. The 2<sup>nd</sup> document was a certificate of official search dated 6<sup>th</sup> December, 2004.

**18.** PW-1 held that he applied for the official search. It showed the owner to the suit land was Hamisi Ayubu Mwanjika and Swalehe Mohamed Mwakuriwa respectively. He responded that the letter dated 6<sup>th</sup> July, 2007 by the Director of Land Adjudication and Settlement was addressed to the Director of CID. According to PW-1 the letter stated that the current information on the said land would be obtained from the District Land Registrar Kwale. PW-1 confirmed as true that the letter stated that all the original records were forwarded to the Chief Land Registrar Nairobi for issuance of title deeds at the time.

PW-1 refuted knowing that Mr. Mohamed Jembe the Land Registrar Kwale was called as a witness in the Criminal Case nor was he aware that he produced the records. PW-1 testified that according to the judgment in the criminal case, the Adjudication record was produced there as Exhibit No. 13. PW-1 responded that the payment of the land was done in Nairobi. He confirmed not knowing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They were strangers to him.

**19.** On cross examination of PW – 1 by the Learned Counsel M/s. Moka for the 4<sup>th</sup> Defendant PW-1 stated that on the Criminal case the Magistrate stated that the evidence left a possibility that the land in question belonged to the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. PW-1 added that in

his own view the prosecution ought to have called the Chief Land Registrar to testify as the prosecution witness.

20. On cross examination of the PW - 1 by the Learned Counsel Mr. George Gilbert Advocate for the 5<sup>th</sup> Defendants, PW-1 testified that he completed secondary school education. He was also a businessman. He was referred to the last paragraph of the letter dated 6<sup>th</sup> July, 2007 which begun with the word "note". He testified that while the letter was for the year 2007, the criminal case was for the year 2008. He confirmed from the contents of page 4 of the judgment that the Land Registrar Kwale Mr. Mohamed Jembe was a witness – PW-6 in the criminal Case. He asserted that the title he held was a Land Certificate and not a title deed. He stated that at the time of the adjudication he would have been in Nairobi or Mombasa – he would be coming in and out as the adjudication was a process which never happened in a day or a minute.

21. He participated in the payment of Kenya Shillings Sixty (Kshs. 60/=) and the collection of the title. He reported the matter to the CID when he realized that there was a problem with his land. The criminal were in Kwale. He stated that there was no restriction on where he would lodge a complaint. He reported in Nairobi as was the right place to do so but not because he had some influence. He informed court that prior to purchasing the land, he had done some due diligence. He responded that on Page 2 of the Judgment it was recorded that the land transaction was in Nairobi and he dealt with it before seeing the land. He applied for the land adjudication and paid for the adjudication fees as he could not be issued with the title prior to making payment of Kshs. 50/=. He had shown the Criminal court the receipt. He had no receipt then but held that they acknowledged receipt by endorsing the payment on the Land Certificate.

PW-1 stated in and before the year 1974, he was residing in Nairobi and had visited Kwale severally. He never attended any Land Adjudication meetings, apart from when he was collecting the title deed. He stated that the writings on the title was by the person who issued it. He affirmed that from the Criminal records, it was confirmed there was land adjudication record. He answered by stating that from the Criminal Case, PW-8 Mr. Thomas Mararo Nyangau, the Legal Counsel for the Land Adjudication and settlement Department, Nairobi confirmed that according to their records Plot. No. 676 was registered in the names of Richard Kimani – the PW-1. He stated that on being asked questions, the witness confirmed that the record was not signed. The place of the chairman was also not signed. PW - 1 informed court knowing the late Justice Mugo Waiyaki. He acquired land in the same area. He did not know how the judge acquired the land.

22. PW-1 stated that in the year 1978 he erected a fence and planted some trees but which were uprooted. He said he had seen the certificate of official search which showed the proprietors of the land being Mr. Hamisi Ayubu Mwanjita and Swalehe Mohamed Mwakuriwa – the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. He said he could not remember the date he made the report from the CID in Nairobi. PW - 1 stated that he was the 1<sup>st</sup> registered owner of the land. He also stated that he bought it from the person Mr. Karanganya who officially owned it. He paid him Kenya Shillings Five Thousand (Kshs. 5,000/=). He held that the land had not been adjudicated by then. He held that the 1<sup>st</sup> entry in the title was Richard Kimani and by then there was no Land Certificate. From the green Card – (Plaintiff Exhibit - 4) the Entry No. 1 was Richard Kimani – PW-1. He emphasized being the 1<sup>st</sup> owner to the land after the Land Adjudication process and he paid by Cheque Kenya Shillings Five Thousand (Kshs. 5,000/=) to Mr. Karanganya though he had no evidence of the payment. He did not have a sale agreement as it was not disputed.

23. He did not have a transfer as he already was the original owner of the land. He did not have evidence of stamp duty. He stated that he had the certificate of title. He answered having seen the judgment in the Criminal Case No. 772 of 2008. He bought the land from Mr. Karanganya who was an employee of the Ministry of Lands in Nairobi. He stated that, it was recorded that Mr. Karanganya did not know the title he held or the seller of the land whom PW1 never met. He reiterated that the transaction was in Nairobi and he dealt with it before seeing the land. He stressed having paid them a Cheque and signed a sale agreement but could not produce these documents in court. He held that the title showed he was the 1<sup>st</sup> Registered owner though he never appeared before the Land Adjudication committee. He held that he did not know whether there was a Land Adjudication Committee. He did not have a receipt. He never got a letter of consent from the Land Control Board. He reiterated having bought the land from someone who had been given the land after the Land Adjudication though his name did **not** appear in the land adjudication record.

24. PW-1 stated that according to the judgment in the Criminal Case it was stated that he fenced the land in the year 1974 and learnt of the encroachment in the year 2007. He answered that the judgment stated that he never had any records of how he acquired the land though he had a title deed. He reiterated that Plaintiff-Exhibit 4 showed that the first owners of the land as being Hamisi Ayubu Mwanjita and Swalehe Mohamed Mwakuriwa on 15<sup>th</sup> November, 1974. They transferred the suit land to Dr. Kawafeet Singh Rekhu – 5<sup>th</sup> Defendant – on 15<sup>th</sup> May, 2004 and then to Sheila Love Ridge the 4<sup>th</sup> Defendant on 8<sup>th</sup> December, 2004. PW1 stated that according to the judgment, the transfer was executed before DW-5 and Mr. Jared Magolo Advocate. He stated that the District Land Registrar recalled there were two (2) Green Cards and had the Land Certificate issued and the 2<sup>nd</sup> Green Card had 1<sup>st</sup> entry No. 2 as proprietors and they were issued with a title deed. PW-1 stated on cross examination in the Criminal Case, the Land Registrar PW- 6, he confirmed that the entries on the 2<sup>nd</sup> Green Card were proper while the bundle of the Land Adjudication records shown to him by the Investigations Officer (the I.O.) in the case was not dated.

PW-1, stated that PW-8 in the criminal case the Legal counsel added that certain records could still be at the office of the Chief Land Registrar and he never compared his records with those of the District Land Registrar and never knew the records at Kwale Lands Registry. PW-1 testified that at Page 7 of the judgment the 3<sup>rd</sup> Defendant admitted making the entry and which he stated ought to be formalized and produced in court as Exhibits – the official search and green cards – D- Exhibit 1 and Defence Exhibit – 2 respectively.

PW-1 also confirmed he had seen the part where it stated he stated that the complainant bought land in Nairobi, the records would be part of the records on the Lands Office.

PW- 1 stated that on Page 11 of the Judgment, it stated that the court asked itself whether the Chief Land Registrar had power to prepare the green card in his offices in Nairobi. PW-1 further stated that on page 15 of the Judgment, the court stated it was possible that the land belonged to the accused persons, and if so then their obtaining registration of the land could not have been by false means at all. PW-1 refuted the assertion that he obtained the land by fraudulent means. That was all.

25. On re-examination of the PW – 1 by Mr. Nyachoti Advocate. PW – 1 stated that initially, he bought the suit property from Mr. Erastus Karaganya for a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=). At that time, the land had not been adjudicated. He paid a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=) by a national bank cheque. He stressed that he was the one who applied for the adjudication. His name then appeared in the adjudication records. It was then 40 years ago, hence he could not produce the cheque. He was not born in Kwale. He testified being aware of many of his neighbours who were not born in Kwale but had bought Land in Kwale. He referred to the list of documents filed by the 6<sup>th</sup> Defendant on 21<sup>st</sup> February, 2018. He was number 7 in the list while number 675 was Francis Judah Muoka with land measuring 1.5 ha.

He stated that his name appeared as the allottee of Plot No. 676. Plot No. 678 was allotted to Mugo Wanyakia. Plot 673 was allotted to two people, Anna Njeri Githae and Susana Njoki Karuri jointly. 671 was for Wilfred Koinange Karuga. He was not a stranger in the allotment. He paid for the adjudication fees and the Land certificate. He paid a sum of Kenya Shillings Sixty (Kshs. 60/=). He held that the title deed indicated the said payment of Kshs. 60/= was for adjudication and the land Certificate. The Land Certificate was issued on 6<sup>th</sup> December, 1978. He had never transferred this title to anybody. That was all.

**26. PW – 2 CHARLES KIPKURUI NGETICH SWORN AND STATED IN ENGLISH:**

PW – 2 testified that he was by then the Acting Deputy Chief Land Registrar at Nairobi. He was directed by the Chief Land Registrar to come and represent him. He was summoned to come and give evidence in respect of Title KWALE/GALU/KINONDO/676 in the name of Richard Kimani. He confirmed that that was why he was summoned to testify. He had a Green Card for the suit land with him. According to the Green card, the registered owner was Richard Kimani – PW - 1. He was issued with a certificate of title on 6<sup>th</sup> December, 1978 and he paid a sum of Kenya Shillings Fifty (Ksh. 50/=). The Green card was opened on 15<sup>th</sup> November, 1974. According to their records, PW – 2 stated that there was no other entry in the title. The records showed that the registered owner of the suit land - Plot Galu/Kinondo/676 was Richard Kimani. In the 6<sup>th</sup> Defendant's list of Documents filed on 7<sup>th</sup> July, 2015, there was a green card produced as Plaintiff Exhibits - 3 and 4 respectively.

He stated that that the Green card did not exist in their records. It showed the entries from 15<sup>th</sup> November, 1974. It referred to parcel No. 676. It was the same parcel that belonged to Richard Kimani. PW – 2 thought it was a case of double registration. He suspected the Land Registrar in Kwale expunged it from the record when he discovered that there was an original register.

It was his testimony that title was issued to Richard Kimani in year 1978. In the second Green card, Entry No. 2 showed a title was issued on 15<sup>th</sup> August, 2003 and had a serial NO. 55384. According to PW-2, the earlier title took precedence as it was backed by adjudication records. From the testimony by the PW – 2, the adjudication register showed it was in the name of Richard Kimani. The Adjudication register was the one filed by the 6<sup>th</sup> Defendant on 21<sup>st</sup> February, 2018. He stated that there was another register kept in Nairobi. His testimony was that the entries in the second register had been cancelled.

He concluded his evidence in chief by stating that as the Ministry, if the latter entries still existed, they were ready to have them expunged if ordered to do so.

27. On examination in Chief of PW – 2 by Mr. Wachira for the 6<sup>th</sup> Defendant. PW – 2 stated that he was the District Land Registrar Kwale from January 2014 upto May 2016. He was in charge of Kwale Land registry. He also had the Land Adjudication Register for the parcel Land reference Number KWALE/GALU/KINONDO /676 both in Kwale Registry and another from Nairobi. He produced the Land register marked as Plaintiff Exhibit - 6. According to him, the beneficiary was Mr. Richard Kimani for 0.9 hectares. He stated that there was no dispute during Adjudication. The Entry No. 2 showed that the Title was issued to Richard Kimani on 6<sup>th</sup> December, 1976. He testified that there was a difference in the Green cards. First the Record register had a typo reading the year 1974, Secondly the one used was not that of the Government printer and thirdly, the signature was repeated. He stated that the tone and the signatures of the Land registrar differed. The Green card (Plaintiff Exhibit - 3) was six entries all of them signed by the same person. Entry No. 1 and 2 were signed in early 1970's upto 1974. There had been no entries in the first Green card and the same still held upto date. The earlier registrars never had official stamps. Therefore, he concluded that the Entries in the second Green card were null and void. He stated that they never conferred any ownership. The Land Adjudication record was certified by the Adjudication and settlement officer from Kwale Adjudication and settlement office. It was addressed to a Land Registrar to open a register or Green card. The Adjudication record formed part of the history of the record. The Land Adjudication record he had were from Nairobi. It was certified by the Land Registrar Kwale in the year 2007. He produced the Land Adjudication record and marked as Plaintiff Exhibit - 7.

28. On Cross examination of the PW – 2 by the Advocate for the 1<sup>st</sup> Defendant's. He stated that neither the Plaintiff nor him were from the tribe of clan Digo. He stated that the Plaintiff was the first to be registered during Land Adjudication. He did not know the person who sold the Land to the Plaintiff. He did not know the people as the ones he may have inherited from. He stated having obtained the documents and the records on the land, both from Kwale and Nairobi. He responded by stating that the work of Land Registrar was to register and keep records.

On Cross examination of PW – 2 by Mr. Aziz Advocate for the 3<sup>rd</sup> Defendant. He stated that his designation was of the Principal Land Registration Officer. He stated that there were summons to have the Chief Land Registrar appear and on that day, he appeared on his behalf. He had authority to appear for the Chief Land Registrar but not having it physically with him then in Court. The register he produced had been gotten from the Lands Office. He held that he saw the Plaintiff Exhibit 3. From the face of it, it had no errors. It came from the Lands office. The property was number 676 in the register. The first Title was issued on 15<sup>th</sup> August, 2003. His testimony was that it was not illegal to collect title after some years. Normally when a register was opened, a Registrar had to sign it, but title was not necessarily issued. But the Green card had to be signed. He stated that he neither knew nor ever heard of Erastus Karanganya. It was his evidence that the Adjudication Register constituted first allottees. The Adjudication records had the name of allottee, acreage, identification number etc. The register was the Green card used by the Land Registrar while the Adjudication record was with the Adjudication office.

PW – 2 responded by stating that a committee by the locals was formed and they gave names to the Lands adjudication and settlement officer who send the names to Nairobi which were in a form and he ratified those names. It prepared another record, issued letters of offer and send them back. He stated that the documents he produced were from Galu Kinondo Adjudication Section. In the land Certificate, it was indicated that a sum of Kenya Shillings Sixty (Kshs. 60/=) was paid. It was not a must that the amount be paid as indicated by the Land Registrar. PW-2 informed court that there was only one title deed over the suit property, but there were two (2) Green cards. The second one was however expunged. He was in Kwale from the period of January, 2014 upto May 2016. When the criminal case was in progress, he had no longer been in Kwale. He left the place.

29. On Cross examination of PW – 2 by M/s. Moka the Advocate for 4<sup>th</sup> Defendant. PW – 2 testified that ordinarily, land was usually given to persons who were settled on the land. He had produced the Land Adjudication Register. There was a committee headed by a chairman who forwarded the list of beneficiaries. During the adjudication process, those residing showed their boundaries. If there were any dispute, it was settled. He stated that what he produced was an extract of the record. It was certified. It was a list with a name, plot number and acreage. He repeated not knowing Mr. Karanganya and that he was not an Adjudication Officer. He was not aware, if the Plaintiff bought the land from Mr. Karanganya. He held that some people used to sell land without signing any agreements. He was not aware what Mr. Mohamed Jembe stated in the Judgment. He held that If he had been the Land Registrar and the record were not signed, he would send it back to the Adjudication officer for his/her endorsement. He stated that the record was signed by the Chairman and the local committee. He did not know who the Chairman was.

30. On cross – examination of PW – 2 by Mr. George Gilbert the Advocate for the 5<sup>th</sup> Defendant. PW – 2 stated that during his examination in chief, although he had stated that he was the acting Chief Land Registrar, but his position was that of a Principal Land Registrar. He held that he was a Lawyer by profession and an Advocate of the High Court of Kenya. He stated that the suit property was registered under The Registered Land Act Chapter 30 (repealed). When one wanted to purchase this land, the intended purchaser would have to go to Kwale for a search where the register was located. A transfer is entered at the Kwale Land registry. He averred that Title Deed would be issued at Kwale Land registry. It would be irregular to get a title deed from Nairobi as it would be coming from another registry. It would also be irregular of entries being made by another Land Registrar in a different Land registry. The official custodian of the relevant documents in this case was the Land Registrar, Kwale. This court was not far from Kwale. There were summons to the Chief Land Registrar from the year 2017 to appear in court.

He stated that he never had any summons. There was a letter stating that if they failed to attend the court proceedings, they would be held in contempt. PW - 2 stated that The Land Registrar Kwale was not summoned, Instead it was the Chief Land Registrar who was summoned. The representative of the Chief Land Registrar in Kwale was the Land Registrar, Kwale. He held that he was not aware if he was called as a witness. If one got an official search from the Land Registrar, that would be okay, unless they were forgeries. He was not aware of the criminal case. He was the Land Registrar Kwale upto May 2016. He was instructed to come and testify on Friday the previous week, that is on 20<sup>th</sup> September, 2019. On 23<sup>rd</sup> September, 2019 he called the Land Registrar Kwale to avail the records pertaining to the instant suit. It showed the history of the land. He produced the Land Adjudication record which was marked as Plaintiff Exhibit 7. It was from the Adjudication office, Nairobi. He produced two documents. He did not know whose handwriting it was on both documents. It was correct that one was written Adjudication record, while the other was not. The one from Nairobi was written Adjudication record at the top. The one from Kwale was not written Adjudication record at the top.

31. The number written against Richard Kimani was number 676. The first number on top was No. 671. There must be other numbers from to 670. He had not seen those other numbers. In the document, the number ended at Number 680. He had not produced the next numbers as he was not aware of the next numbers. He had no authority to produce it, but it formed part of their records. He had produced a photocopy of a certified copy. The copy he had had no date. There was nothing written on top of the document. There was nothing to prove what the document was. If he produced the entire document, it would show what document it was. The last page of the document should have a signature. The document came from them. If given time, he would produce the whole register. The register existed. He was not aware the last time the case was in court. The document was filed on 21<sup>st</sup> February, 2018. That was about one year, seven months earlier from then.

He said that he was not personally seized of the matter. He came to court because they had not wanted to be held in contempt. He was not aware that gaps on the document were raised with the Plaintiff. Given a chance, he could bring the entire document. Personally, he was not the one handling the mater. It was being handled by another person. He was testifying on behalf of the Chief Land Registrar, through the Attorney General. The Attorney General had been in the case all the time. He stated that the case was filed in the year 2008 - It was only ten (10) years old by hten. The record was incomplete but still formed part of the record. He testified for both the Plaintiff and the Attorney General. He admitted that there was no signature on the documents he produced - a Land Adjudication record.

32. He stated that it contained the Registration block, list of beneficiaries, date when it was prepared, signature of chairman and other committee members. He did not know the number of committee members who sat. He was aware that the Chief and the District officer of the area were ex officio members. So the other members were eminent persons of that society. Those days identity cards were not important. The details he had mentioned were supposed to be in the Adjudication record. The document he produced did not have the registration number, list of beneficiaries block signatures, list of chairman and eminent persons.

He stated having worked for the Government for 16 years. He understood the importance of execution of government documents. He was supposed to produce the register only, but he produced these documents. It was important to produce them. When adjudication was being done, the person to be given the land ought to be present. Normally the locals spearhead the adjudication process. The adjudication officer called the chief, the District Officer (D.O.) and the locals to elect committee the members whose names were forwarded to the Minister.

He held that he had never heard of a person by the name of Erastus Karanganya. He did not know if the was working as an Adjudication officer. He was aware the adjudication record ought to be signed by the land owner. He had not produced the adjudication record signed by the Plaintiff. He knew the District Land and Settlement Officer (DLASO). The documents he produced did not have a serial number. He was not aware what was contained on the second page of adjudication record. He was not aware if it was for objections and appeals. He knew that the purchase of land was a process. He was aware of agreements over land must be in writing. He had never seen an agreement over the suit property. When someone purchased land, there must be a transfer when there was title. In this case there was no transfer nor a title. He had

not seen any ownership documents in the names of Erastus Karanganya. If they were to look for the record, he was not aware if he used his position to fraudulently acquire the land. Entries on a Green card were made by the Land Registrar. In this case, it was made by Land Registrar Kwale. Plaintiff exhibit 4 was made by Kwale Land Registrar.

33. The Title he used was by the Land Registrar, Kwale. He stated that, If title was issued elsewhere it would be irregular. Registration could only be done in Kwale. He did not know if the Plaintiff stated he never appeared before any Adjudication committee. Ordinarily, the locals benefitted from an adjudication process. He did not know how the Plaintiff found himself there. He could not see the Plaintiff exhibit 3. He knew the person who signed it. He was aware he was and still is a Land Registrar. He stated that as a Land registrar, he was aware he had the authority to make the entries. He was aware of the person who made the Entry. That was the 3<sup>rd</sup> Defendant. It must have been the only register then. The second entry was typed. The 3<sup>rd</sup> Defendant must have invented Entry No. 1 on the Green card. It was in good faith. It was prudent for him to continue with the entries that way.

PW – 2 stated that the subsequent entries were made by the 3<sup>rd</sup> Defendant. He would not have been expected to open a new Green card. If one did a search, the register in the Kalamatoo would have been used which was the register on record. If one wanted to buy the land in the year 2013, according to the register the owner was Hamisi Ayubu Mwanixta and Swalehe Mohamed Mwakuriwa - the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. In the year 2004, the owner was Mr. Kawajiject Singh, the 5<sup>th</sup> Defendant The 4<sup>th</sup> Defendant is Sheila Loveridge. The person who could have sold to the 4<sup>th</sup> Defendant was the 5<sup>th</sup> Defendant. According to the documents, after entry No. 5, the owner was Sheila Loveridge and if one wanted to buy would find the owner as such.

He stated that the record had been expunged. He did not have evidence of the cancellation of the title by Sheila Loveridge or by court. PW-2 stated that there was no caveat or caution placed on Sheila Loveridge's property. Apart from this case, he was not aware of any case to cancel the title deed for Sheila Loveridge. According to the Green card, titles were issued to the 1<sup>st</sup>, 2<sup>nd</sup>, the and 5<sup>th</sup> Defendants, except the Attorney General. He confirmed that they were issued with titles from the government, according to the Land Registry. They were given by the 3<sup>rd</sup> Defendant who was a Land Registrar.

34. He stated that he was not aware what was in the suit property. He was not aware if the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were charged with fraud. He was not aware if the suit property was a subject of sub division. If there was any subdivision, land control Board consent would have been necessary. He knew of the a Land Registrar known as Mohamed Jembe. He was not aware if he testified in a criminal case. He wouldn't be shocked if he testified that the documents were proper. He was last in Kwale registry in May 2016. He had been to Kwale registry many times on official duties, the last time being the previous day. The Two (2) Green cards would mean double registration. His testimony was that the collection of titles had no effect in law. He knew the Green card that was in Kwale in 1974. He knew the Green card that was there in 2003. He could not be sure between the two which Green card was there. The Land Registrar who was there in the year 2003 would know which Green card was being used at that time. Changes in the ownership come with changes in the Green cards. Ordinarily, one got title from Kwale registry. That was all

35. On re - examination of PW – 2 by Mr. Nyachoti Advocate for the Plaintiff. PW – 2 stated that he had the Green card registered in name of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He visited Kwale Land Registry the previous day and he checked the records and even brought a copy. He stated that the entries in the 2<sup>nd</sup> Green card were no longer on record. To him they were expunged from the records. In the year 1974, he was in baby class. He had no knowledge of the practice of land adjudication then. Currently, there were slight changes as the process had advanced. He saw the entire register but only carried the copies he produced. The Plaintiff's exhibits 6 and 7 were photocopies made earlier. He stated that one register could even contain 4 to 5 adjudication sections. The title in the Green Card was in names of Plaintiff. It was issued in Nairobi.

He said that the copies of record that he had were the ones from Nairobi and another from Kwale. They contained the same contents. Whatever was in Nairobi was also in the County Land Registry. He was before court on the instructions of the Chief Land Registrar who had authorized him to represent him. He was aware of the summons issued by the court. There were discrepancies on the two registers (Green cards) The green card in name of Richard Kimani had comments on easement columns. There were no comments on the other Green card. In the column written absolute, there was a difference in the tone and the reading of the place written nature of title. One was written Kalama business while the other was written "title below this line". Before a register was opened, payment must be paid. A title could not be issued without payments being made. According to the records in the lands office, the owner of the parcel land known as Land Reference Numbers KWALE/GALU/ KINONDO/671 was Richard Kimani. That was all.

36. On re – examination of PW – 2 by Mr. Wachira Advocate for the 6<sup>th</sup> Defendant. PW – 2 stated that the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was done irregularly. He reiterated that he was the Principal Lands Registration officer and the acting Deputy Chief Land Registrar. He was the Registrar of the court section. He was the one who appeared in courts to testify on behalf of the Chief Land Registrar. His duties were to assist the court understand the documents. There was a department that dealt with Adjudication and had a better a capacity to produce their records. The entries in the second Green card were made because the entries in the earlier one had been plucked out.

## **II. THE 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup> 4<sup>TH</sup>, 5<sup>TH</sup> & 6<sup>TH</sup> DEFENDANTS HEARING**

### **DW - 1: SWALEH MOHAMED MWAKURIWA SWORN STATES IN SWAHILI**

37. DW – 1 was born in Kinondo Location, Galu Village. The suit property is in Galu. He was the 1<sup>st</sup> Defendant herein. When he was born, he was shown the graves for his grandfather, grand mother and aunt. There was a time when elders came with the area chief and asked that everyone who resided on the land be shown their boundaries. They identified their boundaries. After 3 months, they were brought village elders by the lands officials. The chief came and announced that demarcation was going to be done and asked everyone to stand besides and/or along his / her own boundary. On that day, everyone was shown their boundary and given a number. That was in the year 1974. Everyone was given their documents to await title deeds. They would be checking at the chief's office on the notice board.

DW – 1 stated that in the year 2003, they were asked to go and collect their title deeds. They went and collected their title deeds. At that time, there was no Kinondo Location. The location was only Diani location and his Chief was known as Athumani Said Rimo. He collected his title deed and kept it. The 5<sup>th</sup> Defendant approached him wanting to buy the suit land. He directed him to Kwale Registry to carry out a search. He came with a search which had no problem. Thereafter, DW – 1 sold the land to the 5<sup>th</sup> Defendant. After sometimes, police came and arrested and detained him. He was taken to Kwale court and charged. He denied the offence and was released on bond. The Complainant was the Plaintiff herein. The criminal case commenced and proceeded on. Eventually, he was acquitted. That was all

38. On cross - examination of DW -1 by Mr. Nyachoti, Advocate for the Plaintiff. DW – 1 stated that his grandfather, grandmother and aunt were buried on the suit land. He sold the land with those graves on it. He was given the land together with the 2<sup>nd</sup> Defendants who is his uncle. His father was called Mohamed Ayub Mwachita. He was Swaleh Mohamed Mwakuriwa. He was not named after his father, but his younger grandfather. In the year 1974, there was Diani Location and the Chief was called Athumani Said Rimo. In the year 2003, he went to the Chief who gave him the 4 title deeds. He was given by Athuman Said Rimo. He was now deceased. He died about 5 years earlier.

DW – 1 knew the 5<sup>th</sup> Defendant since the time he sold him the land. He came to his home looking for him and asked him to sell him land. He could not remember the year he came. He sold the land for a sum of Kenya Shillings Four Million (Kshs. 4, 000, 000.00). When he sold it, the 2<sup>nd</sup> Defendant was present. The 2<sup>nd</sup> Defendant took a sum of Kenya Shillings Two Million (Kshs. 2,000, 000.00) and him the balance. They were given the payment He informed court that in his family, he had other siblings namely Mwasiti Mohamed and Mishi Mohamed.

DW – 1 stated that he was given the land together with his uncle. They sold the land together with their house. They moved to Kinondo location. The Chief was called Kazimu Rika. His two sisters were married and were in their houses. They were not witnesses in this case. The land was his and the 2<sup>nd</sup> Defendant. He was given the title deed in the year 2003. That was the title he used to sell the suit land to the 5<sup>th</sup> Defendant.

39. On cross - examination of DW – 1 by Mr. Wachira, Advocate for the 6<sup>th</sup> Defendant. DW – 1 stated that his national identity card No. 2198975 borne the names of Swalehe Mohamed Mwakariwa. He inherited the suit land. His father died in in the year 1988. He was given the land because his father had another land. His father gave them the land both his brother, the 2<sup>nd</sup> Defendant and himself. He was the one who went to Adjudication, not his father. He took out his identity card in Diani location. He went to register with those others who were allocated land. There were 12 elders including the Chief, Mr. Mangome and Mr. Salimu etc.

It was the area Chief and committee elders, not land officials. He did not know that the land belonged to the Plaintiff. Problem arose when he was arrested and charged in Kwale. He was acquitted from the criminal case. His advocate Stephen Oddiaga had the documents. He could not remember the year he came to know Mr. Odiaga. He did not remember the date when he was acquitted. The 5<sup>th</sup> Defendant brought to them the sum of Kenya Shillings Four Million (Kshs. 4, 000, 000.00) in cash. He received the money while in the company of his uncle. They split the money on equal basis. They were not witnesses in this case.

He stated that it was only the 2<sup>nd</sup> Defendant and himself who got paid and the payment was in cash. He had no bank account. He could not remember when he was arrested. It was a few months after he sold the land to the 5<sup>th</sup> Defendant. He was taken to court after a day. He could not remember how long the criminal case took before it was concluded. They entered into an Agreement for sale of the land with the 5<sup>th</sup> Defendant. He affirmed there was an agreement of sale. It was taken to him at home. The agreement was with his Advocate. That was all.

40. On cross – examination of DW – 1 by Ms. Moka Advocate for the 4<sup>th</sup> Defendant. DW – 2 held that he was a resident of Kwale. He was born in the suit property. He stated that when they were called to identify the land, nobody turned up to claim it. The Adjudication was done in the year 1974. He was charged in court for obtaining documents of title unlawfully but he was acquitted. When the Chief, the 2<sup>nd</sup> Defendant and himself gave out their names, they had the boundaries of the land confirmed.

On cross – examination of DW – 1 by Mr. Gilbert Advocate for the 5<sup>th</sup> Defendant. DW – 1 confirmed that his three relatives were buried on that land. They used to live on the suit land but relocated to another land. There were graves and a borehole which he dug with his father. He was born and brought up on that land. DW – 1 met the Plaintiff in Kwale for the first time when he was charged. The Plaintiff was not a resident of Galu Kinondo. PW-1 was a Digo.

He stated that when they were given the land, there were elders. He was with his uncle. Later on, they were called to the Chief's office to check if their names were on the list. They found the names were on the list. At that time nobody including the Plaintiff came claiming the land. At the time of adjudication process, nobody came claiming the land. His father was there when they were given the land. It was ancestral land. Later on he was issued with his title deed and he sold it to the 5<sup>th</sup> Defendants. The 5<sup>th</sup> Defendant did a search. Apart from that they constructed. There were no other constructions. They also went to the lands office. He knew the land. There was a house which had been built on it by the 5<sup>th</sup> Defendant. He did not know how the 4<sup>th</sup> Defendant got the land. They were charged for obtaining the documents unlawfully but they were acquitted. He did not know if his father had sold the land to someone else. DW – 1 testified that the land rightfully belonged to 5<sup>th</sup> Defendant whom I sold to. That was all

#### **DW – 2 SHILA LOVERIDGE SWORN AND STATED IN ENGLISH.**

41. DW – 2 testified that she was a holder of a Pass Port bearing No. 639411. She prepared a witness statement dated 6<sup>th</sup> December, 2012 and filed it in Court on 18<sup>th</sup> March, 2013. She also filed a list of documents on 10<sup>th</sup> August, 2015. She produced the list and bundle of documents as Defence exhibit 1. She knew the case before court from the year 2004. She indicated that her husband and her were looking for land with the intention of returning home. They were told that the 5<sup>th</sup> Defendant was selling land and arranged to meet him. It was Plot No. Kwale/Galu Kinondo/676. They asked the 5<sup>th</sup> Defendant if he was selling and had the documents. She asked for original search and title deed. They conducted a search themselves and confirmed that the 5<sup>th</sup> Defendant was the registered and legal owner. They entered into a sale

agreement with. They made payments for the land and stamp duty and search.

She stated after that, they received the title deed in her name. She had the original title deed in her name. Thereafter they undertook a search which showed her name. They fenced the land, planted trees and arranged for the land to be cleared and the building started. Once the building was completed they took residence. She was told someone came to the gate claiming the land was his. She came to know that person as being the Plaintiff herein. That was all.

**42.** On cross – examination of DW – 2 by Mr. Nyachoti, Advocate for the Plaintiff. DW - 2 stated that she first met the 5<sup>th</sup> Defendant in October 2004. They went to his place of work at the Diani Hospital. They were told about it by the person who showed them the land. Before October 2004, Dr. Rekhi had been a stranger to them. They were looking for land generally. She could not remember the person who told them that the 5<sup>th</sup> Defendant was the owner. Other than this land, they had not meet him before.

She was referred to the Power of Attorney from herself to Dr. Rekhi dated 8<sup>th</sup> December, 2004 found on page 16 of her documents. It was after two months after they had met that she gave him the Power of Attorney. She trusted him. The power of attorney was to execute the transfer for the parcel of land. Dr. Rekhi was to sign for both himself and herself. He transferred the land pursuant to this Power of Attorney. The 5<sup>th</sup> Defendant sold her the land in October 2004. She confirmed the title was in his name. She was referred to the Plaintiff Exhibit 3 in 5<sup>th</sup> Defendants list of documents. Her name was on entries No. 5 and 6. Entry No. 1 was the name of Hamisi Ayubu Mwanjita and another and title issued in the year 2003. The land was transferred to 5<sup>th</sup> Defendant on 12<sup>th</sup> May, 2014 and title issued on same date.

She stated that the title was transferred to her on 8<sup>th</sup> December, 2004 and title issued on same day. At page 6 of her bundle of Documents was a Title Deed. She indicated she was familiar with the title Deed in the name of Dr. Kawajeet Singh Rekhi. On entry No. 3 of 12<sup>th</sup> May, 2004 it indicated that was when the title deed was issued. This was the Title Deed that was transferred to her. At pages 18 – 21 of the bundle of documents was a copy of Title Deed in her name which she obtained after it was transferred from Dr. Rekhi. It was Entry No. 5 and 6 in the Green card. She had not filed a case against Dr. Rekhi. She was not aware of the suit ELC No. 174 of 2013. She had no claim against Dr. Rekhi.

**43.** On cross - examination of DW – 2 by Mr. Wachira, Advocate for the 6<sup>th</sup> Defendant. DW – 2 stated that she first visited the suit land in October 2004. She was in company of her husband and the person who showed them the land whom she could not remember who it was. She purchased the land from Dr. Rekhi for a sum of Seventy Thousand Euros (Euros 70,000 Euros). The sale Agreement for the land was on page 12 of her bundle of documents. They entered into the sale agreement on 3<sup>rd</sup> December, 2004, and executed it on same date. She did not remember from where they executed the sale agreement or if they visited a law firm. In December, 2004, she was in both Kenya and United Kingdom. She came to Kenya to sign it. She then left. An application for consent to transfer was made to the Land Control Board. She produced the Letter of consent from the said Land Control Board. She did not have the application for the consent.

On being referred to page 10 of the bundle of documents - the Letter of consent. She confirmed that under Paragraph 1 there was no date on the application. At paragraph (f), the consideration indicated to be 80,000 Euros. It was the same parcel. She would have to check how much she purchased the land for. She remembered they agreed at a sum of 7000 Euros. They communicated with Dr. Rekhi by email. At page 30 of the bundle was an email from her to Dr. Rekhi. It was written on 27<sup>th</sup> January, 2005. Her title deed was dated 8<sup>th</sup> December, 2004. She would be making payments in pounds. She did not have euros.

At page 16 of the bundle was the Power of Attorney. She gave it to Dr. Rekhi, dated 8<sup>th</sup> December, 2004. At page 14 of the bundle of documents was a transfer of land from Dr. Rekhi to herself. It was dated 24<sup>th</sup> November, 2004. She confirmed having signed the transfer in her favour 3 weeks before she gave him the Power of Attorney. She could not remember where she was on 24<sup>th</sup> November 2004. She confirmed that she appeared before Susan Makyoto Advocate. She instructed her lawyer to deal with the transfer of the land. She did not know whose signature it was on a document on page 15 of the bundle of documents. The Letter of Consent at page 10 is dated 10<sup>th</sup> November, 2004. Dr. Rekhi obtained the Letter of Consent a month before. She could not remember whether she attended the Msambweni Land Control Board. She was not told to answer questions. She did not know where Msambweni Land Control Board was. She could not remember what documents she had with her when she went for the consent. At page 11 of the bundle of documents was a certificate of official in name of Dr. Rekhi, dated 18<sup>th</sup> November, 2004. She obtained this particular search after Dr. Rekhi had given her the consent. She conducted several searches. She did not have the other searches now with her. She did remember where she collected her title deed. It was not true she paid nothing. She did not have the bank transaction document. She was a true purchaser for value. She could see the certificate of official search in her documents dated 18<sup>th</sup> November, 2004. She could not remember if she made the search. The next page was an Application dated 19<sup>th</sup> November, 2004. It was not her document. The certificate of official search in her documents was dated 18<sup>th</sup> November, 2004.

**44.** The application in 5<sup>th</sup> Defendant's documents was dated 19<sup>th</sup> January, 2004. This was the sale agreement on (page 12) of the bundle. The acreage was not indicated. She signed the sale Agreement. She looked at the plot number. She did not look at the acreage. She paid 70,000 Euros.

On cross – examination of the DW – 2 by Mr. Gilbert Advocate for the 5<sup>th</sup> Defendant. DW – 2 stated that when purchasing the land, she looked at the title and confirmed it was in the names of Dr. Rekhi. The copy of the Title was at page 6 of the bundle of documents. It indicated the acreage. They walked through the land and saw the beacons. According to the title the land was 0.9 ha. She did not know she was buying 0.9 ha. At page 10 of the bundle was a Letter of Consent from the Msambweni Land Control Board. She did not know why they wrote 8000 Euros. She was not the one who wrote the Letter of Consent.

**45.** From her documents, she had mentioned 90,000 Euros. So she paid extra money for other activities. The purchase price was Euros 7000. The extra was for stamp duty, fencing and other activities. The sale Agreement was drawn by a lawyer, A.A. Amadi & Co. Advocates. There was a search on page 111 of her documents dated 18<sup>th</sup> November, 2004 and signed by a Land Registrar, H. G Sat of numbers 174. It was a

search done in the year 2004. She was aware he was the 3<sup>rd</sup> Defendant herein. At page 22 the document was a search dated 8<sup>th</sup> December, 2004 in her name. There was another search dated 30<sup>th</sup> March, 2007 in her name signed by Land Registrar, M.A. Kai. On page 63 of the bundle of documents was another dated 28<sup>th</sup> July, 2015 in her name. It was absolute title. It was signed by a Land Registrar by name C.K. Ngetich of numbers 212. Mr. C.K. Ngetich was the Land Registrar who testified. He proved that she was the owner of the land in the year 2015. She could not remember his testimony. They met with Dr. Rekhi when her husband and her were looking for land they heard he had land to sell. She never knew him before she purchased the land. She confirmed the land was his. A search was done. She paid for the consideration. She paid for the stamp duty. She purchased the land when it was a bushy and with no fence on it.

She stated that she constructed a building on that suit property and that is where she resided. In the year 2008 she learnt that the Plaintiff was claiming the land. Her worker told her someone came and threatened him and that he would kill the dogs and break down the wall. That person never confronted her. The suit pleadings were left in her house after the shooting of the dogs on the throat. When she was doing this transaction, she would be assisted by her brother in Nairobi and Dr. Rekhi. She gave Dr. Rekhi authority to do what she was required. She had not complained. Everything he did was with her authority. She had never been served with any documents in respect to that land. She had never seen the owner the property apart from during this case instituted in court. She got to know about the criminal case after about 1½ years. She heard the accused persons were acquitted.

46. There the figure indicated was 9000 euros. There were 3 currencies, sterling pounds, euros and Kenya shillings. Currencies kept on changing. All monies for the purchase price had been paid. She was sending money through bank transfer. The person she sent the money would acknowledged receipt of the money. Page 28 of the bundle is a confirmation that the stamp duty and fencing money was added to the purchase money. She confirmed that her brother Sunid was part of the transaction. A.A Amadi & Co. Advocates was doing the transaction for them. She confirmed paying the stamp duty which was Kshs.14000, which was to cover all the costs including the lawyers and fencing charges. At page 29 of the bundle Dr. Rekhi was confirming that he would correct the name on the transfer and the acreage and that he had received the money. It's her husband who noticed the size was 0.9 acres which was missing in the sale agreement. They were also checking to confirm if the money had arrived which Dr. Rekhi acknowledged receipt. When they purchased the land, they conducted an official search. They found out that the title was in Dr. Rekhi's name. They entered into a sale agreement. They obtained consent to transfer. They had a transfer. She had a title in her name. She conducted a search after transfer was in her names. She got a search upto 2015. She noted from the Plaintiff under paragraph 9 that the Plaintiff had pleaded that he acquired ownership in the year 1974. In paragraph 13, he mentioned the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were charged for fraudulent transactions. The particulars of fraud included the 6<sup>th</sup> Defendant, the Attorney General. In their defence, the Attorney General denied that there was any fraud by any of the Defendants.

47. On re - examination of the DW – 2 by Ms. Moka Advocate for the 4<sup>th</sup> Defendant. DW – 2 stated that when she saw Dr. Rekhi he showed her the title deed. She conducted a search. She got a lawyer to do the transaction. She got the land control consent and paid up for the stamp duty. At the end, she got a title deed under her name and did a search after she got title in her name. She paid 7000 euros. She was not the one who wrote 8000 euros. The document was signed by the Chairman of the Land Control Board. The property was transferred to her in December, 2004. They also had discussion about the transfer of the money (page 28). The purchase price agreed on was 7000 euros. That was indicated in the agreement. The 9000 euro at page 30 of the bundle of documents was in order to cater for fencing, stamp duty beacon location, lawyers fees, making a total of 9000 euros. Before she left, she took part in the transaction and left Dr. Rekhi to finalize. Her brother was in Nairobi. She would like the court to dismiss the suit. They were residing on the property and she had the title deed. That was all

DW - 3 Ramadhan Indszumba Mcharo swore and stated in Kiswahili language. DW – 3 stated that he recorded witness statements dated 10/1/ 2013. He wished to adopt the statement as his evidence in-chief in this case. Currently, he worked for Mr. John Loveridge and M/s. Sheila the 4<sup>th</sup> Defendant herein. In the year 2014, he was working as a shamba boy. He knew for a fact that a fence was erected there. He cleared the land and planted the live fence. He was keeping records of those who were constructing. In the year 2005, when the construction was completed, he was employed as a Caretaker. From the time the fence was being put up and the construction was complete, he never heard anyone claim the land. He came to know about this case in the year 2008 when the Plaintiff rang the bell on the gate and asked him about the land. The Plaintiff left but came back and threatened to kill the dogs and demolish the structures thereon. That was all.

There was no cross examination of DW – 3 by Mr. Nyachoti, Mr. Aziz, Mr. Wachira and Ms. Moka Advocates.

On cross – examination of DW – 3 by Mr. Gilbert George for the 5<sup>th</sup> Defendant. DW – 3 stated that he entered the land in the year 2004. By that time, it was a bush. He was still staying on that land. Currently, there were houses in which they were living in. He came from there on that day.

#### **DW – 4 MR. ARWIND NARAN VEKARIA SWORN AND STATED IN ENGLISH.**

48. DW – 4 testified that he recorded witness statement on 2<sup>nd</sup> November, 2015. He adopted the said statement as his evidence in - chief. He stated that he was a businessman in Diani, carrying out general business in construction of buildings. He was chosen as the contractor to build the suit property by Dr. Rekhi. He had not told him who were the owners of the property, He came to know the owners around years 2004 – 2005.

He stated that during the period, he was carrying out the constructions, there was no complaints and they completed the house and handed over the same to the client, Sheila Loveridge. That was all.

There was no cross-examination of DW – 4 by Mr. Nyachoti, Mr. Aziz, Mr. Wachira and M/s. Moka Advocates.

On cross - examination of the DW – 4 by Mr. Gilbert George for the 5<sup>th</sup> Defendant. DW – 4 stated that he was the one who constructed the fence. It was bare land and bushy. He went there for the first time around the year 2004. He finished the construction of the house around the year 2006. During the period he was carrying out construction, nobody came to claim the land. He handed over the property to Sheila Loveridge. When he passed by there, he could still see that the property was in fact.

That was all.

**49. DW - 5 HASHIM GOT SAT SWORN & STATED IN ENGLISH.**

DW – 5 stated that he was the Land registrar currently based at the Land Registry, County of Narok. He had been working for the government of Kenya for the last 35 years. He was posted to Kwale. He reported there on 17<sup>th</sup> December, 2002 from Nairobi Central registry where he was the in-charge of the investigation of documents related to land. He worked in Kwale from 17<sup>th</sup> December, 2002 to the year 2005 when he was transferred to Kisumu Land registry. He was posted to Kwale to take over as Land Registrar from Mr. Mwachanya who was retiring.

He testified that the Galu Kinondo was a registration Section located within Kinondo. It was in Diani Location of the County of Kwale. He knew how adjudication was done. Adjudication was in terms of the provision of the Land adjudication Act, Cap 284 Law of Kenya Within Kwale, the land adjudication process took place between the years 1968 and 1974. He referred to the Plaintiff exhibit 4. It was a certified copy of the Green card opened on 15<sup>th</sup> November, 1974 under Title No. KWALE/GALU KINONDO/676. It was for 0.9 Hectares which was covered under R.I.M. No. 7. It was a freehold property and as contained on Entry No. B (1) dated 15<sup>th</sup> November, 1974, the registered owner according to the record, were Hamisi Ayubu Mwanjita and Swaleh Mohamed Mwakuriwa of P.O. Kinondo.

50. He held that when he found this card, the first entry had not been signed. When the registered owners approached the office for their title deed, he acted by issuing them their titles on 15<sup>th</sup> August, 2003. He testified that by the time he was issuing them with the title, Entry No. 1 had not been signed. Before the title was issued, the first entry had to be signed. There was no other Green card at all because if there was, he would not have signed. He would not have allowed that to happen if there were two concurrent Green cards in the parcel. Therefore he signed both entries but he failed to indicate by counter signing the date of issue of the title. Thereafter, there were several transactions that took place on the suit property.

He confirmed he signed first entry on 15<sup>th</sup> August, 2003. He left Kwale in the year 2005. By then nobody had ever complained about this property until the year 2008 when he was arrested. He was arrested and charged after three (3) months of the above activities. He was charged in Kwale criminal case No. 772 of 2008 The criminal case was Republic – Versus - Swaleh Mohamed Mwakuriwa and 2 Others. The complainant was Richard Kimani. The charges were that they made a document without authority, obtaining registration by false pretense. The criminal case was concluded on 1<sup>st</sup> April, 2010 and the accused persons were acquitted. After the acquittal, he never served with any appeal. In the criminal case, the complaint produced an Adjudication Record. The document produced as Plaintiff Exhibit No. 7 was not an Adjudication record.

51. His testimony was that the Adjudication Record was a prescribed form with a serial number it showed the district, the Adjudication area, the Adjudication Section, the plot Number and the acreage and the owner of the land, and the residential particulars of the land owner. The form was supposed to be signed by the land owner and witnessed by executive officer. The second page was an appeal area. The form was supposed to be from Kwale Land Registry, not Nairobi. If the Plaintiff or any one else wanted, they could apply and be given subject to payment of requisite charges. That was all

On cross – examination of DW – 5 by Mr. Nyachoti, Advocate for the Plaintiff. DW – 5 stated that he worked in the lands office for 35 years. In the year 2002 when he was posted to the Land Registry of Kwale he had worked for 27 years. He was a qualified but a junior officer. He was a competent officer in the year 2002. He appreciated the sanctity of title. He could see the Green card (Plaintiff Exhibit - 3). He confirmed all the signatures thereon were his. He signed Entry No. 1 dated 15<sup>th</sup> November, 1974 on 15<sup>th</sup> August, 2003. There must have been records of the year 1974. The owners appeared in person. He stated they must have been residing at Galu Kinondo. If one proprietor identified himself on that basis, he signed the document. He had no reason to doubt them, though all along he had not known them. He had heard of the criminal cases pending but he knew they were all malicious. His Job group was H. When he was appointed, he joined under job Group D. He knew Mr. Ngetich who came to work at Kwale after he left. He was his Senior in terms of ranking. Currently he worked at the Headquarters in Nairobi. He was shown the Green Card (Plaintiff Exhibit 4). At the time he signed the Plaintiff Exhibit 3, he had not seen the Plaintiff exhibit 4. If he had seen the green card, he could not have signed. The owners came to him and identified themselves. He signed the Entry No. 1 of Green card to validate the record.

52. He informed Court that in the criminal case, he was represented by Paul Alando Advocate. The 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons were represented by Mr. Oddiaga, Advocate. That was not the first time he was encountering Mr. Oddiaga. He had known him before. That was all.

On cross – examination of DW – 5 by M/s. Moka Advocate for the 4<sup>th</sup> Defendant. DW – 5 stated that in the criminal case, there was an adjudication record that was produced. The Plaintiff exhibit 7 was not produced. In the Judgment from the criminal case, it was indicated that the Adjudication record had not been signed. He could sign previous entries to validate the document. That is the practice. When a record had not been signed, a Land Registrar was allowed to sign for continuity purposes. In the criminal case, he gave examples of other parcels that he had signed in the same manner. Some people would wish to leave their titles at Land registry.

He stated that during the Adjudication process, people who resided within the locality were given land and they were shown their boundaries. One had to be present. Erastus Ngarakanya was the director of Adjudication and settlement and was based in Nairobi. If he was adjudicated any land from this process, his name would appear in the Plaintiff exhibit 3. He held that his name was not and did not appear anywhere. He informed court that indeed his name featured in the criminal case that he sold the land to the Plaintiff. Once the Adjudication process was completed, the Land Adjudication records would be sent to Kwale. Adjudication record was a form not a handwritten paper. He refuted that Plaintiff exhibit 7 was not an adjudication record. The Adjudication record was supposed to be executed on the form. For one doing due diligence, one would conduct search at Kwale land registry who had all the records. The only thing he got was the Green card and therefore he signed it in good faith. He could see the search dated 18<sup>th</sup> November, 2004. He signed the search under search No. 1858/2004. It was based on the Green card on record.

The search that was conducted on 8<sup>th</sup> December, 2004. He signed the search confirming entry No. 5 in name of Sheila Loveridge. There was also another search dated 30<sup>th</sup> March, 2007 which was signed by one Mary Kai and confirmed that Sheila Loveridge as owner of the suit land. By then he had left the search dated 28<sup>th</sup> July, 2015 to be signed by C. K. Ngetich. He was a witness. It was in the name of Sheila Loveridge. Kwale/Galu Kinondo records are kept in Kwale, not Nairobi, except a copy of the land Adjudication record which would be kept in Nairobi. All original records were kept at Kwale land registry. For the suit land, the title could be gotten at the Kwale land registry. That was all.

53. On Cross - examination of DW – 5 by Mr. Gilbert George – Advocate. DW – 5 responded by stating that the Item No. 2 in the Plaintiffs list of documents was a certificate of official search dated 6<sup>th</sup> February, 2004. The certificate of search was signed by him. It showed Hamisi Ayubi Mwanjita and Swaleh Mohamed Mwakuriwa were the registered owners. He signed the search as the Land Registrar. He signed the search on 6<sup>th</sup> February, 2004. They knew by then who the registered owners were. He could see the second search in the 4<sup>th</sup> Defendant's list of documents at page 11 of the bundle of documents which he signed on 18<sup>th</sup> November, 2004. It was in the names of Dr. Kawaajet Singh Rekhi. At page 23 of the bundle of documents was a third search done on 30<sup>th</sup> March, 2007 which was signed by Mary Kai. The registered proprietor was Sheila Loveridge and title issued on 8<sup>th</sup> December, 2004. This was a different Land Registrar who confirmed the information. He left Kwale in the year 2005. The 4<sup>th</sup> official search was on page 63 of the bundle of documents was dated 28<sup>th</sup> July 2015 signed by C.K. Ngetich showing the registered proprietor as Sheila Loveridge. This case was filed in 2009. In the year 2015, Mr. C.K. Ngetich confirmed that Sheila Loveridge was the registered proprietor of the suit land. He knew Mr. C.K. Ngetich as a colleague in Nairobi. In the year 2015, Ngetich was the Land Registrar at Kwale.

He stated that the official search emanated from Kwale land registry. He confirmed that all the 4 searches were consistent with the Green card. He testified that as a principle had there been two (2) green cards on record none of them – Ngetich, Mary Kai in the year 2005 nor himself in the year 2004 would have given out the official search. According to him he strongly held there were no two Green Cards on record. If there were, he had powers as the Land registrar to place restriction against the Land. He heard Ngetich state that the Green card he signed was a forgery. He lamented that It was a total contradiction which he did not expect from a Senior Land Registrar. He heard Ngetich testify. He confirmed that he contradicted himself based on the search that were produced. He saw Plaintiff exhibit 3. Entry No. 1 of 15<sup>th</sup> November, 1974 was in the name of Hamisi Ayubu Mwanjita and Swalehe Mohamed Mwakuria, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He was not the one who made the entry No. 1. He only signed entry No. 2. In the year 2003, the green card had already been opened but it had not been signed. He was not the one who opened the card. He was not the one who signed the title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 15<sup>th</sup> August, 2003.

54. The registered owners came to the office, identified themselves and having confirmed their identity , he issued them with the title. The green card was the source of his information that led him sign entry No. 2. The Green card was the source of information for issuance of a search. Under the provisions of the Registered Land Act, Cap. 300 (Repealed), the Green card were a very important document on ownership and encumbrances and if there was any inhibition. Entry No. 3 showed that the property was transferred to 5<sup>th</sup> Defendant. It was transferred to 4<sup>th</sup> Defendant on 8<sup>th</sup> December, 2004 as per Entry No. 5 and as per search issued by C.K. Ngetich. He was referred to Plaintiff's Exhibit 7 which was produced as an Adjudication record. He confirmed seeing Charles Ngetich produce it. He strongly castigated the record for not being dated, signed and not being able to know what it was. He confirmed that an Adjudication form was a prescribed form. He informed court that the same was produced in the criminal case. It lacked some details. He confirmed that it was a finding of the criminal court. Plaintiff exhibit 7 was different from what was produced, during the conduct of land Adjudication. He emphasized that during the Adjudication process, the person ought to be present and identify the boundary of the land.

DW - 5 held that the Plaintiff confirmed that he was not there and did not appear before the adjudication committee. He stated that according to the ruling, the Plaintiff stated he did not know who sold him the land. He had seen the second Green card. It was his first time to see him in court. It was not in the land Registry and he acted on what was there. DW - 5 stated that the first Entry was signed by Noor Mohammed who was Land Registrar, Mombasa.

The 2<sup>nd</sup> Entry was by Ngenyi who was Land Registrar in Kwale and Mombasa. He had never seen any document that showed Mr. Erastus Karanganya as the owner to the suit land. In 1974, he was the Director of settlement and Adjudication. His testimony was that no one could transact or transact in property which was not in the name of the government unless one had authority. If one wanted to transact, one had go to Kwale Land Registry. If one wanted a search, one had go to Kwale.

He stated that if the headquarters wanted anything over this land, they requested it from the Kwale registry. Authoritatively, everything was found at Kwale Land registry. The Land registrar or the court had the authority to cancel a title but one had to be given an opportunity to be heard. According to him/the owner of the suit property was Sheila Loveridge as per the records, unless proven otherwise by the court. He did not personally know Sheila Loveridge. He knew the 1<sup>st</sup> and 2<sup>nd</sup> Defendants because the three of them were arrested and charged together. He knew Dr. Rikhi who had a clinic in Diani. He had no personal relationship. He did everything in compliance with the law. He was acquitted In the criminal case in which he was charged under the provisions of Section 215 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya. That was all

55. On Cross – examination of DW – 5 by Mr. Wachira Advocate for the 6<sup>th</sup> Defendant. DW – 5 responded that after he was acquitted he did not sue the Government of Kenya for the malicious prosecution and unlawful arrest. It was the practice and procedure that one endorsed the entries above before one proceeded with subsequent entries. They had the Land Registrar's handbook. He had to go to practice directions to confirm that one could endorse a blank entry. He had the procedures which are issued every time there were new laws.

When there was a blank entry, one endorsed it before one proceeded to the next entry. It could not left blank. Whatever Mr. Ngetich produced was not Adjudication Record. He did not have any other Adjudication record for this parcel of land. In Plaintiff Exhibit 3, Entry No. 1 was not signed. In this circumstances, he had no doubts. DW 5 stated that there were circumstances when one had doubts, hence do not sign. He remembered there was a time when there was a moratorium for registration of titles for carrying out audit, but not during his time. It was possible for the Plaintiff to have purchased the land before the registration. That was all.

On re – examination of the DW- 5 by Mr. Aziz Advocate for the 3<sup>rd</sup> Defendant. DW – 5 answered by stating that at the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants came and identified themselves to him, the Green card was there. It was his testimony that an unsigned Green card was not strange. He stated that if the Plaintiff had purchased the land, his name could have been indicated as first owner. That was all.

#### **56. DW – 6 DR. KAWALJEET SINGH REKHI SWORN AND STATES IN ENGLISH**

He stated that he was the 5<sup>th</sup> Defendant in this case. He filed a witness statement dated 28<sup>th</sup> August, 2012. He had it adopted as his evidence in Chief in the case. He also produced the 5<sup>th</sup> Defendant's bundle of documents as exhibits. He was also aware having filed a Defence on 13<sup>th</sup> November, 2009.

He stated that he knew the 4<sup>th</sup> Defendant filed a list of documents on 10<sup>th</sup> August, 2015. He also wished to rely on the said documents. He referred to the Certificate of search dated 6<sup>th</sup> February, 2004 in name of Hamisi Ayabu Mwanyita and Swalehe Mohamed Mwakuriwa, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in this case. The document was issued by the Land Registrar, H.G Sat, the 3<sup>rd</sup> Defendant. He also filed document No. 4 a copy of the Green Card. It was also signed by H.G. Sat, the 3<sup>rd</sup> Defendant. The 5<sup>th</sup> document was a transfer signed by Hashim Got Sat, the 3<sup>rd</sup> Defendant. That was all.

57. On cross – examination of the DW – 6 by Mr. Nyachoti Advocate for the Plaintiff. DW – 6 responded by stating that he could see the Plaintiff Exhibit – 3. It was a Green Card in name of 1<sup>st</sup> and 2<sup>nd</sup> Defendants. According to the document, it was issued on 15<sup>th</sup> November, 1974. He could not see any date of signature. The signature are for the same person, one H.G Sat, the 3<sup>rd</sup> Defendant. He confirmed that he was the one who signed the document.

He was referred to the Plaintiff Exhibit No. 4. It was a Green Card dated 15<sup>th</sup> November, 1974 and it is signed. The second column showed the title was issued in the year 1973 and it was signed. The signatures were not the same as those of the Plaintiff Exhibit 3. He produced the transfer in his name.

He could see the last document in his list of documents. It was a title deed issued on 12<sup>th</sup> May, 2004. It was the same title that he transferred to the 4<sup>th</sup> Defendant. It was signed by H.G Sat. This title deed was issued on the basis of the Green Card referred above. He transferred it for 70000 Euros. He bought the property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for a consideration being a sum of Kenya Shillings Four Million (Kshs. 4, 000, 000.00). He saw the Sale Agreement dated 7<sup>th</sup> May, 2004. He was the one who drafted the Sale Agreement. A deposit of a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00) was paid upon the execution of the sale agreement. The sellers received of a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00) jointly. He could not remember when he paid the balance of a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00).

58. He could not remember the person who received it. It was only received by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants at Diani Beach. He later on transferred the land to the 4<sup>th</sup> Defendant. He could see the 4<sup>th</sup> Defendant's documents. At page 14 of the bundle of documents was a transfer. He signed it as the seller of the land on 24<sup>th</sup> November, 2004. He appeared before Messrs. Anne Amadi Advocate on the same day, 24<sup>th</sup> November, 2004.

He was referred to page 15 of the bundle of documents where his signature was he transferred it dated on 3<sup>rd</sup> December, 2004 before Susan Makyotto Advocate. Both the signatures of the transferee and transferor were at pages 14 & 15 of the bundle of documents were his. Before and which he signed, he had known 4<sup>th</sup> Defendant for two months. He could see the document at page 16. It was a Power of Attorney from Sheila Loveridge to him to facilitate the transfer in favour of Sheila Loveridge. It was dated 8<sup>th</sup> December, 2004. He did not know if it was ever registered. He did not know if it was witnessed. He did not know who signed it. He confirmed that he signed the transfer on 24<sup>th</sup> November, 2004. According to the transfer (page 15) the person who appeared before Susan Makyotto was Sheila Love Ridge, but the signature was his.

He was relying on 4<sup>th</sup> Defendant's documents. The title deed at pager 18 was dated 8<sup>th</sup> December, 2004. It was signed by Mr. H.G. Sat, the Land Registrar. It was issued on 8<sup>th</sup> December, 2004. That was the same date the Power of Attorney was issued to him. He started practicing medicine in the year 1984 when he finished the University of Delhi.

59. He started working at the Coast General Hospital from the year 1985. He opened his clinic in Kwale in the year 1990. After a few years, around the year 1995, he started buying land. He had been in court in a number of cases touching on land, Kwale/Galu Kinondo. He had finalized some of the cases in his favour. That was all.

On the Cross - examination of the DW – 6 by Mr. Aziz Advocate for the 3<sup>rd</sup> Defendant. DW – 6 answered and refuted that he conspired with the 3<sup>rd</sup> Defendant to deprive the Plaintiff of his land. He stressed that all the documents he had produced were done officially. He affirmed that he had never used any means to influence those transactions. That was all.

There was no cross examination of the DW – 6 by Mr. Hamisi Advocate for the 4<sup>th</sup> Defendant.

On re - examination of DW – 6 by Mr. George Gilbert Advocate for 5<sup>th</sup> Defendant. DW – 6 stated that at page 14 of the 4<sup>th</sup> Defendant's documents was a transfer of land. It was prepared by the lawyers – Messrs. A.A Amadi & Co. Advocates.

DW-6 emphasized that he appeared before professionals who executed their work professionally. It was correct that he signed in place of Sheila. Sheila was aware he was signing on her behalf. Sheila Love Ridge was the purchaser. She had never complained that he signed on her

behalf. The transfer was registered on 8<sup>th</sup> December, 2004. She instructed him to sign on her behalf. He knew one Mr. Magagaja. Mr. Magagaja used to supply water to his hospital.

He was present when he was paying the purchase price to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He knew both of them. He was not paid part of the purchase price. That was all.

#### **IV. THE SUBMISSIONS.**

60. On 26<sup>th</sup> July, 2021 upon the closure of both the Plaintiff and 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants case as provided for by law, the Honorable court directed that all the parties file their written submissions prior to it rendering its Judgement. Subsequently, all parties obliged accordingly.

##### **A. The Written Submissions by the Plaintiff.**

On 29<sup>th</sup> September, 2021 the Learned Counsel for the Plaintiff the law firm of Messers. Nyachoti & Company Advocates filed their written submissions dated 29<sup>th</sup> September, 2021. The Learned Counsel submitted that the Plaintiff was the legal and absolute registered owner of the suit property having been issued with the title on 6<sup>th</sup> December, 1978. He was allocated the said land title on 15<sup>th</sup> November, 1974. The suit measured 0.9 Ha.

The Learned Counsel contended that not only the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently acquired but also sold the suit property to the 5<sup>th</sup> Defendant on 7<sup>th</sup> November, 2004. Subsequently, they argued that the 5<sup>th</sup> Defendant sold the suit property to the 4<sup>th</sup> Defendant who was currently in occupation of it illegally. They stated that the Plaintiff had set out the particulars of fraud by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants under Paragraph 13 of the Plaintiff *inter alia*:-

i) The 3<sup>rd</sup> Defendant issued title deed/Land Certificate/Certificate of lease to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants when he knew or ought to have known that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants were not the registered owners of the property.

ii) The 3<sup>rd</sup> Defendant conspired with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants to deprive of the Plaintiff his property. The Plaintiff was the original registered owner from the Government of Kenya

iii) The 6<sup>th</sup> Defendant is being sued in his official capacity and in line with the doctrine of vicarious liability as the 3<sup>rd</sup> Defendant was acting within the scope of his employment and/or in course of his employment

61. The Learned Counsel held that the Plaintiff filed his witness statement dated 8<sup>th</sup> October, 2013 which he caused to be adopted and relied on as his evidence in chief during the trial where he was cross examined and re-examined accordingly.

The Learned Counsel further argued that during the trial the Plaintiff produced the original certificate of title deed allocated and issued to him on 6<sup>th</sup> December, 1978 – Plaintiff Exhibit -1 together with a copy of the Green Card that had been issued to him on 15<sup>th</sup> November, 1974 marked as Plaintiff – Exhibit No. 4.

They held that the said Green Card together with title were not challenged at all by any of the Defendants nor their Counsels during the trial. In other words this evidence remain uncontroverted. Besides, they contended that none of the said defendants filed or raised any Counter Claim mounted against the Plaintiff as regards his claim as required by law. They further submitted that the 6<sup>th</sup> Defendants list of Documents dated 16<sup>th</sup> February, 2018 produced the Kwale Galu Kinondo Adjudication List Register which indicated that entry No. 676 was the suit property allocated to the Plaintiff. The said that the adjudication register had a number of allottee listed chronologically therein with the Plaintiff being No. 6 in that order. They held that that land Adjudication register was produced by PW-2 – one Mr. Charles Kipkurui Ngetich who testified on 24<sup>th</sup> November, 2019 during the trial PW-2

62. The Learned Counsel averred that the 6<sup>th</sup> Defendant filed a witness statement of one Kennedy Githunguri Njenga dated 16<sup>th</sup> February, 2018 and filed in court on 21<sup>st</sup> February, 2018 specifically under Paragraph 2 it read:-

***“That is accordance with the Land Adjudication records available at the District Land Adjudication and settlement office Kwale Galu Kinondo Adjudication register (Entry No. 676) indicates that the parcel of land was recorded as having been first registered in the name of Richard Kimani through adjudication process. Subsequently the same records were forwarded to the Director of Land Adjudication and Settlement after closure of the Register without objections by any of the Defendants.”***

Additionally they argued that the evidence by the two (2) witnesses being PW – 1 and PW-2 were not sufficiently controverted or challenged at all, either by way of documents or during cross examination of the said witnesses a position which stood in favour of the Plaintiff and his claim.

The Learned Counsels further analyzed the filed Defences and the witnesses statements together with the bundle of documents and in summary stated their positions as follows:-

(a) They were mere denials without facts to controvert the Plaintiff’s claim as set out.

(b) The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed 1 page witness statements dated 28<sup>th</sup> July, 2015 did not offer any answer to the Plaintiff's claim as set out.

(c) The 4<sup>th</sup> and 5<sup>th</sup> Defendants – only held she was an innocent bona fide purchaser for value and was not aware of any fraud and therefore entitled to the suit property. They argued that this does not answer the Plaintiff's claim.

The Learned Counsel opined that the 6<sup>th</sup> Defendant who was the custodian of the title deed fully supported the Plaintiff's claim.

The Learned Counsel urged this court to find the testimony of the 2<sup>nd</sup> and 5<sup>th</sup> Defendants on how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transferred the suit property to the 5<sup>th</sup> Defendant being full of contradictions particularly on how the transaction was undertaken, how the payments of the purchase price was done, the mode of payment and the manner in which the transaction was concluded – as a clear indication of the fraud that was committed by the Defendants on the suit property.

The Learned Counsel in summary submitted as follows:-

(a) The Plaintiff's title was first in place – the registration having been done on 6<sup>th</sup> December 1975 compared to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants done on 15<sup>th</sup> November, 2003 and that of 4<sup>th</sup> Defendant's title which was a forgery.

(b) The Plaintiff's title was not challenged hence its authenticity and validity was not questionable at all.

(c) The Plaintiff's green card – Plaintiff Exhibit – 4 was equally neither challenged and/or controverted.

(d) The Documents by the Plaintiff and the testimony by PW-2 who is the custodian of the title to land was categorical that the Plaintiff was the lawful owner of the suit land.

To buttress their case they relied on several authorities being:- **Arthi Highway Developers Limited – Versus - West End Butchers (2015) eKLR Benja properties Limited – Versus - H.H. Dr. Syenda Mohammed Burhaunudin Salied & 4 Others (2015) eKLR and Mangrove Investments Ltd. – Versus - The Attorney General & Another (2020) eKLR.**

In the long run the Learned Counsel averred that the Plaintiff had established and proved his case on a balance of probability as required by law and entered against the defendants and to his favour as prayed in the Plaint thereof.

#### **B. The Written Submissions by the 3<sup>rd</sup> Defendant.**

63. On 22<sup>nd</sup> October, 2021 the Law firm of Messrs. Aziz and Associates for the 3<sup>rd</sup> Defendant filed their written submissions dated 19<sup>th</sup> October, 2021. They commenced their submissions by raising four (4) fundamental issues for consideration and determination by this Honorable Court. There were:-

(a) Whether the Plaintiff was the legal proprietor to the suit land (b) whether the 3<sup>rd</sup> Defendant acted fraudulently jointly with the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants (c) Whether the 3<sup>rd</sup> Defendant ought to have been sued in his personal capacity (d) Whether the 4<sup>th</sup> defendant was an innocent purchaser for value. In response to these it was their argument that by the time the 3<sup>rd</sup> Defendant was issuing the title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the green card for the suit land had already been issued and was in the respective file – Plaintiff Exhibit – 3. They held that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants requested to be issued with the title and it was done by the 3<sup>rd</sup> Defendant. They noted that the entry No. 1 had not been attested in the 3<sup>rd</sup> Defendant's capacity as the Land Registrar whereby he proceeded to sign the said entry and issued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the title deed and since there had been no complaint forwarded to him at the time.

(b) The 3<sup>rd</sup> Defendant further testified that he executed and/or altered the green card and issued title deed on 15.8.2003 for both entry Nos. 1 and 2 but out of human error failed to indicate the date of attestation at Entry No. 1 since at the time Entry No. 1 was made he had not been the Land Registrar in Kwale.

They averred that the Plaintiff produced as part of his evidence another green card which had his name as the 1<sup>st</sup> registered owner. It was as at 15<sup>th</sup> November, 1974 and title issued on 6<sup>th</sup> December 1978 but which green card was not available at the time the 3<sup>rd</sup> Defendant issued the title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Hence, according to the counsels all actions by the 3<sup>rd</sup> Defendant were done in good faith and in his capacity as the Land Registrar of Lands at the time in Kwale. The Learned Counsel held that the Plaintiff further produced in evidence a copy of a page as extracted from the Register. He alleged it was part of records kept at the Land Adjudication and Settlement office Kwale Galu Kinondo Adjudication Entry No. 676 indicated his names However the Learned Counsel argued that the Plaintiff failed to produce the register itself or a forwarding letter from the Land Adjudication and Settlement office supporting that single page. In any case by the time the 3<sup>rd</sup> Defendant was issuing the title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants there had been no complaint or dispute whatsoever concerning the said parcel of land. Their contention was that had this happened it would have warranted the 3<sup>rd</sup> Defendant to have requested for a clarification on the authenticity of the Land Adjudication records from the office of the Land Adjudication and Settlement (DLAO) for this reason, they opined the title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants became the 1<sup>st</sup> Registration. The Learned Counsels noted the inconsistency and contradiction emanated from the Plaintiff's testimony in court. These were that he had no sale agreement duly executed between himself and the person who sold him the land, failure to know the physical location of the suit land, failure to be present during the land adjudication process, failure to sign the land Adjudication documents, only seeing the property for the first time in the year 2004 and noting that someone was undertaking some development on the suit land but only filed the instant suit in the year 2009.

64. The Learned Counsel contended that the 3<sup>rd</sup> Defendant submitted that had the other Land Registrars noted the existence of another green card on the same suit property definitely they would have caused for investigations and even registered a restriction on it. They would never have dealt with it at all but the fact that there were four (4) official searches conducted by the 4<sup>th</sup> Defendant over the same property on diverse dates and under the two Land Registrars all indicating the legal and registered owners to the suit property and issuing the searches it showed the Plaintiff was not the legal owner to the suit land and he ought to have been investigated on how he obtained his title and the green card he produced in court.

On the issue as to whether the 3<sup>rd</sup> Defendant acted fraudulently jointly with the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Learned Counsel submitted that The 3<sup>rd</sup> Defendant denied having acted fraudulently jointly with the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants to deprive the Plaintiff of the suit property as alleged by him. They held that by the time the Plaintiff filed the Civil Suit, the 3<sup>rd</sup> Defendant had been arrested and charges preferred against him in the Criminal Case No. 772 of 2008. In the long run the 3<sup>rd</sup> Defendant was acquitted of all the charges under the provisions of Sections 215 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. On 1<sup>st</sup> April 2010 and there had been no appeal preferred by the Plaintiff against the said judgment making the acquittal unchallenged.

65. Finally, the Learned Counsel posed as to whether the 3<sup>rd</sup> Defendant ought to be sued in the instant civil case in his personal capacity. To them the answer to the query was negative. They relied on the provisions of Section 36 of the Registration of Documents Act Cap. 285 which provided as thus:-

**“The Principal Registrar shall not be liable to any suit, claim or demand by reason of anything in good faith done or omitted to be done in his official capacity”.**

They submitted that the 3<sup>rd</sup> Defendant being the Land Registrar at the time and being a Civil Servant he ought not to have been sued in his personal capacity for action done in the course of his duty and who acted in good faith. Besides, having been acquitted of any wrong doing in the Criminal Case. Furthermore, they argued the Hon. Attorney General had been sued to act on behalf of the Ministry of Lands and Settlement and hence was prejudiced to be suing the 3<sup>rd</sup> Defendant at the same time.

They held the suit against the 3<sup>rd</sup> Defendant was malicious misplaced and an abuse of the due process of law and facts all aimed at embarrassing him in the public domain and an attempt to intimidate him whatsoever.

In the final analysis, the Counsels for the 3<sup>rd</sup> Defendant herein held that the plaintiff had failed to prove his case and the same should be dismissed with costs to the 3<sup>rd</sup> Defendant.

#### **B. The Written Submissions by the 4<sup>th</sup> Defendant.**

66. On 19<sup>th</sup> October, 2021 the Law Firm of Messrs. H.M. Lugongo & Company Advocates for the 4<sup>th</sup> Defendant filed their written submissions dated 19<sup>th</sup> October, 2021. The Learned Counsels held that their submission fell with the following issues for courts consideration and determination. These were:-

- (a) What was the burden of proof, who bore that burden and what was the standard of required in this case?
- (b) Whether the Plaintiff satisfactorily discharged the burden of proof
- (c) Whether the 4<sup>th</sup> Defendant had discharged her evidential burden
- (d) Who was the lawful owner of the suit property and what were the appropriate reliefs in the circumstances.

In the essence, they submitted on the burden of proof who bore it – between the Plaintiff and the 4<sup>th</sup> Defendant who had satisfactorily discharged the evidential burden and who was the lawful owner to the suit property. The Learned Counsel submitted that by dint of Section 107 of the Land Registration Act 2012, the law applicable to the title for the 4<sup>th</sup> Defendant issued in the year 2005 was the Registered Land Act Cap 300 (now repealed) – the relevant Provisions being Sections 27, 28, 37 and 143 of the Act.

67. They held that under the provisions of Section 107 of the Evidence Act Cap 80 and Order 2 Rule 4 of the Civil Procedure Rules 2010 claims arising from fraud ought to be specifically pleaded and strictly proved. It was not enough for the Plaintiff to have pleaded fraud. The Plaintiff ought to have tendered evidence that proved each and every particular of fraud to the satisfaction of the Honorable Court. The Learned Counsel averred that the allegation was that of fraud which was a very serious one and the onus of proof was much heavier in this case than in an ordinary civil case.

The Learned Counsel argued that the Plaintiff who pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the suit land to the 5<sup>th</sup> Defendant who in turn sold it to the 4<sup>th</sup> Defendant and that all these transaction by the Defendants were meted by fraudulent means and that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants while the 3<sup>rd</sup> Defendant was generally accused of issuing the green card and the title to the Defendants with knowledge that the Defendants were not owners were all unfounded and baseless. The 6<sup>th</sup> Defendant was sued vicariously as the legal representative of the 3<sup>rd</sup> Defendant.

68. They held that PW-1 the Plaintiff seem to be in full contradiction while on the one hand he stated to have acquired the suit land through land adjudication process. At the same time, the Plaintiff stated to have purchased it from Mr. Erastus Karanganya for a sum of Kenya

Shillings Five Thousand (Kshs. 5,000/=) an amount which they opined was exceedingly low. This is glaring inconsistency according to them. On the purchase of the land from Mr. Erastus Karanganya the Counsels relied on the provisions of Section 3 (3) of the Law of Contract Act Cap 23 of the Laws of Kenya where it was trite law contracts for disposition of interest in land must be in writing signed by the parties and witnessed; They further invoked the provisions of Section 6 (1) of the Land Control Act Cap. 302 as from the facts it was not clear when the purchase transaction took place – was it before or after the land adjudication process? These were not clear facts as - The Learned Counsels contended that the Plaintiff conceded – he entered into and completed the purported purchase in Nairobi before seeing the land itself – he did not know the previous owners, he could not produce the written contract for the sale of land between him and Mr. Karanganya – he had no evidence of the payment of Kenya Shillings Five Thousand (Kshs. 5,000/=) as a purchase price, he had not Letter of Consent from the Land Control Board, he had not paid the stamp duty, he had no witnesses to the transaction and that it was the 4<sup>th</sup> Defendant who had been in occupation of the suit land as the Plaintiff had never taken possession of the suit land. In the final analysis, the Counsels for the 4<sup>th</sup> Defendant held that the Plaintiff had never bought the land from Mr. Erastus Karanganya. To buttress their point they relied on the cases of:- **Daudi Ledama Morintat – Versus - Mary Christine Karie & 2 Others (2017) eKLR** and **David Sironga Ole Tulai – Versus - Francis Arap Muge & 2 Others (2014) eKLR**.

69. The Learned Counsels submitted that on the alleged acquisition of land through the land adjudication proved by citing the Land Adjudication Act Cap 284 – as reiterated by the evidence of PW -2 and DW – 5 – in particular the provisions of Sections 13, 19, 23 of the said Act which spelt out clearly the claims made out of the adjudication of land process, the dispute arising thereof and the resolution mechanism involved, the record keeping and management aspects and the appellate structures and processes. They stressed that the Plaintiff admitted that he handled all transactions for the land in Nairobi, without visiting the suit property – where he resided. He never appeared before the Land Adjudication Committee and that he even never knew if the said committee existed and hence he was never present to point out his boundaries neither did he send any representative. He did not know the chairman or any of the members of the committee, nor paid a sum of Kenya Shillings Sixty (Kshs. 60/=) and collection of the land certificate which he did in Nairobi. He never had any receipt for the Kenya Shillings Sixty (Kshs. 60/=) he alleged he paid. The Counsels held that the Plaintiff conceded further not having signed the adjudication record. They held that the Plaintiff failed to comply with the requirements by the provisions of the Land Adjudication process and Land Adjudication Act, Cap 284 of the Laws of Kenya.

70. On the allegation of the Defendants having acquired their title deeds fraudulently held the Learned Counsel that he only visited the land and erected a fence in the year 1974 but failed to avail any evidence of his possession/occupation of the suit property. He neither called any witness to prove these facts nor stated what due diligence he engaged in prior to purchasing the land.

The Learned Counsel referred to the Criminal case – SRM No. 772 of 2008 which the Plaintiff lodged in the trial court against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which case after hearing they were acquitted thereof on 1<sup>st</sup> April, 2010. They used the judgment as their evidence in this instant civil case. The Learned Counsel noted that - The Plaintiff stated he bought land from Mr. Erastus Karanganya in Nairobi without seeing the land. On another stance, he stated having bought it after the adjudication exercise, and the title he showed was the first registered owner upon adjudication although he did not appear before the land adjudication committee and was not present during the land adjudication exercise. The Counsel for the 4<sup>th</sup> Defendant held that the Plaintiff was not sure whether the suit land was an adjudication area or private land; However the adjudication record he produced showed that he bought the land from someone who sub-divided it and was selling it in portions.

Mr. Mohamed Jembe, the then Land Registrar Kwale testified that it was difficult to tell which green card was the correct one.

The Learned Counsel relied on the evidence of PW-2 who though has stated that the Plaintiff's title seemed to have been issued in first instance and an earlier title took precedence, on cross examination by the 3<sup>rd</sup> Defendant's advocate PW-2 readily accepted that the green card bearing the 4<sup>th</sup> Defendant's as owner of the suit land had no errors on the face of it. PW - 2 further held that it was not illegal for a title deed to be collected years after issuance and that the Registrar who was present during collection would have to sign the entries on the green card. He admitted that the extract of what he had presented was the adjudication record had not been signed, and locked key information. All the records and transaction concerning the suit property were supposed to be done at the Kwale district Registry and it would be irregular for a green card to be opened, entries made and a title deed for the suit land to be issued and collected in Nairobi. He explained that the custodian of the relevant documents in the case was the Kwale Land Registrar. The best person to produce documents on the property was the Kwale Land Registrar. He admitted that it was irregular for the Land adjudication records for Kwale to be produced at Nairobi. To buttress their point they relied on the case of:- **“Court of Appeal Munyu Maina – Versus - Hiram Gathiha Maina (2013) eKLR where court held:-**

**“When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how the acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register” and Huber L. Martin & 2 others –Versus- Margaret J. Kamau & 5 Others (2016) eKLR.**

71. The Learned Counsels emphasized and reiterated that the Plaintiff's testimony on how he acquired his title deed was full of contradictions and wide discrepancies and brought aspects of credibility. On this point they relied on the Court of Appeal decision of **Coast Water Services Board – Versus - Juma Abdalla Vitu & 4 Others (2018) eKLR**. Where Court was faced in a similar situation.

While reacting to the submission by the Plaintiff to the effect that his title could not be challenged being a first registration and issued as a first registration they – relied on the Court of Appeal decision of **Munyu Maina –Versus - Hiram Gathiha Maina (2013) eKLR** where the court termed argument fallacious thus:-

**“The Respondent contends that his title to the suit property which is a first registration is absolute and indefeasible we agree that the Respondents title is a first registration however his argument is fallacious. Section 27, 28 and 30 of the repealed Registered Land Act (RLA) Cap 300 provide exceptions to indefeasibility of title”**

They argued that the Principles of Indefeasibility of title did not apply where the title was found to have been issued fraudulently, irregularly or through unlawfulness. Further it is their contention that the 4<sup>th</sup> Defendant had been in possession and/or occupation of the suit property to date.

The Learned Counsels argued that the 4<sup>th</sup> Defendant had discharged her evidential burden to disprove the Plaintiff's evidence and justify her case as follows:-

(a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants testified that they were the original owners of the land and their parents and grandparents were born and buried there and later on sold to the 5<sup>th</sup> Defendant as they moved to a place called Kinondo.

(b) The root of the 4<sup>th</sup> Defendant title was the Land adjudication process attended by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. There was nothing fronted by the Plaintiff to suggest that the title was fraudulently and irregularly done.

(c) The acquisition of title by 5<sup>th</sup> Defendant – DW -6 – The 5<sup>th</sup> Defendant acquired the title from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the year 2004 after conducting due diligence. He paid up a consideration of the purchase price of a sum of Kenya Shilling Four Million (Kshs. 400,000) after entering into a sale agreement with them. Later on in the year 2005 he sold it to the 4<sup>th</sup> Defendant for 70,000Euros.

(d) The Testimony by the 3<sup>rd</sup> Defendant Hashim Got Sat – DW – 5 who was the Land Registrar Kwale then – from years 2002 to 2005 was extremely exhaustive and convincing. He acknowledged the Plaintiff Exhibit - 3 as the green card bearing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the 1<sup>st</sup> Registered legal and absolute owners to the suit land. Upon the completion of the adjudication process, he explained that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants approached him for the issuance of title deed. He admitted that the first entry had not been signed. He decided to sign it in order to pave way for the next transaction as was the normal practice for the Land Registrars in the given circumstances. He castigated the Plaintiff Exhibit – 7 as according to him it was not an adjudication record but a mere list. It should have been a prescribed form with a serial number, showing the district adjudication area, the adjudication section, plot number, acreage, land owner and residential particulars of the land owner. It's supposed to be signed by the Chairman and the land owner and witnessed by the Executive officer. The Second pager was the appeal section. The form was supposed to be kept and obtained at DLAO Kwale and not Nairobi as the case herein.

72. Finally, the Learned Counsels for the 4<sup>th</sup> Defendant submitted that it was the 4<sup>th</sup> Defendant who legally and absolutely owned the suit property. They challenged the Plaintiff for apart from dangling the title deed and the green card he failed to prove on the process upon which he acquired the title deed and that he never participated in the Land adjudication process. They stated the umpteenth times, that the Plaintiff's title and green card were all acquired from Nairobi and not Kwale Lands Registry as required by law. They distinguished all the authorities relied on and submitted by the Plaintiffs. And, mostly on the grounds that appropriate relief could be granted even if not pleaded based on the case of **Odd Jobs – Versus - Muhia (1974) EA 476**.

In concluding their submissions, the Learned Counsels for the 4<sup>th</sup> Defendant urged the Honorable Court to grant the following reliefs:-

(a) Dismiss the Plaintiff's case.

(b) Declare the 4<sup>th</sup> Defendant as the lawful owner of the suit property.

(c) Declare the Plaintiff's land certificate to be unlawful having been acquired through fraud or mistake.

(d) Direct the Plaintiff to surrender his land certificate to the Land Registrar in Kwale for cancellation.

(e) Direct the Land Registrar, Kwale to cancel the Plaintiff's title and to rectify the records in order to reflect the 4<sup>th</sup> Defendants as the owner of the suit property.

(f) To award the costs of this suit to the Defendants.

## **B. The Written Submissions by the 5<sup>th</sup> Defendant**

73. On 21<sup>st</sup> October, 2021 the law firm of Messrs. George Gilbert Advocates for the 5<sup>th</sup> Defendants filed their written submissions dated 19<sup>th</sup> October, 2021. The Learned Counsels submitted and urged first and foremost that the statement of one Kennedy Githunguri Njenga dated 16<sup>th</sup> February, 2018 allegedly by the Plaintiff was never served upon them and the witness never testified hence it be expunged from records. The Learned Counsels held that the Plaintiff produced a title to the suit property issued on 6<sup>th</sup> December, 1978 (Plaintiff – Exhibit 1) and Green Card (Plaintiff – Exhibit -4) and was curiously supported by the Attorney General – the 6<sup>th</sup> Defendant during the hearing. They submitted that it was curious because the Attorney General from its filed Defence or through PW – 2 = Mr. Charles Kipgeach Ngetich made about turn and supported the Plaintiff's case without amendment of their pleadings whereby they had denied all the claims of fraud and sought the Plaintiff's suit to be dismissed with costs. Additionally, they averred that it was not clear why a witness had to come from Nairobi to testify on matters related to Kwale Land Registry in Kwale. They argued that the Plaintiff testified that he visited the land in the year 2004 and found construction works going on to the suit land. He never sought an injunction order and never filed a suit to restrain or prevent that act from proceeding until the year 2009 – 5 years later on.

74. The Learned Counsel averred that the Plaintiff extensively submitted that he obtained the suit property through land adjudication which

again seemed to contrast from his evidence that he bought it from Mr. Erastus Karaganya who never testified nor recorded any witness statement. The Learned Counsels in summary brought out the following features emerging from the cross examination of the Plaintiffs by the Defendant's Counsels and other evidence adduced by other witnesses during the trial. These were:-

- (a) The Plaintiff obtained the title and adjudication records from Nairobi Land Registry and not Kwale Land Registry.
- (b) By the time he obtained the title he had never seen the land.
- (c) He bought land at a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=) from Mr. Karaganya and whom he never saw.
- (d) No record of Mr. Erastus Karaganya, an employee of Ministry of Lands was shown to him owning the suit land and as he never testified.
- (e) No evidence of any sale agreement between Plaintiff and Mr. Karaganya was produced.
- (f) No evidence of any official search transfer, payment, stamp duty produced by the Plaintiff.
- (g) The Plaintiff was not a local resident in Kwale region.
- (h) The Plaintiff was never present during the Land Adjudication process nor did he appeared before the Land Adjudication Committee.
- (i) He only went to the land in the year 2004 when he saw it for the first time.
- (j) The Plaintiff confirmed it was the 4<sup>th</sup> Defendant in occupation and possession of the suit land.
- (k) The Plaintiff was a complainant in the Criminal case SRM No. 772/2008 and a judgment was delivered on 1<sup>st</sup> April, 2010 acquitting the three (3) accused persons who are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the instant case.
- (l) PW – 2's evidence was that the Plaintiff's title was earlier and should take precedence. Plaintiff Exhibit – 3 does not exist in their records but later changed the story that he thought it was a case of double registration and produced the Land Adjudication record – Plaintiff exhibit – 7. Later he held the Land Adjudication record was not signed by the Plaintiff and had no serial numbers. The owner must be present during the adjudication process.
- (m) PW -2 conceded that he never produced the Land Adjudication register. Plaintiff – Exhibit 7 did not have registration block numbers no list of beneficiaries, no chairman signatures, no list of Committee members, and their signatures, no list of eminent persons, it was irregular to obtain records for Kwale Land registry from Nairobi Land Registry. The Land Adjudication Register was available in Kwale. The Land Register for Kwale then – 3<sup>rd</sup> Defendant would know the proper green card to be used by then. The 3<sup>rd</sup> Defendant, testified and held the issuance and collection of title has no effect in law.
- (n) 1<sup>st</sup> Defendant was born on the suit land and a resident of Kwale. His grandmother, grandfather and uncles were buried on the suit land. He sold the land to the 5<sup>th</sup> Defendant with their graves and his house. He dug bore holes on it and moved to a place called the Kinondo location. They were present during Land Adjudication process and fully participated in identifying the boundaries. In the year 1974 they appeared before the Chief and village elders whom he names. There was no objection and they were given a number. They were given documents to await title which they obtained in 2003. The Plaintiff was not a Digo. He was not present.
- (o) The Evidence by the 3<sup>rd</sup> Defendant – Hasham Got Sat as elaborate and valuable:-
  - (i) He was the Land Registrar Kwale in the years 17.1.2002 – 2005.
  - (ii) The documents produced by PW – 2 was not Land Adjudication records Plaintiff – Exhibit 7 as it was not a prescribed form. It was available at Kwale Land Adjudication Offices.
  - (iii) The green card he found at Kwale Land Registry was Plaintiff Exhibit 3 which had names of 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the 1<sup>st</sup> registered and absolute owners.
  - (iv) In the Land Adjudication process the claimant had to be physically present to identify his land and boundaries before the land Adjudication Committee. The area chief and villages elders had to be present to confirm ownership and resolve any dispute.
  - (v) The names of Erastus Karanganya was not on records not the green card as the 1<sup>st</sup> owner of the land. He had no capacity to sell it to the Plaintiff. There was no evidence of sale of land.
  - (vi) He did not open the green card – Plaintiff Exhibit 3 as he found it open devoid of any signature – He issued them with the title deeds. The practice and procedure demanded of him to endorse the same before he would proceed with the next entry. He signed the 1<sup>st</sup> entry dated 15<sup>th</sup> November, 1974 on the 15<sup>th</sup> August, 2003 to validate the record and for continuity

and in good faith.

(vii) There were never two green cards for the suit property as the three (3) Land Registrars previously would have seen them and registered restrictions against the property.

(viii) PW-2 claimed that Plaintiff – Exhibit 3 was a forgery he would not have issued and signed a search reflecting the contents of the said green card as he did on 28<sup>th</sup> July, 2015.

(ix) The Land Adjudication record produced by the Plaintiff in the criminal case Plaintiff Exhibit 2 and the one produced by the Plaintiff in the instant were different, inconsistent and in conflict in themselves and did not qualify as official government records. They were not the same.

The 4<sup>th</sup> Defendant bought land from the 5<sup>th</sup> Defendant as an innocent bona fide purchaser for valuable condition and notice. She was in occupation to date she after conducted all due diligence and paid up all dues, while the 5<sup>th</sup> Defendant bought land from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant after observing all the due diligence and vide a Power of Attorney sold the land to the 4<sup>th</sup> Defendant.

The Learned Counsels submitted extensively on the credibility of the evidence by the Plaintiff, the PW – 2, Mr. Charles Kipkirui Ngetich and the Hon Attorney General the 6<sup>th</sup> Defendant all summarized as follows:-

**(a) The Credibility of the Plaintiff.**

They held that the Plaintiff's evidence was conflicting and unreliable as stated above on how he obtained the land – through adjudication process and/or purchase from Mr. Karanganya at Kenya Shillings Five Thousand (Kshs. 5,000/=), production of the land Adjudication records Plaintiff- Exhibit – 7 which was different from what he produced in the criminal case, item failing to appear before the Land Adjudication Committee and the entire Adjudication process, claiming to have visited the land in the year 1974 but in the criminal case stating he had never visited it nor known the person who sold him land, obtaining the Land Adjudication records and the green card from Nairobi Land Registry and not Kwale Land Registry where the records for these area or locality were kept.

The Learned Counsel for the 5<sup>th</sup> Defendant's contention was that the Plaintiff's case was based on fraud. It is trite law that he who alleges must prove his case. The test for fraud was beyond any reasonable doubt the Plaintiff failed to do so.

**(b) The Credibility of PW - 2**

The Learned Counsel argued that he confirmed that all records for Kwale region were found at Kwale Land Registry yet he obtained them from Nairobi, Him travelling from Nairobi to testify in Mombasa on behalf of the Land Registrar who was in Kwale – the custodian of all the records, the Green Card P. Exhibit 3 was forged and yet he issued and signed a search dated 28.7.2015 confirmed details from the same green card. Being the Attorney General's witness yet he supported the case for the Plaintiff. Clearly brought out conflict of interest.

**(c) Credibility of the Attorney General – 6<sup>th</sup> Defendant**

The Learned Counsel submitted that the 6<sup>th</sup> Defendant were bound by their own pleadings. They filed a Defence denying all the particulars of fraud and sought for the Plaintiff's case to be dismissed but again summoned PW - 2 who seem to support the Plaintiff's case.

By and large, the Learned Counsel contended that the following evidence had remained unchallenged and uncontroverted throughout the trial. These were:-

(a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's resided in the suit property and only left it in the year 2003 when they sold it to the 5<sup>th</sup> Defendant.

(b) The Plaintiff never visited the suit property before he purchased it and never did any due diligence at all and was never present during the Land Adjudication process. He did not know who sold it to him.

(c) There were searches conducted and consistently all produced green cards by the 3 Land Registers with the same results Plaintiff Exhibit – 3 – 6<sup>th</sup> February, 2004 – showing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as being owners, from 18<sup>th</sup> November, 2004 showing Kawalfeet Singh Rekhi 5<sup>th</sup> Defendant as owner from 30<sup>th</sup> March, 2007; confirming Sheila Loveridge as owner. It was not in dispute that the searches emanated from the Green Cards. Based on the above consistencies on the searches and Plaintiff Exhibit – 3, the particulars of fraud as enumerated on the Plaintiff could not stand. Thus, they argued that the Plaintiff had failed to prove the allegation of fraud. They relied on the decision of **Nyagata Guto – Versus - Maxwell Okemwa Mogere and Another (2011) eKLR** and on the double allocation of title deeds as advanced by PW-2 and the root of title deed they relied on the decision of **Hubert L. Martin & 2 Others – Versus - Margaret K. Kamar & 5 others (2016) eKLR**. Where they argued the Plaintiff failed to show the foundation of his title deed – whether he bought it or acquired it from the land Adjudication process, as opposed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having acquired the title from inheritance and the land adjudication process which they actively participated in and had been well demonstrated from the evidence adduced. They held that the 4<sup>th</sup> and 5<sup>th</sup> Defendants had a genuine title deed having acquired it with the full compliance and adherence with all the prerequisite processes and procedures – the Land Control Board consent, the transfer and payment of statutory dues. They further argued that the Plaintiff's documents Plaintiff – exhibit 1 marked as **"Land Certificate"** was in doubt – irregular and illegal. They argued that the Defendant's documents were consistently known or described as **"Title Deed"**. All these emanated from the provision of Section 32 of the Registered Land Act Cap. 300 (Now repealed) the contemplated issues of documents termed either **"Title Deed" or a "Certificate of Lease"**. On the contrary the Learned

Counsels for the 5<sup>th</sup> Defendants argued that there was no such a document contemplated under the law or the Registered Land Act, Cap. 300 (Repealed) known as **Land Certificate**” as produced by the Plaintiff and PW - 2.

In the long run they prayed that the Plaintiff suit be dismissed with costs awarded to the 5<sup>th</sup> Defendant.

#### **IV. ANALYSIS AND DETERMINATION**

75. I have critically read and analysed all the filed Pleadings, evidenced adduced by all the witnesses summoned by both the Plaintiffs and the Defendants, the articulate and robust filed written submissions, the cited authorities by all the parties hereof and the relevant provisions of the law.

In order to arrive at an informed, just and fair Judgement hereof, I have frame the following salient issues for consideration. These are:-

***a) Whether the Plaintiff is the absolute and legally registered proprietor to all that parcel of land known as Land Reference Numbers KWALE/GALU KINONDO/676 with all the indefeasible title, rights and interest vested on him by law.***

***b) Whether this Honorable Court has jurisdiction to deal and handle on any matter pertaining to the Claim, the administration and management emanating from, in connection with and related to the land Adjudication process and/or the statutory provisions founded in the Land Adjudication Act, Cap. 284 of the Laws of Kenya.***

***c) Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants acquired all that parcel of land known as Land Reference Numbers KWALE/GALU KINONDO/676 illegally, irregularly and wrongfully and hence should the title deed issued to them be cancelled and the Land Register be rectified forthwith.***

***d) Whether the 3<sup>rd</sup> Defendant, the then Land Registrar Kwale by dint of being a Civil Servant was liable to any claim or demands by reason of anything done in good faith or executed or omitted to be done in his official capacity.***

***e) Who will bear the Costs of the suit.***

**ISSUE No. a). Whether the Plaintiff is the absolute and legally registered proprietor to all that parcel of land known as Land Reference Numbers KWALE/GALU KINONDO/676 with all the indefeasible title, rights and interest vested on him by law.**

76. Before indulging onto indepth analysis of this case leading to a just and fair judgment, it is imperative that I first and foremost recount on the brief facts of this case. From the filed pleadings, the oral and documentary evidence adduced before court, the facts are that the Plaintiff commenced this suit by way of a Plaint dated 28<sup>th</sup> October, 2009 and filed in Court on 29<sup>th</sup> October, 2009. In the Plaint and particularly the contents of Paragraph 9, the Plaintiff avers that he was the lawful and absolute registered owner to the suit property - all that parcel of land known as parcel Land Reference No. KWALE/GALU KINONDO/676 measuring 0.9 Hectares and that the title thereof was issued to him on 6<sup>th</sup> December, 1978. The Plaintiff averred that the allocation of the land to him was issued on 15<sup>th</sup> November, 1974. There were unclear facts as regards the exact means of the acquisition of the land as at some point he as a resident of Nairobi claimed in the year 1974 to have purchased the suit land from one Mr. Edward Karanganya who had acquired it from the land Adjudication process and caused several sub – division to it. He paid upto a sum of Kenya Shillings Five Thousand (Kshs. 5, 000.00) as the purchase price for the suit paid. On the other hand he stated that he was allocated through the Land Adjudication as allottee number 676. He paid Kenya Shillings Sixty (Kshs. 60/=) for it. He was issued with a title deed on 6<sup>th</sup> November, 1978. He planted some trees, land scapped and fenced it. It was in the year 2005 that he discovered that there was someone had undertaken some construction works on the land and even fenced it. According to the Plaintiff the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently sold the suit land to the 5<sup>th</sup> Defendant on 7<sup>th</sup> May, 2004. Subsequently the 5<sup>th</sup> Defendant sold it to the 4<sup>th</sup> Defendant who is currently in occupation of the suit land.

77. He lodged a complaint with the CID and a criminal case SRM (Kwale) number 772 of 2008 was instituted where the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were arrested and charges preferred against them.

The charges included Making documents without authority contrary to section 537 (a) Forgery contrary to Section 349. Conspiracy to defraud under section 317, Obtaining registration by false pretenses Contrary to Section 320 of the Penal Code. Subsequently, on 1<sup>st</sup> April, 2020, Judgment of the Sub – ordinate court in the criminal case was delivered whereby all the accused persons were acquitted under the provisions of Section 215 of the Criminal Procedure Code Cap 73.

78. Juxtapose, on the other hand the 1<sup>st</sup> and 2<sup>nd</sup> Defendants emphatically hold to have acquired the land from the Land Adjudication process conducted by the Land Adjudication Committee. They were identified and requested to stand in front of their boundaries. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were nephew and uncle. They held that their grandfather, grandmother and aunty were buried on the suit land. They were later on issued with Certificate of title deeds. Consequently, they were approached by the 5<sup>th</sup> Defendant whom they knew having been his water suppliers to his clinic at Kwale. They entered into a sale agreement and they sold the land at a sum of Kenya Shillings Four Million (Kshs. 4,000,000/=) which he paid them on equal basis and he was issued with the title deed. They moved to a place known as Kinondo Location. Sometimes later, the 5<sup>th</sup> Defendant was approached by the 4<sup>th</sup> Defendant who had been searching for land and having heard the 5<sup>th</sup> Defendant had intention of selling his parcel. They agreed on terms. After conducting due diligence which involved several official searches , they executed a sale agreement for a purchase price of Euro 7,000,000/=. The 5<sup>th</sup> Defendant was given a Power of Attorney by the 4<sup>th</sup> Defendant to be acting for her in all the land sale transactions as she was away abroad most of the time. The transfer was successfully effected. All this time there had been no complaint from anywhere or person over the ownership of the land. It was until the Plaintiff had

appeared at the gate of the 4<sup>th</sup> Defendant and chatted with the Care taker alleging to be the owner of the land and threatening to return and even shoot the dogs. Further, in the year 2008, the 4<sup>th</sup> and 5<sup>th</sup> Defendants learnt of the afore stated criminal case. Thereafter, it is when the Plaintiff instituted in the instant civil case.

79. Having stated the facts briefly, I would now like to commence on the critical analysis of the case. Let me turn to the issue under this sub heading. This court 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. For this reason, thus any emerging land dispute has to be handled with vast caution and circumspect to avert creating any chaos or disarray situation arising therefrom. 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. The Provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods as follows:

**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.**

In the instant case, the Plaintiff claims to have acquired and allocated the suit land on 15<sup>th</sup> November, 1974 and was issued with a title on 6<sup>th</sup> December, 1978. He claims by dint of law, he was the 1<sup>st</sup> Registered owner from the Government of Kenya with all the indefeasible title, interest and rights over it by law. At the same time, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant claim to have acquired the land which was their ancestral land and where all their fore fathers lived and buried vide the process of Land Adjudication process of the Kwale Kinondu Land Adjudication section on 15<sup>th</sup> January, 2003 and this is where the main bone of contention, the pith and substance of the dispute in this case rests.

Fundamentally, its significant to set out the relevant provisions of the law with regard to this land dispute as spelt out above. To begin with, the provisions of Section 107 of **“The Land Registration Act” of 2012**, as a saving and transitional provisions with respect to rights, actions, dispositions and so forth, provides that the law applicable to this matter here and for the title deeds that were issued in the years 1974 and 2003 respectively would be the Registered Land Act, Cap. 300 (Now Repealed) and the relevant Sections being 27, 28 and 143 of the RLA.

**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”**

Nonetheless, the effect of the Registration of Lands is founded in the provisions of Section 24 of **“The Registration Land Act (Repealed)** which provides as follows:-

**“Subject to this Act – 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 appurtenances thereto and;**

80. To advance on this legal proposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the “*prima facie*” evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of “**The Land Registration Act**” No. 3 of 2012 provides as follows:-

**“The right of a 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 interest and claims whatsoever.....”**

This fact is strengthened by the following decisions - “**ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka.** And in **Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moiwo Ole Keiwua’** where courts has held that:-

**‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’**

Applying these principles of law to the instant case, three (3) issues are evident namely:- a). The Plaintiff’s title deed was first registration and was never challenged by any one for ostensibly having had it acquired by fraud, omission or mistake. b). the allegations meted by the Plaintiff against the 1<sup>st</sup> & 2<sup>nd</sup> Defendants that they acquired their title deeds illegally and through fraudulent means. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants effected the registration of their title deed, obtaining and issuance of its documents by fraudulent means, irregularly and illegally through direct collusion and conspiracy with the officers at the Land Registry Kwale. The Plaintiff alleging that they were assisted in making a second green card to justify the legality of their title deed; and c). the 4<sup>th</sup> and 5<sup>th</sup> Defendants emphatically holding that they were innocent bona fide purchasers who acquired their title deed through consideration and value for the notice.

a) The Plaintiff has set out particulars of fraud by the Defendants in Paragraph 13 of the Plaint which reads *inter alia*:-

**b) The 3<sup>rd</sup> Defendant issued title deed/Land Certificate of Lease to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants when he knew or ought to have known that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were not the registered owners of the Property.**

**c) The 3<sup>rd</sup> Defendant conspired with the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants to deprive of the Plaintiff his property. The Plaintiff was the original registered owner from the Government of Kenya.**

**d) The 6<sup>th</sup> Defendant is being sued in his official capacity and in the line of the doctrine of vicarious liability as the 3<sup>rd</sup> Defendant was acting within the scope of his employment and/or in the course of his employment.**

81. In order for this Honorable Court to effectively deal with the afore stated three (3) issues, I cannot agree more with the Plaintiff onto these submission and taking that none of the Defendants challenged nor controverted the above position as brought out by the Plaintiff herein from their pleadings. Instead, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants spend a lot of their energies critically indicating how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants attained their title deed though the statutory land adjudication process. The Learned Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Defendants themselves rubbed it in by emphatically stressing the extend they went by strictly adhering with and complying with the letter and spirit of the Land Adjudication process and statures as opposed to the Plaintiff who ostensibly never participated in the process at all they claimed. They also over relied on the judgment of the Criminal Case to demonstrate innocence of the Defendants. Further, the Learned Counsels for the 4<sup>th</sup> and 5<sup>th</sup> Defendants authoritatively emphasized and justified of them having legally acquired the suit land as bona fide innocent purchasers for value without notice. I wish to cite the provisions of Section 26 (1) of the Land Registration Act Verbatim:-

**“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

In the case of “**Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR** - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the provision of Section 143 of RLA and currently Section 26 (1) of Land Registration Act, the Provisions of Section 80 (1) & (2) of Land Registration Act for the cancellation and rectification of the title comes to play – “**Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others**” **ELC (Kjd) No. 204 of 2017.**” From the instant case, the Honorable court wishes the Defendants had taken trouble to scientifically and by way of law on grounds of having it acquired fraudulently, omission or mistake to disapprove the title being held by the Plaintiff as the first registration. Undoubtedly, there was no such effort made by them.

82. Now turning to the concept of bona fide innocent purchaser for value and notice. From the Black Law Dictionary defines this term “**bona fide Purchaser**” as “*someone 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.....". The question here is, does this definition fit in within the ambit of the cases for the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively? I noticed that this argument was heavily relied on by them and their Counsels in the tendered submissions to justify their acquisition of the Certificate of Title from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The substratum on this concept has been well captured in the now famous case of **"Katende Haridar & Company Limited (2008) 2 EA 173**, where the Court of Appeal of Uganda held that:-

a) **"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the properly offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki Vs. William Nyanzi, High Court Civil suit number 434 of 1996, must prove that:-**

b) **He holds a Certificate of title;**

c) **He purchased the property in good faith;**

d) **He had no knowledge of the fraud;**

e) **He purchased for valuable considerations;**

f) **The vendors had apparent valid title;**

g) **He purchased without notice of any fraud; and**

h) **He was not party to the fraud.**

Suffice it to say, the above legal position seem to be changing. In the case of **"Mwangi James Njehia & Another – Versus – Simon Kamanu'**, Civil appeal no. 177 of 2019, the Court of appeal on this matter held:-

**"We nonetheless wish to state that the law, including case law, is not static and the above requirement which were entered over twenty (2) years ago cannot be said to have cast in stone. We hold the vie that ( e ) above will need to be revisited and the word "apparent" be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, in collusion of officers in the land registries, been transplanted at the Lands Office and intending buyers have duped to believe that such documents are genuine and on the basis they have 'Purchased' properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land registries at Nairobi....."** In view of the above analysis, this Honorable Court is left with the plausible conclusion that the Plaintiff was the first registered owner to the suit land having acquired it in the year 1974 while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only acquired theirs in the year 2008 – 30 years later. The first title takes precedence.

**ISSUE No. b). Whether this Honorable Court has jurisdiction to deal and handle on any matter pertaining to the Claim, the administration and management emanating from, in connection with and related to the land Adjudication process and/or the statutory provisions founded in the Land Adjudication Act, Cap. 284 of the Laws of Kenya.**

83. Under this sub heading, it has become imperative to make these observation as in an effort to trace and or deal with the root of the title held by both the Plaintiff and the 1<sup>st</sup>, 2, 4<sup>th</sup> and 5<sup>th</sup> Defendants herein. As indicated above, all the Learned Counsels particularly for the 4<sup>th</sup> and 5<sup>th</sup> Defendants in this proceedings spend a sizeable, substantial and significant resources on the matters of the claim, administration and management of the Land Adjudication process under the Land Adjudication Act Cap. 284 and the Judgment in the Criminal case to disapprove the title held by the Plaintiff.

From the onset, this Honorable Court wishes to state that this Court has no jurisdiction to deal with matters pertaining with, in connection with and relating to the claim, registration and management arising from the Land Adjudication Act, Cap. 284. On the contrary, the Court would be acting Ultra vires, unreasonably and beyond its powers vested in law. The preamble of the Act which was enacted in the year 1969 holds:- **"It an Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust Land, and, for purposes incidental thereto."**

It follows that in terms of any claims, allocation and recording of land, recording of land or any disputes arising from the adjudication process there are well established statutory mechanisms created within it where all the objections emanating from this adjudication process are dealt with. For instance, the Land Adjudication Committees, The land Arbitration board, The land Adjudication Officer and the Minister of land under the provisions of Sections 7, 8, 9, 11,12, 13, 14, 15, 16, 29 and 30 of the Act and where the Minister as the appellate organ makes the final decision inter alia:-

29 (1) – **"Any person who is aggrieved by the determination of an objection .....may be appealed against to the Minister.....the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final"**

30 (1) **"Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that section has become**

*final in all respects under Section 29 (3) of this Act.....”*

Based on the above legal propositions, it is trite law that this Court may only deal on matters of once moved strictly on aspects of the Administration of Justice arising from the whimsical and blatant breach, capriciousness, biasness, ultra vires and unreasonableness by the public officers while dealing in the Adjudication process. In that case court may grant such prerogative orders of Certiorari, prohibition and Mandamus under the Judicial Review of Order 53 of the Civil Procedure Rules, 2010, Part III, Sections 7, 8, 9, 10, 11 and 12 of the Fair Administrative Action Act, (No. 4 of 2015) and Article 47 of the Constitution of Kenya. I have noticed that none of the Defendants invoked any of these provisions of the law herein.

84. In concluding the issues under this sub – heading, the Court holds jurisdiction is everything. It is guided by the famous decision of the famous case of *“the owners of Motor Vessel MV Lillian “S” - Versus - Caltex Oil (K) Limited” (1989) eKLR 1653* where Justice Nyarangi had this to say:

***“Jurisdiction is everything without it a court has no process to make one more step. Where a “Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law dismiss its tools in respect of the matter before it the moments. It holds the opinion that it is without jurisdiction.*”**

I need not say more on the issue.

**ISSUE No. c). Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants acquired all that parcel of land known as Land Reference Numbers Land Reference KWALE/GALU KINONDO/676 illegally, irregularly and wrongfully and hence should the title deed issued to them be cancelled henceforth.**

85. Although the credibility of the evidence by the Plaintiff and PW – 2 have been intensively castigated by all the Learned Counsels for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants herein, this court has taken keen interest in the same. As stated above, the bulk of the attack revolves on the claim, administration and management of the Land Adjudication process which this court has indicated it has no jurisdiction to deal at all.

Nonetheless, it has noted that on 24<sup>th</sup> November, 2019 PW – 2 during the trial stated in the examination in Chief that the green card of the suit property at Kwale land registry, the registered owner was the Plaintiff. He was issued with the Certificate of Title on 6<sup>th</sup> December, 1978 and the Green Card was opened on 15<sup>th</sup> November, 1974. There was no other Entry in the title and according to the land registry at Kwale. According to the records, the green card marked as Plaintiff Exhibit 3 does not exist in the records and hence to him this was a case of double registration and he suspected that the land Registrar in Kwale expunged the green card from the records when he discovered that there was an original register.

86. He held that the first title was issued on 6<sup>th</sup> December, 1974 while the 2<sup>nd</sup> one was issued on 15<sup>th</sup> August, 2003 with serial numbers 55384 and in the given circumstances the earlier title took precedence as it is backed by adjudication records. PW – 2 stated that the Land Adjudication register showed that it was in the name of the Plaintiff as allottee number 676 and the register was the one filed by the 6<sup>th</sup> Defendant on 21<sup>st</sup> February, 2018. On cross examination, PW – 2 stated that he was the District Land Registrar from January, 2014 upto May, 2016 and in Charge of Kwale Land Registry. He had the land Adjudication register for the suit property both in Kwale registry and another in Nairobi registry and he produced it Marked as Plaintiff Exhibit – 6 which indicated the Plaintiff was the beneficiary of the suit property. There was a difference in the green cards and that the tone and signatures of the land register differed since the green card Plaintiff Exhibit – 3 has 6 Entries all of them signed by the same person. The Entry no. 1 and 2 of the first Green card were signed in the early 1970s and 1974 and there are no entries in the 1<sup>st</sup> Green card and the same still holds upto date. The earlier registries used not to have stamps and the entries in the 2<sup>nd</sup> Green card are null and void and did not confer any ownership. PW – 2 stated that the Land Adjudication record was certified by Adjudication and Settlement officer from the Kwale Adjudication and Settlement Office. He testified that the Adjudication Record formed part of the history of the record and the Land Adjudication record he had was from Nairobi and it was certified by the Land Registrar Kwale in the year 2007. He produced the said land Adjudication Record which was marked as Plaintiff Exhibit – 7.

**ISSUE No. d) - Whether the 3<sup>rd</sup> Defendant, the then Land Registrar Kwale by dint of being a Civil Servant was liable to any claim or demands by reason of anything in good faith done or executed or omitted in his official capacity.**

87. By dint of the provisions of Section 36 of the Registration of Documents Act Cap. 285, to wit:-

***“The Principal Registrar shall not be liable to any suit, claim or demand by reason of anything in good faith done or omitted to be done in his official capacity”.***

Whereby this Honorable Court fully concurs with the Learned Counsel for the 3<sup>rd</sup> Defendant by all reason and means and anything that he did or omitted to do was in good faith and in his official capacity. The 3<sup>rd</sup> Defendant should not be held liable in his personal capacity. In any case, the Plaintiff had already instituted the instant suit against the Honorable Attorney General on behalf of the Government of Kenya and specifically the Ministry of lands and Settlement.

Indeed the Plaintiff seem to fully concur with this position in Paragraph 13 of the filed Plaintiff which holds as follows:-

***“The 6<sup>th</sup> Defendant is being sued in his official capacity and in the line of the doctrine of vicarious liability as the 3<sup>rd</sup> Defendant was acting within the scope of his employment and/or in the course of his employment”.***

For this very reason, the 3<sup>rd</sup> Defendant, Mr. Hashim Got Sat, the Kwale Land Registrar be and is hereby found not liable to any claim or

relief sought against him and therefore he is henceforth exonerated and discharged from any liability arising from and pertaining to this instant suit.

**ISSUE No. (e) - Whether the parties are entitled to the relief sought**

88. Based on the issues and the analysis undertaken herein, this Honorable Court finds that the Plaintiff is entitled to the relief sought. On the contrary, none of the Defendants particularly the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have demonstrated any entitlement to their defence. The Honorable Court makes this legal proposition based on several reasons. These are firstly, from the adduced evidence and the authorities relied on, the Plaintiff is the “*Prima facie*” registered owner of the suit land with all the indefeasible title, right and title vested in him by law. The Court is satisfied that he acquired the suit land as a 1<sup>st</sup> Registration in consonance to the provisions of Sections 27, 28 and 143 of the Registered Land Act, Cap. 300 (Now repealed). There was no omission, mistake or fraud alluded to by any of the Defendants herein. The arguments advanced by the Learned Counsels on the distinction of and whether the term Land Certificate and title deed vary are all baseless and unfounded to say the least. Apart from over relying on the Judgement from the criminal case, which was purely on the culpability and criminality of the accused persons being the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein and not the genuineness of the title for the suit land, there was no tangible evidence that was placed before this court to demonstrate the genuineness of the title held by the Plaintiff.

89. Secondly, the 4<sup>th</sup> Defendant has emphatically urged the Honorable court to call for the cancellation of the title held by the Plaintiff. It is trite law and as founded under Sections 107 and 108 of “**The Evidence Act**” **Cap 80** that he who alleges fraud or any such a claim has to prove it. Although it was submitted heavily on the burden of proof none of the parties herein have been able to prove the allegation of fraud mistake or omission by the Plaintiff in acquiring his title by filing a report by a Land Surveyor or an investigation agency or forensic document examiner, or a report from the Division of Criminal Investigation Office being the established expert on demonstrating the allegation fraud were produced nor summoned.

Thirdly, indeed, while the root of the title is significant, the Defendants have spend all their energies on the claim, administration and management of the Land Adjudication process – the claim, the allocation of the land, the storage of the Land Adjudication Register and Records and so forth - to disapprove the good title held by the Plaintiff which this Court has no jurisdiction to deal with. The Honorable Court finds these to be purely administrative matters in the domain of the Division of the Land Adjudication & Settlement Officers (DLAO) who for some reason or other were never summoned to testify in this matter.

Fourthly, on the argument that there were conducted official searches established that the property belonged to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and belonging to them. It was held during the regime of three (3) Land Registrars all this time it and later on transferred to the 5<sup>th</sup> and the 4<sup>th</sup> Defendants and belonged to them. It was held should any of the Land Registrars found out that there existed two Green Cards over the same parcel they would have registered a restriction against it. The legal position on official searches is well established in a Torren system of registration. The registration and as part of the due diligence conducting of official searches to ascertain the genuine position of land in Kenya was elaborately deliberated on In *the ELC (Nbi) – ELC Reference No. 1 of 2018 – In the Matter of Drive In – Primary School & Ruaraka School – Versus – the National Land Commission & 11 others*” court held:-

***“An official search on any title at the land registry is very important before one can act on it. The search indicates the owner (s) of a particular property and the encumbrances or other relevant entries registered against that land. Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration. However, a search may not always be a true reflection of the position. ....On Torrens System of registration. It is necessary for one to take further steps to ascertain the authenticity of the search and ownership of land. If the Applicant had bothered to delve into history of the title. It would have discovered that the title had two mortgage besides the entries in the register.....or any other overriding interest affecting the land they wish to transact on. In light of the foregoing our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search” (Emphasis is mine)***

90. Fifthly, as per the Plaintiff’s pleadings, it will be prudent that the 4<sup>th</sup> Defendant should legally vacate the suit land under the laid down Provision of Section 152 E of the Land (Amended) Act, 2016. Additionally, although this was not a direct issue during the trial, but this court is anxious, “**Suo Moto**” to know the nationality of the 4<sup>th</sup> Defendant and whether she is eligible to acquire a title deed of the suit land being under a freehold, controlled and agriculture set up under the provisions of Section 9 (1) of The Land Control Act, Cap. 300 of the Laws of Kenya. She was only requested to state her Passport numbers and nothing else to demonstrate her nationality. The Honorable Court has noted that, without any justifiable cause or reason whatsoever, in all this land transaction she donated the powers to the Vendor, the 5<sup>th</sup> Defendant through a duly registered Power of Attorney. To his court this is a critical issue.

91. Finally, the relief sought by the Defendants herein are not fathomable and cannot be granted without a Counter Claim instituted by the Defendants. A Counter Claim as provided and Couched in mandatory terms under provisions of Order 7 Rules (3), 4, 5, 6 7 and 8 of the Civil Procedure Rules, 2010, defines it as basically a cross action brought by the Defendant against the Plaintiff. The Court in which a Counter Claim is pleaded must therefore have jurisdiction to entertain the Counter Claim as if it had been filed in a separate legal action. A Counter Claim may be used both as a Sword and Shield with which the Plaintiff may be attacked. The purpose of a Counter Claim is to have all the matters in dispute between the parties finally determined by a Court in order to avoid multiplicity of suits. In the book “**Federal Practice and Procedure**” 1403 Version, Pages 15 - 16 by Charles Alan Wright et al states on Counter Claim:-

***“”Under the (Fed. R. Civ P) Rules 13 the Court has broad discretion to allow claims to be joined in order to expedite the resolution of all controversies between the parties in one suit, Rule 13 ( c) specifically provides that the Counter Claimant is not limited by recovery sought by the opposing party but may claim relief in excess of that amount. Further, the general legal rule is that it is immaterial whether a Counter Claim is legal or equitable for purposes of determining whether it properly is brought under Rule 13 .....The elimination of circuity of action and multiple litigation .....***

92. It cannot be gainsaid that filing a Counter Claim by the Defendants herein would have been critical. Without one they all got immensely

exposed. While attacking the evidence by the 6<sup>th</sup> Defendant, they cited the case of:- “**Daniel Otieno Mogore – Versus - South Nyanza Sugar Co. Limited. (2018) eKLR:-** where the court held:-

**“It is by now well settled by precedent that parties are bound by their pleadings and that the evidence which tends to be at variance with the pleadings is for reflection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence however strong, that tends to be at variance with the pleadings must be disregarded”**

Clearly, in the instant case there is no Counter Claim raised by any of the Defendants. In effect, therefore the claim on the credibility of the title deed by the Plaintiff and the Land Adjudication process and the reliefs sought particularly by the 4<sup>th</sup> Defendant are not attainable based on the filed pleadings. Under the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010 parties are bound by their own pleadings. While I totally disagree with the submission by the 4<sup>th</sup> Defendant that appropriate relief can be granted even if not pleaded and based on the case of **Odd Jobs – Versus - Muhia (1974) EA 476** it was stated:-

**“A Court may base a decision on an un-pleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for decision” (Emphasis is mine).**

93. Be that as it may, on this aspect, I fully concur with the contention by the Learned Counsel for the 5<sup>th</sup> Defendant while attacking the evidence by the 6<sup>th</sup> Defendant and citing the case of:- “**Daniel Otieno Mogore – Versus - South Nyanza Sugar Co. Ltd. (2018) eKLR:-** where the court held:-

**“It is by now well settled by precedent that parties are bound by their pleadings and that the evidence which tends to be at variance with the pleadings is for reflection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence however strong, that tends to be at variance with the pleadings must be disregarded”**

94. I am reminded of Madan, JA (as he then was) in the case of “**Chase International Investment Corporation and Ano. – Versus – Laxman Keshra & Others (1978) eKLR 143; 143 (1976 – 80) 1 KLR 891**” to the effect that:-

**“If the circumstances are such as to raise equity in favour of the Plaintiff and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred”**

95. Therefore, in the given circumstances, the most appropriate and available legal relief entitled to the Plaintiff is to invoke the provisions of Section 80 (1) and (2) of the Land Registration Act which holds:-

**“Subject to sub - section (2), the court may order the rectification of the 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...”**

#### **ISSUE No. f). Who will bear the Costs of the suit**

96. The Black Law Dictionary defines cost to means:-

**“the expenses of litigation, prosecution or other legal transaction  
especially those allowed in favour of one party against the other”**

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The events in this case are the result of the case whereby the Plaintiff has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants herein.

#### **V. DETERMINATION**

97. Ultimately, upon undertaking the afore going elaborate and comprehensive analysis of the matter before hand, I do wish to proceed to make a determination as follows. I find that the Plaintiff has proved its case on the balance of probabilities. For avoidance of doubt I accordingly enter judgment in favour of the Plaintiff as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Specifically, I award the Plaintiff the following reliefs:-

**a) THAT the Plaintiff is granted judgment to his favour and against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally for:-**

**i) General damages;**

**ii) Special damages for a sum of Kenya Shillings One Fifty Thousand Eight Hundred (Kshs. 150,800/=).**

b) **THAT** by invoking the provisions of Section 80 (1) and (2) of the Land Registration Act, of 2012, the 6<sup>th</sup> Defendant is and hereby ordered and/or directed, within the next thirty (30) days from this date hereof, to:-

i. cancel the lands certificate for all that parcel of land known as “Land Reference KWALE/GALU KINONDO/676” issued to the 4<sup>th</sup> Defendant and the transaction be declared null and void *ab initio*.

ii. rectify the lands records and register all that parcel of land known as “Land Reference KWALE/GALU KINONDO/676” in the names of Mr. Richard Kimani, the Plaintiff herein.

c) **THAT** under the laid down Provision of Section 152E of the Land (Amended) Act, 2016, the 4<sup>th</sup> Defendant is directed and/or ordered to legally vacate the suit land by removing all her fixed fixtures, assets and/or property thereof within the next Ninety (90) days from this date hereof without failure.

d) **THAT** by virtual and dint of the provisions of Section 36 of the Registration of Documents Act Cap. 285, the 3<sup>rd</sup> Defendant, Mr. Hashim Got Sat, the Kwale Land Registrar be and is hereby found not liable to any claim or relief sought against him and therefore he is henceforth exonerated and discharged from any liability arising from and pertaining to this instant suit.

e) **THAT** the County Commander of Police, Kwale and the Officer In Charge of the Police Station, Diani are hereby directed to ensure full adherence and compliance of this orders.

f) **THAT** Costs of the suit to be awarded to the Plaintiff to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

g) **THAT** Interest on (a), (b), (d) & (f) above at court rates.

**IT IS ORDERED ACCORDINGLY.**

**JUDGEMENT DELIEVERED ON THIS 20<sup>TH</sup> DAY OF JANUARY, 2022**

**HON. JUSTICE L. L NAIKUNI**

**ELC MOMBASA**

**In the Presence of:**

*M/s. Yumna Court Assistant.*

*Mr. Philip Nyachoti Advocate for the Plaintiff*

*Non Appearance for the 1<sup>st</sup> Defendant.*

*Non Appearance for the 2<sup>nd</sup> Defendant.*

*Non Appearance for the 3<sup>rd</sup> Defendant.*

*Mr. Hamisi Advocate for the 4<sup>th</sup> Defendant.*

*Mr. Amolo holding brief for Mr. Gilbert George Advocate for the 5<sup>th</sup> Defendant.*

*M/s. Waswa holding brief for Mr. Wachira Nguyo Advocate for the 6<sup>th</sup> Defendant.*