



REPUBLIC OF KENYA



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**Njoroge v Kamau (Environment & Land Case 32 of 2012)
[2022] KEELC 69 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 69 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 32 OF 2012**

LL NAIKUNI, J

APRIL 28, 2022

- 1. A DECLARATION THAT THE PROPERTY KNOWN AS MOMBASA/BBOLCK/MS/III/462 BASED ON THE SPECIFIC PERFORMANCE BE REGISTERED IN THE NAMES OF THE DEFENDANT IN THE PLAINT AND PLAINTIFF IN THE COUNTER CLAIM BEING THE ESTATE OF THE LATE STEPHEN KIMONDO KARUKU.**
- 2. AN ORDER OF SPECIFIC PERFORMANCE ISSUED COMPELLING THE 1ST DEFENDANT IN THE COUNTER CLAIM TO TRANSFER THE PARCEL OF LAND KNOWN AS LAND REFERENCE MOMBASA/BBOLCK/MS/III/462 TO THE ESTATE OF THE DECEASED – THE LATE STEPHEN KIMONDO KARUKU WITHIN THE NEXT SIXTY (60) DAYS FROM THE DATE OF THIS JUDGEMENT. ____**
- 3 IN DEFAULT TO CAUSE THE SAID TRANSFER BY THE 1ST DEFENDANT, THE DEPUTY REGISTRAR OF THIS COURT SHALL DULY EXECUTE ALL THE PREREQUISITE DOCUMENTS PERTAINING TO THIS SALE OF LAND TRANSACTION TO BE REGISTERED IN THE NAMES OF THE ESTATE OF THE DECEASED.**
- 4. THE PLAINTIFF IN THE COUNTER CLAIM AS THE DULY APPOINTED LEGAL ADMINISTRATOR TO THE ESTATE OF THE LATE STEPHEN KIMONDO KARUKU TO BEAR THE COSTS OF THE STAMP DUTY AND REGISTRATION FEES. ____**
- 5. THE DEFENDANT IN THE PLAINT AND WHO IS ALSO THE PLAINTIFF IN THE COUNTER CLAIM DIRECTED TO PAY THE PLAINTIFF IN THE COUNTER CLAIM THE OUTSTANDING BALANCE OF THE PURCHASE PRICE BEING A SUM OF KENYA SHILLINGS THREE FOURTY TWO THOUSAND SEVEN HUNDRED (KSHS. 342, 700.00) PLUS INTEREST ACCRUED FOR THE PAST 23 YEARS BY THE TIME OF FILING THE CASE AT THE COURT RATE OF TWELVE PER CENT (12%) PER ANNUM WITHIN THE NEXT SIXTY (60) DAYS FROM THE DATE OF THIS JUDGEMENT.**
- 6. THE LAND REGISTRAR MOMBASA DIRECTED PURSUANT TO THE PROVISIONS OF SECTION 80 (1) AND (2) OF THE LAND REGISTRATION ACT, NO. 3 OF 2012 TO CANCEL THE TITLE DEED AND ANY OTHER LAND REGISTRATION DOCUMENTS IN ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NUMBERS MOMBASA/BBOLCK/MS/III/462 IN THE NAMES OF DOUGLAS MUNGAI NJOROGE AND RECTIFY THE RECORDS BY REGISTERING IT IN THE NAMES OF THE DULY APPOINTED**



LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE STEPHEN KIMONDO KARUKU WITHIN THE NEXT SIXTY (60) DAYS FROM THE DAY OF JUDGEMENT.

7. AN ORDER OF PERMANENT INJUNCTION RESTRAINING THE PLAINTIFF IN THE PLAINT BY HIMSELF AND/OR AGENTS FROM INTERFERING WITH. MOVING INTO, LAYING CLAIM OR IN ANY MANNER INTERFERING WITH THE PLAINTIFF'S IN THE COUNTER CLAIM PEACEFUL OCCUPATION OF ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NUMBERS MOMBASA/BBOLCK/MS/III/462.

8. COSTS AND INTEREST OF THE SUIT AWARDED TO THE DEFENDANT IN THE PLAINT AND 1ST DEFENDANT IN THE COUNTER CLAIM BY THE PLAINTIFF IN THE PLAINT HEREIN.

BETWEEN

DOUGLAS MUNGAI NJOROGE PLAINTIFF

AND

STEPHEN KIMONDO KAMAU DEFENDANT

JUDGMENT

I. Preliminaries.

1. This suit was instituted by the Plaintiff herein through filing of a Complaint dated 27th February, 2012 filed on 28th February, 2012. It was against the Defendant.
2. The Plaintiff sought for the following prayers. These were:-
 - a. A declaration that the property known as Mombasa/block/ms/III/462 belongs to the Plaintiff.
 - b. An order of injunction restraining the Defendant by himself and/or agents from interfering with. Moving into, laying claim or in any manner interfering with the Plaintiff's peaceful occupation of property known as Mombasa/ Block/ MS/III/462.
 - c. Any other and further Order this Court deems fit to grant.
 - d. Costs and interest.
 - a. Under the same breath, the Defendant on 23rd April, 2013 filed an Amended Statement of Defence and Counter Claim dated 22nd April, 2013. He has named Stephen Kimondo Kamau the son to the late Stephen Kimondo Kariuki (hereinafter referred to as "The Deceased") as the Plaintiff, Mr. Peter Kamau Kimondo and Mr. Douglas Mungai Njoroge respectively as the 1st and 2nd Defendants in the Counter Claim. As fate would have it, the deceased passed away intestate on 30th April, 2012 and the Grand Letters of Administration to the estate issued on 3rd December, 2012 in accordance with the information from the Certificate of death produced hereof by the Defendant in the Complaint.

He sought for the following prayers from the filed Counter Claim. These are:-



- b. A declaration that the transfer of property known as Mombasa/block/MS/III/462 by the 1st Defendant to the Counter Claim to the 2nd Defendant to the Counter Claim was null and void ab initio and the registration be cancelled.
- c. An order that the parcel of land known as Land reference numbers Mombasa/block/ms/III/462 be transferred to the Plaintiff in the Counter Claim.
- d. In the alternative and without prejudice to the above a refund of the sum of Kshs, 3, 649, 646.65 being special damages.
- e. Costs of the suit and this Counter Claim.
- f. Interest on (c) and (d) above at the Courts rates.
- g. Any other relief that the Court may deem fit and just to grant.

II. The Plaintiff's Case

3. Upon full compliance on the case management, on 29th July, 2019 the hearing of the case commenced by the Plaintiff summoning three (3) Plaintiff witnesses. Examination in Chief of PW – 1 - Douglas Mungai Njoroge by Mr. Magolo Advocate.
4. PW – 1 was sworn stated in Kiswahili language. He stated that he was a businessman. He lived in Mombasa town, Near Central Police Station. He came to know the Defendant as being a son of one Stephen Kimondo Karuku. In the year 2010, he was informed by one Francis Kahombe that there was an old man called Ngure the owner of Limuru Bar who had called him. Mr. Kahombe further informed PW – 1 that one Peter Kamau Nguatha the owner of the plot and who was upcountry had called Ngure to go and tell Francis to go and see his plot which had been invaded. PW – 1 was called by Kamau Kimondo to accompany Francis to see who had invaded the plot.

Stephen Kimondo introduced PW – 1 to a pastor of a church which had leased the property. There were two on the suit land being Plots 462 and 462. He was advised to talk to the owner, Peter Kamau Nguatha. After about six (6) months, he bought Plot No. 463 and Peter Kamau Nguatha. One time, Stephen Kimondo called him to his home and he asked Francis Kahome to accompany him. On arrival, they talked with Stephen Kimondo for a long period. He told them he had intended to buy Plot No. 462 but if PW -1 wanted it, he could buy it.
5. PW – 1 approached Peter Kamau Nguatha who agreed he could sell it to him. Mr. Kimondo told him he had bought it in the year 1997 and by then, the year 2010 he had not yet finished paying. He then went to Mr. Peter Kamau Nguatha and they agreed. PW – 1 took a loan from a bank – the Family Bank to in order to purchase Plot 462. They entered and duly executed a sale agreement dated 1st December, 2011. He produced it as Plaintiff Exhibit No. He then undertook the transfer process. The transfer forms are marked Plaintiff Exhibit No. 2. He got his Certificate of title deed and the same was issued on 29th December, 2011 a copy of which was produced and marked as Plaintiff Exhibit No. 3. He testified that Mr. Kimondo had leased the plot to the church. PW – 1 prepared a notice and served Mr. Kimondo in the company of Francis. Before the expiry of three (3) months, Mr. Kimondo issued a letter claiming that he had purchased the plot and claimed the ownership to the plot. After three (3) months, PW – 1 filed a suit against Stephen Kimondo Karuku. PW – 1 later on learnt that Stephen Kimondo had died and his son was substituted as a Defendant. Kamau Kimondo was now occupying the suit plot. PW -1 had not permitted him to stay in his plot. He knew the Defendant was staying in the plot todate, claiming that his father bought it.



6. PW – 1 testified that he filed a supplementary list dated 2nd November, 2015. Among the documents filed was succession cause No. 295 of 2012. From the list of assets for the estate of the deceased, it does not include plot No. 462. PW – 1 prayed for declaration that the plot was his. He also pray for an eviction order and costs. He refuted that he acquired the plot fraudulently. He acquired his title in the year 2011. He had not been served with notice to surrender it. He had not been charged with any criminal offence. He concluded by stating that his Certificate of title to the suit land had never been challenged.

Cross Examination of PW – 1 by Mr. Njoroge Advocate:-

7. He stated that when he first filed the suit, it was against Stephen Karuku (Deceased), who was the father of Peter Kamau Kimondo. He was aware Stephen Kimondo Karuku died on 30th April, 2012. This was after he had served him with the pleadings. He never had a case against Peter Kamau Kimondo who was substituted in place of his late father. He sated that in his Complaint, he had applied for an injunction against Mr. Stephen Kimondo. He was aware the deceased filed his statement of Defence and a Counterclaim. He saw a statement, in which the Defendant challenged his title deed. In the Counterclaim, he joined Peter Nguatha as a Defendant. It was not his first time to buy land. It is important before purchasing any land to know the owner. He bought Plot No. 462 which belonged to Peter Kamau Nguatha. He saw that the title was in the name of Peter Kamau Nguatha. By that time, he had purchased Plot No. 463. He did not know that Plot No. 462 and 463 were a sub - division of Plot No. 98 but when he bought Plot No. 462 he was told. In the Defendant's documents, he had seen a copy of a sale agreement between Peter Nguatha and the late Stephen Kimondo. He was shown the agreement in Page 2 dated 13th February, 1994. He could also see another sale agreement dated 19th March, 1997 at Page 8 between Peter Kamau Nguatha and Stephen Kimondo Karuku. Stephen Kimondo had told him he had entered into a sale agreement for purchase of the plot.
8. Before he bought the plot, he went to the ground and saw the church. In his statement filed on 5th October, 2018, he explained it. He explained to him that he had bought Plot 98. Mr Kimondo informed PW – 1 that there was a caution registered against the said Plot. He served the vacation notice on the late Kimondo and the church. It is true he filed three (3) statements in this case. In his statement dated 20th February, 2012 but filed on 21st June, 2012. He was introduced to Peter Kamau Nguatha by Francis Kahumbi in the year 2008. He was someone he knew. In the Defendant's supplementary list of Documents filed on 16th August, 2016, on Page 89 Paragraph 4, he had stated that he bought the plot from one Stephen Kimondo Karuku.
9. When he bought the Plot, they used one advocate, Mr. Thairu. He explained to the advocate all the conditions he wanted and Mr. Nguatha explained his too. If there was an issue, we could tell the advocate. He had not brought the search he obtained before he bought the Plot. He had not brought it in court. He was the one who had not done the search. He knew it was important to do a search before buying it.

If there was a caution, that search would show. He was aware that the Defendants challenged him on not having carried out a search. If the search had revealed a caution, he could not have bought it. To purchase a plot with a caution was to buy trouble.

PW – 1 had the sale agreement (P. Exhibit 1). The Plot was sold to him for a sum of Kenya Shillings One Million Four Hundred Thousand (Kshs. 1,400,000/=). He had neither produced and shown evidence of payment of this amount nor the loan documents. There was no evidence that he paid the balance of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=).



10. Under Clause 2(c) of the sale agreement, there was the balance of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) to be paid within ninety (90) days, after deducting all the expenses for the removal of the registered caveat among other expenses. They agreed they would deduct miscellaneous expenses such as Land Rates, land Control Board and removal of caveat. He knew the caveat was registered in the land registry as a prohibition.

Kimondo had told him that there was no caution. In his statement, he had stated that the caution had been removed. In the Defendant's supplementary list of documents, on page 39 was a hearing of a removal of caution. PW – 1 stated that he had not seen it. In the search he obtained, he had not seen a caution. He filed the statement of P. Kamau Nguatha. His name was signed by somebody else. He stated that the purchase price for the Plot on the sale agreement for a sum of sale of Kenya Shillings One Million Four Hundred Thousand (Kshs. 1,400,000/=) while on the transfer forms it showed the considerations as Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=).

11. He testified that the government was to charge stamp duty on Kenya Shillings One Million Four Hundred (Kshs. 1, 400, 000.00) but the transfer was for a sum of Kenya Shillings Eight Hundred (Kshs. 800,000/=). He was an obedient Kenyan. He signed the transfer indicating a sum of Kenya Shillings Eight Hundred (Kshs. 800,000/=) as consideration. He paid stamp duty but he had not produced the documents in court. He was aware the deceased challenged his title. He was the one who paid the advocate. He had not produced the receipt. The certificate of official search (Plaintiff Exhibit 2) was dated 23rd January, 2012. He was the one who applied for the official search. This was because the transaction was complete. In the agreement for sale, Mr. Nguatha made warranties (See clause 8(f) and (g)).

He stated that they had agreed that if there was any objection, he would be refunded his money. There was indemnity. He was not aware of access road. He had seen the map. He could also see the sketch on page 12 from the Defendant's original list. There was a road reserve. At Page 55, there was a road. He had no problem with the map. The access road was on the upper side. He used the road he found people using. Mr. Nguatha informed him about the map and the access road.

12. He read the statement of the late Mr. Kimondo. It was true he stated he did not know PW – 1. Mr. Nguatha never showed him a letter terminating his transaction with the late Mr. Kimondo. When he bought the plot, he knew there was a tenant who was paying Mr. Kimondo. He did not get any problem with Plot No. 463. He had not utilized Plot No. 462 because of the case. They left the lawyer to obtain consent from the Land Control Board. They attended the special Land Control Board Meeting. He had not produced a copy of the Letter of Consent from the Land Control Board. Mr. Nguatha also attended. It was at the offices of the D.O.'s Officer. He was certain they attended the Land Control Board. He had seen the agreement of Mr. Kimondo of the year 1994. He was a tenant from the year 1988. He heard he was running a bar called Mtongwe Inn. He had leased it out.

PW – 1 had seen the valuation report filed (page 49-52). The value of the land was a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) and improvements of Kenya Shillings Three Million Six Hundred (Kshs. 3,600,000/=). He was not told that Mr. Kimondo built the houses in the photos. He had not produced any valuations report. That was all.

Re-Examination of the PW – 1 by Mr. Magolo Advocate:-

13. He bought the Plot in the year 2011. Mr. Kimondo told him there was a registered caution against the Plot as the same had been removed. They left the transfer of the land to be completed by Thairu Advocate. He was the one who put the consideration of a sum of Kenya Shillings Eight Hundred (Kshs. 800,000/=). He never the figure of a sum of Kenya Shillings Eight (Kshs. 800,000/=) as he was told



just to sign the papers. It was Thairu advocate who lodged the transfer forms at the land Registrar for the registration. He paid up the purchase price in full. No sum was deducted for Land rates e.t.c.

14. In the supplementary list of Defendant's documents, page 39, the caution was to be removed within 90 days after beacons had been put. It was nine (9) years in the year 2011 from the time he purchased the land. He did not know if duty was assessed at a sum of Kenya Shillings Eight Hundred (Kshs. 800,000/=) and not Kenya Shillings One Million Four Hundred Thousand (Kshs. 1,400,000/=). On page 89 is a copy of a Plaintiff in CMCC 860 of 2013. The person who sold him land was Stephen Nguatha. The contents in the Plaintiff had an error. That case was concluded and the church left/vacated the plot. Mr. Kimondo was aware that PW – 1 bought the plot.

Mr. Kimondo told him there was a deposit he had paid to Mr. Nguatha. He even told PW – 1 to go for his deposit as he indicated that he had stayed on the plot and had been receiving rent for long. That was all.

15. Examination in Chief of Pw – 2 - Peter Kamau Nguatha by Mr. Magolo Advocate.

PW – 2 sworn stated in English language. He was then aged 81 years. He was a farmer. He lived in the County of Kiambu, Kiambaa sub - location. That was where he lived after his retirement. He remembered having recorded a witness statement filed on 5th October, 2018. He wished to adopt it as his evidence in chief. Sometimes in the year 1980's Stephen Kimondo (deceased) rented a house from him together with the Plot No. Mombasa/MS/Block III/98. The deceased told him that he wanted to put up a bar business. That was in the year 1997. He had to give the title under his name so that he would obtain the license. He was paying him a rent of a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=) every month. He also expressed his interest to buy the plot together with the house. Later, he wanted $\frac{3}{4}$ of the plot. They went to a lawyer and an agreement dated 19th March, 1997 was prepared. He gave him the title so that he could arrange the sub - division. The sale agreement was on page 8 of the Defendant's documents filed on 22nd March, 2012. The acreage was 0.23.Ha. The purchase price was a sum of Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650, 000.00/=) out of which the sum of Kenya Shillings Two Ninety Thousand Seven Hundred (Kshs. 290,700/=). There was a balance of Kenya Shillings Three Fifty Nine Thousand Three Hundred (Kshs. 359,300/=) which was to be paid on or before 28th February. 1998 but was never paid. It was agreed that he was to be paying a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=) per month until he completed payment by settling the balance of the purchase price.

16. After the execution of the agreement, he stopped paying the monthly rent of Kenya Shillings Five Thousand (Kshs. 5,000/=) and did not also pay the outstanding balance of the purchase price. PW – 2 asked him to give him back the title so that he could sub - divide the plot himself. He agreed. He had put a church in one of the rooms in the premises. The church was paying him rent.

PW – 2 caused the sub - division of the Plot No. 98 and after completion, it became Plot No. Mombasa/III/462 and Mombasa/III/463 respectively. Mr. Kimondo was to buy Plot No. 462. He did not pay the balance. He travelled from Nairobi to look for him but he evaded him. PW – 2 later told him that because he was not paying him, he would be free to sell the plot to someone else. PW – 2 found a buyer by the name Douglas Mungai Njoroge, the Plaintiff herein.

Douglas Mungai Njoroge, the Plaintiff herein and him entered into a Sale agreement. The agreement for sale was prepared and executed on 1st December, 2011 over Plot No. MSA/Block MS/III/462, measuring 0.3022 hectares. The purchase price was Kenya Shillings Five Hundred (Kshs. 500,000/=). When he learned of the sale, Mr. Kimondo went to the Land Registry and registered a caution. The Land Registrar wrote to Mr. Kimondo that unless he gave good reason, the caution would not be removed. There was a transfer signed on 9th December, 2011 and registered on 29th December, 2011.



Later a title deed was issued in the name of Douglas Mungai Njoroge. The plot No. Mombasa/MS/Block III/462 was now owned by Douglas Mungai Njoroge, the Plaintiff herein. That is all.

17. Cross Examination of Pw – 2 by Mr. Njoroge Advocate:-

He was now a retired Civil Servant. He was a policeman. He retired at the rank of Senior Assistant Commissioner of Police. The statement he recorded contained facts he explained but the signature was not his own as he had been unwell. After he recovered he did not record any other statement. The agreement for rent was on page 1 of the Defendant's documents filed on 22nd March, 2012. They signed the agreement for rent on 27th September, 1988. According to the agreement for Rent, the rent was for a sum of Kenya Shillings One Thousand Five Hundred (Kshs. 1,500/=) per month. He was renting him one semi-permanent house with nine (9) rooms. When PW – 2 agreed to sell Mr. Kimondo the plot. They signed the sale agreement dated 13th December, 1994 (see page 2). The purchase price was for a sum of Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650,000/=). They agreed that he was going to sell him a portion, measuring one (1) acre with a bar and Restaurant.

He signed the agreement. At Page 4, there was an acknowledgement that PW – 2 received a sum of Kenya Shillings Thirteen Thousand Five Hundred (Kshs. 13,500/=). This was for rent not towards purchase price. They went to the same lawyer, Mr. Gathuku who was now deceased and who prepared the sale agreement found at page 8.

Clause 2 referred to 0.23 Ha or thereabouts sworn in sub - division Plan marked as 'A' at page 12 was the proposed sub-division on plot No. 98/III/MS. It identified two plots, one was leveled 'A' and the other 'B'. It was correct that the agreement written by hand and the one typed before a lawyer had the same consideration of a sum of Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650,000/=). Paragraphs 5 stated that he was to pay him a sum of Kenya Shillings Five Thousand (Kshs. 5,000.00) per month to clear the outstanding debt. This was not rent. PW – 2 gave Mr. Kimondo the Original title for Plot No. 98 as per paragraph 6. He also undertook to sign documents of transfer as soon as the documents of title for the portion sold was made available. The rates payable on the plot was to be paid jointly in proportion. Paragraph 8 stated the survey and subdivision fees would be shared equally.

18. At page 13 was the acknowledgement of money paid. It was true he wrote the letter dated 2nd January, 1998 at Page 22. He remembered writing letters to Mr. Edward Kiguru, a Land surveyor. He also confirmed he wrote the letter at page 24 and that he met one Kitumu Nzomo at Ardhi House. The signature at page 25 was his. After Mr. Kimondo failed, he speeded up the process himself. The letter at page 28 bore his signature. This was the letter they signed when he took the original title from Mr. Kimondo for purpose of registering new titles after sub-division. The letter was copied to Mr. James Gathuku, Advocate. He confirmed never returning the title number 462 to Mr. Kimondo because of payment. He could see the Defendant's supplementary list of documents filed on 16th August, 2016. The signature at page 21 was his. He was complaining about the caution that had been placed by Mr. Kimondo. He conducted an official search and discovered there was a caution. He could not remember being summoned by the land Registrar. He could not remember seeing the letter at page 25. He remembered a Land Registrar at the Land Registry Mombasa by the names of Kenneth Githii. He saw Mr. Githii. He never appeared before Mr. Githii together with Mr. Kimondo. He had gone to Mr. Githii because of the caution. He could not remember of the decision at page 39. He could not remember that he was told to provide an access road to Mr. Kimondo. He could not remember making any complaint to the Chief Land Registrar. He could not receive some letters from the Land Registrar. He struggled to have the caution removed. He could not telling or remember if Mr. Githii wrote to him to provide an access road.



19. He could see the map on page 55 of Original List. There were Plots 98, Plot 462 and 463. He could see the beacons. There was a road on the right of Plot 463 but there was a squatter. The squatter was there even when he bought the plot. There was a house where the squatter was. The road could be placed anywhere. He did not refuse for the road to be put up.

On Page 45 of the Defendant's Supplementary List of documents is an agreement for sale of land they went to the same lawyer, M.W. Thairu. They discussed with Mr. Douglas Njoroge and agreed. He told him about Mr. Kimondo having failed to pay him.

Paragraph 2(c) state-s balance of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) was to be paid on or before 90 completion period (after deducting miscellaneous expenses relating to land rate, land control board and removal of caveat)

His agreement with Douglas Mungai Njoroge had not been broken. If there was any balance, that was between the two of them. On the other hand, his agreement with Mr. Kimondo was broken when he stopped paying him and also stopped seeing him.

20. When buying land, one has to undertake a search. When he was discussing with Douglas Mungai Njoroge, he had notified him that Mr. Kimondo had put a caution on the land. To be sure land was free of encumbrance; one had to carry out a search. He did not have a search showing his land had no caution before he sold it. There was no dispute over the parcel Plot No. 463 with Mr. Kimondo because he was selling him the whole land. There was no letter from Mr. Gathuku demanding that Mr. Kimondo completes the agreement because it was not necessary. There was no letter from him to Mr. Gathuku to Mr. Kimondo terminating the agreement. He did not remove Mr. Kimondo or his sons, even the Church. Douglas had told him he had not been able to occupy Plot No. 462. Mr. Kimondo and him communicated a lot through writing by hand. There was a Letter of consent from the Land Control Board.

He appeared before the Land Control board. He did not write a letter to the Defendant or the church telling them that he had sold the plot. This was because he was dealing with Mr. Kimondo himself.

He stated that he received the letter dated 7th February, 2012 at page 56 of Original list from Kiarie Kariuki & Co. Advocates. He could see Page 46 of Supplementary List of documents. He could also see it under paragraph (g) and (h). That was all.

21. Re - Examination of PW – 2 by Mr. Magolo Advocate:-

At page 41 of the Defendant's original list of documents is a lease. The Defendant had been collecting rent from the premises for a long duration. At page 21 of the Defendant's list of documents list of documents was a letter PW – 2 wrote to the Land Registrar to remove the caution. There was a response by the Land Registrar at Page 23.

At page 40 was a letter from the Chief Land Registrar to the District Land Registrar Paragraph 2 which stated an access road was provided.

At Page 71 was a letter PW – 2 wrote to the Land Registrar stating that Mr. Kimondo had failed to honour the agreement.

At Page 72, was a notice to show cause by the Land Registrar to Mr. Kimondo to give explanation or reasons within 30 days or why the registered caution should not be removed. See also page 73. Eventually, the caution was removed lawfully. The search (P. Exhibit 2) showed there was no caution on the land. The search was carried out on 23rd January, 2012. THat Was All.

22. Examination In Chief of PW – 3 - Francis Gachoire Kahumbi By Mr. Magolo.



The PW – 3 sworn and stated in the English language. He lived in Changamwe. He was 57 years old. He knew the Plaintiff. He had known him for over fifteen (15) years. He had been a friend. He knew Peter Kamau Nguatha who hailed from Banana Hills, within the County of Kiambu, in Central province and is the one who sold the suit Plot to Douglas Mungai Njoroge, the Plaintiff. There was a problem with this plot and the late Stephen Kimondo went to report to David Ngure in Sabasaba so that he could inform Kamau Nguatha his plot had been encroached by some people in Mtongwe, Likoni. PW – 3 was called by the owner Kamau Nguatha, to go and see the nature of the encroachment. He went with a friend, the Plaintiff herein. They were shown around the plot by the Late Kimondo. When they saw the encroached the area, he and the Plaintiff informed the owner, Kamau Nguatha who was in Banana Hills. PW – 3 testified that the Plaintiff and Kamau Nguatha entered into a sale agreement over the plot in which the Plaintiff purchased the plot. Later he was informed by Douglas Njoroge Mungai that he had bought the plot from Kamau Nguatha. We were then to serve the late Kimondo with notice that the land had been sold and belonged to Douglas Mungai Njoroge. At the moment, the land belonged to the Plaintiff after he bought it from Kamau Nguatha. That is all.

23. Cross Examination of PW – 3 by Mr. Njoroge Advocate.

PW – 3 informed court that he was a businessman. He undertook business in printing industry. He was not a land broker. He had not bought land in Mombasa. He had inherited land in Central Kenya. He did not know about the two plots in Likoni. He may not have known if he went to Plot No. 462 or 463. He would not know whether the squatter was in Plot No. 462 or 463 but he knew he was in a plot that belonged to Kamau Nguatha. He was not involved in the sale. He was not there when the Plaintiff was shown the plot he bought. He could buy with a squatter because he could deal with the squatter. If it had a caution, he could not buy it until after the caution had been removed. He testified by stating that one went to the Land Registry to get a search to confirm that the caution had been removed. Prospective purchasers of land involved lawyers to buy land. If one lost documents, one could go back to the lawyer to get copy. The person selling the land primarily had the documents. A buyer made payment to the seller/owner.

24. It was reasonable to keep records, including withdrawal slips. One would also ask the seller to sign somewhere. He was not part of the agreement for sale. When they went to serve Mr. Kimondo, the Plaintiff wanted to take possession.

There was also another person, Amazing Grace church, who accepted the notice and paid the owner.

The problem was that the son of the late Kimondo refused to vacate from the plot. PW – 3 had never gone back to that land. He did not remember accompanying Douglas (Plaintiff) to Uhuru na Kazi to obtain Land Control Board Consent.

25. Re - Examination of the PW – 3 by Mr. Magolo Advocate.

He testified that the son to the late Stephen Kimondo Kariuki was in possession of the suit land. The reason the Plaintiff was before court was because he was unable to access his property which he bought. That was all.

III. The Defendant's Case

26. Examination in Chief of DW – 1 Peter Kamau Kimondo by Mr. Njiroge Advocate.

The Defence Witness – 1 was sworn and stated in English language. He resided in Mtongwe Estate, Likoni Sub - County, within the County of Mombasa. He worked with Kiarie Kariuki & Company Advocate as an accountant. He was the Defendant in this suit. He took over the suit from his late father, the late Stephen Kimondo Karugu. He obtained a Grant Letters of Administration before he



was substituted. He could see the amended Statement filed on 16th August, 2016 which he also recorded and filed further statements filed on 23rd October, 2018. DW – 1 wished to adopt the statements as his evidence in chief.

27. He also filed bundle of documents on 22nd March, 2012 which he wished to produce as Defendants Exhibit 1 - 36. There was also a supplementary List of Documents filed on 16th August, 2016. I wish to produce the documents as D. Exhibit Numbers 37-124. There was also further supplementary documents filed on 23rd October, 2018 which he wished to produce as D. Exhibit Numbers 125-127. His father first moved into the property in the year 1988.

At that time, he was a tenant. He was a tenant to Peter Kamau Nguatha. In February, 1994, the lease agreement was terminated and a sale agreement was entered into between his late father as purchaser and Peter Kamau Nguatha as vendor at page 2 of the original bundle of documents was the sale agreement. His father entered into an agreement on the portion that he had developed with the consent of Mr. Peter Kamau Nguatha. Initially, when his late father entered into a lease agreement, there was a semi-permanent building which he was allowed by Mr. Peter Kamau Nguatha to renovate it.

After the renovation, he extended the building by building some four (4) more halls. That was with the consent of the owner. At page 53 and 54 were the developments done by his late father with the knowledge and consent from Peter Kamau Nguatha. At Page 8 - 9 was a sale agreement dated 19th March, 1997 between his late father and Peter Kamau Nguatha. It was prepared by the Late James Gathuku Advocate. It referred to the same property. The price agreed upon was as sum of Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650,000/=). In the agreement there was an acknowledgement of a sum of Kenya Shillings Two Ninety Thousand Seven Hundred (Kshs. 290,700/=).

28. DW – 1 stated that his father was purchasing a portion of Plot No. 98. The subdivision was to be done by Mr. Peter Kamau Nguatha. At Pages 22 - 27 showed letters by Peter Kamau Nguatha to Edward Kiguru surveyors and copied to his father on the sub-division. His father then became a purchaser in possession. The rent was automatically terminated because there was a sale agreement between his late father and Peter Kamau Nguatha. There was no demand for rent after the year 1994 when the agreement for sale was made. He testified that his father was put in possession in the year 1994 after entering a sale agreement with the owner of the property - Mr. Peter Kamau Nguatha.

29. He started residing in the suit premises in the year 2007 and renovating some rooms and turned them into residential houses. He moved in with my family and that was where they all lived todate. Prior to the renovation the property was operating as a Bar and Restaurant, known as Mtongwe Inn.

At page 12, he could identify a sub - division Plan for Plot No. 98. The portion was marked 'A' measuring 0.23 Ha. was the one his father bought. The Plaintiff herein acquired Plot marked 'B' measuring 0.13 Ha. The Plaintiff had since transferred the property to a church, Amazing Grace. Plot No. 'A' was now title No. Mombasa/MS/111/462. Plot No. 'B' was title No. Mombasa/MS/III/463.

30. The agreement between his late father and Peter Kamau Nguatha was still in force because it had never been terminated todate. Peter K. Nguatha never gave his father a completion notice.

At page 56-57 was a letter issued by Kiarie Kairuki & Company Advocate to Peter Kamau Nguatha. The letter asked Mr. Nguatha to surrender the original title for plot No. 462, transferred and also to give a clear access so that his father could pay him the balance of the purchase price.

The letter was sent by registered post and there was no response. At page 28 was an acknowledgement signed by Peter Kamau Nguatha and my father Stephen Kimondo Kariuki and copied to James K. Gathuku Advocate.



After entering into the agreement dated 19th March, 1997. Peter Kamau Nguatha surrendered the original title for Plot No. 98 before it was sub - divided. The reason for surrendering that title was because his late had paid some substantial amount of money towards purchase price towards the portion he was to purchase, thus he requested the title to secure what he had bought.

31. According to the acknowledgement at page, his father surrendered the title to Peter Kamau Nguatha for purposes of obtaining titles for the sub - divisions. Mr. Nguatha was able to get titles for Plot No. 463 and 463.

Plot no. 462 was the subject matter of this suit. Mr. Nguatha was supposed to sign a transfer after obtaining title for Plot No. 462, but he went away with the title. His father lodged a caution at lands office for Plots No. 462 which he had purchased. His father's interest was that of a purchaser. DW – 1 was involved in the preparation of the caution. It was prepared in the offices of Kiarie Kariuki & Co. Advocates.

The caution was at page 29. It was registered on 28th March, 2002. At Page 30 is a receipt for payment for the caution. At Page 31 is an application for registration of the caution. The caution was registered. He was not aware if whether the caution was ever removed. Mr. Peter Kamau Nguatha attempted to have the caution removed sometimes in the year 2002. He wrote to the Land Registrar requesting him to remove the caution. The Land Registrar did not remove it.

Instead, the Land Registrar Mr. K.K. Githii sent a notice to his father requiring him to show cause why the caution should not be removed (See page 36). The Land Registrar was requiring his father to attend the hearing on 28th November, 2002 at 10.00 a.m.

In the second bundle of his documents, pages 26 - 38 are handwritten notes for the hearing to remove the caution.

At page 39 was the decision/ruling of the District Land Registrar after hearing his late father and Peter Kamau Nguatha. It was dated 18th December, 2002. The Land Registrar ruled that Mr. Nguatha should remove the beacons to the other side where there were no squatters. The cost for changing the access road was to be shared. The caution was to be removed within 90 days after the beacons had been put on the ground, unless the cautioner gave valid reasons to the contrary.

32. The caution was never removed. Mr. Nguatha did not comply with the decision given by the Land Registrar. DW – 1 was not aware of the sale of Plot No. 462 from Peter Nguatha to the Plaintiff herein. The Plaintiff never visited the property in his presence. His late father had no dealings with the Plaintiff herein. The evidence given by the Plaintiff in court was not true.

His father and DW – 1 challenged the sale to the Plaintiff. This was because there was sale agreement between his late father and Peter Kamau Nguatha which was never terminated and had not been terminated todate. Secondly, Peter Kamau Nguatha did not give a completion notice to his late father before entering into any other dealings with the Plaintiff herein.

His late father was put into possession as a purchaser in possession since year 1994 when they first entered into a sale agreement. He was in possession until this death in 2012, and was in possession as an administrator of the estate todate.

The caution which was lodged by his late father was not removed and had not been removed todate. With the caution in place, no other transaction could have taken place before the caution was removed. Also to be able to transfer property from one person to another there was a procedure to be followed. One was supposed to make sure land rates are cleared and a clearance certificate was issued for the Land



Registrar to effect a transfer from one person to another. That was not done because the Plaintiff never provided any rates payment of clearance certificate.

There was no evidence that shows stamp duty was paid. There was no evidence proving that an application of the transfer from Peter Kamau Nguatha to the Plaintiff was made. The land was not agricultural land and did not require Land Control Board Consent. DW – 1 had not seen Land Control Board Consent provided by the Plaintiff.

33. The transfer form was valued at Kenya Shillings Eight Thousand (Kshs. 800,000/=), consideration in the Agreement was indicated as Kenya One Million Four Hundred (Kshs. 1,400,000/=). There was a variance of Kenya Shillings Six Hundred (Kshs. 600,000/=). This means if stamp duty was paid, the property was undervalued. The Plaintiff and Peter Kamau Nguatha concluded. The Plaintiff was aware of the existence of the caution. In his statement, he admitted that his late father informed him that there was a caution registered against the title.

In the agreement entered between the Plaintiff and Peter K. Nguatha, there was a clause that an amount of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) of the purchase price was to be retained by the Plaintiff which amount was to facilitate the payment of land rates, obtaining Land Control Board Consent and to facilitate the removal of the caution.

So even at the time of signing the agreement, the Plaintiff was aware there was a caution. Before one entered into a transaction such as purchase of land, he/she has to do a search to ensure the land was free of any encumbrances. This case was filed against his late father when he was still alive. By that time, the title had not been transferred into his late father's name. When he applied for letters of administration, his family was to list properties. They could not include this property because he had not gotten title and had been sued while still alive, and there was a case pending over the property. They were advised that if the case if ruled in our favour they would amend the Letters of Administration to include the suit property.

34. The Plaintiff owned Plot No. 463 before he transferred it to a 3rd party. Plot No. 463 was acquired first. It was a sub-division of Plot No. 98. Anyone standing on Plot No. 463 could see plot 462. At the Plaintiff acquired the suit property, there was his late father who was the purchaser in possession. DW – 1 as administrator with his family and have lived there since year 2007, there was a church which had rented part of the premises from his late father.

It is not possible that anybody could have missed to see that there were people on that land. His prayer was for the court to cancel the title issued to the Plaintiff and compel Peter Kamau Nguatha to transfer the property to the estate of his late father.

They are willing to pay the balance of the purchase price of a sum Kenya Shillings Three Fourty Two thousand (Kshs. 342,000/=), within 3 to 5 months to Peter Kamau Nguatha. My father had done major developments in the property with an intention of retaining the property. The value of development done by his late father was Kenya Shillings Three Million Six Thousand (Kshs. 3,600,000/=). Between the Plaintiff and his late father, his father invested more.

35. He could see page 55 of my original bundle. The Plot was Plot No. 98. The access was covering Plot No. 463 to 462. There was a squatter covering part of the access. As per the decision given by the Land Registrar, the access road was to be relocated from where it was to the left of Plot No. 463. This never happened. By the time Mr. Nguatha transferred Plot 463, he had not relocated the access. The property was transferred to the Plaintiff who sold to a third party, a church.

Apart from the access where there was a squatter and his father placed a caution, there was no other issue. After the suit was filed, the County Government came up with a cabro road which touches Plot



No. 462, the suit premises. DW – 1 confirmed that he now had access. If granted the prayers sought, he would not require that he would be given access.

Prior to the filing of the case, there was no clear access. The cabro road came after the filing of this case. That was all.

36. Cross Examination of DW – 1 by Mr. Magolo Advocate

DW – 1 worked at the law firm from the year 1993 to date. It was not possible for a transfer to be effected when there was a caution. He could see a payment slip of KRA showing the amount of stamp duty was to be paid for Plot No. 462. He could also see a bankers cheque for Kenya Shillings Thirty Two Thousand Three and Fourty (Kshs. 32,340/=). There should be a bank slip confirming money was paid. He could see a rates clearance certificate for Plot 462. He could see the Agreement for Plot Rent at page 1 of the original bundle. It was for Plot 98 measuring 1.5 acres. At Page 2 was the sale agreement, the portion that was being sold was part of 1.15 acres which was developed by his late father. At Page 8, the portion sold/bought was 0.23 ha. Which covered the sub-division shown as 'A'.

37. Upon payment of part of the purchase price, he stopped paying rent. Clause 4 stated the balance of sum of Kenya Shillings Three Fifty Nine Hundred Three Thousand (Kshs. 359,300/=) was to be paid on or before 28th February, 1998. It was not paid. After the initial payment, his father paid Kenya Shillings Seven Thousand Three Hundred (Kshs. 17,300/=). Clause 5 stated he was to be paying Kenya Shillings Five Thousand (Kshs. 5,000/=) per month.

At page 33 is a notice for removal of caution. At page 35 was a letter his father giving reasons why caution should not be removed. He was able to pay.

At page 26 of the second bundle were handwritten notes. They were not certified. He could see page 29. The issue was the squatter and his father leased he could not get title. The issue of the squatter had not arisen by the time the agreement was signed.

At Page 39, his father was given 90 days to make payments. At page 40 was a letter dated 18th December, 2007. He could see paragraph 3. By 1993, there was no existing sale agreement between my father and the vendor. At page 40, a proposal/views by the Chief Land Registrar, Nairobi. His father was living in Changamwe. He was not staying at the suit premises, but was doing business there. He was not staying at the suit premises. He had not conducted a search on the property. He had seen the documents filed by the Plaintiff. There was a search dated 3rd January, 2012. according to the search, the proprietor was shown as Douglas Mungai Njoroge. He could see the transfer dated 9th December, 2011 and signed by Peter Kamau Nguatha and Douglas Mungai Njoroge. He could see the title deed dated 29th December 2011 in name of Douglas Mungai Njoroge, but the title was challenged. It was not possible to transfer where there was a registered caution. According to the search, there was no encumbrance. That was all.

38. Re - Examination of the DW – 1 by Mr. Njoroge Advocate.

DW – 1 stated that the documents he was shown were photocopies which he had never seen before. He remembered requesting the Plaintiff to supply him with the documents, but he never did. He could not tell if they were genuine or not. At Page 2 of his bundle, the entire area of Plot 98 was 1.15 Acres. At page 12, the Plot was described in hectares. His father paid further sum of Kenya Shillings Seventeen Thousand Three Hundred (Kshs. 17,300/=) (see page 13).

At page 29 of the second bundle, he stated that his father explained that he could not pay the Kenya Shillings Five Thousand (Kshs. 5,000/=) because he could get problems in transfer.



The access road was to be availed by the vendor. If he had been given access, there could be no problem. In the year 1994, his late father was in occupation. He was living in Changamwe but was the purchaser in possession carrying out a bar business. They had never given up possession. It was not possible to get a search because the file at Lands Office was always missing.

Apart from the search shown, he had never seen any other search.

39. Examination in Chief of the DW – 2 - Josephine Nyazi Rama by Njoroge Advocate.

She testifies and sworn in English language. She holds the national identity card. She was the Registrar of Titles Mombasa. She lived at Tudor within the County of Mombasa. She joined the Civil Service in March 2015. She had been the Registrar for seven (7) years of which the two and half (2½) years based at the Mombasa Land Registry.

She received the witness summons issued by court issued on 14th September, 2021. She was requested to produce the parcel and correspondence file to the suit land herein. She was not able to get all records. For instance, she was not able to get part of the green card. She only had the last part of the green card which she had a copy of it. She showed it to the Plaintiff, the Defendant's Counsel and the Court.

The Plaintiff's Counsel. He confirmed that it was the last part of the last part of the Green Card to the suit land and he would not be objecting to its production eventually by.

Mr. Njoroge Advocate. He indicated that they had already produced a bundle of documents. – P. Exhibit 99 – Extract of the part of the Green Card produced by the Registrar of Title i.e Certified copy.

DW – 2 stated that the current owner is Douglas Mungai Njoroge – the Plaintiff – Entries are No. 5 & 6. The said entries are in favour of Mr. Njoroge. There was an application for an official search dated 20th June 2019 but did not issue the search. She declined to issue the search as there was no flow from the entry. There were no entries for No. 1 to 4. She wanted to see the history of the land. She was worried as these entries were missing. She stated that the Certificate of title was issued on 29th December, 2011 to Douglas Mungai Njoroge. She did not have any record to show how this green card was opened. Since March 2011 and March 2021 she had been looking for said green records but to date they had never gotten the records.

40. She testified that in such circumstances, a fresh green card is issued. This is after an application is made by the registered owner holding an identity – (Refer to the provisions of Section 33 of [Land Registration Act](#)). They did have any documents on reconstructed file. This was a continuation of the green Card, and that is why it was a construction. She held that this happened when it got filled up. She was not able to tell whether this card was intact or not.

It was her testimony that she did not have the documents for transfer of land to Mr. Douglas Njoroge. They could not trace any of those documents on the registration/transfer of that parcel in the file. They would not be having a copy of receipt in the file. The registration fees were payable.

She would not be having a copy of receipt to show whether the stamp duty was paid or not. They did not have proof of whether rate was payable or not. The land was at Mtongwe near Likoni. The Land reference No. would be associated to South Coast. From the documents, one would not know if it was an agricultural land or not. She did not have a copy of the Letter of Consent from the Land Control Board and whether it was a requirement. She would not know whether what was the consideration paid for the land transaction. On the caution registered by Stephen Kimondo Karuku - the Deceased Defendant, there were supporting documents which included sale agreement entered with Kamau Nguatha dated 19th March, 1997. The supporting documents were a MAP, and acknowledgement of receipt marked as DW – Exhibit 100 (a), (b) and (c).



41. She held that there was an attempt to remove the caution. These documents were from the corresponding file (a) Application for removal of caution by the registered owner – 1st Defendant – Peter Nguatha. There was a letter dated 16th September, 2002 by Peter Kamau Nguatha addressed to the Land Registrar and marked as D. Exhibit 101. On 17th September, 2002, he issued a Notice to show cause why the caution should not be removed. It was sent by postal way. There was a copy of a receipt marked as D. Exhibit 102 through a letter dated 17th September, 2002. D. Exhibit 103 was vide a letter dated 4th October, 2002 which the Cautioner responded to the Notice that is a letter of objection. Hence a caution hearing session was fixed and conducted.

An Caution removal inquiry took place on 28th November, 2002 – both the Cautioner and the registered owner attended. It was presided by Mr. K.K. Githi – The land Registrar. On 18th December, 2002 he made a determination. It was signed by the Land Registrar. He decided on the removal of the caution but on fulfillment of certain conditions. The change of beacons to avail the access road was measured by the proprietor within 90 days. D. Exhibit 104 (a) and (b) Pages 26 and 39 of the proceedings and the decision. They were produced by the Land Registrar.

She also testified on a letter by M/s. Wanjau – the Chief Land Registrar – that the cautioner had been dissatisfied by the decision. The Letter dated 18th December, 2007 written by the Cautioner having been dissatisfied by the decision by the Land Registrar see on PAGE 40.

Mr. H. S. W. Musumiah responded vide a letter dated 19th March, 2008. DW. Exhibit 106. There were no records to show that the caution was ever removed. In the ordinary circumstances a person aggrieved would file an appeal through court within 30 days.

42. There was an attempt to remove the caution dated 17th September, 2010 and 26th November, 2010 D. Exhibit 107 (a) and (b) by Stephen Kimondo – 15th October, 2010 – D. Exhibit 108 requesting the Land Registrar to remove the caution. There was no record on service of the said letter. She stated that the relevance of the previous decision by the Land Registrar would guide the current Land Registrar (A case of “Stare decisis”) would include summoning the witness where an application was made and it bore a caution. It could not reach the Land Registrar’s desk. A buyer was expected to conduct an official search prior to purchasing land. The information was obtained from the green card. She stated that she was neither known to any of the parties in this matter. That was all for evidence in chief.

43. Cross Examination of DW – 2 by Mr. Magolo Advocate

She stated that it was impossible to conduct a transaction where a caution was registered. She referred to Clause 4 of the Sale agreement Clause 4, the Cautioner was to pay the balance of the purchase price for the suit land before the February 1998. An application D. Exhibit 101 he claimed the balance had not been paid. There were two attempts all along to the it removed as the Cautionee kept on pressing he had not been paid by the Cautioner. There was no response from the Cautioner. The Property being transferred was the suit land. Stamp duty was duly paid.

44. Re – Examination of DW – 2 by Mr. Njoroge.

She stated that she had no proof of delivery or the service of the said letter. Regarding the two documents – the transfer form and the receipt on payment of stamp duty payment were not in her records. That was all.

Examination in Chief of DW - 3 Kenneth Kariuki Githii by Mr. Njoroge Advocate.

He was sworn and testified in the English language. He lived in Thika. He was a retired Civil Servant from the years 1975 to 2008. From the year 1977 he was a Land Registrar to Senior Land Registrar. He was the District Land Registrar at Mombasa from the years 1993 to 2003. He was summoned to



tender evidence with regard to this case before this Honorable Court. In the year 2003, he was the Land Registrar at Mombasa. He recall the letter dated 16th September, 2002 marked as D. Exhibit 101. He issued the Notice and there was a response as an objection dated 17th September, 2002. It was in his documents marked as D. Exhibit 101 in his own writing and bearing his signature. He summoned all the parties for a removal of Caution hearing which was held on 28th February, 2020. The inquiry took place. He presided over it and a decision was arrived at. To be fair – the registered owner – Cautionee sold the land to the Cautioner and he was complaining that the Cautioner had not completed the payment. He stated that the Cautioner held that there were to be access road yet there were squatters. They had agreed the owner would remove the squatters and hence the reason he decided to change the beacons making the land more accessible. He did not bring the dispute before him. He gave them time (60 days) for further direction. But he never saw them again. He did not know the Cautioner nor the Cautioner. He left Mombasa in the year 2003. He was not aware whether the parties were in compliance of his orders or not. This happened nineteen (19) years ago. He was only relying on records. That was all.

45. Cross Examination of the DW – 2 by Mr. Magolo Advocate.

He testified that When a caution was placed, the Land Registrar checked and verified whether it was registerable or not. Under the Clause 4.0 of the Sale Agreement (Refer). He had no power to alter any clause from the sale agreement. The reasons given for the removal of caution was that his balance had not been paid. He confined himself to the issues – if his decision was wrong they were entitled to have appealed at the High Court. He did not alter the terms of the agreement. The letter dated 16th September, 2002 (D. Exhibit 101). He testified that a transfer should not be effected if there was a registered caution. He has an official search which indicated that the owner of the land was Douglas Mungai Njoroge. A Copy of transfer of land was on 29th December, 2011 from Peter to Njoroge. It showed that the transfer was done and effected. He confirmed having left Mombasa Land Registry in the year 2003. From that time onwards, he was not engaged in this matter anymore. That is all for this witness.

V. Submissions.

46. Upon the close of both the Plaintiffs and the Defendant's case in as far as the Plaintiff, Defence and the Counter claim is concerned, in the presence of all the parties, the Honorable Court directed them to file and exchange their written submissions. Thereafter, they all complied and Court reserved a date for Judgment date.

A. The Plaintiff's Written Submission.

47. On 12th November, 2021 the Learned Counsel for the Plaintiff the Law firm of Messrs. J.O. Magolo & Company Advocates filed their written submissions dated 11th November, 2021 Mr. Magolo Advocate submitted that the Plaintiff filed his suit through a Plaintiff dated 27th February, 2012 where he made Certain prayers as stated thereof and that the suit was defended by a Defence and a Counter Claim. He provided a detailed background of the case. He contended that the final sale agreement between the Defendant's late father and Mr. Peter Kamau Karuku was dated 19th March, 1997 was drawn and executed by his father and Peter Kamau Nguatha – Clauses 3 and 4 confirmed that the agreed purchase price was Kenya Shillings Six Hundred and Fifty (Kshs. 650,000/=) and that Kenya Shillings Two Ninety Thousand Seven Hundred (Kshs. 290,700/=) was paid as deposit and Kenya Shillings Three Hundred and Fifty Nine Thousand Three Hundred (Kshs. 359,300/=) was to be paid on or before 28th February, 1998.



48. However, the said outstanding balance was never paid at all for over twenty three (23) years down the line. The Learned Counsel argued that under Clause 5 of the said agreement it provided that the purchaser the late father to the Defendant was to be paying a sum of Kenya Shillings Five Thousand (Kshs. 5,000/=) rent per month commencing from 28th February, 1997 pending the availability of funds to clear the outstanding debt. But despite all this the Defendant confirmed that his late father again breached the agreement as he was never paying rent since the execution of the contract. For these reasons the suit property was never transferred to him.
49. In summary, the Learned Counsel opined that the Defendant was intentionally in breach of Clauses 4 and 5 of the sale agreement despite the fact that Clause 6 stated the vendor had already handed over to the title documents to the purchaser. To support his point he relied on the case of *Sagoo – Versus - Dourado* (1993) eKLR 365 whereupon from the *Halsbury Laws of England, 4th Edition* paragraph 481 stated as follows:-
- “The Modern Law in the case of contracts of all types may be summarized as follows. Time will not be considered to be of essence unless (a) The Parties expressly stipulate that conditions as to time must be strictly complied with. (b) The nature of the subject matter of contract or the surrounding circumstances show that time should be considered to be of the essence or (c) A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence”.
50. He argued that when a party to a contract promises to do a certain thing at a specified time but fails to do it the contract becomes voidable. He referred court to the Court of Appeal of *Wagichiengo – versus- Gerald* (1981) eKLR where the Court of Appeal was faced with an appeal which was based on similar facts.
- In addition, the Learned Counsel cited and relied on the provisions of Section 26(1) of the [Land Registration Act](#) supporting the fact that the Certificate of title is conclusive evidence of proprietorship unless it was acquired by omission, mistake, fraud or through corrupt means. He argued that the Plaintiff in the Plaint produced before court a copy of a title deed issued on 29th December, 2011 with regards to the suit property and it showed that the property was duly registered in his names. He submitted that the Plaintiff further produced a Certificate of official search dated 23rd January, 2012 that showed the property was registered in his name.
51. From the supplementary list of documents dated 9th October, 2018 by the Plaintiff included Letters of Grant of Administration and the application it contained an affidavit and an inventory of all the assets and liabilities of the deceased and the estate. The suit property is not included as being part of the deceased assets. In other words it shows this property was never part of the assets for the deceased.
52. In conclusion the Learned Counsel submitted that the Plaintiff in the Plaint had proved his case on a balance of probabilities as required by the law and hence was entitled to prayers as sought in the filed Plaint and a sum of Kenya Shillings Five Thousand (Kshs. 5,000,000/=) for trespass. He prayed for the suit against him as the 2nd Defendant in the Counter Claim to be dismissed with Costs.

B. __The Defendant’s written Submissions

53. On 14th January, 2022 the Learned Counsels for the Defendant the Law Firm of Messrs. Njoroge Katisya and Company Advocates filed their written submissions dated 14th July, 2021 Mr. Njoroge Advocates submitted using the three (3) Swahili adages that “Riziki ya mtu hai potei, bali yaweza kucheleweshwa tu” (meaning what is yours as of right or part of your bounty or nourishment from



God will never be lost. It may be delayed but it will never be lost) and “Haki ya mtu haipotei” (meaning justice will always prevail) and “Ukinyanganywa riziki yako na mtu ujue ataitumia kwa muda tu itakurudia mwenyewe, mwenye haki yako” (Meaning that though someone may take away from you your nourishment, bounty, blessing, right he cannot keep it for long) as they were to the instant case, to be extent that the Defendant’s in the Plaintiff right to acquire the suit property may have been derailed or delayed but it was never lost. The Counsel submitted that the Plaintiff in the Plaintiff may have interfered with the process of the acquisition of the land by the Defendant but could not take the right away and that the Defendant who was in possession of the suit land ought to be granted the relief of specific performance in the counter claim and the suit by the Plaintiff dismissed. He submitted that though the 1st Defendant in the Counter Claim filed issues for determination the parties herein did not agree on them. He argued that Peter Nguatha the 1st Defendant by way of counterclaim leased a portion of Plot No. Mbsa/MS/Block III/98 to Stephen Kimondo Karuku the Defendant vide a tenancy agreement dated 27th September, 1988.

54. The Counsel held that pursuant to that the Defendant proceeded to renovate and develop the premises where set up and operated a bar and restaurant called Mtongwe Inn. In the cause of time the Plaintiff offered up to sub-division of the land to sell to the Defendant one portion of the suit land. A sale agreement dated 13th February, 1994 was duly executed by the deceased and the Plaintiff terms and condition stipulated thereof. That for the purchase price of Kshs. 650,000/= deposit of Kshs. 50,750/= and balance of Kshs. 599,300/= to be paid when the arrangements for the transfer was complete. Indeed the deceased made efforts to make some payments a deposit of Kenya Shillings Fifty Thousand Seven Hundred (Kshs. 50,700/=), Kenya Shillings Thirty Thousand (Kshs. 30,000/=) paid on 1st June, 1994, Kenya Shillings Thirty Thousand (Kshs. 30,000/=) paid on 18th July, 1994 as part payment and Kenya Shillings Twenty Two Thousand (Kshs. 22,000/=) paid to Edward Kiguru Land Surveyors Kenya Shillings Seventeen Thousand Three Hundred (Kshs. 17,300/=) on 20th March 1997 hence a total of Kenya Shillings Three Hundred and Eight Thousand (Kshs. 308,000/=) leaving a balance of Kenya Shillings Three Fourty Two Thousand (Kshs. 342,000/=) subsequently the plot No. MSA/MS/BLOCK III/78 was sub-divided into two (2) portions being Numbers 462 and 463 respectively. The deceased was to purchase Plot No. 462 and he never left possession from where he had leased all along. He further leased out a portion of it to Beatrice Nthuli t/a. Amazing Grace Church but retained possession of the rest. The Plaintiff had never taken possession. The counsel therefore refuted the allegations that the deceased had trespassed on the suit land as he and his family had always been in possession of the suit land. He argued that the terms and condition of sale agreement was binding to the parties as it had never been terminated not was the Defendant ever been served with a completion notice as required by the LSK condition of sale of 21 days and thereafter the sale agreement entered on 19th March 1997 remained as valid.
55. On this point, he relied on the cases of “Thrift Houses Ltd. –Versus- Kenya Investments Limited 2015 KLR and Anne Murambi –Versus- John Munyao Njama and Another (2018) KLR.” He averred that the agreement never stipulated that time was of essence that it never stipulated within which time the vendor was to conclude his obligation regarding the sub-division and the vendor never cited any frustration in conducting his part of the bargain as indeed the deceased made part payments – what was clear was that the completion dated being 28th February 1998 came and went without the vendor having concluded the sub-division processes. Thus without having concluded or terminated the sale agreement Peter Nguatha could enter another agreement with Douglas Mungai Njoroge as he purported to do. The Learned Counsel argued that Mr. Njoroge could not argue that he was an innocent purchaser for value as all along he had been aware that the suit property was already being occupied by the deceased making the 2nd sale agreement fraudulent and misrepresentation as the



registered caution by the Deceased never got to be removed which was registered on 28th March 2002 and the Plaintiff never carried out any official search to that effect.

56. The Learned Counsel based his argument on the fact that the Land Registrar – DW2 testified that there had been several efforts to remove the caution and that after holding a sitting he delivered a fair and just ruling which had never been set aside by any of the parties. He referred to the subsequent letters issued by the Land Registrar for the removal of the caution allegedly served but there were no proof of delivery or certificate of posting them having been served upon the deceased. The counsel held that other proof would have been in the green card but it was only part of the green card that was available as the other part went missing from the records to show that the records to show that the caution was removed this was supported by DW-2 the current Land Registrar that she had no proof of the removal of the caution. With the caution still registered no transfer of land to the Plaintiff would have taken effect at all. On the reconstruction of Land records relied on the case of *Elias Joseph Wamburi Wamunyu v Joseph Mwangi Njoroge* [20187] eKLR where court rebutted person interfering with the sacred land records held at the Land Registry and therefore it made the Plaintiff's title impeachable on this ground. He cited the cases of *Lawrence Mugambi Rutere – versus - Nelly Wachira and another* eKLR 2019 and *S.A.O. v - JFMN & 3 others* [2018] eKLR.

57. The counsel by way of challenge the sanctity and validity of the Plaintiff's title held that the Plaintiff never paid stamp duty for the transaction as required by law. He never showed any KRA pay in slips rates, cleared and clearance certificate issued and the Plaintiff only held a Certificate of title deed and nothing else. To support his point he relied on the decision of *Lawrence P. Mukiri Mungai –Versus- Attorney General and 4 Others* 2017 eKLR. Whereby where title was challenged it was incumbent for parties to prove the process of acquisition and registration. While the sale agreement stated the value being a sum of Kenya Shillings One Million Four Hundred Thousand (Kshs. 1,400,000/=) as consideration or purchase price the transfer documents held it at Kenya Shillings Eight Hundred (Kshs. 800,000/=). The Defendant conducted a valuation and from the valuation report it showed the property was at Kenya Shillings Four Million Six Hundred (Kshs. 4,600,000/=) a clear under valuation and hence serious and gross anomaly and transgression.

He further held on the issue of written statement of Peter Nguatha dated 5th October, 2018 admittedly was never signed by him but someone else.

Further, the Plaintiff never obtained a Letter of Consent from the Land Control Board though this being an agricultural land. As to the reason the property was not listed as a property when applying for the Letters of Administration for the estate was that by the time the deceased passed on he had not gotten a title to the said suit property. Once the title was obtained they would apply for the amendment of the Petition for Letters of Administration to include it.

58. In the alternative, the Learned Counsel contention was that the court should grant the Defendant a sum of Kenya Shillings Three Million Six Fourty Nine Thousand Six Fourty Six Hundred and Sixty Five Cents (Kshs. 3,649,646.65/=) as a refund towards specific performance so as to maintain intention of the parties as set out in their original agreement. With reference to the relief of specific performance the Learned Counsel cited the case of “*Orion East Africa Ltd. –Versus- ITE Farmers’ Co-operative Society Limited* 2019 and *Thuo Commercial Agencies Limited –Versus - Nicholas Muya Kamau*2019 (eKLR).

In conclusion, the Learned Counsel held that the Defendant was entitled to costs, of defending the suit and the Counter Claim. In finalizing his submissions, he cited a scriptural verse from the holy bible the book of Leviticus 25:14 - 20 “If you sell land to any or your own people or buy from them, do not take advantage of each other”



He urged court to dismiss the suit by the Plaintiff and allow the prayers sought in the filed Counter Claim by the 1st Defendant's orders of specific performance as prayed.

VI. ANALYSIS AND DETERMINATION.**

59. I have considered the filed pleadings filed by the parties herein being the Plaintiff, Statement of Defence and Counter Claim, the oral and documentary evidence adduced by all the Plaintiff and Defendant witnesses during the full trial, written submissions, the cited authorities and relevant provisions of the law.

In order for this Honorable Court to arrive at an informed, just and fair Judgement, I have framed the followingsalient issues for consideration. These are:-

- a. Whether the Plaintiff has demonstrated that it was the absolute and legally registered proprietor to all that parcel of land known as Land Reference numbers known as MOMBASA/BLOCK/MS/III/462 with indefeasible rights, interest and rights over it.
 - b. Whether there exists any specific performance from the Conveyancing transaction guided by the duly executed sale agreement between the Plaintiff and the Defendant.
 - c. Whether the parties herein are entitled to the prayers sought in the Plaintiff, the Statement of Defence and the Counter Claim by the Defendant.
 - d. Who will bear the Costs of the Suit.
- ISSUE No. a). Whether the Plaintiff has demonstrated that it was the absolute and legally registered proprietor to all that parcel of land known as Land Reference numbers known as MOMBASA/BLOCK/MS/III/462 with indefeasible rights, interest and rights over it.

Brief facts.

60. Prior to embarking onto a detailed analysis of the framed issues herein, it is imperative first and foremost that the Honorable Court extrapolates on the brief facts. From the filed pleadings and the adduced evidence as stated above, the Plaintiff claims to be the registered proprietor to the suit property having bought it from one Peter Kamau Nguatha. He produced a Certificate of Title dated 9th December, 2011 and was issued with a title on 29th December, 2011. The Defendant on the suit property operating a bar and restaurant business as a tenant for a long period and paying an agreed rental sum. After a while, the Defendant developed interest on buying one of the sub – divided portion from the main the suit parcel of land. Indeed they entered into a duly executed sale agreement terms and conditions stipulated thereof. Unfortunately, though he made some payments onto the purchase price but subsequently defaulted on claim that the Plaintiff failed to finalise on the registration process for no apparent justifiable and/or good reasons and cause thereof. The Plaintiff alleges that the Defendant would be evading him hence despite all efforts made.

For this reason, the land owner decided to engage other prospective purchasers and that is how he got into a second agreement. Clearly, from these facts and the evidence adduced herein, it's a case of the breach of sale agreement.

61. On the other hand, the deceased whose son is the Defendant in the Plaintiff and 1st Defendant in the Counter Claim, and the duly appointed legal substitute of the Defendant vide a Limited Grant Letters



of Administration, Ad Litem. He claims the deceased moved onto the property as a tenant of a bar and restaurant business at Mtongwe. They entered into a tenancy agreement with Mr. Peter Nguatha. In the year 1994, the Lease agreement was terminated and a sale agreement was entered into between the late Peter Kamau Nguatha and the Defendant for the purchase of a portion of the sub – divided land from the main suit property. The purchase price was Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650, 000.00/=). An amount of Kenya Shillings Three Hundred and Fifty Nine Thousand Three Hundred (Kshs. 359, 300.00/=) was paid retaining a balance of Kenya Shillings Three Fourty Two Thousand Seven Hundred (Kshs. 342, 700.00/=) to have been paid on or before 28th February, 1998. The parties agreed and as per Clause 5 of the Sale Agreement was to be settled in instalment of Kenya Shillings Five Thousand (Kshs. 5, 000.00/=) per month. This was not to be confused with the previous rental remittances. Instead of clearing the said debt, he defaulted as he insisted on being shown an access road to his property and as a squatter had all along erected a house on the access which he was being shown on the sub – division plan. Pursuant to this, and upon gathering that the said land being sold off to a third party, he decided to lodge a Caution to protect his purchaser’s interest.

62. The Plaintiff made several attempts to remove the Caution which was vehemently resisted by the Defendant though admitting that he was the one who had failed to clear the outstanding balance of the purchase price for the suit land. All efforts on the removal of the registered caution through series of correspondences was vigorously resisted by the Defendant on grounds that he was still making arrangements to access finances from a financial institution for that purpose. The events that followed were that the Land Registrar issued a notice on to show cause why the caution would not be removed. There was no response that was elicited. Upon expiry of the stipulated period, the Land Registrar convened a sitting and an inquiry was carried out culminating into a very fair and just ruling delivered by him. From the ruling he directed that beacons be moved and the Defendant be shown an alterative access road to enable him make payment of the outstanding balance. It is evident that the Land Registrar never removed the Caution. But later on it appears the registered caution was mysteriously removed as from the evidence of the current Land Registrar all records at the Land Registry got tampered with including part of the green card from its place of safe keeping. Arising from this state of affairs, Peter Kamau Nguatha sold the suit land to the Plaintiff. As a result, a Certificate of title deed in his names was issued on 29th December 2011. On 23rd January, 2012 there an official search that indicated that the certificate of title was in the names of the Plaintiff. It was confirmed by all parties that the Defendant was in occupation of the suit land todate. Its upon learning that the land was sold to the Plaintiff and he stood a risk of being evicted from the suit land that he filed both the statement of Defence and Counter Claim to the suit instituted by the Plaintiff seeking the orders as prayed thereof. . That is adequate about the facts of this case.
63. Having stated the facts briefly, I would now like to commence on the critical analysis of the case. Let me torn to the issue under this sub heading. Undoubtedly, 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.

64. In the instant case, the Plaintiff claims to have acquired suit land and was issued with a title on 29th December, He claims by dint of law, he was the registered owner having bought it from Perter Nguatha with all the indefeasible title, interest and rights over it by law. At the same time, the Defendant in the Plaint and 1st Defendant in the Counter Claim, holds was in the process of acquiring the land from Peter Ngarua through a duly executed sale agreement having had a tenancy agreement, carrying out business and being in possession with his entire family on it all these years. Ideally, this is where the main bone of contention, the pith and substance of the dispute in this instant 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”



65. 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;

To advance on this legal preposition, 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.....”

66. 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 transferred and registered culminating from a sale transaction between Peter Nguatha and him but has been vehemently challenged by the Defendant for ostensibly having had it acquired by irregularities, illegalities, fraud, omission or mistake. b). the allegations meted by the Defendant against the Plaintiff in its Defence and Counter Claim that they acquired their title deeds illegally and through fraudulent means. He argued that the Plaintiff 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 Mombasa. The Defendant alleging that the Plaintiff and Peter Nguatha were assisted in making a title deed without any other proper registration documents to justify the legality of their title deed; and c). the Plaintiff emphatically holding that he was innocent bona fide purchaser who acquired their title deed through consideration and value for the notice.

67. The Plaintiff in the Counter Claim has set out particulars of fraud and/or misrepresentation of facts by the 1st and 2nd Defendants in the Counter Claim in Paragraph 5 of the Counter Claim which reads inter alia:-

- i. The 1st Defendant to the Counter Claim knew very well that the Plaintiff was in occupation of MBSA/MS/BLOCK III/462 with his express consent and had accepted the 1st offer to purchase the same on agreed terms and conditions.
- ii. The 1st Defendant in the Counter Claim failed to disclose that he had offered the property for sale to the late Stephen Kimondo Karuku and had even



accepted money from the late Stephen Kimondo Karuku as part of the agreed consideration.

- iii. The 1st Defendant in the Counter Claim who had earlier on surrendered the parent title in respect of MBSA/MS/BLOCK III/ 98 to the late Stephen Kimondo Karuku took it from the late Stephen Kimondo Karuku for the sole purpose of registering new titles after the sub – division had been finalized and went ahead to fraudulently transfer it to the 2nd Defendants to the Counter Claim.
- iv. The 1st Defendant to the Counter Claim failed to execute the transfer in favour of the late Stephen Kimondo Karuku upon the conclusion of the sub – division process.
- v. The 1st Defendant fraudulently had the Caution that was registered against the suit property on 15th March, 2002 by the late Stephen Kimondo Karuku removed without the requisite procedure being followed.
- vi. The 1st Defendant in the Counter Claim misrepresented to the 2nd Defendant that the late Stephen Kimondo Karuku was only a tenant on the suit property while knowing very well that the late Stephen Kimondo Karuku was not a tenant on the suit property.
- vii. The 2nd Defendant to the Counter Claim knew very well that the Plaintiff to the Counter Claim was in occupation of the suit property but went ahead to purchase the same.
- viii. The 1st Defendant to the Counter Claim did not issue a notice to the Plaintiff to complete the conveyance prior to transferring the same to the 2nd Defendant to the Counter Claim.

68. In order for this Honorable Court to effectively deal with the afore stated three (3) issues, I cannot agree more with the Defendant onto these submission and taking that the Plaintiff s challenged nor controverted the above position as brought out by the Defendant herein from his pleadings. Instead, the Plaintiff spend a lot of his energies critically on the breach of contract allegedly caused by the deceased. Further, the Learned Counsels for the Plaintiff authoritatively emphasized and justified of him having legally acquired the suit land as bona fide innocent purchaser 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.”



69. 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.” Under the provisions of Sections 104, 107 and 112 of the Evidence Act, Cap. 80. It holds that he who claims have to proof. The Defendant in the Plaintiff and the 1st Defendant in the Counter Claim has challenged the Certificate of Title Deed in the names of Douglas Mungai Njoroge and these need to be assessed keenly in order to arrive at a decision under this sub – heading. He holds that there were some irregularities on the title deed particularly caused by the Plaintiff. These include, causing the registration despite of there being a caution registered against the title deed, failure to produce certain importance registration documents such as the letter of Consent from the land Control Board this being an agricultural land under the provisions of Section 6 (1) of the Land Control Act. Cap. 302, a Copy of receipts or the KRA Slip indicating the payment of stamp Duty by the Plaintiff, failure to issue him with a completion notice for the termination of the sale agreement as required by law.
70. Emphasis is placed in the manner in which the registered caution was removed if at all. Cautions or the absence of it can only be known by way of conducting or carrying out official search. The evidence on the balance of probability shows that the Defendant registered a caution on 28th March, 2002 but no evidence was produced in court demonstrating that the Plaintiff carried out any form of due diligence such as an official or personal search prior to acquiring it. On cross examination, the Plaintiff admitted that he had been informed by the deceased that there was registered a Caution on the parcel though he alter on recanted the testimony. Suffice to say, from the numerous correspondences by the Land Registrar and efforts to remove the registered caution no one would ape ignorance on the existence of the Caution. All parties have agreed on the proper legal position that no registration of any instrument can be possible where a Caution was validly registered. Such registration has to be cancelled for being done before the Caution is properly and procedurally removed in accordance with the provision of Section 73 (2) of the *land registration Act*, No. 3 of 2012 and Articles 50 (1) and (2) of the Constitution of Kenya on the right to be heard and fair hearing. For these reasons, it has been submitted the Plaintiff acquired its title through irregularities, wrongfulness and illegally. It is an issue on transgression and gross anomaly that this Honorable Court has taken up so seriously. Therefore, the allegation cannot just be washed away casually as it carries stand the light of the day whatsoever.
- From the instant case, the Honorable court notes that the Defendant indeed took trouble to scientifically and by way of law to demonstrate how the title was acquired fraudulently, omission or mistake to disapprove the title being held by the Plaintiff.
71. 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 pad 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 Plaintiff? I noticed that this argument was heavily relied on by the Plaintiff and his Counsel in the tendered submissions to justify their acquisition of the Certificate of Title from Peter Nguatha. 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 v 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 not innocent purchaser for value as he was fully aware of an existing sale agreement and that the deceased was already in occupation of the suit land for many years. The first agreement which had never been legally terminated still subsisted and took precedence. It left the original contract intact and unenforceable by law.

72. Additionally, this Court has taken notice from the pleadings and the evidence adduced in Court that the Plaintiff failed to produce the prerequisite empirical evidence associated with such legal land transfers. These are the Letter of Consent from the land Control Board, duly executed transfer forms, Clearance Certificates, application form KRA Pay in Slips and so forth as the evidence of DW – 2, the current land Registrar all the records on this suit land were missing and called for the reconstruction of the file. This by itself compels the Honorable Court to emphatically conclude that the process of the transfer and indeed the issuance of the Certificate of the Title deed to the Plaintiff was not bona fide



as it was full of mistakes, fraud and/or omission. Hence the same was illegal, irregular and wrongful to say the least.

ISSUE No. b). Whether there exists any specific performance from the Conveyancing transaction guided by a duly executed sale agreement between the Plaintiff and the Defendant.

73. Under this Sub heading, the orders of Specific performance,

like any other equitable remedy, is discretionary and court will only grant it on well settled principles of law. The Jurisdiction of specific performance is based on the existence of a valid, enforceable contract. In the instant case is the duly executed sale Agreement dated 19th March, 2017. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. According to Halbury's Laws of England, 4th Edition at Paragraph 487 Vol. 44 states that:-

“A Plaintiff seeking specific performance must show that he has

performed all the terms of contract which is has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the writ in action. However this rule only applies to term as which are essential and considerable . The Court does not bar a claim on the ground that the Plaintiff has failed in literal performance or is in default in some non - essential or unimportant term although in such cases it may grant compensation.”

In the instant case it is a pure Conveyancing land transaction pure and dry. There is no doubt that there existed a tenancy agreement between Mr. Peter Nguatha and the deceased for the operation of the suit property where he was carrying out a bar and restaurant business. He would be paying his monthly rent so regularly. He actually lived there with his entire family. He caused a lot of improvement on it and even sub leased it to a Church. This was an indication that he was already in occupation of the suit premises for numerous years with the knowledge and consent of the land owner unlike the Plaintiff who had never taken possession.

Subsequently, arising from their good relationship with the deceased, they entered into a the sale agreement for the purchase of the sub – divided portion – term and conditions stipulated thereof. The main issue to ponder here is where did the rain start beating this transaction which appeared to be well choreographed from the beginning? Although, the deceased paid up the deposit and some other part payments towards the purchase price he was not able to complete the finalizing the balance. The main reason given was that the Vendor failed to fulfil his part of the bargain. They had agreed

on the land owner providing an access road to its land and also removing a squatter who had been living on the land.

Indeed, the land owner who had given the deceased the original title for land reference numbers Mbsa/ Ms Block III/98 but later on asked for it. Hoping that he had intended to use it for the sub – division in order to transfer the sub – divided portion to the deceased he released it to him. But only to discover it was all fraudulent tricks as he never proceeded to do so instead he went to transfer the land to the Plaintiff. In other sense, the completion arrangement was never done and come the completion date of 19th February, 2018 came and passed without any efforts made. Later on, the land owner was angered by the conduct of the deceased as he indicated had become evasive despite of him travelling all the way from Nairobi to see him. Now, this Court has observed that instead of the land Owner taking up the proper legal and direction for such Conveyancing transaction as provided for in law – the Law Society Condition of Sale (1989) edition of issuing a 21 days notice of termination of the transaction to the Deceased. I have keenly looked at and notice that the Sale Agreement has not specifically stipulated



that time was essence when the Vendor was to conclude his obligation regarding the sub – division. Instead out of rage and frustration which is well appreciated and understood would affect any human being or mortal to act illegally. From a span of a moment, he took the laws into his hands and entered into a second land sale agreement with the Plaintiff notwithstanding the seemingly illegal and irregular processes as discussed herein. The Law Society of Kenya Conditions stipulates there be a twenty one (21) days notice issues before either party terminates , rescinds or repudiate the sale agreement. Without issuing of such a completion notice, the repudiation of the Sale Agreement is unlawful and constitutes a breach of contract. It is evident in the instant case that no notice of termination of the sale transaction was issued to date and that means, which is trite law, that the original sale agreement over the suit property duly entered between the Vendor and the deceased on the 19th March, 2017 remained intact, valid and unenforceable. Juxtapose, it is actually the Plaintiff in the

Counter Claim – Peter Kamau Kimondo who issued a letter dated 7th February, 2012 to the Vendor – the 2nd Defendant in the Counter Claim to complete the transaction by fulfilling his

obligation. During the cross – examination, the Vendor admitted receiving the letter but never responded.

74. Ironically, the Learned Counsel for the Plaintiff by citing the authority of “Sagoo – Versus – Dourado (Supra) and the Halbury’s Law of England, 4th Edition, Paragraph 481 above as he fully concurs on this legal proposition.

On the Deceased learning about it, he proceeded to register a

Caution forbidding any transaction from taking place. Despite all efforts on removing it, for some miraculous way, the deceased was able to transfer and have the land registered in the names of the Plaintiff. This Court deduces graphic evidence of specific performance and breach of contract between the deceased and the land owner. He ailed to fulfil his part of the bargain as had been agreed upon.

Besides, the sale agreement never provided any time frame making the transaction not bound by time being of essence and thereof the contract still remains valid to date. Be that as it may, the Vendor never cited any frustrations or severe hardship he encountered in trying or incapable of transferring the Title to the deceased. Based on the legal maxim “Equity regards as done that which ought to be done” - all along there was intention by the Vendor to pass the possession and title to the Purchaser. Thus, this Court is convinced that the land owner owes the deceased who has been in physical occupation and possession of the suit land for over twenty years (20) years his part of the bargain by passing the title to the suit land to him. On the contrary, and in the given circumstances, the Vendor ought to know what to do to the Plaintiff who has a remedy of being refunded his finances from him. As the best alternative, and in all fairness, in the fullness of time going forward, the balance of probability is for the estate of the deceased will be compelled to pay off the outstanding balance to the land owner at the Court interest rate computed for all those years to the date of this Judgement. In this way, natural justice, equity and conscience would have been attained in the given circumstances.

ISSUE No. d). Whether the parties herein are entitled to the prayers sought in the Plaintiff by Plaintiff, the Statement of Defence and the Counter Claim by the Defendant.

75. Although, the Plaintiff did produce before court the copy of a title to the suit land issued on 29th December, 2011 and all other documents including the several official searches indicated the suit land belonged to the Plaintiff but the same was vehemently challenged by the Defendant on the grounds indicated above. For the reasons adduced herein, the Defendant in the Plaintiff and the 1st Defendant in the Counter Claim are entitled to the suit land where they have occupied and taken possession for all those years and on the legitimate expectation that the land was theirs.



76. The Plaintiff has never taken possession to it. This Court is not impressed in the manner and the process in which the Plaintiff acquired his title deed. It is full and marred by gross irregularities, wrongfulness and procedural transgression contrary to the standards and the provisions of law. The evidence in the Court is left without any choice but to call for the cancellation of the said title deeds and the rectification of the land register already so tampered by some crooked people at the Land Registry. The Honorable Court will not pen off before strongly rebuking and condemning those persons who have taken upon themselves the criminal acts and behavior of tampering with the sacred land records held and maintained at the Land Registry. From the evidence by DW – 2, the current Land Registrar was that all the records in this instant case apart from one part of the green card were missing from the correspondence and land records. Definitely, this was intentional to frustrate the due process. It calls for the reconstruction and construction of the records whereby chances are high mistakes would occur leading to miscarriage of justice. This has to stop henceforth.

ISSUE No. e). Who will bear the Costs of the Suit.

77. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

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

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

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

The events in the instant case is the Plaintiff in the Counter Claim has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff in the Counter Claim by the 1st and 2nd Defendants in the Counter Claim herein.

VII. Conclusion & Disposition.

78. Ultimately, following the indepth analysis of the framed issues herein, the Honorable Court finds that the Plaintiff’s suit is unmeritorious and must fail. The Honorable Court proceeds to enter Judgement in favor of the 1st Defendant in the Plaint and the Plaintiff in the Counter Claim against the 1st and 2nd Defendants in the Counter Claim herein.

79. For avoidance of any doubt, the Honorable Court determines as follows:-

a. That__ a declaration that the property known as Mombasa/BBolck/MS/III/462 based on the specific performance be registered in the names of the Defendant in the Plaint and Plaintiff in the Counter Claim being the estate of the late Stephen Kimondo Karuku.

b. THAT__ an order of Specific Performance be and is hereby issued compelling the 1st Defendant in the Counter Claim to transfer the parcel of land known as land reference Mombasa/BBolck/MS/III/462 to the estate of the deceased – the late



Stephen Kimondo Karuku within the next Sixty (60) days from the date of this Judgement. _____

c. That__ in default to cause the said transfer by the 1st Defendant, the Deputy Registrar of this Court shall duly execute all the prerequisite documents pertaining to this sale of land transaction to be registered in the names of the estate of the deceased.

d. That__ the Plaintiff in the Counter Claim as the duly appointed Legal Administrator to the Estate of the late Stephen Kimondo Karuku shall bear the costs of the Stamp Duty and Registration fees. _____

e. That__ the Defendant in the Plaint and who is also the Plaintiff in the Counter Claim is directed to pay the Plaintiff in the Counter Claim the outstanding balance of the purchase price being a sum of Kenya Shillings Three Fourty Two Thousand Seven Hundred (Kshs. 342, 700.00) plus interest accrued for the past 23 years by the time of filing the case at the Court rate of twelve per cent (12%) per annum within the next Sixty (60) days from the date of this Judgement.

f. That__ the Land Registrar Mombasa be and is hereby directed pursuant to the provisions of Section 80 (1) and (2) of the *land Registration Act*, No. 3 of 2012 to cancel the title deed and any other land registration documents in all that parcel of land known as Land Reference Numbers Mombasa/BBolck/MS/III/462 in the names of Douglas Mungai Njoroge and rectify the records by registering it in the names of the duly appointed Legal Administrator of the estate of the late Stephen Kimondo Karuku within the next Sixty (60) days from the day of this Judgement.

g. That__ an order of permanent injunction restraining the Plaintiff in the Plaint by himself and/or agents from interfering with. Moving into, laying claim or in any manner interfering with the Plaintiff's in the Counter Claim peaceful occupation of all that parcel of land known as Land reference Numbers Mombasa/BBolck/MS/III/462.

h. That__ Costs and interest of the suit to be awarded to the Defendant in the Plaint and 1st Defendant in the Counter Claim by the Plaintiff in the Plaint herein.

JUDGEMENT DELIVERED ON THIS 28 TH DAY OF APRIL 2022

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT JUDGE

MOMBASA

In the presence of:

M/s. Yumnah – Court Assistant

Mr. Magolo Advocate for the Plaintiff.

Mr. Njoroge for the Defendant.

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