



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Dika & 2 others (Environment & Land Case 002 of 2022)
[2025] KEELC 3149 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 002 OF 2022**

**JO MBOYA, J
APRIL 2, 2025**

BETWEEN

FATUMA MOHAMED ALI PLAINTIFF

AND

BORU DIKA 1ST DEFENDANT

HENRY KIMATHI 2ND DEFENDANT

FESTRUS NYAGA KAMBERIA 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein has approached the court vide the Plaint dated 15th January 2013; and wherein the Plaintiff sought the following reliefs:
 - i. An injunction requiring defendants to immediately restore the Plaintiff to possession of the whole of plot J (1) L.R No. 7918/128 and thereafter restrain the defendants personally or by any of their agents, employees and/or any other person whatsoever from interference of the plaintiff's quiet enjoyment of the suit property.
 - ii. A declaration that all that Plot J (1) being a sub-division of L.R No. 7918/128 belongs to the Plaintiff.
 - iii. Damages for breach of covenant, including aggravated and special damages.
 - iv. Costs and interests.
2. The 1st and 3rd Defendants duly entered appearance and thereafter filed a statement of defence and in respect of which the named Defendants denied the claims at the foot of the Plaint. Furthermore, the said Defendants also contended that the suit property, which is claimed by the Plaintiff was never sold to and in favour of the 2nd Defendant. In this regard, the named Defendants posited that the 2nd



Defendant therefore had no lawful title capable of being sold to and transferred in favour of the Plaintiff or at all.

3. The 2nd Defendant duly entered appearance and filed a statement of defence dated 6th February 2013; and wherein the 2nd Defendant contended inter-alia that the suit property previously belonged to and was registered in the name of Festus Nyaga Kaberia [now deceased], who sold the said property unto him vide a lawful sale agreement.
4. Additionally, the 2nd Defendant contended that the 3rd Defendant [now deceased] thereafter made the requisite application to the County Council of Isiolo [now defunct] for purposes of transfer of the suit property to the 2nd Defendant. Suffice it to state that the 2nd Defendant has contended that the application by the 3rd Defendant [now deceased] was approved, culminating into the transfer of the suit property in his [2nd defendant's] name.
5. The subject matter came up for case conference whereupon the advocates for the various parties confirmed that same had filed and exchanged the requisite list and bundle of documents, list of witnesses; and the witness statements. In this regard, the court confirmed that the matter was ready for hearing.
6. The Plaintiff's case revolves around the evidence of two [2] witnesses, namely; Fatuma Mohamed Ali and Peter Wachira. Same testified as PW 1 and PW 2, respectively.
7. It was the testimony of PW 1 [Fatuma Mohamed Ali] that same is the Plaintiff in respect of the instant matter. In addition, the witness averred that by virtue of being the Plaintiff, same is conversant with and knowledgeable of the facts of the matter.
8. It was the further testimony of the witness [PW 1] that same has since recorded a witness statement in respect of this matter. In this regard, the witnesses referenced the witness statement dated 22nd January 2013 and which witness statement the witness sought to adopt and rely on as her evidence in chief. Instructively, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
9. Moreover, the witness referred to the list and bundle of documents dated 22nd January 2013 and 27th September 2016, respectively and thereafter sought to tender and produce the documents as exhibits before the court. There being no objection to the production of the documents, same [Documents] were duly tendered and produced as exhibits on behalf of the Plaintiff.
10. On cross-examination by learned counsel for the 1st and 3rd Defendants, the witness averred that same bought/purchased the suit property from the 2nd Defendant. Furthermore, the witness added that the sale agreement between herself and the 2nd Defendant was duly reduced into writing. In this regard, the witness stated that the sale agreement is dated 30th June 2011.
11. While still under cross-examination, the witness averred that what was being sold unto her was a plot measuring 50ft by 100 ft. In any event, the witness testified that the size/acreage of the plot are duly reflected in the body of the Sale agreement.
12. It was the further testimony of the witness that before buying the suit property, the 2nd Defendant took her to the ground and pointed out the portion that was to be sold. Besides, the witness averred that the portion of land which was being sold is located along the Isiolo- Moyale Highway. In addition, the witness added that the land is situated on the left-hand side as one enters/approaches Isiolo.



13. On further cross examination, the witness averred that upon purchasing/acquiring the suit plot, same [witness] proceeded to and fenced the plot. Nevertheless, the witness averred that the 1st Defendant herein later came to the suit plot and demolished the fence which same had erected on the suit plot.
14. It was the further testimony of the witness that the 2nd Defendant informed her that same [2nd Defendant] had bought the plot in question from Festus Nyaga, who was the 3rd Defendant but now deceased.
15. Additionally, the witness averred that what was being sold was a plot referenced as J (1). In any event, the witness averred that same was shown an application for transfer to the County Council of Isiolo [now defunct] which was made by Festus K. Nyaga [now deceased] to facilitate the transfer of plot no. 7981/128. Nevertheless, the witness conceded that the application for transfer does not allude to Plot J(1).
16. On the other hand, the witness averred that upon the sale of the suit plot to herself, the 2nd Defendant made an application to the County Council of Isiolo [now defunct] and sought approval to transfer plot NO. 7918/128/J (1) unto her. In any event, the witness averred that the application by the 2nd Defendant and which sought to transfer the plot, was duly approved by the County Council of Isiolo [now defunct].
17. On cross-examination by learned counsel for the 2nd Defendant, the witness averred that same had been searching for a plot within Isiolo town. In this regard, the witness averred that same received information that the 2nd Defendant had a piece of land/plot for sale. To this end, the witness averred that same looked for the 2nd Defendant who confirmed that same [2nd defendant] had a plot to sell.
18. It was the further testimony of the witness that thereafter the 2nd Defendant took her to the site for the purposes of viewing. Furthermore, the witness added that the plot which was being sold to her was a sub-division of what was previously Plot No. 7918/128.
19. While still under cross examination, the witness averred that upon purchasing the suit property, same engaged a surveyor who surveyed the plot and thereafter placed beacons showing the boundaries thereon. In addition, the witness averred that same was later issued with a beacon certificate and which the witness referenced and produced as exhibit P9.
20. It was the further testimony on the witness that subsequently someone trespassed onto her plot and pulled down her fence. In particular, the witness averred that the someone who trespassed onto her land was the 1st Defendant herein.
21. Furthermore, the witness averred that when the 1st Defendant trespassed onto her plot, same [witness] sought to know from the 2nd defendant why a third party had entered upon and trespassed onto her plot. Nevertheless, the witness averred that an endeavor to get help from the 2nd and 3rd Defendant[s] did not bear any fruits.
22. On re-examination, the witness averred that same had seen the plot in question before she bought the plot. In addition, the witness averred that the sale agreement between herself and the 2nd Defendant was reduced into writing.
23. While still under re-examination, the witness testified that same proceeded to and fenced her plot. However, the witness averred that the fence which same had erected around her plot was removed by the 1st Defendant. To this end, the witness added that she was constrained to report the incident to the police.



24. Additionally, the witness testified upon reporting to the police, the 1st Defendant was summoned to the police. Furthermore, the witness also averred that same also lodged a complaint with the County Council of Isiolo and whereupon the 1st Defendant was summoned. Nevertheless, the witness averred that the 1st Defendant declined to attend.
25. The 2nd witness who testified on behalf of the Plaintiff was Peter Wachira. Same testified as PW 2.
26. It was the testimony of the said witness that same is the deputy county surveyor of Isiolo County. Furthermore, the witness averred that same had been ordered and directed to visit the scene [suit plots] and thereafter prepare a report pertaining to the status of the plot in question. To this end, the witness stated that same indeed visited the ground and thereafter prepared a survey report, a copy of which was tendered and produced before the court as exhibit P2. [See the report dated 4th May 2017].
27. On cross-examination by learned counsel for the 2nd Defendant, the witness averred that same visited the plot in question and thereafter prepared the report. Furthermore, the witness averred that the plot in question is marked as J(1). In addition, the witness averred that the plot is a sub-division of what was previously plot no. 7918/128.
28. While under further cross-examination, the witness averred that the plot in question arose after the sub-division of the original parcel of land. Besides, it was the testimony of the witness that plot J(1) measures 50ft by 100ft.
29. It was the further testimony of the witness that the plot in question is currently registered in the name of the Plaintiff. To this end, the witness referenced a letter dated 19th July 2012, which is stated to be the transfer of the land. It was the further testimony of the witness that the Plaintiff was also issued with a beacon certificate, which confirms the boundary positions of the suit plot.
30. On cross-examination by learned counsel for the 1st and 3rd Defendants, the witness averred that the beacon certificate is supposed to be prepared by a surveyor. Furthermore, the witness averred that the beacon certificate is prepared after the surveyor has gone onto the land and undertaken a survey.
31. While still under cross-examination, the witness averred that the original land, namely; 7918/128 was a big parcel of land. However, the witness added that the land was thereafter sub-divided and thus culminated into the creation of many plots, including J(1).
32. It was the further testimony of the witness that the boundary beacons were placed to show the extent of the Plaintiff's plot. In any event, the witness averred that the beacon certificate cannot issue before the survey has been done.
33. On further cross-examination, the witness averred that one cannot transfer a plot unless the plot has been surveyed on the ground.
34. Moreover, the witness testified that in respect of the matter before the court, the original plot was sub-divided. In this regard, the witness referenced the sub-division scheme which same has attached to the report. Besides, the witness averred that the sub-division scheme is ordinarily prepared at the request of the plot owner, but same has to go through the physical planner.
35. It was the further testimony of the witness that the sub-division plan was submitted to the County Council of Isiolo. In addition, the witness averred that the same is able to see the endorsements by the county council of Isiolo.
36. While still under cross-examination, the witness averred that the map/sub-division scheme has no endorsement[s] from the County clerk. Furthermore, the witness averred that it is not true that the



- map before the court is an idea from the claimant. The witness further stated that if one seeks to register a piece of land, then the registration cannot be done without payments and issuance of a receipt.
37. On the other hand, the witness averred that same used various equipment[s] during the visit to the site. The witness further averred that the equipment[s] which were used during the visit have been highlighted in the report.
 38. On further cross-examination, the witness averred that same was not involved in the sub-division of the original plot No. 7918/128. Nevertheless, the witness testified that same was involved in the placement of beacons on plot J(1). Thereafter, the witness averred that same issued and signed the beacon certificate.
 39. Additionally, it was the testimony of the witness that during the process of sub-division, one is obligated to ensure that the requisition for sub-division has been paid for. In this regard, the witness averred that during the sub-division in favour of the Plaintiff, the same ensured that there was a receipt. In any event, the witness averred that the receipt was in the name of the 2nd Defendant.
 40. While still under cross-examination, the witness testified that it is the receipt in the name of the 2nd Defendant that same used to transfer the piece of land to the Plaintiff at the time of the transaction.
 41. It was the further testimony of the witness that J(1) was a sub-division. Furthermore, the witness averred that one cannot get a letter of allotment via sub-division. In addition, the witness averred that a beacon certificate cannot be issued without a legal survey.
 42. On re-examination, the witness averred that the custodian of all land documents is the Department of Land in Isiolo. In addition, the witness testified that the Plaintiff did not pay for the sub-division. Moreover, the witness averred that same used the fees paid by the 2nd defendant.
 43. While still under re-examination, the witness averred that the original parcel of land was previously plot No. 7918/128. Besides, the witness averred that the suit plot was a sub-division of the original plot.
 44. It was the further testimony of the witness that same [witness] was involved in the identification of plot J(1). In any event, the witness added that the identification of plot J(1) was undertaken at the request of the Plaintiff.
 45. With the foregoing testimony, the Plaintiff's case was closed.
 46. The 2nd Defendant's case is premised on the evidence of one witness, namely; Henry Kimathi. Same testified as DW 1.
 47. It was the testimony of the witness that same is the 2nd Defendant in respect of the instant matter. Furthermore, the witness averred that same is conversant with Festus Nyaga who was the 3rd Defendant. In addition, the witness averred that same entered into a sale agreement with the 3rd Defendant. In particular, the witness testified that the 3rd Defendant sold to him [2nd defendant] a plot on 30th November 2009.
 48. It was the further testimony of the witness that same has since recorded a witness statement in respect of the matter. In this regard, the witness referenced the witness statement dated 20th June 2013 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement was duly adopted and constituted as the evidence in chief of the witness.
 49. The witness further referenced the list and bundle of documents dated 18th July 2013 and which documents the witness sought to tender and produce before the court as exhibits. There being no



- objection to the production of the documents, same were tendered and produced as exhibits D1 – D3, respectively on behalf of the 2nd Defendant.
50. On cross-examination by learned counsel for the Plaintiff, the witness averred that the original plot was plot no. 7918/128. In addition, the witness testified that the said plot was sub-divided and what was sold to the Plaintiff is plot J(1).
 51. On cross-examination by learned counsel for the 1st and 3rd Defendants, the witness averred that same [witness] bought the land from the 3rd Defendant. Furthermore, the witness averred that there was an agreement and a transfer. However, the witness added that the agreement is with the advocate while the transfer is with the county.
 52. While still under cross-examination, the witness averred that the agreement is there. However, the witness conceded that the agreement is not one of the documents which had been tendered and produced before the court.
 53. It was the further testimony of the witness that document No. 2 of his documents is an application for transfer. Nevertheless, the witness admitted that the application for transfer has no stamp from the council. However, the witness testified that the signature of Festus Nyaga is there.
 54. On further cross-examination, the witness averred that the application for transfer also has a segment relating to the declaration. It was averred that the segment relating to the declaration does not have the signature of Festus Nyaga.
 55. It was the further testimony of the witness that the application for transfer form also has a segment for official use. However, the witness averred that the segment for official use has not been filled. Besides, the witness averred that no signature has been affixed by the designated officer in the said segment.
 56. Furthermore, the witness testified that there is a segment which relates to the receipt number. However, the witness admitted that no receipt number has been included/endorsed in the said segment.
 57. While still under cross-examination, the witness averred that his plot is plot J(1). In any event, the witness testified that plot J(1) was a sub-division of the original plot. However, the witness testified that same [Witness] cannot see plot J(1) on the sketch plan.
 58. Additionally, the witness averred that the county council of Isiolo usually takes time in the issuance of the land. Nevertheless, the witness admitted that same has neither tendered nor produced the minutes.
 59. On re-examination, by learned counsel for the Second Defendant, the witness averred that the agreement with Festus Nyaga was dated 30th November 2009. Furthermore, the witness testified that the agreement was prepared before an advocate. In particular, it was averred that the advocate was one, namely; Mr. Mukiira Mbaya.
 60. While still under Re-examination, the witness testified that it is the 3rd Defendant [now deceased] who showed him the plot. In addition, the witness averred that thereafter Festus Nyaga made the application for the transfer at the County Council of Isiolo.
 61. It was the further testimony of the witness that the application by Festus Nyaga was duly signed. To this end, the witness averred that the county council of Isiolo duly approved the application for the transfer. In addition, the witness averred that it is the plot shown by the Festus Nyaga, which same [witness] sold to the Plaintiff.
 62. With foregoing testimony, the 2nd Defendant's case was closed.



63. The first Defendant's case is predicated on the testimony of one witness, namely; Boru Dika. Same testified as DW 2.
64. It was the testimony of the witness that same is the 1st Defendant in respect of the instant matter. Furthermore, the witness averred that by virtue of being the 1st Defendant, same is therefore conversant with and knowledgeable of the facts of the case.
65. It was the further testimony of the witness that same bought a plot measuring 50 by 100 ft from Festus Nyaga. The witness further averred that the plot which same bought, was facing/fronting the Isiolo-Moyale highway.
66. The witness further testified that his plot touches on the road. In any event, the witness averred that it is the same plot which is being claimed by the Plaintiff. Nevertheless, the witness averred that the plot in question lawfully belongs to him and not the Plaintiff.
67. It was the further testimony of the witness that when the Plaintiff commenced to lay a claim to the suit property, same [witness] informed the Plaintiff to sort out her dispute with the 2nd Defendant.
68. On cross-examination by learned counsel for the Plaintiff, the witness averred that same bought the plot in the year 2008. However, it was the testimony of the witness that the Sale agreement was signed much later in the year 2010. For coherence, the witness averred that the Sale agreement was signed much later because he [witness] was working far away from Isiolo.
69. While still under cross-examination, the witness averred that upon purchase of the suit plot, the ground was pointed out by Festus Nyaga. In addition, the witness testified that he thereafter proceeded and fenced the plot.
70. It was the further testimony of the witness that it is the same plot that is now being claimed by the Plaintiff. However, the witness clarified and reiterated that the plot lawfully belongs to him.
71. On further cross-examination, the witness averred that the original plot was No. 7918/128. Furthermore, the witness averred that the plot in question has not been duly registered and hence he does not have a search.
72. On the other hand, it was the testimony of the witness that the court issued an order for the visitation of the locus in quo. In addition, the witness averred that the site was indeed visited by a surveyor, namely; Peter Wachira. Nevertheless, the witness averred that Peter Wachira is not the district/county surveyor in Isiolo.
73. On cross-examination by learned counsel for the 2nd Defendant, the witness averred that same did not file any witness statement in court regarding the evidence he was to give. Furthermore, the witness testified that same bought the plot from Festus Nyaga. In any event, the witness added that same knew Festus Nyaga very well.
74. With the foregoing testimony, the 1st Defendant's case was duly closed.
75. The 3rd Defendant's case is premised on the evidence of one witness, namely; Adam Gitonga Nyaga. Same testified as DW 3.
76. It was the testimony of the witness [DW3] that same is the legal administrator of the estate of Festus Nyaga [now deceased]. To this end the witness averred that same has since been issued with a grant of letters of administration.



77. It was the further testimony of the witness that same has also recorded and filed a witness statement. In this regard, the witness sought to adopt and rely on the witness statement dated the 2nd November 2021; and another dated 23rd January 2020. To this end, the two witness statements were adopted as evidence in chief of the witness.
78. Moreover, the witness adverted to a list and bundle of documents dated 23rd January 2020; 2nd November 2021 and 3rd November 2021, respectively and which documents the witness sought to tender and produce before the court as exhibits. However, the request by the witness to tender and produce the documents as exhibits was objected to by the advocates for the adverse parties.
79. Arising from the objection, the court [differently constituted] ordered and directed that the parties do agree on the way forward. Furthermore, learned counsel for the 3rd Defendant was granted an opportunity to make an application for the production of the documents which were objected to.
80. Suffice it to point out that learned counsel for the 3rd Defendant indeed filed an application dated 2nd May 2023; and which application was heard and dismissed by the court [differently constituted].
81. Following the dismissal of the application dated the 2nd May 2023, the 3rd Defendant's case appears to have been left hanging. For good measure, the 3rd Defendant was neither subjected to cross-examination on the basis of his testimony or at all. In addition, there is no indication that the documents which the witness had sought to produce were ever produced or at all.
82. The foregoing represents the state of affairs which obtained in the court records up to and including the 27th January 2025, when the matter came up for directions. Furthermore, it is imperative to underscore that the advocates for the parties thereafter covenanted to file and exchange written submissions.
83. The parties thereafter filed and exchanged their written submissions. In particular, the Plaintiff filed two [2] sets of written submissions, namely; the submissions dated 25th November 2024 and the rejoinder submissions dated the 4 March 2025. The 1st and 3rd Defendants filed written submissions dated 10th February 2025.
84. On the other hand, the 2nd Defendant does not appear to have filed written submissions. In any event, the submissions, if any, on behalf of the 2nd defendant are not traceable on the case tracking system [CTS] of the court.
85. I have perused the pleadings filed by and on behalf of the parties; I have also considered the evidence tendered [both oral and documentary], and I have also considered the written submissions filed on behalf of the parties. Having considered the said documents, I come to the conclusion that the determination of the instant matter turns on three salient issues, namely; whether the 2nd defendant was the lawful owner of the plot No. 7918/128/ J(1) [suit plot] or otherwise; whether the Plaintiff herein lawfully acquired the suit plot or better still, whether the Plaintiff is a bona-fide purchaser for value.; and whether the 1st Defendant has trespassed onto the suit plot or otherwise.
86. Regarding the first issue, namely; whether the 2nd defendant was the lawful owner of the plot No. 7918/128/ J (1) [suit plot] or otherwise, it is imperative to recall that the 2nd defendant contended that same bought/purchased plot No. 7819/128/J1 [the suit plot] from Festus Nyaga Kamberia (now deceased). Furthermore, the 2nd defendant posited that upon purchase of the suit property from the deceased, the deceased made an application to the county council of Isiolo [now defunct] seeking to have the suit property transferred to the 2nd defendant.
87. It was the further testimony of the 2nd defendant that the application which was made by the deceased to the County Council of Isiolo [now defunct] was duly acted upon and approved. To this end, the



- 2nd defendant who testified as DW 1, referenced the letter dated the 2nd of June 2011 which is said to have emanated from the county council of Isiolo as evidence of the approved transfer.
88. Moreover, it was the testimony of DW 1 (2nd Defendant) that the application for transfer was duly signed and executed by the deceased. In addition, it was averred that the application for approval was subjected to the usual procedures at the County Council and that minutes were duly issued attesting to the approval.
89. Additionally, it was the testimony of DW 1 [2nd defendant] that it is the same plot which was subsequently transferred to and registered in the name of the Plaintiff. Suffice to underscore that the 2nd Defendant could only sell to and convey lawful interest to the Plaintiff, if and only if, the 2nd defendant had himself procured lawful rights to and in respect of the suit property.
90. Back to the issue at hand. Did the 2nd defendant acquire lawful rights and or interests over the suit property? The totality of the evidence that was tendered by the 2nd defendant advert to the fact that same [2nd defendant] entered into a land sale agreement with Festus Nyaga Kaberia [now deceased]. Furthermore, it was contended that the sale agreement was entered into on the 30th November 2009.
91. Nevertheless, it is not lost on this court that the 2nd defendant who contends that same entered into a land sale agreement with Festus nyaga Kaberia [now deceased], neither tendered nor produced the said sale agreement as an exhibit before the court. Suffice it to underscore that the question as to whether or not the 2nd defendant ever bought the land from the deceased was in contest.
92. To be able to understand the totality of the evidence touching on and concerning whether the sale agreement [if any] was available, it is imperative to reproduce the evidence of DW 1 [2nd Defendant] while under cross-examination by learned counsel for the 1st and 3rd Defendants.
93. The witness [DW 1] testified thus;
- “Nyaga did sell to me the land. There is an agreement and a transfer. The documents of agreement is with the advocate while the transfer is with the county. The agreement is there.
94. Additionally, it is worthy to recall that the witness [DW1] herein only produced 3 sets of documents, namely; the application for transfer, the letter of approval dated the 2nd June 2011 and a copy of the sub-division scheme plan. Same were marked as exhibits D1, 2 and 3 respectively.
95. There is no gainsaying that the 2nd Defendant neither produced nor tendered a copy of the Sale agreement before the court. The significance of the sale agreement cannot be gainsaid. Pertinently, it is the said agreement which would have clarified whether or not, the deceased sold the land to and in favour of the 2nd Defendant or otherwise.
96. Moreover, it is common knowledge that the 2nd Defendant would have been in a position to tender and produce the sale agreement. As to why the sale agreement was neither tendered and nor produced before the court only the 2nd defendant can explain. Nevertheless, the established and trite position of the law is to the effect that where a person withholds or fails to produce a critical document that is under his or her custody, then the court is entitled to draw an adverse inference.
97. Furthermore, it is important to point out that the 2nd defendant and the deceased were engaged in a transaction pertaining to and touching on the disposition of an interest in land. In this regard, if at all the transaction was entered into and or executed in the manner adverted to by the 2nd defendant, then the law required that such a transaction must be reduced into writing and thereafter be executed by the person[s] chargeable therewith.



98. The provisions of section 3 (3) of the Law of Contract Act Cap 23, Laws of Kenya are clear, succinct and apt.

99. The said provisions state as hereunder;

Certain contracts to be in writing

1. No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.
2. No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.
3. No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

100. To my mind, the transaction between the 2nd defendant and the deceased, [if any], ought to have been reduced into writing. Furthermore, if the transaction was reduced into writing, then it behooved the 2nd defendant to tender and avail same [Agreement] before the court. The absence of the sale agreement, if any, between the 2nd defendant and the deceased negates a fundamental fulcrum upon which the 2nd defendant's ownership of the suit land stood.

101. Other than the foregoing, it is also important to underscore that the production of the sale agreement, if any, would have clarified whether the deceased sold to and in favour of the 2nd defendant the entire of plot No. 7918/128 or otherwise. It is important to recall that the 2nd defendant herein posited that upon the sale of the land by the deceased, the deceased made an application to the County Council of Isiolo for purposes of transfer of the Plot in favour of 2nd defendant.

102. Moreover, it was the evidence of the 2nd defendant that the application by the deceased was duly approved. For good measure, the 2nd defendant thereafter tendered and produced before the court a copy of the application for transfer of plot. Interestingly, the copy of the application for transfer which was tendered and produced before the court by both the Plaintiff and the 2nd defendant, references an application for transfer of plot No. 7918/128 and not a portion thereof. In particular, the application which has been tendered before the court does not relate to [sic] plot no. 7918/128/J1 or otherwise.



103. Could the deceased have made an application to transfer the entire plot 7918/128 [which was indicated to be a big parcel of land measuring about 6 acres] if what was sold to the 2nd defendant was only a plot of 50ft by 100ft?
104. It is also worthy to recall that the 2nd defendant testified that upon the application by the deceased, the county council of Isiolo approved the application and issued the letter dated 2nd June 2011. Notably, the letter under reference adverts to the approval to transfer the plot No. 7918/128 and not plot no. 7918/128/J1, the latter, which is the suit plot.
105. Yet again, something is amiss. Nevertheless, it is worthy to revert to the testimony of the 2nd defendant and wherein same is on record to have only bought a plot measuring 50 by 100 ft.
106. For ease of appreciation, the witness [2nd defendant] testified as hereunder:
- “I know Festus Nyaga [3rd defendant] on 30th November 2009 nyaga sold to me a plot. It was a 50 by 100 ft plot. My statement is dated 20th June 2013 and I signed it. I rely on this statement as my evidence in chief.
107. While under cross examination by learned counsel for the Plaintiff DW 1 [2nd defendant] stated as hereunder;
- “The plot no. 7918/128 is the registration of the whole land where J1 emanated from. Plot J1 is what I sold to Fatuma”.
108. From the foregoing testimony, it is abundantly clear that plot No. 7918/128 was a bigger plot. Furthermore, it is also evident that plot No. 7918/128/J1, is a smaller plot in comparison to [sic] the mother plot.
109. Notwithstanding the foregoing, there is a serious discrepancy in the evidence tendered by DW 1 [2nd defendant] vis a vis the documentary evidence that were produced by the same witness. Suffice it to underscore that oral testimony of the witness adverts to the purchase of a plot measuring 50 ft by 100 ft while the documentation tendered alludes to the entire property.
110. To my mind, there is a conundrum and quagmire which only the 2nd defendant could elaborate. Nevertheless, despite having the opportunity to do so, the 2nd defendant for reasons known to himself, failed to appropriate the opportunity and thus the court is left in the wonderland.
111. Moreover, it is imperative to observe that the burden of proving the purchase and acquisition of the land fell on the shoulders of the 2nd defendant. Was the burden to demonstrate that the 2nd defendant lawfully purchased the plot established? I am afraid that the 2nd defendant did not tender any credible document to prove and or demonstrate the purchase of the plot.
112. Other than the foregoing, it is also apposite to return to the application for the transfer of the plot which was referenced by the 2nd defendant. To start with, it is worthy to note that the application under reference is deficient in material particulars. Pertinently, the application for transfer does not indicate whether same was approved and if so the minute[s] attesting the approval. In addition, the application under reference does not indicate pertinent details under the segment alluding to; For official use only.
113. Again, the application for transfer also does not contain the signature and designation of [sic] the issuing officer. Suffice it to state that the missing items on the face of the application for transfer were brought to the attention of the 2nd defendant during cross examination by the learned counsel for the 1st and 3rd defendants.



114. The response by DW 1 [2nd defendant] while under cross examination merits reproduction.

115. Same are reproduced as hereunder;

“In this item no. 2 of my document, it is an application for transfer. It has no stamp from the counsel. The signature of Festus Nyaga is there. I can see a declaration for Festus Nyaga but I can't see a signature. I can also see a portion written for official use. I see the issuing officer has not signed. There is a place for receipt numbers. However, there is no receipt number. There is a place for the paid register updated but there is no date indicated.

116. In my humble view, the application for Transfer which has been heavily relied upon by the 2nd defendant to denote that Festus Nyaga applied for transfer of Plot No. 7918/128, is not only deficient but fatally defective. Such a document, in my humble view, is devoid and bereft of probative value.

117. Moreover, it is imperative to highlight that even though the application for transfer was tendered and produced as an exhibit, the production thereof does not amount to proof of the document in the eyes of the law. Furthermore, it must also be remembered that production/ admissibility of documents is distinct from proof of documents and [sic] the probative value, [if any], to be assigned to the document.

118. In the case of Kenneth Nyaga Mwige vs Austin Kiguta (2015) eKLR the Court of Appeal stated as hereunder;

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted



into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
 22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.
119. From the foregoing analysis, I come to the conclusion that the 2nd defendant did not tender and or produce any evidence to vindicate his ownership of the suit plot. In this regard, there is no gainsaying that the 2nd defendant was not the lawful owner and or proprietor of the suit plot.
 120. Next is the issue as to whether the plaintiff lawfully acquired good title to and in respect of the suit property. To start with, it is worthy to recall that the Plaintiff bought the suit property from the 2nd defendant. However, while dealing with issue number one the court has since found and held that the 2nd defendant did not own the suit property.
 121. The question that does arise is whether the 2nd defendant, who did not have any lawful title to the suit property could pass a good title to the Plaintiff? At this juncture, it is important to remind ourselves of the doctrine of *nemo dat quod non habet* [he who has no title over an item cannot pass a better title].
 122. The doctrine of *nemo dat quod non habet* [supra has been elaborated upon in a number of judicial decisions. In this regard, it is imperative to reference the decision in the case of *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] eKLR; where the Court of Appeal stated thus:

Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner’s authority or consent, sell and confer a better title in the goods than he has. (*Nemo dat quod non habet*). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd V. Transport Brakes LTD* (1949) 1 KB 322, at pp. 336-337 when he stated:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

In *Pacific Motor Auctions Pty. Ltd V. Motor Credits (hire Finance) Ltd*(1965) AC 867 AT P 886 the Privy Council explained that the purpose of that provisions is:



“to protect an innocent purchaser who is deceived by the vendor’s physical possession of goods or documents and who is inevitable unaware of legal rights which fetter the apparent power to dispose.”

123. Secondly, the Plaintiff may well argue and indeed same has argued that by virtue of having bought the suit property from the 2nd defendant, same [Plaintiff] is therefore a bona-fide purchaser for value without notice and hence her title to the suit property is indefeasible.
124. Nevertheless, I beg to underscore that the doctrine of bona-fide purchaser for value can only arise and be invoked where the vendor, in this case, the 2nd defendant, had a valid and legal title over the property in question. For good measure, the doctrine in question cannot apply where the title underpinning its invocation is vitiated by illegality, which goes to the root thereof.
125. In the case of *Mwangi James Njehia v Janetta Wanjiku Mwangi & Simon Kamanu* (Civil Appeal 177 of 2019) [2021] KECA 768 (KLR) (Environment and Land) (19 March 2021); the Court of Appeal stated thus;

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property 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 v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether. [Emphasis Supplied].

38. 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, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that 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 the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

126. Moreover, in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) the Supreme Court of Kenya addressed and highlighted the ingredients that underpin the doctrine of bona-fide purchaser for value.
127. For coherence the court stated thus;
90. The Black’s Law Dictionary 9th Edition defines a bona fide purchaser as: “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows:
- “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:1.he holds a certificate of title;2.he purchased the property in good faith;3.he had no knowledge of the fraud;4.he purchased for valuable consideration;5.the vendors had apparent valid title;6.he purchased without notice of any fraud; and7.he was not party to the fraud.”
92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows:“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”
93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009* [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.
128. My answer to issue number two [2] is three-fold. Firstly, the 2nd defendant never owned plot NO. 7918/128/J1 [the suit property]. In this regard, there is no way that the 2nd defendant could have purported to sell and transfer the suit property to the Plaintiff. [see the doctrine of *nemo dat quod non habet*].
129. Secondly, the title [if at all] that the 2nd defendant owned was vitiated with illegality. To this end, the 2nd defendant had no lawful and or valid title, if any, capable of being passed to the Plaintiff.



130. Thirdly, the Plaintiff herein cannot invoke and rely on the doctrine of bona-fide purchaser for value. For good measure, the Plaintiff has neither established nor met the requisite ingredients that underpin the doctrine of Bona -fide purchaser for value.
131. Lastly, I beg to turn to the issue of whether the Plaintiff has demonstrated that the 1st Defendant has trespassed onto and or encroached upon the suit property belonging to the Plaintiff. Pertinently, it is worthy to recall that this court has come to the conclusion that the Plaintiff herein does not lawfully own the suit property.
132. Additionally, it is important to underscore that trespass can only arise and or ensue where the claimant had demonstrated that same is the title holder [whether as a freehold or leasehold] of the property that is said to have been trespassed upon. Instructively, proof of ownership or entitlement to the designated land is paramount before the claimant can venture forward to propagate a claim for trespass.
133. It then means that where the claimant does not establish and or demonstrate ownership rights or entitlement[s] to the designated land, then the question of trespass cannot arise and or be propagated.
134. What is Trespass? The answer to the question was addressed in the case of Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment) where the Court of Appeal stated as hereunder;

Trespass is described under the *Trespass Act* Cap 294 to mean “any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof”. On the other hand, a continuing trespass is defined in Jowitt’s Dictionary of English Law 2nd Edition (page or paragraph?) as follows:-

“A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”. In Black’s Law Dictionary 8th Edition (page or paragraph?), a continuing trespass is defined as:- “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.” Finally, in Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:- “Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

53. From the above definitions of the term “trespass” by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant’s continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent, amounts to trespass and remains as such to date. The respondent’s claim for trespass being a continued tort is, therefore, not time-barred. We find no fault with that finding by the trial court.”
135. In the absence of proof of trespass by the Plaintiff, the prayer for permanent injunction as against the defendants and more particularly, the 1st Defendant, is legally untenable.
136. Furthermore, the prayer for aggravated damages which has also been sought by the Plaintiff, are also built on quicksand. For good measure, the law as pertains to the circumstance[s] where the Court can grant aggravated and punitive Damages was highlighted in the case of Municipal Council of Eldoret versus Titus Gatitu Njau [2020] eklr.



Final Disposition:

137. Having reviewed the totality of the evidence that was tendered and having taken into account the applicable law, I come to the conclusion that the Plaintiff herein has neither proved nor established her claims to the requisite standard. [see the decision in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi (2014) eKLR.
138. The upshot of the matter is to the effect that the Plaintiff's claim is devoid and bereft of merits.
139. Consequently, and in the premises, the final orders of the court are as hereunder;
- i. The Plaintiff's suit be and is hereby dismissed.
 - ii. Costs of the suit be and are hereby awarded to the 1st and 3rd Defendants only.
 - iii. Any other order not expressly granted is hereby declined.
140. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 2ND DAY OF APRIL 2025.

OGUTTU MBOYA,

JUDGE.

In the presence of

Mukami/Mustafa Court Assistant

Mr. Ndungu holding brief for Mr. Kabiru for the Plaintiff.

Mr. Mutege for the 1st & 3rd Defendants

Mr. Tyson Mwenda for the 2nd Defendant

