



**Mwanajuma v Nassoro & 5 others (Environment and Land Case Civil Suit 253 of 2021) [2025] KEELC 5980 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE CIVIL SUIT 253 OF 2021**

**AE DENA, J  
JUNE 30, 2025**

**BETWEEN**

**MWANAJUMA NIGATEMBO ALIAS MWANAJUMA MBWANA NOOR  
GAKWELI ..... PLAINTIFF**

**AND**

**MWARONGA NASSORO NASSORO ..... 1<sup>ST</sup> DEFENDANT  
MOHAMED JUGE DALENO ..... 2<sup>ND</sup> DEFENDANT  
ISMAEL WARE GODANA ..... 3<sup>RD</sup> DEFENDANT  
MOHAMED WARE GODANA ..... 4<sup>TH</sup> DEFENDANT  
LAND REGISTRAR KWALE ..... 5<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of plaint dated 5/07/2019 and relates to parcel number Kwale/Waa/115 (suit property) registered in the names of Suleiman Omari Mabweta, Nironga Omari Mabweta and Mwanajuma Nigatembo as tenants in common. The plaintiff claims to be the said Mwanajuma Nigatembo. Her claim is that she was disinherited by the 1<sup>st</sup> defendant who sold part of the suit property to the 2<sup>nd</sup> 3<sup>rd</sup> defendants without her involvement.
2. The plaintiff seeks the following reliefs
  1. An order declaring the conveyances of sub-divisions numbers Kwale/Waa/2101 and Kwale/Waa/2102 to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively as null and void and directing the registrar Kwale Lands Registry to expunge them from the register;



2. An order declaring the registration of sub-divisions number Kwale/Waa/2101, Kwale/Waa/2102 and Kwale/Waa/2103 in the names of the 1<sup>st</sup> Defendant and Suleiman Omari Mwaronga as null and void and directing the registrar Kwale Lands Registry to expunge it from the register;
  3. An order declaring the sub-division of plot number Kwale/Waa/115 as null and void and directing the registrar to expunge it from the register;
  4. An order declaring transfer of Mwanajuma Nigatembo's share in plot number Kwale/Waa/115 to the 1<sup>st</sup> Defendant and Suleiman Omari Mwaronga as null and void and directing the registrar to expunge it from the register;
  5. An order declaring that the transfer of Nironga Omari Mwabweta's share in the suit property to the 1<sup>st</sup> Defendant as null and void expunging it from the register;
  6. An order declaring the entire proceedings before the Kadhi's Court Kwale in Succession Cause 119 of 2011 and any judgment and order emanating and proceeding from the said matter purporting to vest the share of Nironga Omari Mwabweta (deceased) in the suit property to the 1<sup>st</sup> Defendant as illegal and null and void;
  7. An order directing the registrar Kwale Lands Registry to issue a fresh title deed in the names of the plaintiff, Suleiman Omari Mwaronga and Nironga Omari Mwabweta;
  8. An order of a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, their servants, workmen and agents from entering on and/or erecting or causing to be erected thereon any structures, in any way interfering with the plaintiff's use and enjoyment of the suit property plot number Kwale/Waa/115;
  9. Costs of this suit and any other relief the court deems fair to grant.
  10. An order directing and compelling the 5<sup>th</sup> Defendant to expunge from the record the name of the 1<sup>st</sup> Defendant as a proprietor of the suit property in place of Nironga Omar Mwabweta;
3. On the other hand, the 1<sup>st</sup> defendant avers that the plaintiff is impersonating Mwanajuma Nigatembo who is since deceased.
  4. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants responded to the suit through a joint Statement of Defence and Counterclaim dated 10/6/2022. They also argue that the Plaintiff and Mwanajuma Nigatembo is not one and the same person. They content that the plaintiff has no claim over the suit property legally or illegally as there is no connection between her and the suit property.
  5. They also deny all the allegations of fraud attributed to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants in the plaint. That if there was any fraud or misrepresentation then the same were not due to their actions. They aver that upon having scrutinised the identification and title documents of both Suleiman Omar Mwaronga and the 1<sup>st</sup> defendant and further having conducted all due diligence procedures and confirming with the land registry that the 1<sup>st</sup> defendant was one of the proprietors owning 1/3 of the whole share of the suit property and had obtained title by transmission through a succession cause at the Kadhis court proceeded to purchase the portion which was subsequently hived off creating new parcels Kwale/WAA/2101 and 2102 reflecting the sale and purchase.
  6. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants raised a counterclaim dated seeking the following reliefs; -



- a. A declaration that the entire transaction that led to the subdivision of property known as Kwale/Waa/115 be declared valid.
  - b. A declaration that the entire transaction that led to the mutation of property known as Kwale/Waa/115 to Kwale/Waa/2102 and Kwale/Waa/2101 be declared valid
  - c. A declaration that the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants acted in good faith and with all due diligence procedures were complied with in registering property Kwale/Waa/2102 and Kwale/Waa/2101 at the offices of the 5<sup>th</sup> defendants
  - d. That the plaintiffs suit be dismissed with costs
  - e. Costs of the counterclaim
  - f. Any other relief the court deems fit to grant
7. The 5<sup>th</sup> and 6<sup>th</sup> defendants filed their Statement of Defence dated 4/10/2019 and filed on 30/10/2019. They denied the averments in the plaint. The contents of the plaint are denied including the particulars of fraud. That if the transactions registered by the 5<sup>th</sup> defendant relating to the sale were a mistake, then it is as a result of the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants misrepresenting and or misleading the office of the 5<sup>th</sup> defendant. It is averred that the reliefs sought by the plaintiff are neither available nor merited.

### **Plaintiffs Evidence**

8. The plaintiff testified as PW1 and called two additional witnesses. Adopting her witness statement dated 17/05/2021, PW1 testimony based on the witness statement is that around 1975 during land adjudication the suit property was recorded in the names of Suleiman Omari Mabweta, Nironga Omari Mabweta (who were siblings) and the plaintiff, to hold the same in common in equal 1/3 undivided shares. This was under the Waa adjudication section and title issued in April 1981. She told the court she was Nirongas granddaughter. That at the time of adjudication Nirongas only child whose name was Fatuma Bakari Juma was deceased but was survived by four children comprising the plaintiff and three siblings (whom I will refer to by their 1<sup>st</sup> names Hamisi, Hassan and Mwaka (deceased). All the three had not attained the age of 18 years at adjudication.
9. That Suleiman Omari Mabweta died in 2016 and was survived by two children Swalehe Suleiman Mwaronga (Swalehe) and Omar Suleiman Mwabeta (Omar). According to PW1, Nironga Omar Mwabeta the 3<sup>rd</sup> proprietor died in July 1992 leaving PW1 as the only remaining original owner of the suit property on first registration.
10. According to the witness the name recorded at adjudication was her maiden family name and upon marriage she was issued with a new card bearing her husband's name Mbwana Noor Gakweli. That the title to the suit property had always been in the custody of Suleiman Omari Mabweta. That she and the rest of the family remained in quiet and peaceful possession thereof until June 2019 when some individuals entered a portion of the suit property and started construction of a residential house. They indicated they were under the instructions of the 1<sup>st</sup> defendant who claimed proprietorship of the said portion which he referred to as Kwale/Waa/2103.
11. PW1 asserted she undertook a search. She outlined all the entries therein including the subdivisions of the plots and the registered proprietors who featured being the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants. The details are discussed later in this judgement. PW1 termed the said entries as fraudulent and illegal. It was PW1 further testimony that she and her family believed the deceased Suleiman Omar Mwaronga



was not a party to the fraud since he was sickly and bedridden. The witness reiterated the particulars of fraud as pleaded in the plaint which are highlighted elsewhere in this judgement.

12. It was PW1 testimony that she and her family had become squatters in their own land and were apprehensive that they would be evicted by the buyers pursuant to the fraudulent and illegal subdivisions.
13. PW1 produced the documents listed in the plaintiffs list dated 17/05/2021 as PEXH 1-13. The Letter dated 17/5/21 was marked for identification following objection to its production by Mr. Oyas counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.
14. Cross examined by the 1<sup>st</sup> defendant PW1 stated her name was different because of marriage. That the plots were sold in 2018 after Suleiman Omar Mwaronga death who died in 2016. The witness did not ask Suleiman about the sell because she was not aware he was selling. That the death certificate of Mwanajuma is dated 2014 and the agreement predated it in 2013 which was a difference of 1 year. That Suleiman had a right to sell the land but the problem was he did so without the rest of the owners. PW1 reiterated the 1<sup>st</sup> defendant took advantage of Suleimans advance age by directing him to change the ownership.
15. Cross examined by Mr. Oyas on the ID Card on her further list of documents the witness confirmed it was in the name of Mwanajuma Mbwana Noor Gakweli issued in 1997 and admitted she held an ID by the year 2012 and that she had changed names by virtue of marriage. She had no evidence to show that Fatuma had her own land. She confirmed Omar had a sister called Fatuma. She disagreed any one of the three owners could sell their share. She testified that the three owners did not know their distinct portions. That many people had bought land from plot 115 while others had leased though she had no evidence of the leases. The witness did not know if the two buyers followed due process but maintained Omar could not sale the property alone.
16. Cross examined by Ms. Kiti the witness agreed the land registrar follows what is presented to him. She stated she does not live in the suit property. She confirmed there were some portions that were not yet sold.
17. PW2 was Suleiman Nassoro Mwaronga who adopted his witness statement dated 25/07/22. He testified that the plaintiffs maternal grandmother was his fathers niece. That the mother to Mwanajuma Nigatembo was Fatuma Bakari Juma. That Mwanajuma Nigatembo is also known as Mwanajuma Mbwana Noor Gakweli which she acquired after being married to Mbwana Noor Gakweli. That he was of the conviction that there was no other person in their clan or anywhere by the name Mwanajuma Nigatembo who also goes by the name of Mwanajuma Mbwana Noor Gakweli except the plaintiff who was still alive having seen her during the signing of PW2 statement. That any allegation that she was deceased is false.
18. On being cross examined by the 1<sup>st</sup> defendant PW2 reiterated Mwanajuma Nigatembo was Nironga Omar Mwabetas grandchild. That Mwanajuma did not inherit the land but was registered by adjudication. The plaintiff was Mwanajuma Nigatembo before marriage. That during adjudication people were not using names as per their ID cards but as per the colonial ID cards. He did not know how the 2<sup>nd</sup> defendant became registered as owner of the land.
19. Cross examined by Mr. Oyasi PW2 confirmed Suleiman Omar Mwaronga, Fatuma Omar Mwaronga and Nironga Omar were siblings. That all the names in the title 115 are heirs for their fathers property. That the Nigatembo in the title is a grandchild. He could not remember when the plaintiff got married since he was young then. He could not confirm if the plaintiff had an ID card during adjudication. He confirmed the 1<sup>st</sup> defendant's grandmother was Nironga Ali Mwabeta. That the 1<sup>st</sup> defendant was in



- the lineage by virtue of his birth. That he could not get his mothers property because his mother was still alive. He was not aware if the 1<sup>st</sup> defendants mother had given him her share though it is allowed with consent. That it was possible she may have decided to give her share directly to the 1<sup>st</sup> defendant but it would be wrong if she did without the consent of the others. On being shown entry no. 4 of the title (PEX7) the witness stated he could not tell if the owners knew their portions of their 1/3 shares. He confirmed the plaintiff had no claim against Suleiman Omar. That the plaintiff had a right to be consulted by Suleiman Nassoro and the 1<sup>st</sup> defendant.
20. The witness clarified at re-examination that it is only the people of those listed in the title that ought to inherit. Fatuma Sangade the 1<sup>st</sup> defendants mother had her own plot. That he was not an expert on land issues and didn't understand the concept of joint shares. That the adjudication search bore three names and he was not aware of any complaints raised at adjudication.
  21. PW3 was Mbwana Noor Gakweli. The witness testified as the plaintiffs former husband. He told the court he married the plaintiff in January 1975 and she did not have an ID card. That he made arrangements for her ID card which was processed in both her name and the witness name. He divorced the plaintiff in 1984. That the marriage certificate and the talaka were destroyed by fire that burnt the plaintiffs house in Denyenye.
  22. Cross examined by the 1<sup>st</sup> defendant PW3 affirmed his wife was Mwanajuma Nigatembo and was the same person as Mwanajuma Gakweli. That he knew her at marriage as Mwanajuma Nigatembo. They lived together for 9 years. That PW1 had explained to her about the issue of his names appearing in her ID card and he had come to prove he is the person referred to as Gakweli.
  23. Cross examined by Mr. Oyas PW3 informed the court that in 1975 he was based in Hola. PW3 was not underage at marriage. In the marriage certificate she used the name Mwanajuma Juma Mwalau and not Nigatembo. That they never lived in Waa as a couple but only visited. The witness confirmed he did not have both the marriage and divorce documents. He reiterated he was before court to only confirm the plaintiff was his wife and that he is the one who processed the ID.
  24. The witness clarified that he was muslim and one was allowed to marry in absentia provided that someone steps in for him. The witness confirmed the plaintiff was present in court.
  25. With the above the plaintiffs case was marked as closed.
  26. DW1 was Mwaronga Nassoro Nassoro the 1<sup>st</sup> defendant. He adopted his witness statement dated 17/10/2022. His evidence was that he was registered as proprietor on behalf of his maternal grandmother Fatuma Omar Mabweta through the Succession undertaken in 2011 by Suleiman Omar Mwaronga. That in relation to the suit property the plaintiff was infact a stranger as she was not from the Mwaronga family but Juma Malaus family. That the subdivision was undertaken legally as he was entitled to the plot being the closer member of the family. He prayed that prayer a- c in his defence be allowed.
  27. The 1<sup>st</sup> defendant had listed Mwanatoro Salim Kosikos his mother as a witness but who failed to attend court give evidence.
  28. Mohamed Juge Daleno testified on behalf of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup>. The court notes that the records places him a DW3 though he ought to have been listed as DW2. The witness informed the court the 3<sup>rd</sup> and 4<sup>th</sup> defendants were his nephews. He adopted his witness statement dated 10/6/2022 as his evidence in chief. He also produced in evidence the documents listed in the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants list dated 10/6/2022 as EX 1-11. He also produced annexures MJI – MJ13 annexed to his replying affidavit sworn in response to the plaintiffs application dated 8/7/2019 as part of his evidence.



29. The witness testified that they came to Waa in the year 2013, they liked the place, spotted a vacant piece of land and were referred to Mwaronga Suleiman and the 1<sup>st</sup> defendant. That they informed him the land belonged to them and he was shown the title. He wanted a small piece and upon search he confirmed the two names and a 3<sup>rd</sup> person Mwanajuma Nigatembo. Upon inquiry on the 3<sup>rd</sup> person the two explained that she was Mwarongas grandmother who was deceased and gave him a copy of the Kadhis order. Being satisfied they embarked on the execution of the sale agreements for two plots. They wanted their separate titles and engaged a surveyor for the requisite subdivision.
30. That upon subdivision they were issued with titles. The originals were shown to the court. They then took possession and developed the property and had at the time of the hearing lived on the property for 11 years with no disturbance until the year 2019 when they were sued in these proceedings which by then they had lived therein for 6 years. The plaintiff never came to the suit property inform them of her claim. The witness stated they followed due process and invited the court to interrogate the plaintiff who came from nowhere and legalise the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants titles. He stated that the entire property is 1.8 HA and not less than 100 people have bought land therein.
31. Cross examined by Mr. Mgupu the witness reiterated that their search was the lands registry who keep all the records of title. He admitted the original adjudication record did not bear Omar Mwambweta name. On being shown order 5&6 on beneficiaries in the Kadhis order dated 6/6/2011 vis a vis the sale agreement he conceded the later did not bear the names of Hamisi and Mwaka juma neither did it bear the names of Mwanatoro Kozkosi. He agreed they were not given any consent authorising the sale from these beneficiaries.
32. The witness also admitted that Mongare advocate certified/authenticated the signatures on the transfer for plot 2108 on 29/8/2018. He confirmed he was informed of Suleiman Omar Mwarongas death but he could not remember the year of death. On being shown the death certificate vis a vis the transfer he conceded Suleiman died in 2016 yet parties appeared before Mr/ Mongare on the said 29/8/2018 meaning the death predated the signing before Mr. Mongare.
33. During cross examination by the 1<sup>st</sup> defendant the witness testified that before Suleiman died he had signed the sale agreement, LCB consent and transfer. Subdivision was undertaken by the lands department. He confirmed that Suleiman only told him about Mwanajuma Nigatembo the deceased. The witness confirmed he never saw Mwanajuma Nigakweli. Cross examined by Ms. Kiti the witness reiterated they followed procedure to the satisfaction of the land registry.
34. On re-examination the witness clarified that the Kadhis order shows the petitioner as Suleiman Ali Mwaronga and he was alive as one of the owners of the property 115. That he obtained documents from the land's office followed the procedure and he did not know about family issues. That the piece they bought did not consume the entire 1/3 and therefore the grandchildren of Mwanajuma Nigatembo can still get their 1/3 and in event the order No. 6 confirm their shares. Suleiman signed all the documents prior to his death and the signatures were valid just like in a will.
35. With the above the 2<sup>nd</sup> 3<sup>rd</sup> 2<sup>nd</sup> defendants closed their case.
36. DW4 was Steve Mokaya County Land Registrar Kwale. he adopted the statement of Mr. Dick Safari dated 21/12/2020 as his evidence in chief and produced the documents in the list dated 8/01/2021 as DW4 1-5. He read out all the entries in the parcel file from 6/4/1981 to the transmission, transfer and subdivisions 2101,2102 in favor of the defendants. He confirmed that subdivision number 2103 was still registered under Suleiman Omar Mwaronga and the 1<sup>st</sup> defendant and clarified that the 1/3 share means that portion out of the total acreage after subdivision and it is therefore defined.



37. Cross examined by Mr. Mgupu DW4 confirmed all the three registered owners of parcel 115 had equal rights to the property. There must be subdivision for each to identify individual portions unlike in joint ownership. He stated based on the 1<sup>st</sup> entry after adjudication none of the 3 registered owners inherited but were found there during adjudication. He testified that it was possible that the entry 'deceased' against Nigatembo was made by the registry waiting documents in proof of death. He agreed that the parties in Kadhis case 199/2011 were different from those in the green card and referred to Kwale/Waa/1309. He confirmed they only followed the orders dated 21/10/2016 (item No.8 of the 1<sup>st</sup> defendants' bundle). With regard to the mutations DW4 confirmed that a party cannot know the parcel number before the mutation is complete.
38. Cross examined by Mr. Oyas DW4 confirmed he had carried the original documents in the parcel files and confirmed all the copies supplied to be true. He confirmed the three original proprietors and stated there were no other names. That each party has 1/3 share and after subdivision can use it in any manner they desire without consultation. That it can be assumed the subdivision process was duly followed and had there been a problem the registrar would have held onto the application. He confirmed the entries dated 15/11/2018, 29/8/2018, details of transferor and transferee tallied with the green card for 2101 including 2102 and it was safe to state they transferees procure proper title as bonafide purchasers. He affirmed that provided that one did not exceed their 1/3 share a buyer would get good title.
39. DW4 clarified that kadhis order 199/2011 was never served upon the land registrar. The order dated 21/10/2016 is what was served and confirms Suleiman Omar Mwaronga and the 1<sup>st</sup> defendant for vesting.
40. With the above Ms. Kiti closed the 5<sup>th</sup> and 6<sup>th</sup> defendants case.
41. The court marked the 1<sup>st</sup> defendants case as closed on 19/6/2024.

### **Submissions**

42. The court on 19/6/2024 issued directions for parties to file their closing submissions. Parties only complied by 18/11/2024. The plaintiffs submissions are dated 21/9/2024, the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendant 18/11/2024 and the 5<sup>th</sup> and 6<sup>th</sup> defendants 2/10/2024. The 1<sup>st</sup> defendant who appeared in person did not file submissions.

### **Plaintiffs Submissions**

43. Rehashing the plaintiffs case it is submitted that the three registered proprietors were all relatives. That the 1<sup>st</sup> registration of the plaintiff was done using her maiden name Mwanajuma Nigatembo. That Suleiman Omar Mabweta one of the registered proprietors died in the year 2016 and was survived by his two children Swalehe Suleiman Mwaronga and Omar Suleiman Mabweta. That Nironga Mabweta the 2<sup>nd</sup> proprietor died in 1992. That this leaves the plaintiff as the only surviving person of the three original proprietors and as at the time of filing these proceedings in 2019 none of the heirs of Suleiman Omar Mabweta had filed a suit for transmission of the share of their fathers property to them.
44. It is further submitted that the 1<sup>st</sup> defendant who was a total stranger to Nironga Omari Mwabweta proceeded to fraudulently obtain orders in Kadhis Court 119 of 2011 vesting Nironga Omari Mwabwetas share into his name. Pursuant thereto the land was registered in the 1<sup>st</sup> defendants name. He also procured a death certificate confirming the death of the plaintiff. That using the death certificate and without a valid court order together with Suleiman Omar Mwaronga (deceased) fraudulently executed transfer instruments and were illegally registered by transmission as proprietors of the suit property succeeding the plaintiff. The 1<sup>st</sup> defendant then subdivided the suit property,



- registered subdivisions 2101, 2102 and 2103 in his and Suleiman Omar Mwaronga names. The 1<sup>st</sup> defendant later sold the former two subdivisions to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants.
45. Based on the above rendition of the plaintiffs case Mr. Mgupu identified four issues for determination by this court 1) whether the plaintiff is the proprietor of the suit property, 2) whether the plaintiff has proved fraud against the 1<sup>st</sup> defendant 3) Whether the 1<sup>st</sup> defendant could legally transfer the suit property to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants 4) whether the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants could obtain a good title from the 1<sup>st</sup> defendant.
46. On whether the plaintiff is the proprietor of the suit property, it was submitted that the 1<sup>st</sup> defendant allegedly procured a death certificate 12 years after the alleged plaintiff death on 14/4/2014. That PW1 and PW2 had confirmed that the plaintiff was indeed Mwanajuma Nigatembo who is the same person as Mwanajuma Mbwana Noor Gakweli who had other siblings Mwaka Juma and Hamisi Juma. That the presumption of death is a question of fact for the court to decide and not a presumption of law. That the presumption of death had now been rebutted by the evidence of more than one witness the burden shifted to the 1<sup>st</sup> defendant to prove that the said Mwanajuma Nigatembo was not the PW1 as claimed neither was she the owner of the property.
47. Counsel proceeded to submit that the order in the Kadhi Succession cause No.119 of 2011 states Mwanajuma Nigatembos share to include that of her siblings Hamisi and Mwaka Juma. That the 1<sup>st</sup> defendant acknowledges at paragraph 6 of his witness statement that Mwanajuma Mbwana Noor Gakweli, also had the same siblings mentioned in the Kadhis order. That were the plaintiff not to be who is said she is then it would be a huge coincidence that they shared siblings of similar names.
48. Counsel challenged the 1<sup>st</sup> defendant position that the suit property was held by his grandfather who during adjudication in 1975 distributed the property to all his children but one of them Fatuma Omar Mwabeta the 1<sup>st</sup> defendant grandmother was excluded from the adjudication list and the mistake was rectified in through the Kadhis court. It is submitted that the rectification could only be done through the mechanisms set out in the *Land Adjudication Act* specifically sections 26 and 29 thereof. That moreover the Kadhis order in 119 of 2011 does not feature that the share of the said Fatuma Mohamed was to be given to the 1<sup>st</sup> defendant. That the record at the Kwale Settlement and Adjudication office did not show the 1<sup>st</sup> three allottees held the property in trust of anybody else.
49. It was therefore posited that the balance of probability sways in the plaintiff side as her story made more sense that she is the sole survivor of the first three allottees than that of the 1<sup>st</sup> defendant which is full of contradictions.
50. On whether the plaintiff has proved fraud against the 1<sup>st</sup> defendant, it submitted that the plaintiff has at paragraph 24 of the plaint specifically pleaded and particularised the acts of fraud committed by the 1<sup>st</sup> defendant as required by law. That it has been established that the plaintiff is the grandchild of Nironga Omar Mabweta and not the 1<sup>st</sup> defendant it was surprising that the issue of succession was entrusted to the 1<sup>st</sup> defendant and not the plaintiff or even her siblings. That the Kadhis order still retained Mwanajuma Nigatembos share as if she were still alive. The order did not list the 1<sup>st</sup> defendants mother and uncle as persons surviving Nigatembo neither does it list the plaintiffs siblings. It was contended that it was not logical that the order obtained would list other people as beneficiaries not included in the petition. Therefore, since the orders were unlawful, execution of transfer documents by way of transmission on 25/05/2011 cannot stand.
51. It is submitted that it is illogical that the 1<sup>st</sup> defendant waited for 12 years to take out a death certificate for the plaintiff, 12 years after her alleged death in 2002. That the 1<sup>st</sup> defendant filed succession proceedings in 2011 when Nirongas Omar Mwabwetass death had not yet been reported as it was



reported by the plaintiff in 24/05/2019. In the absence of such report the 1<sup>st</sup> defendant cannot have had a death certificate a prerequisite for filing succession proceedings.

52. It is submitted that had the death of Nirongas Omar Mwabwetwas been registered prior then the plaintiff would have been informed as such at the time she was reporting the late death. That these arguments applied to Mwanajuma Nigatembo who was alleged to have died in 2002. In both cases the 1<sup>st</sup> defendant never provided proof that he procured the death certificates by filling forms 6 and 7 as required by the Birth and Death registration rules making the death certificate a fraud and therefore the process of obtaining the succession orders in 199 of 2011 illegal, null and void.
53. It is submitted that the transfer documents to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants were signed by Suleiman Mwaronga on 29/08/2018 when the Suleiman had died in December 2016. Further that the 1<sup>st</sup> defendant and Suleiman Mwaronga were registered as proprietors by transmission in February 2017 and it is only after this period that they could apply for consent for subdivision from the Land Control Board. Further that they could only do this upon the order of transmission which was delivered in October 2016.
54. That consequently the defendants contravened the provisions of the law of Succession Act which forbids selling of any immovable property before confirmation of grant. That the agreements entered on 20/11/2014 and 18/4/2014 were invalid having been entered before the succession proceedings were concluded in court.
55. On whether the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants could obtain a good title from the 1<sup>st</sup> defendant counsel referred to the provisions of section 26 of the Land Registration Act and posited that the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants need not be a party to the fraud for their titles to be impeached. That once a party demonstrates to the court that such title has been unprocedurally acquired, the 1<sup>st</sup> defendant could not pass good title.
56. Highlighting the difference between proprietorship in common and joint proprietorship and its implication to the suit property counsel relied on the provisions of section 101(1), 102 and 103 of the Registered Land Act (repealed). It is submitted that where land is held in common each proprietor has a separate share except that it is undivided. The land is held with the other proprietors in one whole. That where one dies his share does not vest in the surviving proprietor but vests in his estate. Referring to the holding in the case of NNK Vs JNK: ELC 781 of 2017 (2020) eKLR it is submitted that since the 1<sup>st</sup> defendant disposed of the suit property without consent of the plaintiff, the plaintiff is entitled to the order sought in the plaint.
57. It is subsequently submitted that the plaintiff has proved her case on a balance of probabilities to warrant the grant of the reliefs sought and to have the counterclaims dismissed.

### **The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants Submissions**

58. Rehashing the plaintiff's case vis a vis the 1<sup>st</sup> defendant case it is submitted that it emerged during the cross examination of PW1 that she was an imposter and was in no way the same person as Mwanajuma Nigatembo whose name appears in the original title. That no documents were adduced in court to suggest that indeed the plaintiff and the person named the title deed are one and the same person.
59. Rehashing the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants case and the due diligence conducted it submitted that the defendants having certified the validity of the ownership of the suit property containing the three joint proprietors with each having a distinct share through the search and certificate of title issued. That the certificate of title is prima facie evidence that the persons registered therein as proprietor is the absolute and infeasible owner. They then pursued all the processes of competition of the purchase, obtaining



LCB consent for subdivision, a mutation form filed by District Land Surveyor which resulted to creation of new parcels creating the sale and transfer completed with issuance of new title deed.

60. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants identified three issues for determination 1) whether the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants obtained good title to the purchase of the property 2) whether the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants were innocent third party purchasers for value and 3) whether the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants were involved in any fraud and/or misrepresentation in the purchase of the suit property.
61. It is submitted that the 2-4<sup>th</sup> defendants purchased the property in good faith and did not participate in any form of illegality as they followed due process in acquiring the title. The court was referred to the Case of Dina Management Limited Vs County Government of Mombasa & 5 Others Petition No. 8 (E10) of 2021 where the Supreme Court cited various authorities on the definition of a Bonafide Purchaser including Katende Vs Haridar & Company Ltd (2008)2EA 173 Court of Appeal Uganda and Samuel Kamere Vs Lands Registrar, Kajiado Civil Appeal No. 28 of 2005 (2015) eKLR. It is submitted that a party who has complied with all legal requirements in the conveyance of the title is protected under section 26 and 53 of the [Land Registration Act](#) and section 39 of the repealed RLA.
62. Applying the principles in Vijay Morjaria Vs Nansigh Madhusingh Darbar & Another (2000) eKLR on the standard of proof of fraud it was submitted that the plaintiff has not proved the case of fraud against the 2-4 the defendants as the ingredients and threshold of establishing fraud had not been met. That it was clear the defendants undertook extreme due diligence and went to the relevant authorities to establish the authenticity of the suit property. It is submitted the allocation was legal, proper and regular and protected under article 40 of [the Constitution](#). That the plaintiff has failed to prove fraud and the 2-4 defendants title cannot be impeached. The court is urged to dismiss the plaintiffs case and allow the counterclaim.

#### **The 5<sup>th</sup> and 6<sup>th</sup> defendants Submissions**

63. Rehashing the evidence led by the Land Registrar before court it was submitted that according to the adjudication record the land is a tenancy in common. Explaining the concept of tenancy in common as defined in The Law of Real Property Sweet & Maxwell it is stated that the share of the deceased in a common ownership devolves not to the other co-owners but to the estate of the deceased co-owner. Referring to the provisions of section 61 of the [Land Registration Act](#) 2012 on procedure for dealing with a tenancy in common, it is submitted the personal representative is entitled to be registered on transmission as proprietor in the place of the deceased effective the date of death.
64. That based on the above provisions it was the responsibility of the co-owners of the suit property to have petitioned the land registrar in order for each party to acquire their one third portion of the suit property. Reviewing the succession in 119 of 2011 and that of 199 of 2011 vis a vis the shares it was submitted that the 5<sup>th</sup> defendant registered instruments presented in accordance to the laid down procedures. The order from the Kadhis court was presented by the 1<sup>st</sup> defendant having the knowledge that the same went through the court process, subdivision and transfers were done accordingly as seen in the documents presented before court.
65. It was further submitted that based on the definition of fraud, its standard of proof as enunciated in Vijay Morjaria (supra) and the provisions of section 26 of the [Land Registration Act](#) 2012 on the instances where title may be impeached, the plaintiff had not proved any fraud as against the land registrar. That should the court find the plaintiff is one and the same person as the third registered proprietor, then it will be evident that the 1<sup>st</sup> defendant misled the Kadhis court into obtaining orders in succession cause 199 of 2011 vesting the plaintiffs shares to themselves and further misleading



the 5<sup>th</sup> defendants by having the order registered against the title, transmitting the suit property into themselves subdividing and selling to the 2-4<sup>th</sup> defendants.

66. Referring to section 94 of the *Land Registration Act* on severance of common tenancy by way of partitioning and the case of *Muhuri Muchiri Vs Hannah Nyamunya* (sued as administrator of the estate of Njenga Muchiri also known as Samuel Njenga Muchiri (deceased) (2015)eKLR, it was submitted that since the suit property is 1.8 Ha and each owner is entitled to a one third share, the law gives the land registrar power to partition land held under common tenancy as provided in section 12 and 13. It is proposed that the parties involve the services of a surveyor to establish the status of the suit property. The suit property be subdivided, the portion which has already been sold by the 1<sup>st</sup> defendant and his uncle Suleiman Omar Mwabeta be apportioned to them and their beneficiaries under them and the remaining portion be given to the plaintiff and beneficiaries under her.
67. It is ultimately submitted that the plaintiff cannot claim allegations of fraud, misrepresentation or collusion as against the 5<sup>th</sup> and 6<sup>th</sup> defendants and that the 1<sup>st</sup> defendant should be held solely responsible for the misfortunes of the plaintiff. That from the conduct of the 1<sup>st</sup> defendant it is evident that he was out to defraud the plaintiff herein and other family members. The court is urged to dismiss the suit against the 5<sup>th</sup> defendant.

### **Analysis And Determination**

68. I have considered the plaintiffs case vis a vis the defendants cases including the counterclaims which stand as suits of their own. The court has also considered the evidence led by the parties as well the rival submissions of the parties. The following issues commend determination; -
1. Whether the plaintiff has proved her interest over the suit property and to what extent.
  2. Whether the transfer of Mwanajuma Nigatembos share in plot No. Kwale/Waa/115 to the 1<sup>st</sup> defendant and Suleiman Omar Mwaronga was null and void
  3. Whether the transfer of Nironga Omari Mwabetwa share in the suit property to the 1<sup>st</sup> defendant was null and void
  4. Whether the proceedings in the Kadhis court purporting to vest the suit property to the 1<sup>st</sup> defendant were illegal
  5. Whether 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants are bonafide purchasers without notice to warrant the grant of the reliefs sought in the counterclaim?
  6. What orders should issue in the circumstances.
  7. Who should bear the cost of both the suit and the counterclaims.

### **Whether the plaintiff has proved her interest over the suit property**

69. I must first observe that I have reviewed the plaintiffs case as summarised by Mr. Mgupu in the plaintiffs submissions. The same appear to suggest that the plaintiff is the owner of the suit property thus the 1<sup>st</sup> issue identified on behalf of the plaintiff for the determination of this court. The submissions seem to suggest that the plaintiff as the sole survivor of the original three registered proprietors is entitled to the entire suit property cannot be far from the truth. Having reviewed the plaint and the prayers in the plaint I note that the plaintiff craves the title of the suit property to revert to the original three proprietors as reflected in the title issued in 1981 upon first registration (see prayer g of the plaint). I understand her to be saying that the land could not be sold without her consent, secondly that it is



held in undivided shares and thus incapable of subdivision, she was disinherited and all subsequent entries made should be removed from the register having been the result of fraud perpetrated by the 1<sup>st</sup> defendant and the other defendants.

70. It is trite that a party is bound by their pleadings - See the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR. I have not seen a prayer that the plaintiff be registered as the sole proprietor of the entire suit property.

71. Before I delve into the analysis, it is not in dispute that the suit property being the mother title is held in common ownership of the three first registered proprietors of the property each holding 1/3 share of the whole. I find it pertinent to enumerate the law and concept of tenancy in common. I note that the counsel for the plaintiff and state counsel discussed the concept in their submissions.

72. The Land Act defines Co-tenancy to mean the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.

73. The Registered Land Act (now repealed) under which the mother title was registered has the following relevant provisions

Section 101 (1) An instrument made in favor of two or more persons, and the registration giving effect to it, shall show

a. Whether those persons are joint proprietors or proprietors in common and

b. Where they are proprietors in common, the share of each proprietor.

Section 103 (1) Where any land, lease or charge is owned in common each proprietor shall be entitled to an undivided share in the whole, and on death of a proprietor his share shall be administered as part of his estate. (2) No proprietor in common shall deal with his undivided share in favor of any person other than another proprietor in common of the same land except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

74. In an article published by Nyiha Mukoma & Co. Advocates on 5/04/2024 six characteristics of a tenancy in common are enumerated as follows;-

The first characteristic is individual ownership. Each tenant in common holds an individual, undivided ownership interest in the property. This means that while the property itself is owned collectively, each owner has a specific share that is legally recognized.

The second characteristic is the possibility of owners having unequal shares in the property. Unlike joint tenancies, which require equal ownership, tenancy in common allows for owners to have unequal shares in the property. These shares can be apportioned based on the agreement among the co-owners at the time of purchase or subsequently through agreements.

The third characteristic is separate titles. Each tenant in common can have a separate legal title to their share of the property. This allows for the individual portion of the property to be sold, transferred, or bequeathed independently of the other owners.

The fourth characteristic is that in tenancy in common there is no right to survivorship. One of the key distinctions of a tenancy in common is the absence of the right of survivorship. This means that upon the death of a tenant in common, their share of the property does not transfer to the surviving owners. Instead, it becomes part of the deceased's estate and is distributed according to their will or the laws of intestate succession.

The fifth characteristic is freedom to dispose interest. Owners are at liberty to dispose of their interest in the property as they see fit during their lifetime. This includes the ability to sell, lease, or mortgage



- their share without needing consent from the other co-owners, although the practical aspects of selling a shared interest might be complicated.
75. The court will therefore apply the foregoing to the present case it analysing the issues for determination.
  76. To be able to impeach the titles issued to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants the plaintiff is required to establish her interest in the suit property and extend/nature of the alleged interest. However, before this the plaintiff must surmount the hurdle mounted by the 1<sup>st</sup> defendant that she is an imposter. The question that must be determined at this early stage is whether the plaintiff is the Mwanajuma Nitagembo referred to in the Land Adjudication Record and the title issued pursuant thereto.
  77. It is not disputed that during the process of adjudication in 1975 the suit property was recorded in the names of three individuals Sulemani Omari Mwabweta, Nironga Omari Mwabweta and Mwanajuma Nitagembo. This was corroborated by a copy of Adjudication record (A 622115) under the Waa Adjudication section dated 1975 adduced by both the plaintiff and the 5<sup>th</sup> defendant, Land Registrar Kwale. This was also confirmed by DW4 who testified on behalf of the Land Registrar Kwale. It is also not in dispute that pursuant to the adjudication title was issued in the names of the three individuals. It is also not in dispute that the three individuals were relatives. More specifically that Sulemani Omari Mwabweta and Nironga Omari Mwabweta were siblings. It is further not in dispute the three registered owners held the land in common in equal shares of 1/3.
  78. The plaintiff claims to be the 3<sup>rd</sup> registered owner but this is contested by the 1<sup>st</sup> defendant whose case is that she is an imposter because the said Nitagembo died in 2000.
  79. Section 107(1) of the [Evidence Act](#) Cap 80 (Laws of Kenya) states that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.
  80. The burden of proof was upon the plaintiff to prove she is the Mwanajuma Nitagembo the third registered proprietor featuring in the adjudication record and the first edition green card opened on 6/4/1981. In her witness statement the plaintiff stated she is the granddaughter of Nironga Omari Mabweta. So how did she as a granddaughter come to be recorded yet she was not a sibling to the other two individuals in the record? Her evidence was that Nironga had only one child Fatuma Bakari who was the plaintiff's mother. Fatuma Bakari was deceased at the time of adjudication. That the plaintiffs three siblings were minors and she was the one who ended up being registered.
  81. It was expected that if she had attained 18 years of age she would be having an ID card. The ID card would then be proof of her name in 1975 but it was her evidence that she did not have an ID card then. This evidence was corroborated by PW3 who was her former husband and whose evidence was that he is the one who processed the plaintiffs ID card. PW2 who told the court he was a relative to the plaintiff confirmed that there was no other family member by the name Mwanajuma Nitagembo except the plaintiff.
  82. I have noted the submission that the plaintiff did not produce any documentary proof linking her to the name Nitagembo. However from the proceedings a number of observations can guide the court towards resolution of this issue. Firstly is the order of the Kadhis Court in Succession Cause No. 119 of 2011 which at order No. 6 states that the share of Mwanajuma Nitagembo includes that of her siblings Mwaka Juma and Hamisi Juma. It is imperative to note that this petition/succession cause was filed by Suleiman Omar Mwaronga who must have supplied these particulars. The details are given as if Mwanajuma Nitagembo were still alive then. The question the would be if Mwanajuma Nitagembo was said to have died in the year 2000 the particulars should not have been supplied in this manner.



Yet it is not the plaintiff who gave these details in the petition. This points to the fact that the plaintiff is the Mwanajuma Nigatembo.

83. PW1 testified that she had siblings by these same names. PW3 her former husband testified that he knew all these siblings and brought them up which resonates with the plaintiff testimony that they were still minors at the time of adjudication.
84. At page 2 (paragraph 2 & 3 from the top) of DW1 witness statement filed on 17/10/2022, DW1 in fact corroborates the plaintiffs evidence when he contradicts his position by stating as follows; -

‘The Deceased Nironga Omar Mwabeta had a daughter by the name of Fatuma Bakari Juma who in turn had a daughter by the name of Mwanajuma Mbwana Noor Gakweli, the sibling to Mwaka Juma Mwalau(deceased) and Hassan Juma Mwalau’
85. The same names of the plaintiffs siblings are emerging above through the 1<sup>st</sup> defendant. It cannot therefore be a coincidence that the siblings of Mwanajuma Nigatembo recognised in the Kadhis order above would have the same names as the one recognised by the 1<sup>st</sup> defendant. At no point during the hearing did the 1<sup>st</sup> defendant refute that these were not the siblings he was referring to in his witness statement or the ones referred to in the Kadhis order.
86. For me this is the same Mwanajuma Nigatembo who was being referred to by Suleiman Omar Mwaronga one of the 3 proprietors and the petitioner in the above Kadhis proceedings. In my view being one of the original owners he stood to have a better understanding of who were the other co-registered proprietors of the suit property during adjudication.
87. The 1<sup>st</sup> defendant is the one who asserted that the plaintiff is not the Mwanajuma Nigatembo mentioned in the adjudication record and the title issued pursuant thereto. Moreover his evidence was not corroborated by any witness. The 1<sup>st</sup> defendant listed and filed a witness statement by Mwanatoro Kosikos who would have shed light on the issue but who never testified despite opportunity given to the 1<sup>st</sup> defendant to have her attend court.
88. The 1<sup>st</sup> defendant produced a copy of Certificate of Death dated 11/04/2014 (DEX7) relating to Mwanajuma Nigatembo Mwabeta. Having noted the foregoing then it puts into question the veracity of the death certificate. However the authenticity of the death certificate is questionable and this will become clear later in this judgement (see paragraph 97 and 98 herein).
89. It is the finding of this court that the plaintiff is not an imposter and is the same person as the Mwanajuma Nigatembo appearing in the adjudication record and title issued on 6/4/1981.
90. Having resolved the above hurdle, it goes without say that the plaintiff is the 3<sup>rd</sup> registered proprietor of the suit property. This being the case her share of the property is one third of the whole share. This share as per her oral testimony she holds in trust for her siblings who were minors at the time of adjudication. As seen above including the evidence of the DW1, PW1 had siblings who are already mentioned hereinabove and she was registered because her siblings were still minors then.
91. Up to the above point the plaintiffs interest was limited to the 1/3 share which she also held in trust for her siblings.

**Whether the transfer of Mwanajuma Nigatembos share in plot No. Kwale/Waa/115 to the 1<sup>st</sup> defendant and Suleiman Omar Mwaronga null and void**

92. I will now proceed to discuss the plaintiffs allegation that she was fraudulently disinherited by the 1<sup>st</sup> defendant. It is now trite that fraud must be specifically pleaded and particularised in what manner the



fraud was committed and by which party. This is the position enunciated by all counsels appearing for the parties in these proceedings as seen in the cases of Vijay Morjaria Vs Nansigh Madhusingh Darbar & Another (2000) eKLR. where the Court of Appeal held that:-

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

93. At this juncture the court is dealing with the 1/3 share the plaintiff holds on her on own behalf and that of her siblings, this is Mwanajuma Nigatembos share. The particulars of fraud are pleaded at paragraph 24 of the plaint and which in my view have met the threshold required in terms of the details expected. For purposes of the determination of this issue I will pick the relevant ones namely:-
- a. On 27<sup>th</sup> January 2015, the 1<sup>st</sup> Defendant fraudulently procured a letter from the chief Waa Location purporting to confirm the death of the plaintiff while knowing at all times that the plaintiff was alive;
  - b. On 11<sup>th</sup> April 2014, the 1<sup>st</sup> Defendant procured a document purporting to be a death certificate of the Plaintiff while knowing at all times that the plaintiff was alive;
  - c. On 21<sup>ST</sup> October 2016, the 1<sup>st</sup> Defendant without a valid court order and purportedly together with Suleiman Omari Mwaronga (deceased) fraudulently executed documents purporting to be transfer instruments and were thereby illegally registered by transmission as the proprietors of the suit property succeeding the plaintiff;
  - d. On 10<sup>th</sup> February, 2017, the 5<sup>th</sup> Defendant unlawfully registered the 1<sup>st</sup> Defendant and Suleiman Omari Mwaronga (deceased) as the proprietors of the suit property in place of the Plaintiff on the basis of Succession Cause 199 of 2011 before the Kadhi's Court Kwale knowing fully well that the 1<sup>st</sup> defendant was neither a party nor a beneficiary of any order in the matter;
94. The burden of proof was upon the plaintiff to prove the allegations raised to the standard required. It is established that the Standard for proof in claims for fraud is slightly higher than in the ordinary civil cases. See Koinange & 13 others Vs Charles Karuga Koinange 1986 KLR, Kinyanjui Kamau Vs George Kamau [2015] eKLR and Ndolo Vs Ndolo [2008] 1KLR (G&F) 742.
95. At what point was the 3<sup>rd</sup> common proprietor removed from the register? The Land Registrar produced a green card for the first edition of the mother title opened on 6.4.81. This document was also produced by both DW1 and PW1. Entry No. 6, 7 & 8 dated 10/2/2017 is in favor of Suleman Omar Mwaronga and Mwaronga Nassoro Nassoro the first defendant registered pursuant to cause No. 119 of 2011, from the Kadhis Court, Kwale. An application for transmission (R.L19) dated 21/10/2016 was received on 10/2/17 and lodged on 16/2/17 by the two as personal representatives of Mwanajuma Nigatambo. Transmission was registered on 10/2/2017. A copy of the title deed was produced dated 10/2/17 for Kwale/Waa/115.
96. I had a problem with the dates above. The application was booked in the presentation book on 16/2/2017 but is seen to have been registered on 10/2/2017. Registration cannot predate a booking. To me this is an irregularity.



97. But I must also address the alleged death of the plaintiff whom I have already made a finding is the 3<sup>rd</sup> proprietor. The chief's letter dated 27<sup>th</sup> January 2015 was also part of the evidence produced by the plaintiff. The letter is by the Chief Waa Location, addressed to whom it may concern and the subject is 'introduction Mwanajuma Nigatembo (deceased)'. The Chief confirms that he knew the deceased very well and that she died many years ago. Firstly the letter is not specific on the date or year of death which raises a doubt. It is not on letter head nor is the name of the Chief disclosed.
98. Then there is the Certificate of Death in respect of Mwanajuma Nigatembo which was registered and issued on 11/4/2014. Clearly the letter above cannot have been used for purposes of the Certificate of death as it was allegedly written in the year 2015 post the date of alleged death certificate. The plaintiff's allegation that the death certificate was questionable were not displaced. No further documentation was availed to displace these allegations to show how the same was applied for.
99. Moreover I have already made a finding that the plaintiff is the Mwanajuma Nigatembo alleged to be deceased. I will not delve into the arguments raised by the plaintiff's counsel on the presumption of death because this is not an issue. The 1<sup>st</sup> defendant who was alleging the death did not do so under the doctrine but was very categorical that the plaintiff was an imposter.
100. Blacks Law Dictionary 7<sup>th</sup> edn defines fraud as:-
- “Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”
101. Further, Black's Law Dictionary 9<sup>th</sup> Edn also defines 'fraud' as:-
- “A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.
102. In view of the foregoing it is my finding that the two documents were fraudulent.

**Whether the transfer of Nironga Omari Mwambweta share in the suit property to the 1<sup>st</sup> defendant is null and void.**

103. The plaintiff alleges that the 1<sup>st</sup> Defendant being a total stranger to the deceased Nironga Omari Mwambweta fraudulently obtained an order in Succession Cause 119 of 2011, from the Kadhis Court, Kwale vesting the deceased Nironga Omari Mwambweta's share of the suit property to himself. Further that on 26<sup>th</sup> May 2011, the 1<sup>st</sup> Defendant purporting to be the personal representative of Nironga Omari Mwambweta (deceased) fraudulently executed documents purporting to be transfer instruments and was illegally registered by transmission as the proprietor of the suit property in place of the deceased Nironga Omari Mwambweta;
104. But who petitioned the Kadhis Court in Succession Cause 119 of 2011. PW1 adduced in evidence an order dated 26/5/2011, issued on 6/7/2011 from the proceedings filed in the Kadhis Court at Kwale. This document was also produced by the 1<sup>st</sup> defendant. The order reveals that the succession cause was commenced by Suleiman Omar Mwaronga who is indicated as the one who petitioned the Kadhis court. It is therefore not the 1<sup>st</sup> defendant who filed the proceedings. However there is a nexus since the 1<sup>st</sup> defendant is named as the person taking over the deceased share and he is seen featuring in application for registration as proprietor by transmission dated 26/5/2011 which he produced as his evidence.



105. The first port of call should be for the plaintiff to prove her interest in Nironga Omari Mwambweta's share of the suit property. PW1 told the court she is the granddaughter of Nironga Omar Mwabeta which was also confirmed by DW1. It was PW1's testimony that her mother Fatuma Bakari Juma was the only daughter of Nironga Omari and was deceased. This evidence was not controverted. It would therefore follow that the plaintiff and her siblings would be entitled to Nironga's share in the suit property upon Nironga's death.
106. I have noted that item 3 of the order indeed vests the deceased Nironga Omar Mwambweta's share in the 1<sup>st</sup> defendant Mwaronga Nassoro Nassoro. This share is as per order 5 therein said to include that of Mwanatoro Kozkosi and Gozi Salimu Karima. Mwanatoro Kozkosi is the mother to the 1<sup>st</sup> defendant. But why does the 1<sup>st</sup> defendant claim entitlement of this share to the exclusion of the Plaintiff and her siblings? This takes me to the second allegation of fraud.
107. According to the plaintiff the 1<sup>st</sup> Defendant purporting to be the personal representative of Nironga Omari Mwambweta (deceased) fraudulently executed documents purporting to be transfer instruments and was illegally registered by transmission as the proprietor of the suit property in place of the deceased Nironga Omari Mwambweta.
108. It was DW1's evidence in chief that he was more entitled to the suit property by blood unlike PW1. In fact according to DW1 Nironga Omar Mwabeta (came with her mother) meaning he was not a Mwaronga but was adopted. DW1's evidence in chief is that Fatuma Omar Mwaronga his grandmother was excluded from the list during adjudication. That Suleiman Omar Mwabeta after the death of Nironga Omar Mwabeta informed the chief about the situation and proceeded to institute a case at the Kadhis court in Kwale (119 of 2011) for the sole purpose of adding his sister Fatuma Omar Mwabeta (the 1<sup>st</sup> defendant's grandmother) replacing Nironga Omar Mwabeta in the title deed.
109. Having noted the above rendition a title cannot be rectified through succession proceedings. Secondly a Kadhis Court has no jurisdiction over matters of land titles and ownership. The jurisdiction of the Kadhis court as provided under article 170 of *the Constitution* as read together with section 5 of the Kadhis Court Act is only exercised in the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. Any replacement of Nironga Mwabeta from the title pursuant to the above argument is null and void.
110. There was also no evidence led by the 1<sup>st</sup> defendant that the requisite objections were raised during the land adjudication process. The only other option was for the estate of Fatuma to have filed the requisite proceedings to challenge the original title. This was therefore an illegality because the title document and the adjudication record only bore three names. I will later in this judgement revisit this item for purposes of the beneficiaries of Fatuma Omar Mwambweta.
111. But what then would be the fate of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' titles? This question is tied to the issue whether the 1<sup>st</sup> defendant could pass good title to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as well as whether the defence of bona fide purchasers for value without notice of any adverse claims on the title would be available to protect their titles.
112. In the case of *Lawrence Mukiri vs The Attorney General & 4 others* (2013) eKLR the court defined a bona fide purchaser for value as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongfully. That the purchaser must prove he holds a certificate of title, He purchased the property in good faith, He had no knowledge of the fraud, The Vendor had apparent valid title, He purchased without notice of any fraud and that he was not a party to any fraud. Also see *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR where the Court cited with authority the Ugandan Case of *Katende Vs Haridar & Company Ltd* (2008) 2EA 173.



113. The burden of proof lay upon the 2<sup>nd</sup> to 4<sup>th</sup> defendant to demonstrate to the court that they were bona fide purchasers for value without notice. The 2<sup>nd</sup> to 4<sup>th</sup> defendants stated through the 2<sup>nd</sup> defendant that they were interested in land they came to Waa and they liked the place. They saw some vacant land and were referred to Suleiman Omar Mwaronga and the 1<sup>st</sup> defendant. I did not doubt the 2<sup>nd</sup> defendant in his oral testimony that they honestly intended to buy the land.
114. Secondly the witness presented a bundle of documents contained in their list of documents 10/6/2022 starting with a search dated 7/11/2012 for Kwale/Waa/115 indicating Suleiman Omar Mwaronga , Mwaronga Nassoro Nassoro and Mwanajuma Nigatembo. Two of the names of the people he was purchasing from were indicated in the title. He stated that even upon realising a 3<sup>rd</sup> name he inquired and was informed that the said Nigatembo was deceased and succession was undertaken which was confirmed in the Kadhis order of 6/11/2011 which he clarified in re-examination retained Nigatembo's share (see order No.4). I have read the said order which confirms Nigatembo's share is being retained. For me clearly the vendors seemed to have apparent good title. The witness categorically stated there was no way he would be aware of family issues and which I agree. Furthermore the witness and his nephews are not the ones who filed the petition there was nothing linking their participation in whatever happened before the Kadhis court.
115. An agreement for sale dated 13/05/2013 was produced by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants. It shows Suleiman Omar Mwaronga and the 1<sup>st</sup> defendant as vendors which tallied with the Kadhis orders. The agreement predates the death of Suleiman Mwaronga and therefore vindicates the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> defendants testimony. There was also the sale Agreement dated 12/4/2013 sold to Mohamed Were Godana and Ismael Were Godana by the same vendors measuring 75ft by 35ft.
116. In my view for the foregoing reasons I would have no hesitation to declare the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants as innocent purchasers for value.
117. Additionally, I would protect the titles for the reasons firstly that Suleiman Mwaronga was rightly selling his portion. The agreement was for seventy five feet (75ft) by forty five feet (45ft). This does not exceed 1/3 of his portion. This also goes for the agreement for sale in respect of 3<sup>rd</sup> and 4<sup>th</sup> defendants. Mr. Mokaya confirmed that any of the owners could deal with their 1/3 share provided it did not exceed the same. Moreover PW1 conceded in cross examination that Suleiman had a right to sell. It was also her evidence that she had no problem with Suleiman.
118. From the proceedings it became apparent to the court there are various people who have bought land in the suit property. The 2<sup>nd</sup> defendant's oral testimony is that there could be not less than 100 people who may have bought plots within the suit property. The 1<sup>st</sup> defendant also presented agreements in his bundle. PW1 confirmed in cross examination that there are people who have bought plots within the premises. It would be unfair to sustain an objection to the purchase of 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants.
119. But what about equity? The 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> defendants being innocent purchasers would still be entitled under their interest as purchasers. By the sale agreement they took possession and settled in the portions they purchased.
120. What orders therefore commend in the circumstances of this case. I have noted the prayers that have been sought by the plaintiff and I think to grant them as drafted would lead to an injustice. Section 13 (5) of the *Environment and Land Court Act* empowers me to make any order and grant any relief as the court deems fit and just.
121. Based on the foregoing discussions it is clear that the orders sought in prayer 1,2, 3 and including the orders of permanent injunction cannot issue as against the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants.



122. This court further finds it necessary in the interest of justice and equity to provide for the estate of Fatuma Omari Mwabweta the 1<sup>st</sup> defendant's grandmother, as the plaintiff could not confirm that the said Fatuma had a separate land and it was not disputed that she was a family member. *The Constitution* of Kenya 2010 has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others,
123. What orders therefore commend in the present circumstances? As earlier noted one of the characteristics of ownership in common is that each tenant in common can have a separate legal title to their share of the property which then allows for the individual portion of the property to be sold, transferred, or bequeathed independently of the other owners.
124. The above is also grounded on the provisions of section 94 of the *Land Registration Act* which provides for the severance of common tenancy by way of partitioning as follows; -
- (1) 1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.
  - (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—
    - (a) any one or more of the tenants in common without the consent of all the tenants in common; or
    - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.
125. The following orders therefore issue to dispense of the suit and the counterclaims; -
1. The plaintiff having confirmed that there are portions of land within the suit property that have not been sold, the County Land Surveyor Kwale and the Land Registrar Kwale shall visit the suit property and within 90 days of this judgement conduct and complete the following;
    - a. Ascertain and survey the portion of the original title Kwale/Waa/115 that have not been sold as shall be identified by the plaintiff and her siblings, the 1<sup>st</sup> defendant and beneficiaries of Suleiman Omar Mwabweta.
    - b. The Area chief shall attend and assist in the identification exercise in a) above.
    - c. In the event the portion in a) above shall amount to 1/3 share of the suit property, then the County Land Surveyor Kwale and the Land Registrar Kwale shall identify the exact boundaries and cause to be excised the said portion and register the Plaintiff and her siblings as proprietors in common of this 1/3 share.
    - d. That any deficit arising from a) above shall be excised from the Subdivision Kwale/Waa/2103 which is still in the name of the 1<sup>st</sup> defendant and Suleiman Omar Mwabweta.



- e. That upon d) the Subdivision Kwale/Waa/2103 shall be rectified by replacing the 1<sup>st</sup> defendants name with that of Fatuma Omari Mwabweta (deceased) and the Plaintiff ,to be held in equal shares.
2. The Deputy Registrar ELC shall sign any documentation as may be required to enable the County Land Surveyor and Land Registrar Kwale implement the orders of this court.
  3. The costs of the survey, the registration and further rectification as may be necessary pursuant to the exercise herein shall be borne by the Plaintiff.
  4. A permanent injunction hereby issues restraining the 1<sup>st</sup> defendant and his agents from entering on and/or erecting or causing to be erected thereon any structures, in any way interfering with the plaintiff's use and enjoyment of the properties or portions thereof as shall be registered in her name and siblings pursuant to the orders of this court.
  5. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants titles Kwale/Waa/2102 and Kwale/Waa/2101 are hereby validated and sustained.
  6. That in view of (5) above I shall not make any orders on the 1<sup>st</sup> defendants counterclaim except that the defendant shall bear his costs.
  7. Having noted that some portions of the land may be occupied by people who may have been invited into the suit property by sale or lease and for the avoidance of doubt the orders herein shall not serve as eviction orders.
  8. Due to the nature of family interactions in this suit each party shall bear their own costs of the suit and counterclaims.

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 30<sup>TH</sup> OF JUNE 2025.**

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**HON. A.E DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

In the presence of:

Mr. Mgupu for the Plaintiff

Mr Oyas for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants

No appearance for the 1<sup>st</sup> defendant

No appearance for the 5<sup>th</sup> and 6<sup>th</sup> Defendants

Asmaa Muftah Court Assistant

