



**Itumo alias Margaret Nthoki Itumo v Kilolo & 4 others (Environment and Land Case 447 of 2019) [2025] KEELC 5079 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5079 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 447 OF 2019**

**CA OCHIENG, J**

**JULY 7, 2025**

**BETWEEN**

**MARGARET TITI ITUMO ALIAS MARGARET NTHOKI ITUMO . PLAINTIFF**

**AND**

**DAVID MUTUKU KILOLO ..... 1<sup>ST</sup> DEFENDANT**

**ANTHONY MWANGI KAMENJU ..... 2<sup>ND</sup> DEFENDANT**

**DANIEL MUTUA NDAMBUKI ..... 3<sup>RD</sup> DEFENDANT**

**JACKSON MUTUKU MWIKYA ..... 4<sup>TH</sup> DEFENDANT**

**CHARITY MWENDE ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit by a plaint dated 14<sup>th</sup> December 2017. She claims that she is the owner of Plot No. 305 Katheka –Kai “A”, which she purchased on 8<sup>th</sup> October 1999. She then allegedly put up a six (6) roomed residence thereon and was living with her husband Sergio Carlesso (now deceased) and herein referred to as “Sergio” but at the time of his death in 2017, she had fled the residence due to Sergio’s cruelty.
2. It is her case that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants including the 4<sup>th</sup> and 5<sup>th</sup> Defendants, who were Sergio’s employees took undue advantage of him at a time when he was incapable of making willful and informed decisions by virtue of ill-health and old age, and purported to acquire the suit land through alleged purchase. Subsequently, they illegally and fraudulently trespassed thereon in September 2017 and demolished her permanent structures, put up illegal beacons, fences and structures causing her to incur loss and expenses. She particularized the alleged fraud and illegality as well as alleged expenses incurred.
3. She prays for judgment against the Defendants jointly and severally for;



- a. A declaration that the purported purchase and or bequest of the suit land or portions thereof by and or to any of the Defendants is null and void.
- b. A declaration that the Defendants' occupation and use of the suit land or any portion thereof is illegal and wrongful.
- c. Eviction orders.
- d. An order that the Defendants vacate the suit land and do remove the illegal beacons, fences and other structures that they have erected on the land.
- e. An order permanently restraining the Defendants, their agents and servants or any persons claiming under them from remaining in occupation of the suit land.
- f. An order permanently restraining the Defendants, their agents and servants or any person claiming under them from preventing the Plaintiff from accessing the land or any portion thereof and from interfering with the Plaintiff's use or enjoyment thereof in any manner whatsoever.
- g. Mesne profits for loss of use and benefit of the suit land from September 2017 to the time vacant possession of the land is given to the Plaintiff.
- h. General damages for trespass.
- i. Special damages of ksh.80,000/=
- j. An order that the damage of the demolished parts of the building on the land be assessed and the Defendants do pay the Plaintiff the same.
- k. Interest on (g) (h) (i) and (j) above.
- l. Any other or further relief that the court may deem necessary to issue to serve the interests of justice.
- m. Costs of the suit.

## Responses

4. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants opposed the suit vide a joint amended defence and counterclaim of the 1<sup>st</sup> Defendant dated the 2<sup>nd</sup> February 2018. They denied allegations levelled against them in the plaint and averred that the 1<sup>st</sup> Defendant entered into an agreement of sale dated 10<sup>th</sup> May 2017 with Sergio who sold him a portion of the suit land, where the main house sits. The 4<sup>th</sup> and 5<sup>th</sup> Defendants seek a dismissal of the Plaintiff's suit against them, while the 1<sup>st</sup> Defendant seeks the following Orders in the counterclaim:
  - a. A declaration that the 1<sup>st</sup> Defendant is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
  - b. An order of injunction to restrain the Plaintiff, her agents, workers, servants/anyone else from trespassing or remaining onto the parcel of land to be excised from Plot No. 305 Katheka-Kai.
  - c. General damages for trespass.
  - d. Costs of this suit together with interest thereon at such rates and for such period of time as this Honourable Court may deem appropriate.



5. The 2<sup>nd</sup> Defendant filed a defence and counterclaim dated 13<sup>th</sup> February 2018. He avers that the Plaintiff is not the absolute owner of the suit land, as it was shared between herself and Sergio by the court vide a consent dated 26<sup>th</sup> October 2009. Further, that he purchased a plot measuring 100ft by 100ft from Sergio's share in 2011 and that he immediately took possession. He seeks the following Orders in the Counterclaim:
  - a. A declaration that the 2<sup>nd</sup> Defendant is the lawful owner of the portion of land measuring 100ft by 100ft and is entitled to the exclusive possession of the said portion purchased from Sergio Carlesso.
  - b. An order of permanent injunction restraining the Plaintiff and/or agents from trespassing on the said portion of land to be hived off Plot No. 305 Katheka Kai.
  - c. General damages for trespassing on the said portion of land.
  - d. Costs of the suit and interest at court rates.
  - e. Any other relief this Honourable Court deems fit to grant.
6. The 3<sup>rd</sup> Defendant filed an amended defence and counterclaim dated 23<sup>rd</sup> February 2018. He denies allegations levelled against him in the plaint and contends that on 26<sup>th</sup> June 2016, he bought two plots from Sergio measuring 50ft and 100ft hived from Plot No. 305 Katheka -Kai and was peacefully in occupation when the plaintiff trespassed thereon. He seeks for the following Orders in the Counterclaims:
  - a. The Plaintiff's suit be dismissed and the counterclaim be allowed.
  - b. A declaration that the 3<sup>rd</sup> Defendant is the lawful owner of the 2 portions of land each measuring 50ft by 100ft and is entitled to the exclusive possession of the said portions of land he purchased from Sergio Carlesso.
  - c. An order of permanent injunction restraining the Plaintiff and/or agents from trespassing on the said two portions of land each measuring 50ft by 100ft to be hived off Plot No. 305 Katheka Kai.
  - d. General damages for trespassing on the said portions of land.
  - e. Costs of the suit and interest at court rates.
  - f. Any other relief this Honourable Court deems fit to grant.
7. The Plaintiff filed defenses to the parties' respective counterclaims denying allegations levelled against her. She also reiterated her averments in the plaint.

### **Evidence of the Plaintiff**

8. The Plaintiff as PW1 adopted her witness statement as her evidence in chief. She stated that she is the absolute sole owner of Plot No. 305 Katheka-Kai "A" measuring approximately 1.79 acres, hereinafter referred to as the 'suit land', which is valued at approximately Kshs.40 million, that she purchased in 1999 from one Batram Mutinda Muthoka herein referred to as "Mutinda", who was owner by virtue of being a shareholder in Katheka-Kai Farmers' Co-operative Society Limited, herein referred to as "the Society". She claimed that her rights to the parcel are noted on the relevant register of the said Society. Further, that she developed the suit land by putting up a permanent six (6) roomed stone masonry



house roofed with brick tiles as the main house, a kitchen, servants' quarters, stores and external toilets. She confirmed that she had a compound and a farm for subsistence crops.

9. It was her testimony that she married Sergio under the Marriage Act in 2005 and he had no other relatives save for herself and her daughter whom she bore before the marriage. Further, that about 8<sup>th</sup> December 2017, she got information from third parties that Sergio had passed away. She contended that at the time of his death, she had been forced to flee the suit land due to Sergio's cruelty and was renting a house in Machakos town pending hearing and determination of Machakos High Court Divorce Cause No. 1 of 2009, which she had filed and Civil Suit No. 41 of 2009 filed by Sergio and wherein she had filed a counterclaim. She pointed out that in Civil Suit No. 41 of 2009, the court issued orders restraining Sergio from denying her access to and use of the suit land and movables in the said land but he disobeyed and relegated her to a small portion, for farming purposes.
10. She stated that in September 2017, she learned that the Defendants had hatched a scheme to illegally and irregularly acquire the suit land and the premises thereon from Sergio at a time he was incapable of making willful and informed decisions due to illness and old age. Further, that he did not have a title to pass to the Defendants as he was not the registered owner. She claimed that following illegal acquisition of portions of the suit land, the Defendants' started purporting to parcel it up and put up illegal; beacons, fences and structures thereon prompting her to seek restraining orders against Sergio in Civil Suit No. 41 of 2009 but following Sergio's death, the Defendants' completely took over the entire suit land and have denied, her plea to vacate.
11. She produced her list of documents dated 14<sup>th</sup> December 2024 as Exhibit No. 1-13. She also relied on the documents annexed to her supporting affidavit sworn on 12<sup>th</sup> December 2017 and those annexed to her supporting affidavit sworn on 13<sup>th</sup> March 2018.
12. During cross-examination PW1 stated that she had been to the Society's offices to verify records of the suit land held there, but officials had declined to grant her an audience or allow her to peruse the records. She insisted that the suit land belongs to her and while she took possession in 1999, she did not have a certificate of title or allotment letter though she signed a Transfer between Mutinda and herself, which she did not have in court. She also confirmed that she conducted a search to confirm the suit land was registered to Mutinda before she purchased it, but she did not have a copy of the search in court and neither did she have a document from the Society confirming Mutinda's ownership. Further, that Mutinda did not give her a share certificate or allotment letter.
13. In re-examination, PW1 clarified that while the Society declined to allow her to peruse their records, she had severally checked their records before she purchased the suit land and confirmed that Mutinda was the registered owner thus Sergio had no right to transfer land, which she bought before they got married.

### **Evidence of the Defendants**

14. DW1 was the 1<sup>st</sup> Defendant. He adopted his witness statement as his evidence in chief. He stated that he purchased a portion of the suit land measuring 100ft by 100ft from Sergio through a Sale Agreement dated 10<sup>th</sup> May 2017. Further that the parcel was transferred to him vide Land Transfer Form dated 4<sup>th</sup> December 2017 and it includes the main house that the deceased was living in and some other structures.
15. He produced the sale agreement dated 10<sup>th</sup> May 2017 as D. Exhibit 1.
16. In Cross-examination, DW1 stated that the society confirmed that he owns a portion of the suit land vide their letter dated 19<sup>th</sup> October 2022. He also stated that he witnessed the sale agreement dated 28<sup>th</sup>



June 2016, from Sergio to the 3<sup>rd</sup> Defendant. He explained that during sale of the property at the point of executing the sale agreement, he never met the Plaintiff. Further, when he visited the suit land, he found Sergio living alone as he did not have a wife. He confirmed doing a search at the Society and which confirmed that the suit land belonged to Sergio. Further, that Sergio showed him documents including a transfer and a consent between his wife and himself but he did not have them in court. He reaffirmed that Sergio executed a transfer to him on 4<sup>th</sup> December 2017 when admitted at Nairobi Women's Hospital, and that he received the balance of the purchase price, while at the hospital.

17. It was his contention that the plot he purchased is the one where the main house sits and that he bought the house while Sergio had moved out. He claimed that the household goods appearing at pages 20-29 of the Plaintiff's bundle are his household goods, which he took to the house once Sergio moved to Eastleigh.
18. He stated that he had seen the letter dated 27<sup>th</sup> April 2016 from messrs Kamolo & Associates to Sergio, in which the said advocate was seeking permission from the Plaintiff to enable Sergio sell a portion of the suit. Further, he saw the letter dated 22<sup>nd</sup> June 2016 by the Plaintiff's advocate, warning Sergio from selling the suit land since a dispute over the said land was pending in court.
19. In re-examination, DW1 said that when he purchased his plot, it was in Sergio's name as per the Society's records and that at the point of purchase, Sergio was alert, had lived thereon for 15 years and was his neighbour.
20. The 2<sup>nd</sup> Defendant as DW2 adopted his witness statement as his evidence in chief. He stated that about 15<sup>th</sup> December 2011, he entered into a written agreement with Sergio for the sale of a portion measuring 100ft by 100ft to be hived from the suit land. Further, that he purchased the portion allocated to Sergio pursuant to the Consent dated 26<sup>th</sup> October 2009 and he took possession and uses it for farming.
21. He produced his documents in his list dated 13<sup>th</sup> February 2018 as D. Exhibit 4- 6 and a further list dated 16<sup>th</sup> June 2020.
22. During cross -examination, DW2 insisted that Sergio was in good health when he sold him a portion of the suit land. Further, he knew that the 3<sup>rd</sup> Defendant also purchased a plot measuring 100ft by 100ft separated by a fence between them, but he had not built thereon. He claimed that the Plaintiff only appeared after Sergio's demise as Sergio was living with the 5<sup>th</sup> defendant as his wife. Further, that she signed on the sale agreement between Sergio and himself, but he did not know that she had no capacity to consent to the sale. He denied colluding with officers from the Society to deprive Sergio of his property.
23. The 3<sup>rd</sup> Defendant testified as DW3. He adopted his witness statement as his evidence in chief. He claimed that he purchased two plots measuring 50ft by 100ft each at Kshs.2,200,000 from Sergio who executed a Transfer form to him and the portion was accordingly excised and transferred to him on 3<sup>rd</sup> November 2017. He confirmed that he immediately took possession during the lifetime of the deceased, fenced the land, dug terraces and planted fruits thereon. He produced his bundle of documents dated 12<sup>th</sup> December 2019 as exhibits. These include copy of sale agreement dated 28th June 2016 and a copy of consent dated 26<sup>th</sup> October 2009.
24. In cross-examination, he pointed out that on 26<sup>th</sup> October 2009, Sergio and the Plaintiff had shared out the suit land vide a Consent filed in court and each was occupying and utilizing a distinct portion of the suit land. Further, that the Plaintiff filed Machakos CMCC No. 815 of 2017 between the same parties herein over Sergio's burial and it was resolved by Consent. Further, the Court directed that the deceased was to be buried on the undisputed portion of land.



25. He claimed that when he visited the suit land before purchasing it, Sergio introduced the 5<sup>th</sup> Defendant as his wife. He explained that he conducted a search at the Society, before purchasing and that he confirmed the suit land was registered in the name of Sergio. He insisted that he purchased two plots measuring 50ft by 100ft. He stated that the Transfer form to himself was signed on 3<sup>rd</sup> November 2017 but he did not know, where Sergio signed it from.
26. In re-examination, he explained that the Society called him to pick his Transfer after Sergio had signed it.
27. The 4<sup>th</sup> Defendant testified as DW4. He stated that he was Sergio's employee and that he does not own the suit land and has no interest in it.
28. The 5<sup>th</sup> Defendant testified as DW5. She told the court that she has no interest in the suit land.
29. DW6 was Dominic Musembi Muene, the Society's secretary. He confirmed that the letter dated 12<sup>th</sup> April 2018 emanated from the Society's office and it has his signature. He further confirmed that the 2<sup>nd</sup> Defendant purchased a portion of the suit land measuring 100ft by 100ft. He was emphatic that according to the Society's records, the owner of the suit land is Sergio.
30. During cross-examination, DW6 stated that Sergio also sold a portion of land to the 3<sup>rd</sup> Defendant and the Society's officials signed the transfer to that effect. He explained that he became the Society's secretary in 2016 but the society had lost documents from previous years, which had to be reconstructed from documents furnished by members. Further, that Sergio had purchased the suit land from Vai Kumbu who sold to Ngei Mutisya, who must have sold to Sergio. He confirmed that Geo Info was the Society's surveyor but a survey is not evidence of ownership.
31. He insisted that Mutinda, who allegedly sold suit land to the Plaintiff was not a member of the Society nor owner of suit land, but was a son of a member known as Paul Muthoka Kumbu. He furnished the court with a Register of the Society's members, a map he claimed indicated Vai Kumbu as owner of the suit land and a Register of Transfers relating to the suit land. He explained that the Register had been reconstructed and the previous one was not in court. Further, that the Register did not show Sergio as a member of the Society and he had not seen any transfer from Vai Kumbu to Monica Syokau and to Sergio.
32. In re-examination, DW6 stated that the suit land was initially owned by Vai Kumbu, the Society's Member No. 98. He sold to Ngei Mutisya who sold it to Sergio.

### **Submissions**

33. The Plaintiff submitted that the sale agreement dated 8<sup>th</sup> October 1999 between Mutinda and herself is sufficient proof of her acquisition of the suit land. Further, that while DW6 took the position that Mutinda did not own the suit land, so as to have capacity to sell it to her, as there was no document from the Society indicating that he was owner, however, their Transfer form dated 4<sup>th</sup> December 2017 to the 1<sup>st</sup> Defendant is noted at the bottom that the parcel was previously owned by Mutinda. She argued that there was a concerted tampering with the Society's documents and withholding them in cahoots with the Defendants. She contended that DW6 admitted that Geo info surveyors were the Society's surveyors thus the receipt dated 20<sup>th</sup> September 2001 at page 98 of her bundle supports her ownership of the suit land.
34. It was her further submission that the Defendants' deviated from their pleading that they purchased plots from Sergio on the strength of the consent dated 26<sup>th</sup> October 2009 and that they only purchased



- his share, to claims that the deceased had showed them his ownership documents. She urged the court to reject evidence that deviates from pleadings.
35. She also submitted that since there is no sale agreement/transfer/any document showing Sergio owned the suit land, the sale agreements produced herein are null and void for want of capacity, adding that they are also void for want of spousal consent, since the suit land is matrimonial property. To buttress her averments, she relied on the following decisions: JKN v JWN & 3 Others [2022] eKLR, Solomon Ndegwa Kuria v Peter Nditu Gitau [2019] eKLR and Muchiri v Boresha Maisha Self Help Group [2024] eKLR.
  36. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the Plaintiff failed to demonstrate that she is the absolute owner of the suit land as the sale agreement between Mutinda and herself could not suffice to confer ownership of the said land to her. They insisted that the 1<sup>st</sup> Defendant provided sufficient evidence of ownership of the suit land from the initial owner thus he is entitled to reliefs sought in the counterclaim. They pointed out that the 1<sup>st</sup> Defendant produced a consent dated 26<sup>th</sup> October, 2009, which essentially conferred ownership of the suit land to Sergio as it shared the suit land between the Plaintiff (only by way of possession not ownership) and Sergio and that the two had their distinct portions. Further, that Sergio sold a part of his distinct portion to the 1<sup>st</sup> Defendant. Further, that DW-6 who is the Secretary of the Society stated that the suit land was initially owned by Vai Kumbu, who was the Society's Member Number 98 and that he sold it to Ngei Mutisya who then sold to Sergio, who in turn sold a portion thereof to the 1<sup>st</sup> Defendant.
  37. They submitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants do not have any claim in this suit thus the case against them should be dismissed with costs. To buttress their averments, they relied on the following decisions: *Kimuyu v. City Council of Nairobi (now Nairobi City County) (ELC 170 of 2011)* (2023) KEELC 16288 (KLR) (21 February 2023) (Judgment), the case of Caroline Awinja Ochieng & Another v. Jane Anne Mbithe Gitau & 2 Others (2015) eKLR and Mwaja *¶ 5 Others v. National Land Commission ¶ Another (ELC Case 100 of 2021)* (2023) KEELC 16458 (KLR) (27 March, 2023).
  38. The 2<sup>nd</sup> Defendant submitted that the Plaintiff failed to prove that she was the legal registered proprietor of the suit land and thus lacked the locus standi to sue. It was his submissions that he demonstrated that he acquired a good title that warrants protection by this Court by dint of purchase from the registered owner from the Society's records, which he confirmed upon conducting a search at the Society, before executing the agreement for sale dated 15<sup>th</sup> December, 2011, between Sergio Carlesso and himself. Further, that Sergio's ownership status were confirmed by DW6. To support his arguments, he relied on the following decisions: Robert Kilonzo Muange & Another v Joel Nganda [2018] eKLR, Chumo v Korir & Another (Environment and Land Appeal E002 of 2022) [2024] KEELC 3877 (KLR) (16 May 2024) (Judgment) and the case of Kibera Blessed Academy v World Missionary Evangelism of Kenya Registered Trustees & 4 Others [2016] eKLR.
  39. The 3<sup>rd</sup> defendant's submissions mirrored those of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. He further submitted that he had demonstrated through oral testimony and documentary evidence that he is the rightful owner of a portion of the suit land and is entitled to the reliefs sought in the counter-claim. To support his averments, he relied on the following decisions: Caroline Awinja Ochieng & Another v. Jane Anne Mbithe Gitau & 2 Others (2015) eKLR, Mwaja *¶ 5 Others v. National Land Commission ¶ Another (ELC Case 100 of 2021)* (2023) KEELC 16458 (KLR) (27 March, 2023) and *Kimuyu v. City Council of Nairobi (now Nairobi City County) (ELC 170 of 2011)* (2023) KEELC 16288 (KLR) (21 February 2023) (Judgment).



## Analysis and Determination

40. Upon consideration of the pleadings herein, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:
- a. Whether the Plaintiff is the lawful owner of Plot No. 305 Katheka-Kai “A”.
  - b. Whether the Plaintiff is entitled to the Orders as sought in the Plaint.
  - c. Whether Sergio Carlesso had legal capacity to sell portions of the suit land.
  - d. Whether the Defendants fraudulently acquired their respective plots and if they are entitled to the reliefs sought in their respective counterclaims.

### **Whether the Plaintiff is the lawful owner of Plot No. 305 Katheka-Kai “A”.**

41. The Plaintiff claims that she is the absolute sole owner of Plot No. 305 Katheka-Kai “A” which she acquired vide purchase from one Batram Mutinda in 1999. She produced a Sale Agreement and receipts from a Surveyor to that effect. She claimed that she was married to Sergio Carlesso (deceased) and they had established their home on the suit land but she had left after their marriage became sour. She alleges that during her absence, the Defendants fraudulently entered the suit land alleging that they had purchased their respective portions from Sergio, who had no capacity to sell.
42. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants claim to have purchased their respective plots from Sergio Carlesso (deceased) at different times. Further, that they all took possession of their respective portions after purchase and have been utilizing them. The 1<sup>st</sup> Defendant confirmed that he purchased 100ft x 100ft including the main house on 10<sup>th</sup> May 2017. The 2<sup>nd</sup> Defendant alleges to have purchased a portion of 100ft x 100ft in 2011 while the 3<sup>rd</sup> Defendant stated that he purchased two plots measuring 50ft x 100ft each on 28<sup>th</sup> June 2016. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants produced various documents including Sale Agreements to prove they acquired their respective portions of land from Sergio. The Plaintiff as PW1 was categorical that she purchased the suit land in 1999 from Batram Mutinda who was a member of the Society.
43. DW6 who was the Secretary from the Society where the suit land emanated from, explained that the said Batram Mutinda was not a member of the Society nor owner of the land, which was sold to the Plaintiff, but a son to a member, He contended that as per their records the suit land was initially owned by Vai Kumbu (deceased) member no. 98 whose nominee was Monica Syokau. Further, that Vai Kumbu sold land to Ngei Mutisya that in turn alleged sold land to Sergio. There was evidence that Sergio and the Plaintiff had various suits in court and there was reference to a Consent Order dated 26<sup>th</sup> October, 2009 in Miscellaneous Civil Application No. 307 of 2009 – Margaret Ititi Tumu Vs Sergio Carlesso. I wish to reproduce an excerpt of the said Consent.

“By consent of both parties entered in the presence of Mrs. Mwangangi – Advocate for the Applicant and Mr. Kamolo for the Respondent on 26<sup>th</sup> October, 2009, it is hereby agreed that the Applicant will be working on and cultivating three terraces located at the lower end of the farm on plot number 305 Katheka Kai and the Respondent will be working on and cultivating three terraces located at the upper end of the farm adjacent to the residence. It is further agreed that non of the parties will enter into the terraces reserved for the other party or harvest any crops on the parties portion.”

44. From a reading of this consent, there is no indication of who was the real owner of the suit land, but it seems the Plaintiff and Sergio were simply sharing out the portions of said land to cultivate.



The Plaintiff insisted that Sergio had no capacity to sell portions of the suit land to third parties without spousal consent. Further, that she owned the suit land because she had the Sale Agreement with Mutinda and receipt of Geoinfo Surveys Ltd dated 20<sup>th</sup> September, 2001.

45. During cross examination PW1 confirmed that she did not have a Certificate of Title, Plot Allotment Letter nor an executed Transfer document in court. She claimed to have undertaken a search to confirm Mutinda owned the suit land but the said Search was also not availed in court. Further, she stated that she did not have any documents from Katheka Kai to confirm Mutinda owned the suit land. I note she also did not avail any extract from the Register from the Society confirming she owned the suit land. At this juncture, I opine that the burden of proof was upon her to demonstrate how she acquired the suit land and provide documentary evidence but except for the receipt from the Geoinfo Surveyors and Sale Agreement, she has failed to discharge the fact that the vendor who sold her the land did own it. Even though there were proceedings in the High Court between Sergio and herself, she has not informed this court of the outcome. Further, I note the 1<sup>st</sup> to 3<sup>rd</sup> Defendants only purchased portions of the suit land and the Plaintiff has not indicated what became of the remaining portion. I hence find that there is no conclusive proof that the Plaintiff was the lawful owner of the whole of the suit land as claimed. In the circumstances, I find that the Plaintiff is not entitled to the orders as sought, for in the Plaintiff.

As to whether Sergio Carlesso had legal capacity to sell portions of the suit land and if the Defendants fraudulently acquired their respective plots and if they are entitled to the reliefs sought in their respective counterclaims.

46. DW6 confirmed that as per their records Sergio was owner of the suit land. Further, that he sold portions of the said land to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their respective testimonies as DW1, DW2 and DW3 respectively confirmed purchasing their portions of land to be hived off the suit land, from Sergio when he was still alive. They explained that at the point of purchase, they undertook searches at the Society where it was confirmed Sergio owned the suit land. The Plaintiff insisted that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants did not legally acquire their respective portions of the suit land as Sergio did not have capacity to sell it, since he did not own it.

47. I note as per the impugned Consent, which I have highlighted above, there was evidence that both Plaintiff and Sergio were sharing out the suit land and I cannot wish this piece of evidence away. Which brings me to the question on whether Sergio had capacity to sell the land. Since it emerged that he owned a portion of the land but as per Society records, he owned the whole of it, I find that he was not estopped from selling it. Further, if so, did the 1<sup>st</sup> to 3<sup>rd</sup> Defendants legally acquire their respective portions of land.

48. I note as per letter dated the 12<sup>th</sup> April, 2018, the Society confirmed that the 1<sup>st</sup> Defendant owns a portion of the suit land measuring 100ft x 100ft, which he purchased from Sergio Carlesso. It is worth noting that at paragraph 3 of the said letter, the Society stated as follows:

“After the Court ordered for subdivision of the whole land as per consent dated 26<sup>th</sup> October, 2009, the plot remained on the part of Mr. Sergio Carlesso who is now deceased.”

49. Yet in another letter dated the 12<sup>th</sup> April, 2018, the Society further confirmed that the 2<sup>nd</sup> Defendant owns part of plot no. 305 measuring 100ft x 100ft, which he bought from Sergio Carlesso who died before the transfer was effected. The Society further confirmed that the 2<sup>nd</sup> Defendant visited their offices to conduct a search on the property. I opine that since they bought their respective portions of land from an owner and entered into Sale Agreements including paid the purchase prices, I find that they legally acquired their respective portions of land.



50. I note DW4 and DW5 who were sued as 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively during their testimonies, said they had no interest in the land. Further from their evidence, I find that the Plaintiff has not proved any claim against them. In the foregoing, I find that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants have proved their case as per the Counterclaim and will enter judgement in their favour.
51. On costs, I note there was a dispute between Plaintiff and Sergio, who were initially husband and wife, which disputes were in Court prior to the sale of the respective portions of suit land to the first three defendants, in that regard, I will decline to grant costs to any party.
52. In the circumstances, I find that the Plaintiff has not proved her case on a balance of probability and will proceed to dismiss it. I however find that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants have proved their case on a balance of probability and will enter judgement in their favour as per the Counterclaims in the following terms:

For the 1<sup>st</sup> Defendant:

- i. A declaration be and is hereby issued that the 1<sup>st</sup> Defendant is entitled to exclusive and unimpeded right of possession and occupation of the portion of the suit land he had purchased.
- ii. An order of injunction be and is hereby issued restraining the Plaintiff, her agents, workers, servants/anyone else from trespassing or remaining onto the parcel of land to be excised from Plot No. 305 Katheka-Kai.

For the 2<sup>nd</sup> Defendant

- a. A declaration be and is hereby issued that the 2<sup>nd</sup> Defendant is the lawful owner of the portion of land measuring 100ft by 100ft and is entitled to the exclusive possession of the said portion purchased from Sergio Carlesso.
- b. An order of permanent injunction be and is hereby issued restraining the Plaintiff and/or agents from trespassing on the said portion of land to be hived off Plot No. 305 Katheka Kai.

For the 3<sup>rd</sup> Defendant

- a. A declaration be and is hereby issued that the 3<sup>rd</sup> Defendant is the lawful owner of the 2 portions of land each measuring 50ft by 100ft and is entitled to the exclusive possession of the said portions of land he purchased from Sergio Carlesso.
- b. An order of permanent injunction be and is hereby issued restraining the Plaintiff and/or agents from trespassing on the said two portions of land each measuring 50ft by 100ft to be hived off Plot No. 305 Katheka Kai.

55. Each party to bear their own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY 2025**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Mwangangi for Plaintiff

K. Musyimi for Adv Mutinda for 2<sup>nd</sup> Defendant

Muema for 3<sup>rd</sup> Defendant

Mwongela for 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants



Court Assistant: Joan

