



Luis (suing as the Executrix of Vincent Aghostinho Rafael Luis (Deceased) v Mwangi & 2 others (Environment & Land Case 185 of 2016) [2024] KEELC 628 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 185 OF 2016
LA OMOLLO, J
FEBRUARY 8, 2024**

BETWEEN

**TAHIRA BEGUM LUIS (SUING AS THE EXECUTRIX OF VINCENT
AGHOSTINHO RAFAEL LUIS (DECEASED)) PLAINTIFF**

AND

PETER MUCHIRI MWANGI 1ST DEFENDANT

**THE HON ATTORNEY GENERAL OF THE REPUBLIC OF
KENYA 2ND DEFENDANT**

THE DISTRICT LAND REGISTRAR, NAKURU 3RD DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a Plaint dated 25th May, 2016 which plaint was later amended on 9th December 2019.
2. In the Amended Plaint, the Plaintiff avers that at all material times relevant to this suit, she was the executrix of the Estate of her late husband, Vincent Aghostinho Rafael Luis (hereinafter referred to as “the deceased) who died on 19th June, 2012 and at the time of his death, the deceased was domiciled in Kenya and had left a valid written will dated 3rd April, 2007.
3. She avers that on or about the 1st July, 1976, the deceased was employed by the Settlement Fund Trustees as a farm manager at Cortina/Piave farm at Njoro and was tasked to perform the duties of a Farm Manager Grade I. She avers that the Settlement Fund Trustee (SFT) was then a body corporate established by the Kenya (Amendment of Laws) (Agriculture) Regulations, 1963 (Legal Notice Number 352/1963).



4. It is her averment that the deceased was allotted a parcel of land in the Piave Settlement Scheme and on or about the 7th June, 1980, the Estates Manager on behalf of the Settlement Fund Trustees gave the deceased a letter of offer in respect of Parcel No. 1139 in Piave Settlement Scheme Number 751 in Njoro within Nakuru District.
5. She avers that the deceased accepted the offer by executing the letter of offer and became an allottee holding a certificate of registration No 22776. She also avers that pursuant to the said allotment, the deceased paid a settlement charge in the sum of Kenya Shillings 414, 450/= The deceased also executed a charge, paid a deposit of Ksh 40, 750/= and further paid conveyancing fees thereon and the Trustees accepted the said payments.
6. It is her averment that the deceased further executed a Charge in which he charged his interest in the land comprised in Piave Settlement Scheme Parcel No 1139 in respect of the principal sum of Ksh 414,450/= and interest thereon at the rate of 6.5 % per annum and for which the deceased agreed to pay principal sum and interest by 56 consecutive half-yearly instalments of Ksh 16,166/= each.
7. The Plaintiff avers that by a letter dated 8th July, 1987, the Director of Land Adjudication and Settlement wrote a letter to the District Commissioner, Nakuru District in which he confirmed that according to the records held at the Land adjudication and settlement department in the then Ministry of Lands and Settlement, the deceased, Vincent Aghostinho Rafael Luis was allocated Plot Number 1139 at Piave Settlement Scheme which comprised a farm house, workshop and other minor structures.
8. She avers that on or about 17th July, 1987, the deceased, Vincent Aghostinho Rafael Luis, was issued with a Title Deed for the said parcel, being Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 measuring approximately 26.5 hectares and on 29th March, 1999, he caused a Charge to be registered in favour of Delphis Bank Limited to secure a loan of Ksh 6,300,000/= and which charge was discharged on 4th December, 2002.
9. The Plaintiff avers that since the date of allotment, the deceased and his estate continue to be in possession, control and management of the said property and regularly pays Land Rates to the Nakuru County Government, Njoro Sub- County. She avers that the deceased cultivated the said land since 1980s and improved the same by heavily investing in planting trees, fencing and erecting permanent building and fixtures thereon.
10. She avers that upon the death of Vincent Aghostinho Rafael Luis, she petitioned the High Court of Kenya at Nairobi for the probate of the deceased's written will by filing her Petition in the High Court's family registry at Nairobi on 7th November, 2012 and the Plaintiff was obliged under the [*Law of Succession Act*](#) to prepare an inventory of all the assets and liabilities of her deceased husband.
11. It is her averment that on 1st March, 2013, the High Court of Kenya sitting at Nairobi, issued her with a grant of probate in Succession Cause No 2810 of 2012 (In the Matter of the Estate of Vincent Aghostinho Rafael Luis) (deceased).
12. The Plaintiff avers that in her Petition for Probate of the deceased's written will, she swore an affidavit on 7th November, 2012 in support of the Petition and made reference to two immovable properties, owned by the deceased namely: a) Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1060; and Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
13. It is her averment that she applied for confirmation of Grant which was filed before the High Court at Nairobi on 8th October, 2013 and swore an Affidavit on 7th October, 2013 in support of summons for confirmation of Grant and annexed a consent to confirmation of grant in which by



- an inadvertent mistake, she described both of the deceased's immovable properties as Title Number Nakuru/piave Settlement Scheme/1060 and inadvertently left out Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
14. The Plaintiff avers that on or about 18th November, 2013, the High Court issued the Plaintiff with a certificate of confirmation of Grant bearing a schedule of the deceased's properties and in which the two immovable properties held by the deceased were therein both described as Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1060, leaving out Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
 15. It is the Plaintiff's averment that on or about 11th April, 2014, the Plaintiff caused to be filed Summons for rectification of grant to rectify the error in the certificate of Confirmation of Grant issued by the High Court on the 18th November, 2013 which error related to the description of the deceased's immovable properties that had inadvertently left out Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
 16. The Plaintiff avers that on 4th June, 2014, the High Court allowed her application for rectification of grant and directed that the certificate of confirmation of grant which had been issued on 18th November, 2013 be amended accordingly and she then took out a rectified Certificate of Confirmation of Grant.
 17. It is her averment that on or about 17th November, 2014, the 1st Defendant moved the Court in Nairobi High Court Succession Cause No 2810 of 2012 (Now Nakuru High Court Succession Cause No 231 of 2016) and filed Summons for revocation of Grant alleging that the Plaintiff herein undiligently and irregularly included property Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 in the list of the deceased's assets.
 18. The Plaintiff avers that upon being notified of the 1st Defendant's claim, she caused to be made an application for an official search over Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 which search was carried out on 27th November, 2014 and revealed that the property was and is hitherto registered in the name of Vincent Agostinho Rafael Luis and that the 1st Defendant had filed a Caution on 20th December, 2006 claiming beneficiary interest.
 19. She avers that she caused a search to be carried out on the Green Card which confirmed that the property was registered and a Title Deed issued on 17th July, 1987 in the name of Vincent Agostino Rafael Luis.
 20. It is also her averment that the action by the 1st Defendant to file Summons for revocation of Grant was a malicious scheme hatched by the 1st Defendant to meddle with the deceased's estate and to scuttle and interfere with the proceedings relating to the administration of the deceased's estate.
 21. The Plaintiff avers that the 1st Defendant has never held, occupied, used or had the benefit of the said property and his claim in the Succession Cause is misplaced and incompetent and the caution he registered on 20th December, 2006 claiming beneficiary interest is unlawful and illegal as he has no bona fide and/ or a legally enforceable claim over the said property.
 22. She further avers that in support of his claim, the 1st Defendant produced before the Nairobi High Court Succession Cause No 2810 of 2012 (Now Nakuru High Court Succession Cause No 231 of 2016) a copy of a Land Certificate allegedly issued to him under the provisions of the Registered [Land Act](#), Chapter 300 of the Laws of Kenya and purportedly relating to property comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 and based on that Land Certificate,



- the 1st Defendant claims he has a bona fide interest in the land comprised in Piave Settlement Scheme Parcel No 1139.
23. The Plaintiff avers that her deceased husband had, at all material times prior to his death, held the original title in respect of Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 and upon his demise, the Plaintiff herein has been and is hitherto having the custody of the said original title.
 24. It is also her averment that despite the 1st Defendant's alleged ownership of the land the subject matter of this suit on 16th May, 1980 by the Settlement Fund Trustees, the 1st Defendant has never settled on the property and/or exercise his purported right to possession of the suit property and/or undertaken any business or farming activity on the said land.
 25. She avers that if indeed the 1st Defendant had any legal right, title or interest over the suit land which the Plaintiff denies, then the 1st Defendant acquiesced to the Plaintiff taking over the said right, interest or title and the 1st Defendant is estopped from claiming ownership of the suit land almost Forty (40) years after the 1st Defendant was allegedly allotted the property.
 26. She avers that without prejudice, that her late husband was in continuous occupation and possession of the suit property for a period exceeding Twelve (12) years and under the provisions of Section 7 and 37 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya, she is entitled to be registered as the proprietor of the land by reason of the doctrine of Adverse Possession.
 27. She avers that the title held by the 1st Defendant is invalid ab initio and the same should be cancelled forthwith. She avers that even if the 1st Defendant's alleged title document (Land Certificate) was a bone fide, genuine and legitimate document, which is hereby denied, the then office of Commissioner of Lands erred and failed in its statutory duty by issuing more than one title in respect of the same parcel of land and as a result, the 2nd Defendant must indemnify the Plaintiff from any form of loss.
 28. The Plaintiff avers that the 2nd Defendant failed to exercise due care resulting in the negligent performance of his duties leading to the issue of two title documents in respect of one parcel of land.
 29. She avers that the particulars of negligence are:
 - a. Failing to exercise due care and/or due diligence before issuing a Land Certificate and a Title Deed to two different persons over the same parcel of land;
 - b. Failing to maintain proper and accurate records of Titles documents issued in respect of all that parcel of land known as Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057;
 - c. Issuing two totally distinct ad diametrically different documents of title to two different people over the same parcel of land known as Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057; and
 - d. Failing to review records for over 20 years which would have led to the cancellation of the irregularly issued title document.
 30. The Plaintiff further avers that having been issued with a Title Deed by the Land Registrar, the Land Registrar and/or any other Government Officer acting on that behalf could not allot the same property to any other party and could not issue a Land Certificate or any other form of title to the 1st Defendant or any other party in whatever manner described and that the issuance of a Land Certificate was and remains illegal, null and void ab initio.



31. The Plaintiff avers that despite her demand that the 1st Defendant stops interfering with her rightful ownership over the suit property, the 1st Defendant has refused to do so and persists in his unwarranted and unjustified claim over the said property, making this suit necessary.
32. She avers that prior to the institution of this suit, she caused a Notice to be issued to the Attorney General under the provisions of Section 13A (2) of the Government Proceedings Act, Chapter 40 of the Laws of Kenya.
33. The Plaintiff avers that orders were issued in Nairobi High Court Succession Court No 2810 of 2012 (Now Nakuru High Court Succession Cause No 231 of 2016) that the status quo be maintained. It is her averment that she craves leave of this Honourable Court to let the said orders prevail in the instant suit as the same relate to the property that is the subject matter of this suit.
34. She avers that apart from the Summons for revocation of Grant filed by the 1st Defendant on 17th November, 2014 in Nairobi High Court Succession Cause No 2810 of 2012, there is no other suit pending between the parties herein or any court in the Republic of Kenya.
35. The Plaintiff prays for judgment against the 1st and 2nd Defendants for:
 - a. A declaration that Vincent Aghostinho Rafael Luis (deceased) is the lawful owner of the property comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 and the said property is now lawfully vested in the Plaintiff herein by virtue of being the Executrix and Beneficiary of the Estate of the deceased.
 - b. A declaration that the Title Deed issued to Vincent Aghostinho Rafael Luis by the Land Registrar on 17th July, 1987 is the legitimate, bona fide and genuine document of title in respect of Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
 - c. A declaration that the Land Certificate issued to Peter Muchiri Mwangi, the 1st Defendant herein, by the Land Registrar on 17th July, 1987 is not a legitimate, bona fide and genuine document of title that can confer any right of ownership or interest over Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 and the same is null and void to the extent that there was no provision and/or prescribed form in the provisions of the Registered Land Act, Chapter 300 of the Laws of Kenya and its subsidiary legislation providing for the issuance of a Land Certificate.
 - d. A declaration that the 1st Defendant is entitled to enjoy continued possession of the suit property being the registered proprietor by virtue of the Title Deed issued to Vincent Aghostinho Rafael Luis by the Land Registrar on 17th July, 1987. (sic)
 - e. In the alternative to the declarations sought under prayers i, ii and iii above, a declaration that the late Vincent Aghostinho Rafael Luis and following his demise, his Estate, be and is hereby entitled to be registered as the proprietor of the suit land by reason of the doctrine of adverse possession having been in continuous occupation and possession of the suit land since the 1980s.
 - f. An order compelling the 1st Defendant to surrender the Land Certificate to the District Land Registrar Nakuru, Commissioner of Lands and/or the Land Secretary or any other officer authorized in that behalf for purposes of cancellation of the said Land Certificate.
 - g. An order directing the District Land Registrar Nakuru, Commissioner of Lands and/or the Land Secretary or any other Officer authorized on that behalf to cancel the Land Certificate or any other form of registration purporting to confer Peter Muchiri Mwangi, the 1st Defendant



herein, a right or title to land in respect of the property comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 or in the alternative, the 2nd Defendant to cause the 1st Defendant to be paid the market value of the suit property as determined by the Chief Government Valuer within Six (6) months of making the order.

- h. An order of permanent injunction restraining the 1st Defendant, his agents, servants and/or employees from trespassing into, cultivating, constructing upon or in any other form whatsoever interfering with the Plaintiff's quiet possession and enjoyment of the suit land.
 - i. An order lifting the Caution lodged by the 1st Defendant on 20th December, 2006 claiming beneficiary (sic) interest over the suit land.
 - j. Cost of this suit and interest thereon at Court rates.
 - k. General damages.
 - l. Such other or further order as this Honourable Court may deem fit to grant.
36. The 1st Defendant filed his amended statement of defence and counterclaim on 22nd November, 2019. He denies the averments in the Plaint.
37. He states that on or about 17th May, 1980, he bought land known as Piave Settlement Scheme Plot Number 1139 through Settlement Fund Trustees (SFT) and executed legal documents and puts the Plaintiff to strict proof of the contrary.
38. The 1st Defendant states that he was allocated Parcel Number Nakuru/Piave 1139 currently Nakuru/Piave/1057 by the Settlement Fund Trustees in execution of its statutory duty but was to pay a down payment of 10% of the purchase price and the balance was a loan payable over a period of ten (10) years to the Settlement Fund Trustees. He states that Settlement Fund Trustees did charge the said title to secure the 1st Defendant's payment of the balance in purchaser's consideration.
39. The 1st Defendant states that he faithfully paid his loan to Settlement Fund Trustees and diligently completed payment and was issued with the discharge of charge and other title documents and as such the Plaintiff cannot now claim to have had a charge on the same property and invites strict proof to the contrary.
40. The 1st Defendant states that at the time of collecting his discharge of charge and other title documents, he was informed by the officials of the Settlement Fund Trustees that for registration purposes and for purposes of issuance of title documents, his parcel number had been changed from Piave Settlement Scheme Plot Number 1139 to land reference Nakuru/Piave/1057 and continued to use plot number 1139 until the time of this dispute and invites strict proof to the contrary.
41. The 1st Defendant also states that he was the one that built a house on the said property and planted trees. He also states that the Plaintiff obtained the grant of probate to which she attached an affidavit in support of her petition outlining the deceased immovable properties, which did not include the subject property in dispute, information which she sought to rectify later to mischievously include Nakuru/Piave Settlement Scheme/1057 in the now rectified Certificate of Confirmation of Grant and puts the Plaintiff to strict proof thereof.
42. He also states that upon learning of the Plaintiff's scheme to have his property listed as one of the deceased's properties, he quickly moved the High Court sitting in Nairobi High Court Succession Cause No. 2810 of 2012 (Now Nakuru High Court Succession Court Cause No 231 of 2016) and filed Summons for revocation of grant raising issue with the irregular inclusion of Nakuru/Piave Settlement Scheme 1057 in the list of the deceased's assets and puts the Plaintiff to strict proof thereof.



43. The 1st Defendant states that upon noting the irregularity in the documents at the lands registry and the green card, he moved with speed to file a caution claiming beneficiary (sic) interest. He states that he rightfully owns a Land Certificate issued to him under the provisions of the Registered Land Act Cap 300 Laws of Kenya- now repealed relating to property comprised in Title Number Nakuru/Piave/1057 formally Nakuru Piave Settlement Scheme Parcel No 1139.
44. The 1st Defendant also states that the Land Certificate he holds is a bona fide, genuine and legitimate document and puts the Plaintiff to strict proof to the contrary.
45. He also states that having been issued with a Land Certificate by the Registrar, the Land Registrar and/ or any other government officer acting on that behalf was and remains legal.
46. The 1st Defendant states that he denies receipt of any demand and notice before the filing of this suit and further insists that he is the rightful and sole owner of the land and as such cannot be said to have an unjustified claim over the land.
47. In his counterclaim, the 1st Defendant avers that as a result of the Defendant's (sic) negligence he has suffered loss and damage.
48. The 1st Defendant (now Plaintiff) avers that he legally acquired the Certificate of Title to Nakuru/ Piave/1057 and that the Plaintiff (now Defendant) is acting fraudulently/irregularly in trying to lay claim to that land an allegation she knows to be false and he shall seek the suit herein be dismissed on this account.
49. The 1st Defendant has particularized fraud, illegality, bad faith and malice on the part of the Plaintiff as:
 - a. Misrepresenting the fact that the deceased whose Estate she now represents was the rightful owner of the parcel of land known as Nakuru/Piave/1057.
 - b. Misrepresenting the fact that the title of the parcel of land Nakuru/Piave/1057 forms part of the Estate of Vincent Aghostinho Rafael.
 - c. Forging, falsifying and/or altering records to reflect that the Estate of Vincent Aghostinho Rafael Luis- Deceased owns the parcel of land known as Nakuru/Piave/1057.
 - d. Failure to desist from interfering with the parcel of land known as Nakuru/Piave/1057.
 - e. Misleading the High Court in Nakuru High Court Succession Court Cause No 231 of 2016.
50. The 1st Defendant prays that the Plaintiff's suit be dismissed with costs and judgment be entered in his favour as follows:
 - a. A declaration that PETER MUCHIRI MWANGI; 1st Defendant (now Plaintiff) is the lawful owner of the property comprised in Title Number Nakuru/Piave/1057.
 - b. A declaration that the Land Certificate issued to PETER MUCHIRI MWANGI the 1st Defendant (now Plaintiff) herein, by the Land Registrar on 16th July, 1987 is the legitimate, bona fide and genuine document of title in respect of Nakuru/Piave/1057.
 - c. A declaration that the Title Deed issued to Vincent Aghostinho Rafael Luis- Deceased is illegal, null and void ab initio.
 - d. An order compelling the Defendant to surrender the Title Deed to the Commissioner of Lands and/or the Land Secretary or any other officer authorized in that behalf for purposes of cancellation of the said Title Deed.



- e. An order directing the Commissioner of Lands and/or the Land Secretary or any other officer authorized in that behalf to cancel the Title Deed purporting to confer Vincent Aghostinho Rafael Luis- Deceased the right or title to land in respect of the property comprised in Title Number Nakuru/Piave/1057.
 - f. Orders that this Honourable Court do issue a Permanent Injunction against the 1st and 2nd Defendants by themselves, their agents and/or servants restraining them from entering, or trespassing onto, or wasting, destroying, alienating, selling, interfering or otherwise disposing off NAKURU/PIAVE SETTLEMENT SCHEME/1057.
 - g. Such other orders as this Honourable Court may deem fit to grant.
51. The 2nd Defendant filed its Statement of Defence on 20th July, 2016 and denies the averments in the plaint.
52. The 2nd Defendant denies all allegations of failure on its part to observe its statutory duty by issuing more than one title in respect of the same parcel of land.
53. The 2nd Defendant lists the particulars of Statutory Duty on its part as follows:
- a. To facilitate law and order in all land registration matters;
 - b. To register land in the manner and in accordance to documents lodged at the registry and the law; and
 - c. To ensure that all land allocation and registration is conducted properly and the relevant documents and law is followed.
54. The 2nd Defendant prays that leave sought by the Plaintiff to let orders issued in Nairobi High Court Succession Cause No 2810 of 2012 prevail in the instant suit be denied.
55. The 2nd Defendant prays that the Plaintiff's suit be dismissed with costs.

FACTUAL BACKGROUND.

56. This suit came up before this court for hearing on 24th February, 2022 in the presence of counsels for the Plaintiff and the 2nd and 3rd Defendants'. The 1st Defendant appeared in person.
57. The hearing of this suit on many occasions was longer than anticipated. Parties endured long hearings and numerous breaks in between all owing to ill health of the 1st Defendant. The 1st Defendant was allowed great latitude during the hearing and these can be seen in the handwritten notes made by the Judge.
58. After the hearing, the Plaintiff requested that the court visits the locus in quo. The visit took place on 24th April, 2023. The observations made by the court during the visit shall be summarized in subsequent paragraphs.

PLAINTIFF'S EVIDENCE.

59. The first witness to testify in support of the Plaintiff's case is one Tahira Begum Luis (herein after referred to as PW1). She introduced herself as the Plaintiff in this suit and also stated that she is 76 years old. She further stated that she had filed her witness statement. It was her testimony that she was married to Vincent Rafael Agostinho Luis who died on 19th June, 2012 adding that she had the death certificate.



60. It was PW1's testimony that she had filed succession proceedings in respect of the estate of her deceased husband and was issued with a certificate of confirmation of grant. She went on to state that lives on Nakuru/ Piave Settlement Scheme/1057 (the suit property) and that it measures 26.5 Hectares which is approximately 65 acres.
61. She testified that she has lived on the suit property for 42 years where her children were born and raised. She testified that the remains of her son are interred on the suit property and that her occupation has been continuous.
62. It was her testimony that her deceased husband worked for an Italian man who owned the suit property. That the suit property was subsequently transferred to the settlement and then to her husband who worked for the settlement.
63. She testified that her husband, in the 1970's, worked for the settlement trust fund as a farm manager. She testified that when her husband was working there, he applied for allocation of the suit parcel, got a letter of offer and then paid the sum of money in the letter of allotment.
64. It was her further testimony that the letter of offer is addressed to her husband and it's in respect of Parcel No 1139 under Piave Settlement Scheme No 751. She testified that this parcel later became 1057 which is the subject matter of this suit.
65. It was also her testimony that there is a settlement charge on the letter of offer and it contains her husband's signature.
66. She prayed that her witness statement dated 25th May, 2016 be adopted as part of her evidence.
67. PW1 also stated that she has a list of documents dated 25th May, 2016 and prayed that the documents therein be produced in evidence. They were marked and produced as follows:
 - a. Will of Vincent dated 3rd April, 2007 as Exhibit P1.
 - b. Petition for Grant of probate as Exhibit P2.
 - c. Death certificate of Vincent Luis as Exhibit P3.
 - d. Summons for Confirmation of grant as Exhibit P4.
 - e. Certificate of confirmation of grant as Exhibit P5.
 - f. Summons for rectification of Grant as Exhibit P6.
 - g. Rectified Certificate of Confirmation of Grant as Exhibit P7.
 - h. Summons for revocation of grant as Exhibit P8.
 - i. Land Certificate for suit property issued in the name of the 1st Defendant as Exhibit P9.
 - j. Official search dated 27th November, 2014 as Exhibit P10,
 - k. Green card as Exhibit P11.
 - l. Letter dated 7th June, 1980 from department of settlement (Letter of offer) as Exhibit P13.
 - m. Letter dated 5th January 1979 as Exhibit P12.
 - n. Charge dated 7th June, 1980 as Exhibit P14.



- o. Letter dated 8th July, 1987 as Exhibit P15.
 - p. A copy of title of the suit property as Exhibit P16.
 - q. Charge dated 29th March, 1999 as Exhibit P17.
 - r. Bundle of land rate receipts as Exhibit P18 (a-u).
 - s. Receipts from settlement fund trustee dated 25th June 1987 for Ksh 405,798, 1st July, 1987 for Ksh 406,217.65, 28th June, 1987 for Ksh 143.80 and 17th July, 1987 for Kshs 16750.
 - t. Receipt for taking out Certificate of Title registration fees and stamp duty as Exhibit P19 (a-d).
68. PW1 referred to Exhibit P12 and testified that the letter shows that her husband was a farm manager and it says he was a farm manager since 1976. She testified that they have made improvements and developments on the land and there is a permanent house and an extension house which was for her son.
69. She testified that previously, they charged the property to Delphis bank and it is contained in Exhibit P17 and the charge was discharged.
70. She stated that she knows that 1st Defendant and explained that he is her neighbour and was also friends with her husband. PW1 went on to testify that she knows that the 1st Defendant is claiming the suit property yet he has never lived, occupied or developed the property. It was also her testimony that she is aware that he has documents of title in relation to the suit property which she only came to know about after the filing of this suit.
71. When referred to Exhibit P9, PW1 stated that it is a land certificate in the name of the 1st Defendant. She testified that her document of title is a title deed and the difference is:
- a. She has a title deed while the 1st Defendant has a land certificate.
 - b. Her title deed is dated 17th July, 1987 while that of the 1st Defendant is dated 16th July, 1987 and it appears to be issued a day before hers.
 - c. The green card was opened on 26th May, 1981 and it was issued to her husband on 17th July, 1987. Further the property has been charged and discharged.
72. When referred to Exhibit P11 (Green card), PW1 testified that the first entry shows that the suit property was owned by Settlement Fund Trustee and the second entry was to her husband. She testified that it does not show registration to the 1st Defendant. She testified that he only registered a caution on the property and he is claiming beneficial interest.
73. It was also her testimony that at the time of registration of the caution, which was on 20th December, 2006 her husband was sick. She testified that she learnt about the caution during succession proceedings.
74. When referred to Exhibit P8, PW1 stated that the 1st Defendant filed for summons for revocation of grant and explained that the reason he raised the objection was because he was challenging her ownership.



75. It was PW1's testimony that she came to court because she is seeking justice. She explained that she has been in occupation of the suit property for 45 years and that she uses it to sustain herself and her workers.
76. She further testified that the 1st Defendant has never filed a suit in relation to this property but had previously interfered with their other property being 519/350. She testified that it is in Njoro township and it's a commercial plot which he claimed ownership of after they sold it.
77. It was her testimony that 1060 Piave settlement was bequeathed to her daughter by her late husband as can be seen on the certificate of confirmation of grant. She stated that ownership of other parcels of land belonging to her deceased husband was resolved through succession.
78. PW1's testimony was that she was called to the National Land Commission to answer questions in respect to the
suit property. She stated that the National Land Commission informed her that it had received complaints about the suit property. She referred to her supplementary list of documents dated 26th July, 2016 and testified that it contains a letter from the National Land Commission dated 12th October, 2015. She explained that the letter is addressed to her and it supports her claim that Vincent Aghostinho Rafael Luis is the rightful owner. She produced the letter as Exhibit P20.
79. The court granted leave to the 1st Defendant to file a supplementary bundle after he indicated that he needed to file a document concerning Exhibit P20.
80. PW1 testified that the 1st Defendant previously filed applications alleging that she was cutting trees on the suit property and was granted orders of injunctions. She testified that the trees are still on the suit property.
81. PW1 also referred to the 1st Defendants further list of documents dated 10th December 2021 filed on 13th January 2022 specifically document Number 3 on the list. She testified that it is described as a charge and it's in relation to 1139. She testified that this was previously the number of the suit property and next to it is a letter of offer. She testified that they were the same documents that she had produced and confirmed ownership in the name of her husband.
82. She further testified that there was another document which was (number 7 on the list). She explained that it is in respect of LR 519/350 and that the title is in the name of her deceased husband. She testified that she does not know why the 1st Defendant has her title document. She testified that this property is situated in Njoro township and that the 1ST Defendant has attempted to interfere with it.
83. PW1 also referred to the 1st Defendant's further list of documents dated 10th December, 2021 and filed on the same date. She testified that document No 4 on the list is a charge for 1139 (1057). She testified that the plot number is 1139 and it's in the name of the 1st Defendant and it is dated 17th May, 1980. She testified that there is an amount of Ksh 47,400/= which is the settlement charge. She testified that she has a similar charge document (Exhibit 13) but hers is dated 7th June, 1980. She testified that the amount on hers is Ksh 414,450 but for the 1st Defendant is Kshs. 47,400/= and explained that this amount is the settlement charge.
84. She testified that No 8 on the list is a letter dated 9th May, 1980 addressed to the District Settlement Officer. The letter said that the plot is allocated to Vincent Aghostinho Rafael Luis and that the records should be amended to read 1140 for the 1st Defendant.



85. She further testified that she is not aware if the amendment was done. She testified that the letter by the District Commissioner Nakuru dated 26th May, 1987 and addressed to Vincent Aghostinho Rafael Luis and the 1st Defendant was written before her husband was issued with the title deed. PW1 explained that the letter was written to summon her husband to a meeting that was to be held on 8th June, 1987 to discuss matters pertaining to Piave Settlement scheme.
86. It was her further testimony that document No. 10 on the 1st Defendant's further list of documents is a letter dated 18th September, 2006. She explained that the letter is from District Land Adjudication Settlement. She testified that it is addressed to the 1st Defendant in respect to the suit property and it is responding to the 1st Defendant's letter. She testified that the letter confirmed that the suit land was allocated to Vincent Aghostinho Rafael Luis
and that it goes on to mention the new plot numbers, correction and states the position as it is. PW1 stated that she wished to rely on this letter as part of her evidence though it's on the 1st Defendants list.
87. She testified that she has been paying rates for the suit property and asked the court to grant her prayers as contained in her amended plaint. She also stated that she seeks orders that the 1st Defendant be restrained from interfering with her property.
88. Counsel for the Plaintiff informed the court that he wished to withdraw the letter dated 8th March, 2016.
89. PW1 in her witness statement dated 25th May, 2016 states that her late husband was on 1st July, 1976 employed by the Settlement Fund Trustees as a farm manager at Cortina/Piave farm at Njoro and was tasked to perform the duties of a Farm Manager Grade 1. She states that the Settlement Fund Trustee was then a body corporate established by the Kenya (Amendment of Laws) (Agriculture) Regulations, 1963 (Legal Notice Number 352/1963).
90. She states that the deceased was allotted a parcel of land in the Piave Settlement Scheme and on or about the 7th day of June, 1980, the Estates Manager on behalf of the Settlement Fund Trustees gave the deceased a letter of offer in respect of Parcel No 1139 in Piave Settlement Scheme Number 751 in Njoro within Nakuru District.
91. She also states that the deceased accepted the offer by executing the letter of offer and became an allottee holding a certificate of registration No. 22776. She further states that pursuant to the said allotment, the deceased paid a settlement charge in the sum of Kenya Shillings 414,450/=. He executed a charge and paid a deposit of Ksh 40,750/= and further paid conveyancing fees thereon and the Trustees accepted the said payments.
92. It is also PW1's statement that the deceased further executed a charge in which he charged his interest in the land comprised in Piave Settlement Scheme Parcel No 1139 in respect of the principal sum of Ksh 414,450/= and interest thereon at the rate of 6.5% per centum per annum and for which the deceased was to pay principal sum and interest by 56 consecutive half-yearly instalments of Ksh 16,166/=.
93. She states that in addition to this, by a letter dated 8th July, 1987, the Director of Land Adjudication and Settlement wrote a letter to the District Commissioner, Nakuru District in which he confirmed that according to the records held at the Land adjudication and settlement department in the then Ministry of Lands and Settlement, the deceased Vincent Aghostinho Rafael Luis was allocated Plot Number 1139 at Piave Settlement Scheme which comprised a farm house, workshop and other minor structures.



94. She states that on 17th July, 1987, her late husband was issued with a Title Deed for the said parcel, being Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 measuring approximately 26.5 hectares.
95. She states that on 29th March 1999, the deceased caused a Charge to be registered in favour of Delphis Bank Limited to secure a loan of Ksh 6,300,000 and which charge was discharged on 4th December, 2002.
96. It is her statement that since the date of allotment, the deceased has and his estate continues to be in possession, control and management of the said property and regularly pays Land Rates in respect of the above property to the Nakuru County Government, Njoro Sub-County.
97. She states that her late husband together with herself, at all material times prior to his death, held the original title in respect of Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 and upon his demise, she has had custody of the said original title.
98. She states that she believes the Land Certificate issued to the 1st Defendant by the Land Registrar on 17th July, 1987 is not a legitimate, bona fide and genuine document of title that can confer any right of ownership or interest over Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
99. She further states that the Title Deed issued to Vincent Aghostinho Rafael Luis by the Land Registrar on 17th July, 1987 is the legitimate, bona fide and a genuine document of title in respect of Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
100. Upon Cross-examination by the 1st Defendant, PW1 referred to document No 4 in the 1st Defendant's list dated 10th December, 2021 and explained that it shows that the 1st Defendant was allocated the land on 17th May, 1980 and hers was allocated on 4th June, 1980.
101. PW1 further confirmed the contents of paragraph 6 of the plaint and explained that she has the certificate but it is not in court. She also referred to document No 4 on the 1st Defendant's list and added that she sees the 1st Defendant's name and his number. PW1 referred to Exhibit P16 and stated that the title deed has an Identification card number. She also referred to her bundle at page 31 and confirmed that there is no identification number on the document. She stated that it is not true that her husband used someone else's identification card.
102. She confirmed that there was an amendment to change
the 1st Defendant's parcel from 1140 to 1056. She stated that there was a letter showing the changes and it is number 10 in the 1st Defendant's bundle of documents. She confirmed that she does not have any document talking about amendments apart from that letter.
103. She stated that she does not know if the 1st Defendant went to the land control board and she has never seen any document. She confirmed that her husband died in June 2012 and the land was allocated in June 1980. She confirmed that the documents say that the 1st Defendant was allocated the suit parcel on 17th May, 1980.
104. PW1 explained that the letter dated 9th May, 1980 makes reference to the amendment and it is copied to the 1st Defendant. She went on to explain that the File No. is EST/751/1140.
105. PW1 confirmed that she has not produced a map. She
however informed court that she has produced documents to show how the number changed from 1139 to 1057.



106. She confirmed that she does not have a map for this change. She also confirmed that she does not have a beacon certificate. PW1 confirmed that there is a letter summoning the 1st Defendant and Vincent Aghostinho Rafael Luis to the District Commissioner.
107. PW1 explained that the District Commissioner was the chairman of the allocation board and that he had asked that the 1st Defendant to show up with his documents. She confirmed that the letter does not say that there is a dispute. She stated that she does not know that the District Commissioner was the chair of the Land Control Board. She also stated that she is not aware of Case Number 580 of 1995 and does not know the outcome of the said case.
108. PW1 confirmed that one Mr. Bowry acted as an advocate for her deceased husband. She further confirmed Bowry drafted her husband's will and also confirmed that it is dated 3rd April, 2007. She also confirmed that they had land in Njoro town and that her deceased husband had purchased it.
109. PW1 stated that she is not aware that 1057 was removed from the list of properties belonging to the estate of her deceased husband as a result of this case. She also stated that she is not aware that certificate of title was not attached to the succession cause.
110. PW1 stated that she went to the Directorate of Criminal Investigation to inform them that the 1st Defendant was troubling her and asked them to investigate the 1st Defendant together with his documentation. She informed the court that she does not know the outcome of the investigations. She also stated that she does not know that the investigation was stopped by court.
111. PW1 referred to a search for parcel number 1060. She confirmed that the search has a restriction. She stated that the green card shows that a restriction was removed. She confirmed that she removed it and did not notify the 1st Defendant.
112. PW1 also confirmed that her husband asked for a loan to purchase assets on 1139 which he bought. She confirmed that it is not true that the valuation included the farm machinery.
113. On 28th February, 2022, cross examination of PW1 by the 1st Defendant continued.
114. PW1 confirmed that she has three parcels of land and 1057 is one of them. She stated that the other one is 1060.
115. She further stated that it is possible that her husband got 120 acres plus 7 acres from the settlement. She explained that the land was 5400 acres and he was a farm manager of the Italians and got a job with the settlement. She confirmed that he also had land in Narok which was about 5000 acres.
116. PW1 explained that they were given Letters of offer and that she did not have any letter of application in court. She stated that she has no letter for deposit of payment. She also stated that 1060 belonged to one Major General Tonje and that after an exchange between them, 1057 was joined with 1060. PW1 stated that she does not remember when parcel number 1060 was bought from Tonje.
117. PW1 was referred to the Official search and the green card and stated that the search is in the name of Vincent Aghostinho Rafael Luis and that Major General Tonje's name does not appear. She explained that the two exchanged the parcels of land.
118. PW1 informed court that she cannot remember when her husband was allocated parcel No. 1060. She explained that the green card shows it was in 1993 while the official search shows that it was allocated to him in 1980.
119. PW1 confirmed that she has not raised any objection to the documents. She explained that on page 16, there is an official search which shows a restriction by the 1st Defendant. She confirmed that she



- removed the restriction because the 1st Defendant was given one month and he was equally served. She confirmed that there is an affidavit of service filed. The court further confirmed that there is notice dated 14th August, 2000 informing the 1st Defendant that a restriction will be removed at the end of 30 days if an objection is not received by him.
120. PW1 stated that it is not true that the notice was not served on the 1st Defendant and the 1st Defendant's name is not on the green card at page 16. She stated that the outright to purchase parcel number 1060 at page 15 says 1417/80. She stated that the green card says parcel number 1060 was allocated to Vincent Aghostinho Rafael Luis in 1993.
 121. She stated that the application for parcel number 1057 was approved and she has the letter for Piave farm which she has produced as part of her evidence.
 122. She also stated that her deceased husband helped the 1st Defendant get his land. She further confirmed that the will is general and it says everything is left to her and her daughter. It was her statement that she does not know the succession ruling or about the preliminary objection.
 123. PW1 confirmed that her husband was employed with the Settlement Fund Trust and she is possession of her husband's identity document.
 124. She confirmed that neither the title nor the letter of allotment has the identity card number.
 125. PW1 explained that the letter of allotment says Ksh 400,000 was to be paid and she did not have the authority to pay. She confirmed that she has the receipt of payment of the deposit and it is not in her bundle. She confirmed that the farm machinery was paid for and she has produced various receipts.
 126. PW1 stated that it is not true that her deceased husband allocated land to himself without the authority of Settlement Trust Fund. She reiterated that they built the house on the farm and they bought the stores with the land.
 127. When referred to the letter dated 8th July, 1987, PW1 stated that she does not know if a person by the name Gachanga knew that there was a court case before he wrote the letter.
 128. PW1 confirmed that she produced her title in court and she does not know if her title is absolute. She stated that her husband stayed on the farm when he was the farm manager. She confirmed that there are trees on the farm. She further stated that the rates in respect of 1139 were paid and she does not have the receipts as evidence of payment since it was long time ago.
 129. She stated that in respect of the succession case, she does not know if the documents of ownership were filed as the lawyers dealt with it. She further stated that she does not know why her grant was revoked in respect of 1057.
 130. PW1 referred to paragraph 20 of the Plaint and stated that
there was no negligence on the part of her husband. If there was any negligence it may be attributed to the Settlement fund. She explained that she knows that the 1st Defendant's fence was burnt and she stays on the farm from time to time. She explained that the reason she does not permanently reside in the farm is because she has to be near the hospital and it is not because of the 1st Defendant.
 131. PW1 also confirmed that there is an order prohibiting the Directorate of Criminal Investigations from interfering and there is a history behind their involvement. She stated that the electrical posts have been moved but they have not been removed and this is not against the status quo order.
 132. She stated her husband's wish was to be buried at the cemetery next to his son and he wanted his son buried at the cemetery.



133. Counsel for the 2nd and 3rd Defendants had no question for the Plaintiff.
134. On re-examination, PW1 stated that this suit is in respect of parcel No. 1057 and she has no complaint in respect of 1060.
135. She also referred to the letter of offer which is Exhibit P13 at page 30 of the trial bundle and asked it to be compared with the 1st Defendant's letter of offer at page 4 issued on 17th May, 1980.
136. She testified that there is no requirement for the allottee to provide his identification number on Exhibit P13. She testified that in the 1st Defendant's document there is no provision for an identification number and the one in the 1st Defendant's bundle appears to be hand written.
137. PW1 also stated that on Exhibit P13, there is an MR number at the bottom right corner and a date and there is no such number on the 1st Defendant's document.
138. PW1 also referred to document 4 and 5 on the 1st Defendant's bundle and testified that the reverse side of the settlement scheme document is for 1140 and it is signed. She stated that the MR number is blank.
139. It was her testimony that 1139 is also signed but has no MR number. She testified that for parcel No. 1139 the settlement charge is 47,400 and for 1140 the settlement charge is 47,400. She testified that she does not know the acreage for 1140 and 1139.
140. PW1 testified that in regard to the letter dated 9th May, 1980 which is document No 8 on the 1st Defendant's bundle, the title to the suit property was issued on 17th July, 1987 which means that the letter of amendment preceded issuance of the title.
141. In respect of the letter dated 26th May 1987 appearing at page 9 of the 1st Defendant's bundle, PW1 stated that it makes reference to a meeting and added that the meeting was before the title to the suit property was issued. She stated that the letter does not mention a dispute. She further clarified that suit No. 580 of 1995 does not mention parcel no. 1057 (the suit property)
142. PW1 explained that the complaint to the Directorate of criminal investigations was by the Lands office and it was made on 30th September, 2020. She testified that it is signed by the Permanent Secretary and it is addressed to a person by the name George Kinoti and it is on page 54 on the Plaintiff's bundle.
143. PW1 made reference to the last paragraph and the 1st paragraph at page 55 and testified that the letter states that Peter Muchiri asked for her deceased husband's documents. She went on to state that there is a ruling by Justice Mutungi dated 30th September, 2021 and it appears on the 1st Defendant's further list of documents. She made reference to paragraph 28 of the said ruling.
144. She testified that the letter to the Directorate of Criminal Investigation by the Permanent Secretary is dated 30th September 2020 and the ruling is made a year later. PW1 made reference to page 56 of the Plaintiff's additional list of documents and states that there is a letter from her Advocate and it is dated 13th April, 2021 which letter was written before the ruling by Justice Mutungi.
145. It was her testimony that they don't own the 5000 acre of land in Narok and it was leased from the Massai (a Kenyan community). She testified that on the outright purchase on the 1st Defendant's list at page 15, it's not a letter of allotment and it is not in respect of 1057 and it has nothing to do with the case before this court.
146. She clarified that the electricity poles were relocated to



- another parcel by Kenya Power and she has not interfered with plot 1057 and there have been no complaints on her interference with 1057.
147. Samuel Kabiru Thiongo testified as PW2. It was his testimony that he works at the Ministry of Lands, Department of Lands Adjudication and Settlement. He testified that he is the Assistant Director Land Adjudication and Settlement.
 148. He testified that he has been working for 30 years and he appreciates the nature of the dispute. He stated that he prepared and filed a witness statement dated 22nd February, 2022 and prayed that it be adopted as part of his evidence, which prayer the court acceded to.
 149. He stated that the Settlement Fund Trustee office name had since changed to Land Settlement Fund but the mandate remains the same. He explained that they get money from treasury and their core mandate is to settle landless Kenyans. He further explained that any landless person qualifies for allocation of one parcel and he or she must apply. He went on to explain that the application letter is handwritten and made to the chairperson adding that the chairperson used to be the District Commissioner and is now the Deputy County Commissioner.
 150. He went on to explain the procedure for allocation of land and stated that a committee sits to verify the application after which they give a letter of offer. He further explained that a person is then shown the land and pays a 10% deposit to the Settlement Fund Trustee.
 151. PW2 went on to state that there are usually conditions attached to the allocation. He stated that after payment of the deposit and fencing, the allottee must put up a dwelling structure and cultivate the land. The allottee then puts beacons and that it is the responsibility of the allottee to fence the land.
 152. He explained that at least one acre should be put under cultivation. He testified that if the conditions are not met, then the land is repossessed.
 153. He testified that the parcel in dispute is parcel number 1057 and explained that the numbering arises from planning and survey. He also testified that every parcel is given a plot number and the parcel number comes in the letter of offer.
 154. It was his testimony that parcel number 1139, is an old number and it was used for working before registration. He stated that it was an old number relating to parcel number 1057.
 155. He testified that he has the original file for 1057 and stated that it was allocated to Vincent Aghostinho Rafael Luis on 7th June, 1980 and explained that the offer letter does not indicate the acreage.
 156. He referred to Exhibit P13 (the letter of offer) and testified that it is the same as the one he has in his file. He testified that it is addressed to Vincent Aghostinho Rafael Luis and the settlement scheme is Piave. He testified that the parcel number is 1139. He also stated that the scheme name is Piave scheme which is number 751. He went on to explain that the settlement charge in respect of the suit parcel was Kshs. 414,450/=.
 157. PW2 explained that the Kshs. 414,450 is a land loan and it is the money that the settler is supposed to pay in 56 instalments in the month of June and December for a period of 28 years. He went on to explain that one cannot get a title deed without clearing the loan and the amount is in respect of soil alone and not machinery.



158. He went on to state that the money is to be paid from agricultural proceeds and explained that in the case of the suit parcel, it was paid earlier and there is nothing wrong with that. He testified that the evidence of payment is the discharge.
159. PW2 was referred to Exhibit P14 (the charge document appearing at page 32 of the bundle) and confirmed that it was issued by them. It was his testimony that he has the original in his file and it was issued in the name of Vincent Aghostinho Rafael Luis and it is for plot 1139 Piave Settlement Scheme. He testified that the amount is Ksh 414,450/= and it is the same amount on the letter of offer. He further confirmed that the 56-month period is shown on the letter. He confirmed that the charge was signed on 7th June, 1980 by the settler (the Plaintiff's deceased husband).
160. When referred to the bundle of receipts on page 89 (Exhibit P18), PW2 stated that the receipts were issued in Nairobi and he does not have them in his file. He further explained that when a settler pays, he is given statements and stated that the statements are not in the file.
161. When referred to Exhibit P13 (letter of offer of 7th June, 1980), PW2 explained that it bears a number MR No T761422. He testified that this is 10% deposit payment for the suit land.
162. He testified that the letter of offer bears the name of the allottee as Vincent Aghostinho Rafael Luis and the certificate of registration is No 22776. He explained that this was Luis's working certificate number. He testified that he was a foreigner and did not have an identification number so they used a certificate of registration i.e. work permit.
163. PW2 went on to testify and stated that non-citizens qualified for allotment of this kind. He stated that he knows that the 1st Defendant was allocated land at the scheme. He testified that the 1st Defendant (Peter Muchiri Mwangi) was allocated plot No 1140 and the new number is 1056. He testified that it is 10.1 hectares which is approximately 25 acres.
164. He clarified that the 1st Defendant's parcel of land is not the same size as that of the Plaintiff and added that the Plaintiff's is 26.5 hectares which is approximately 65 acres.
165. It was also his testimony that he is aware that there is a letter of offer that was issued to the 1st Defendant which letter bears the number 1139. He explained that there was a clerical error made in writing the letter. He testified that it was rectified through a letter dated 9th May, 1980.
166. PW2 was referred to document 8 in the 1st Defendant's list of documents and explained that it is a letter addressed to the District Settlement Officer. He explained that it says that the parcel number on the letter of offer to Peter Muchiri Mwangi (the 1st Defendant) had wrongly been entered as 1139 and that it should be 1140.
167. He testified that it's their office that made the amendment and the information was communicated to the 1st Defendant and the subsequent document makes reference to 1140. He testified that the letter has CC file number EST/751/1140 and this is estate/scheme number/parcel number.
168. He testified that in the course of their work, they relate three things: 1) the ground where the settlement officer shows the settler the land to settle on. 2) The payment which corresponds with number of acreage offered, 3) The Document which involves the files and the maps where a person is settled is the parcel number for instance parcel 1140 is where the 1st Defendant was settled.
169. PW2 testified that if at all the 1st Defendant was allocated parcel No. 1139 and 1140, then he would have documentation for 2 plots and added that these allegations by the 1st Defendant were not true. It



was PW2's testimony that a person can only have one plot and added that there was no amalgamation in respect of the two plots.

170. When referred to document number 4 on the 1st Defendant's further list of documents, PW2 stated that he has seen the letter of offer dated 17th May, 1980. That it is signed by the 1st Defendant and it is for plot No. 1139. PW2 testified that he does not have this letter of offer in his file and he does not know where it came from.
171. PW2 was referred to document number 5B on the 1st Defendant's bundle. He described it a letter of offer dated 17th May, 1980, that it is for plot No 1140 and that it is issued to the 1st Defendant. He testified that it also indicates that the settler is supposed to pay Ksh 47,400. He confirmed that the amount was paid.
172. When referred to document No 4 on the 1st Defendant's bundle, PW2 explained that it is a letter of offer for parcel No 1139 issued to the 1st Defendant. He testified that he does not have this offer letter in his file and he does not know where it came from. He testified that the settlement charge amount on this letter of offer is 47,400 but it does not have the MR number showing the 10% deposit. He testified that it is not possible for the settlement amount for 1139 and 1140 to be the same because the acreage is different.
173. PW2 was also referred to document number 10 on the 1st Defendant's further list of documents. He explained that it is a letter addressed to the 1st Defendant by T.M Nyang'au for Director Land & Settlement, it is dated 18th September, 2006 and is copied to the District Land Adjudication Settlement Officer Nakuru. He testified that it is copied to File No 751/1140 and this is the 1st Defendant's parcel and the copy of the letter would be in the 1st Defendant's file.
174. He testified that paragraph 2 of the letter says that parcel number 1139 was allocated to Vincent Aghostinho Rafael Luis and explained that the term "a parcel being documented to someone" means that the person has been shown land on ground, has accepted the offer and paid the 10% deposit.
175. He testified that it goes on to say that parcel 1056 was documented and allocated to the 1st Defendant on 17th May, 1980 which date was before the allocation to Vincent Aghostinho Rafael Luis. He testified that the date of the amendment was 9th June, 1980.
176. PW2 referred to the letter on page 8 of the bundle and it was cross referenced with the letter at page 10. He explained that it means the amendment was done a month after the letter of 9th May, 1980. He testified that the change to read 1140 for the 1st Defendant was done on 9th June, 1980 and reference is made to paragraph 2 of the letter dated 18th September, 2006.
177. He testified that the amendment does not require that the settler goes to the Land Control Board. He testified that he has never seen the original title of the Plaintiff or the 1st Defendant.
178. He testified that the Plaintiff's title was issued on 17th July, 1987 and the acreage is 26.5 hectares. He testified that this date is after the amendments alluded to in the letter dated 18th September, 2006 and also after the letter dated 9th May 1980.
179. PW2 testified that Plot No 1060 was allocated to Colonel Tonje and it was allocated to him on 13th May, 1980. He testified that the acreage is 24.5 Hectares approximately 60 acres. He testified that the property was discharged on 22nd February, 1983 and later sold to Mr. Vincent Aghostinho Rafael Luis.
180. PW2 referred to document No 15 on the 1st Defendant's bundle which is a certificate of outright purchase. He testified that he does not know this document. He testified that a certificate of outright



purchase is given to the people to pay off land once. The amount is Ksh 21,600 and his file says that parcel number 1060, if paid for at once should have been Ksh 61020/= and it is not possible that the parcel was bought for that amount.

181. PW2 confirmed that the Plaintiff's deceased husband bought land and machinery. He testified that he took a loan of Ksh 125,380 to buy machinery and implements from them and it was applied for on 22nd October, 1981.
182. It was further his testimony that he also borrowed a loan of Ksh 141,679 for agricultural machinery and implements on 24th October, 1981. He testified that he also borrowed for cleaning Ksh 5000, Fencing Ksh 7500, Grass cutting Ksh 1500 and Cows, Ksh 16,000. He testified that this made a total of Ksh 30,000. He testified that these loans are not part of the Ksh 414,450 appearing on the offer letter.
183. PW2 was referred to page 63 of the Plaintiff's additional list of documents. He testified that the charge document is issued in the name of the 1st Defendant. He testified that there is a cancellation on the plot number from 1139 to 1140. He testified that there is also the letter of offer on page 65 to 66 and there is also a cancellation on this one.
184. He testified that his file for parcel number 1139 has the cancellation on the two documents. He testified that this cancellation is genuine and shows that the amendment was effected. PW2 added that there was no complaint either from the 1st Defendant or Mr. Vincent Aghostinho Rafael Luis. He testified that they only heard of it in 2020 after they had discharged it in 1987. He testified that when the complaints were received, the director asked him to go to the suit parcel and find out what was happening.
185. His testimony is that he went to find out what was happening and prepared a report. PW2's testimony is that he checked the documents and it is at that point that he realized that there was a parallel title.
186. He testified that the 1st Defendant is on parcel number 1056 while the plaintiff is on parcel number 1057 and added that between the two parcels there is a road.
187. He testified that Vincent Aghostinho Rafael Luis had constructed two permanent houses and there is cultivation and fencing which has also been done. He testified that parcel number 1060 is adjacent to parcel number 1057 and this forms a continuous land of about 120 acres. He testified that on the ground, parcel number 1057 and parcel number 1060 cannot be differentiated. He testified that the Plaintiff's deceased husband settled on parcel number 1057 and parcel number 1060.
188. He testified that the 1st Defendant is on the other side of the road and occupies 25 acres. He went on to testify that he did not see any evidence of settlement or occupation on parcel number 1057 or parcel number 1060 by the 1st Defendant.
189. He testified that he found that the 1st Defendant is settled on parcel number 1056, has constructed a house and also saw farm machinery.
190. PW2 testified that he prepared a report and submitted to Nairobi and that the report submitted by him formed the basis of the Permanent Secretary instructing that the matter be investigated. He testified that the investigation was done and he recorded a statement and the letter stated that they be given documents.
191. It was his testimony that he was informed that this court issued an order stopping investigation. He testified that he is not aware if anyone has been charged but he wrote a statement.
192. In his witness statement dated 22nd February 2022, PW2 states that the parcel of land comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 (old parcel number 1139) was properly documented and registered under proprietorship of Vincent Agostinho



- Rafael Luis while the parcel of land comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1056 (old parcel number 1140) was properly documented and registered under proprietorship of the 1st Defendant.
193. He states that the purported documentation of land parcel number NAKURU/PIAVE SETTLEMENT SCHEME/1057 (old parcel number 1139) to the 1st Defendant is illegal unless conveyed through sale.
 194. It is his statement that from the records available at the Department of Land Adjudication and Settlement, the 1st Defendant and the late Vincent Agostino Rafael Luis were each allocated one parcel of land and these parcels of land are adjacent to each other.
 195. He further states that's he has confirmed from the records that the 1st Defendant applied for SFT development loan of Ksh 80,000/= on 1st August, 1980 and he accepted the SFT loan reference EST/751/1140/6 of Ksh 18,500/= dated 15th October, 1980.
 196. He states that if indeed the 1st Defendant was allotted two parcels of land as alleged by him, then the two parcels of land should have been combined into one and documented and registered as one parcel of land and it is not tenable that the 1st Defendant was settled twice.
 197. He states that during planning and survey, all the documents used are in a draft format including the plot numbers for the plan and after planning and survey works at Piave Settlement Scheme, plot number 1139 adopted new parcel number, being NAKURU/PIAVE SETTLEMENT SCHEME/1057 while plot number 1137 adopted new parcel number, being NAKURU/PIAVE SETTLEMENT SCHEME/1060.
 198. He further states that it is evident that the 1st Defendant applied for SFT land loan of Ksh 47,400/= and was later funded with a SFT development loan of Ksh 18,500/= for the land parcel NAKURU/PIAVE SETTLEMENT SCHEME/1056 (old number 1140) and at no time has he settled or occupied the suit property and/or carried out any development on the said Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
 199. PW2 was cross examined by the 1st Defendant and he confirmed that he is the assistant director and he was employed in 1991. He stated that it is true that allocation is preceded by an application.
 200. He explained that Vincent Agostinho Rafael Luis was the farm manager and they bought the land from Cortina and Luis who managed the farm. He testified that Vincent Agostinho Rafael Luis was staying on the farm and the land was owned by Piave Cortina.
 201. He explained that three quarters of the land was allocated and the remaining quarter was given to other landless deserving Kenyans. He stated that Vincent Agostinho Rafael Luis was one of the other persons who applied and got land.
 202. PW2 explained that the District Selection Settlement Committee was chaired by the District Commissioner of the area where the land is. He stated that they applied to the District Commissioner's office and that is where the copy of the application is.
 203. PW2 further stated that he does not know who the District Commissioner was at the time and neither does he know where the minutes are and they could be in the District Commissioner's office.
 204. He further explained that other allottees were getting 4 acres each and Luis was given 60 acres while he bought



- the other 60 acres. He explained that before land is given, Settlement Fund Trust finds out what the land is for and if it is for agricultural purposes, then people get bigger portions to increase productivity.
205. He informed the court that Luis used a work permit and it was allowed for him to hold freehold property. He explained that their file in respect of the suit property is complete and what they need is in the file and there is no error in his file.
206. PW2 stated that in respect of parcel number 1139, there was an error in the correspondence and not in the allocation. He explained that the letter had a typing error. He further stated that there is a letter advising that parcel number 1139 was an error.
207. He explained that allocation means three things: 1) The ground 2) Map and 3) Numbering. He stated that if the court requests, the map can be made available. He explained that the 1st Defendant was allocated parcel No 1140 and Vincent Agostinho Rafael Luis parcel number 1057. He further explained that the ground was clear and everyone settled where they were shown on their respective parcels.
208. PW2 explained that when land is given to a settler, they show the land to the settler physically and once the settler is satisfied, he or she pays the 10% deposit. He stated that a settler cannot pay without seeing the land.
209. It was also his statement that the payment is against the number provided and they have records of plot numbers against the settler's name. He stated that after 1139 was documented, the land remains Settlement Fund Trust Land until a settler is discharged.
210. PW2 confirmed that he had the parcel files in court. He asked the court to look at the files No 1057 and 1140. He explained that file 1057 has the 1st Defendant's name cancelled and in its place it has the name of Vincent Agostinho Rafael Luis (on the cover). He stated that file No 1140 has the name of the 1st Defendant on the cover. He stated that there is a signature against the cancellation on file No 1139.
211. PW2 explained that the cancellation was on account of clerical error and it was corrected and a letter was done to that effect. PW2 referred to document on page 63 of the Plaintiff's additional list of documents and it is a document that had a clerical error which was corrected.
212. He stated that the 1st Defendant signed for parcel number 1140 which was allocated to him and he could not have signed for parcel number 1139. The court confirmed to have seen the file No 1140 and confirmed that it has a certificate of acceptance signed by the 1st Defendant.
213. He explained that a settler is first given a letter of offer and the letter of offer has conditions attached. He stated that a charge is a document showing how the payment for land is to be made.
214. PW2 stated that payment depends on acreage. He explained that for plot No 1057, the payment is Ksh 414,450. He stated that for 1140, the payment is 47,000. He confirmed that the 1st Defendant was given a loan. He stated that there are 2 types of payment: 1) Charge for the land 2) Development loan for buying equipment, fencing, building a house and seeds.
215. He stated that for plot 1140, the charge is not in the file. He stated that Settlement Fund Trust buys land, the land is subdivided and given to settlers and until it is discharged, the land remains in the name of the Settlement Fund Trust.



216. He explained that he has a charge for parcel number 1139 cancelled because it is a clerical error. He further explained that they deal with land from allocation and the survey department is involved. He stated that they also have an area list which had already been produced in evidence.
217. It was his statement that when a settler pays, they are given receipts and that is the proof of payment. He explained that there is a charge for land and loan for development. He stated that it is the settler who requests money for development. He confirmed that Ksh 414, 450 is for the land.
218. He further stated that Plot No 1057 has a house, depending on what is on the land e.g. Plot No 1057 also had machinery. He stated that they are the ones who do the valuation and it was not done by the Plaintiff's deceased husband. He confirmed that there were no assets for parcel number 1139. He stated that they are not in court for Case No 580 of 1985.
219. Counsel for the 2nd and 3rd Defendant's had no cross examination questions for PW2.
220. Upon re-examination, PW2 referred to the charge on page 32 on the original bundle and asked the court to compare it with the document on page 5 of the 1st Defendant's list dated 6th December, 2021.
221. He testified that there is a charge for both parcel number 1139 and parcel number 1140. He testified that 1139 the charge is in the name of Vincent Agostinho Rafael Luis and 1140 is in the name of the 1st Defendant. He stated that both charges are signed and dated.
222. On the issue of the plaintiff's husband being a foreigner and that he held freehold land, PW2 stated that at the time of allocation of land to him, Article 65 of the [Constitution of Kenya, 2010](#) was not in force.
223. PW2 stated that he is not aware of anything that would have barred the Plaintiff's deceased husband from being allocated land. He further stated that Vincent Agostinho Rafael Luis has settled on parcel number 1057 while the 1st Defendant has settled on parcel number 1140 and added that there is a road separating the two and the properties are on the opposite side of each other.
224. PW2 testified that the 1st Defendant has never made any attempts to settle on parcel number 1139 in the 42 years and parcel 1139 is the same as parcel 1057. He testified that had the 1st Defendant been allocated parcel number 1057 and parcel number 1139, it would have meant "double allocation".
225. He testified that parcel number 1057 and parcel number 1060 is not "double allocation" and added that the Plaintiff's deceased husband bought 1060 from General Tonje. He stated that he has the file for parcel 1060 in court. He testified that on the error and cancellation, he confirmed that there is a signature accompanying the cancellation on file for parcel No 1057.
226. The court sought clarification on parcel number 1139 and parcel number 1057 and PW2 stated that they did arbitrary issuing of numbers during allocation and during registration, the numbers change. He stated that parcel number 1139 then became parcel number 1057 and the title was issued as parcel number 1057. He also stated that plot no 1140 became plot number 1056 and title issued for plot number 1056.
227. He testified that there is a letter on file No 1057 and the letter is dated 18th September, 2006. He explained that the said letter is addressed to the 1st Defendant. He stated that it is in respect to parcel number 1139 which became parcel number 1057. He explained that this letter forms part of the documents on the 1st Defendants bundle dated 10th December, 2021. He explained that the letter states plot No 1139 was discharged on 1st July 1987 where parcel number 1140 was discharged on 9th July, 1987.



228. He testified that the letter clarifies the error and cancellation and this was communicated to the 1st Defendant. He stated that the letter is in the 1st Defendant's bundle which he has filed in court.
229. It was PW2's testimony that there has been no further amendment to the records and this letter is the last and final position in relation to ownership of the two plots.

1ST DEFENDANT'S EVIDENCE.

230. On 31st January, 2023, Peter Muchiri Mwangi (hereinafter referred to as DW1)/testified. He stated that he had filed a witness statement dated filed on 26th July, 2022 which he prayed that the court adopts as part of his evidence in chief.
231. He stated that he is the 1st Defendant in this matter and that he had fled the following lists of documents:
- a. A list of documents filed on 8th July, 2016.
 - b. List of documents dated 10th December, 2021
 - c. List of documents dated 6th May, 2022
 - d. List of documents dated 23rd December,
 - e. List of documents dated 10th December, 2021
232. DW1 prayed that the list of documents be admitted in evidence and they were marked and produced as follows:-
- a. List of documents filed on 8th July, 2016 as a bundle containing 42 documents as Exhibit D1,
 - b. List of documents dated 10th December, 2021 containing 29 documents as Exhibit D2,
 - c. List of documents dated 6th May, 2022 and filed on 10th May, 2022 containing 17 documents as Exhibit D3,
 - d. List of documents dated 23rd December and filed on 28th December, containing 10 documents as Exhibit D4
 - e. List of documents dated 10th December, 2021 filed on 12th January, 2022 and it contains 7 documents as Exhibit D5.
233. It was his testimony that on 16th May, 1980, the Settlement Fund Trust gave him a letter of offer to allow him make a deposit for parcel number 1139 and that was after he made an application to be allocated parcel number 1139. He testified that the application was made to the District Commissioner Nakuru.
234. He testified that he then got a letter asking him to pay Ksh 4685/= to open his file. He testified that the letter is dated 19th May, 1980 and the money was for the deposit and conveyancing fees. He further testified that he was given a voucher dated 19th May, 1980 to go and pay and he paid and was issued with a receipt dated 19th May, 1980 for plot number 1139.
235. DW1 testified that a charge instrument was prepared and it is dated 17th May, 1980 which was in favour of Settlement Fund Trust. He testified that there after he was given the charge instrument and a copy given to the District Land Registrar.



236. He testified that the charge instrument required him to pay Ksh 47,400 and he paid the money. He testified that the receipt is for LR 751139/1057 and it is for Ksh 75,000/= and the receipt is dated 17th June, 1987.
237. It was his testimony that he was then given discharge and transfer and they are in Exhibit D1 as No 13 and 14. He testified that on 16th July, 1987, he got a certificate of title and it is on Exhibit D1 as No 16. He testified that parcel number 1139 later became parcel number 1057 and this was also in the statement by the settlement director who testified.
238. DW1 further testified that he has a green card extract and it's on Exhibit D2 with Entry No 7 being for parcel number 1057, Entry No 1 by Settlement Fund Trust dated 26th May, 1981, No 2 by himself dated 16th July, 1987 and No 3 being the title deed issued and is dated 16th July, 1987.
239. He also testified that he has a document dated 9th May, 1980 and it is from the Director Settlement and it relates to parcel number 1139. He states that it says that the plot has been allocated to Vincent Agostinho Rafael Luis and the plot had been documented to the 1st Defendant. He testified that one is required to change the record to parcel number 1140 and their records have been amended and it is addressed to the District Settlement Officer Nakuru.
240. He further testified while Vincent Agostinho Rafael Luis signed the allocation letter for 7th June, 1980, by 9th May, 1980 Vincent Agostinho Rafael Luis had not been allocated the land parcel number 1139 and in his opinion, this is fraud.
241. He testified that there is a letter from the District Commissioner Nakuru dated 26th May, 1987 to himself and Vincent Agostinho Rafael Luis summoning them over the dispute arising from parcel number 1139 and parcel number 1140 and it is on Exhibit as D2 as document No 9. He testified that it required them to avail themselves in his office in June 1987. He stated that the letter asked them to come with their documents.
242. He testified that the Settlement Fund Trust wrote to him on 18th September, 2006 and it is in Exhibit D2 as document No 10. He testified that it says parcel number 1139 has a new number which is parcel number 1057 and was documented to Luis where parcel number 1140 had a new number which was documented to him on 17th May, 1980. He also stated that it says that it was initially typed as parcel number 1139 and was cancelled to read parcel number 1140 on 9th June, 1980. He testified that it goes on to say that they have both paid their dues on parcel number 1139 and it was discharged on 1st July, 1987 while parcel number 1140 was discharged on 9th July, 1987.
243. He testified that plot number 1139 is 26.5 hectares while plot No 1140 is 10.1 hectares. He testified that there is no record to show any amendment was done and the map appears with new numbers. He stated that according to him, the cancellation of his name from parcel number 1139 was not legal.
244. He testified that the witness who appeared from Settlement Fund Trust had two files and parcel number 1139 was cancelled from his name to that of Vincent Agostinho Rafael Luis. He testified that the disputed parcel has been subject of many court orders such as Case number 2810 of 2012 (Nairobi), Nakuru Succession number 231 of 2016 and Nakuru High Court case number 580 of 1995.
245. DW1 testified that he has a letter which is number 14 on Exhibit D2 and it is written by Vincent Agostinho Rafael Luis and is dated 10th May, 1981. The letter is addressed to Mr. Biwott (a former minister) and it says that he was allocated parcel number 1139 and this letter is not true since he was not allocated by the president but he allocated it to himself. He stated that this was because he was a farm manager and was able to access files and documents.



246. He testified that according to him, Vincent Agostinho Rafael Luis wanted to be given parcel number 1137 and a person by the name Tonje was transferred to a town known as Kitale and that is his interpretation of the letter. He further testified that Vincent Agostinho Rafael Luis made an application for assets found on parcel number 1139 which included tractors and not the land.
247. It was his testimony that the loan was for the assets and not the land. He stated that the receipts that he produced do not talk about parcel number 1139 and it is only a debt meaning the loan was to buy assets.
248. DW1 testified that No 18 of Exhibit D2 is a letter by Vincent Agostinho Rafael Luis to the Director of Settlement and it is dated 20th June, 1980 and he says that he wants to buy loose assets within parcel number 1139. He testified that therefore the money that he paid was for loose assets and he then drew a letter of allotment and included the loose assets value.
249. He testified that there are certain comments on the letter made by the director and that the loose assets shall be valued and a development loan given for their purchase. He testified that the Ksh 400,414 paid to the Settlement Trust Fund is for loose assets and not the land.
250. He testified that he was the first to be allocated the suit parcel and that the Plaintiff does not have a discharge. He testified that the deceased was a manager and there are criminal cases against him.
251. He testified that the Plaintiff tried to remove him from the suit parcel and he fought with the workers because they tried to remove his fence.
252. He testified that he has been growing crops on parcel number 1139 and there is evidence in Exhibit D4. He testified that the Plaintiff left the land and there is nothing that belongs to them on parcel number 1139 and he is the one in occupation of 1139.
253. He testified that he has another document from Settlement Fund Trust and it is a form that is for application for consent for Land Control Board. He stated that it is a blank form that shows that for a transfer to happen, parties must go to the Land Control Board. He testified that it is not true when PW2 says that Settlement Fund Trust does not go to the Land Control Board. He stated that therefore Luis and himself should have gone to the Land Control Board to change ownership of parcel number 1139 from himself to Vincent Agostinho Rafael Luis.
254. DW1 testified that there is a charge on Exhibit D4 and it is cancelled by hand. He testified that it is a charge for parcel number 1139 and cancelled by hand from 1139 to 1140. He testified that his is not cancelled and it is his evidence that a document cannot be cancelled with a pen and it must be cancelled by the law.
255. He testified that Exhibit D4 is a judgment on Civil Appeal No 9 of 2014 and reference is made to page 6. He testified that this is meant to be used as a point to show that parcel number 1139 was first registered to him. It was his testimony that a will has been produced in court as Exhibit P1. He testified that parcel number 1139 does not belong to the plaintiff's deceased husband and that is why it is not mentioned in the will.
256. He testified that he has a witness statement dated and filed on 26th July, 2022 and he wished to have it adopted as part of his evidence in this case. He testified that the confirmation of grant does not contain parcel number 1139 and it is in Exhibit D4.
257. It was his testimony that the judge in the succession cause in the ruling produced as Exhibit D2, dated 28th October, 2012, said at paragraph 10, that on the ruling date, there was no title and the title was obtained after this ruling.



258. He testified that the plaint at paragraph 29 attributes negligence to the 2nd Defendant. He testified that Vincent Agostinho Rafael Luis is a staff of the 2nd Defendant and he acknowledges that he was allocated land already allocated to him.
259. DW1 testified that the orders particularly (v) should not be granted and he is an African and he needs to live on the land. He stated that he wants the court to grant him orders as contained in the counterclaim.
260. He testified that his evidence is that the allocation letter produced by the Plaintiff has a number different from that on the title. He testified that the identification number for the Plaintiff on the charge is 22776 but the title has identification number 7165715/70 and according to him, these are two different people.
261. DW1 testified that from the fights they have had, it's his evidence that the Plaintiff has not enjoyed quiet possession.
262. In his witness statement dated 26th July, 2022, DW1 states that on or about 17th May, 1980 he bought a land known as Piave Settlement Scheme Plot Number 1139 through Settlement Fund Trustees and executed legal documents. He states that he was allocated Parcel Number Nakuru/Piave 1139 currently Nakuru/Piave/1057 by the Settlement Fund Trustees in execution of its statutory duty but he was to first pay a down payment of 10% of the purchase price and the balance was a loan payable over a period of ten years to the Settlement Fund Trustees.
263. He states that the Settlement Fund Trustees charged the said title to secure his payment of the balance in the purchaser's consideration.
264. He states that he paid his loan to the Settlement Fund Trustees faithfully and diligently and completed payment. He states that he was then issued with the discharge of charge and other title documents hence the Plaintiff cannot now claim to have had a charge on the same property.
265. He states that at the time of collecting his discharge of charge and other title documents he was informed by the Officials of the Settlement Fund Trustees that for registration purposes and issuance of title documents, his land number had been changed from Piave Settlement Scheme Plot Number 1139 to Land Reference Nakuru/Piave/1057 and he continued to use plot number 1139 until the time of this dispute. He states that he is the one who built a house on the said property and planted trees.
266. DW1 also states that he obtained the grant of probate to
which the Plaintiff attached an affidavit in support of her petition outlining the deceased's immovable properties which did not include the subject property in dispute. He further states that she sought to later rectify the said grant of probate to mischievously include Nakuru/Piave Settlement Scheme/1057 in the now rectified Certificate of Confirmation of Grant.
267. He states that upon learning of the Plaintiff's scheme to have his property listed as one of the deceased's properties, he quickly moved the High Court sitting in Nairobi High Court Succession Cause No 2810 of 2012 (Now Nakuru High Court Cause No 231 of 2016) and filed summons for revocation of grant raising issue with the irregular inclusion of Nakuru/Piave Settlement Scheme 1057 in the list of the deceased's assets. He states that he also rushed to the land registry upon realizing the irregularity in the documents to file a caution claiming beneficial interest.
268. It is his statement that he rightfully owns the Land Certificate issued to him under the provisions of the Registered [Land Act](#) Cap 300 Laws of Kenya- now repealed to property comprised in Title Number Nakuru/Piave/1057 formally Nakuru Piave Settlement Scheme Parcel No 1139.



269. He states that the land certificate he owns is bona fide, genuine and legitimate and furthermore the land certificate was issued by the Land Registrar and/or any other government officer acting on that behalf and it remains legal.
270. DW1 was cross examined on 16th March, 2023.
271. He confirmed that he is the 1st Defendant in this matter and has a counterclaim filed. He also confirmed that he has filed an amended statement of defense dated 21st November, 2019.
272. He stated that in the counterclaim there are particulars of fraud, illegality, bad faith and malice on the part of the 2nd Defendant.
273. He confirmed that these allegations of fraud, malice and bad faith are not attributed to the Plaintiff. He explained that prayer (d), prayer (e) are orders of injunction which are against the Plaintiff and the 2nd Defendant.
274. DW1 explained that he has his original title, land certificate, RLA, Nakuru Piave Settlement Scheme/1057 that was given on 16th July, 1987. He explained that he also has the original letter of offer and it is in Exhibit D2 as document No 5b.
275. He referred to Exhibit D2 (4) which is a letter of offer for parcel number 1139 and stated that he does not have the original letter of offer for parcel number 1139. He stated that it is true that there are two titles in respect of the suit property. He stated that one is held by him and another by the Plaintiff.
276. DW1 explained that he realized when succession proceedings were filed in respect of the Estate of Vincent Aghostinho Rafael Luis. He stated that the succession cause is Nakuru High Court Case No. 231 of 2016 formerly Nairobi High Court Succession 2810 of 2012 and it was filed in the year 2012.
277. He stated that after this realization, he put a caution and he did not file any suit challenging ownership by Vincent Agostinho Rafael Luis. He confirmed that he has not filed any case to date in respect of parcel number 1057. He stated that parcel number 1057 is 67 acres and he does not know the value.
278. DW1 stated that the title he has produced shows that it is 26.5 hectares which is approximately 65 acres. He stated that the land is a holding ground for cattle and he has a slaughter house and a house. He confirmed that he does not live in the house and he gave the house to his son who lives in Uganda.
279. He stated that document No. 10 on Exhibit D3 was a plan for a slaughter house and he has the original and it does not mention the suit parcel. He stated that there is no approval by the county government but the ministry approved it.
280. He explained that Luis lives on parcel number 1060 which is part of his land. DW1 stated that he was present when PW2 testified that he visited the suit property.
281. He denied that a person by the name Thiongo (who testified as PW2) made a site visit to the suit property. He denied (PW2's) report that stated that there is no evidence of development and settlement of the suit land by himself.
282. DW1 stated that he has control and possession of the suit property. He also stated that he has 2 workers and 20 cows. He also confirmed that he did not call any witness.
283. When referred to Exhibit D3, which has a Kenya Power quotation for relocation of electricity supply, he confirmed that the application was done by the Plaintiff and the poles were removed. He denied that it shows that he has no control.



284. DW1 explained that the land was allocated to him in May 1980 and it is true that since the land was allocated, it has been over 40 years. He stated that he lives on the land and he has cows.
285. He stated that he is aware that parcel number 1060 was sold and also stated that he is not aware that the Plaintiff lives on parcel number 1057 adding that she moved out. He reiterated that he lives on parcel number 1057 and he goes there every day. He stated that there are several permanent houses, garages, dryers (wheat), water tanks, machineries and other developments. He stated that they are his.
286. DW1 confirmed that he built two houses and that one is for his son. He stated that he is the one who lives on the suit parcel. He explained that he knew Luis very well and they were business partners but he does not remember when he fell ill. He stated that he knows he was diabetic and died from related complications.
287. When referred to Exhibit P9 which is a green card (Plaintiff's bundle at page 27), he confirmed that it is a green card for suit property which is parcel number 1057.
288. He explained that the first entry is the Settlement Fund Trustee, the second Entry is dated 17th July, 1987 for Vincent Aghostinho Rafael Luis the third entry shows that the title deed was issued to Vincent Aghostinho Rafael Luis the fourth is a charge and the fifth entry is a caution by himself (1st Defendant) registered on 20th December, 2006.
289. He stated that he registered the caution in 2006 and it is not true that he learnt about the two titles in 2012. He stated that in 2012, the Land Registrar told him to remove the caution. He stated that it is true that he knew about the 2 titles as early as 2006.
290. DW1 further stated that he has Exhibit D2 at Number 24. He explained that it is a ruling in Civil Suit No 580 of 1995 where a person named Nyakinyua sued Luis for 1057. DW1 confirmed that case No 580 of 1995 is a ruling by Justice Angawa in respect of an application and the suit is not between Vincent Agostinho Rafael Luis and himself. Instead it is Nyakinyua Co-operative Society suing Vincent Agostinho Rafael Luis, himself and other people.
291. He confirmed that that entry No 4 on the green card is a charge and further confirmed that he has never charged the property. He confirmed that at to page 40 of the Plaintiff's trial bundle is a charge document and further confirmed that it was registered on 29th March, 1999.
292. DW1 also confirmed that as at the date of registering the caution, there was already a charge and the reason for registering the caution is that he has beneficial interest in the suit property. He stated that having a beneficial interest is the same thing as being an owner.
293. DW1 also stated that it is not true that he has been meddling with the deceased's property since he died. He explained that he has a claim against parcel number 1057 and parcel number 1060 but has not filed any suit in respect of parcel number 1060.
294. He confirmed that he only registered a caution in 2016 as shown on Exhibit D2 at page 15 and 16 and he thought that this would deal with parcel number 1060.
295. He confirmed that he has not been summoned by the Directorate of Criminal Investigations while investigating him for falsification of documents. He referred to the Plaintiff's additional list of documents filed on 22nd February, 2022 from page 23 to 40. He confirmed that the report cross references the letter at page 54.



296. On the letter at page 54 of the Plaintiff's trial bundle (letter by the Permanent Secretary Ministry of Lands), DW1 confirmed that it was written before the application and ruling delivered on 30th September, 2021.
297. When referred to page 55 of the letter by the Permanent Secretary Ministry of Lands, he confirmed that it says that the documents by the 1st Defendant are a forgery and asked the Directorate of Criminal Investigations to investigate. He stated that the allegations by the Permanent Secretary in this letter are false.
298. He stated that he did not run away from investigations and the ministry cancelled his documents by hand. DW1 explained that in regard to the process of allocation, it is true that when a person complies with the process, they become owners and he is challenging the process and ownership.
299. DW1 stated that it is true that he made an application for parcel number 1057 and he referred to a letter dated 19th February, 1980 (found in Exhibit D4). He stated that he was applying for a specific property which was 1139 being 145 acres. He further explained that after the application, he received a letter of offer which is at page one of Exhibit D2. He confirmed that he did not have the original.
300. He stated that the letter of offer is dated 17th May, 1980 and it is found at page 4 of Exhibit D2. He stated that the document at page 1 is dated 16th May, 1980 and added the offer precedes the payment.
301. DW1 confirmed that the letter dated 9th May 1980 appearing at page 8 of Exhibit D2 is addressed to the District Commissioner and it seeks cancellation of parcel 1139 to him. He stated that the reference is 751/1139/3. He confirmed that before the offer letter, there was a letter calling for cancellation. DW1 was referred to page 32 of the Plaintiff's bundle (the charge document) and confirmed that Vincent Agostinho Rafael Luis signed it on 7th June, 1980. He alleged that the letter is not correct. He was referred to the same letter of 18th September, 2006 appearing on Exhibit D2 at page 10.
302. DW1 confirmed that he received the letter and has no records to show that any amendment was done and the map appears with the new numbers. He stated that they had no power to cancel the allocation.
303. DW1 confirmed that he knew as early as 2006 (according to this letter dated 18th September 2006) about the typographical error in allocation. He stated that he did not go to court because of the ruling by Justice Angawa.
304. DW1 was referred to document No 4 which has an offer letter and a letter dated 9th May, 1990. He confirmed that these two letters are signed by the same officer, one Felix Muga. He explained that after the letter of 18th September, 2006, there has been no other letter and the charge was illegal.
305. DW1 confirmed that in his testimony, he stated that they should have gone to the Land Control Board and he is not aware that Settlement Fund Trustee is exempt from provisions of the [Land Control Act](#).
306. He stated that he has been paying rates in respect of the suit land and when referred to documents on the Plaintiff's additional bundle at page 3 to 22. He stated that page 5 has the property details which are Piave Settlement Scheme 1057 and the property owner is Vincent Aghostinho Rafael Luis.
307. DW1 stated that he has attached on Exhibit D3 at page 12 records for parcel number 1139 and confirmed that he has not changed them to read parcel number 1057.
308. He confirmed that the column on the receipts is 400, 80 and 105. He confirmed that that the Plaintiff's invoice is for Ksh 1300/= annually. He denied that his document is falsified.



309. When referred to the document appearing at page 19 of Exhibit D2, DW1 stated that he got it from settlement and it is addressed to Vincent Agostinho Rafael Luis. He confirmed that the figure is Ksh 141,679 and it is for agricultural machines and implements. He confirmed that his evidence is that the Plaintiff bought the machinery and not the land.
310. DW1 was referred to page 30 of the Plaintiff's initial bundle and confirmed that that the settlement charge is Ksh 414,450. He stated that it is not true that these documents are separate for land and farm implements. He was referred to the letter dated 20th June, 1980 and confirmed that it answers the question of different amounts for Land and implements.
311. DW1 was also referred to the letter dated 8th July, 1987 at page 34 of the Plaintiff's first bundle and asked to read the last paragraph. DW1 explained that Vincent Agostinho Rafael Luis was allocated plot 1139 which comprised of farm house, workshop and other structures. He confirmed that Vincent Agostinho Rafael Luis applied for the balance of the machinery and equipment that remained after the disposal to other applicants.
312. When referred to the receipt at page 89, 90 and 94 of the Plaintiff's trial bundle, he confirmed that these documents support the charge document. He stated that he also has receipts for payment for plot No 1139/1057 and it is payment for Ksh 5000 and it is dated 17th June, 1987. He stated that the receipt is similar to his and it bears the same parcel number.
313. When referred to Exhibit D1, he confirmed that it is a receipt No 7551/51 dated 29th December, 1982. He confirmed that the amount paid would be commensurate to the size of the land and added that he does not agree with PW2.
314. DW1 denied that he has been harassing and intimidating the widow of Luis.
315. On cross-examination by counsel for the 2nd and 3rd Defendants, DW1 stated that his claim against the Settlement Fund Trustee is that he wants the costs of the suit and to be given back his land.
316. He further stated that he wants costs from the Plaintiff and the 2nd and 3rd Defendants and he does not know if this is reflected in his pleadings.
317. The Defendants case was closed.
318. Counsel for the Plaintiff informed the court that it is important that the court visits the site to establish who lives on the suit parcel. The 1st Defendant and the counsel for the 2nd and 3rd Defendants did not object. The court scheduled the site visit on 21st April, 2023.
319. The Court's observation and opinion is as follows:
- a. There is a road between parcel No. 1056 and 1057.
 - b. The 1st Defendant is in occupation and use of 1056 while the Plaintiff is on 1057.
 - c. Parcel 1057 is merged with 1060. There is no obvious boundary between the two.
 - d. While at the parcel No. 1057/1060, the 1st Defendant stated that he built the cattle dip, the slaughter house and a house which his son used to live in. He identified these structures on the suit parcel.
 - e. The Plaintiff's worker/farm manager (Mr. Zakayo) who was showing us around the farm refuted these claims. He explained that the house that the 1st Defendant claims to have built for his son was used as an office. The court observed that there are old pieces of furniture and an old type writer in it. The court was particularly interested in knowing where the toilet and



bathroom to this house was. The 1st Defendant showed us a concrete slab and stated that that was the location of the bathroom and toilet which was demolished. The Plaintiff's worker explained that it was a fuel tank. This explanation by the worker was more plausible as there was an old fuel pump adjacent to it.

The court learnt that this house that the 1st defendant claims to have built and that his son lives in was actually an office used by the Plaintiff's deceased husband. The court was also informed that what the 1st defendant was claiming to be a slaughter house was a shed for tractors. Again, this explanation is plausible as the shed is right next to the gate.

- f. The 1st Defendant stated that his cattle graze on the suit parcel and are driven back to parcel No. 1056 in the evening. He also stated that he built a cattle dip on the suit parcel. The Plaintiff explained that the cattle dip belongs to the community and that while it sits on the suit parcel, there is a separate title document for it.
- g. The court observed that there is maize growing on the suit parcel. The same was planted by the Plaintiff.
- h. The Plaintiff's employees were present and introduced themselves and stated the year of employment. They are;
 - i. Zakayo; farm manager 1978
 - ii. Baluto Kaumbe 1995
 - iii. Wambui 2012
 - iv. Sakwa 2020
- i. Parcel No. 1056 had combined harvesters lying on it, there were also cows grazing on the said parcel. There is a stone house standing on the parcel and another wooden house adjacent to it. There were several old looking cars parked in the compound.
- j. The 1st Defendant's daughter (Damaris) took us round Parcel No. 1056. She informed us that her mother was at home and wasn't feeling well. She stated that she was born in 1980 and grew up on the farm.
- k. She showed us a structure and explained that it was used as a slaughter house. She also showed us feeding troughs.
- l. She stated that at their other farm (the suit parcel) they only grew crops and grazed cows. She claimed that they also have a house sitting on the suit parcel which belongs to her brother. When the court inquired about what is in the house, she stated that there are house hold items. She explained that her brother was out of the county but last used the house in December of the year 2022.
- m. The 1st Defendant's daughter showed us a cattle dip which she explained was last used 10 years ago. She also stated that they do not use the cattle dip on the suit parcel.
- n. The court observed that there were no crops growing on parcel No. 1057 but there were sheep and cows grazing.
- o. The 1st Defendant's daughter listed the structures on parcel No. 1057 as :a main house, an extension of the main house, a cattle dip and a slaughter house. All these structures were identified by the court save for what was described as a slaughter house. The court had no way



of establishing what the structure was used for it was old, falling apart and had weeds growing in it and around it.

- p. The 1st Defendant's daughter also informed the court that the Plaintiff's deceased husband was their employee and was employed as a supervisor/ manager.

ISSUES FOR DETERMINATION

320. The Plaintiff filed her submissions on 2nd June, 2023. She identifies the following issues for determination:
- a. Who between the Plaintiff and the 1st Defendant is the bona fide lawfully registered owner of the suit property, NAKURU/PIAVE SETTLEMENT SCHEME/1057?
 - b. Who between the Plaintiff and the 1st Defendant has the actual control, possession and occupation of the suit property, NAKURU/PIAVE SETTLEMENT SCHEME/1057?
 - c. Whether the deceased, Vincent Agostinho Rafael Luis followed due process and fulfilled the requisite legal requirements in acquiring a title to the suit property?
 - d. Whether the 1st Defendant has a bona fide legal claim over the ownership of the suit property NAKURU/PIAVE SETTLEMENT SCHEME/1057?
 - e. Who between the Plaintiff and the 1st Defendant deserves the orders sought in their respective pleadings?
321. The Plaintiff submits that the 1st Defendant has not adduced evidence before this Honourable Court to support his claims that he was allocated the suit property and/or that he is the bona fide registered owner of the suit property. The Plaintiff relies on provisions of Section 24 of the [Land Registration Act](#) No 3 of 2012 and Section 26 (1) of the [Land Registration Act](#) No 3 of 2012.
322. The Plaintiff submits that she has produced the original Title Deed issued to Vincent Agostinho Rafael Luis in respect of the suit property and which PW2 confirmed was the genuine document of title in respect of the suit property.
323. The Plaintiff submits that no basis was laid by the 1st Defendant upon which this Honourable Court can depart from holding that the title produced by the Plaintiff is prima facie evidence that Vincent Agostinho Rafael Luis is the absolute and indefeasible owner of the suit property.
324. The Plaintiff relies on the judicial authority of *Africa Inland Church vs County Council of Nakuru & 20 others* [2006] eKLR, where the court made reference to the judicial decision of *DR Joseph Arap Ngok Vs Justice Moiwo Ole Keiwa & 5 others* Civil Appeal No C.A 60 of 1997.
325. The Plaintiff submits that the 1st Defendant did not lead evidence to demonstrate that Vincent Agostinho Rafael Luis or the Plaintiff herein were party to a fraudulent scheme or made any misrepresentation to acquire title to the suit property. She submits that on the contrary, evidence was led and documents produced to show that it is the 1st Defendant who had forged documents and that the registration of plot 1057 (old number 1139) in the 1st Defendant's claim was not supported by any document from the Ministry of Lands.
326. The Plaintiff submits that the 1st Defendant admits that he was summoned by the Directorate of Criminal Investigations to record a statement on the suspected falsification of documents regarding his alleged ownership of the suit property and rather than honour the summons, the 1st Defendant moved



- this Court and obtained orders barring the Directorate of Criminal Investigations from carrying out the said investigations. The Plaintiff questions what was the 1st Defendant running from.
327. The Plaintiff submits that the 1st Defendant did not call a document examiner to exonerate himself from allegations of fraud. She submits that besides objecting to being investigated by the Directorate of Criminal Investigations, he failed to call or summon a witness from the Ministry of Lands to give evidence in support of his contention that he obtained his title documents legally and procedurally.
328. The Plaintiff invites this Honourable Court to make an adverse inference on the 1st Defendant's failure to submit himself to the Directorate of Criminal Investigations for investigations and failure to call any witness from the Ministry of Lands to testify on the authenticity of his documents.
329. The Plaintiff relies on the Court of Appeal judicial decision of Kenya Akiba Micro Financing Limited Vs Ezekiel Chebii & 14 others [2012] eKLR. She submits that it should not be lost on this Honourable Court that the Directorate of Criminal Investigations examined the documents purportedly held by the 1st Defendant and prepared a Forensic Document Examiner's Report. She submits that an Affidavit was also sworn by PC ALEX MUIINDE, a police officer attached to the Directorate of Criminal Investigations who deposed at paragraph 20 of his Affidavit that certain copies of receipt vouchers bearing the 1st Defendant's name were under investigation since they did not appear in the records of the Director of Land Adjudication and Settlement.
330. The Plaintiff submits that the Forensic Document Examiner's Report was produced by consent of the parties themselves and this Honourable Court is entitled to rely on the said documents. The Plaintiff relies on the judicial decision of Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982 [1982-1988] 1KAR 278.
331. The Plaintiff submits that when this Honourable Court evaluates the evidence adduced and the testimonies of each of the parties in the trial, it will arrive at the inevitable conclusion that the Plaintiff adduced evidence to support her averments and challenged the validity of the documents held by the 1st Defendant. She submits that the 1st Defendant did not adduce any evidence whatsoever in support of his averments, he did not challenge the validity of the Title Deed and/or the certificate of official search produced by the Plaintiff as exhibits.
332. The Plaintiff submits that she challenged the procedure the 1st Defendant used to obtain the documents of title for the suit property, and that the 1st Defendant did not lead evidence to challenge the Title documents produced by the Plaintiff on grounds of fraud, misrepresentation, illegality or procedure of acquisition.
333. The Plaintiff relies on the judicial decision of Narriman A. Khan Vs Ramadhan Hamisi & 2 others [2018] eKLR. The Plaintiff submits that her assertions against the 1st Defendant were not mere unsubstantiated allegations. She submits that credible evidence was produced through the testimony of Mr. Samwel Kabiru Thiongo (PW2), a Senior Officer at the Ministry of Lands holding the position of Assistant Director Land Adjudication and Settlement. She submits that the officer who had over 30 years of working experience at the Ministry produced the original files in respect of Plot No 1139 (Nakuru/Piave Settlement Scheme/1057) and Plot No 1140 (Nakuru/Piave Settlement Scheme/1060) and told the Court he visited the suit property and that noted the Plaintiff was in occupation of the land and that the Title documents held by the Plaintiff in respect of the suit property were obtained procedurally.



334. The Plaintiff submits that PW2 clarified to the Court that the letter of offer relied upon by the 1st Defendant to claim allocation of the suit property by the Settlement Fund Trustee had a clerical error which wrongly bore the parcel number 1139 instead of 1140. The Plaintiff further submits that she explained that the clerical error was rectified through a letter dated 9th May, 1980 hence the cancellation of the parcel number 1139 on the letter of offer and replacement thereof with parcel number 1140. He confirmed to the Court that the records were duly amended and that the said amendment was communicated to the 1st Defendant. She submits that the evidence was not challenged by the 1st Defendant in cross-examination.
335. The Plaintiff submits that contrary to the 1st Defendant's contention, there was no requirement for Land Control Board Consent in order to amend and/or rectify the 1st Defendant's letter of offer which erroneously read 1139 but rectified and replaced with parcel number 1140. The Plaintiff relies on Section 6 of the *Land Control Act* (Cap 302) which speaks to "Transactions affecting agricultural land." She submits that Section 6(3) limits the Application of Land Control Board which the Plaintiff goes on to rely upon.
336. The Plaintiff submits that the unchallenged evidence adduced before this court by Samwel Kabiru Thiongo (PW2) is that on the ground, Vincent Agostinho Rafael Luis was settled on Nakuru/Piave Settlement Scheme/1057 while Peter Muchiri Mwangi was settled on Nakuru/Piave Settlement Scheme/1056 and that there is a road separating the two parcels.
337. The Plaintiff relies on the judicial decision of George Were Nyakora Vs Fredrick Odhiambo Chiambo [2022] eKLR. She submits that she had actual possession of the suit property since 1980 where she has uninterruptedly lived, cultivated and occupied with her deceased husband and children. She submits that this Honourable Court confirmed the foregoing during the site visit held on 24th April, 2023 where it was apparent that the Plaintiff lives in a residential house within the suit property and has Nine (9) employees working at the suit property and there was no evidence of settlement or any activity by the 1st Defendant on the suit property.
338. The Plaintiff submits that despite being afforded an opportunity during the site visit, the 1st Defendant was not able to demonstrate that he lives and/or carries on any business on the suit property or that he has unhindered access to all or any of the buildings and structures within the suit property. She submits that it was clear to the Court that the 1st Defendant's claims of control and possession of the suit property were and remain mere assertions.
339. The Plaintiff submits that this Honourable Court will no doubt recollect that when it visited the suit property on 24th April, 2023, it was the Plaintiff's employees who had custody of the keys to the various buildings in the suit premises and the Plaintiff herself was present and operating from the residential house within the suit property.
340. The Plaintiff submits that the uncontroverted evidence by PW2 was that the Settlement Fund Trustees did not allocate any individual with more than one parcel of land and that it was not reasonably and legally possible for the 1st Defendant to be allocated Parcel No 1139 and Parcel No 1140. She submits that according to PW2, there was an elaborate process to be followed before an individual could be allocated a parcel of land and he clarified that the process involved making an application, a committee sitting to verify the application, issuance of a letter of offer, allottee accepting the offer and being shown the parcel of land, allottee paying 10% deposit, fencing the land and putting up a structure and cultivating.
341. The Plaintiff submits that according to PW2, Vincent Agostinho Rafael Luis was allocated Parcel No. 1139 and followed the above process. She submits that PW2 confirmed that the deceased paid the



requisite consideration and had the land discharged to him and the deceased settled on the said parcel of land. She submits that he clarified that the 1st Defendant was allocated parcel No 1140 and the letter of offer addressed to the 1st Defendant that had parcel No 1139 was an error which was amended vide a letter dated 9th May, 1980 and the amendment communicated to the 1st Defendant.

342. The Plaintiff submits that both herself and the 1st Defendant have laid a claim to the suit property and each of the two has produced before this Honourable Court, a title document in support of their claim. She submits that the Court must therefore determine which of the two parties has proved the root of their title and which of the two documents is authentic and legitimate. The Plaintiff relies on the judicial decisions of *Munyu Maina Vs Hiram Gathiha Maina*, Civil Appeal Number 239 of 2009 and *Hubert L. Martin & 2 others Vs Margaret J. Kamar & 5 others* [2016] eKLR.
343. The Plaintiff submits that she has successfully demonstrated that from her deceased husband Vincent Agostinho Rafael Luis acquired legal title over the suit property by doing the following:
- a). Making an application for allocation of land,
 - b). Having the said Application duly considered by the Settlement Fund Trustee and being issued with an Offer Letter dated 7th June, 1980 for Land No 1139 in Piave and duly accepting such letter of offer by appending his signature on the same,
 - c). That the offer letter required the deceased to pay a settlement Charge of Kshs 414,450/= and the 10% deposit payable was Kshs 40,750/= and paid such deposit was paid on 7th June, 1980 whereupon he was issued with an official receipt Serial No. T761422,
 - d). That the said deceased then borrowed a principle sum of Kshs 414, 450 at an interest of 6.5% per annum and paid back the same through 56 consecutive half yearly installment of Ksh 16,166/=.
344. The Plaintiff submits that the evidence of PW2 was crucial in addressing the issue under determination. She submits that according to PW2, the deceased must have cleared the said loan of Kshs 414, 450 as a Title Deed, which is now in the possession of the Plaintiff
herein, could only be issued once such loan had been cleared. She submits that further such clearance was confirmed by the Discharge of Charge on the Title Document.
345. The Plaintiff submits that whereas the 1st Defendant produced documents No. 1, 2 and 3 in the 1st Defendant's further list and bundle of documents dated and filed on 10th December, 2021 being the Exhibit Bundle marked D2) the receipt voucher and official receipt for payment of 10% deposit and legal fees for plot No 1139 amounting to Kshs 4,685/=, the Plaintiff produced Official Receipt T761422 dated 7th June, 1987 for Kshs 40,775 being payment of 10% deposit and legal fees for plot No 1139.
346. It is also the Plaintiff's submission that the 1st Defendant relied on document No 4 in the 1st Defendant's further list and bundle of documents dated
and filed on 10th December, 2021 being the Exhibit Bundle marked D2) being the letter of offer for parcel No 1139 with a settlement charge amount of Kshs 47,400/= and deposit of Kshs 4,660/= but when asked for the original, he told the Court he did not have it.
347. The Plaintiff submits that the 1st Defendant also relied on document No 5 in the 1st Defendant's further list and bundle of documents dated and filed on 10th December, 2021 being the Exhibit Bundle marked D2 being the letter of offer for parcel No 1140 which also had a similar amount of settlement charge of Ksh 47,400/= and deposit of Ksh 4,660/= despite Plot No 1140 being much smaller, measuring



approximately 10.1 Hectares (25 Acres) as opposed to parcel 1139 that measures approximately 26.5 Hectares (65 Acres).

348. The Plaintiff submits that on her part, she relied on the letter of offer for parcel No 1139 with a settlement Charge amount of Kshs 414,450/= and a deposit of Kshs 40,750/=. She submits that the discrepancy in the amounts of settlement charge and 10% deposit appearing on the documents held by the Plaintiff and the 1st Defendant is an issue that this Court must ask itself about taking into account the explanation offered by PW2 who informed the Court that it was not possible for the settlement amount for plot 1139 and 1140 to be the same because payment of settlement charge amount corresponds to size of the land and there was no way the 1st Defendant would pay the same amount of settlement charge for a 65 Acre and 25 Acre parcel of land.
349. The Plaintiff submits that Document 7 in the 1st Defendant's further list and bundle of documents dated and filed on 10th December, 2021 being the Exhibit Bundle marked D2 is an extract of the Green Card showing the 1st Defendant as the registered proprietor of the suit property, Nakuru/Piave Settlement Scheme/1057. The Plaintiff submits that on her part, she produced her own extract of the said Green Card at Page 27 of the Plaintiff's list and bundle of documents dated 25th May, 2016 and filed on 27th May, 2016.
350. The Plaintiff submits that the copy she produced shows an entry No 5 being a Caution registered by the 1st Defendant on 20th December, 2006 claiming beneficiary interest. She submits that it is curious why the 1st Defendant did not file suit on or about 20th December, 2006 when he registered the caution yet it was now apparent to him that the Plaintiff held Title to the Suit Property.
351. The Plaintiff submits that the contents of the letter dated 9th May, 1980 are very explicit. She submits that it confirms that plot number 1139 had been allocated to Mr. Vincent Agostinho Rafael Luis who had executed legal documents relating to it. She submits that it confirms that the plot had been documented to Mr. Peter Muchiri Mwangi and advised the District Settlement Officer to change the records in respect of the plot documented to Mr. Peter Muchiri Mwangi to read plot 1140. The Plaintiff submits that the amendment should apply to the records held by Mr. Peter Muchiri Mwangi. She submits that it is curious that Mr. Muchiri Mwangi did not raise any complain about the decision of the Director of Settlement made in May 1980 and only made it an issue during these proceedings which in any case, were filed by the Plaintiff and not Mr. Peter Muchiri Mwangi.
352. The Plaintiff submits that the 1st Defendant made a personal inquiry to the Director of Land Adjudication and Settlement vide his own letter dated 6th August, 2006 regarding documentation on ownership of Plot No 1139 Piave Settlement Scheme. She submits that on 18th September, 2006, the Director of Land Adjudication and Settlement wrote to the 1st Defendant and confirmed the following facts:
- a. Records held in the Office of Director of Land Adjudication and Settlement show that plot No. 1139 (New No 1057) was allocated to Vincent Agostinho Rafael Luis and the same was documented to him on 7th June, 1980.
 - b. Records held in the Office of Director of Land Adjudication and Settlement show that plot No. 1140 (New No. 1056) was allocated to Peter Muchiri Mwangi and the same was documented to him on 17th May, 1980.
 - c. Both Vincent Agostinho Rafael Luis and Peter Muchiri Mwangi have repaid all their respective dues to Settlement Fund Trustee and Plot No. 1139 was discharged on 1st July, 1987 while Plot No 1140 was discharged on 9th July, 1987.



- d. The letter clarified that Plot No 1139 measures approximately 26.5 Hectares while Plot No 1140 measures approximately 10.1 Hectares.
- e. There are no records to show why any amendment was done to change the foregoing and the map appears with the new numbers, being 1056 for plot 1140 and 1057 for plot 1139.
353. The Plaintiff submits that if indeed the 1st Defendant herein was allocated Parcel 1056 and 1057, he would have documentation for two plots, to which he does not. She further submits that if the aforementioned parcels of land were merged, such amalgamation would have resulted in the issuance of one plot number and not two as is the case. It is the Plaintiff's submission that it is safe to conclude that the documents relied on by the 1st Defendant are unlawful and invalid and they must have been obtained illegally.
354. The Plaintiff submits that whoever alleges must prove, and the parties herein having made various allegations, and have the onus of proving the said allegations. She submits that in proving the root of her title, the Plaintiff called PW2, an officer in the Ministry of Lands, who testified and confirmed to the Court that Vincent Agostinho Rafael Luis followed all processes and procedures in acquiring his title and that the root of his title can properly be traced without a break in the chain. The Plaintiff submits that the witness rebutted the authenticity of the Title document and green card held by the 1st Defendant and testified that the 1st Defendant's title had no good foundation.
355. The Plaintiff submits that the 1st Defendant did not produce any evidence to controvert the evidence of PW2 who was an Officer at the entity that the 1st Defendant claimed to have acquired the suit property from. She submits that according to PW2, the records of the Settlement Fund Trustees indicate that Vincent Agostinho Rafael Luis as the legitimate owner of the suit property.
356. The Plaintiff submits that from the evidence of the Plaintiff and PW2, it follows that Vincent Agostinho Rafael Luis bought the suit property from Settlement Fund Trustees and the Plaintiff has therefore been able to prove the root of her title and therefore the Estate of Vincent Agostinho Rafael Luis is the bonafide owner of the suit property.
357. The Plaintiff submits that in the alternative, she has pleaded ownership by adverse possession. She submits that she has been in continuous, open and exclusive uninterrupted occupation of the Suit property for a period of over 12 years, and as such would otherwise acquire proprietary rights over the said portion of land by dint of Adverse Possession.
358. The Plaintiff relies on Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya and submits that if indeed this Honourable Court finds that the 1st Defendant's Title is valid, it is the Plaintiff's submission that her and her family's occupation of the Suit property for over 40 years has extinguished the 1st Defendant's title and the 1st Defendant has been holding it in trust for the Plaintiff and/or deceased's estate.
359. The Plaintiff relies on the judicial decision of Samuel Kihamba Vs Mary Mbaisi [2015] eKLR in KISUMU CIVIL APPEAL NO. 27 OF 2013. She submits that she has satisfied the aforesaid requirements as she has openly lived on the suit property for over 40 years and that the 1st Defendant, who alleges to be the owner of the same has never interrupted such occupation and possession of the said property. She submits that in fact, the 1st Defendant has admitted to knowing both the Plaintiff and the deceased who have lived next to him for 40 odd years, and even engaged in business with the deceased.
360. The Plaintiff submits that not only has the 1st Defendant failed to demonstrate any attempts to interrupt the deceased and the Plaintiff's quiet enjoyment and possession of the suit property, he has



- equally failed to show that they were living and in possession of the suit property with his permission. She submits that even if indeed the 1st Defendant had legal title over the suit property (which he does not) he has otherwise lost such title under the doctrine of adverse possession.
361. The Plaintiff submits that costs of the suit are awarded at the discretion of the Court and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. The Plaintiff relies on the judicial decisions of *Jasbir Singh Rai and 3 others vs Tarlochan Singh Rai and 4 others* [2014] eKLR and *Republic v Communication Authority of Kenya and Another Ex-Parte Legal Advice Centre Aka Kituo cha Sheria* [2015] eKLR.
362. The Plaintiff submits that she has suffered hardship, inconvenience and harassment from the 1st Defendant and has been burdened with an obligation to file suit in order to protect her rights from acts of forgery by the 1st Defendant who fraudulently obtained a parallel title deed to the suit property and is now unable to explain and/or defend it. She submits that had it not been for the 1st Defendant's harassment and fraudulent acts, the Plaintiff would not have had to incur unnecessary costs of filing this suit. The Plaintiff submits that the 1st Defendant ought to bear the costs of this suit.
363. The Plaintiff submits that no cogent explanation has been offered by the 1st Defendant to explain why he did not take action to evict the Plaintiff from the suit property since 17th May, 1980 when the 1st Defendant was allegedly allocated the suit property or from 16th July, 1987 when he obtained a land Certificate (Title Deed) and had to wait until 27th May, 2016 when the Plaintiff filed this suit for him to file a Counter-claim. She submits that a period of over 30 years of inaction clearly manifests that the 1st Defendant has no legitimate bona fide claim over the suit property.
364. The Plaintiff submits that equity aids the vigilant and not the indolent and that delay defeats equity. The Plaintiff relies on the judicial authority of *Ibrahim Mungara Mwangi Vs Francis Ndegwa Mwangi* [2014] eKLR.
365. The Plaintiff submits that this Honourable Court must not countenance a corrupt scheme where parties obtain title by fraud or misrepresentation and this Court must lift the orders barring the Directorate of Criminal Investigations from conducting investigations into the authenticity of the documents held and produced before this Court by the 1st Defendant as requested by PC ALEX MUINDE, a Police Officer attached to the Directorate of Criminal Investigations who deposed an Affidavit that certain copies of receipt vouchers bearing the 1st Defendant's name were under investigation.
366. The Plaintiff submits that she is the only party in this suit that has demonstrated the foundation and requisite legal requirements in which her deceased husband acquired the suit property and that she has demonstrated her occupation and uninterrupted possession of the suit property from 1980 to date.
367. The Plaintiff submits that the 1st Defendant on the other hand has been unable to demonstrate throughout his testimony, pleadings and documentation filed in Court, that he is in fact the true owner of the suit property and has further failed to show that he has a bona fide interest or any interest whatsoever in the suit property.
368. The Plaintiff submits that she has proved her case to the required standard of balance of probability and that she humbly and most respectfully prays that this Honourable Court be pleased to grant the prayers sought in the amended plaint dated 9th December 2019.
369. The 1st Defendant filed his submissions on 17th July 2023.



370. The 1st Defendant relies on the judicial authorities of Ali Gaddafi & Another Vs Francis Muhia Mutungu & 2 others [2017] eKLR, Rukaya Ali Mohamed Vs David Gikonyo Nambacha & another Kisumu HCCA No 9 of 2004 and M. Mugwikaa M' Rugongo Vs Settlement Fund Trustee & Another [2022] eKLR.
371. The 1st Defendant submits that the Settlement Fund Trustee is established under Section 167 of the Agricultural Act, Cap 38 and is mandated to settle settlers on either un-alienated Government land or on land purchased from private owners by the Settlement Fund Trustee.
372. The 1st Defendant submits that the subject matter in this case was un-alienated government land and the process of alienation is explained by PW2 Samwel Kabiru Thiongo who is the Assistant Director Lands Department, Adjudication and Settlement. He submits that the title deed he holds was issued after due process while the one issued to Vincent Aghostinho Raphael Luis (deceased) was issued fraudulently and without due process.
373. The 1st Defendant submits that the first step of the allotment was an application by the settler. He submits that he applied for a plot of approximately 145 acres at Piave farm Njoro No 1139 on 17th February 1980 and a copy of the letter is annexed for ease of reference. He submits that the Plaintiff has not produced any document or evidence that the deceased ever applied for any plot in Piave settlement scheme Njoro.
374. The 1st Defendant submits that the second step is issuing the letter of offer and he submits that on 17th May, 1980, he was issued with the letter of offer in respect of Plot No 1139 Piave settlement scheme and a charge for Ksh 47,400/= to Peter Muchiri Mwangi I.D no. 2332204/65. He submits that he has annexed copies of offer and charge for ease of reference.
375. The 1st Defendant submits that 21 days later on 7th June, 1980, the Plaintiff was issued with a letter of offer of the same parcel of land No 1139 Piave-settlement scheme and a charge for Ksh 414,450/= issued to Vincent Agostino Rafael Luis certificate of Registration No 22776. He submits that he has annexed a copy for ease of reference.
376. The 1st Defendant submits that the third step is acceptance of the letter of offer. He submits that condition six of the offer letter required the settler to accept the offer by signing the offer together with 10% deposit of the charged amount.
377. He submits that on 19th May, 1980, he paid Ksh 4,685 representing 10% of the consideration and he has produced the letter for ease of reference. The 1st Defendant further submits that receipt No T762174 clearly indicates Plot No. 1139. He submits that the Plaintiff on the other hand has not filed any documents or evidence of acceptance and payment of 10% deposit and legal fees.
378. The 1st Defendant also submits that the Plaintiff in their submission has annexed receipt No 1761422 dated 7th June, 1980 which does not indicate the plot number and the same is forgery as the serial number indicates that it was issued earlier than the 1st Defendant's receipt. He submits that it cannot be true as the 1st Defendant's offer was given 21 days before the Plaintiff's offer and further this document should be expunged from the court record as it is not in the Plaintiff's list of documents filed in court.
379. The 1st Defendant submits that it should be noted that the he accepted the offer on 17th May, 1980 while the Plaintiff's offer as per the receipt (which is submitted should be expunged from the record) is purported (Annexure B) to be issued on 7th June, 1980 which is 21 days later.



380. The 1st Defendant submits that the fourth step is the charge document and he submits that he signed the charge document in respect of Plot No 1139 Piave Scheme on 17th May, 1980. He submits that the Plaintiff (deceased) signed his charge on 7th June, 1980 which is 21 days later.
381. The 1st Defendant submits that the fifth Step is the discharge and he submits that he paid all sums of money owed to the Settlement Trust Fund and was issued with the discharge document that was signed by the 1st Defendant on 26th June, 1987 and transfer of land in settlement scheme signed and executed on the same date.
382. He submits that the Plaintiff on the other hand has not annexed any discharge of charge and/or transfer duly executed by the Settlement Fund Trustee, as evidence that they paid.
383. The 1st Defendant submits that the sixth step is on the title deed. He submits that the 1st Defendant presented to the District Land Registrar the discharge of charge and transfer of land in settlement scheme and paid the requisite charges to the government on 16th July, 1987 and was issued with Title deed for Nakuru Piave Settlement Scheme /1057 (previously 1139) measuring 26.5 Ha. He submits that he has annexed a payment receipt, title deed and green card for ease of reference).
384. He submits that on the other hand, the Plaintiff has produced title deed issued on 17th July, 1987 one day after the Plaintiff was issued with title deed on the same plot without annexing supportive discharge and transfer of land in settlement scheme.
385. The 1st Defendant submits that both the title deeds given under the signature and the seals of the Nakuru District Land Registrars. It is his further submission that once the letter of offer was issued and accepted and the 1st Defendant fulfilled all terms and condition in the letter of offer, in accordance with condition (d) in the letter of offer, the land was not liable to forfeiture, or available for re-allocation to any third party unless mandatory notice is served to the 1st Defendant containing:
- i. Specifying the particulars breach complained of and
 - ii. If the breach is capable of remedy requiring the 1st Defendant to remedy the breach and
 - iii. In any case, requiring the 1st Defendant to make compensation or remedy the breach.
386. The 1st Defendant submits that no notice was served to him. He further submits that the court took judicial notice of this fraud during the hearing and noted on the cover of the file's name that the 1st Defendant's name was cancelled by pen and in its place inserted the name of Vincent Aghostinho Rafael Luis in the cover. He submits that this action is fraudulent and the action of settlement Fund Trustee is illegal and unlawful.
387. The 1st Defendant submits that the Plaintiff's claim for adverse possession is misconceived and incompetent on the following grounds: The Plaintiff has never enjoyed peaceful occupation of the disputed land as demonstrated in the pleadings and by the Defendant's evidence of interruptions through court proceedings and filing of a caution. He submits that the claim for adverse possession is incompetent for failing to comply with provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010.
388. The 1st Defendant submits that the visit of the court to the scene of the dispute did not make things better for the Plaintiff as they were not accompanied by professional surveyors to point the area of dispute as supported by Registry Index Map (R.I.M) of the area and the visit of the scene was a waste of the courts time.



389. The 1st Defendant submits that the Plaintiff has failed to prove that the deceased acquired the suit property procedurally and the suit should be dismissed with costs. He submits that on the other hand, he has proved that he acquired the suit property through the legal process and the counterclaim succeeds with costs to be paid by the Plaintiff.
390. The 2nd and 3rd Defendants filed their submissions on 11th July, 2023. They identify the following issues for determination:
- a. Whether NAKURU/PIAVE SETTLEMENT SCHEME/1057 was allotted to VINCENT AGOSTINHO RAFAEL LUIS or PETER MUCHIRI MWANGI?
 - b. Which of the two titles issued in regard to NAKURU/PIAVE SETTLEMENT SCHEME/1057 is genuine?
 - c. Who was the first person to be issued with letter of allotment and title deed for NAKURU PIAVE SETTLEMENT SCHEME/1057?
391. They submit that according to the documents that have been provided by the Plaintiff and the 1st Defendant, they were both allotted parcel number NAKURU/PIAVE SETTLEMENT/1057 on different dates by executing a charge at a different sum.
392. They submit that for instance, Vincent Agostinho Rafael Luis (deceased) was allotted a Parcel on 7th June, 1980 and charged his interest with repayment to Settlement Fund Trustees of a Principal sum of shillings 414,450/= while Peter Muchiri Mwangi charged his interest thereon of shillings 47,400/=.
393. It is their submission that as per the letter dated 9th May, 1980, Felix G Moga wrote to the District Settlement officer that Plot NAKURU/PIAVE SETTLEMENT/1057 had been allocated to Vincent Agostinho Rafael Luis (deceased) even though the plot had been documented to Mr. Peter Muchiri Mwangi. They submit that Felix G Moga was informing the District Settlement officer to change the record of Mr. Peter Muchiri Mwangi to read Plot No 1140 instead of Plot No 1139 (New No 1057) PIAVE SETTLEMENT SCHEME.
394. The 2nd and 3rd Defendants rely on the judicial decisions of Charles Karathe Kiarie & 2 others vs Administrators of Estate of John Wallance Muthare (deceased) & 5 others and David Peterson Kiengo & 2 others vs Kariuki Thuo. It is their submission that a title is to be held as prima facie evidence that the holder is the true owner of the land, unless fraud is established to have been used in the process.
395. They submit that when the 1st Defendant made inquiries about PLOT NO 1139 (New No 1057) PIAVE SETTLEMENT SCHEME on 6th August, 2006, he was informed by the Director of Land Adjudication and settlement that the records held by the office indicated that Plot No 1139 (New No 1057) was allocated to Vincent Agostinho Rafael Luis (deceased) while on the other hand Plot No 1140 (New No 1056) was allocated to Mr. Peter Muchiri Mwangi. They submit that both plots were fully repaid by the respective parties and discharged.
396. They submit that there is need to establish whether the existing letters of allotment to both parties over the same parcel were erroneously issued and if so did the Settlement Fund Trustee try to rectify the error by involving both parties. They submit that it is therefore important to know how the two allotments came up in order to establish whether there is a forgery or an inadvertent mistake by the Settlement Fund Trustee allotting the same parcel of land in question.
397. The 2nd and 3rd Defendants submit that two titles were allegedly issued to two different persons over the same parcel of land. They submit that according to the Plaintiff's documents, two titles in the names of



- the 1st Defendant, Peter Muchiri Mwangi and Vincent Agostinho Rafael Luis (deceased) were issued. They submit that this has not been disputed since both parties possess Title Deeds to the same parcel.
398. They submit that the title in the name of Peter Muchiri Mwangi, the 1st Defendant is dated 16th July, 1987 while that of Vincent Agostinho Rafael Luis (deceased) is dated 17th July 1987. They submit that the title deed of the 1st Defendant has been referred to as Land Certificate while that of Vincent Agostinho Rafael Luis (deceased) is referred to as Title Deed which raises issues as to the true format of title deed at that time being 1987.
399. It is their submission that as per the certificate of official search dated 27th November, 2014, it is indicated that the proprietor of NAKURU/PIAVE SETTLEMENT SCHEME/1057 is Vincent Agostinho Rafael Luis (deceased). They submit that the search statement further indicates that a caution had been registered in favour of the 1st Defendant claiming beneficial interest.
400. They submit that although the particulars indicated on the Green card are not disputed, the 1st Defendant alleges fraud on the part of Vincent Agostinho Rafael Luis (deceased) that led to the issuance of two titles.
401. They further submit that the title deeds held by the executrix in the names of Vincent Agostinho Rafael Luis (deceased) and the 1st Defendant over plot No NAKURU/PIAVE SETTLEMENT SCHEME/1057 remain genuine subject to confirmation of their authenticity by the Land Registrar Nakuru.
402. The 2nd and 3rd Defendants further submit that on 17th May, 1980, the 1st Defendant was allotted a parcel of land in the Piave Settlement Scheme by the settlement Fund Trustees and given a letter of offer in respect of parcel No 1139 in Piave settlement scheme Number 751 in Njoro within Nakuru District while Vincent Agostinho Rafael Luis (deceased) was allotted the same parcel of land on 7th June, 1980.
403. They submit that on 16th July, 1987, the 1st Defendant was issued with a Land Certificate to Title Number NAKURU PIAVE SETTLEMENT SCHEME/1057 whereas Vincent Agostinho Rafael Luis (deceased) took out the title deed on 17th July, 1987.

ANALYSIS AND DETERMINATION.

404. After considering the pleadings, submissions and the testimony of the Plaintiff, the Defendants and their witnesses, the following issues arise for determination:
- a. Who, between the Plaintiff and the 1st Defendant, is the lawfully registered owner of the suit property, NAKURU/PIAVE SETTLEMENT SCHEME/1057?
 - b. Who, between the Plaintiff and the 1st Defendant, has the actual control, possession and occupation of the suit property, NAKURU/PIAVE SETTLEMENT SCHEME/1057?
 - c. Who between the Plaintiff and the 1st Defendant is deserving of orders sought in their respective pleadings?
 - d. Who should bear the costs of this suit and the counterclaim

A. Who between the Plaintiff and the 1st Defendant is the lawfully registered owner of the property known as NAKURU/PIAVE SETTLEMENT SCHEME/1057?

405. The Plaintiff has instituted this suit as the executrix of the estate of her deceased husband one Vincent Aghostinho Raphael Luis.



406. It is the Plaintiff's case that her late husband was on 1st July, 1976 employed by the Settlement Fund Trustees as a farm manager at Cortina/Piave farm at Njoro and was tasked to perform the duties of a Farm Manager Grade 1. She states that the Settlement Fund Trustee was then a body corporate established by the Kenya (Amendment of Laws) (Agriculture) Regulations, 1963 (Legal Notice Number 352/1963).
407. She states that the deceased was allotted a parcel of land in the Piave Settlement Scheme and on or about the 7th day of June, 1980, the Estates Manager on behalf of the Settlement Fund Trustees gave the deceased a letter of offer in respect of Parcel No 1139 in Piave Settlement Scheme Number 751 in Njoro within Nakuru District.

PARA 408.

She also states that the deceased accepted the offer by executing the letter of offer and became an allottee holding a certificate of registration No. 22776. She further states that pursuant to the said allotment, the deceased paid a settlement charge in the sum of Kenya Shillings 414,450/= and executed a charge and paid a deposit of Kshs. 40,750/=. He further paid conveyancing fees thereon and the Trustees accepted the said payments.

PARA 409.

It is also PW1's statement that the deceased further executed a charge in which he charged his interest in the land comprised in Piave Settlement Scheme Parcel No 1139 in respect of the principal sum of Kshs. 414,450/= and interest thereon at the rate of 6.5% per centum per annum for which the deceased was to pay principal sum and interest by 56 consecutive half-yearly instalments of Kshs. 16,166/=.

410. She states that in addition to this, by a letter dated 8th July, 1987, the Director of Land Adjudication and Settlement wrote a letter to the District Commissioner, Nakuru District in which he confirmed that according to the records held at the Land adjudication and settlement department in the then Ministry of Lands and Settlement, the deceased Vincent Aghostinho Raphael Luis was allocated Plot Number 1139 at Piave Settlement Scheme which comprised a farm house, workshop and other minor structures.
411. She states that on 17th July, 1987, her late husband was issued with a Title Deed for the suit parcel, being Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 measuring approximately 26.5 hectares.
412. In support of her averments as to use and occupation, the Plaintiff states that on 29th March 1999, the deceased caused a Charge to be registered in favour of Delphis Bank Limited to secure a loan of Kshs. 6,300,000 and which charge was discharged on 4th December, 2002.
413. It is her statement that since the date of allotment, the deceased has and his estate continues to be in possession, control and management of the said property and pays Land Rates to the Nakuru County Government.
414. The court has scrutinized the documents provided by the Plaintiff as contained in the list of documents dated 25th May 2016 and found that indeed a charge was created with the Settlement Fund Trustees and it is dated 7th June, 1980. The Plaintiff has further given evidence which is in the form of receipts on how the loan was repaid. She has adduced the Receipt dated 25th June, 1987 of Kshs. 405,798, Receipt dated 1st July, 1987 for Kshs. 406, 217.65, Receipt dated 28th June 1987 for Ksh143.80 and Receipt dated 17th July 1987 for Kshs. 16,750.
415. The Plaintiff has also adduced a charge registered in favour of Delphis Bank Limited to secure a loan of Kshs. 6,300,000/= and which charge was discharged on 4th December, 2002.



416. The plaintiff's further case is that there have been attempts by the 1st defendant to claim ownership of the suit land and more specifically that in the year 2014 he filed an objection in the succession proceedings before the High court alleging that she had irregularly included property Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 in the list of the deceased's assets. It is the Plaintiff's case that the 1st defendant attached a copy of a Land Certificate allegedly issued to him under the provisions of the Registered Land Act, Chapter 300 of the Laws of Kenya and purportedly relating to the suit property.
417. It is also the Plaintiff's case that the Land Certificate held by the 1st Defendant allegedly issued on 17th July, 1987 is not a legitimate, bona fide and genuine document of title that can confer any right of ownership or interest over the suit property.
418. The Plaintiff's case is that in her Petition for Probate of the deceased's written will, she swore an affidavit on 7th November, 2012 in support of the Petition for Probate with the deceased's written will annexed, and made reference to two immovable properties, owned by the deceased namely: a) Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1060; and Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
419. It is her further case that she applied for confirmation of Grant which was filed before the High Court at Nairobi on 8th October, 2013 and swore an Affidavit on 7th October, 2013 in support of summons for confirmation of Grant and annexed a consent to confirmation of grant in which by an inadvertent mistake, she described both of the deceased's immovable properties as Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1060. Essentially, her case is that she inadvertently left out Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
420. It is her further case that the certificate of confirmation of grant ensuing bore the same mistake and both described as Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1060, leaving out Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
421. She states that on account of this inadvertent mistake, she filed summons for rectification of grant to rectify the error in the certificate of confirmation of Grant issued by the High Court and the High Court allowed her application for rectification of grant and directed that the certificate of confirmation of grant which had been issued earlier amended and she took out a rectified Certificate of Confirmation of Grant.
422. It is the Plaintiff case that upon being notified of the 1st Defendant's claim, she conducted an official search over the suit property on 27th November, 2014 and which search revealed that the property was and still is registered in the name of Vincent Agostinho Rafael Luis and that the 1st Defendant had filed a Caution on 20th December, 2006 claiming beneficial interest.
423. Her case is that after she caused a search to be carried out, she was also issued with a green card which confirmed that the property was registered and a Title Deed issued on 17th July, 1987 in the name of Vincent Agostino Rafael Luis.
424. The Plaintiff states that the 1st Defendant has no legal right, title or interest over the suit land and makes an alternative prayer on account of Section 7 and 37 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya if the court find otherwise. She justifies this prayer for adverse possession for the reason that they have been enjoying quiet possession of the suit property for almost Forty (40) years.
425. The 1st Defendant's case is that in the year 1980 (17th May) he bought land known as Piave Settlement Scheme Plot Number 1139 through Settlement Fund Trustees (SFT) and executed necessary legal documents.



426. His case is that he made a 10% deposit towards the purchase price and the balance was a loan payable over a period of ten (10) years and that a charge was registered against the suit parcel to secure his payment of the balance.
427. The 1st Defendant case is that he paid his loan to Settlement Fund Trustees and was issued with the discharge of charge and other title documents and as such the Plaintiff cannot now claim to have title over the suit property.
428. The 1st Defendant case is that at the time of collecting his discharge of charge and other title documents, he was informed by the officials of Settlement Fund Trustees that for registration purposes and purposes of issuance of title documents his land number had been changed from Piave Settlement Scheme Plot Number 1139 to land reference Nakuru/Piave/1057.
429. The 1st Defendant also states that he was the one that built a house on the suit property and planted trees.
430. His further case is that he learnt that the Plaintiff had instituted proceedings before the High court for grant of probate and that she irregularly and mischievously included and/ or sneaked in the suit parcel in the schedule of assets as one of the properties belonging to her deceased husband.
431. His case is that when he learnt of this mischievous/ irregular act of the Plaintiff he filed Summons for revocation of grant to raise issue with the irregular inclusion of Nakuru/Piave Settlement Scheme 1057 in the list of the deceased's assets.
432. The 1st Defendant states that upon noting the irregularity in the documents at the lands registry and the green card, he moved with speed to file a caution claiming beneficial (sic) interest in the suit property.
433. His case is that he has in his possession a Land Certificate issued to him under the provisions of the Registered *Land Act* Cap 300 Laws of Kenya- now repealed relating to property comprised in Title Number Nakuru/Piave/1057 formally Nakuru Piave Settlement Scheme Parcel No 1139.
434. The 1st Defendants further case is that the Land Certificate he holds is a bona fide, genuine and legitimate document having been issued by the Land Registrar. In his counterclaim, the 1st Defendant avers that as a result of the Defendant's (sic) negligence they have suffered loss and damage.
435. The 1st defendant's case is also that the cancellation of his name from parcel number 1139 was not legal as the consent of the land control Board was not obtained, which consent would have preceded the transfer to the Plaintiff.
436. The 1st Defendant has particularized fraud, illegality, bad faith and malice on the part of the Plaintiff and prays that the Plaintiff's suit be dismissed with costs and judgment be entered in his favour as set out in the counterclaim.
437. The 2nd and 3rd Defendants did not call any witnesses. In their statement of defence they set out their statutory duties which are: To facilitate law and order in all land registration matters; To register land in the manner and in accordance to documents lodged at the registry and the law; and to ensure that all land allocation and registration is conducted properly and the relevant documents and law is followed.
438. Both the Plaintiff and the 1st defendant have produced copies of their documents of title. The Plaintiff in her list of documents dated 25th May, 2016 has produced a copy of a title deed in the name of Vincent Aghostinho Rafael Luis in respect of NAKURU/PIAVE SETTLEMENT SCHEME/1057 and 1st Defendant in his list of documents received by the court on 8th July, 2016 has produced a Land Certificate in respect of NAKURU/PIAVE SETTLEMENT SCHEME/1057.



439. Both the Plaintiff's and the 1st Defendant's claims to the suit property are premised on their application, allotment, payment of a 10% deposit towards the purchase price and repayment of the Settlement Fund Trustees loan and discharge of charge. They both claim to be in use and occupation of the suit parcel
440. In essence this court has been presented with two documents of title and each party want the court to believe that the title documents held by him and her result from one process. Invariably, this court has to query both title document and the process culminating to the issuance of them.
441. In the judicial decision of *Hubert L. Martin & 2 Others Vs Margaret J. Kamar & 5 Others* [2016] eKLR, at paragraph 31, the court pronounced itself thus;
- “A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.” (Emphasis mine)
442. Away from the assertion of the Plaintiff and the 1st defendant, the evidence of PW2 (Samuel Kabiru Thiong'o) is therefore crucial in determination of this dispute. PW2 filed a witness statement on 22nd February, 2022.
443. I must also mention that the evidence as tendered by the Settlement Fund Trustee is in support of the Plaintiff's case. They have stated that during the process of allocation and documentation there was a mix-up. The mix-up as explained by PW2 related to a typographical error in the letter of allotment which described the parcel number allocated to the 1st Defendant as 1139 while it should have been 1140. He explained that the 1st Defendant was nevertheless settled (the process of showing an allottee his parcel of land) on 1140. The fact of this error was communicated to the District Settlement Officer vide a letter dated 9/5/1980.(it is in the 1st Defendant's further list of documents; Document No 8.) This letter further asked him to amend the records held at his office so as to correct this error relating to the parcel numbers. The letter is copied to file No. EST/751/1140. PW2 explained this to mean estate/ scheme number /parcel number. 1140 is the parcel of land allocated and documented to the 1st Defendant. This means and would mean that as at 9/5/1980 the 1st Defendant was aware of the clerical error and communication relating to its correction.
444. This court had occasion to look at the physical files in respect of the parcel No. 1139 and 1140. File 1139 on the cover has Peter Muchiri's name cancelled and in its place the name of Vincent Agostino Rafael Luis. File 1140 has the name Peter Muchiri Mwangi. There is a signature against the cancellation on file 1139.
445. The 1st Defendant has taken issue with this procedure for amendment and stated that the Plaintiff's deceased husband should have gone to the Land Control Board.



446. PW2 testified that the kind of amendment that was ordered did not require that the settler goes to the Land Control Board. He explained that it was an amendment to the letter of offer issued to the 1st Defendant which erroneously read 1139 but was rectified and replaced with parcel number 1140. In any event, Section 6 of the *Land Control Act* (Cap 302) which has a heading “Transactions affecting agricultural land.” provides at subsection 3(b) that the section does not apply to transactions to which the Government or the settlement Fund Trustee or County Council is a party.
447. PW2 stated that the parcel of land comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 (old parcel number 1139) was properly documented and registered under proprietorship of Vincent Aghostinho Rafael Luis while the parcel of land comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1056 (old parcel number 1140) was properly documented and registered under proprietorship of the 1st Defendant. He stated that the purported documentation of land parcel number NAKURU/PIAVE SETTLEMENT SCHEME/1057 (old parcel number 1139) to the 1st Defendant is illegal unless conveyed through sale.
448. It is his statement that from the records available at the Department of Land Adjudication and Settlement, the 1st Defendant and the late Vincent Agostino Rafael Luis were each allocated one parcel of land and these parcels of land are adjacent to each other.
449. He further states that’s he has confirmed from the records that the 1st Defendant applied for SFT development loan of Ksh 80,000/= on 1st August, 1980 and he accepted the SFT loan reference EST/751/1140/6 of Ksh 18,500/= dated 15th October, 1980.
450. He states that if indeed the 1st Defendant was allotted two parcels of land as alleged by him, then the two parcels of land should have been combined into one, documented and registered as one parcel of land and it is not tenable that the 1st Defendant was settled twice.
451. He states that during planning and survey, all the documents used are in a draft format including the plot numbers for the plan and after planning and survey works at Piave Settlement Scheme, plot number 1139 adopted new parcel number, being NAKURU/PIAVE SETTLEMENT SCHEME/1057 while plot number 1137 adopted new parcel number, being NAKURU/PIAVE SETTLEMENT SCHEME/1060.
452. It is important for me to mention that while the 1st defendant went to great lengths in cross examining the Plaintiff on the parcel of land known as NAKURU/PIAVE SETTLEMENT SCHEME/1060, it does not form part of the dispute in this matter save that Plaintiff is in occupation of it after purchasing it from another allottee.
453. PW2 further states that it is evident that the 1st Defendant applied for Settlement Fund Trustee land loan of Ksh 47,400/= and was later funded with a Settlement Fund Trustee development loan of Ksh 18,500/= for the land parcel NAKURU/PIAVE SETTLEMENT SCHEME/1056 (old number 1140) and at no time has he settled on or occupied the suit property and/or carried out any development on the said Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
454. The 1st Defendant has adduced a list of documents that was received by the court on 8th July, 2016. Among the documents adduced by the 1st Defendant is a Notification of charge in relation to the suit property being Nakuru/Piave/1057 and it specifies the amount of the loan as Ksh 68,305 with an interest rate of 6.5%, The document adduced by the 1st Defendant has a date i.e. 6th October, 1981 as the date of the loan. However, at the bottom it bears a date 25th April 1986.



455. The receipts adduced by the 1st Defendant to establish the veracity of his claim that he indeed settled the loan amount in respect of the suit property. In Defendant's list of documents received by the court on 8th July, 2016, there are various receipts; one is unclear and it is dated 29th December, 1982 with the amount to SFT as 1850/=, the other is dated 13th March, 1987 with the amount of Ksh 10,000/= to SFT, a receipt dated 17th June, 1987 with the amount of 75,000/=, and an unclear receipt dated 29th December, 1982.
456. I note that some of the receipts do not specify the property in relation to which the payment is made. The court is not in a position to determine whether the payment is made in relation to the loan amount on NAKURU/PIAVE SETTLEMENT SCHEME/1056 (old number 1140) or NAKURU/PIAVE SETTLEMENT SCHEME/1057 (old number 1139). Secondly, based on the documents adduced by the 1st Defendant received by the court on 8th July, 2016, the date of the Notice of Charge in respect of property known as Nakuru/Piave/1057 was issued on 25th April, 1986 but the receipts adduced by the 1st Defendant were issued before this date.
457. The Plaintiff during her testimony relied on a letter dated 18th September, 2006. The letter is from the Ministry of Lands and settlement and is addressed to the 1st Defendant and it is produced in the 1st Defendants further list of documents dated 10th December, 2021 (Exhibit D5). This letter was also referred to by PW2. PW2 explained that the letter states plot No 1139 was discharged on 1st July 1987 while parcel number 1140 was discharged on 9th July, 1987. This letter specifically states;
- “Both allottees have fully repaid all the Settlement Fund Trustees dues and hence plot No1139 was discharged on 1st July, 1987 while plot No 1140 was discharged on 9th July, 1987. Plot No 1139 is approximately 26.5 Ha while plot No 1140 is 10.1 Ha. There are no records to show that any amendment was done and the map appears with the new numbers.”
458. Further, PW2 in his testimony stated that in regard to parcel No 1139, the 1st Defendant produced a letter of offer dated 17th May, 1980 and it is signed by the 1st Defendant. PW2 testified that he does not have this letter of offer in his file and does not know where it came from. During cross examination of the 1st Defendant, it was his testimony that he does not have the original letter of offer for parcel number 1139.
459. I must also mention, for what it is worth, that the evidence tendered to this court points to the fact that there were attempts by the Permanent Secretary in the Ministry of Land to investigate documents held by the 1st defendant in respect of the suit property but those attempts were thwarted when the 1st Defendant made an application dated 18th June, 2021 before this Honourable court. The orders sought were that the Plaintiff, DCIO Nairobi and DCIO Njoro be barred from harassing the 1st Defendant subjecting him to any criminal charges or investigations in relation to ownership of the suit parcel and that the investigations be stopped. The said orders were granted by my brother Hon. Justice Mutungi. It is not clear why there was resistance by the 1st Defendant to have this investigation done. This would have gone a long way in supporting his claim as set out in the counter claim. As things stand, the 1st Defendant has produced documents in support of his case, which documents have been disowned by the Settlement Fund Trustee. An example is the charge document that the 1st defendant is using to Claim ownership of the suit parcel.
460. I have noted that the charge document tendered in evidence by the 1st Defendant contains material inconsistencies. This is further explained by the evidence of the Plaintiff and PW2. For example, the plaintiff was able to point out differences between the letter of offer issued to her deceased husband in respect to the suit parcel and the one relied on by the 1st Defendant. Her position was supported



- by PW2 who stated that the Plaintiff's letter of offer has an MR No T761422 of 7th June, 1980. He testified that this is indicative of the 10% deposit payment towards the land allocated to the Plaintiff's deceased husband. PW2 Stated that the 1st Defendant's letter of offer doesn't have this number but has a settlement charge amount of Kshs. 47,400. PW2 went on to state that it is not possible for the settlement amount for 1139 and 1140 to be the same because the acreage is different.
461. The evidence tendered is that 1139 is 25.5 Ha while 1140 is 10.1 ha. Essentially 1139 is larger than 1140 in size. The evidence of the Plaintiff is therefore more plausible than the amount due to the Settlement Fund Trust in respect of the suit property as at the date of the charge was Kshs. 415,450 and not Kshs. 47,400 as claimed by the 1st Defendant.
462. The 1st Defendant attempted to explain this evidence on the amount on the charge by stating that the Plaintiff's deceased husband was paying for farm and machinery. However, PW2 while looking through the original file for the suit property which he had brought to court, testified that the Plaintiff's deceased husband took a loan of Kshs. 125,380 to buy machinery and implements from them and it was applied for on 22nd October, 1981. PW2 also stated that Plaintiff's deceased husband borrowed another loan on 24/10/1981 for Kshs. 141, 679. PW2 also gave evidence of the Plaintiff's deceased husband borrowing an amount of Kshs. 30,000 towards clearing, fencing, grass cutting and purchase of cows. He explained that these loans are not part of the amount of Kshs. 414,450 appearing on the offer letter.
463. As has been analyzed in the foregoing paragraphs, the 1st Defendant's claim over the suit parcel is based on documents and processes that are inconsistent with the procedure of allocation of land as enumerated by PW2 (the assistant Director at the Settlement Fund Trust), explanations offered by him on documents appearing in the file which he brought to court. The notes taken during trial show that the 1st Defendant believes that he has superior rights over the suit parcel because he is an African. The court takes great exception to the remarks made by the 1st Defendant and informed him as much.
464. PW2's evidence remains uncontroverted as relates to the procedure in allocating land to the Plaintiff's deceased husband and the 1st Defendant. It is also uncontroverted as it relates to the authenticity of documents held by the Plaintiff. The Plaintiff produced a search certificate and green card for the suit land both of which show that it is registered in the name of Vincent Aghostinho Rafael Luis.
465. In *Munyu Maina Vs. Hiram Gathiha Maina* [2013] eKLR it was held thus;
- “We state that when a registered proprietors root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register”.
466. Section 27 and 28 of the Registered *Land Act*; CAP 300 (Repealed) is in pari materia with section 26 of the *Land Registration Act* 2012 which provides that a certificate of title shall be held as conclusive evidence of proprietorship and that such title shall not be subject to challenge except on the grounds that it has been acquired through fraud, misrepresentation, illegally unprocedurally or through a corrupt scheme.
467. While the 1st Defendant has set out the particulars of fraud on the part of the Plaintiff he has failed to prove them. He did not call any witnesses from the lands office who are custodians of land records and



would be able to speak to their authenticity and in turn negate the Plaintiff's claim or support the 1st Defendant's counterclaim.

468. The law obligates me to protect the rights of a person who have been registered as proprietor of land unless it can be proved to have been acquired through fraud, misrepresentation, illegally unprocedurally or through a corrupt scheme.
469. Based on the foregoing exposition, it is clear that the Plaintiff has discharged her burden of proof in explaining the root of her title, while the 1st Defendant has failed to do so. This court is therefore satisfied that Vincent Aghostinho Rafael Luis is the lawfully registered owner of the suit property known as NAKURU/PIAVE SETTLEMENT SCHEME/1057.

B. Who between the Plaintiff and the 1st Defendant has the actual control, possession and occupation of the suit property, NAKURU/PIAVE SETTLEMENT SCHEME/1057?

470. This question for determination made sense in light of the alternative prayer by the Plaintiff. The Plaintiff prayed that this court finds that she is owner of the suit property by reason of the doctrine of adverse possession having been in continuous occupation and possession of the suit land since the 1980s.
471. PW2 in his evidence stated that over the years there was no complaint from the 1st Defendant or from Mr. Agostino Luis since 1987 when both their charges were discharged. He states that its only in the year 2020 when the Director of the Settlement Fund Trustee asked him to visit the suit parcel and find out what was happening. He stated that he prepared a ground report and his findings formed the basis for the Permanent Secretary instructing that the matter be investigated.
472. His findings were that the 1st Defendant is on 1056 while the plaintiff is on 1057 and that between the parcels there is a road. H also found that the Plaintiff has constructed 2 permanent houses, there is cultivation and fencing has been done.
473. He also observed that there is a parcel No. 1060 which is adjacent to 1057 and both form a continuous tack of land measuring about 120 acres adding that on the ground, the two cannot be differentiated and that the plaintiff and her deceased husband settled on 1057 and 1060.
474. He further observed that the 1st Defendant is on the other side of the road and occupies 25 acres and that he did not see any evidence of settlement by him on 1057 or 1060. He explained that the 1st defendant has constructed a house and has farm machinery thereon.
475. This report by PW2 is similar in content to the one by the trial judge made while she conducted a site visit to the suit property on 21st April, 2023, save for the interviews conducted.
476. Bearing in mind my finding on question (A) above, a determination on this question is no longer useful.

Whether the 1st Defendant's counterclaim is merited?

477. The 1st Defendant in his counterclaim dated 21st November, 2019 avers that he legally acquired the Certificate of Title to Nakuru/Piave/1057 and that the Plaintiff is acting fraudulently/irregularly in trying to lay claim to that parcel of land which is an allegation she knows to be false. The 1st Defendant thus seeks the dismissal of the suit.



478. Fraud has been defined in Black's Law Dictionary 11th Edition as;

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

479. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the decision of Vijay Morjaria Vs Nansingh, Madhusingh Darbar & another [2000] eKLR held thus;

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. 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.”

480. The 1st Defendant lists the particulars of fraud, illegality, bad faith and malice on the part of the Plaintiff as;

- a. Misrepresenting the fact that the deceased whose Estate she now represents was the rightful owner of the parcel of land known as Nakuru/Piave/1057.
- b. Misrepresenting the fact that the title of the parcel of land Nakuru/Piave/1057 forms part of the Estate of Vincent Aghostinho Rafael.
- c. Forging, falsifying and/or altering records to reflect that the Estate of Vincent Aghostinho Rafael Luis- Deceased owns the parcel of land known as Nakuru/Piave/1057.
- d. Failure to desist from interfering with the parcel of land known as Nakuru/Piave/1057.
- e. Misleading the High Court in Nakuru High Court Succession Court Cause No 231 of 2016.

481. It is therefore incumbent upon the 1st Defendant to prove fraudulent conduct on the part of the Plaintiff. The 1st Defendant has fallen short of this burden of proof which is higher than proof on a balance of probabilities but lower than proof beyond reasonable doubt.

482. In the judicial decision of Narriman A. Khan Vs Ramadhan Hamisi & 2 others [2018] eKLR, at paragraph 14, the court pronounced itself as follows;

“The Defendants questioned the validity of the Plaintiff's titles. They however failed to adduce any evidence to contradict the evidence adduced by the Plaintiff and neither did they adduce any evidence to support their contention that the Plaintiff illegally acquired the suit titles through misrepresentation, forgery and trickery as alleged. I thus reach the finding that indeed the Plaintiff is legally registered as the owner of the suit properties.”

483. This court finds that no evidence has been adduced by the 1st Defendant to demonstrate that the Plaintiff forged, falsified and/or altered records to reflect that the Estate of Vincent Aghostinho Rafael Luis Deceased owns the parcel of land known as Nakuru/Piave/1057.

D. Who between the Plaintiff and the 1st Defendant is deserving of orders sought in their respective pleadings?

484. The 2nd and 3rd Defendants in their submissions pose the questions: which of the two titles issued in regard to NAKURU/PIAVE SETTLEMENT SCHEME/1057 is genuine? and who was the first



person to be issued with letter of allotment and title deed for NAKURU PIAVE SETTLEMENT SCHEME/1057?

485. The 2nd and 3rd Defendants submit that there is need to establish whether the existing letters of allotment to both parties over the same parcel were erroneously issued and if so, did the settlement fund trustee try to rectify the error.
486. The 2nd and 3rd Defendants further submit that the title deeds held by the Executrix in the names of Vincent Aghostinho Rafael Luis (deceased) and Peter Muchiri Mwangi over plot No NAKURU/PIAVE SETTLEMENT SCHEME/1057 remain genuine subject to confirmation of their authenticity by the Land Registrar Nakuru.
487. The 2nd and 3rd Defendants were for the most part silent observers of the trial. They chose not to call any witness. The 2nd and 3rd defendant do not want to be seen to support either the case of the Plaintiff or of the 1st Defendant and have left it to the court to make a determination.
488. As stated earlier in this judgment, Section 26 of the [Land Registration Act](#), 2012 provides as follows:
- 26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as Prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-
- a. On ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
489. Given that the root of Plaintiff's title has been established by evidence and documents, this court is inclined to grant orders sought in the plaint.

E. Who should bear the costs of this suit and the counterclaim?

490. On the question of costs of the suit and counterclaim, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

DISPOSITION.

491. In the result, I find that the Plaintiff's suit succeeds. Consequently, judgment is hereby entered in favour of the Plaintiff in the following terms:
- a. A declaration is hereby made that Vincent Aghostinho Rafael Luis (deceased) is the lawful owner of the property comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 and the said property is now lawfully vested in the Plaintiff herein by virtue of being the Executrix and Beneficiary of the Estate of the deceased.



- b. A declaration is hereby made that the Title Deed issued to Vincent Aghostinho Rafael Luis by the Land Registrar on 17th July, 1987 is the legitimate, bona fide and genuine document of title in respect of Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
- c. A declaration is hereby made that the Land Certificate issued to Peter Muchiri Mwangi, the 1st Defendant herein, by the Land Registrar on 17th July, 1987 is not a legitimate, bona fide and genuine document of title that can confer any right of ownership or interest over Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057. The said title is hereby declared to be null and void.
- d. A declaration is hereby made that the Plaintiff is entitled to enjoy continued possession of the suit property as the registered proprietor by virtue of the Title Deed issued to Vincent Aghostinho Rafael Luis by the Land Registrar on 17th July, 1987.
- e. The 1st Defendant is hereby ordered to surrender the Land Certificate relating to the suit parcel to the District Land Registrar Nakuru, Commissioner of Lands and/or the Land Secretary or any other officer authorized in that behalf for purposes of cancellation of the said Land Certificate.
- f. An order is hereby issued directing the District Land Registrar Nakuru, Commissioner of Lands and/or the Land Secretary or any other Officer authorized on that behalf to cancel the Land Certificate and/or any other form of registration purporting to confer Peter Muchiri Mwangi, the 1st Defendant herein, a right or title in respect of the property comprised in Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057.
- g. An order of permanent injunction is hereby issued restraining the 1st Defendant, his agents, servants and/or employees from trespassing into, cultivating, constructing upon or in any other form whatsoever interfering with the Plaintiff's quiet possession and enjoyment of the property comprised in and the parcel of land known as NAKURU/PIAVE SETTLEMENT SCHEME/1057.
- h. An order is hereby issued that the Caution lodged by the 1st Defendant on 20th December, 2006 claiming beneficial interest over the suit land be lifted forthwith.
- i. The 1st Defendant's counterclaim is hereby dismissed.
- j. The Plaintiff shall have Cost of this suit and interest thereon from the date of this judgment until payment in full.

492. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF FEBRUARY, 2024.

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Ndeku for the Plaintiff.

Mr. Muchiri Mwangi 1st Defendant present in person.

No appearance for the 2nd and 3rd Defendant.



Court Assistant: Mr. Miruya.

