



Salim v Co -operative Bank of Kenya Ltd & 2 others; Co-operative Bank of Kenya (Plaintiff); Mage & another (Defendant) (Environment & Land Case 193 of 2021) [2024] KEELC 852 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 193 OF 2021
LL NAIKUNI, J
FEBRUARY 13, 2024**

BETWEEN

HAMRAN AHMED SALIM PLAINTIFF

AND

THE CO- OPERATIVE BANK OF KENYA LTD 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

THE REGISTRAR OF LANDS, KILIFI 3RD DEFENDANT

AND

CO-OPERATIVE BANK OF KENYA PLAINTIFF

AND

EZEKIEL BESA MAGE DEFENDANT

THE LAND REGISTRAR DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Hamran Ahmed Salim the Plaintiff herein through a Plaint dated 20th September, 2021 and filed on court on 21st September, 2021. The suit was against the Co -operative Bank of Kenya, Garam Investment Auctioneers and the Registrar of Lands, Kilifi the 1st, 2nd and 3rd Defendants herein respectively.
2. In accordance with the filed Plaint, the Plaintiff is described as an adult of sound, while both the 1st and the 2nd Defendants are limited liability Company duly incorporated under the Companies Act



Cap. 486 of the Laws of Kenya. Indeed, the 2nd Defendant is registered under the Auctioneers Act, and carrying out the business of auctioneer under the name and style of Garam Investment Auctioneers in Mombasa. The 3rd Defendant is described as the Registrar of Lands Kilifi District and being sued through the Attorney General as the Chief advisor of the Government.

3. Upon service of the Plaint and the Summons to Enter onto the parties herein, the 1st Defendant filed their Statement of Defence and Counter Claim under protest dated 10th December, 2021 whilst the 3rd Defendant filed their Statement of Defence dated 23rd April, 2022. It is instructive to note that the 2nd Defendant despite of being served according never participated at all in these proceedings whatsoever.
4. On 10th February, 2022, all parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - Trial conference requirements accordingly, the suit was fixed for full trial on 27th September, 2022.

II. The Plaintiff's case

5. Based on the filed pleadings by the Plaintiff and the Plaint the brief facts of the case are that at all material times to this suit, the Plaintiff herein is and remained the registered and the beneficial owner of Land Reference No. Kilifi/Mtwapa/2258 situate in Mtwapa having validly acquired the subject property from one, Mr. Andrew Katana Mwaeba sometime in January 2010 (Hereinafter referred to as "The Suit Land"). The Plaintiff averred that he was issued with an Original Title Deed with respect to the aforementioned parcel of land on 20th January 2010 being Title Deed Serial No. 717116, which serial number was endorsed on the Green Card.
6. Immediately after the said acquisition, the Plaintiff took possession of the subject property and had been in possession of the same to date with no interference whatsoever from any third party. The Plaintiff had been undertaking farming on the said parcel of land. On 23rd July, 2021 he received a call from a representative of the 2nd Defendant who informed the Plaintiff that he had documents that he needed to serve the Plaintiff. On the same date, the Plaintiff met with the said representative of the 2nd Defendant at a restaurant trading in the names and style of Blue Room in Mombasa wherein after exchanging pleasantries, the said representatives of the 2nd Defendant served the Plaintiff with a Notification of Sale dated 23rd July 2021, Letter dated 23rd July, 2021 and Sale Form 4 of 23rd July, 2021 and also instruction letter dated 22nd July, 2021.
7. Upon a quick perusal of the said documents, the Plaintiff was surprised to learn that his property herein above mentioned was due to be sold by way of public auction on the grounds that it had been used to secure a loan facility by one Ezekiel Besa Mage (Hereinafter referred as "Mr. Mage") to as from the 1st Defendant at its Eldoret Branch which loan the said borrower had defaulted in paying. The Plaintiff was quite shocked by the said development as he had not guaranteed any loan using his property above mentioned and further he was not aware of the said Mr. Mage in addition to the fact that he still held his Original Title Deed issued to him on 20th January, 2010 being Serial No. 717116.
8. The Plaintiff was convinced that there was fraud that had been perpetrated by the borrower in obtaining a loan facility from the 1st Defendant using forged land documents relating to his parcel of land above mentioned. Thereafter, he visited the Kilifi District Lands Registry for purposes of ascertaining the state of his parcel of land and confirming whether indeed his property had been charged to the Bank as was notified through the letters by the 2nd Defendant.
9. On 28th July 2021, he went and applied for an official search at the Kilifi District Lands Registry with respect to LR No. Kilifi/Mtwapa/2258. He was issued with an official search dated 28th July 2021 indicating that the property thought still owned by him, was charged to the 1st Defendant on 24th July



- 2015 vide a Charge dated 24th July 2015 for a sum of Kenya Shillings Six Million Five Hundred (Kshs. 6,500,000/-). On 29th July 2021, the Plaintiff stated that his Advocates wrote a letter addressed to the Lands Registrar of Kilifi requesting to be supplied with copies of the Charge dated 24th July 2015 and to date, the Plaintiff had not been supplied with a copy thereof from the lands registry.
10. The Plaintiff having established that his property was wrongfully charged without his knowledge, involvement and or consent, he reported the matter to the Kilifi Police Station and the same was recorded as OB No.4 of 11th August 2021. On the same date, the Sub County Criminal Investigation Officer of Kilifi County wrote a letter addressed to the Lands Registrar Kilifi District requesting for certified copies of Green Cards, Searches, Charges, and all documents to facilitate in carrying out their investigation. The Plaintiff managed to secure certified copies of documents from the Kilifi Lands Registry, save for the Charge aforementioned.
 11. From the certified copies of the documents secured from the land's registry, it was evident to the Plaintiff that there was outright fraud that was perpetrated, forged title deed was created that was used to wrongfully charge the Plaintiff's property to secure the facility issued by the 1st Defendant. The Plaintiff was able to obtain a certified copy of the Green card for the property and it was established by the Plaintiff that the serial number for his title deed was properly recorded thereon. He also managed to secure a certified copy of the title deed that was used to register the charge at the land registry, and upon keen perusal of the same, the Plaintiff noted quick discrepancies with the title deed in his possession.
 12. Amongst other discrepancies that the Plaintiff observed in the title deed used by the 1st Defendant to charge were that:-
 - i. The serial number on the said title deed was 932918 while in the Plaintiffs Original Title was and remained 717116.
 - ii. There was no mention of a sub-division details in the said title.
 13. Further the signature on the certified copy of the Land Control Board Application form was quite different and distinct from the signature of the Plaintiff. The documents that were used to wrongfully charge his property were fraudulent, forged, fictitious and absolutely illegal. The 3rd Defendant, without any colour of right, unlawfully and without any regard to the sanctity of the Plaintiff Title, intentionally, deliberately, illegally and without due regard to the law proceeded register a charge over the Plaintiff without following the due process of law and while knowing well that the title deed used for registration was forged title deed.
 14. The 3rd Defendant's action to irregularly and unlawfully registering the 1st Defendant Charge over its property was illegal, irregular and wrongful. The 3rd Defendant acted with gross negligence and recklessness in accepting the instruments presented to him and proceeding to register a charge over the Plaintiff register at the lands registry. As a result of the said illegality by the Defendants jointly and severally, it had been denied its constitutional rights of fair administrative action and right to property and it had consequently suffered loss and damage.
 15. According to the Plaintiff the said illegal charge against its register was wrongful, illegal, unlawful, contrary to law, without any justification whatsoever and therefore null and void. The Plaintiff averred that he never and had not guaranteed any loan facility by offering to have his property above mentioned charged and further the Plaintiff was not aware of Mr. Mage of Eldoret Town within the Republic of Kenya. The title documents are in his possession and was never at all surrendered by the Plaintiff to any party, including the Defendants herein for purposes of guaranteeing a loan facility. The subject property was all that he had and it would be greatly prejudicial to the Plaintiff and his family if the sale of the said property was allowed to proceed in light of the evident fraud that had been perpetrated.



16. Through his advocates the Plaintiff wrote a letter to the 1st Defendant wherein they advised the bank of the fraud perpetrated on the Plaintiff subject property as well as on them as the title documents used to secure the loan was a forgery and fraud as the Plaintiff had in his possession the original title deed issued to him by the lands office. The Plaintiff demanded that the 1st Defendant to stop any intended sale and further requested to be supplied with copies of the said Charge instrument as well as any deed of guarantee that the Plaintiff allegedly signed. The Bank responded vide their letter dated 17th August, 2021 which was sent in advance by email, whereby instead of issuing the Plaintiff with the copies of the Charge that he had requested, they sought to be supplied with copy of the title and the Occurrence Book extracts that were in the Plaintiffs possession.
17. On 18th August, 2021, the Plaintiff through his lawyers responded to the Banks letter aforementioned whereby he enclosed to them the scanned copy of the title deed and the Occurrence Book extracts that they had requested for and further demanded that they withdraw their instructions from the 2nd Defendant to sale the Plaintiffs property as well as commence the process of having the wrongful charge registered over the Plaintiffs register at the lands discharged. The charge that was registered against the Plaintiff's property was wrongful, illegal, unlawful and ought to be declared as such and the sale scheduled to be conducted by the and Defendant on 27th September, 2021 ought to be stopped.
18. The Plaintiff posited that he stood to suffer substantial loss if the sale was allowed to proceed owing to the wrongful charge that had been registered over his property as he was likely to lose all his investment.
19. There was no other suit pending and there had not been previous proceedings on the same suit property. The Plaintiff submitted to the jurisdiction of the Honourable Court. The Plaintiff prayed for Judgment against the 1st, 2nd and 3rd Defendants jointly and severally for:-
 - a. A declaration that the Plaintiff is the absolute, indefeasible and registered owner of Land Reference No. Kilifi/Mtwapa/2258.
 - b. A declaration that the Charge dated 24th July 2015 registered over Land Reference No. Kilifi/Mtwapa/2258 by the 1st Defendant was wrongful, unlawful, fraudulent, illegal and thus void.
 - c. An order directing the Registrar of Lands, Kilifi to cancel and revoke the entry of the Charge registered on the Plaintiffs register for parcel of land Kilifi/Mtwapa/2258 at the Lands Registry.
 - d. A Permanent Injunction order restraining, barring and or stopping the 1st and 2nd Defendants whether by themselves, their servants, agents, employees and or anyone acting on their authority from advertising for sale, offering to sale, selling by public auction or by private treaty, disposing off, leasing, further charging and or in any way interfering in any manner with the Plaintiff's parcel of land known as Kilifi/Mtwapa/2258.
 - e. General Damages against the 1st Defendant for unlawful conversion
 - f. Exemplary and or Aggravated damages against the 1st Defendant for the unlawful, illegal, wrongful actions is charging the Plaintiff property in favour of the 1st Defendant.
 - g. The costs of the suit and incidentals thereto.
20. The Plaintiff called his two (2) witnesses on the 27th September, 2022. As the PW - 1 and PW - 2 they testified as follows:



A. Examination - in - Chief of PW - 1 by Mr. Khalid Advocate.

21. PW - 1 was sworn and testified in Kiswahili language. The witness identified himself as Hamran Ahmed Salim. He was a holder of national identity card bearing numbers 13595739. He was born on 6th February, 1975. He lived at Imara Diama estate in Nairobi. He was the Plaintiff in the matter told the court that he recorded a witness statement dated 20th September, 2021 which he adopted as part of his evidence. He informed Court having received a call on 23rd July, 2021 and was informed that his land being KILIFI/MTWAPA 228 measuring 2.84 ha had been auctioned. The caller informed the witness that he was reaching out from Co - operative Bank of Kenya. The caller asked whether they were to meet in town where he was handed over the papers. They showed that someone had used his land as collateral for a loan by one Mr. Mage based in Eldoret, a person he never knew at all.
22. He confirmed that he had never used the suit property for this purpose and had never signed the papers that were handed to him. He called his brother who had his title deed to inquire if he still had it in his possession. They conducted an official search dated 28th July, 2021 which confirmed that a loan had been taken out using the title of the suit property. They reported the matter to the DCIO and the police took them to the land offices where they were presented with several documents including the green card for the suit property certified on 28th July, 2022. He noted that the title deed had a serial number 717116 which was the number in both his title and the green card.
23. The witness told the Court that they were given the title deed that was used to charge his land, its serial number was 932918. These numbers were different from his title deed. The title deed in his possession did not have any charge on it by the Co - operative Bank of Kenya. The 1st Defendant refused to give him some documents although they brought some documents, he had never signed the letter of offer before any Advocate called Noel and he had never signed the charged documents on 24th July, 2014 before an advocate by the name of Rosemary Momanyi.
24. According to the witness he gave the documents to an expert document examiner to check on the documents who told him that the signatures on the charged documents were different from his own signatures on other documents. The document examiner prepared an Expert Document Examiner called Jacob Oduor Report dated 8th February, 2022.
25. He confirmed that he sued Co - operative Bank of Kenya as they refused to give him audience. He told the Court that he was married with four children. He prayed for relief sought in the Plaint being that the suit property was the only property he had. He confirmed that he filed a list of documents 1 to 21 documents dated 1st October, 2021 marked as Plaintiff Exhibit No. 1 to 21 as part of his evidence. He also filed a supplementary list of documents marked as 1 to 4 dated 8th February, 2022 which he produced as Plaintiff Exhibit 22 to 25.

A. Cross examination of PW - 1 by Mr. Kongere Advocate

26. He told the Court that he lodged a Complaint to the Division of Criminal Investigation Office (DCIO) that his land had been charged by the 1st Defendant on 21st August, 2021. He was not aware of any action taken; any arrests or being arraigned in Court. The land registrar gave him the green card on the 12th entry which showed that there was a charge registered against his title deed. There were no title deeds with the serial number 717116 at the land registry.
27. When referred to Exhibit No. 13, he told the Court that this was the document he was given at the land office which was a certified copy with serial number 932918 which was different from his own



which was 717116 and there was no sub division of 2258 which was in his name. All the pages were stamped as certified copies of the original on the last page there was only a stamp without a signature.

28. According to him the averments of paragraph 23 of the Plaint to wit that:- “Further the Plaintiff avers that the signature on the certified copy of the Land Control Board Application form is quite different and distinct from the signature of the Plaintiff.”, he took several documents vide his advocate to the document examiner; the consent from the Land Control Board was not one of them.

A. Re – examination of PW - 1 by Mr. Khalid Advocate

29. He reiterated that the purpose for taking the documents to the document examiner was to distinguish the signatures on the documents handed over to him by the 1st Defendant’s representatives and his own signature.
30. On 12th June, 2023 after seeking for a further hearing to call PW - 2, the Witness testified in Honourable Court as follows:-

D. Examination - in - Chief of PW - 2 by the Mr. Khalid Advocate

31. PW – 2 was sworn and testified in English language. The witness told the court that he was Jacob Mugoni Oduor, a forensic document examiner for 15 years with a Bachelor of Education from Kenyatta University and had acquired the qualifications on Document examination from the Institute of DCI Laboratory, Nairobi and the International Rabat University; Forensic Institute at Khartoum Sudan. He had worked for Fister & Freeman Forensic Company in the U.K. He also had experience from Rigila Forensic System, East Europe, Republic of Latvia.
32. On this matter the witness told the Court that he prepared a report dated 8th February, 2022 in response to the letter dated 25th January, 2022 by Khalid Salim Advocate requesting for analysis for signatures. Attached to the letter there were documentary exhibits three (3) of them;
- a. Copy a letter of offer dated 19th June, 2015
 - b. Copy of charge dated 24th July, 2015
 - c. Copy of the affidavit from 24th July, 2015
33. There were specimen for Mr. Hamran Ahmed Salim dated 25th January, 2022; known signature of original marriage certificate dated 2nd July, 2008; original acknowledgement of handing over dated 25th January, 2010. He did the analysis on January 2022 by company signatures of Hamran Ahmed Salim on the dispute documents which indicated by arrow in pencil and specimen of known signatures.
34. According to the witness she noted that the signatures were in different styles and formation. On page 3 of the report, he saw the disputed letter “S” was bigger than others. Other had capital “A’ which were conspicuous. The capital letter “S’ had a unique trend. At pages 11, 51 and 53 - on pen fluency. The witness told the Court that there were not common in other documents- specimen in the list of documents dated 11th February, 2022. The letter “S’ connected to the letter “A’ in the disputed signature. In the specimen there (d)(i), the disputed signature there was a “’t’ – the specimen had a “’t’ bar slanting upwards.
35. He told the Court that from the discrepancies, he made the conclusion that the disputed signatures on pages 11, 52 and 55 were made by different authors. He computed a report dated 8th February, 2022 which he signed and produced as part of the Plaintiff’s exhibits No. 25.



A. Cross examination of PW - 2 by Mr. Kongere Advocate

36. The witness reiterated that he had 16 years' experience and had been trained in different places. He did not have any documentation of his qualifications. Some of his duties included hand writing analysis. He owned a laboratory where he conducted his analysis. He had not registered the laboratory.
37. He told the Court that he was employed by the EACC. He had no authorization to conduct the investigations pertaining to this suit. When referred to the supplementary documents by the Plaintiff dated 11th February, 2022, he told the Court that he received a letter dated 25th January, 2022, it had a copy of letter of offer dated 19th June, 2015, copy of the charge dated 24th July, 2015 and affidavit dated 24th July, 2023. According to him one could not tell whether it was an original affidavit and who had sworn the affidavit.
38. When referred to the forensic report dated 8th February, 2022, the witness told the Court that the report did not have the documents he received but they were found in the bundle of documents at pages 11, 51 and 55. The preference was to use the originals but there were instances one could use copies. In the case of using copies, the results would vary then when one used the originals. The one factor would be the machine and the person using the copies would affect the accuracy. He did not know the machine nor the person who made the copies.
39. According to the witness he had the documents; the ones containing the specimen belong to the Plaintiff and the other which was the known signature of the documents in the bank.

B. Re - examination of PW - 2 by Mr. Khalid Advocate

40. He confirmed that on his report dated 8th February, 2020 was an error it should read 8th February, 2022. He told the Court that he was qualified and had certification which he could produce if requested in their original form. He was not supplied with the original form rather the copies from the documents he did not notice anything from what he was supplied with. There were specimen for comparison. He looked at the documents at the preliminaries and he had no need to include this information in the report but he concluded that they matched.
41. On 12th July, 2023 the Plaintiff through his Counsel Mr. Khalid marked his case closed.

III. The 1st Defendant's case

42. On 15th December, 2021, the 1st Defendant filed its statement of Defence and Counter Claim dated 10th December, 2021. The 1st Defendant averred that there was no suit capable of resolution in light of the provision of Order 5 rule 1(2) & (6) of the Civil Procedure Rules 2010. All subsequent averments, denials or admissions hereinafter are without prejudice to paragraph 2 in the defence. Paragraphs 5 and 6 of the Plaintiff were admitted save for the allegation that the Title Deed was endorsed with Serial No. 717116, which was denied. They were strangers to paragraphs 7, 8, 9 & 10 of the Plaintiff and makes no admission of them in any event.
43. In response to Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 & 39 respectively of the Plaintiff, the 1st Defendant averred that:-
 - a. It lawfully, regularly and procedurally advanced a loan of Kenya Shillings Six Million Five Hundred Thousand (Kshs.6,500,000.00/=) to one of its customers, Mr. Mage, on the terms and conditions in a Letter of Offer dated 19th June 2015.



- b. It lawfully, regularly and procedurally created a Charge dated 24th July 2015 (the “Charge”) over Title No. Kilifi/Mtwapa/2258 (the “Suit Property”) to secure the advances to Mr. Mage.
 - c. It received the Letter of Offer and Charge which were ex facie regularly executed by all relevant parties including the Plaintiff and Mr. Mage.
 - d. It was not aware of, has never been aware of, nor could it, exercising any reasonable diligence, be aware of, any claim by the Plaintiff as pleaded, except for the fact of the Plaintiff being the registered owner of the Suit Property.
 - e. Upon satisfying itself of the ex facie regularity of the Letter of Offer and Charge, it disbursed the loan to Mr. Mage on the security of the Charge.
 - f. There was default by Mr. Ezekiel Besa Mage in servicing the loan. The 1st Defendant therefore commenced the lawful exercise of its statutory power of sale to recover the sum of Kenya Shillings Eleven Million Three Hundred and Twenty Five Thousand Six Seventy Seven Hundred and Fifty One Cents (Kshs. 11,325,677.51) then outstanding.
 - g. There was no fraud, forgery, illegality or any unlawful conduct in the creation and registration of the 1st Defendant's interest in the Suit Property or in the Title Deed in the Plaintiff's possession.
 - h. Without prejudice to the contents made out under Paragraph 6 (g) herein, the 1st Defendant was not and has never been a party to any fraud, forgery, illegality or any unlawful conduct in the creation and registration of its interest in the Suit Property.
 - i. In light of the contents made under Paragraphs 6 (a) to (h) herein, there is no lawful reason to impede the 1st Defendant's exercise of its statutory power of sale. any loss to the Plaintiff, if at all, is contemplated and permitted by statute in the very act of creating the Charge.
44. The contents of Paragraph 39 and 40 were admitted with the 1st Defendant averring that the same were inconsequential in light of the averments in the defence. Paragraph 41 of the Plaint was denied in light of paragraph 2 of the defence.
45. On the Counter - Claim, the facts were that:-
- i. The 1st Defendant reiterated the contents of the paragraphs in the statement of defence.
 - ii. The 1st Defendant in the Counter – Claim, Mr. Mage was a male adult of sound mind residing in Eldoret and Kakamega.
 - iii. The 1st Defendant, relying on records kept by the 3rd Defendant in the Plaint, advanced to Mr. Mage a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00).
 - iv. By reason of success of the Plaintiff's claim, the 1st Defendant had lost the sole security it took for the loan advanced to Mr. Mage.
 - v. With the loss of the sole security, the 1st Defendant was unable to recover the outstanding loan of a sum of Kenya Shillings Eleven Million Three Hundred and Thirteen Thousand Five Fourty Eight Hundred and Three cents (Kshs. 11,313,548.03/=) as at 29th September 2021. It continued to accrue interest at contractual rate of 20.41% per annum.
 - vi. The 1st Defendant's loss aforesaid was attributable to and is the direct or indirect result of the 3rd Defendant's failure and neglect to perform or properly perform his statutory duties to guarantee the accuracy of the records relating to the Suit Property.



- vii. Ezekiel Besa Mage received a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00/=) from the 1st Defendant. He undertook to repay the sum as per the Letter of Offer dated 19th June 2015.
 - viii. Despite demand for repayment, Mr. Mage had failed, refused and neglected to repay the sum owed. The sum owed stood at Kenya Shillings Eleven Million Three Hundred and Thirteen Thousand Five Fourty Eight Hundred and Three cents (Kshs. 11,313,548.03/=) as at 29th September 2021 and continued to accrue contractual interest at the rate of 20.41% per annum.
 - ix. The 1st Defendant's claim against Mr. Mage was for breach of contract and for recovery of a debt that was due and owing.
 - x. There was no suit pending and there had been no previous proceedings between the parties in the counterclaim raising the same or similar issues and the cause of action relates to the 1st Defendant/Plaintiff in the counterclaim.
46. He submitted to the jurisdiction of this Honourable Court. From the Counter claim, the 1st Defendant sought for the Plaintiff's suit to be dismissed with costs or in the alternative, Judgment be entered on the Counter Claim against the Land Registrar-Kilifi and Mr. Mage, jointly and severally, as follows;
- a. Kshs. 11,313,548.03 being the outstanding loan as at 29th September 2021.
 - b. Interest at contractual rate of 20.41% per annum from 29th September 2021 until payment in full.
 - c. Costs of the original suit and the Counter - claim together with interest at court rates from the date of Judgment until payment in full.
47. On 12th June, 2023, the 1st Defendant called its witness DW - 1 testified in the court thus:-

A. Examination in Chief of DW - 1 by Mr. Kongere Advocate:-

48. DW – 1 was sworn and testified in English language. He was Mr. Jackson Nyaega Oire. He was a holder of the Kenyan Passport bearing numbers 1992864. He was born on 24th August, 1981. He was the Legal Officer of the Co - operative Bank of Kenya. He recalled having recorded a statement dated 19th May, 2022 and filed in Court on 25th May, 2022 and a list of nine documents dated 10th December, 2021 with the exhibits marked as Exhibits 1 to 9 which he adopted as his evidence.

B. Cross examination of DW - 1 by Mr. Khatib Advocate:-

49. DW – 1 informed the Court that he was at the Legal Department in Nairobi. The loan was taken out from Eldoret in the year 2015. By that time, he was working for the bank in the business department. He joined the legal department in May, 2021 before which he was not conversant with the charges. He became aware of this issue when the case was filed in Court. Prior to the filling of the case, he had no information pertaining to the issues in this suit. His testimony was based on what he had been able to gather from the bank records. Further some of the information was what he had been told by the bank.
50. He told the Court that he had never met Mr. Hamran Ahmed Salim – the Plaintiff - physically. He knew the officer who dealt with the matter at the branch called Eric Ireri but he had left the bank and the witness had not gotten a chance to talk to him. All transactions were authorized by the branch manager Mr. Daniel who was still with the bank but who had not prepared or signed any witness statement. He had seen the documents in court he had never signed any transfer documents.



51. He was aware that the Plaintiff had testified that he still had the original title deed. He was also aware that the title deed used for the charge was not the Plaintiff's title deed. The title on page 59 had the serial numbers 932918 while the one used to charge the land in the name of the Plaintiff which title he was shown had the serial numbers 717116. He confirmed that these documents were different. He went through all the documents filed by the Plaintiff. He observed that the serial number in the green card was different and that it contained the number 717116 as the one contained in the original title with the Plaintiff.
52. According to the witness, the letter of offer on page 11 of the bundle of documents by the Defendant, it was witness by an advocate called Noel M. Mahuni Advocate, who was not familiar to him. He never got a chance of talking to him. He was not part of the Defendant's witness. On page 5, the witness stated that the charge was witnessed by an Advocate named Rosemary Momanyi. He had never met or engaged the advocate personally. The advocate was also not a witness in the case. According to him there was an affidavit dated 24th July, 2015, he was not familiar with an advocate by the name of S. M. Mwendwa who was also not a witness in the suit.
53. According to him there were some payment of the repayment of the loan according to page 85 which statement amounted to slightly less than a sum of Kenya Shillings One Million (Kshs. 1,000,000/-). The last day was 22nd December, 2015 from there onwards there had been no payment. The bank had filed a Counter Claim to have Mr. Mage pay the bank. They had not filed the Counter Claim against the Plaintiff.

C. Cross examination of DW - 1 by Mr. Mwandeche Advocate.

54. He stated that they advanced Mr. Mage a loan facility of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/-). The letter of offer was sufficient to have advanced the monies. They also required a letter/ valuation report and a search. They never used the green card; once the charge was registered, they retained the title deed; i.e. the original, was presented by the Plaintiff through his advocate from the information he had.

D. Re - examination of DW - 1 by Mr. Kongere Advocate.

55. When referred to the green card he stated that the serial number 717116, which was not indicated as being the serial number.
56. On 12th July, 2023 the 1st Defendant through its advocate marked the close of its case.

IV. The 3rd Defendant's case

57. The 3rd Defendant filed a Statement of Defence dated 23rd April, 2022 where the 3rd Defendant contended to be a stranger to the contents of Paragraphs 5, 7, 8, 9, 10 and 11. Denials were made to the contents of Paragraph 6 of the Plaintiff. In response to Paragraph 12 of the Plaintiff, the 3rd Defendant stated that it never participated in any fraud.
58. In response to the contents of Paragraphs 13 and 14 of the Plaintiff the 3rd Defendant stated that the particulars of statutory duties of the 3rd Defendant in reference to this suit included:
 - a. To facilitate law and order in all registration processes
 - b. To register in the manner and in accordance to the documents lodged at the Lands Office and the law



- c. To ensure that all land allocation and registration was conducted properly with the relevant documents and the law followed.
59. Further in response to the contents of Paragraph 14, the 3rd Defendant stated that without prejudice that if at all there was a registered charge as against the suit property the same was done in accordance to the law and the due procedure followed. The Defendants were strangers to the contents of Paragraphs 16 and 17 of the Plaintiff. The averments in Paragraph 18 and 19 of the Plaintiff were denied. In response to Paragraphs 25, 26 and 27 of the Plaintiff the 3rd Defendant stated that its action to register a charge in favour of the 1st Defendant was done procedurally and in regard to the laws set in place and not clothed in fraud.
60. According, the 3rd Defendant posited that they were strangers to the averments of Paragraphs 32, 33, 34, 35 of the Plaintiff. The contents of Paragraph 39 of the Plaintiff were admitted. The 3rd Defendant denied the demand and notice of intention. In response to Paragraph 41 of the Plaintiff the jurisdiction of the court was admitted.

V. Submissions

61. On 12th June, 2023 the Honourable Court in the presence of all the parties gave directions on the disposition of the Plaintiff dated 20th September, 2021 by way of written submission. Pursuant to that on 31st October, 2023 after the Honourable Court confirming compliance set the Judgment date on the 29th January, 2024.

The Written Submission by the Plaintiff.

62. On 11th July, 2023 the Learned Counsel for the Plaintiff the Law firm of Messrs. Khalid & Company Advocates filed their written submissions. Mr. Khalid Salim Advocate commenced his submission by providing a brief background on the matter. He stated that the Plaintiff filed this suit against the Defendants through his Plaintiff dated 20th September 2021 and filed on 21st September 2021. The Plaintiff prayed for orders as aforesaid.
63. The 2nd Defendant representative served the Plaintiff with a Notification of Sale dated 23rd July 2021, Letter dated 23rd July 2021 and Sale Form 4 of 23rd July 2021 and also instruction letter dated 22nd July 2021. Upon keen perusal of the said documents, he was surprised to learn that his property herein above mentioned was due to be sold by way of public auction on the grounds that it had been used to secure a loan facility by Mr. Mage from the 1st Defendant at its Eldoret Branch which loan the said borrower had defaulted in paying.
64. The Plaintiff stated that he had not guaranteed any loan using his property above mentioned and further states that he was not aware of the said Mr. Mage in addition to the fact that he still held his Original Title Deed issued to him on 20th January 2010 being Serial No.717116. The Plaintiff had applied for an official search at the Kilifi District Lands Registry with respect to LR No. Kilifi/Mtwapa/2258 whereby he was issued with an official search dated 28th July 2021 indicating that the property though still owned by him, was charged to the 1st Defendant on 24th July 2015 vide a Charge dated 24th July 2015 for Kenya Shillings Six Million Five hundred Thousand (Kshs.6,500,000/=).
65. The Plaintiff was claiming that his property was wrongfully charged without his knowledge, involvement and or consent, he reported the matter to the Kilifi Police Station and the same was recorded as OB No. 4 of 11th August 2021. The Plaintiff stated that he obtained a certified copy of the Green card for the property and it was established that the serial number for his title deed was



properly recorded thereon. He also managed to secure a certified copy of the title deed that was used to register the charge at the land registry, and upon keen perusal of the same, the Plaintiff noted quick discrepancies with the title deed in his possession. The discrepancies that the Plaintiff observed in the title deed used by the 1st Defendant to charge the property are that:

- i. The serial number on the said title deed was 932918 while in the Plaintiffs Original Title is and remains 717116.
 - ii. There was no mention of a sub-division details in the said title.
66. The Plaintiff claimed that the 3rd Defendant, unlawfully and without any regard to the sanctity of the Plaintiff Title, intentionally, deliberately, illegally and without due regard to the law proceeded register a charge over the Plaintiff property without following the due process of law and while knowing well that the title deed used for registration was forged title deed.
67. The 1st Defendant was claiming to have procedurally created a charge dated 24th July 2015 over Title No. Kilifi/Mtwapa/2258 and advanced a loan of a sum Kenya Shillings Six Million Five Thousand (Kshs. 6,500,000/=) to Mr. Mage in a Letter of Offer dated 19th June 2015. The 1st Defendant states that they had received Letter of Offer and charge which were executed by the Plaintiff and the borrower Mr. Mage whereupon they had disbursed the loan to Mr. Ezekiel Besa Mage. The 1st Defendant was further claiming that they were not aware of the Plaintiffs' claim even after exercising due diligence. The 1st Defendant was refuting any claim of fraud, forgery, illegality in the registration of the charge on the said property. The 1st Defendant filed a counterclaim in their defence against the 3rd Defendant for their failure and negligence in performing their statutory duties and therefore request to be indemnified. The 1st Defendant also claimed against the said borrower Mr. Mage in their Counter - Claim for repayment of the sum owed to them.
68. The 3rd Defendant stated in its statement of Defence that it did not participate in any fraud and invited the Plaintiff to strict proof. The 3rd Defendant is also claiming if there was any charge then it was done in accordance to the Law and due procedure was followed. The Learned Counsel raised two (2) issues for the determination by Court. Firstly whether the Charge dated 24th July 2015 registered over the suit land by the 1st Defendant was wrongful, unlawful, fraudulent, illegal and unjust created. The Plaintiff testified on his own behalf as PW - 1. He confirmed that he was the owner of the property and had the title deed is in his possession. PW - 1 also testified that he had never used the title deed as a collateral for any loan for himself or anyone else. PW - 1 also stated that he was not aware that a charge had been created over his property and that he only became aware when he was informed by the 2nd Defendants representative that his property was charged and was due to be sold by way of public auction on the grounds that it had been used to secure a loan facility by Mr. Mage in the year 2021.
69. In his testimony he stated that he had no knowledge of the said Mr. Mage nor had he ever met him. The witness stated that upon investigation of the parcel file, he realized that the serial number of the title deed used to create the Charge never matched the serial number of the title as per the green card. His title's serial number however matched the one on the green card. The Plaintiff denied ever signing any bank documents for the purposes of charging his land as security. To buttress this position, the Plaintiff presented the bank documents – letter of offer, Charge and Affidavit) for examination by an expert for purposes of confirming whether or not the said documents were signed by him as compared to his specimen signatures as well as his known signatures. The expert returned the verdict that the signatures contained in the bank documents as compared with the specimen signatures and the known signatures were not signed by the same person.



70. Mr. Oduor elaborated how the signatures differed. The Learned Counsel averred that the 1st Defendant presented one witness – DW – 1 one Mr. Jackson Oire the Legal Officer of the bank. He indicated that he joined the bank in May, 2021 while the loan transaction took place in the 2015. He also stated that when the loan process was going on he was in Nairobi while it happened at Eldoret. He admitted not being conversant with on matters of charges. He only became conversant when this case was filed in Court. He admitted that his testimony was based on what he was told and on documents presented to him. He admitted never having met the Plaintiff. He further admitted that there were other offices who dealt with the matter but who never recorded statement nor appear as witnesses as they had left the employment with the bank before he had had a chance of discussing the matter with them. There was no representative from the 1st Defendant’s Eldoret branch who ever testified in the case. Not even the staff who had dealt with Mr. Mage at the time of the loan applications.
71. The 1st Defendant witness evidence was therefore partly based on hearsay and partly based on the documents presented to him. He never met and or engaged any of the parties involved in perfecting the charge in favour of the 1st Defendant. DW - 1 further confirmed not engaging the advocates who allegedly witnessed the Plaintiff’s signature to confirm whether or not the Plaintiff appeared before them since the Plaintiff had denied ever appearing before any of them. Therefore, it was his submission that based on the evidence by the parties, it was beyond a balance of probabilities that the charge created over the Plaintiff land was wrongful, the 1st Defendants having been hoodwinked and conned into charging the property hence the counter claim against the borrower. The mere fact that the Original Title Deed for the property was in possession of the Plaintiff was itself a confirmation of fraud having been perpetrated. The 1st Defendant also had in their possession a title deed to the property, albeit a forged one.
72. The 1st Defendant was under an obligation to carry out a background check on the owner of the suit property, visit the property, enquire from neighbours and/or even establish a history of the land through the green card. Had they obtained a copy of the green card, they would have established that the title deed presented before them was actually not the original issued one. He cited the case of:- “Esther Ndegi Niiru & Another -Versus - Leonard Gatei (2014) eKLR where Mutungi J held that:-
- “.....the rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners involving title to land to carry out due diligence that goes beyond merely obtaining certificate of official search.. Section 26(1)(a) and
- (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as ‘grabbed lands’ it is essential to endeavor to ascertain the history and/or root of the Title.
73. Further, he referred Court to the case of:- “the Environment And Land Court At Eldoret ELC No. 137 Of 2015 Daniel Kipruto Metto - Versus - Chase Bank (Kenya) Limited The Court Stated In Its Holding that:-
- “With the digital age, where people are developing software day in day out, banks should be ahead in innovative ways to curb any unforeseen and foreseeable compromise to their systems. Banks must be extra diligent when dealing with properties to be charged or mortgaged.”



74. It was thus our submission that the Plaintiffs land was wrongly charged by the 1st Defendant without his involvement, knowledge, participation and or consent. The title deed used for purposes of charging the Plaintiff land was a forgery and a fictitious title and thus our submission that this Court ought to revoke and cancel the said charge. In another the case of: “Githinga Kibutha – Versus – Versus Caroline Nduku ELCA No 16 of 2007 the court stated thus:-

“The Land Registration Act does not define fraud. Recourse must therefore be had to other sources of law. The Black’s Law Dictionary defines fraud thus:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

75. To demonstrate that the title held by the Plaintiff is the genuine title, a look at the serial number (717116) in the Plaintiff title deed which corresponds to the serial number (717116) in the green card, shows that the title held by the Plaintiff is the genuine title. In contrast that’s not the case with the title deed held by the Bank which was used to register the charge (932918).The above fact was admitted by the 1st Defendants witness in cross-examination who had confirmed that the serial numbers in the Green Card is the same one as the one contained in the original title with the Plaintiff. The charge created in favour of the 1st Defendant was never created by the rightful proprietor of the suit land and it was never created using the genuine documents of the suit land. There was a creation of a parallel but fake title deed which was used to get the sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=) from the 1st Defendant.

76. The Plaintiff was therefore claiming that there was fraud that had been perpetrated by the borrower in obtaining a loan facility from the 15th Defendant using forged land documents relating to his parcel of land above mentioned The whole transaction was marred with illegalities or fraud as the Plaintiff was not aware of the transaction, he never signed any bank documents, he never appeared before any advocates for purposes of signing any of the bank documents, he never gave out his property for purposes of creating a charge over it. The Plaintiff therefore rightfully claims that his property was fraudulently charged without his knowledge, involvement and or consent. Secondly, the Learned Counsel submitted that whether the Plaintiff was entitled to the relief claimed. It was not in dispute that the Plaintiff was and remained the registered owner of the above mentioned parcel of land. The issue of ownership was not contested by any of the parties. In fact, the same was properly admitted. He cited the provision of Sections 24 and 25 the Land Registration Act, No. 3 of 2012 created absolute ownership of land upon registration with all rights and privileges thereto, while the provision of Section 26(1) of the said Act created indefeasibility of title. Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



77. It was thus their submission was that the Plaintiff had demonstrated proper ownership of the land and we thus invite this Court to declare him as such, as the indefeasible owner of the suit property. The Learned Counsel asserted having aptly demonstrated herein above that the charge created over the Plaintiffs land was improper, wrongful, illegal null and void and we humbly invite this Honourable Court to declare the charge as wrongful, null and void. Having demonstrated that indeed the charge over the suit property was created through forged documents and is null and void, this court should thus issue an order for its cancellation or revocation in the register for the property. To buttress on this point, he was guided by the decision in the case of:- “ELC No.51 Of 2014 (O.S) Alice Chemutai Too – Versus - Nickson Kipkurui Korir, The Attorney General (Sued On Behalf Of the Chief Land Registrar) Consolidated Bank of Kenya. The Court had the following to say on cancellation of a charge that had been registered through a fraudulently obtained title:-

“Submissions of Mr. Odhiambo curious, that because of the charge, the register cannot be rectified. Mr. Odhiambo was of the opinion that it would be a dangerous precedent to set if I proceed to cancel the charge. On the contrary, it is my view that it would be a dangerous precedent to set, if I were not to proceed to cancel the charge. It would mean that all a person needs to do is to fraudulently acquire title, then proceed to charge it, and because of that charge, his fraudulent transactions will be sanitized. The fraudster would end up being unjustly enriched, for he will have money in return for the charge, which money he will obviously have no incentive to pay, and the bank will still be able to recover its money by a sale of the property. The looser will of course be the proper title holder....Having considered all arguments I frankly do not see how the title of the 1st Respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money.”

78. Similarly, the Learned Counsel in this case the title having been proven to have been fraudulently obtained, the subsequent charge created over a false title cannot stand. He prayed that the court allow this limb of the Plaintiff prayer. He cited the case of:- “Kenya Power & Lightning Company Ltd – Versus - Sheriff Molan Habib” court sated as follows on permanent injunctions:-

“It determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

In another case of: “Bandari Investments & Co. Limited - Versus - Martin Chiponda & 139 others the court stated:

“Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendants in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.



Having shown that the Plaintiff is the absolute and indefeasible owner of the subject property, he was entitled to all rights flowing from ownership of the property and these rights have to be upheld and protected by this court. This included the right to quiet possession of his property. He urged the Court to grant the permanent injunction as sought.

79. When it came to an award of general damages, the Courts were guided by the principles already established through various authorities in determining the appropriate award. To support this point, he referred Court to the Court of Appeal case of “Gitobu Imanyara & 2 others – Versus - Attorney General [2016] eKLR where it opined as follows:-

“.....the South African Case of “Dendy – Versus - University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“..The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

80. Therefore, he averred that the honourable should grant the Plaintiff this order as compensation for having his fundamental rights infringed. Further, he submitted that the principles of Exemplary damages were summarized as follows in the case of:- “Godfrey Julius Ndumba Mbogori & Another – Versus - Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR as follows:-

“The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes – Versus - Barnard [1964]AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the Government ii) cases in which the Defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the Plaintiff and iii) where exemplary damages are expressly authorized by statute”.

81. Additionally, the Learned Counsel informed Court that the categories of cases in which exemplary damages should be awarded were also set out, at paragraph 243 of Halsbury's Laws of England, as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

- (1) Oppressive, arbitrary on unconstitutional action by servants of government;
- (2) Conduct calculated by the Defendant to make him a profit which may well exceed the compensation payable to the Plaintiff;



82. He further stated that the issue was set out in the cases of:- “John – Versus - MGN Limited (Supra); Kipyator Nicholas Biwott – Versus - Dr. Ian West & Another (Supra); Juma Mikidadi – Versus - Ali Khalfan & Another (Supra); Standard Limited – Versus - G.N. Kagia T/A Kagia & Company Advocates (Supra) and Radio Africa Ltd & Another – Versus - Nicholas Sumba & Another (Supra) where the courts held that exemplary damages were awarded where the Defendant’s conduct was calculated to make some profits for the Defendant which would have exceeded the compensation payable to the Plaintiff.
83. In this instant case, the 1st Defendant went ahead and charged over the Plaintiff’s property without conducting proper due diligence at the detriment of the Plaintiff. Exemplary damages were necessary and hence urged this court to award the same. In conclusion, he submitted that the Plaintiff had proved his case on a balance of probabilities and hence to allow the Plaintiff’s claim as prayed.

A. The Written Submission by the 1st Defendant.

84. On 4th August, 2023 the Learned Counsels for the 1st Defendants the Law firm of Muriu Mungai & Company Advocates filed their written submissions. Mr. Kongere Advocate commenced his submissions by stating that the two claims by the Plaintiff through the Plaint dated 20th December, 2019 and the 1st Defendant’s through the Counter – Claim dated 10th December 2021 were tried in one. The first claim was the Plaintiff’s claim which essentially sought to declare as void, a charge created in favor of the 1st Defendant, over the Suit Property. The second action was a cross-suit. It would be dependent on the success of the Plaintiff’s suit. If it succeeded, then the 3rd Defendant and Mr. Mage, were sought to be held liable to compensate the 1st Defendant for the financial loss it would suffer.
85. The Learned Counsel then briefly narrated the parties’ respective cases to give some context of the case. With regard to the Plaintiff’s case was through the filed Plaint. He testified on 27th September 2022 by adopting his witness statement dated 20th September 2021 and produced all, bar one, of the twenty-one (21) documents in the List of Documents dated 15th October 2021, and the four (4) documents in the Supplementary List of Documents dated 11th February 2022. The Plaintiff also called PW - 2, Mr. Jacob Oduor, a forensic document examiner. Mr. Oduor testified on 12th June 2023. He produced the document examiner’s report dated 8th February 2020, which had been marked for identification. The Plaintiff’s case was that he is the registered owner of the Suit Property. He has, all through, been in custody of the original title to the Suit Property. However, he was surprised to learn that the Suit Property had apparently been charged to the 1st Defendant. On inquiry, he learnt that the charge was securing advances made to Mr. Mage. The Plaintiff maintained that he never offered to guarantee any loan to Mr. Mage, and therefore, any charge was a fraud by the 1st Defendant and Mr. Mage. The Plaintiff stated that he perused the records kept at the Kilifi land registry and found two discrepancies. First, the title at the land registry was missing the serial number 717116. Second, the signature on the LCB consent application form for the charge is different from his. For those reasons, the Plaintiff wants the declaration that the charge was a fraud and is for setting aside. He also prayed for a permanent injunction against any sale as threatened or at all.
86. On the other hand, the 1st Defendant filed a Statement of Defence and Counterclaim. It called one witness, Mr. Jackson Oire, who adopted his witness statement dated 19th May 2022 and produced the nine (9) documents in the List & Bundle of Documents dated 10th December 2021. As far as the 1st Defendant was concerned, it was presented with ex facie regular documents to be used as security for a loan of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00/=) that it was to advance to Mr. Mage. It cross - checked, as it was bound to, with the custodian of land records, the 3rd Defendant and received the all clear to proceed. Therefore, there was nothing



fraudulent in the manner it created its security, having given valuable consideration and exercised reasonable diligence. Thus, he urged that the Plaintiff's suit be dismissed. However, if the Court upset the 1st Defendant's charge because of some fault by either or both of Mr. Mage and the 3rd Defendant, then the 1st Defendant would have been deprived of its security which it would otherwise had. The loss of the security would expose the 1st Defendant to the tune of a sum of Kenya Shillings Eleven Million Three Thirteen Thousand Five Fourty Eight Hundred and three cents (Kshs. 11,313,548.03/=), which it sought from Mr. Mage and the 3rd Defendant. The 1st Defendant's Closing Submissions-Suit & Counterclaim 'entered appearance, filed defence and defended the suit' and therefore validated the summons to enter appearance. In point of fact there was no unconditional appearance or defence filed by the appellant. They were all expressly done under protest. The summons to enter appearance were thus invalid. The situation was worse when one notes that here, there was not even an attempt to take out the summons.

87. There was therefore nothing to validate, even assuming participation could validate summons. That then should be the quick end to the Plaintiff's suit. The Plaintiff founds his case on fraud supposedly committed by the 1st and 3rd Defendants. On "fraud" he cited the case of:- "Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & another [2000] eKLR, where where Tunoi JA (as he then was) held that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It was also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it was not allowable to leave fraud to be inferred from the facts. He stated that his understanding was that it was enough, if the Plaintiff, read as a whole, pleads fraud and gave the particulars of fraud. Here, the fraud, and its particulars were pleaded at Paragraphs 19 to 24 of the Plaintiff. First, it was said that the title deed at the land registry was different from that held by the Plaintiff in that a number, 717116, which was shown in the green card, appeared on the one held by the Plaintiff but not on the one at the land registry. Second, it was alleged that the signature on the Land Control Board application form was different from the Plaintiff's, therefore pointing to forgery. To the Learned Counsel the Plaintiff had not proven any of the occurrence of any forgery. He justified by giving several grounds. Firstly, the supposed "serial number" never advanced the Plaintiff's case. To begin with the numbers "717116" appearing in the green card meant it was the serial number on the title deed issued. It was of some interest that even the 3rd Defendant, the only person authorized by law to keep such records, never had a title deed with such a number. Thus, the Learned Counsel wondered where the Plaintiff got that document from and why what he held should override what the statutory custodian had.
88. According to the Learned Counsel, the Plaintiff was inviting the court to infer that the number 717116 on the green card meant that was the serial number of the proper title, and anything else was therefore fraudulent. But from the case of "Vijay Morjaria (Supra) was quite emphatic that:- "it is not allowable to leave fraud to be inferred from the facts". Secondly, on the alleged forgery. The Learned Counsel submitted that in the Plaintiff, the only document alleged to have been forged was the Land Control Board Consent application form (see Paragraph 23). No other document was pleaded as having been forged. However, during his testimony, the Plaintiff led evidence of alleged forgery of his signature on the Letter of Offer, Charge and Affidavit. This has been repeated in the submissions. The Learned Counsel stated that apart from "the Vijay Morjaria (Supra) case holding that the particulars of fraud must be pleaded, there was authority for the proposition that if a party led evidence that was at variance with the pleadings, that evidence must be rejected. On this point he referred Court to the case of:- "Independent Electoral and Boundaries Commission & another – Versus - Stephen Mutinda Mule & 3 others [2014]eKLR). To him, that was what the court should do with the evidence led on supposed forgery of the Letter of Offer, Charge and Affidavit. He argued that assuming that the court was to



be magnanimous and consider all the evidence even those that it should not consider, it fell short of proving the fraud charged.

89. With regard to the presumption of due execution of documents. Speaking of that presumption in relation to Wills, he cited the case of:- “Ndirangu – Versus - Ndirangu [2022]KECA 1296 (KLR) which stated that:-

“Where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the Testator, there is a rebuttable presumption of due execution (Omnia esse riteatta).

In the instant case it was held that there were official documents said to have been signed by the Plaintiff. The presumption operated to hold that they had in fact been so signed. If so signed, he cited the case of:- “Galana Oil Kenya Limited – Versus - Longonot Place Limited [2019] eKLR stated that:-

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or misrepresentations”.

90. According to the Learned Counsel, clearly the Plaintiff was to be bound by the contractual documents here, unless he could show that his signature, or what was said to be his signature, was procured through fraud. In other words, he must dislodge the presumption of due execution. In doing so, the Plaintiff referred to two facts. First, that he never appeared before any of the people it was said he appeared before to sign the documents. But whether or not the Plaintiff appeared before those people, would not matter if it was, in fact, his signature on the documents. It would only mean that he signed the documents but not in the presence of the people said to have been there. So, this fact, even if proven, never advanced the Plaintiff's case at all. The second argument if proven, was whether the signature appearing on the documents was not that of the Plaintiff. To the Counsel, the Plaintiff offered no proof. The solitary piece of evidence presented was a document examiners report by Mr. Jacob Oduor. That report, though presented as an expert report fell way short. First, Mr. Oduor confirmed that he was in the employment of the EACC; he never owned a laboratory of his own; and used the laboratory at his disposal as an employee of the EACC. The EACC is a public body sustained by public funds. It discharges functions of a public nature to the general public and not to individuals on their private ventures. For Mr. Oduor to convert resources at his disposal because of his public office and use it for his private gain was a violation of various laws. To buttress his point, he cited the provision of Section 11 of the Public Officer Ethics Act, 2003 and Section 46 of the Anti-Corruption and Economic Crimes Act 2003 and the case of:- “Kenya Ports Authority – Versus - Fadhil Juma Kisuwa [2017] eKLR where Court held:-

“No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the Plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa [“from an immoral cause”], or the transgression of a positive law of this Country, there the court says he has no right to be assisted.

91. To the Learned Counsel, Mr. Oduor's conduct was a transgression of the law and urged Court not to rely on that transgression to aid the Plaintiff's case. Secondly, the Learned Counsel averred that although Mr. Oduor alleged that he was qualified, when asked for his academic testimonials, he admitted that he never had them but would provide on request. On this aspect the Learned Counsel



referred Court to the case of:- “Kagina – Versus - Kagina & 2others [2021] KECA 242 (KLR) where the Court stated that:-

“.....without proof and submission of the witnesses’ credentials to the court, there was nothing to demonstrate that the said witness was indeed a forensic expert”.

Thirdly, Mr. Oduor made the honest, admission that he relied on photocopies of documents. This was inadequate and wrongful. He cited the case of:- “Samson Tela Akute – Versus - Republic [2006] eKLR which stated that:-

“.....the witness conceded that a photocopy's accuracy depends on the machine used and the skill of the person making the photocopy...Further the witness stated that he did not know if the photo-copying was made from another copy or from the original. He stated that the original signature and the signature on a photocopy can differ depending on the machine used and how the photocopying was done. Taking into account these concessions and the defence advanced by the Appellant, we think that the trial Court should have been cautious in accepting the experts evidence.

He further referred Court to “the Reeta R. Gupta's "Challenges in forensic examination of photocopied document" published in IP International Journal of Forensic Medicine and Toxicological Sciences, January-March,2018; 3(1):12-14 which also discounted Mr. Oduor's decision to rely on photocopies and come to the conclusions he came to. The author says:-

“ All the handwriting features are not exactly present in the photocopied documents. When the photocopied signatures are compared with the known original standard, the accurate Judgment regarding line quality, ink morphology, ink gooping, hesitation, tremor, etc. is sometimes not possible to conclude. Expressing the opinion on poor quality of reproduced document is not justified.

92. The Contention by the Learned Counsel was that Mr. Oduor made no attempt to call for the original documents; he was content to rely on copies of copies filed by the 1st Defendant. Fourthly, Mr. Oduor wanted the court to believe that he examined some documents. But the documents that he said he examined were not part of his report. His testimony was that they were the same documents that were in the 1st Defendant's bundle of documents. To support his point, he cited the case of:- “Stephen Kinini Wang'ondu – Versus - The Ark Limited [2016] eKLR, where the Court stated that:-

“ A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

93. He opined that the court should not assume that the documents which the expert examined were the same documents in the 1st Defendant's bundle. It was settled law that a court was not bound by the expert evidence, even in the absence of another expert to counter the first. The court could reject the evidence of an expert as it was the case of Mr. Oduor's evidence. Once that evidence was rejected, there was nothing left to prove the allegations of forgery which, as the authorities held must be proven to a standard higher than a balance of probability but not beyond reasonable doubt (see “Kagina – Versus - Kagina (Supra)).

94. 10

To the Learned Counsel, the Plaintiff was not entitled to the reliefs sought. It was the Plaintiff's duty to prove his case to the required standard. He must prove his case independently of any weakness in the



defence. If he failed, as already shown here, his case must be dismissed (see “Kerai Ghanshyam v James Wambua Muendo [2021] eKLR). If the Plaintiff proved what he had alleged, then the declarations and injunctions he sought, became irresistible. He would however not still have a basis for claiming general or exemplary damages. From the case law which he cited, and he agreed, exemplary damages are awarded in two restricted categories, none of which was found here. But he only stated these things for prosperity, for he had already shown that the Plaintiff had failed to prove his case; and so, it was for dismissal. PARAGRAPH 95.

With regard to the Counter – Claim. He stated that 1st Defendant had proven its Counter – Claim. The Learned Counsel clarified that the claim was only being made only if the Plaintiff succeeded. He noted that Mr. Mage chose to remain silent, as he was entitled to. Similarly, although the 3rd Defendant filed a defence against the Plaintiff’s claim, he never filed any against the 1st Defendant’s Counter - Claim. On authority, the 1st Defendant’s burden of proof remained, but it had been significantly lessened in the absence of any rebuttal. As against Mr. Mage, there was evidence that he applied for a loan; it was advanced to him; he repaid four (4) instalments but then defaulted. The Counsel observed that it was appreciated in the case of:- “Khan & another – Versus - Habib Bank AG Zurich & another [2022] KEHC 130 (KLR) that a statement of account was prima facie evidence of its contents. The 1st Defendant had presented that statement of account at pages 85 to 87 of its documents. Under the provision of Section 90 of the Land Act 2012, the 1st Defendant had various rights against the Plaintiff as a guarantor of Ezekiel’s debt. But none of those rights could be exercised if the court sustained the Plaintiff’s suit. That was because the court would have effectively held that the Plaintiff never guaranteed the debt. A discharge of a guarantor however never discharged the principal debtor, whom the lender could still pursue, as the 1st Defendant now did Since the 1st Defendant had shown there was default, that was sufficient to prove the case against Mr. Mage.

96. As regards the 3rd Defendant. The Learned Counsel asserted that the success of the Plaintiff’s claim meant the 1st Defendant would lose its sole security for the loan advanced to Mr. Mage. The reason they made claim against the 3rd Defendant was because they relied on the accuracy of the 3rd Defendant’s records. Indeed, the 3rd Defendant maintained they were accurate. Relying on that, the 1st Defendant lawfully and procedurally registered a charge over the Suit Property and advanced colossal amounts on the strength of that security. That reliance on the 3rd Defendant was not unreasonable. To support his argument, the Counsel cited the case of:- “Wambui – Versus - Mwangi & 3 others [2021] KECA 144 (KLR) which held that:-

“The Government as the keeper of the master record of all land and their ownership guarantees indefeasibility of all rights and interests shown in the register against the entire world”.

97. But it now seemed, that the keeper of the master record may have allowed the existence of two titles over the same parcel. He further referred Court to the case of:- “Simon Nyoro Ngugi – Versus - John Baptista Irungu Kariuki & another [2018] eKLR where Court considered such to be a breach of statutory duty by stating that:-

“To maintain parallel registers in respect of the same parcel of land is not only criminal but also an abdication of statutory duty on part of the Land Registrars”.

98. Therefore, the very fact of existence of two titles; and the registration of the 1st Defendant’s charge when it should not have been, was all the evidence that the 1st Defendant needed to succeed against the 3rd Defendant. Having proven its case against Mr. Mage and the 3rd Defendant as shown, the 1st



Defendant was entitled to the reliefs sought. He argued that the keeper of master records had abdicated that duty and an innocent party had suffered, see the case of:- “Wambui – Versus - Mwangi (Supra)” pointed out to the remedy thus:-

“.....if by any chance the register of the title was inaccurate by reason of malfeasance by land registry officials, any party(ies) deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property”.

99. The damage suffered by the 1st Defendant was the loss of security for a loan which stood at a sum of Kenya Shillings Eleven Million Three Thirteen Thousand Five Forty Eight and three cents (Kshs. 11,313,548.03/=). From the valuation report, the Suit Property was worth about a sum of Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.00/=). Thus, the 1st Defendant was fully secured were it not for the 3rd Defendant's malfeasance. As against Mr. Mage, was a claim for breach of contract and/or for recovery of a debt – that is recovery of a liquidated sum.
100. The breach of contract entitled the 1st Defendant to special damages, which was the money it would have received had the breach not occurred. Alternatively, the 1st Defendant may recover the sum as a debt that was due and owing. As to interest was in the discretion of the court on the rate and duration (Section 26 of the Civil Procedure Act, Cap. 21). The practice of the court however has been to award interest on special damages from the date of filing suit (See the case of:- “Heinz Broer – Versus - Buscar (K) Limited & others [2019] eKLR). He urged the Court to maintain that trend.
101. In conclusion, the Learned Counsel submitted that the Plaintiff had not proven its case. Therefore, he was not entitled to any of the reliefs he sought. That would render any consideration of the counterclaim, which was no doubt merited superfluous. The Court should dismiss the Plaintiff's suit with costs. But if it allowed it, then it should also allow the 1st Defendant's Counter - Claim with costs.

VI. Analysis and Determination

102. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes. This case proceeded whereby the Plaintiff and the 1st Defendant gave evidence and produced several documents in support of their cases.
103. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has crafted the following four (4) issues for its determination. These are:-
 - a. Whether the suit instituted by the Plaintiff through a Plaint dated 20th September, 2021 has any merit whatsoever.
 - b. Whether the charge and the guarantee should be declared null and void ab initio and the title issued following sale by public auction should be cancelled
 - c. Whether the Counter Claim dated 10th December, 2021 by the 1st Defendant is sustainable?
 - d. Whether the Plaintiff is entitled to the relief sought including compensatory damages for conversion?
 - e. Who will bear the Costs of suit and the Counter claim?



Issue No. a). Whether the charge and the guarantee should be declared null and void ab initio and the title issued following sale by public auction should be cancelled

104. Under this sub - title, the Honourable Court takes cognizance of the fact that the main substratum of the case is whereby the Plaintiff holds that at all material times to this suit, is and remained the registered and the beneficial owner of Land Reference No. Kilifi/Mtwapa/2258 situate in Mtwapa having validly acquired the subject property from one, Mr. Andrew Katana Mwaeba sometime in January 2010. The Plaintiff avers that he was issued with an Original Title Deed with respect to the aforementioned parcel of land on 20th January 2010 being Title Deed Serial No. 717116, which serial number was endorsed on the Green Card. Immediately after the said acquisition, the Plaintiff took possession of the subject property and has been in possession of the same to date with no interference whatsoever from any third party.
105. At all material times of the filing of this suit, the Plaintiff has been undertaking farming on the said parcel of land. On 23rd July, 2021 he received a call from the 2nd Defendant Representative who informed the Plaintiff that he had documents that he needed to serve the Plaintiff. On the same date, the Plaintiff met with the representative of the 2nd Defendant at a restaurant trading in the names and style of Blue Room in Mombasa wherein after exchanging pleasantries, the said 2nd Defendant's representative served the Plaintiff with a Notification of Sale dated 23rd July 2021, Letter dated 23rd July, 2021 and Sale Form 4 of 23rd July, 2021 and also instruction letter dated 22nd July, 2021. Upon a quick perusal of the said documents, the Plaintiff was surprised to learn that his property herein above mentioned was due to be sold by way of public auction on the grounds that it had been used to secure a loan facility by Mr. Mage from the 1st Defendant at its Eldoret Branch which loan the said borrower had defaulted in paying. The Plaintiff was quite shocked by the said development as he has not guaranteed any loan using his property above mentioned and further he was not aware of the said Mr. Mage in addition to the fact that he still held his Original Title Deed issued to him on 20th January, 2010 being Serial No. 717116.
106. The 1st Defendant argued that it was the Plaintiff who signed the offer letter guaranteeing the third party for the loan facility and using his parcel of land in this case the suit property as collateral. He who alleges must prove. This degree of prove is well enunciated in the case of "Miller – Versus - Minister of Pensions [1947] cited with approval in D.T. Dobie Company (K) Limited – Versus - Wanyonyi Wafula Chabukati [2014] eKLR". The court stated:-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
107. Further, the provision of Section 107 of the Evidence Act Cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts. It is in dispute that the Plaintiff charged the suit property with the 1st Defendant for a loan facility a fact that the 1st Defendant. This Honourable Court perceives this issue extremely serious and with severe consequences almost bordering on criminality. However, and as I entirely concur with the Submissions by the Learned Counsel for the Plaintiff, that the evidence by the 1st Defendant rather callous, insensitive, negligent and wanting to say the least. I say so based on several reasons. Firstly,



in this era of high information technology and where financial institutions are being duped through hacking, the court would have expected a rather higher standard of risk management measures by them particularly on their customers' documents and security to be used for collateral reasons. The level of due diligence by the bank should have been higher than what was casually depicted here. Secondly, and confirmed through its witness DW – 1 the bank ought to have internally cross checked all the documents before approving them for registration for the Charge by noticing some of the obvious discrepancies from the documents. According to the Plaintiff through PW - 2 the document examiner who examined the questionable documents from the bank confirming that there was a charge on the suit property, he noticed discrepancies with title numbers on the documents held by the 1st Defendant and the ones with the Plaintiff. This testimony was confirmed by DW - 1 – who testified that he was aware that the Plaintiff had testified that he still had the original title deed. He was also aware that the title deed used for the charge was not the Plaintiff's title deed. The title on page 59 had the serial number 932918 while the one used to charge the land in the name of the Plaintiff which title he was shown had the serial number 717116. He confirmed that these documents were different. He went through all the documents filed by the Plaintiff. He observed that the serial number in the green card was different. It contained the number 717116 as the one contained in the original title with the Plaintiff. Amongst other discrepancies that the Plaintiff observed in the title deed used by the 1st Defendant to charge were that:-

- i. The serial number on the said title deed was 932918 while in the Plaintiff's Original Title is and remains 717116.
 - ii. There was no mention of a sub-division details in the said title.
108. Further, from a close observation, the signature on the certified copy of the Land Control Board Application form is quite different and distinct from the signature of the Plaintiff. The documents that were used to wrongfully charge his property were fraudulent, forged, fictitious and absolutely illegal. Thirdly, even after all this incident had occurred and the bank seem to be claiming that they had incurred losses in terms of a colossal amount of Kenya Shillings Eleven Million Three Thirteen Thousand Five Hundred Eighty Four and Three cents (KShs. 11,313,548.03) the 1st Defendant continues to conduct itself in such a cavalier, casual and careless carefree attitude. For instance, with all due respect, the evidence by DW – 1 had no value addition at all but full of hearsay. Being a Legal Officer based at Nairobi who was not in employment when this transaction took place and who was never in touch with the officers who handled the matter as they had already left employment was wanting to say the least. His testimony was that he relied on the documents available to him and what he was told by unnamed colleagues. The Honourable Court will forever wonder why such an established financial institution never saw valuable reason to have mandated an officer from the Eldoret branch where this heinous incident took place to appear in Court as a witness. There was no evidence to the effect that the 1st Defendant had lodged a complaint of criminal nature with the police nor instituted a Civil Suit separately for recovery of the lost monies. The Court is left thinking aloud with such taste in the mouth that clearly this was an inside and well choreographed syndicate. I need say no more.
109. As regards the 3rd Defendant is more pathetic. Ideally, this is meant to be the legal and Government custodian of all documents for safekeeping in this Country. It is an office entrusted with so much wealth related documentations and information. According to the provision of Section 12 and 13 of the Land Registration Act, No. 3 of 2012, the Land Registrar means the Chief Land Registrar, the Deputy Land Registrar, County Land Registrar and the Land Registrars appointed by the Government. Their role and legal mandate of Land Registrar as founded under the provision of Section 14 of the Act has been overstated the umpteenth times by this Court's ought to exercise a high standard of care, resilience, prudence and diligence to these valuable property. However, from the



instant case it is rather pathetic and disappointing the manner in which the 3rd Defendant conducted himself. He acted without any colour of right, unlawfully and without any regard to the sanctity of the Plaintiff Title, intentionally, deliberately, illegally and without due regard to the law proceeded register a charge over the Plaintiff without following the due process of law and while knowing well that the title deed used for registration was forged title deed. I discern that this was deliberate and was part of the syndicate working close collusion and cohort with the 1st Defendant and Mr. Mage. I strongly hope one day the truth will be revealed to set all us free as it is stated from the Holy scripture – John 8:32. I will not hesitate to chastise this Land Registrar, personally for acts of Misfeasance as a Public Officer. I am send air - waves early enough that these acts of omission and Commission of forgery of documents in the all public offices and particularly the Land Registry has to stop once and for all. (See my decision in the case of:- ELC (Mombasa) No. 168 of 2009 – Kenya Anti Corruption Commission – Versus – Bernsoft Limited and Sammy Mwaita eKLR (2022).

110. The essence of a guarantor is to discharge liability when the principal debtor fails to honor his duty. This principle was enunciated in *Geraldine Andrews & Richard Millet* in “The Laws of Guarantees” at page 156 as herein under:-

“A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.”

By its very nature, a guarantee is distinct from the agreement which gives rise to the obligation guaranteed. The principal debtor is neither a party to the guarantee nor considered as one with the guarantor. Consequently, the rights and/or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee as was held by the Court of Appeal in “*Robert Njoka Muthara & another – Versus - Barclays Bank of Kenya Limited & another* [2017] eKLR”.

111. The Plaintiff was quite shocked by the said development as he has not guaranteed any loan using his property above mentioned and further he was not aware of the said Mr. Mage in addition to the fact that he still held his Original Title Deed issued to him on 20th January, 2010 being Serial No. 717116. The Plaintiff was convinced that there was fraud that had been perpetrated by the borrower in obtaining a loan facility from the 1st Defendant using forged land documents relating to his parcel of land above mentioned. He thereafter visited the Kilifi District Lands Registry for purposes of ascertaining the state of his parcel of land and confirming whether indeed his property had been charged to the Bank as was notified through the letters by the 2nd Defendant.
112. On 28th July 2021, he went and applied for an official search at the Kilifi District Lands Registry with respect to LR No. Kilifi/Mtwapa/2258 whereby he was issued with an official search dated 28th July 2021 indicating that the property thought still owned by him, was charged to the 1st Defendant on 24th July 2015 vide a Charge dated 24th July 2015 for a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs.6,500,000/-). On 29th July 2021, the Plaintiff states that his advocates wrote a letter addressed to the Lands Registrar of Kilifi requesting to be supplied with copies of the Charge dated 24th July 2015 and to date, the Plaintiff has not been supplied with a copy thereof from the lands registry. The Plaintiff having established that his property was wrongfully charged without his knowledge, involvement and or consent, he reported the matter to the Kilifi Police Station and the same was recorded as OB No.4 of 11th August 2021. On the same date, the Sub County Criminal Investigation Officer of Kilifi County wrote a letter addressed to the Lands Registrar Kilifi District



requesting for certified copies of Green Cards, Searches, Charges, and all documents to facilitate in carrying out their investigation. The Plaintiff managed to secure certified copies of documents from the Kilifi Lands Registry, save for the Charge aforementioned. From the certified copies of the documents secured from the land's registry, it was evident to the Plaintiff that there was outright fraud that was perpetrated, forged title deed was created that was used to wrongfully charge the Plaintiff's property to secure the facility issued by the 1st Defendant.

113. As pertains to the Burden of proof, I fully concur with the Submissions by the Learned Counsel for the 1st Defendant and I beg to reiterate his rightful legal position and the myriad of authorities cited that allegations of fraud and/or illegalities must be established and/or proven to a standard above the balance of probability, but not beyond reasonable doubt. In support of the foregoing position, I can do no better than to adopt the holding in the Decision in the cases of: "Kagina – Versus Kagina" (Supra) ; the Viraj Morajaria (Supra) and "Kinyanjui Kamau -Versus - George Kamau Njoroge [2015] eKLR", where the Honourable Court of Appeal observed as hereunder:-

"It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:

"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

114. On the other hand, it is also important to take note of the holding of the Court of Appeal in the case of "*Kuria Kiarries & 2 Others – Versus - Sammy Magera* (2018) eKLR", where the Honourable court of appeal adopted a similar stance as in the case of "*Kinyanju Kamau* (Supra)". Suffice it to say, that the evidence tendered by the Plaintiff on the issue of forgery of his own signature and the apparent



illegalities, were not challenged. For clarity, the persons against whom the allegations were made chose not to participate in the trial or to tender any evidence, whatsoever.

115. In my view having the documentation for the said facility being marred as fraudulently obtained by the Plaintiff being that the said documents the 1st Defendant confirms had discrepancies, the conclusion of the Court is that there was no such agreement between the bank and the Plaintiff to warrant the charging of the suit property.
116. This Honourable Court also takes note that a Letter of Offer is a contract on its own once the person it is offered to signed and returns it. The provision of Section 3(3) of the Law of Contract Act provides as follows:-

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

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

117. The key question in this suit revolves around the legal tenor of a letter of offer which is formally expressed to be subject to an anticipated formal contract that never crystallizes. This question was the focal question of consideration by the Court of Appeal [Gicheru JA, Kwach JA, and Muli JA] in “East African Fine Spinners Limited (in receivership) & 3 others – Versus - Bedi Investments Limited [1994] eKLR”. Expressing himself on this question, Gicheru JA adopted the following words of Lord Westbury LC in “Chinnock – Versus - The Marchioness of Ely 4 DE G J&S 638 at 646”:

“As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.”

Of course these averments above by the Learned Judges can only be disputable where fraud has been established and in this case, it is a well-established fact that the Plaintiff did not sign the letter of offer and was not familiar with Mr. Besa who the 1st Defendant disbursed the loan facility too thereby not being privy to the contract between the 1st Defendant and the third party therefore his property should not have been charged by the 1st Defendant. The doctrine of privity of contract demands that a contract can only be enforced between the parties. The Plaintiff was not a party to the letter of offer which I believe was meant to bind only the 3rd Party on the facility granted by the 1st Defendant.

118. In conclusion, I find that the 1st Defendant had the obligation to have conducted thorough and intensive investigation of the title before charging it. For this reason being that the Plaintiff was not



privity to the letter of offer and therefore his land should be discharged from the said charge being that he had no obligation to guarantee a charge that was obtained through fraudulent means.

Issue No. b). Whether the Counter Claim by the 1st Defendant is sustainable

119. Under this sub title this Honourable Court takes cognizance that the 1st Defendant in its Counter claimed brought a claim against Mr. Mage, who was not a party to the suit as per the Plaintiff filed by the Plaintiff. I shall therefore examine the sustainability of the Counter - Claim as it is.

In the case of “County Government of Kilifi – Versus - Mombasa Cement Limited 2017 eKLR” the Court defined a counterclaim as;

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross- claim of any kind against A which by law is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim”.

120. In the case of:- “County Government of Kilifi case” (Supra) above, the Defendant sought an injunction against a property which though owned by the Plaintiff had not been included in the plaint as the suit property. The Court of Appeal held that Order 7 Rule 3 of the Civil Procedure Rules, 2010 gives a Defendant in a suit permission or a carte blanche to raise a counterclaim based on any right or claim against the Plaintiff even where the subject matter or cause of action may be different from the original suit. That Order 7 Rule 3 of the Civil procedure Rules, 2010 gives the Court wide discretion to reject or admit a Counter - Claim.

The provision of Order 7 Rule 3 provide as follows:-

A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof.

The Provision of Order 7 Rule 8 states as follows: -

“Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the Plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence”.

The provision of Order 7 Rule 8 gives the Defendant permission to raise a Counterclaim against the Plaintiff together with any other persons. Any other persons give the Defendant a leeway to bring a counterclaim even against a person not already a party to the suit. The rationale of Order 7 rule 8 in my considered view is to avoid multiplicity of proceedings and claims based on the same or different causes of action between the parties to the suit.

Under Order 1 Rule 10 (2) and 10(4) of the Civil Procedure Rules 2010 as to substitution and addition of parties, read as follows:-



- (2) *The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, (emphasis mine) be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*
- (4) Where a defendant is added or substituted, the Plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the Plaint shall be served on the new Defendant and, if the court thinks fit, on the original Defendants.
121. The plain interpretation of these rules is that they clearly recognise that a Defendant by his Counter - Claim may join to the Counter - Claim parties other than the Plaintiff. The parties so joined, if they are not already parties to the suit with the Plaintiff, must then be brought into the suit by serving them with the Defence and Counter - Claim and allowing them time to appear and defend, if they are inclined to do so. But either the Plaintiff or any of the parties so joined by the Defendant in the Counter - Claim may be of the view that the claim raised by the Counter - Claim ought not to be disposed of by way of Counter - Claim, but in an independent suit, then in such a case, the Plaintiff or any of the parties joined in the counterclaim, may apply to the court, at any time before filing a reply to the Counter - Claim, for an order that such Counter - Claim be excluded, and the court may, on the hearing of the application, make such order as it deems just. So that while rule 2 applies only as between a Plaintiff and a Defendant, rule 11 applies as between the Plaintiff and/or any other party joined in a Counter - Claim, on the one hand, and the Defendant on the other hand.
123. But under rule 11 the Plaintiff or any other person joined by a Defendant in his Counter - Claim or both the Plaintiff and such other person may apply to the court before filing a reply to the counterclaim for an order that the Counter - Claim may be excluded.
124. That being the legal position, this Honourable Court reserved the discretion of sustainability of a Counter claim where no party through an application has contested the same, I proceed to examine the merits of the Counter Claim by the 1st Defendant.
125. In its Counter Claim, the 1st Defendant sought for the Plaintiff's suit to be dismissed with costs or in the alternative, Judgment be entered on the Counter - Claim against the Land Registrar-Kilifi and Mr. Mage, jointly and severally, as follows;
- a. Kshs. 11,313,548.03 being the outstanding loan as at 29th September 2021.
 - b. Interest at contractual rate of 20.41% per annum from 29th September 2021 until payment in full.
 - c. Costs of the original suit and the counterclaim together with interest at court rates from the date of judgment until payment in full.
- From the Counter Claim, the facts were that:-
- i. The 1st Defendant reiterated the contents of the paragraphs in the statement of defence.
 - ii. The 1st Defendant in the Counter – Claim, Mr. Mage is a male adult of sound mind residing in Eldoret and Kakamega.



- iii. The 1st Defendant, relying on records kept by the 3rd Defendant in the Plaintiff, advanced to Ezekiel Besa Mage a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00/=).
- iv. By reason of success of the Plaintiff's claim, the 1st Defendant had lost the sole security it took for the loan advanced to Mr. Mage.
- v. With the loss of the sole security, the 1st Defendant was unable to recover the outstanding loan of a sum of Kenya Shillings Eleven Million Three Thirteen Thousand Five Fourty Eight Hundred and Three cents (Kshs. 11,313,548.03) as at 29th September 2021. It continued to accrue interest at contractual rate of 20.41% per annum.
- vi. The 1st Defendant's loss aforesaid is attributable to and is the direct or indirect result of the 3rd Defendant's failure and neglect to perform or properly perform his statutory duties to guarantee the accuracy of the records relating to the Suit Property.
- vii. Mr. Ezekiel Besa Mage received a sum of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00) from the 1st Defendant. He undertook to repay the sum as per the Letter of Offer dated 19th June 2015.
- viii. Despite demand for repayment, Mr. Ezekiel Besa Mage had failed, refused and neglected to repay the sum owed. The sum owed stood at a sum of Kenya Shillings Eleven Million Three Thirteen Thousand Five Fourty Eight Hundred and Three cents (Kshs.11,313,548.03/=) as at 29th September 2021 and continues to accrue contractual interest at the rate of 20.41% per annum.
- ix. The 1st Defendant's claim against Mr. Mage is for breach of contract and for recovery of a debt that is due and owing.
- x. There was no suit pending and there have been no previous proceedings between the parties in the Counter - Claim raising the same or similar issues and the cause of action related to the 1st Defendant/Plaintiff in the Counter - Claim.

126. This Honourable Court has established that the title submitted to the 1st Defendant was fraudulently obtained therefore was not meant to be charged. But then again this being the Environment and Land Court may not have the jurisdiction to deal with commercial matters.

127. Jurisdiction is everything and this court should first establish the same before it can proceed further in analyzing and making a determination of the Party's claim. The jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the Constitution of Kenya and Section 13(2) of the ELC Act No. 19 of 2011. Article 162(2)(b) which states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land.

128. In the now 'locus Clasicus' case of:- "Owners of the Motor Vessel "Lilian S" – Versus - Caltex Oil (Kenya) Limited [1989] KLR 1" Nyarangi, JA expressed himself as follows:

"Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".



129. In particular the provisions of Article 162(2) of the Constitution of Kenya 2012 provide as follows: -

- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
 - (a); and
 - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

130. The provisions of Section 13 (2) of the ELC Act clearly gives power to ELC to “hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues..

131. From the pleadings, the 1st Defendant has indicated that there were was evidence of some repayment of the loan by Mr. Mage until he started defaulting. They stated they would demonstrate this through the bank statements (See paragraphsof the Counter – Claim). Additionally, the 1st Defendant has sought for the specific prayers from the Counter Claim which relate to an order requiring the 1st Defendant in the Counter Claimer to refund the loan facility advanced to him. Therefore, by and large these are pure matters of accounts and financial obligations between the 1st Defendant and Mr. Mage. To me, I would resolve the issue by utilizing the predominant purpose test. The purpose of the Counter - Claim is predominantly to recover the monies due to the 1st Defendant and not the ownership of the suit property as partly argued by the 1st Defendant. Clearly this is a dispute or declaration that can only be resolved by the High Court – Commercial division. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3).

132. In saying this I seek refuge and wise guidance from the now famous decision by the Court of Appeal case of “Co - operative Bank of Kenya Limited – Versus - Patrick Kangethe Njuguna & 5 Others [2017] eKLR”, where the Court of Appeal determined that the ELC jurisdiction to deal with disputes connected to ‘use’ of land and do not include mortgages, charges, collection of dues and rents are within the civil jurisdiction of the High Court. The Court further held that exclusive jurisdiction of the ELC is limited to Articles 162 (2) (b) of the Constitution and Section 13 of the ELC Act which are not concerned with accounting questions whereas the jurisdiction of the High Court in accounting matters is evidenced by Article 165(3) of the Constitution.

133. For all these reasons, therefore, I strongly discern that the issues in the Counter - Claim squarely fall within the jurisdiction of the High Court (Commercial and Tax Division). Thus, it is my own opinion that that the Counter - Claim lodged by the 1st Defendant herein be and is hereby struck out for lack of jurisdiction.

Issue No. c). Whether the Plaintiff is entitled to the relief sought

134. Under this sub-title the Plaintiff seeks among other prayers, compensatory damages for unlawful conversion. The primary issue herein is whether the Plaintiff has proved his case for conversion. Conversion is a common law remedy for the unlawful interference with the goods of another. Winfield and Jolowicz on Tort 15th Edn page 588 provides that conversion may be committed by wrongfully



taking possession of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded.

135. According to the Black's Law Dictionary 9th Edition, conversion is defined as the act of appropriating the property of another to ones benefit or to the benefit of another. The Halsbury's Laws of England, 4th Edition at page 355 para 548 defines conversion that exists in three forms as follows:-

To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in doing so to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. Liability in conversion is strict and fraud or other dishonesty is not a necessary ingredient in the action.

A second form of conversion is committed where the goods are detained by the defendant. A wrongful detention gave rise to an action for detinue before detinue was abolished (by the Torts Interference with Goods Act 1977) and now gives rise to an action in conversion. The normal method of establishing a wrongful detention is to show that the claimant made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with the demand.

The third form of conversion lies for the loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.

136. Thus to succeed in his claim, the Plaintiff must establish that the 1st Defendant unlawfully took possession of his property with the intention of asserting a right over it inconsistent with hers as the owner of the property, or that the property though lawfully taken was later converted in a manner inconsistent with the rights of the Plaintiff. The 1st Defendant has conceded in his Counter - Claim that his claim was not against the Plaintiff. It is also important note that this Honourable Court has held before in this Judgment that the charged property was done so through fraudulent means therefore to that extent the 1st Defendant registered a charge over his property was not within the legal purview therefore an unlawful conversion.

137. Resultantly, I am of the considered view that the Plaintiff suffered loss and damage by the act of the 1st Defendant of using his property as security without his knowledge and going to the extent of executing a sale with the help of the 2nd Defendant without the knowledge of the Plaintiff or any due diligence. Apart from being denied the use of his security as the proprietor, the Plaintiff has incurred expenses in regard to the Court proceedings as well as other incidental expenses.

138. I wish to rely on the persuasive decision of "John Chumia Nganga – Versus - Attorney General & another [2019] eKLR" the court made reference to the case of "Peter Ndungu – Versus - Ann Waithera Ndungu & 2 others" where the court stated:-

The issue then that follows for determination is on the question of damages to be awarded to the Plaintiff. In determining this question, I am guided by the passage in Halsbury's Laws of England at pg 389 para 616 on the measure of damages. The authors state:-

Nominal measure of damages: In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected.



Accordingly, an award of damages in conversion must operate neither by way of penalty to the defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss.

Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation and the goods are not later returned.

139. The Plaintiff is therefore entitled to compensation for the value of the property as at the time of the conversion at the discretion of the Court. In the foregoing this Honourable Court holds that the Plaintiff is therefore entitled to a sum of Kenya Shillings Six Million (KShs. 6,000,000/-) for the unlawful conversion.
140. The Plaintiff also sought for exemplary and/ or aggravate damages. As stated by the Court of Appeal in the case of “Miguna Miguna – Versus - The standard Group Ltd & 4 others [2017] eKLR” while quoting the case of John – Versus - GM Limited [1993] QB 586”:-
- “Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurried defence of justification or failure to apologize.”
141. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example “Ken Odondi & 2 others – Versus - James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR” and “Standard Ltd – Versus - G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR”.
142. In the case at hand, the through his advocates, the Plaintiff wrote a letter to the 1st Defendant wherein they advised the bank if the fraud perpetrated on the Plaintiff subject property as well as on them as the title documents used to secure the loan was a forgery and fraud as the Plaintiff has in his possession the original title deed issued to him by the lands office. The Plaintiff demanded that the 1st Defendant to stop any intended sale and further requested to be supplied with copies of the said Charge instrument as well as any deed of guarantee that the Plaintiff allegedly signed. The Bank responded vide their letter dated 17th August, 2021 which was sent in advance by email, whereby instead of issuing the Plaintiff with the copies of the Charge that he had requested, they sought to be supplied with copy of the title and the OB extracts that were in the Plaintiff's possession. On 18th August, 2021, the Plaintiff through his lawyers responded to the Bank's letter aforementioned whereby he enclosed to them the scanned copy of the title deed and the OB extracts that they had requested for and further demanded that they withdraw their instructions from the 2nd Defendant to sale the Plaintiff's property as well as commence the process of having the wrongful charge registered over the Plaintiff's register at the lands discharged. The charge that was registered against the Plaintiff's property is wrongful, illegal, unlawful and ought to be declared as such and the sale scheduled to be conducted by the and 1st Defendant on 27th September, 2021 ought to be stopped.
143. I assess damages for defamation at Kenya Shillings Five Million (KShs. 5, 000,000/=) and exemplary and aggravated damages of and Misfeasance in Public office by the 1st Defendant and 3rd Defendant – specifically the two Land Registrars – Mr. M. S Chinyaka of Staff Personal numbers 097 and Mr. S. K. Gatuiru of personal numbers – 356 (1210812021) who served at the Land Registry at Kilifi within this period at a sum of Kenya Shillings Two Million (KShs.2, 000,000/=) hence a total sum adding up to a sum of Kenya Shillings Seven Million (KShs. 7, 000,000/=) jointly and severally. (See for example “Mary Koli Kitonga – Versus - Gheto Radio Limited [2020] eKLR”).



Issue No. d). Who will bear the Costs of suit by the Plaintiff and the Counter claim by the 1st Defendant

144. It is now well established that the issue of costs is at the discretion of Courts. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

145. In other words, costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

146. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

147. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

148. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”



149. In the instant case, as this Honourable Court has opined above, the Plaintiff has proved his claim against the Defendants and therefore the Plaintiff has the costs of the suit as per the Plaint dated 20th September, 2021 to be paid by the 1st, 2nd and 3rd Defendants jointly. There shall be no costs for the Counter Claim dated 10th December, 2021.

VII. Conclusion and Disposition

150. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the 1st, 2nd & 3rd Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgement be and is hereby entered in favour of the Plaintiff against the 1st, 2nd & 3rd Defendants jointly and severally as pleaded in the Plaint dated 21st September, 2021.
- b. That a Declaration be and is hereby made that the Plaintiff is the absolute, indefeasible and registered owner of Land Reference No. Kilifi/Mtwapa/2258.
- c. That a declaration be and is hereby made that the Charge dated 24th July 2015 registered over Land Reference No. Kilifi/Mtwapa/2258 by the 1st Defendant was wrongful, unlawful, fraudulent, illegal and thus void.
- d. That an order be and is hereby made directing the Registrar of Lands, Kilifi to cancel and revoke the entry of the Charge registered on the Plaintiffs register for parcel of land Kilifi/Mtwapa/2258 at the Lands Registry.
- e. That a permanent injunction do issue restraining, barring and or stopping the 1st and 2nd Defendants whether by themselves, their servants, agents, employees and or anyone acting on their authority from advertising for sale, offering to sale, selling by public auction or by private treaty, disposing off, leasing, further charging and or in any way interfering in any manner with the Plaintiff's parcel of land known as Kilifi/Mtwapa/2258.
- f. That this Honourable Court hereby awards the Plaintiff general damages for the unlawful conversion to the tune of a sum of Kenya Shillings Six Million (Kshs 6,000,000/-) to be paid by the 1st Defendant.
- g. That this Honourable Court also awards the Plaintiff exemplary and aggravated damages (acts of Misfeasance in Public office) to the tune of Kenya Shillings Seven Million (Kshs. 7, 000,000/-) to be paid by the 1st and 3rd Defendants (specifically the two Land Registrars – Mr. M. S. Chinyaka of Staff Personal numbers 097 and Mr. S. K. Gatuiru of personal numbers – 356 (1210812021 both of whom handled the matter while serving at the Land Registry, Kilifi during this period) jointly and severally for the unlawful, illegal, wrongful actions is charging the Plaintiff's property in favour of the 1st Defendant.
- h. That the Plaintiff shall have the costs of the suit filed under the Plaint dated 20th September, 2021 to be paid by the 1st 2nd & 3rd Defendants jointly and severally.
- i. That there shall be no award of costs for the Counter Claim by the 1st Defendant dated 10th December, 2021.
- j. That the Interests on (g) and (h) above shall apply at Court rates from the date of filing of this suit.

It is so ordered accordingly.



JUDGMENT DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI (JDUGE),
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. M/s. Amina Advocate holding brief for Mr. Khalid Advocate for the Plaintiff.
- c. Mr. Kongere Advocate for the 1st Defendant.
- d. No appearance for the 2nd Defendant.
- e. Mrs. Winnie Waswa Advocate holding brief for Mr. Mwandeje Advocate for the 3rd Defendant.

