



**Mwihaki v Kigathi & 2 others (Environment & Land Case
572 of 2015) [2024] KEELC 3558 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 572 OF 2015**

JO MBOYA, J

APRIL 4, 2024

BETWEEN

REUBEN GACHAU MWIHAKI PLAINTIFF

AND

JAMES KIGATHI 1ST DEFENDANT

GUESTCARE IDEAL HOMES LIMITED 2ND DEFENDANT

IRENE WANJIKU GIKANA 3RD DEFENDANT

JUDGMENT

1. The suit herein was commenced and/or originated vide Plaintiff dated the 22nd June 2015; and in respect of which the Plaintiff herein originally impleaded the 1st and 2nd Defendants only. Furthermore, the Plaintiff herein sought for various reliefs essentially as against the 1st and 2nd Defendants.
2. Upon being served with the Plaintiff and summons to enter appearance, the 1st and 2nd Defendants duly entered appearance and filed a statement of defense and counterclaim dated the 3rd December 2015; on and in respect of which the 1st and 2nd Defendants sought for various reliefs, touching and/or concerning the suit property, namely, L.R No. 7785/824 [I.R No. 30597/592]; which is also the property claimed by the Plaintiff.
3. Be that as it may, the Plaintiff thereafter sought for and obtained leave to file and serve an amended Plaintiff culminating into the filing of the amended Plaintiff dated the 24th November 2017; and in respect of which the Plaintiff sought for the following reliefs;
 - a. A declaration that the Plaintiff is the bona fide and registered proprietor of L.R No. 7785/824, situate in Runda Estate.
 - b. A declaration that the Defendants' action are in breach of law, oppression and colors and a threat to breach of peace, law and order.



- c. A permanent injunction against the Defendants by themselves, by their agents, servants, employees and/or anyone from evicting the Plaintiff, its agents, employees, servants, sub-tenants and further be restrained from taking possession and attempting to take possession, entering, breaking into, violating peace or otherwise, or interfering with the Plaintiff's tenancy over the premises situate on L.R No. 7785/824, situate at Runda Estate, Nairobi.
 - d. General and punitive damages for trespass.
 - e. Special damages of Kes.1, 160, 000/= only.
 - f. Monthly security fee payments to Inter-security Services Ltd at Kes.40, 000/= only per month from September 2017 to the date of determination of this matter.
 - g. Monthly security fee compensation until the Defendants cease to interfering with the Plaintiffs ownership rights over and in respect of L.R No 7785/824, Runda Estate.
 - h. Costs of this suit.
 - i. Interest on (d), (e), (f), (g) and (h) at court rates.
 - j. Any other relief this Honorable court may deem fit and just to grant.
4. Instructively, upon being served with the amended Plaint, the 1st and 2nd Defendants filed an amended statement of defense and counterclaim which was subsequently re-amended on the 22nd June 2020. For coherence, the 1st and 2nd Defendants sought for the following reliefs;
- a. Declaration that title L.R No. 7785/824 [I.R No. 30597/572] issued on the 3rd September 1996 is the valid and genuine title to the suit property.
 - b. A declaration that the title L.R No. 7785/824 [I.R No. 30597/572] issued on 29th November 2007 is invalid, null and void.
 - c. A declaration that the company is the legal owner of L.R No. 7785/824 [I.R No. 30597/572] issued on the 3rd September 1996 and an order directing the land registrar to reinstate the company as the registered owner of the suit property.
 - d. A permanent injunction restraining the Plaintiff whether by himself, his servants, his agents, representatives and/or employee or any one claiming under him, howsoever from charging, selling, re-entering, taking possession, remaining thereon, erecting or continuing to erect any building of structure on L.R No. 7785/824 [I.R No. 30597/572] or in any way interfering with company's quiet possession and enjoyment of the suit property.
 - e. Mesne profits.
 - f. Costs of the suit and the counterclaim.
 - g. Any other relief the court deems fit.
5. Suffice it to point out that the further amended statement of defense and counterclaim, by and on behalf of the 1st and 2nd Defendants impleaded and brought forth a 3rd Defendant to the counterclaim, namely, Irene Wanjiku Gikanga.
6. Arising from the joinder of the 3rd Defendant herein, same [3rd Defendant to the counterclaim] duly entered appearance and thereafter filed a statement of defense and counterclaim dated the 26th April



2019 and in respect of which the 3rd Defendant to the counterclaim [counter-claimer] sought for the following reliefs;

- a. A declaration that the Plaintiff [3rd Defendant] herein is the legal owner of all that piece of land L.R No. 7785/824 [I.R No. 30597/572] situate in Nairobi.
 - b. A declaration that the sale and transfer of L.R No. 7785/824 [I.R No. 30597/572] situated in Nairobi to the Defendants is unlawful and fraudulent and order the cancelation of the Defendant's title deed.
 - c. An order of Eviction be issued against the Defendants.
 - d. Mesne profits.
 - e. Costs of the suit.
 - f. Such other or further relief this Honorable court shall deem fit and proper to grant.
7. It is worthy to point out that upon being served with the two [2] sets of statement of defense and counterclaims, by and on behalf of the 2nd and 3rd Defendants, the Plaintiff to the main suit filed appropriate replies thereto. For clarity, the Plaintiff filed a Reply to defense and defense to counterclaim by the 2nd Defendant dated the 2nd April 2019.
8. Other than the foregoing, the Plaintiff to the main suit also filed a Reply to the statement of defense and defense to counterclaim by the 3rd Defendant dated the 6th march 2020.
9. Notably, the pleadings in respect of the instant matter thereafter closed and the suit was subjected to the usual pre-trial directions. For good measure, the Parties herein duly appeared before the Honourable court on the 15th June 2021; and thereafter confirmed that same had filed and exchanged all the requisite pleadings; List and bundle of documents and witness statements. Furthermore, the Parties also confirmed that the matter beforehand was therefore ready for hearing.
10. Pursuant to and at the instance of the Parties, the court proceeded to and fixed [scheduled] the matter herein for hearing.

Evidence by the Parties:

a. Plaintiff's Case:

11. The Plaintiff's case revolves around the evidence of one [1] witness, namely, Reuben Gachau Mwihaki. Same testified as PW1.
12. It was the testimony of the witness [PW1] that same is a business person, currently residing within the city of Nairobi. Furthermore, the witness averred that same is privy to and conversant with the facts of the instant matter.
13. Additionally, it was the testimony of the witness that as pertains to the subject matter same [witness] has since recorded a witness statement dated the 24th November 2017 and wherein same has supplied the details pertaining to and concerning the purchase, acquisition and ultimate registration of L.R No. 7785/824 [I.R No. 30597/572] unto him.
14. Furthermore, the witness thereafter sought to adopt and rely on the witness statement dated the 24th November 2017. For good measure, the witness statement dated the 24th November 2017 was thereafter adopted and constituted as the evidence in chief of the witness.



15. On the other hand, the witness herein referred to a List and bundle of documents dated the 24th November 2017; and thereafter sought to produce the said documents as evidence [Exhibits] before the Honourable court.
16. There being no objection to the production of the various documents at the foot of the List dated the 24th November 2017, same [documents] were tendered and produced before the court as Exhibits P1 to P13, respectively.
17. Additionally, the witness averred that same had filed an amended Plaintiff dated the 27th November 2017, together with a verifying affidavit thereto. In this regard, the witness sought to adopt and rely on the contents of the amended Plaintiff.
18. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that the suit property was transferred to and registered in his name on the 23rd April 2015. However, the witness indicated that the certificate of title which same has produced before the court does not show when the suit property was transferred and registered in his name.
19. On further cross examination the witness averred that same [witness] lodged and/or mounted a complaint with the police at Runda pertaining to and concerning with the interference with the suit property. For good measure, the witness averred that the complaint was lodged against the 1st Defendant herein.
20. Whilst under further cross examination, the witness averred that the 1st Defendant appeared before the police and thereafter indicated that same [First Defendant] had original title documents to and in respect of the suit property.
21. On the other hand, it was the testimony of the witness that during his visitation to the police station, the 1st Defendant indicated that same would be availing an original copy of the certificate of title of the suit property to the police.
22. Be that as it may, it was the further testimony of the witness that same bought and/or purchased the suit property in terms of a sale agreement which was entered into and executed between him [witness] and the vendor. In any event, the witness stated that same thereafter proceeded to and paid the deposit at the execution of the sale agreement.
23. Whilst under further cross examination, the witness averred that the balance of the purchase price was agreed to be paid upon the transfer of the suit property to and in favor of himself [witness].
24. Nevertheless, it was the testimony of the witness that even though same paid the entire purchase price to and in respect of the suit property, same [witness] has however, not produced before the court any evidence to confirm such payments.
25. Additionally, it was the testimony of the witness that even though same [witness] was issued with a certificate of title over and in respect of the suit property, same [witness] has however not adduced the original certificate of title before the court.
26. In any event, the witness has averred that the original certificate of title is under the custody of his previous advocates, namely, M/s CN Kihara & Company Advocates.
27. On further cross examination, the witness averred that the letter dated the 11th May 2010, which was produced as Exhibits P11 was given unto him by his erstwhile advocates, namely, M/s CN Kihara & Co Advocates.



28. Furthermore, it was the evidence of the witness that upon purchasing the suit property, same was constrained to and indeed employed security guards to take care of the suit property and to avert the interference thereof by the Defendants. In this regard, the witness averred that same was obliged to and indeed paid various security fees to and in favor of the security firm.
29. On further cross examination, the witness stated that same [witness] has since tendered and produced assorted receipt[s] before the Honourable court showing the various payments which were made on account of security.
30. Other than the foregoing, the witness also averred that same conducted a search over and in respect of the suit property prior to and or before entering into the sale agreement. However, the witness added that same has not produced the certificate of official search before the court.
31. On cross examination by Learned counsel for the 3rd Defendant, the witness testified that same bought and/or purchased the suit property for the sum of Kes. 8, 500, 000/= only. In any event, the witness added that the purchase of the suit property started in the year 2012, but same was concluded in the year 2014.
32. It was the further testimony of the witness that at the time of the transfer of the suit property in his favor, the collector of stamp duty assessed the suit property to be worth Kes.25, 000, 000/= only.
33. Nevertheless, the witness added that same was not privy to and/or knowledgeable of the basis [foundation] upon which the suit property was assessed in the sum of kes.25, 000, 000/= only, for purposes of Stamp Duty.
34. On further cross examination, the witness averred that even though same paid the stamp duty, same [witness] has however, neither tendered nor produced any evidence to show payments of stamp duty.
35. Whilst under further cross examination, the witness averred that even though same paid the monies at the foot of the sale agreement, same [Witness] has not tendered nor produced any evidence to show such payments.
36. Additionally, it was the testimony of the witness, that same [witness] has since looked at and/or perused the statement of defense and counterclaim by the 3rd Defendant. However, the witness added that same did not file any statement of defense to the 3rd Defendant's counterclaim.
37. Whilst under cross examination, the witness averred that he [witness] got to know of the details pertaining to the letter dated 11th May 2010 on or about the year 2017/2018. Nevertheless, the witness averred that the letter in question was obtained from his witness previous counsel, who handled the sale transaction on behalf of the witness.
38. Other than the foregoing, the witness testified that the suit property was transferred to and registered in his name on the 23rd April 2014.
39. On further cross examination, the witness averred that even though same procured and obtained the letter dated 11th May 2010, same has however not challenged the contents therein. In any event, the witness averred that same is not aware whether someone else has a certificate of title to and in respect of the suit property.
40. Other than the foregoing, it was the testimony of the witness that it is him [witness] who paid the various monies at the foot of the receipt tendered before the court to the security firm. Further and at any rate, the witness added that same [witness] is also referred to as Reuben Wanjahia.



41. On further cross examination, the witness averred that even though same is also referred to as Rueben Wanjahia, same [witness] does not have any document to confirm that Reuben Wanjahia is also his name.
42. On re-examination, the witness stated that the original certificate of title in respect of the suit property is currently with his [witness] erstwhile advocates, M/s CN Kihara & Co Advocates.
43. Similarly, the witness also averred that the receipt for payment of stamp duty is also with his erstwhile [previous] advocates.
44. Additionally, it is the evidence of the witness that the letter dated the 11th May 2010, which same has adduced before the court was brought to his attention by his erstwhile advocate after same [witness] had bought the suit property.
45. With the foregoing testimony, the Plaintiff's case was duly closed.

b. 1st and 2nd Defendants' Case:

46. The 1st and 2nd Defendants' case is similarly premised on the evidence of one [1] witness, namely, James Michael Ndungu Kigathi. Same testified as DW1.
47. It was the testimony of DW1 that same [witness] is a director of the 2nd Defendant company. Furthermore, the witness averred that same is conversant with and privy to the facts of the instant matter.
48. Additionally, the witness averred that same has since recorded a witness statement dated the 25th June 2018 and which witness statement [witness] sought to adopt as his evidence in chief.
49. Suffice it to point out that the witness statement dated the 25th June 2018; was thereafter adopted and admitted as the evidence in chief of the witness.
50. On the other hand, the witness also adverted to a List and bundle of documents dated the 24th July 2017; and sought to adopt and produce the various documents as Exhibits before the Honourable court.
51. Instructively, the documents at the foot of the list dated the 24th July 2017, but which are attached to the index dated the 23rd January 2022; were thereafter adopted and admitted as Exhibit[s] D1 to D9 on behalf of the 1st and 2nd Defendants.
52. On the other hand, it was the testimony of the witness that the 1st and 2nd Defendants have also filed a statement of defense and counterclaim dated the 22nd June 2020; and which counterclaim the witness sought to adopt and rely on before the court. For good measure, the witness invited the court to grant the reliefs sought at the foot of the further amended Statement of Defence and counterclaim.
53. On cross examination, by learned counsel for the 3rd Defendant the witness stated that the suit property was bought and/or purchased by the 2nd Defendant from one Mr. Godfrey Ngatia Njoroge. Furthermore, the witness added that the property was transferred to and in favor of the 2nd Defendant in April 2009.
54. On further cross examination, the witness stated that same was privy to and knowledgeable of the letter dated the 11th May 2010. In any event, the witness averred that the said letter dated the 11th May 2010 was addressed to the director of the 2nd Defendant company by the chief land registrar.



55. Whilst under further cross examination, the witness herein averred that prior to the issuance of the letter/decision dated the 11th May 2010, the Chief land registrar had summoned both the 1st and 2nd Defendants and that in any event same [witness] attended and participated in the proceedings before the Chief land registrar.
56. Additionally, it was the evidence of the witness that the decision by the Chief land registrar at the foot of the letter dated the 11th May 2010; has since been challenged by both himself and the 2nd Defendant.
57. On cross examination by learned counsel for the 2nd Defendant to the counterclaim, the witness herein averred that prior to and or before purchasing the suit property, the 2nd Defendant conducted an official search over and in respect of the suit property. In any event, the witness added that same [witness] was indeed issued with a certificate of official search over and in respect of the suit property.
58. Nevertheless, the witness admitted that even though same was issued with a certificate of official search over and in respect of the suit property, same [witness] has neither produced nor tendered a copy of the certificate of official search before the court.
59. It was the further testimony of the witness that the 2nd Defendant bought and/or purchased the suit property after same [suit property] was advertised in one of the local daily newspaper[s]. Furthermore, the witness added that upon purchasing the suit property, the 2nd Defendant paid the requisite stamp duty at the foot of the transfer of the suit property in favor of the 2nd Defendant.
60. On further cross examination, the witness averred that the 2nd Defendant has issued a resolution to authorize and sanction the filing of the counterclaim. However, the witness averred that same has neither tendered nor produced the resolution by and on behalf of the 2nd Defendant.
61. Whilst under further cross examination, the witness averred that same has never carried out any subsequent search over the suit property. For good measure, the witness averred that same only carried out a search over the suit property before the company bought the suit property.
62. At any rate, it was the testimony of the witness that same executed a transfer over and in respect of the suit property. Nevertheless, the witness averred that same has neither tendered nor produced a copy of the transfer instrument before the court.
63. Whilst under further cross examination, it was the testimony of the witness, that upon purchase and acquisition of the suit property, the 2nd Defendant carried out and/or undertook various development[s] on the suit property. However, the witness added that the development[s] which were carried out by the 2nd Defendant were temporary in nature and comprised of temporary structures erected on the suit property.
64. On cross examination by learned counsel for the Plaintiff, the witness averred that same [witness] purchased and/or acquired the suit property in the year 2009. In any event, the witness averred that the 2nd Defendant entered upon and remained on the suit property between the year 2009 up to 2015, when the same [2nd Defendant] was evicted from the suit property by the Plaintiff.
65. Whilst under further cross examination, the witness averred that the 2nd Defendant was in occupation of the suit property through a caretaker, who was employed to take care of the suit property.
66. Other than the foregoing, the witness averred that the 2nd Defendant herein has since taken action against the vendor who sold the suit property to and in favor of the 2nd Defendant. For good measure, the witness averred that the 2nd Defendant has filed a suit against the vendor and in respect of which



- same [2nd Defendant] has sought for refund of the purchase price, which had been paid to the said vendor.
67. On further cross examination, the witness averred that subsequently, the 2nd Defendant procured and obtained a Judgment for refund of the purchase price from the vendor herein. Instructively, the witness added that the Judgment was for the refund of the sum of Kes.12, 000, 000/= only, which had been paid to the vendor.
 68. Besides, the witness averred that even though the 2nd Defendant had obtained a Judgment against the vendor, the 2nd Defendant herein had not recovered the purchase price [consideration] from the vendor, namely, Godfrey Ngatia Njoroge.
 69. On the other hand, it was the testimony of the witness that same shall not be calling the vendor who sold the suit property to the 2nd Defendant, as a witness.
 70. On further cross examination, it was the testimony of the witness that same [witness] was indeed summoned by the Chief land registrar over and in respect of the dispute pertaining to ownership of the suit property.
 71. In any event, the witness added that arising from the summons, same [witness] proceeded to attend the proceedings before the Chief land registrar.
 72. On re-examination by learned counsel for the 1st and 2nd Defendant/Counter-claimers, the witness averred that same has since filed Judicial Review proceedings to challenge the decision by the Chief land registrar in terms of the letter dated the 11th May 2010.
 73. Nevertheless, the witness stated that same has not tendered a copy of the proceedings in respect of the Judicial Review matter. On the other hand, the witness also testified that same has neither tendered nor produced a copy of the said proceedings.
 74. Other than the foregoing, it was the testimony of the witness that the 2nd Defendant filed a suit against the vendor, who sold the suit property to the 2nd Defendant and furthermore same [2nd Defendant] has since obtained a Judgment against the vendor for Refund of the Purchase price [consideration].
 75. On further re-examination, the witness stated that even though the 2nd Defendant has procured and obtained a Judgment against the vendor, same [2nd Defendant] has however not recovered the purchase price which was decreed at the foot of the Judgment.
 76. With the foregoing testimony, the case by and on behalf of the 1st and 2nd Defendants was duly closed.

c. 3rd Defendant's/ Counter-Claimer's Case:

77. The 3rd Defendant's case is similarly premised on the evidence of one [1] witness namely, Irene Wanjiku Gikang'a. same testified as DW2.
78. It was the testimony of the witness [DW2] that same is a farmer and currently resides at Limuru, within the county of Kiambu. Besides, the witness also avers that same is also the legal administratrix of the Estate of Mr. Kariuki Gikana, [now deceased]. In this respect, the witness averred that same is conversant with the facts of the instant matter.
79. On the other hand, the witness averred that same has also recorded a witness statement over and in respect of the instant matter. For good measure, the witness adverted to the witness statement dated the 26th April 2019.



80. Furthermore, the witness thereafter sought to adopt and rely on the witness statement dated the 26th April 2019 and which witness statement was duly adopted and admitted as the evidence in chief of the witness.
81. Other than the foregoing, the witness intimated to court that same had filed a List and bundle of document dated the 26th April 2019; and thus same sought to tender and produce the said documents before the court.
82. Suffice it to point out that the documents at the foot of the List dated the 26th April 2019; were thereafter produced and admitted before the court as Exhibits D1 to D17, on behalf of the 3rd Defendant/Counter-claimer.
83. Besides, the witness alluded to a statement of defense and counterclaim dated the 26th April 2019, together with a verifying affidavit attached to the counterclaim. Further and in addition, the witness thereafter sought to adopt and relied on the contents of the said statement of defense and counterclaim.
84. On cross examination, by learned counsel for the Plaintiff, the witness herein pointed out that though same resides and lives at Limuru, the suit property is however situated at Runda. In any event, the witness added that the suit property was purchased and or acquired by her late husband, namely, Kariuki Gikana, now deceased.
85. On further cross examination, the witness averred that same did not participate in the purchase and/or acquisition of the suit property. To the contrary, the witness averred that the suit property was bought by her late husband.
86. It was the further testimony of the witness that upon the death of her husband, Kariuki Gikana, now deceased, same procured and obtained a Grant of letters of administration which was thereafter confirmed in January 2002. Furthermore, the witness testified that the suit property was one of the assets left behind by the deceased and same [suit property] is contained in schedule at the foot of the Grant.
87. It was the further testimony of the witness that the suit property was bequeathed to Irene Wangari and Christine Wangari Gikang'a, who are the beneficiaries of the suit property. In any event, the witness added that the named beneficiaries are her daughters.
88. On further cross examination, the witness averred that Wangari Gikang'a is not a party to the instant suit. Besides, the witness also added that same [witness] does not have an authority in court from Wangari Gikang'a.
89. In any event, it was the testimony of the witness that it is her [witness] who has filed the instant suit before the court. Nevertheless, the witness has averred that even though the suit property was bequeathed to the various beneficiaries, the suit property has neither been transferred nor registered in favor of the beneficiaries.
90. Additionally, it was the evidence of the witness that even though the Grant of letters were duly confirmed and the suit property bequeathed to Irene Wangari and Christine Wangari Gikang'a, the property has not been transferred to and registered in their name because the parcel file in respect of the suit property has not been traceable at the land registry.
91. Furthermore, it was the evidence of the witness that the Estate of the deceased, namely, Kariuki Gikana, has not been distributed to date. For good measure, the witness averred that the estate is still under administration.



92. Whilst under further cross examination, the witness averred that the certificate of title in respect of the suit property was hitherto deposited with Backlays bank Kenya Ltd, [now Absa Bank Plc] by her late husband. Nevertheless, the witness clarified that neither her late husband nor herself sold the suit property to the Plaintiff herein or at all.
93. On the other hand, the witness averred that the suit property belongs to Estate of the deceased and not otherwise.
94. On cross examination by learned for the necessary party [namely Mr. Allan Kamau, the Principal Litigation Counsel], the witness averred that same has previously carried out a search over and in respect of the suit property. Nevertheless, the witness averred that the search in question was carried out by her advocates.
95. On further cross examination, the witness stated that even though same has previously carried out a search over and in respect of the suit property, same [witness] has not produced the search before the court.
96. On the other hand, it was the testimony of the witness that the certificate of title in respect of the suit property is under the custody of her advocate. In any event, the witness added that the transfer vide transmission of the suit property to the relevant beneficiaries has never been concluded because the original parcel file has never been traced.
97. Other than the foregoing, it was the testimony of the witness that same is privy to and/or aware of the proceedings that were conducted by the Chief land registrar. In this regard, the witness added that same indeed participated in the said proceedings culminating into the decision vide letter dated the 11th May 2010.
98. Furthermore, it was the testimony of the witness that the Plaintiff herein did not participate in the proceedings in question.
99. Whilst under further cross examination, the witness averred that same is aware of a Deed of assent which was executed in respect of the suit property. In any event, the witness added that the Deed of assent was presented to the Land Registry.
100. However, on further cross examination, the witness added that the registration of Deed of assent was frustrated by the land office.
101. On re-examination, by learned counsel for the 3rd Defendant, the witness averred that same is one of the administratrix of the estate of the deceased. In any event, the witness added that the Estate of the deceased has not been distributed and hence the assets are still under the administration of the administratrix.
102. On further re-examination, the witness averred that the suit property has neither been transferred nor registered in the names of the beneficiary [ies] because of the illegality that has been committed by the Plaintiff herein.
103. On the other hand, it was the evidence of the witness that following the proceedings which were conducted before the chief land registrar, same [the Chief land registrar] proceeded to and upheld the title in favor of the deceased. Furthermore, the witness averred that Chief land registrar also cancelled the parallel title which had hitherto been issued in favor of the 2nd Defendant herein.
104. As concerns the registration of the Deed of assent, the witness averred that Deed of assent was duly lodged for registration and same was indeed registered.



105. On the other hand, it was the testimony of the witness that the suit property has not been transferred in the names of the heirs of the Estate of the deceased. To the contrary, the witness averred that the suit property is still under the administration by the designated administratrix.
106. As concerns whether or not same has the requisite capacity to file the counterclaim, the witness confirmed that same was duly constituted as the administratrix of the Estate of the deceased. In this regard, the witness has reiterated that same is seized of the requisite capacity.
107. With the foregoing testimony, the 3rd Defendant's case was duly closed.

d. Necessary/Interested Party's Case:

108. The necessary party's case is anchored and premised on the evidence of two [2] Witnesses, namely, Wilfred Muchai Kabue and Charles Kipkirui Ng'etich, who testified as IPW 1 and IPW2, respectively.
109. It was the testimony of IPW 1, that same is currently the Assistant Director of Survey, working in the Ministry of lands, public works, housing and urban development. In any event, the witness added that same is also a licensed surveyor, as well as a full member of the Institution of Surveyors of Kenya [ISK].
110. Additionally, the witness averred that same has worked with the Department of survey for a total of 29 years and in this regard, the witness added that same is thus conversant with the facts of the subject matter.
111. On the other hand, the witness testified that same has since recorded a witness statement dated the 21st January 2022, pertaining to and concerning the facts of the instant matter. In this regard, the witness sought to adopt and rely on the witness statement under reference.
112. Suffice it to point out that the witness statement dated the 21st January 2022; was thereafter adopted and admitted as the evidence in chief of the witness.
113. On the other hand, the witness adverted to a list and bundle of document dated the 21st January 2022; filed by and on behalf of the necessary party and thereafter the witness sought to adduce [produce] documents 1, 2, 4, 5; 14 to 18, respectively.
114. There being no objection to the production of the named document, same [documents] were thereafter produced as exhibits 1, 2, 4, 5; 14 to 18, respectively on behalf of the necessary party.
115. On cross examination by learned counsel for the Plaintiff, the witness confirmed that other than being the Assistant Director of Survey, same is also a licensed surveyor. Furthermore, the witness also averred that same is conversant with the facts of the instant matter.
116. Other than the foregoing, the witness testified that the records at the director of survey shows that the land was registered in the names of Stanley Kipkurui Rotich, Philip Murianka Keya, Francis Mburu Kimani and Peter Njoroge Wakaba, respectively.
117. In any event, the witness averred that the names of the said persons were contained in a copy of certificate of lease which was attached to the survey plan [F/R].
118. Other than the foregoing, it was the testimony of the witness that the documents, namely survey plans, which same [witness] has referred to relates to the year 2014. Whilst under further cross examination, the witness averred that same has also tendered and produced before the court a copy of certificate of title in respect of the suit property.



119. Nevertheless, the witness averred that the back page of the document at page 63 of the necessary party bundle of documents shows that the suit property was transferred to and registered in favor of the Plaintiff.
120. On further cross examination, the witness averred that same [witness] did not come across any document bearing the name of Irene Gikang'a. Furthermore, the witness added that same did not come across any survey plan bearing the name of the 3rd Defendant.
121. On cross examination by learned counsel for the 3rd Defendant, the witness testified that the Deed plan over and in respect of the suit property was generated on the 6th November 1995.
122. In any event, the witness testified that prior to the preparation of a Deed plan, survey of the designated land must be carried out and/or undertaken either by the Director of survey or by an approved licensed surveyor.
123. On further cross examination, it was the testimony of the witness that the suit property was previously part of a larger piece parcel of land which was subsequently subdivided and culminating into various plots.
124. For clarity, the witness averred that the larger parcel of land was L.R No. 7785/10/R. Whilst under further cross examination, the witness testified that after the subdivision, the resultant plots which emanated from the subdivision were escalated to the Chief land registrar for registration.
125. Other than the foregoing, it was the testimony of the witness that a Deed plan was indeed prepared over and in respect of the suit property and that the Deed plan which same has produced before the court corresponds with the 3rd Defendant's Deed plan.
126. In any event, the witness averred that the cadastral plan number 253/29 relates to L.R No. 7785/10/563. It was the further testimony of the witness that the suit property, does correspond with the 3rd Defendant's documents.
127. In any event, the witness averred that the certificate of title in favor of the Plaintiff herein does not capture the original number of the land [property].
128. Whilst under further cross examination, the witness averred that the certificate of title by the 3rd Defendant tally with the cadastral plan that same [witness] has produced before the court.
129. Furthermore, it was the testimony of the witness that it is the cadastral plan and the Deed plan that are ordinarily forwarded to the Chief land registrar for purposes of registration.
130. Additionally, it was the evidence of the witness that the survey and preparation of the Deed plan were concluded around the year 1995. However, the witness stated that same is not aware of when the cadastral plan and the deed plan were forwarded to the Chief land registrar.
131. At any rate, it was the testimony of the witness that same [witness] is not aware whether any certificate of title had hitherto been issued in the year 1996.
132. On re-examination, by learned counsel for the necessary party, the witness averred that the documents that is ordinarily forwarded to the chief land registrar for purposes of registration is the Deed plan.
133. In in any event, the Witness averred that the Deed plan, that was forwarded to the Chief Land Registrar, referred to the property, namely, L.R No. 7785/10/564.
134. Other than the foregoing, it was the testimony of the witness that same has produced and tendered before the court the various documents which were obtaining from the office of the Director of survey.



135. The second [2ND] witness who testified on behalf of the necessary party was Charles Kipkurui Ng'etich. Same testified as IPW 2.
136. It was the testimony of the witness that same [Witness] is currently the Deputy Chief Land registrar at the Ministry of lands, public works , housing and urban development. Furthermore, the witness averred that same has since worked for the Ministry for the last 18 years.
137. Additionally, the witness averred that as pertains to the instant matter, same [witness] has since recorded a witness statement dated the 24th January 2022. In this regard, the witness has thereafter sought to adopt and rely on the contents of the witness statement.
138. For good measure the witness statement dated the 24th January 2022; was thereafter adopted and admitted as the evidence in chief of the witness.
139. Additionally, the witness adverted to the List and bundle of documents dated the 21st January 2022; and thereafter sought to produce documents numbers 3; 6 to 13, respectively. In this respect, the named documents were thereafter produced as exhibits 3; 6 to 13, respectively on behalf of the necessary party.
140. On cross examination by learned counsel for the 3rd Defendant, the witness stated that by virtue of being the Deputy Chief Land Registrar, same [witness] is conversant with the process pertaining to registration of land. In any event, the witness averred that same has outlined the process relating to the registration of land at the foot of his witness statement.
141. Other than the foregoing, the witness testified that by virtue of his office, same [witness] has custody of various records pertaining to land situate within the city of Nairobi, including the suit property.
142. Besides, it was the testimony of the witness that one of the documents which falls under his custody is the Deed file. Furthermore, the witness averred that the Deed file will contain various documents relative to the particular parcel of land.
143. Whilst under further cross examination, the witness averred that same has produced and tendered before the court some of the documents which were obtained from the Deed file. Nevertheless, the witness admitted that same has not produced the entire Deed file and the documents therein.
144. On further cross examination, it was the testimony of the witness that same has not brought before the court the documents which were relevant to the suit property; and in any event, the once that were sought for by the attorney general.
145. Whilst pressed further, the witness stated that same has brought before the court the documents that same [witness] found in the Deed file. Nevertheless, the witness has averred that same has not brought before the court the entire records.
146. Other than the foregoing, it was the testimony of the witness that the suit property was first registered in the name of Stanley Kipkurui Ng'etich, Philip Indiaka Keya, Francis Mburu Kimani and Peter Njoroge Wakaba.
147. At any rate, the witness added that the said persons [details in terms of the preceding paragraph], were registered as the owners of the suit property on the 29th November 2007.
148. Be that as it may, it was the evidence of the witness that even though the suit property was registered in favor of the four named persons on the 29th November 2007, same [witness] has conceded that he has not brought to court a copy of the transfer instrument from M/s Mae Properties Ltd to the first registered owners.



149. Additionally, it was the evidence of the witness that same [witness] is also conversant with the correspondence file. In any event, the witness averred that the correspondence file will ordinarily contain various correspondence pertaining to and concerning a particular property. However, the Witness averred that a correspondence file is ordinarily under the custody of the Director of Land Administration and not the Chief Land Registrar.
150. Whilst under further cross examination, the witness averred that a certificate of title will ordinarily issue upon [after] receipt of a Deed plan.
151. Other than the foregoing, upon being referred to the letter dated the 11th May 2010 signed by Ms E N Gicheha, the witness indicated that the said letter was directed to the 3rd Defendant herein. Furthermore, the witness confirmed that the letter in question was directed to the 3rd Defendant.
152. Further and in any event, the witness added that the author of the letter, namely, Elizabeth Gicheha was once a Principal Registrar of Title at the Ministry of lands.
153. On re-examination, the witness averred that same has brought to court the documents which same [witness] found in the Deed file. Furthermore, the witness added that same has brought to court the documents which in his [witness view] are relevant to the dispute before the court.
154. On further re-examination, the witness averred that same did not cherry pick the documents from the Deed file.
155. Other than the foregoing, it was the evidence that the letter dated the 11th May 2010; which was produced by the 3rd Defendant did not form part of the Deed file at the Land Registry.
156. Whilst under further re-examination, the witness averred that the suit property, namely, L.R No. 7785/824 was first registered on the 29th November 2007. Furthermore, the witness added that the suit property was registered as I.R No. 110262/1.
157. On the other hand, it was the testimony of the witness that the suit property was thereafter transferred to M/s Estama Investment Ltd on the 10th July 2008; before same was ultimately transferred to and in favor of the Plaintiff.
158. For good measure, the witness averred that the suit property was transferred and registered in the name of the Plaintiff on the 23rd April 2015.
159. Finally, the witness averred that the records at the land office indicate that the suit property belongs to and is registered in the name of the Plaintiff herein.
160. With the foregoing testimony, the Interested/necessary party's case was duly closed.

Parties' Submissions:

161. At the close of the Necessary party's case, the advocate for the respective Parties covenanted to file and exchange written submissions. Consequently and in this regard, the court circumscribed the timeline[s] for the filing and exchange of the written submissions.
162. Pursuant to and in line with the direction[s] by the court, the Plaintiff filed written submissions dated the 25th March 2024; whereas the 3rd Defendant filed written submissions dated the 28th February 2024. For good measure, the submissions by the 3rd Defendant/Counter-claimer were filed long before the ones on behalf of the Plaintiff.



163. Other than the foregoing, it is appropriate to point out that the 1st and 2nd Defendants and the necessary party, did not file any written submissions or at all. Consequently, the only sets of written submissions that are on record are the ones which have been highlighted [alluded to] in the preceding paragraph.
164. On the other hand, it is also worthy to state that even though the court has not reproduced and/or rehashed the submissions filed by the respective parties, the failure to rehash the said submissions is not borne out of any contempt or at all. In any event, the written submissions which have been filed by the parties shall be taken into account and considered in the course of crafting the Judgment under reference.
165. Finally, it is also imperative to state that the court is indeed grateful to the advocates for the respective Parties for the submissions filed, which written submissions are helpful and shall enable the court to arrive at a just and fair determination of the dispute pertaining to and concerning ownership of the suit property.

Issues for Determination:

166. Having reviewed the pleadings filed by and on behalf of the various parties; and upon taking into account the evidence tendered [oral and documentary] and finally upon consideration of the written submissions on record, the following issues crystalize [emerge] and are thus worthy of determination;
- i. Whether the counterclaim by and on behalf of the 3rd Defendant is incompetent and thus legally untenable either as contended by the Plaintiff or at all.
 - ii. Whether the Plaintiff herein lawfully acquired the suit property and if so, whether same is entitled to the requisite protection under the law.
 - iii. Whether the 2nd Defendant/Counter-claimer acquired any lawful rights to and in respect of the suit property or otherwise.
 - iv. Whether the 3rd Defendant/Counter-claimer has lawful rights to and in respect to the suit property and if so, whether same deserves the requisite protection under the law.

Analysis and Determination

Issue Number 1

Whether the counterclaim by and on behalf of the 3rd Defendant is incompetent and thus legally untenable either as contended by the Plaintiff or at all.

167. Learned counsel for the Plaintiff herein has contended that the certificate of grant of letters of administration which was tendered on behalf of the 3rd Defendant [Counter-claimer] herein as Exhibit D 6 contain[s] the names of three [3] persons who were constituted as the Executrix of the Estate of Kariuki Gikang'a, now deceased.
168. Nevertheless, learned counsel for the Plaintiff has ventured forward and submitted that even though the certificate of grant which tendered and produced before the court contained three [3] names, who were appointed as Executrix of the Estate of Kariuki Gikang'a, the counterclaim by and on behalf of the 3rd Defendant has only been filed by the 3rd Defendant, albeit without the involvement and participation of the co-executrix.



169. Further and in any event, learned counsel has ventured forward and stated that the 3rd Defendant has also failed to exhibit any authority given unto her by the Co-executrix, to enable same to mount [sic] the counterclaim.
170. Arising from the fact that the counterclaim by the 3rd Defendant has only been filed by one of the joint executrix, learned counsel for the Plaintiff has invited the court to find and hold that the entire counterclaim by and on behalf of the 3rd Defendant herein is therefore a nullity and hence bad in law for all intents and purposes.
171. To buttress the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on inter-alia the holding in the case of Willis Ochieng Odhiambo vs Kenya tourist Development Corporation & Another Kisumu HCC No. 51 of 2007 (Unreported) and Republic vs Disciplinary Tribunal of The Law Society of Kenya, Ex-parte John Wachira & 2 Others [2016]eKLR, respectively.
172. On the other hand, learned counsel for the 3rd Defendant has not responded to and/or contested the said submissions.
173. Nevertheless, it is imperative to state and observe that the 3rd Defendant herein was impleaded by the 2nd Defendant at the foot of the further amended defense and counterclaim and thereafter same was obliged and/or obligated to respond to the counterclaim as filed. In any event, no contest was ever raised by the Plaintiff herein or at all as pertain[s] to the legal capacity of the 3rd Defendant and/ or the participation of same [3rd Defendant to the Counter-claim] in the proceeding[s].
174. Secondly, it is not lost on this court that certificate of probate which has been tendered and produced before the court on behalf of 3rd Defendant, confirms that the Grant of probate was issued jointly to and in favor of the 3rd Defendant and the two co-executrix, albeit to administer the estate of the deceased and thereafter to render accounts as pertains to the administration and distribution thereof in accordance with the provisions of Section 71 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.
175. Even though the Grant of probate was issued to and in favor of the three [3] co-executrix, it does not mean that any one or more of the executrix cannot file a suit and/or take appropriate steps towards the protection and preservation of the estate of the deceased and thereafter render accounts in accordance with the law.
176. In my humble view, any one or more of the joint administrators/executrix, can take suitable steps [measures], inter-alia filing a suit for the protection and preservation of the estate of the deceased and the fact that the suit [read the counterclaim herein] has been filed by the 3rd Defendant without the involvement of other co-executrix does not negate [diminish] the capacity of the 3rd Defendant.
177. At any rate, there is no gainsaying, that none of the co-executrix has filed any contest [objection] to challenge the ability and/or capacity of the 3rd Defendant to file the counterclaim, whose net effect is geared towards preserving part of the Estate of the deceased.
178. Furthermore, my understanding of the provisions of Section 82 of the *Law of Succession Act*, Chapter 160, Laws of Kenya, is to the effect that the grant of letters of administration would inculcate and/ or bestow upon the administrator or administrators the requisite capacity to protect and preserve the estate of the deceased.
179. Better still, in respect of the instant matter, the 3rd Defendant is not an administrator but an executrix of both the Will of the deceased and the grant of probate, which has since been confirmed and in this respect, same is duly mandated and authorized to maintain the counterclaim.



180. Arising from the foregoing, I am not persuaded by the arguments ventilated on behalf of the Plaintiff herein that the 3rd Defendant herein is devoid and/or divested of the requisite capacity [Locus standi] to maintain the counterclaim on behalf of the Estate of the deceased.
181. To my mind, the Third Defendant to the Counter-claim, by virtue of being one [1] of the Executrix of the Estate of the Deceased, is imbued with the requisite capacity to originate and maintain the Counter-claim in her own name towards and for purposes of the protection of the Estate of the Deceased. Remarkably, to fail to do so, would amount to dereliction of the duty, or better still, one of the duties that inhere in the Executrix; and thus subject the Estate of the Deceased to waste.
182. Further and at any rate, I hold the firm view that to uphold the contention by and on behalf of the Plaintiff shall be tantamount to glorifying a technical objection, which is devoid of any substance; and thereby defeat a legal dispute, which ought to be determined and disposed of on merits once and for all.
183. Furthermore and in this regard, I am prepared to invoke and apply the provisions of Article 159(2)(d) of *the Constitution* 2010, which frowns upon glorification of absolute/ technical objection[s], whose purpose is to camouflage [defeat] the determination of the real Issue[s] in controversy.
184. Other than the foregoing, learned counsel for the Plaintiff has also contended that the counterclaim by and on behalf of the 3rd Defendant is also incompetent because the 3rd Defendant neither sought for nor obtained leave to be joined into the subject proceedings.
185. According to learned counsel for the Plaintiff the fact that the 3rd Defendant neither sought for nor obtained leave to be joined into the subject proceeding, does not only negate the counterclaim filed by the 3rd Defendant, but also her participation in the instant proceedings.
186. Be that as it may, it is not lost on this court that the 3rd Defendant was joined into the instant suit by the 1st and 2nd Defendants who raised a counterclaim against her and upon being impleaded at the foot of the further amended Statement of Defence and counterclaim by the 1st and 2nd Defendants, same [3rd Defendant] was obligated to enter appearance and file appropriate responses.
187. For coherence, the 3rd Defendant deemed it fit and expedient to file a statement of defense and counterclaim, not only against the 1st and 2nd Defendants, but also the Plaintiff to the main suit. For good measure, it does not lie in the mouth of the Plaintiff herein to determine for the 3rd Defendant to the Counter-claim, the manner in which to respond to the counterclaim by the 2ND Defendant, which impleaded her [3rd Defendant] as a party.
188. Notwithstanding the foregoing, it is also worthy to recall that upon being served with the statement of defense and counterclaim by the 3rd Defendant to the Counter-claim [Counter-claimer], the Plaintiff herein proceeded to and filed a Reply to the statement of defense and defense to counterclaim by the 3rd Defendant. Notably, the defense to the 3rd Defendant's counterclaim is dated the 5th March 2020.
189. To my mind, having chosen to respond to the statement of defense and counterclaim by the 3rd Defendant herein and which response was rendered without any protest, the Plaintiff herein cannot at this late hour [tail-end] be heard to say that the 3rd Defendant neither sought for nor obtained leave to join the subject proceedings.
190. In my humble view, the 3rd Defendant having been impleaded at the foot of the further amended statement of defense and counterclaim dated the 22nd June 2020, same became a Principal Party and thus does not require [sic] leave of the court, either as contended by learned counsel for the Plaintiff or at all.



191. Other than the foregoing, it is also important to underscore that the Plaintiff herein did not raise the issue of the 3rd Defendant's pleadings and participation in the proceedings at the onset or at all. Consequently, insofar as no such objection was ever raised and/or canvassed by learned counsel from the onset, it is deemed that the Plaintiff and learned counsel for the Plaintiff, therefore waived any objection and/or better still, acquiesced into the participation by the 3rd Defendant.
192. As pertains to the significance of the doctrine of waiver and acquiescence, it suffices to cite and reiterate the holding of the Court of Appeal in the case of 748 Air Ltd vs Theuri [2017]eKLR, where the court stated and observed as hereunder;

“Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:

“..we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying 'estoppel is only a rule of evidence. If you go into another room you will find a different notice: 'estoppel can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others.”

The rooms we shall enter in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of Banning vs Wright (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.

Closer home in the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”



This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-

Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?."

193. From the foregoing analysis, my answer to issue number one [1] is fourfold. Firstly, the fact that the counterclaim by and on behalf of the 3rd Defendant has been filed by one of the three executrix, without the involvement of the others, does not negate the locus standi [Legal capacity] of the executrix.
194. Furthermore, there is no gainsaying that the counterclaim has been filed by the designated executrix [3rd Defendant] for purposes of preserving the estate of the deceased and beside, the designated executrix shall be under duty to render accounts in accordance with the provisions of Section 71 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.
195. Secondly, the issue as pertains to the capacity of the 3rd Defendant, who is one of the duly appointed executrix of the estate of Kariuki Gikana, now deceased, has not been impeached [contested] by the co-executrix, or at all.
196. Thirdly, the arguments pertaining to whether or not the 3rd Defendant ought to have sought leave to be joined into the suit is a non- issue. In any event, the point being raised by learned counsel for the Plaintiff is moot.
197. Fourthly, even if the question of leave was a necessity [which I have found not], the Plaintiff herein would still be barred from agitating such an issue at this tail end of the proceedings on account of the doctrine of Estoppel, waiver and acquiescence.



Issue Number 2

Whether the Plaintiff herein lawfully acquired the suit property and if so, whether same is entitled to the requisite protection under the law.

198. The Plaintiff herein has contended that same bought and/or purchased the suit property on the 15th October 2014; and thereafter same [suit property] was transferred and registered in his name on the 18th March 2015. In this regard, the Plaintiff contends that upon the transfer and registration of the suit property in his name, same acquired lawful rights to and in respect of the suit property and thus same [Plaintiff] is the lawful and legitimate proprietor of the suit property.
199. Instructively, the Plaintiff has tendered and produced before the court assorted documents inter-alia the sale agreement entered into between himself [Reuben Gachau Mwhiki and Estama Investment Ltd] and the transfer instrument dated the 18th March 2015, respectively.
200. Suffice it to point out that indeed after entering into the sale agreement dated the 15th October 2014 and upon execution of the transfer instrument, the suit property was transferred and registered in the name of the Plaintiff in terms of the entry endorsed on the 23rd April 2015.
201. On the surface and by dint of the issuance of a certificate of title in favor of the Plaintiff, it would appear that the Plaintiff herein is the lawful and legitimate proprietor of the suit property. However, to the extent that there are three [3] sets of certificate[s] of title touching on and concerning the same property, it then behooves the court to undertake due interrogation, analysis and evaluation, with a view to establishing the root of each certificate[s] of title.
202. To start with, there is no gainsaying that the Plaintiff herein contends to have bought the suit property from Estama Investments Limited who executed the transfer instrument dated the 18th March 2015.
203. Be that as it may, Estama Investment Ltd claims to have procured and/or purchased the suit property from Stanley Kipkurui Rotich, Philip Indika Keya, Francis Mburu Kimani and Peter Njoroge Wakaba, respectively. Instructively, a copy of transfer instrument to that effect was duly tendered and/or produced before the court.
204. Nevertheless, it is imperative to state and outline that what constitutes the suit property was stated to have been part of a larger parcel of land known as L.R No. 7785/10/R, which was subdivided and thereafter gave rise to inter-alia the suit property.
205. To be able to appreciate the fact that the suit property emanated from the larger parcel of land namely, L.R No. 7785/10/R, it is imperative to take cognizance of IPW 1 [Wilfred Muchai Kabue] who is the assistant director of survey.
206. For good measure, the said witness testified and stated as hereunder whilst under cross examination by learned counsel for the 3rd Defendant;

“The land in question was a large piece of land and thereafter various plots arose. The larger parcel of land was L.R No. 7785/10/R. there were various plots that arose from the subdivision of the larger parcel of land. The original parcel of land gave rise to various/resultant parcels. One of the plots that arose from the subdivision is the suit property. I do confirm that the subdivision was thereafter escalated to the office of the chief land registrar for registration”.



207. From the testimony of the named assistant director of survey [IPW 1}, it is crystal clear that the suit property arose from the original parcel of land and that upon its subdivision, same was escalated to the office of the chief land registrar for necessary registration.
208. Instructively, upon the subdivision, the resultant parcels/plots would ordinarily be registered in the name of the owner who undertook the subdivision and who would thereafter facilitate the transfer of the resultant parcel to and in favor of the designated beneficiary, where appropriate.
209. Consequently, there is no gainsaying that the original owner of the larger parcel of land and who has sponsored [commissioned] the subdivision, would be called upon to undertake a transfer and such transfer instrument would show the beneficiary of the subdivision.
210. As pertains to the subject matter, evidence abound that the original parcel of land hitherto belonged and was registered in the name of Mae Properties Limited who undertook the subdivision albeit through a license surveyor. Consequently, it is the said Mae Properties Ltd who would then have executed a transfer in favor of [sic] Stanley Kipkurui Rotich, Philip Indiaka Keya, Francis Mburu Kimani and Peter Njoroge Wakaba.
211. To my mind, the root of the certificate of title that is currently held by the Plaintiff must be traced to the point in time when same was transferred to and in favor of [sic] the original owners.
212. Nevertheless, whilst testifying before the court IPW 2 [Charles Kipkurui Koech] conceded and admitted before the court that same has neither tendered nor produced before the court a copy of transfer instrument that facilitated the transfer of the suit property to and in favor of [sic] Stanley Kipkurui Rotich, Philip Indiaka Keya, Francis Mburu Kimani and Peter Njoroge Wakaba.
213. Pertinently, IPW 2 [Deputy Land Registrar] testified and stated as hereunder whilst under cross examination by learned counsel for the 3rd Defendant;
- “I have not brought to court the transfer instrument from M/s Mae Properties Ltd to the named owners”.
214. In my humble view, the transfer instrument if any that was executed by M/s Mae Properties Ltd to and in favor of [sic] Stanley Kipkurui Rotich, Philip Indiaka Keya, Francis Mburu Kimani and Peter Njoroge Wakaba would be part of the documents kept by the office of the chief land registrar.
215. Nevertheless, to the extent that the said transfer instrument was never availed and/or produced before the court, there does arise a serious question as to how the suit property was transferred from the known and legitimate owners [sic] unto Stanley Kipkurui Rotich, Philip Indiaka Keya, Francis Mburu Kimani and Peter Njoroge Wakaba; who thereafter orchestrated the consequential chain culminating into the transfer in favor of the current Plaintiff.
216. Invariably, the Plaintiff herein was obligated to tender and place before the court the requisite historical documents underpinning his certificate of title towards and in a bid to demonstrate that his [Plaintiff’s] certificate of title was procedurally and lawfully acquired.
217. In my humble view, in the absence of a critical document which would have created the linkage between the original owner and the subsequent claimer, negate[s] the legality and in particular, the root of the title held by and on behalf of the Plaintiff herein.
218. Further and in any event, there is no gainsaying that the validity of the certificate of title is dependent on the process that underpin the issuance of the said certificate of title. Consequently, where the certificate of title is not traceable to a known and lawful process; then the end product [certificate of title] cannot



be countenanced and/or sanctioned. [See the decision of the Court of Appeal in the case of Funzi Development Limited versus County Government of Kwale [2014] eKLR].

219. Furthermore, it is appropriate to adopt and reiterate the holding in the case of Hubert L. Martin & 2 Others versus Margaret J. Kamar & 5 Others[2016] eKLR, where the court held thus;

31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.

220. Other than the foregoing decision, the Court of Appeal also had an occasion to speak to the same issue, in the case of Munyu Maina versus Hiram Gathiha Maina [2013] eKLR, where the court stated and observed as hereunder;

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property.

221. Premised on the ratio decidendi espoused in the decisions [supra] it is my finding and holding that the Plaintiff herein has neither demonstrated nor proved the root of the certificate of title which currently inheres in himself [Plaintiff].

222. Secondly, other than the fact that no transfer instrument was tendered to demonstrate the acquisition of the suit property by [sic] initial owners, the certificate of title held by the Plaintiff is also inflicted by another deficiency [anomaly].

223. Suffice it to point out that whenever a subdivision is carried out and/or undertaken, the resultant certificate of title would no doubt refer and/or contain the original number that gave rise to the resultant title. However, in respect of the certificate of title held by the Plaintiff same [certificate of title] does not allude to the original number and hence same is not traceable to a designated parcel of land that birthed same.

224. In this respect, it suffices to take cognizance of the evidence of IPW 1 [Wilfred Muchai Kabue] whilst under cross examination by learned counsel for the 3rd Defendant.



225. Same stated as hereunder;

“The certificate of title for the Plaintiff does not capture the original number of the land. The certificate of title by the 3rd Defendant tally by cadastral plan that I have brought before the court. It is the cadastral plan and the deed plan that are forwarded to the chief land registrar for purposes of registration”.

226. Despite the absence and/or omission of the said critical information, neither the Plaintiff, the assistant director of survey [IPW 1] nor the deputy chief land registrar [IPW 2] tendered any evidence to explain the omission of the said important and material information.

227. To my mind, the absence of such a critical information also impacts on the credibility, validity and thus verifiability of the certificate of title held by the Plaintiff.

228. Thirdly, it is also not lost on this court that the assistant director of survey [IPW 1] testified that upon the survey, the office of the director of survey would generate the requisite survey plan [FR] and the Deed plan arising from the designated survey and thereafter the named document[s] would be escalated to the Chief land registrar to facilitate registration.

229. In respect of the instant matter, the assistant director of survey [IPW 1] testified and stated that the survey and preparation of the Deed plan as pertains to the suit property was concluded in the year 1995.

230. In fact, it is imperative to reproduce the salient features of the testimony of the said witness.

231. For ease of reference, the witness stated as hereunder;

“It is the cadastral plan and the deed plan that are forwarded to the chief land registrar for purposes of registration. The survey and preparation of the deed plan were concluded around the year 1995. I don’t know when the said documents were forwarded to the chief land registrar. I don’t know whether there was a certificate of title that was issued in 1996”.

232. To my mind, if the Deed plan was generated, approved and concluded in 1995, no doubt same were escalated to the office of the chief land registrar for necessary action and registration. In this regard, it is not practicable and/or legally tenable that the subdivision that was underpinned by the Deed plan issued in 1995; would be hanging up to and including the 29th November 2007, when it is purported that a certificate of title was being issued in favor of Stanley Kipkurui Rotich, Philip Indiakia Keya, Francis Mburu Kimani and Peter Njoroge Wakaba.

233. Fourthly, it is also instructive to recall that even though the Plaintiff herein contended to have purchased the suit property at a consideration of Kes.8, 500, 000/= only, no evidence was ever tendered to confirm [authenticate] that indeed the purchase price was ever paid to and in favor of the vendor.

234. In my humble view, there are various instances where people engage in fraudulent activities over acquired land and thereafter cause and/or occasion the transfer in favor of [sic] third parties with a view camouflage and/or conceal the trace of fraud.

235. Consequently, if the Plaintiff herein truly purchased the suit property for valuable consideration, it behooves same [Plaintiff] to tender and place before the court evidence of payments of consideration.

236. Be that as it may, I have found and held that no such evidence was ever tendered by the Plaintiff and in my humble view, the absence of such evidence also create[s] doubt in the mind of the court as to whether or not the transaction underpinning the transfer and registration of the suit property in favor of the Plaintiff was legitimate.



237. Fifthly, it is also worth recalling that whenever a transaction involving land is being undertaken, the subject Property not excepted, the transferee [in this case the Plaintiff] would be called upon to pay the requisite stamp duty in accordance with the provisions of the Stamp Duty Act, Chapter 480 Laws of Kenya.
238. Furthermore, upon payment of stamp duty the transferee would be issued with the requisite receipt denoting payment of stamp duty.
239. Nevertheless and as pertains to the instant matter, though the Plaintiff contended that same indeed paid the requisite stamp duty; no evidence of such payment was ever tendered and/or availed before the court. To the contrary, the Plaintiff was content in stating that the receipt evidencing the payments of stamp duty was with his erstwhile [previous] Advocate[s].
240. Quiet clearly, the Plaintiff herein understood the necessity to prove the chain linking the acquisition, transfer and registration of the suit property unto him and thus it behooved same [Plaintiff] to place before the court every sort [scintilla] of evidence that would bespeak the legitimacy of the impugned transaction.
241. Finally, it is not lost on this court that the Plaintiff himself tendered and produced before the honorable court a letter by the Principal Registrar of Titles, namely, E N Gicheha dated the 11th May 2010; as well as another letter by the Chief land registrar, namely, J. W Kamuyu, dated 27th July 2015. For good measure, the letters under reference were produced as Exhibits P10 and P11 respectively.
242. From the contents of exhibits P11, namely, letter by E N Gicheha, it is evident that the said officer undertook due interrogation and investigation as pertains to the validity of the title pertaining to the suit property and the Principal Registrar of titles, observed that the suit property was lawfully registered in the name of Kariuki Gikang'a, now deceased.
243. I beg to point out that it is the Plaintiff who tendered and produced the letter under reference as part of his evidence. Consequently and in this regard, the contents of the letter under reference must be applied against the claim by the Plaintiff.
244. Arising from the foregoing analysis, my answer to issue number two [2] is to the effect that the Plaintiff herein has neither tendered nor placed before the court credible evidence to underscore the legality and legitimacy of the certificate of title that currently inheres in same [Plaintiff].
245. To the contrary, the totality of the evidence that was tendered by and on behalf of the Plaintiff, including the evidence tendered by the interested party, exhibit a lacuna in the process culminating into [sic] the Plaintiff's title.
246. Simply put, even though the Plaintiff may [sic] not have been privy and/or party to the fraud, which arose at the onset, the provisions of Section 26(1)(b) of the Land Registration Act, 2012 are so explicit and same do not, in my humble view, require the beneficiary of the illegal title to have been party to the fraud.
247. For coherence, an illegal title is vitiated regardless of whether or not the beneficiary was party to the fraud or otherwise.

ISSUE NUMBER 3

Whether the 2nd Defendant/Counter-claimant acquired any lawful rights to and in respect of the suit property or otherwise.



248. Other than the Plaintiff who had contended that same [Plaintiff] was the lawful and legitimate proprietor to and in respect of the suit property, it suffices to state that the 2nd Defendant also laid a claim to ownership of the suit property.
249. According to DW1, namely, James Michael Ndungu Kigathi, the 2nd Defendant purchased the suit property from one Godfrey Ngatia Njoroge, who thereafter transferred the suit property unto the 2nd Defendant.
250. Furthermore, the witness averred that upon purchase, acquisition and transfer of the suit property in favor of the 2nd Defendant, the 2nd Defendant entered upon and took possession of the suit property in the year 2009.
251. Nevertheless, it was the further testimony of DW1 that the 2nd Defendant was evicted from the suit property by the Plaintiff herein on or around the year 2015. For good measure, the 2nd Defendant ceased to have occupation of the suit property.
252. Additionally, it was the evidence of DW2 that in the year 2010, the 2nd Defendant was issued with summons by the Chief land registrar, who invited the 2nd Defendant to attend proceedings pertaining to and concerning ownership of the suit property. For coherence, the witness [DW2] ventured forward and testified that indeed same attended the proceedings before the Principal Registrar of Titles who thereafter generated a decision vide letter dated the 11th May 2010.
253. Instructively, it was the evidence of Dw2 that the Principal Registrar of Titles made a decision which found and held that the suit property lawfully belonged to Kariuki Gikang'a, now deceased.
254. On the other hand, it was the testimony of DW2 that the 2nd Defendant herein thereafter proceeded to and filed a civil suit as against the vendor Godfrey Ngatia Njoroge whereby the 2nd Defendant sought to recover the purchase price [consideration sum] that was paid on account the purchase of the suit property.
255. Further and in addition, it was the evidence of DW2 that the suit which was filed by the 2nd Defendant was heard and determined and a Judgment for refund of the purchase price was granted. However, the witness added as at the time of his testimony, that the 2nd Defendant had not recovered the decretal sum.
256. From the foregoing testimony by Dw2, it is crystal clear [evident] that the 2nd Defendant has since obtained and procured a Judgment for refund of the Purchase price [consideration] that was paid at the foot of the suit property.
257. To my mind, having procured a Judgment for refund of the purchase price [consideration], it is deemed that the 2nd Defendant's claim as pertains to title of the suit property terminates and/or becomes extinguished.
258. Quiet clearly, the 2nd Defendant can no longer be heard to lay a claim to ownership of the suit property whilst at the same time pursuing the purchase price.
259. Other than the foregoing, it is also not lost on the court that the 2nd Defendant/Counter-claimer participated in the proceedings before the Principal Registrar of titles culminating into the decision rendered on the 11th May 2010. For good measure, the decision under reference [which has not been quashed] found that the 2nd Defendant's title was unlawful and illegal.
260. Furthermore, it is evident from the contents of the decision vide letter dated 11th May 2010 that the transfer in favor of the 2nd Defendant was indeed canceled and/or reversed.



261. In a nutshell, the 2nd Defendant herein ceased to have any lawful rights, interests and/or claims to and in respect of the suit property.
262. Consequently and in view of the foregoing, it is my finding and holding that the 2nd Defendant/Counter-claimer has not been able to establish and/or prove her claim in terms of the Further amended Statement of Defence and counterclaim or at all.
263. Without belaboring the point, I find and hold that the further amended statement of defense and counterclaim dated the 22nd June 2020; is devoid and bereft of merits.

Issue Number 4

Whether the 3rd Defendant/Counter-claimer has lawful rights to and in respect to the suit property and if so, whether same deserves the requisite protection under the law.

264. The suit property, has also been claimed by the 3rd Defendant/Counter-claimer. For clarity, it is the 3rd Defendant's contention that the suit property was bought, purchased and acquired by Kariuki Gikang'a, now deceased from M/s Mae properties Ltd.
265. Furthermore, the 3rd Defendant has averred that upon the acquisition of the suit property by her late husband [Kariuki Gikang'a], M/s Mae Properties Ltd executed a transfer instrument culminating into the transfer and registration of the suit property in the name of the deceased. For good measure, same proceeded to and tendered and produced before the court a copy of the certificate of title bearing the name of the deceased.
266. It was the further evidence of the 3rd Defendant that upon the certificate of title being issued to and in favor of Mr. Kariuki Gikang'a, now deceased, same [deceased] placed the title of the suit property under the safe custody of Barkley's Bank of Kenya Ltd, who were his [deceased] employers.
267. Additionally, it was the evidence of the 3rd Defendant that upon the death of the deceased, same [3rd Defendant] together with two other appointed executrix procured and obtained grant of probate over and in respect of the estate of the deceased, including inter-alia the suit property.
268. Other than the foregoing, it was also the testimony of the 3rd Defendant that on or about May 2010, a dispute arose pertaining to ownership of the suit property, which was being encroached upon by the 1st and 2nd Defendants and thus same [3rd Defendant] lodged a complaint with the Chief land registrar.
269. For coherence, it was the evidence of the 3rd Defendant that the dispute pertaining to the ownership of the suit property was entertained by the Principal Registrar of Titles, namely, E.N Gicheha who thereafter rendered a decision vide letter dated 11th May 2010.
270. Instructively, the letter under reference was duly produced as Exhibits D15, on behalf of the 3rd Defendant.
271. It is imperative to state and observe that prior to and before rendering the decision vide letter dated the 11th May 2010, the Principal Registrar of Titles examined the various documents contained in the Deed file [parcel file] in respect of the suit property and authenticated that indeed the suit property was registered in the name of Kariuki Gikang'a, now deceased.
272. Other than the letter by Ms. E.N Gicheha, [Principal Registrar of Titles], it is also imperative to take cognizance of Exhibit P10; which was produced by and on behalf of the Plaintiff and which is yet another letter from the office of the Chief land registrar.



273. For good measure, the letter under reference states as hereunder;

M/s C.N Kihara & Co Advocates,

Bo 50854 -00200,

Nairobi.

Re: L.R No. 7785/824

Refer to the above matter and your letter dated the 9th July 2015.

Please note that this matter had previously been dealt with by this office as per the attached letter dated the 11th May 2010.

Yours faithfully

J.W Kamuyu for Chief Land Registrar.

274. From the contents of the foregoing documents, which trace their root to the office of the Chief Land Registrar, [by dint of the provisions of section 14 of the *Land Registration Act*, 2012], there is no gainsaying that the suit property truly belongs to the estate of Kariuki Gikang'a, now deceased.

275. Perhaps at this juncture, it is opportune to say something about the honesty of IPW 2 [Charles Kipkurui Ng'etich], who is the Deputy chief land registrar. Instructively, the said witness testified before the court and informed the court that same had produced before the court documents which same thought [deemed] to relevant to the dispute beforehand.

276. Furthermore, the witness ventured forward and told that the court that he [Witness] tendered and produced before the court some of the documents which were in the Deed file. In any event, it was the further testimony of the witness that same did not bring all the document that were in the Deed file.

277. So as not to be misunderstood and/or misquoted, it is appropriate to reproduce the salient feature[s] of the evidence of the said witness.

278. For good measure, the witness testified as hereunder;

“I have produced some of the documents that were procured/obtained from the deed filed before the court. The deed filed before the court would ordinarily have various documents. I have not produced a copy of the receipt for valuation. I don't have a copy of the valuation receipt. I have brought the documents that were relevant to the land reference number which were supplied to the office of the attorney general. I have brought the documents that are relevant to the court. I have brought the documents that I found in the deed file. However, I don't have the entire record”.

279. Whilst still under cross examination by learned counsel for the 3rd Defendant [Counter-claimer] the witness herein ventured forward and stated as hereunder;

“ Referred to the 3rd Defendant's list of documents and the witness states that the document at page 22 is a letter by the chief land registrar Nairobi. The letter is directed to the 3rd Defendant herein. I have never seen the letter herein in our custody”. I do confirm Mrs. Elizabeth Gicheha was once a principle registrar of titles”.

280. To my mind, three [3] perspectives do arise and deserves mention. Firstly, the Deputy Chief Land Registrar, by virtue of his office is called upon to exhibit and display fidelity to the law and nothing else.



281. Secondly, whenever called upon to testify before a court of law, it behooves the Deputy Chief Land Registrar and such other Public officer[s] to avail all the records without cherry picking certain documents and leaving others, merely because in his/ her wisdom [or lack of it] the documents picked are the only relevant ones.
282. Thirdly, in pursuit of the principles and values of Public service as entrenched in Article 232 of *the Constitution* 2010, it behooved the witness to be candid with the court and not to endeavor to hide [camouflage] the truth. For coherence, I say so because the letter dated the 11th May 2010 by Ms. E.N Gicheha was traceable to the deed file and indeed Mr. J. W Kamuyu [himself a Land Registrar], writing on behalf of the Chief Land Registrar confirmed as much vide letter dated 27th July 2015. [see exhibit P10].
283. Surely, the contention by IPW2 [Deputy Chief Land Registrar] that same had not seen the said letter [letter dated 11th May 2010] from the record of the chief land registrar smacks of bad faith, underhand dealings and mala fides; which ought to be eschewed by all and sundry.
284. To this end, it is imperative to adopt and reiterate the words of the Court of Appeal in the case of Denis Noel Mukhulo Ochwada & another versus Elizabeth Murungari Njoroge & another [2018] eKLR, where the court stated and observed as hereunder;

This is yet another of those cases involving shameless and egregious fraud at the Ministry of Lands. In the not too uncommon practice, a total stranger obtains false duplicate documents of title to a property duly registered in the name of a citizen. While the genuine owner of the property has his documents of title ensconced in a safe or in some financial institution's strong room, the stranger, mostly with the collusion of Ministry of Lands' officials, surreptitiously and fraudulently transfers the property to another person, who may or may not be party to the fraud. That party subsequently sells and transfers the property to a third party who, more often than not, has no notice of the fraud that resulted in the transfer of the land to him.

Whatever the ultimate result of the judgment in such a dispute, along the chain an innocent party ends up suffering losses and prejudice. At the centre of Torrens land registration system, on which ours is based, is the basic assumption that meticulous professionals of conscience, absolute honesty and integrity, will superintend over it. In *Gibbs v. Messer* [1891] AC 247, the Privy Council stated thus on the registration system:

“The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.”

285. Be that as it may, I beg to point out and underscore that the contents of the two [2] Letters under reference, namely, exhibit P10 and P11, respectively, and coupled with the transfer instrument duly executed by M/s Mae Properties Ltd to Mr. Kariuki Gikana, now deceased, duly demonstrate that the suit property belongs to the Estate of the deceased and not otherwise.



286. Additionally, it is also important to revert to the evidence of IPW 1 [Wilfred Muchai Kabue] who testified and stated thus;

“The suit property is L.R No. 7785/824 and same does correspond with the 3rd Defendant’s documents. The certificate of title by the 3rd Defendant tally with the cadastral plan that I have brought before the court”.

287. Similarly, from the testimony of the Assistant Director of survey, there is no gainsaying that the cadastral plan, the survey plan and the Deed plan [the latter which was concluded in 1995] all vindicate the validity of the certificate of title which was issued to and in favor the Kariuki Gikang’a, now deceased.

288. In a nutshell, it is my finding and holding that the 3rd Defendant herein has been able to place before the court plausible, credible and cogent evidence to prove the manner in which Kariuki Gikang’a, [now deceased] acquired the suit property.

289. Without belaboring the point, the document tendered before the court demonstrate a clear chain and events underpinning the manner in which the certificate of title in favor of Kariuki Gikang’a, now deceased was acquired. For good measure, there is no breakage in the chain of events, right from the onset to the end.

290. Having found and held that the 3rd Defendant has been able to establish and demonstrate the fact that the suit property forms part of the estate of the deceased, it suffices to declare that indeed the suit property forms part of the assets of the deceased and shall be dealt with in the manner stipulated at the foot [schedule of the grant of probate] which was confirmed [rectified on the 2nd September 2011].

291. Finally, it is also worthy to mention one more issue. For clarity, the issue relate to the prayer for mesne profits which was sought for by and on behalf of the 3rd Defendant/Counter-claimer.

292. To my mind, even though the 3rd Defendant has impleaded and sought for mesne profits, it is not lost on this court that the 3rd Defendant failed to particularly plead the claim for mesne profits [which is akin to special Damages]; and also failed to specifically prove same. [See Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR].

Final Disposition:

293. Having reviewed the thematic issues [details in the body of the Judgment], it is now appropriate to bring the Judgment to a close.

294. Nevertheless, whilst discussing the various issues in the body of the Judgment, the court has made various findings and hence it must have become evident [apparent] that the Plaintiff’s suit has neither been established nor proved to the requisite standard.

295. Conversely, the 3rd Defendant [Counter-claimer] has been able to prove the claims at the foot of the counterclaim dated the 26th April 2019.

296. Consequently and in the premises, the court proceeds to and hereby make[s] the following orders;

- a. The Plaintiff’s suit be and is hereby dismissed.
- b. The 2nd Defendant’s counterclaim be and is hereby dismissed.
- c. The 3rd Defendant’s counterclaim be and is hereunder allowed as hereunder;



- i. A declaration be and is hereby made to the effect that the 3rd Defendant [Counter-claimant] is the lawful and legal owner of L.R No 7785/824 [I.R No. 30597/572].
 - ii. A declaration be and is hereby made that the sale and transfer of the suit property L.R No 7785/824 [I.R No. 30597/572] to the Defendant was illegal, fraudulent and void.
 - iii. The certificate of title in respect of L.R No 7785/824 [I.R No. 30597/572] in the name of the Plaintiff and issued on the 23rd April 2015 be and is hereby revoked, canceled and nullified.
 - iv. The certificate of title in respect of L.R No 7785/824 [I.R No. 30597/572] in favor of the 2nd Defendant and issued on the 20th January 2009 be and is hereby revoked and nullified.
 - v. The certificate of title in respect of L.R No 7785/824 [I.R No. 30597/572] issued to and in favor of Godfrey Ngatia Njoroge issued on the 8th March 2001 be and is hereby canceled, revoked and nullified.
 - vi. The Plaintiff be and is hereby ordered to vacate and hand over vacant possession of the suit property to and in favor of the 3rd Defendant within Ninety [90] days from the date herein.
 - vii. In default to vacate and hand over vacant possession of the suit property within the stipulated Ninety [90] days the 3rd Defendant/Counter-claimant shall be at liberty to levy eviction against the Plaintiff and in this regard an Eviction order shall issue without further recourse to the court.
 - viii. In the event that the Plaintiff is evicted from the suit property, the costs/expenses of such eviction shall be certified by the Deputy Registrar of the Court; and shall be recoverable from the Plaintiff.
 - ix. Permanent injunction be and is hereby issued to restrain the Plaintiff; 1st and 2nd Defendant from entering upon, remaining on, interfering with and/or otherwise dealing with the suit property in any manner adverse to the rights and interest of the Estate of Kariuki Gikang'a, now deceased.
- d. Cost of the suit be and are hereby awarded to the 3rd Defendant.
 - e. Costs of the 2nd Defendant's counterclaim be and are hereby awarded to the 3rd Defendant only.
 - f. Costs of the 3rd Defendant's counterclaim are awarded to the 3rd Defendant to the Counter-claim and same to be borne by the Plaintiff and the 2nd Defendant, jointly and/or severally.
 - g. Any other relief not expressly granted is hereby declined.

297. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson: Court Assistant



Mr. Ashford Muguku for the Plaintiff

Mrs. Karanu for the 3rd Defendant

Mr. Allan Kamau [Principal Litigation Counsel] for the Necessary Party

Mr Gode h/b for Mr. Kingati for the 1st and 2nd Defendants

