



REPUBLIC OF KENYA



**Mwangangi v Kambo & 5 others (Environment & Land Case  
336 of 2007) [2024] KEELC 5232 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5232 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 336 OF 2007**

**AA OMOLLO, J**

**JULY 4, 2024**

**BETWEEN**

**COL ALEXANDER M MWANGANGI ..... PLAINTIFF**

**AND**

**VINCENT KAMBO ..... 1<sup>ST</sup> DEFENDANT**

**FLOWER POWER LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**ELART ENTERPRISES ..... 3<sup>RD</sup> DEFENDANT**

**DR TAITA A TOWETT JAMES K BIEGON, ELIZABETH CHEROTICH  
TOWETT, TOWETT PETER TANUI, ANN KAMAYA TOWEET (IN THEIR  
CAPACITY AS THE ADMINISTRATORS TO THE ESTATE OF DR TAITA A  
TOWEET ELIZABETH CHEROTICH TOWEET ..... 4<sup>TH</sup> DEFENDANT**

**ELIZABETH CHEROTICH TOWEET ..... 5<sup>TH</sup> DEFENDANT**

**CHRISTO KATSANTONI CHRISTIE ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. *Vide* a plaint dated 16<sup>th</sup> July, 2007 which was subsequently amended on 28<sup>th</sup> January, 2022, the Plaintiff sued the Defendants seeking the following orders;
  - i. A permanent injunction be issued restraining the Defendants by themselves, agents, servants, employees or otherwise howsoever for entering, cutting trees, demolishing structures and buildings, selling, transferring, alienating, or in any way dealing with or interfering with the property rights, interests and possession enjoyed by the Plaintiff over all that property known as LR No. LR No. 122220 situated in Langata Nairobi.



- ii. A declaration that the plaintiff is the legal, rightful and lawful owner/proprietor of all that property known as LR No. 12220 situate at Langata, Nairobi.
  - iii. In the alternative, declaration that the Plaintiff has acquired title to all that property known as LR No. 12220 situate in Langata Nairobi as against the 2<sup>nd</sup> Defendant under section 38 of the *Limitation of Actions Act*.
  - iv. The Plaintiff be registered as the owner of sole proprietor of all that property known as LR No. 12220 situate in Langata, Nairobi.
  - v. General damages
  - vi. Costs and interests on both costs and (e) above.
2. The Plaintiff pleaded that the 4<sup>th</sup> Defendant was the registered proprietor of all that land L.R No. 13036 measuring 25 acres and situated in Langata, Nairobi. It is pleaded that the 4<sup>th</sup> Defendant subdivided this land into 5 portions of 5 acres each and were numbered LRs 12218, 12219, 12220, 12221 and 12222.
  3. The Plaintiff averred that L.R 12218 was purchased by Grace Kariuki, 12219 purchased by Mr. Handa, 12221 was purchased by Lero Luno; 12222 by Peter Ndegwa while 12220 was sold to him (plaintiff). He asserts that the sale was transacted through the law firm of Ms. Waruhiu & Muite advocates and he made payments through the loan obtained from National Bank of Kshs.80,000. He added that he took physical possession by clearing it and erecting a fence around it and has remained in possession to date.
  4. He pleaded further that sometimes in 1998 in exercise of his proprietary rights over the suit property he subdivided it and sold a subdivision to Nelson Mwanzia Kivuvani (the Interested Party) for Kshs.2.5 million. That Mr. Kivuvani took possession and built a permanent family home which he enjoys peacefully to date. The plaintiff pleaded to the correspondences exchanged between Waruhiu & Muite advocates then for the 4<sup>th</sup> Defendant and the Commissioner of Lands while surrendering the original grant I.R 24218 L.R 13036 for subdivision.
  5. He continued that in 1991, the 1<sup>st</sup> Defendant acting on instructions from the 2<sup>nd</sup> Defendant proceeded to the suit property seeking to take possession on account of being purchasers. The Plaintiff asserts that the 3<sup>rd</sup> Defendant had non-existent statutory power of sale that could be exercised. That the alleged sale transaction which took place on 22<sup>nd</sup> June, 1981 was only registered and came to existence on 18<sup>th</sup> September, 1990. He also asserted that he had registered a caveat on the title on 2<sup>nd</sup> June, 1981 to prevent any fraudulent schemes.
  6. It his is case that the 3<sup>rd</sup> Defendant was established by the Defendants to defraud him of the suit property. He listed to the following as the particulars of the fraud;
    - a. Registering or causing to be registered Elart Enterprises and Flower Power Ltd to defraud the Plaintiff off the Suit Property.
    - b. Purporting to have charged the Main Property; including the Suit Property and other subdivisions to Elart Enterprises, a Company under the Directorship of Elizabeth Towett, the wife of the 4<sup>th</sup> Defendant;
    - c. Colluding to register a change over the Main Property in 1980 in favour of the 3<sup>rd</sup> Defendant for an alleged financial facility when they were aware that the Plaintiff had purchased and obtained physical possession of the Suit Property and was only awaiting the completion of the sub-division process.



- d. Colluding and purporting to charge the Main Property to the 3<sup>rd</sup> Defendant despite the fact that the Main Property did not exist having been subdivided;
  - e. Colluding and purporting to charge the Main Property to the 3<sup>rd</sup> Defendant whose directors and shareholders included Mrs. Towett and Christie, the Director of Flower Power the wife of the 4<sup>th</sup> Defendant.
  - f. Purporting to transfer the title of the Main Property to the 2<sup>nd</sup> Defendant in a purported exercise of a statutory power of sale could or had arisen.
  - g. Purporting to transfer the title of the Main Property to the 2<sup>nd</sup> Defendant in a purported exercise of a statutory power of sale when the 2<sup>nd</sup> Defendant had not been registered and did not exist.
  - h. Purporting to transfer the title of the Main Property to the 2<sup>nd</sup> Defendant, a company associated with Christo Kitasantoni Christie who was a director of Elart Enterprises;
  - i. Purporting to have charged the Main Property to the 3<sup>rd</sup> Defendant when he was aware that he could not lawfully charge the same having sub-divided it into five portions and sold the subdivisions to other buyers including the plaintiff.
  - j. Causing the main property to be transferred to the 2<sup>nd</sup> Defendant in an attempt to make it impossible for the Plaintiff recover the land and when the said 2<sup>nd</sup> Defendant did not exist;
  - k. Seeking to deprive the Plaintiff title to the Suit Property on an account of a charge and sale of the same to Elart Enterprises, while all other subdivisions created therefrom remain in the ownership of the various individuals who purchased them.
7. The Plaintiff impleads on the alternative that he has acquired rights over the property under Section 30 (f) of the [Registered Land Act](#) Cap 300 (now repealed) and Section 38 of the [Limitation of Actions Act](#). He added that in the year 2007, the 1<sup>st</sup> Defendant in the company of hired things encroached on the suit property and started cutting down his trees in preparation of fraudulent developments. That despite demand and notice of intention to sue given, the Defendants have failed to make good the plaintiff's claim. He prayed that this claim be allowed.
  8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in opposing the suit filed a statement of defence dated 24<sup>th</sup> August, 2007 and amended on 31<sup>st</sup> August, 2007. They denied that the plaintiff is the lawful owner of L.R 12220 by dint of matters alleged in paragraph 10 of the plaint. They pleaded that they are strangers to the allegations of purchase by the plaintiff.
  9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants avers that at the time of the alleged sale of a portion of the suit property to the Interested party, it was subject of a pending suit HCCC 3625 of 1996 between the plaintiff, 2<sup>nd</sup> Defendant and others. It is pleaded that the plaintiff had sought in that suit to be declared as the owner hence the purported sale to Mr. Kivuvani was unlawful.
  10. They further state that the 2<sup>nd</sup> Defendant was in existence when it purchased the suit property. They also denied that the plaintiff was in possession nor that he erected a surrounding fence planted with trees. Instead they affirm that it is the 2<sup>nd</sup> Defendant who is the registered owner and is in physical possession of the suit property.
  11. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that to the best of their knowledge (as chargor) the 4<sup>th</sup> Defendant did not challenge the validity of the charge or the 3<sup>rd</sup> Defendant's exercise of its power of sale and the subsequent transfer to the 2<sup>nd</sup> Defendant. They contended that the Plaintiff was not privy to the charge



- between the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and does not in law have any locus to challenge the 3<sup>rd</sup> Defendant's exercise of its statutory power of sale to the 2<sup>nd</sup> Defendant.
12. The 2<sup>nd</sup> defendant denies that it acknowledged the plaintiff's property rights to the suit property and put the plaintiff to strict proof. That if any offers were made, the same were on a "without prejudice" context and not an admission of the plaintiffs' alleged claims. They further denied the allegations of fraud pleaded against them and deny that the plaintiff has acquired any overriding interest by way of adverse possession over the suit property. They urged the court to dismiss the suit with costs.
  13. The 3<sup>rd</sup> Defendant filed a defence and Counter claim dated 3<sup>rd</sup> February, 2022 admitting the description of parties it pleaded that it lawfully owns L.R 13036 by virtue of the charge established between the 3<sup>rd</sup> and 4<sup>th</sup> defendants. It pleaded that Elizabeth Cherotich Towett and Christo Katsantoni Christie were the directors of the 3<sup>rd</sup> Defendant. When Katsantoni pre-deceased his co-director, Dr Joseph Towett obtained letters of administration of her estate and substituted her in this suit. The 3<sup>rd</sup> Defendant pleaded that they did two charges on the mother title 13036 dated 8<sup>th</sup> August, 1989 and 27<sup>th</sup> November, 1980 for a consideration of KShs.1.5million. The charge secured the interest of the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant added that at the time of registration of the charge, the 4<sup>th</sup> and 5<sup>th</sup> defendants were husband/wife living on the property 13036.
  14. The 3<sup>rd</sup> Defendant pleads that the property was transferred to the 2<sup>nd</sup> Defendant (which was registered on 7<sup>th</sup> March, 1973). At the time of incorporation of the 2<sup>nd</sup> Defendant, Henry Flowers held 99 shares and Elizabeth Flowers held 1 share. Currently, Vincent Kambo and his wife Terezia Nzula Kambo are the directors of the 2<sup>nd</sup> Defendant. It avers that the transfer of the property to the 2<sup>nd</sup> Defendant on 22<sup>nd</sup> June, 1981 was done without the knowledge of Dr Joseph Towett (as a co-director/shareholders of Elart Enterprises). It posits that the transfer was done without evidence of share transfer certificate or stamp duty paid to confer legitimate title. Further, the 3<sup>rd</sup> Defendant stated that there were no witnesses in the transfer of shares from Elart Enterprises to Flower Power Ltd.
  15. The 3<sup>rd</sup> Defendant further pleads that the 2<sup>nd</sup> Defendant was struck off the register of companies pursuant to a court order on May 1982 and was only restored in the register after payment of fines and company returns on July 1982. It pleaded that after the transfer to the 2<sup>nd</sup> Defendant (Now 3<sup>rd</sup> Defendant), an agreement was drafted on 22<sup>nd</sup> July, 1983 by Christo Kansantoni Christie the 6<sup>th</sup> Defendant as the co-director of Elart Enterprises (Plaintiff in counter-claim) as well as the main shareholder in the said Flower Power Company indicating that the plaintiff in the counter-claim should be compensated and should receive a portion of the 5 – acre plot on LR 12221 (being 2.5 acres each for Dr Taita Towett and another 2.5 acres for Elizabeth Cherotich Towett (after subdivision)
  16. The 3<sup>rd</sup> Defendant (Now Plaintiff) avers that even if Elart Enterprises had proprietary rights to sell/transfer the property to Flower Power Limited, it could not only be possible to effect that through company shares where Elizabeth Towett shares were transferred to Flower Power Company without her consent being demonstrated or appearing on the records.
  17. The 3<sup>rd</sup> Defendant (now Plaintiff in the counter-claim) together with the 2<sup>nd</sup> Plaintiff therefore avers that for justice to prevail, Elart Enterprises as a charge to the property and due to its statutory rights under the original charges exercised on the original property Langata Nairobi LR 13036 prior to its subdivisions into the subsequent 5 sub-plots is therefore claiming compensation from Flower Power Limited the 2<sup>nd</sup> Defendant (Now 3<sup>rd</sup> Defendant) for its rightful share of 2.5 acres where the matrimonial home for the late Elizabeth Cherotich Towett and the children (beneficiaries) was erected wherein upon the sub-divisions the said matrimonial home felt on LR 12221 of the said sub-plots.



18. The 3<sup>rd</sup> Defendant (Now Plaintiff) avers that following the illegal transfer and illegal charges there has been subsequent illegal titles of the 5 sub-plots originating from the mother title – the sub-division being LR No. 12218, LR 12219, LR 12220, LR 12221 AND LR 12222. The Plaintiff pleaded the following particulars of fraud against the 2<sup>nd</sup> Defendant;
- a. Transferring the shares of Elart Enterprises to Flower Power without consent of the co-director and shareholder Elizabeth Cherotich Toweett.
  - b. Non-execution of CR 19 notice for company directors meeting authorizing the sale or transfer of property to Elart Enterprises Director.
  - c. Non-payment of transfer of stamp duty. No evidence of share transfer certificate during the transfer of property from Elart Enterprises to Flower Power Ltd.
  - d. Transfer of property without details filed on company record for transferor and transferee information on CR 19 as well as missing witness's signatures/company secretary documentation authorizing the transfer of shares from Elart Enterprises to Flower Power Limited.
  - e. Dealing in property/shares of the late Elizabeth Cherotich Toweett the 2<sup>nd</sup> Plaintiff herein without indication of consent or authority/power by transferring from her shares from Elart Enterprises to Flower Power Limited.
  - f. Purporting recording the discharges on 22<sup>nd</sup> June, 1981 on LR 13036, the mother title in the land registry through the Registrar of lands and or land officials when in actual fact there were no discharges executed because there was no charge in the first place or compensation to plaintiffs and to “discharge” it later the purported discharges were only purportedly written so that there can be compensation later per the agreement of 22<sup>nd</sup> July 1983. Therefore, the discharges were fraudulently executed so as to show that the property was transferred to Flower Power but in actual fact, the property was still charged to Elart Enterprises the 3<sup>rd</sup> Defendant (Now Plaintiff) as per company records as that date.
  - g. Non-Execution of the agreement proposed on 22<sup>nd</sup> July, 1983 submitted to Dr Taaita Toweett by P. N. Ndungu of Hamiliton. Harrison and Mathews Law firm then representing the Flower Power Limited the 2<sup>nd</sup> Defendant (Now 3<sup>rd</sup> Defendant) to transfer to Elizabeth Cherotich and her son 2.5 acres for compensation with respect to the initial charge of Kshs.1.5 million.
  - h. A subdivision of the mother title LR 13036 into 5 new titles was done by the commissioner of Land per deed plan dated 10/6/1983 without consent from Elart Enterprises as shareholder and interested party in the original mother title.
19. Consequently, the 3<sup>rd</sup> Defendant prays for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants thus;
1. An order for cancellation for all the subsequent subplots being LR 12218, LR 12219, LR 12220 “the suit property”, LR 12221 and LR 12222 arising from the subdivision of LR 13036 mother title because Elizabeth Cherotich Toweett as director in Elart Enterprises did not consent to the transfer of the property to Flower – Power Ltd as the charges and interests accrued had not been cleared by Flower Power Ltd prior to the transfer of the property.
  2. The 2<sup>nd</sup> Plaintiffs as beneficiary for the estate of the late Elizabeth Cherotich Toweett prays for compensation for the “Matrimonial home” on LR 12220 since the agreement prepared by the Estate of the late Christo Kansantoni Christie was never executed to transfer and compensate the Estate of the late Mrs Elizabeth Toweett and her children (beneficiaries).



3. A declaration that the manner of creating the sub-titles is fraudulent, a forgery, illegal and therefore null and void and the bearers and subsequent occupiers of the property comprised in the said subsequent sub-titles are illegal dwellers and their continued stay over the property constitute trespass over private property.
  4. A declaration that the 3<sup>rd</sup> Defendant (now Plaintiff) is the lawful owner of all the piece of land known as Nairobi Land Reference No. LR 12220 comprised in formerly her matrimonial home amounting to 2.5 acres in total.
  5. An Order of eviction against the Plaintiff (now the 1<sup>st</sup> Defendant) and the 1<sup>st</sup> Defendant (now the 2<sup>nd</sup> Defendant) from the Suit property.
  6. A permanent injunction does and be issued restraining the Plaintiff (now the 1<sup>st</sup> Defendant) and the 1<sup>st</sup> Defendant (now the 2<sup>nd</sup> Defendant) jointly and severally from dealing in any manner whatsoever with the land comprised in LR No. 12220.
  7. Any other relief that this Honourable Court may deem fit and appropriate in the circumstances.
  8. Costs of the suit plus interest thereon.
20. The 4<sup>th</sup> defendant filed a statement of defence dated 30<sup>th</sup> March, 2022 pleading that at all material times, the registered owner of the land L.R 13036 was the 3<sup>rd</sup> Defendant and never the late Dr Taita Towett. They averred that the deceased purchased L.R 13036 in 1971 through a mortgage secured by the 6<sup>th</sup> Defendant and the same was registered in the 3<sup>rd</sup> Defendant's name.
  21. They implead that that the deceased could not sell or subdivide L.R No. 13036 as he was never the owner and any such purported sale was null and void. They assert that in 1978, the deceased exclusively lived on the suit property with his wife (the 5<sup>th</sup> Defendant) and their children and so they put the plaintiff to strict proof regarding paragraph 13 of the amended plaint.
  22. It is pleaded further that the 6<sup>th</sup> defendant was the sole director of Elart Enterprises and it was only until 1980 when the 5<sup>th</sup> Defendant was made a co-director. That when the 6<sup>th</sup> Defendant died in 1983, the 5<sup>th</sup> Defendant remained the sole director. The 4<sup>th</sup> Defendant denied all the paragraphs of the amended plaint save for all those explained. They urged the court to dismiss the plaintiff's suit with costs.
  23. At the close of the pleadings, hearing commenced on 2<sup>nd</sup> May, 2018 with Col. (Rtd) Alexander Mwangangi who is the plaintiff testifying as PW 1. He adopted his written witness statements dated 2<sup>nd</sup> October, 2017 and his documents filed in 3 bundles dated 30<sup>th</sup> November, 2009; 26<sup>th</sup> April, 2010; and 5<sup>th</sup> October, 2017 now produced per bundle as Pex 1, 2 and 3 as per their dates of filing. The plaintiff stated that in 1974 while in the company of his friends visited a restaurant for personnel working at Wilson Airport, he met Dr. Taita Towett then a Minister for Education. That Dr. Towett told them about some parcels of land in Langata area he was selling and challenged them to buy.
  24. PW 1 averred that at the time, the land being sold had not been subdivided and it was measuring 25 acres. He stated that he expressed interest in purchasing a 5 acres portion from L.R No. 13036 and they discussed the price with Dr Towett coming to agreed purchase price of Kshs.80,000. It is PW 1's evidence that he paid this amount in full using financing from the National bank of Kenya. He continued that subdivision was done and he took possession of the plot he was allocated in 1978.
  25. PW 1 referred the court to correspondences exchanged between the Ministry of Lands and Waruhui & Muite advocates who was the advocates handling the transaction on behalf of the 4<sup>th</sup> Defendant.



- For example, the letter dated 26<sup>th</sup> April 1977 was talking about the subdivision of L.R No. 13036 into five parcels 12218-12222 which included one of the subdivisions of L.R 12220. He posited that after taking possession, he fenced the suit property with barbed wire and planted kay apples around it.
26. That because the sold property had not been transferred to him, he gave the bank his title for Kilifi/Madeteni/498 to be charged as security for the loan advanced and the documents found at page 7 of Pex 3. Thereafter he followed up with the 4<sup>th</sup> Defendant on transfer of the suit property as expressed in paragraph 6 of the letter dated 14<sup>th</sup> May 1990 at pages 36 - 37 of Pex 1.
  27. The Plaintiff mentioned about the charge at entry No. 10 registered on L.R 13036 on 27<sup>th</sup> November, 1980 which according to him was done after the title had been surrendered to the Commissioner for effecting the subdivisions. He also talked of a caveat placed by National Bank at entry 11 and the transfer to the 2<sup>nd</sup> Defendant at entry 12 subject to caveat by the bank. PW 1 continued that on 24<sup>th</sup> July, 2007 he carried out a search on the 2<sup>nd</sup> Defendant and found that its registration No. 12443 had ceased to exist. He also produced a Kenya Gazette Notice dated 3<sup>rd</sup> May, 1974 which confirmed the striking out the 2<sup>nd</sup> Defendant.
  28. The Plaintiff said he was aware the suit property was transferred to the 2<sup>nd</sup> Defendant in 1981 and it could not undertake any activities after it ceasing. He mentions the letter at page 9 of Pex 3 which he wrote to the government printers for notices for the period 1980 – 1981 to ascertain whether the 2<sup>nd</sup> Defendant could transact.
  29. In regard to purchase of the property by the 2<sup>nd</sup> Defendant, he pointed several irregularities inter alia;
    - i. That the 3<sup>rd</sup> Defendant could not and did not exercise statutory power of sale over the suit property because it did not have any.
    - ii. That the 2<sup>nd</sup> Defendant Flower Power Ltd was by February 1980 non-existent having been struck off the register of companies
    - iii. That while it was purpotted that the 2<sup>nd</sup> Defendant had purchased L.R. 13036, Dr Towett continued to sell, transact and deal in the property as follows
      - a. On 21.9.1989, the 4<sup>th</sup> Defendant sold LR No 12219 and 12221 to Lero Luno Enterprises ltd
      - b. On 21.6.2007, the 4<sup>th</sup> Defendant swore an affidavit in HCC 138 of 2004 that he had sold LR No. 12218 to Miss Kariuki.
  30. He also mentions the letter dated 28<sup>th</sup> August, 1989 by Waruhiu & Muite to Raballa & Company Advocates regarding the sale of plot 12220 Nairobi I.R 24218/1 to himself. That Raballa & Company was then acting for the 4<sup>th</sup> Defendant. PW 1 avers that he has submitted several documents expressing his interest in the suit property. He continued in evidence stating that he was offered Kshs.200,000 for his claim in the suit property by Mohamed and Muigai Advocates but he rejected. He produced the letter dated 27<sup>th</sup> October, 1987 at page 58 to support this averment.
  31. He reiterated that he is in possession of the suit property and also sold one (1) acre in 1998 to Nelson Kivuvani (the Interested Party). He wants the court to restore to him full ownership of the suit property L.R No. 12220.
  32. In cross-examination, PW 1 said he was asking for the transfer of the suit property to his name. He did not have/produce a copy of the agreement for sale and a transfer executed by Dr Towett in his favour. He said that he was given a copy of the title L.R 13036 by Dr Towett which he said is produced at page



6. The witness admits the copy of the title showing a charge to the 3<sup>rd</sup> Defendant at entry 9 and transfer to the 2<sup>nd</sup> Defendant at entry 12 which entries he says were not contained in the copy given to him. However, he did not produce a copy of the title empty of these entries.
33. Counsel referred to the letter at page 18 of Pex 1 which indicated the purchase price was Kshs.74,000/=. It is the Plaintiff's evidence that the transaction started in 1974 and he paid the purchase price in 1978. That he has not produced a copy of the official search he conducted before buying the suit parcel. He confirmed that the property LR 13036 was charged to HFCK as at 29<sup>th</sup> September, 1971 and the charge discharged in 1980 as shown in the copy of title produced.
34. He reiterated that when the property got charged to the 3<sup>rd</sup> defendant on 27<sup>th</sup> November, 1980, it was already subdivided and the original title surrendered to the Commissioner of Lands. However, the witness conceded that there was no entry in the title concerning the subdivision he refers to. That entry No. 13 which refers to a subdivision was made on 10<sup>th</sup> June, 1983 after the transfer to the 2<sup>nd</sup> defendant.
35. PW 1 asserted that the 2<sup>nd</sup> Defendant had no capacity to own property as at 22<sup>nd</sup> June 1981. He admitted that he had no dealings with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Counsel also referred PW1 to the discharge of charge dated 21<sup>st</sup> November, 1980 at page 31 which was presented for registration on 27<sup>th</sup> November, 1980. The witness affirmed the charge to the 3<sup>rd</sup> Defendant was registered on 27<sup>th</sup> November, 1980 and the charge was signed by Dr Towett.
36. PW 1 admitted that he was not aware of any dispute regarding the charge or the transfer between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He agreed that this suit was filed 26 years after the original plot was transferred to the 2<sup>nd</sup> defendant. He further admitted that the suit he filed in 1991, NBI 3625/1991 which had challenged the transfer to the 2<sup>nd</sup> defendant was dismissed for want of prosecution in 2005.
37. The plaintiff conceded to filing HCCC No. 1215 of 2006 (O.S) against the 2<sup>nd</sup> Defendant. That in the affidavit in support of the O.S, he swore that the 2<sup>nd</sup> Defendant was the registered owner of L.R No. 12220. He averred that he did not plead that the 2<sup>nd</sup> Defendant had been struck out the register of companies. He stated that he wrote to the government printer on 1<sup>st</sup> September, 2017 but he did not receive any response to his letter.
38. The plaintiff agree that if a company is struck off the register, it cannot be sued. Further, the witness admitted that he was aware of the consent making the suit as against the 4<sup>th</sup> Defendant – deceased as a baled. He also concede to the fact that when he sold the land to Mr Nelson Kivuvani, there was a suit pending in court over ownership of the subject property.
39. PW 1 continued in cross-examination asserting that he has been paying rates which indicate the property is in the name of the 2<sup>nd</sup> defendant (pages 132 – 136 of Pex 3). When referred to various letters dated 14<sup>th</sup> May, 1990, 28<sup>th</sup> June, 1990 and 25<sup>th</sup> July, 1997, he said that he had no evidence this later letter was received by the Commissioner of Lands or that the payment of Kshs.2200 was acknowledged. PW 1 asserted that the documents produced by the 2<sup>nd</sup> Defendant alleging the Nairobi City Council attempted to auction the suit property are forgeries. He concluded that he has a witness to corroborate his evidence of taking possession in 1978.
40. Under re-examination, PW 1 said that the letter dated 14<sup>th</sup> September, 1977 confirm he had been given possession as at the date of that letter. In regard to copy of title he produced, he stated that it was received by him when he conducted a search on the property in 1991. In reply to the previous case he filed, PW 1 said none of those cases were heard and determined on merits. He added that page 1 of Pex. 2 from the registrar of companies confirmed the 2<sup>nd</sup> Defendant had ceased to exist when it acquired the



property. His problem with the 3<sup>rd</sup> Defendant was that it belonged to the 4<sup>th</sup> Defendant's wife. That the suit property was sold to others after his purchase.

41. PW 1 was recalled for cross-examination by Mr. Mitei for 3<sup>rd</sup> Defendant on 7<sup>th</sup> February, 2023. He said that currently he lives in his farm in Mua Hills. He maintained buying land from Dr Taitta Towett and Waruhiu & Muite advocates represented them both during the transaction. He stated that it is Dr Towett who is introduced him to the said law firm. PW 1 contended that he did not have the whole amount of Kshs.80,000 so he was introduced to Mr. Nyamu of NBK who assisted him get a loan.
42. PW 1 said he paid the purchase price and he has never received any communication that the money was never given to Dr Towett refund of his money. That the payment was accepted by Waruhiu & Muite Advocates on behalf of the vendor. That he tried to reach out to get a title to his portion but Dr Towett kept referring him to his lawyers. He reiterated that when he purchased the property, there was no charge registered on it. He never met the family of Towett afterwards and was not aware of any case filed in the family division touching on the suit property.
43. PW 1 added that he waited for the creation of the suit title and only paid in 1978. That he had started looking for money before the suit was created. By 1974, the deed plan had not been created so there was no 12220. So, they were doing all these things in trust. The plaintiff said he signed his part of the agreement so there was nothing else he could. He also admitted that the lawyers contributed in not him getting the title.
44. He continued that before he paid the 80K, Dr Towett had put pressure on him to pay a deposit although he had no documents to support this averment. He agreed that he was not a party to the sale transaction for L.R 12218, 12219, 12221 or 12222. He was also out of the country between 1984 – 1989 but he had a relative/brother looking after it.
45. He said that he challenged the charge to Elart because by 1980 since the property had been sold to him. He was not aware the money used to purchase L.R 13036 was a loan given by the 6<sup>th</sup> Defendant. He was also not aware that the property was still charged to H.F.C.K and it was discharged on 5<sup>th</sup> August, 1980. He thus admitted that by 1980, L.R 13036 was still in existence.
46. PW 1 said he learnt there was a problem on the land in 1990 on his return. He admitted that when he sold the one (1) acre to Mr. Kivuvani in 1998, he was aware of the dispute. He sued Elizabeth because she is a director of Elart. That Dr. Towett was living on L.R No. 12221 registered in the name of Lero Luno. In re-examination, the sale was not contested as shown by the correspondences produced at pages 76 – 77 of Pex 1.
47. Cajus Oseno Juma testified on 6<sup>th</sup> February, 2023 as PW 2. He adopted his written witness statement dated 5<sup>th</sup> October, 2017 as his evidence in chief. PW 2 says that while he lived on L.R 12221 owned by his uncle Nicholas Rabala, he got to know the owner of L.R No. 12220. PW 2 stated that his uncle had told him the plot belonged to army man and he later met the army man when he came to the suit plot.
48. PW 2 stated that there were Maasai's who grazed on the suit property. He also used to clear bushes that would extend from L.R 12220 which was fenced. It is PW2's testimony that L.R 13036 had been subdivided into 5 parcels. He moved out of L.R 12221 in 2009. That when he left, he had never met the 1<sup>st</sup> Defendant who is claiming this land. He also said that the plaintiff sold a portion of his land to the Interested Party. The witness also said that as far as he is concerned, the suit property belonged to the plaintiff. He produced pleadings in 138 of 2004 where he had been sued for occupying L.R 12221.
49. On cross-examination by Mr Khaseke learned counsel for 1<sup>st</sup> and 2<sup>nd</sup> Defendants, PW 2 said he started living with his uncle Rabala from 1985. He admitted that from 1985 – 1991, he had not seen the



- plaintiff. That he was told to clear bushes from parcel 12220 meaning the plaintiff was not undertaking any activities on the land. He said he didn't know who planted the fence. PW 2 admitted that he has not seen any document confirming L.R 12220 was registered in the plaintiff's name.
50. PW 2 said that other than the Interested Party, he has not seen anyone else occupy the land. When referred to paragraph 33 of the plaint talking about a container brought on the land, PW 2 said he assumed it was brought by Mr Kivuvani (the Interested Party). In the suit 138 of 2004, PW 2 stated he was claiming adverse possession. He averred that he only knew what his uncle told him regarding ownership of L.R 12220. That the plaintiff was not on the land in 1991.
51. In further examination by Mr. Okatch learned Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants, PW 2 said he had no background in survey and he was only given the information he has shared by his uncle in the presence of Paul who was a worker. That he was told the mother title 13036 was owned by Dr Taitta Towett. However, he was not involved in the subdivision which created 12220 or any other number. That he saw the sale agreement dated 21<sup>st</sup> September, 1989 between Dr Towett and Lero Luno in respect of L.R 12221 and 122219. PW 2 averred that he was present when the beacons of 12221 and 12219 was identified. He was not present when 12218 was sold to grace Kariuki.
52. In re-examination, PW 2 said that when they moved on to L.R 12221, they found Grace Kariuki already on L.R 12218. That they moved on to 12221 because they believed uncle Raballa had bought.
53. The Defendants started their case on 12<sup>th</sup> February, 2024 with the evidence of the 1<sup>st</sup> Defendant Vincent Joseph Kambo Gikonyo as DW 1. He introduced himself as a retired engineer having worked with East African Telecoms Ltd. Currently, he is still engaged in private businesses. He adopted his witness statement dated 24<sup>th</sup> November, 2016 and 8<sup>th</sup> September, 2014. He also produced the documents in the list dated 8<sup>th</sup> September, 2014, 23<sup>rd</sup> November, 2016 and 3<sup>rd</sup> February, 2023 as Dex 1, 2 and 3 respectively.
54. DW 1 states that the suit parcel belongs to the 2<sup>nd</sup> Defendant after acquiring it from the 3<sup>rd</sup> Defendant in 1981. He avers that the original number was 13036 from which 5 subplots were created which includes the suit plot L.R. 12220. He stated that the charge to the 3<sup>rd</sup> Defendant was registered as entry No. 10 on 27<sup>th</sup> November, 1980 (page 28 and 51 of his bundle). He produced a copy of the transfer instrument from the 3<sup>rd</sup> Defendant in favour of the 2<sup>nd</sup> Defendant for a consideration of Kshs.1,600,000/=
55. He contended that after the transfer, a certificate of subdivision was issued on 10<sup>th</sup> September, 1983. That LR Nos 12222 was transferred to Mr. & Mrs. Ndegwa and another plot transferred to Lero Luno in 1989 by the 2<sup>nd</sup> Defendant. He avers that the 2<sup>nd</sup> Defendant retained L.R 12220. The witness was surprised that the plaintiff is claiming the same land yet there were existing charges on the title from 1971.
56. DW1 continued that the charges were removed on 5<sup>th</sup> August, 1980 at entries 6 & 7 while the charge to Elart (3<sup>rd</sup> Defendant) was registered on 27<sup>th</sup> November, 1980. DW 1 said they had no dealings with the plaintiff and only heard about him when they received letters from his advocates. That when Munoru Kagiri & Co. Advocates then acting for Grace Kariuki had refused to return the title to the 2<sup>nd</sup> Defendant's advocate. This action caused the 2<sup>nd</sup> defendant to file HCC 1467 of 1991. The matter was settled after the title was surrendered.
57. DW 1 said that it is not true that the 2<sup>nd</sup> Defendant was non-existent because in this suit, the 2<sup>nd</sup> Defendant is described as a limited liability company. He produced its certificate of incorporation and Memo of Association. He also stated that the company has been in possession of the suit property. That the possession is confirmed by a container they had placed on it and also had a caretaker engaged. They were ordered to vacate but the order was later vacated.



58. The 1<sup>st</sup> defendant was aware that the plaintiff had sold a portion of the suit property to the interested party while case 3625 of 1991 was pending. He added that Mr. Kivuvani requested them to allow him use the fenced portion as a car park. That they accepted the request by the Interested Party and they executed an agreement between them. He urged the court to dismiss the plaintiff's suit.
59. Under cross-examination, DW 1 affirmed that he was not a director of the 2<sup>nd</sup> Defendant during its incorporation. That he has produced documents showing the 2<sup>nd</sup> Defendant was incorporated in 1974 and stated the original subscribers of the 2<sup>nd</sup> defendant was H.G Flowers and Joan E Flowers. He admitted that he has not produced documents to explain how he became a director of the 2<sup>nd</sup> Defendant but that his directorship is not disputed.
60. The witness stated that the name Flower Power Ltd with and without a hyphen refers to one and the same company with one written without hyphen. He did not know who the directors of the 3<sup>rd</sup> Defendant were because he was not a director of the 2<sup>nd</sup> Defendant when the impugned transaction took place. He would be surprised if the 5<sup>th</sup> defendant (who is one of the directors of the 3<sup>rd</sup> defendant) denied executing a transfer to the 2<sup>nd</sup> Defendant.
61. DW 1 averred that he became a director of the 2<sup>nd</sup> Defendant between 2004 – 2005 but he did not produce any document in support. That he got authority to give evidence for 2<sup>nd</sup> defendant from his co-directors. As far as he is concerned, as long as the proceedings are in court, the claim for adverse possession does not arise.
62. In cross-examination by the plaintiff, DW 1 reiterated that he is a director/shareholder of the 2<sup>nd</sup> Defendant. The witness in responses to documents produced by the plaintiff that the 2<sup>nd</sup> Defendant was struck out admitted that the transfer of the suit property to the 2<sup>nd</sup> Defendant took place when the company was struck out. Further, DW 1 admitted he had not seen an agreement between the 2<sup>nd</sup> Defendant and Mr. & Mrs Ndegwa. He also did not know why the land was sold to Lero Luno for Kshs.100,000/=.
63. DW 1 conceded that the Kshs. 100,000 indicated in the transfer to Lero Luno is close to the sum of Kshs. 80,000 which the plaintiff claimed to have paid for the purchase of the suit plot. He was also aware that the plaintiff approached Munoru Kagiri & Co. Advocates to get him title. The 1<sup>st</sup> Defendant was not aware if Dr. Towett had shares in the 2<sup>nd</sup> Defendant.
64. When shown an agreement between Dr. Towett and Lero Luno, DW 1 stated that to his knowledge, it is the 2<sup>nd</sup> Defendant who executed the transfer to Lero Luno. He was again referred to Pex 3 Page 108 at paragraph 5 where Dr Towett says he was selling to Mrs. Kariuki. DW 1 said he was not there in 1981 to confirm the 2<sup>nd</sup> Defendant took possession, and said he is the one who put up the container and the gate in the suit premises.
65. He was also shown the letter dated 25<sup>th</sup> April, 1977 addressed to Waruhiu & Muite Advocates which confirmed the deed plans were ready. Consequently, as at the time the plaintiff engaged with Dr. Towett, the parcel sold was identifiable.
66. DW 1 was re-examined and answered that he got interested in the 2<sup>nd</sup> defendant in 1991 when he purchased shares. However, he became a director in 2005 so that when HCCC 3625 of 1991 was filed, he was not yet a director. He said the documents at page 56 of his bundle confirms he is a director thus qualified to give evidence on behalf of the 2<sup>nd</sup> defendant.
67. According to him, the Interested Party occupies a small portion measuring approximately ½ acre which he purchased from the plaintiff. It is also his evidence that the company which ceased to exist was



- registered on 3<sup>rd</sup> July, 1980 while the 2<sup>nd</sup> defendant was registered on 3<sup>rd</sup> July, 1974. He doubted the documents submitted that the 2<sup>nd</sup> Defendant ceased to exist.
68. DW 1 contend that the amount of Kshs.100,000 stated in entry 16 and 17 seemed to have been added. That the entries on the title presented by all the defendants are the same. DW 1 denied that Dr. Towett was a director of the 2<sup>nd</sup> defendant. He also said he has not seen any document of transfer between Dr. Towett and Lero Luno except the transfer signed by the 2<sup>nd</sup> Defendant.
69. The witness reiterates that as at September, 1989, the subplots were owned by the 2<sup>nd</sup> defendant and the plaintiff was not party to HCC 138 OF 2004. DW 1 commented on the letter at page 17 of Pex 1 which referred to a subsisting charge that their gate placed on the suit property is still there. This marked the close of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's case.
70. Ms. Patricia Chepkemei Towett gave evidence as DW 2 on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants. She introduced herself as the daughter of Dr Towett. She stated that she is a representative of both her parents. She adopted her written statement dated 5<sup>th</sup> February, 2024 as her evidence in chief and produced her bundle of documents dated 5<sup>th</sup> February, 2024 as exhibits. DW 2 said that L.R 13036 belonged to her father and she was aware it was charged to the 3<sup>rd</sup> defendant. She listed the directors of the 3<sup>rd</sup> defendant as Elizabeth (her mother) and Christy Katsantoni who died in 1985.
71. She asserts that she has presented documents confirming her mother was a director of the 3<sup>rd</sup> Defendant. She denied the property L.R 13036 was transferred to any party maintaining it still belongs to the estate. DW 2 stated that in 1980, a portion of the property was charged to the 3<sup>rd</sup> Defendant for a consideration of Kshs.1.5 million. It is her evidence that the 1<sup>st</sup> charge was registered on 6<sup>th</sup> August, 1980 while the 2<sup>nd</sup> charge on 29<sup>th</sup> November, 1980. She went on to state that in the event of default, the portion of the land charged was to be transferred to Deceased other company Flower Power Ltd.
72. DW 2 avers that her deceased father (Dr Towett) was unable to pay back the loan amount and as such the 6<sup>th</sup> defendant intended to proceed with the transfer of the property to Flower Power Ltd. It is also her evidence that the 6<sup>th</sup> Defendant was her friend and so he made her a co-director of Elart Enterprises (3<sup>rd</sup> Defendant) after the demise of Elizabeth. Thereafter in exercise of its statutory power of sale, the 3<sup>rd</sup> Defendant transferred and gifted 5 acres of land from the entire 25 acres to her.
73. It is the evidence of DW 2 that her deceased father never executed the agreement consenting to the transfer of the property to the 2<sup>nd</sup> Defendant in case of default hence he was not bound by any such agreement. Ms Chepkemei further argues as far as she is aware, the property remained charged to the 3<sup>rd</sup> defendant. She also states that the 6<sup>th</sup> defendant relocated to Australia where he died in 1983. This left her (DW2) as the sole director of the 3<sup>rd</sup> defendant.
74. She contended that the supposed transfer to the 2<sup>nd</sup> Defendant's name written with a hyphen was fraudulent. She also accused the 1<sup>st</sup> Defendant of misrepresenting himself as a director of the 2<sup>nd</sup> defendant. DW2 denied selling any shares in the 3<sup>rd</sup> defendant to Lero Luno Enterprises Ltd which shares was allegedly valued at Kshs.100,000/=.
75. According to the witness, if the transfer was done, the same was to exclude the 5 acres bequeathed to her by the 6<sup>th</sup> defendant. She pointed out that the 5 acres bequeathed is now comprised in L.R No. 12221. DW 2 also denied that the plaintiff has any legitimate claim to any part of the main property. She denied the particulars of fraud pleaded by the plaintiff.
76. In cross-examination by Mr. Khaseke learned counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants, DW 2 said she is not an administrator of the estate of Elizabeth (her mother). She confirmed the persons sued are the



- administrator of the estate of Dr. Towett. She admitted that P. M. Hudson (now Absa Bank) gave some finance to her father and the property was charged to them.
77. That the whole property was charged because by 1980 it had not been subdivided. She also admitted that there was an agreement between Dr Towett and the 3<sup>rd</sup> Defendant but she was not sure if it was produced in evidence. She stated that it is the 6<sup>th</sup> Defendant who exercised the power of sale. That paragraph 17(d) of her statement provided the 5 acres where the house is was to be excluded but this was not done. However, she reiterated that her mother never transferred the land to the 2<sup>nd</sup> Defendant. This witness affirmed that the letter at page 63 of their bundle was in respect of a complaint over title L.R. 12221. She avers that her father instituted a suit against Lero Luno but she had no details of that case.
78. Under cross-examination by the Counsel for the plaintiff, DW 2 said they moved on L.R 13036 in May or June of 1971 when she was 9 years old and She moved out in 1985. She confirmed that a Mrs Kariuki built a house opposite their vegetable garden and she thinks she is the one who now owns L.R No. 12218. DW 2 said that her father might have sold the land/plot to the said Mrs Kariuki.
79. DW 2 affirms that Mrs. Kariuki may have built between the years of 1973 – 1975 and that apart from Mrs. Kariuki, no one else lived there. The witness said she does not know Mr. & Mrs Boniface Ndegwa. However, she remembered Mr. Mwangangi who was a friend to his father. She admitted that his father may have sold land to him (the Plaintiff) as the deceased could not write the note if he did not sell.
80. According to her, the directors of the 3<sup>rd</sup> defendant were her mother and the 6<sup>th</sup> Defendant. That the 6<sup>th</sup> Defendant was their family friend and they called him uncle Christo. She remembered Christo saying his father was trying to make them homeless. She denied that her mother signed a transfer in favour of the 2<sup>nd</sup> Defendant. DW 2 maintained that the 3<sup>rd</sup> Defendant was not in the business of lending money. That the chances are, her mother wanted to secure the money hence the execution of the agreement. She admitted there was a relationship between the plaintiff and her father but she did not have details of that relationship.
81. In re-examination, DW 2 said she is the first daughter of the Toweets and is the one familiar with the facts of this case so the family appointed her to bring the evidence on their behalf. She was not aware of any transfer document signed by her mother. That all times, her mother would pass documents to her and her sister before signing.
82. According to her, the 6<sup>th</sup> Defendant had given them the plot where their house stands. Her mother could not sue the 3<sup>rd</sup> Defendant because she was its director. They also did not sue the 2<sup>nd</sup> Defendant because nobody knew who it was. This evidence marked the end of case by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
83. The parties filed their respective submissions which I have read and considered and where applicable, references are made within the judgement. From the evidence adduced, there is no dispute that Dr Taita Towett owned the land title No. 13036 and this evidence is confirmed by copy of the title deed produced by all the parties to this suit. From the copy of title, Dr Towett was registered as the owner on 18<sup>th</sup> June, 1971.
84. Both the Plaintiff and the Defendants are laying claim to the portion of land created from a subdivision of L.R 13036 now titled as L.R 12220 and forms the property in dispute. I adopt the questions posed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their submissions which captures the issues for determination. They are;



- i. Whether the plaintiff is the legal owner of the suit property by virtue of the alleged purchase from the 4<sup>th</sup> Defendant.
  - ii. Whether the Plaintiff acquired the land as against the 2<sup>nd</sup> Defendant by way of adverse possession.
  - iii. Whether the 3<sup>rd</sup> Defendant could sale the suit property under statutory power of sale
  - iv. Whether during the sale by the 3<sup>rd</sup> Defendant, the 2<sup>nd</sup> Defendant had capacity to buy.
  - v. Whether the plaintiff is entitled to the reliefs sought
  - vi. Who bears the costs of the suit?
85. It is the evidence of the plaintiff that he purchased the suit property from the 4<sup>th</sup> Defendant before it was formally subdivided. He averred that the transaction begun in 1974 after meeting the 4<sup>th</sup> Defendant in a club at Wilson Airport reserved for Airport Personnel. He asserted that he made the payment of purchase price between 1977 – 1978 and he was put in possession. He relied on several correspondences exchanged to prove the action of purchase and possession.
86. DW 2 in her evidence confirmed that the plaintiff was a friend of her deceased father (Dr Towet) and that based on the handwritten note, it is possible her father may have sold the suit plot to him (plaintiff). Infact from DW 2's evidence, she is not laying claim to L.R 12220 and instead, she is alleging that L.R 12221 where their house was is what was bequeathed to her by the 6<sup>th</sup> defendant who she described as a family friend.
87. On the other hand, the 2<sup>nd</sup> Defendant is claiming ownership of the entire L.R 13036 premised on purchasing it from the 3<sup>rd</sup> Defendant and it poured cold water on the evidence relied upon by the plaintiff. The second Defendant went forth and presented several bundles of documents in support of their claim over the suit property. Consequently, this court is tasked to weigh the plaintiff's documents vis a vis the challenge by the 1<sup>st</sup> and 2<sup>nd</sup> defendants' documents in determining who is entitled to the suit property.
88. The plaintiff admitted that as at the time of purchasing the suit land, the subdivision of L.R 13036 into five portions had not been registered. He however insists that he was shown the land being sold to him which had a proposed number of L.R No.12220. To prove the existence of this number, he referred to correspondences between Waruhui & Muite Advocates and the bank as well as well as the commission of Lands.
89. For instance, in a letter dated April, 22, 1977 from the said advocates to Nationaal Bank was referenced;
- “Dear Sir
- Purchase of L.R. No. 12220 (a subdivision excised from L.R 13036 Major Alexander M. Mwangangi from Dr Towet:
- .....
- As you know, subdivision of properties take a considerable length of time. It is only now that we have been promised separate title to the portion which Major Mwangangi is to purchase.”
90. Further in a letter dated 14<sup>th</sup> September, 1977 to the Bank,
- Ref: “Banking facilities Major Alex Mwangangi:



The vendor has already handed over possession to our client and we are processing transfer in favour of our client. We shall be grateful if you would kindly clear the amount loan of Kshs.80,000/= granted to him to enable him complete this matter.”

91. On 17<sup>th</sup> August, 1977, National Bank Kenya Ltd wrote to the Plaintiff thus;

“with reference to our various discussion in the above connection, we are pleased to confirm having agreed to sanction a loan facility to the extent of Kshs.80,000 to assist you purchase a piece of land in Langata.

As security, we shall hold a Legal charge over L.R no. 12220 Langata valued at Kshs.100,000 by Wairagu & Co.”

92. This letter by the bank confirms that they had even instructed for the valuation of the suit property by Wairagu & Co. The Plaintiff produced a copy of payment receipt to the said Waruhiu found at page 3 of Pex 3. In the same letter, the bank instructed Waruhui & Muite Advocates apparently acting for parties in the impugned transaction to proceed with the drawing up of the necessary documents.

93. Subsequently vide a letter dated 25<sup>th</sup> May, 1978, the bank forwarded a cheque of Kshs.80K to Waruhui & Muite Advocates and the reference of that letter read, ”purchase of L.R 12220 ( a subdivision excised from L.R 13036) Major Alexander Mwangangi from Hon. TAitta Towett.”

The Plaintiff also produced a copy of the cheque for a sum of Kshs.80,000/= dated 24<sup>th</sup> May, 1978 for Account 031 – 027 – 466.

94. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant took issues with the two letters from the bank reproduced above that no legal charge was registered in favour of National Bank Ltd or any copies of signed security documents were produced in evidence as the letters directed. They also made reference to the handwritten notes on the letter of 25<sup>th</sup> July, 1978 with words “cancelled officially on 30<sup>th</sup> May, 1978.”

95. Below the words “cancelled officially” were also handwritten notes “Error to be corrected ref telcon self/thuo 29<sup>th</sup> May, 1978 same PD cheque KCB 991 615 of 16<sup>th</sup> August, 1977.” It is not clear on the face of the letter who made the handwritten notes. It is also not clear what was being cancelled or the error that was being corrected. In the absence of this detail, the court goes by the typed content of the letter.

96. The question of whether the charge was registered in favour of National Bank Ltd was explained by the Plaintiff. He stated that when the process of filing the suit property, he offered the Bank his property in Kilifi where the charge was registered to secure the interest of the bank due to the delay in processing the title for the suit property.

97. Thus, it is my considered view and I so hold that the purposes the letters produced were to serve was to confirm that indeed the suit property the plaintiff was purchasing was identifiable. Further, the letters confirmed that there was indeed a vendor/purchaser relationship exhibited between the Plaintiff and Dr. Towett. Besides the letters written by their mutual advocates, the deceased (4<sup>th</sup> Defendant) in a handwritten note dated 13<sup>th</sup> May 1994 ( at pages 76-77 of Pex 1) wrote thus;

“NB: I did not make any gift to the company. Please donot ever interfere with Mwangangi’s piece of land”

98. It is misleading for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to submit that the suit property was non-existent merely because the subdivision as at the time of sale to the Plaintiff had not been registered. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants referred this court to the case of *Inner city Property v Housing Finance & 3 Others* (2020)



eKLR where the court declined to issue an injunction to parties who had allegedly purchased the property and taken possession. They submitted that by parity of reasoning, a purchaser of a charged property cannot have a legal claim unless either he has paid some money to the chargee or the chargee has given consent for the sale.

99. As at the time the Plaintiff alleged to have purchased the suit property, the charge in favour of the 3<sup>rd</sup> defendant had not been registered. Despite the subsequent registration of this charge, the law provides that the rights of a chargee take priority in realising their debt but does not extinguish other rights. This position is supported by the quote in the case of *KCB Limited v Jeremy Willy Tsumah* (2014) eKLR cited by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, from the text Land Law by Nigel P. Gravels, 3<sup>rd</sup> edition thus;

“The advantage of such real security is that, even if the borrower becomes insolvent, the lender as a secured creditor, will take priority over the general unsecured creditors of the borrower.”

100. Further, the order made in the case law of *Innecity Property v HFCK supra* was in an interlocutory application where the court refused to grant an order of temporary injunction stopping the auctioning of the property. At paragraph 33 of the said case, the judge stated that “when the property is sold, it is sold subject to the registered interests of those apartments that have been sold.”

101. The paragraph 41 quoted in submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was in respect of the interested parties who the judge noted have no claim to be litigated against the Defendants which then would entitle them to an order of injunction. It is thus distinguishable that this finding was reached on account that the Interested Parties had not brought a claim against the defendants i.e they did not have a direct cause of action presented to express their legal interest in a property.

102. It also notable from the copy of the title presented in evidence that even the transfer to the 2<sup>nd</sup> Defendant was registered subject to the caveat registered as I.R. 19/18. Even as at the time the charge was being registered in favour of the 3<sup>rd</sup> Defendant, it was registered subject to caveat registered as I.R. 19/18. Under the registration in favour of the 2<sup>nd</sup> Defendant, it is entered in a different handwriting that its freed and discharged from entries no 10 (charge to the 3<sup>rd</sup> Def) and no. 11 (caveat in favour of National Bank Limited). No mention is made with regard to Caveat I.R. 19/18. In summary, I am saying that the 2<sup>nd</sup> Defendant was also dealing with a title that had encumbrances and cannot throw the stone of the Plaintiff not being undertaking due diligence.

103. Although the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submit that the letter dated 28<sup>th</sup> June, 1990 at page 17 of Pex 1 said no subdivision would have been registered when charge for the proposition that the plaintiff was aware of the existing charges to the bank. In this instance, the plaintiff is saying that he purchased and paid but the transfer was not effected. As already stated in paragraph 100 hereinabove, It is my considered view that the said letter does not in any way invalidate the transaction between the 4<sup>th</sup> Defendant and the Plaintiff. The circumstances are distinguishable from the two cases cited of *KCB v Jeremy Willy Tsuma (2014) EKL* and *Paul Wangui, Gatete & 13 Others v Capital Realty Limited & HFCK Ltd.*

104. In a bid to further exhibit his stake in the suit property, the plaintiff referred to the letter dated 14<sup>th</sup> May, 1990 by Waruhiu & Muite advocates to Munoru Kagiri & Wamae Advocates found at page 36 of the plaintiffs bundle. The said advocates wrote thus;

“Re; Sale Of Plot 12220 Nairobi

Dr Towett To Col. A.m. Mwangangi

.....



We have considered that it will be of assistance to you, if we give you a brief background;

1. Way back in 1977, Col Mwangangi agreed to buy from Dr Towett a subdivision of L.R 13036 for Kshs 80000. His portion was given L.R No. 12220. Col Mwangangi paid the full purchase price.
2. As late as June 1981, the Vendor had not completed the subdivisinal formalities. On doing a search, we found out that the vendor had in November 1980 created a charge over the whole original title in favour of Elart enterprises limited to secure shs 1.5million. We lodged a caveat on 2<sup>nd</sup> June 1981 for whatever it was worth realising that such a caveat could be overridden by the Charge.
3. We had in the past explained to the various purchasers like Col. Mwangangi that sub-divisional transfers cannot be effected unless various approvals have been given by the Commissioner of Lands and the Nairobi City Commission. And none of these approvals had been given when Dr. Towett charged the land to Flower Power Limited in 1980.

105. From the evidence of DW 2, the directors of the 3<sup>rd</sup> Defendant was the wife and friend of the 4<sup>th</sup> Defendant who is said to have sold the suit property to the plaintiff. The charge was executed between the 3<sup>rd</sup> and 4<sup>th</sup> defendants is dated 21<sup>st</sup> November, 1980 (page 51 – 76 of 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s bundle). As at this date, the 4<sup>th</sup> defendant had sold several subplots to 3<sup>rd</sup> parties including the plaintiff. DW 2 admits that Ms. Karuiki who owns opposite to their vegetable garden owns L.R No. 12218. She built on this land in the 1970s. there is also a Mr. & Mrs. Ndegwa who had purchased L.R 12222.
106. Therefore, the 4<sup>th</sup> Defendant who was aware of L.R No. 13036 was acting in bad faith when he proceed to charge the whole property to the 3<sup>rd</sup> Defendant. The plaintiff and the other 3<sup>rd</sup> parties cannot be blamed for actions of the 4<sup>th</sup> defendant which was not within his knowledge. Nowonder Waruhiu & Muite advocates stated on 14<sup>th</sup> May, 1990 that they lodged a caveat when they learnt of the changes for whatever it was worth on 2<sup>nd</sup> June, 1981 on behalf of the plaintiff.
107. The documents produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants said nothing to contradict the correspondences produced by the Plaintiff. Further on the copy of the title LR 13036 produced show at entries 14 – 18 transfers registered post 1981 after the 2<sup>nd</sup> Defendant had acquired title for the whole parcel in their name. For instance, entry No. 14 in favour of Boniface Peter Ndegwa and Mary S. Ndegwa being a transfer for L.R 12222; entry No. 18 is a transfer to Grace Kariuki for L.R 12218 registered on 22<sup>nd</sup> December, 1989. These are some of the 3<sup>rd</sup> parties who the plaintiff has stated in his evidence that also purchased their parcels from the 4<sup>th</sup> Defendant before the land was charged to the 3<sup>rd</sup> Defendant and probably during the existence of the charges of 1971 to Housing Finance and PM Hudson (now Absa Bank Ltd.)
108. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants did not produce any sale agreement executed as between them and the stated parties whom they executed for the transfers. Added to this is the evidence of DW 2 that her father (the 4<sup>th</sup> Defendant) had sold a portion of 13036 to Ms Grace Kariuki. All these transactions corroborate the evidence by the plaintiff that the 4<sup>th</sup> defendant had engaged in selling the sub plots before the subdivisions were formally registered and despite the existence of the charges registered on the title in 1971.



109. It also confirms that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acknowledged the interests of these parties when the 2<sup>nd</sup> defendant accepted to transfer L.R Nos. 12218, 12219 and 12222 to these parties. One wonders why they declined to sign the transfer in favour of the plaintiff.

110. Section 3(3) of the Law of Contract was introduced as an amended to the Act sometime in 2003. Hence, it did not apply to contracts made before the amendment. Prior to the amendment, it read thus;

“ 3 No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded is in writing, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some persons authorised by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where the intending purchaser or lessee who has performed or is willing to perform his part of the contract;

- i. Has in part performance of the contract taken possession of the property or any part thereof.
- ii. Being already in possession in part performance of the contract has done some other act in furtherance of the contract.

111. In the instant case, although the agreement in writing was not produced, the plaintiff has demonstrated his willingness to do his part when he obtained the requisite financing for the purchase price. The advocate for transaction while writing to the bank confirmed that the plaintiff was put in possession.

112. The plaintiff stated that he took possession by fencing the plot using barbed wire and planting Kay apples trees round it. His evidence of the fencing is corroborated by the evidence of PW 2. I am therefore satisfied that he has proved that there was proof of purchase of the suit land L.R 12220. He has established a legal claim and possession over the suit property.

113. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued further that the Plaintiff having gained possession by way of alleged purchase made a claim for adverse possession unsustainable. They also contended that the plaintiff confirmed that he was neither in occupation nor has he constructed any structure on the suit property.

114. It is indeed true that the plaintiff admitted during his further cross-examination that he currently lives in his farm in Mua Hills. The plaintiff through his testimony did not say he lives on the suit property but he explained that taking possession was by virtue of fencing the property and subsequently selling one acre to Nelson Kivuvani the Interested Party. The argument by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that a person who is not living on a land in dispute cannot claim adverse rights are not supported with any legal provisions. The claimant only needs to establish that he dispossessed the registered owner of the purpose he intended to use the land for.

115. DW 1 in his evidence stated that he had placed a gate on the suit property which gate is still in existence. However, he did not deny that the suit property was fenced neither does he state that they are the ones who put the fence. At paragraph 5 of his statement, he said thus, “the plaintiff is not in possession and the house that is alleged to be on it together with the fence belongs to one Nelson Navanzia Kivuvani (the Interested Party).

116. The witness said Mr. Kivuvani told him that he had erected a fence around the suit property for security reasons. The said Mr. Kivuvani was not called by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to confirm this assertion. Mr. Kivuvani got onto the land having purchased the same from the plaintiff as exhibited in the sale



agreement dated 30<sup>th</sup> June, 1998 and 21<sup>st</sup> August, 1998. Thus his occupation was pursuant to the plaintiff user or exercise of rights accrued from the suit property.

117. I am alive to the requirement of the law that the plaintiff was the one with burden to demonstrate his occupation. He did so by calling the evidence of PW 2 who by the proceedings filed in a case where he had brought a claim for adverse possession over 122221 as evidence to confirm that he lived on a plot neighbouring the suit plot. He confirmed the owner of the plot where he lived told him the plot belonged to an army man and the plaintiff herein is a retired colonel of the Kenya Defence Forces. PW 2 also confirmed the existence of a fence on the suit plot which sometimes he had to cut its branches extending on to their property.
118. Has the Plaintiff proved the allegations of the fraud pleaded? DW2 who gave evidence confirmed that the 5<sup>th</sup> Defendant who was her mother was a co-director of the 3<sup>rd</sup> Defendant. She also confirmed that she knew the Plaintiff who was known to her father (4<sup>th</sup> Defendant) and an inference is drawn that the 5<sup>th</sup> Defendant knew the Plaintiff. Consequently, any dealings they did on the whole of L.R. 13036 must have been with the knowledge of the plaintiff's interest in the suit property. If the 3<sup>rd</sup> Defendant transferred the whole land to the 2<sup>nd</sup> defendant without preserving the interest of the Plaintiff, it acted maliciously and illegally.
119. Further, DW2 also denied that the 5<sup>th</sup> Defendant as a director of the 3<sup>rd</sup> Defendant did not sign any transfer in favour of the 2<sup>nd</sup> Defendant. She stated that their mother used to pass on all documents to her and her sister before signing and none was shown to them. According to the statement of defence filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants, they claim the suit property belongs to the 2<sup>nd</sup> Defendant and not the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant filed what it called a counter-claim and pleaded fraud against the 2<sup>nd</sup> Defendant.
120. For instance, at paragraph 46(f) it is pleaded thus, "purportedly recording discharges on 22.6.1981 on LR 13036 through the Registrar of Lands when there were no discharges executed because there was no charge in the first place or compensation to Elart Enterprises to discharge the property. Therefore, the discharges were fraudulently executed to show the property was transferred to Flower Power Ltd. In actual fact, the property is still charged to Elart Enterprises as per company records at that date"
121. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their submissions stated that the suit against the 5<sup>th</sup> Defendant abated for failure to substitute the said 5<sup>th</sup> Defendant. However, the pleadings on record confirm that Dr Joseph K. Towett is the administrator of the estate of Elizabeth Cherotich Towett. There is nothing presented to prove a contrary view of his authority as an administrator.
122. I have looked through the two bundles of documents produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, such as the estate duty valuation form found at pages 38-39 of the bundle dated 8<sup>th</sup> September 2014 and not that it does not bear the signature of the Vendor. The transfer form produced does not have the signatories of the persons who signed on behalf of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that immediately after acquiring the property, they subdivided it into five portions of LR numbers 12218-12222. From the correspondence produced by the Plaintiff highlighted above, the 2<sup>nd</sup> Defendant may only have processed the subdivision commenced by the 4<sup>th</sup> Defendant. They have not produced documents to support the subdivision process which Waruhiu and Muite advocates had described as a slow process which requires time
123. The 2<sup>nd</sup> Defendant also submitted that they disposed four portions between 1983 to 1989. One of the persons they alleged to have disposed is Mrs Kariuki who DW2 said bought and built on her plot now numbered 12218 between the period 1973-1975. This was before the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants acquired L.R 13036. The 2<sup>nd</sup> Defendant did not produce evidence of this dealing other than relying



on the entries in the register. This in my view portrays the 1<sup>st</sup> and 2<sup>nd</sup> Defendants intention to give the impression that they are the ones who sold the 4 sub plots yet the contrary is true from the documentary and oral evidence adduced.

124. It is now settled law by our courts that certificate of title is not conclusive evidence without establishing its roots. See the case of *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR and *Funzi Development LTD & Others versus County Council of Kwale* (2014) eKLR. The Court of Appeal in *Munyu Maina* held thus;

“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.”

125. The Plaintiff averred that the Defendants are laying claim to the suit property as it is the only property among the five sub plots which has not been developed. From the evidence presented, a bigger chunk of L.R. 13036 had already been disposed off by the 4<sup>th</sup> Defendant by the time he was charging it to the 3<sup>rd</sup> Defendant. This explains the evidence of DW2 stating that she was informed by the 6<sup>th</sup> Defendant (who was a director of the 3<sup>rd</sup> Defendant) that their father was going to render them homeless. Their home had been established in this land soon after the 4<sup>th</sup> Defendant purchased it in 1971.
126. The 4<sup>th</sup> Defendant started disposing the land as soon as they settled in with Ms Kariuki seemingly being the first purchaser. It is my holding that despite the 3<sup>rd</sup> Defendant registering a charge to secure the money it had advanced to the 4<sup>th</sup> Defendant, the horse of ownership had already bolted. Consequently, what it passed on to the 2<sup>nd</sup> Defendant was a paper title for L.R 13036 and not a good title that can supersede the rights of the Plaintiff. The registration of the 2<sup>nd</sup> Defendant amounts to a registration in trust for the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall therefore execute transfers in favour of the Plaintiff, just like they did to the previous buyers.
127. Did the 3<sup>rd</sup> Defendant have capacity to sale the suit property to the 2<sup>nd</sup> Defendant? I will not say much on this because the witness who gave evidence on behalf of the 3<sup>rd</sup> to 5<sup>th</sup> Defendants denied there was ever a sale and transfer to the 2<sup>nd</sup> Defendant. To protect the validity of its title, the 2<sup>nd</sup> Defendant ought to have produced other than the transfer documents to support the transactions undertaken between the two companies. DW1 said became a director between 2004-2005 so he was not able to avail these documents. This does not exclude the 2<sup>nd</sup> Defendant from the requirement of the law on the root of title.
128. In this instance, I find that the Plaintiff has proved his case on the main prayer and so I will not proceed to determine the alternative prayer for adverse possession. The counter-claim by the 3<sup>rd</sup> Defendant was not proved because they were claiming the plot where their house is. According to DW2, their house is on L.R 12221 while the Plaintiff claims 12220.
129. In conclusion, I enter judgement for the Plaintiff in the following terms;
- a. An order of permanent injunction be and is hereby issued restraining the Defendants by themselves, agents, servants, employees or otherwise howsoever for entering, cutting trees, demolishing structures and buildings, selling, transferring, alienating, or in any way dealing



with or interfering with the property rights, interests and possession enjoyed by the Plaintiff over all that property known as LR No. LR No. 12220 situated in Langata Nairobi.

- b. A declaration is made that the plaintiff is the legal, rightful and lawful owner/proprietor of all that property known as LR No. 12220 situate at Langata, Nairobi.
- c. That the 2<sup>nd</sup> Defendant shall within 30 days hereof execute transfer documents to cause the Plaintiff to be registered as the owner of all that property known as LR No. 12220 situate in Langata, Nairobi.
- d. Costs of the suit to the Plaintiff

**DATED, SIGNED & DELIVERED AT NAIROBI THIS 4<sup>TH</sup> OF JULY 2024**

**A. OMOLLO**

**JUDGE**

