



Mwangi (Suing as the Administrator of the Estate of Stephen Mwangi Maina) & 2 others v Ndungu & another; Ndungu & another (Plaintiffs to the Counterclaim); Mwangi (Suing as the Administrator of the Estate of Stephen Mwangi Maina) & another (Defendant to the Counterclaim) (Environment and Land Case Civil Suit 174 of 2019) [2024] KEELC 6077 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 174 OF 2019**

JO MBOYA, J

SEPTEMBER 16, 2024

BETWEEN

**TERESIA NJERI MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF STEPHEN MWANGI MAINA) 1ST PLAINTIFF
JAMES MUSOMBA NDUNGU 2ND PLAINTIFF
CHARITY WAKO KAGWI 3RD PLAINTIFF**

AND

**JAMES MUSOMBA NDUNGU 1ST DEFENDANT
CHARITY WAKO KAGWI 2ND DEFENDANT**

AND

**JAMES MUSOMBA NDUNGU PLAINTIFF TO THE COUNTERCLAIM
CHARITY WAKO KAGWI PLAINTIFF TO THE COUNTERCLAIM**

AND

**TERESIA NJERI MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF STEPHEN MWANGI MAINA) DEFENDANT TO THE COUNTERCLAIM
CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM**



JUDGMENT

Introduction and Background

1. The Plaintiff approached the court vide Plaint dated the 22nd of May 2019 and in respect of which same [Plaintiff] sought for various reliefs. Subsequently, the Plaint was amended culminating into the amended Plaint dated the 1st of August 2019.
2. Furthermore, the Plaintiff herein sought for and obtained leave to file and serve a further amended Plaint. In this regard the Plaintiff thereafter filed and served a further amended Plaint dated the 5th of March 2024 and wherein the Plaintiff has sought for the following reliefs:-
 - a. Permanent injunction against the Defendants to stop farming, construction, demolish the illegal temporary structures currently erected on the suit property and vacate land reference number 12672/79 title number IR88456.
 - b. Mandatory injunction against the Defendants to vacate and hand over vacant possession of land reference number 12672/79, title number IR88456 to the Plaintiff.
 - c. A declaration order that land reference number 12672/79 title number IR88456 belongs to the estate of the deceased and that the title in the name of the Defendants be cancelled and or revoked.
 - d. General damages for illegal occupation and trespass to the suit property.
 - e. Costs of this suit.
 - f. Any other of further relief as this court may deem just.
3. Upon being served the initial Plaint, the 1st and 2nd Defendants duly entered appearance and thereafter filed a statement of defence and counter-claim dated the 30th of October 2019. For good measure, the 1st and 2nd Defendants sought for the following reliefs at the foot of the counter-claim:
 - a. A declaration that James Musomba Ndungu and Charity Wako Kagwi are the registered proprietors of land reference number 12672/79.
 - b. The 2nd Defendant be ordered to cancel the title and all entries in the Central Lands Registry indicating Stephen Mwangi Maina as proprietor of land reference number 12672/79.
 - c. An order for an injunction be made to restraining the 1st Defendant from interfering with the peaceful occupation and enjoyment of Plaintiffs of land reference number 12672/79 title.
 - d. Costs of this suit.
 - e. Any other relief the court deems fit.
4. Suffice to point out that the counter-claim by and on behalf of the 1st and 2nd Defendants also impleaded the Chief Land Registrar as a 2nd Defendant to the counter-claim. In this regard, it behooved the Chief Land Registrar to enter appearance and file a statement of defence.
5. The Chief Land Registrar proceeded to and entered appearance to the counter-claim and thereafter filed a statement of defence dated the 27th of May 2021. However, the said statement of defence was subsequently amended culminating into the amended statement of defence dated the 19th of July 2022.



6. At the foot of the amended statement of defence by the Chief Land Registrar, same [Chief Land Registrar] has traced the background to the suit property from the initial position when grant number LR12672, IR No. 47800 was issued to and in favour of the Ite Farmers' Co-operative Society Limited and thereafter the sub-division thereof into two hundred and sixty six sub-divisions.
7. Other than the foregoing, the 2nd Defendant to the counter-claim has also highlighted that following the sub-division of the original property, LR12672/79 [suit property] was transferred to and registered in the name of Simon Peter Mburu Mucheke and thereafter the suit property was re-transferred back to the society.
8. Other than the foregoing, it is also imperative to state that the Plaintiff herein filed and served a reply to the statement of defence and defence to counter-claim on behalf of the 1st and 2nd Defendants. For completeness, the reply to the statement of defence and defence to counter-claim is dated the 3rd of November 2019.
9. The matter herein thereafter came up for pre-trial directions on various dates resting with the 4th of April 2022, whereupon the Advocates for the respective parties confirmed that same had duly filed and exchanged the requisite pleadings, witness statements and bundle of documents. In this regard, it was confirmed that the matter was ready for hearing.

Evidence by the Parties:

a. Plaintiff's Case:

10. The Plaintiff's case revolves around the evidence of three (3) witnesses namely, Teresia Njeri Mwangi, Emmanuel Karisa Kenga and Joseph Kimani Gathecha, who testified as PW1, PW2 and PW3, respectively.
11. It was the evidence of PW1 [Teresia Njeri Mwangi] that same is the lawful and duly constituted legal administratrix of the estate of one Stephen Mwangi Maina, now deceased. Furthermore, the witness also averred that same is the Plaintiff in respect of the instant matter.
12. It was the further testimony of PW1 that by virtue of being the Plaintiff herein same [PW1] is conversant with the facts of the case. In any event, the witness averred that same has since recorded a witness statement dated 30th of August 2021 and which witness statement same sought to adopt and rely on as her evidence in chief. In this regard, the witness statement dated 30th of August 2021 was thereafter adopted and constituted as the evidence in chief of the witness.
13. On the other hand, the witness also averred that same has also filed a further witness statement dated the 13th of April 2022 and which witness statement, the witness, similarly sought to adopt and rely on as her further evidence in chief. To this end, the further witness statement was adopted and admitted as further evidence in chief of the witness.
14. In addition, the witness adverted to a list and bundle of documents dated the 30th of August 2021, containing eighteen (18) documents and which documents the witness sought to tender and produce before the court. Suffice to point out that the documents at the foot of the list dated the 30th August 2021 were tendered and admitted in evidence save for document number 18, which was marked for identification.
15. On the other hand, the witness also adverted to a further list and bundle of documents dated the 13th of April 2022 and containing four (4) documents. Besides, the witness sought to tender and produce



- the documents as exhibits. There being no objection to the production of the said documents, same were produced and marked as Plaintiff's exhibits 19 to 22 respectively.
16. The witness similarly, referred to the further/supplementary list of documents dated the 4th of July 2022 and containing two (2) documents. The witness thereafter sought to tender and produce the said documents as further exhibits before the court.
 17. There being no objection to the production of the documents at the foot of the further list dated the 4th of July 2022, the documents thereunder were produced and admitted as Plaintiff's exhibits 23 and 24 respectively.
 18. Other than the foregoing, the witness adverted to the amended Plaint dated the 1st of August 2019 and the verifying affidavit attached thereto and thereafter sought to adopt and rely on the contents thereof. In particular, the witness implored the court to grant the reliefs sought at the foot of the amended Plaint.
 19. On cross-examination by learned counsel of the 1st and 2nd Defendants, the witness averred same [witness] is conversant with one Stephen Mwangi Maina, now deceased. In any event, the witness averred that said Stephen Mwangi Maina was her husband.
 20. While under further cross-examination, the witness averred that following the death of Stephen Mwangi Maina, same [witness] applied to be issued with grant of letters of administration. In this regard, the witness averred that same filed succession proceedings before Murang'a Chief Magistrate's Court vide Succession Cause No. 172 of 2009.
 21. It was the further testimony of the witness that same [witness] was thereafter issued with grant of letters of administration. Furthermore, the witness added that the grant of letters of administration was subsequently confirmed by the court in terms of the certificate of grant issued on the 4th of October, 2010.
 22. On further cross-examination, the witness averred that the grant of letters of administration which was issued in her favour, has never revoked and/or cancelled.
 23. It was the further testimony of the witness that the succession cause culminating into the issuance of the grant of letters of administration was filed through a firm of Advocates. In any event, the witness added that the succession cause was filed through her current Advocates.
 24. Additionally, the witness averred that even though same filed the succession cause before the Chief Magistrate at Murang'a, the inventory of assets which was filed before the Chief Magistrate's Court did not include and/ or reference the suit property as one of the assets of the deceased.
 25. Other than the foregoing, it was the testimony of the witness that same further filed another succession cause at the High Court in Nairobi. The witness adverted to Nairobi HCC Succession Cause No. 1238 of 2014. The witness however, pointed out that even though same filed the subsequent succession cause, the suit property was never included in the inventory of assets of the deceased.
 26. While under further cross-examination, the witness averred that her later husband was a member of Ite Farmers' Co-operative Society. Nevertheless, the witness conceded that even though her late husband was a member of Ite Farmers' Co-operative Society Limited, same [witness] has conceded that she has not produced any certificate to show that her deceased husband was a member of the Society.
 27. It was the further testimony of the witness that same has seen a copy of the register of Members of Ite Farmers' Co-operative Society. However, the witness added that even though same has seen the register



- of the members of Ite Farmers' Co-operative Society, the name of her late husband is not reflected in the register.
28. It was the further testimony of the witness that the suit property belonged to and was registered in the name of her late husband. However, the witness clarified that even though the suit property belonged to her late husband, same [witness] has never been in occupation of the suit property. To the contrary the witness acknowledged that the suit property is under the occupation of the 1st and 2nd Defendants.
 29. It was the further testimony of the witness that same is aware of a letter which was generated by the Ministry of Lands and wherein it was indicated that there was an error in the certificate of title that was issued in favour of her late husband. Furthermore, the witness acknowledged that the letter from the Ministry of Lands had sought to have the certificate of title in the name of her late husband to be surrendered back to the Ministry back for correction.
 30. On further cross-examination, the witness averred that same does not know whether her current Advocate [Charles Maina Njonjo] and one Joseph Kimani Gathecha have been arrested and charged with a criminal offence. However, upon being shown the proceedings vide Criminal Case No. 21 of 2020, the witness conceded that there is indeed criminal proceedings that have been taken against her Advocates in respect of the certificate of title pertaining to the suit property.
 31. It was the further testimony of the witness that there was a certificate of title which was issued in favour of one Simon Peter Mburu. Furthermore, the witness added that the title in favour of Simon Peter Mburu was issued on the 30th of October 2002.
 32. On cross-examination by learned counsel for the 2nd Defendant to the counter-claim the witness averred that the suit property belonged to and was registered in the name of her late husband. However, the witness conceded that even though the suit property was registered in the name of her late husband, same [witness], does not have the original certificate of title.
 33. It was the further testimony of the witness that the original certificate of title was left in the custody of her deceased husband's advocate but same was subsequently misplaced.
 34. While under further cross-examination, the witness averred that her late husband was a member of Ite Farmers' Co-operative Society. However, the witness averred that same has neither availed nor produced any documents to confirm such membership.
 35. The 2nd witness who testified on behalf of the Plaintiff, was Emmanuel Karisa Kenga. Same testified as PW2.
 36. It was the testimony of PW2 that same is a forensic document examiner. Furthermore, the witness testified that same received various trainings pertaining to forensic document examination. At any rate the witness added that he was a police officer and retired in the year 2015. Furthermore, the witness averred that by the time of his retirement from the National Police Service, same [witness] had attained the rank of a Commissioner of Police.
 37. It was the further testimony of the witness that his services as a forensic document examiner was retained by the Plaintiff's Advocate. In this regard, the witness averred that the Plaintiff's Advocate required him [witness] to undertake forensic examination of various documents and questioned signatures and thereafter to prepare a report.
 38. Furthermore, the witness averred upon receipt of the instructions from the Plaintiff's Advocate, same [witness] proceeded to and undertook forensic document examination in respect of the various documents and the questioned signatures. Thereafter, the witness averred that he proceeded to and



- prepared a report dated the 1st of October 2020 and which report the witness tendered and produced as exhibit P18.
39. On cross-examination by learned counsel for the 1st and 2nd Defendants, the witness averred that same worked with the National Police Service upto and including the year 2015. It was the further testimony of the witness that thereafter same retired from the police service.
 40. Other than the foregoing, the witness averred that prior to his retirement same [witness] and other police officers had been interdicted by the National Police Service and thereafter same [witness] and the other officers filed a suit vide ELRC Petition *No. 13 of 2015* which Petition was heard and determined vide Judgement rendered on the 24th of June 2016.
 41. It was the testimony of the witness that some of the documents that were forwarded onto to him for purposes of examination bore the signature of E.N. Gicheha. However, the witness added that the documents were photocopies.
 42. In addition, the witness averred that even though the documents bore the signature of E.N. Gicheha, Principal Land Registrar, same [witness] had not met E.N. Gicheha in person. Furthermore, the witness added that same did not seek to obtain the original signature form E.N. Gicheha before undertaking forensic examination.
 43. Be that s it may, the witness averred that same [witness] proceeded to and undertook the forensic document examination of the documents, as well as the questioned signature[s] and thereafter formed an opinion that the questioned signature[s] belonged to E.N. Gicheha.
 44. While under further cross-examination, the witness averred that even though he is a qualified forensic document examiner, same has however, not tendered his certificates before the court.
 45. It was the further testimony of the witness that in the course of undertaking forensic document examination, same also examined the certificate of title bearing the name of Stephen Mwangi Maina.
 46. The 3rd witness who testified on behalf of the Plaintiff was one Joseph Kimani Gathecha. Same testified as PW3.
 47. It was the testimony of the witness [PW3] that same is conversant with the facts of the instant matter. In any event, the witness added that same has since recorded a witness statement dated the 7th of August 2019 and which witness statement the witness sought to adopt as his evidence in chief. Suffice to point out that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
 48. On cross-examination by learned counsel for the 1st and 2nd Defendants, the witness [PW3] stated that same was known to one Stephen Mwangi Maina. Furthermore, the witness averred that Stephen Mwangi Maina is now deceased.
 49. It was the further testimony of the witness that Stephen Mwangi Maina, now deceased, was the registered owner of the suit property. Furthermore, the witness averred that same had intended to purchase the suit property from Stephen Mwangi Maina, now deceased.
 50. While under further cross-examination, the witness averred that before attempting to purchase the suit property from the Stephen Mwangi Maina, same [witness], undertook due diligence to ascertain the ownership status of the suit property. In this regard, the witness averred that same carried out official search and which official search revealed that the suit property was registered in the name of Stephen Mwangi Maina, now deceased.



51. It was the further testimony of the witness that subsequently, the deceased and himself entered into a sale agreement pertaining to the sale of the suit property. However, the witness added that the same transaction was not concluded.
52. On further cross-examination, the witness admitted that the Plaintiff herein and her Advocates were indeed arrested and charged with a criminal offence.
53. While under cross-examination by learned counsel for the 2nd Defendant to the counterclaim, the witness averred that same undertook an official search at the Land Registrar and the registry issued him [witness] with an official search.
54. With the foregoing testimony, the Plaintiff's case was closed.

b. 1st & 2nd Defendants' Case:

55. The 1st and 2nd Defendants' case is premised on the evidence of three (3) witness namely; James Musomba Ndungu, Superintendent of Police John Muinde and Francis Kago Gathuo, who testified as DW1, DW2 and DW3, respectively.
56. It was the testimony of DW1 [James Musomba Ndungu] that same is the 1st Defendant in respect of the instant matter. Besides, the witness averred that the 2nd Defendant is known to him. In any event, the witness added that the 2nd Defendant is his dear wife.
57. It was the further testimony of the witness [DW1] that the 2nd Defendant has since granted unto him authority to attend court and testify on her [2nd Defendant's] behalf. In any event, the witness averred that the authority is dated the 8th of March 2022 and same has been duly filed before the court.
58. On the other hand, the witness averred that by virtue of being the 1st Defendant in this matter, same [witness] is conversant with the facts of the case. Besides the witness added that same has since recorded a witness statement dated the 28th of July 2020 and which witness statement the witness sought to adopt and rely on as his evidence in chief. In this regard the witness statement dated the 28th of July 2020 was duly adopted and constituted as the evidence in chief of the witness.
59. On the other hand, the witness also averred that same has filed a further witness statement dated the 1st of March 2023 and which statement the witness sought to adopt and rely on. Suffice to point out that the witness statement was thereafter adopted and constituted as the further evidence of the witness.
60. The witness thereafter adverted to the list and bundle of documents dated the 30th of October 2019 and sought to produce the documents thereunder. However, learned counsel for the Plaintiff objected to the production of documents number 9, 11 & 14 respectively. In this regard, the said documents namely, documents number 9, 11 & 14, were marked for identification.
61. Be that at it may, the rest of the document at the foot of the list dated 30th October 2019 were produced as exhibits before the court. Furthermore, the witness also adverted to the further list and bundle of documents dated 1st of March 2022 and thereafter sought to produce the various documents as exhibits before the court.
62. Nevertheless, learned counsel for the Plaintiff objected to the production of documents numbers 3, 9 & 10 respectively. In this regard, the named documents were marked for identification while the rest of the documents were duly produced as exhibits.
63. The witness [DW1] also alluded to a further/supplementary list of documents dated 19th of July 2022 and thereafter sought to produce the documents as exhibits. There being no objection to the



production of the said documents same was produced as exhibit D32 on behalf of the 1st and 2nd Defendants.

64. On the other hand, it was the testimony of the witness that the 1st and 2nd Defendants have also filed a statement of defence and counter-claim dated the 8th of March 2022. In this regard, the witness sought to adopt and rely on the contents of the statement of defence and counterclaim.
65. On cross-examination by learned counsel for the Plaintiff, the witness averred that same got to know of the existence of the suit property from a close family friend. The witness averred that it is the close family friend who intimated to the witness that Ite Farmers Co-operative Society was selling the suit property.
66. It was the further testimony of the witness that upon obtaining the said information, same [witness] got in contact with Ite Farmers' Co-operative Society with a view to purchasing the suit property. In this regard, the witness averred that a sale agreement was thereafter entered into and executed.
67. While under further cross-examination, the witness averred that Ite Farmers' Co-operative Society also prepared a transfer instrument which was duly executed by both the Vendor [Ite Farmers' Co-operative Society [and the Purchasers [1st and 2nd Defendants], respectively.
68. It was the testimony of the witness that thereafter the transfer instrument was submitted to the Chief Land Registrar for purposes of registration, culminating into the registration of same. In any event, the witness averred that the registration was reflected as IR No. 47800/105.
69. It was the testimony of the witness that the 1st and 2nd Defendants bought/purchased the suit property for the sum of Kshs.15,000,000/- only. Thereafter, the witness averred that the property was transferred and registered in the names of the 1st and 2nd Defendants. While under further cross-examination, the witness averred that the transfer in favour of the 1st and 2nd Defendants was effected by the society. However, the witness averred that same is aware that the society was placed under liquidation. In this regard, the witness adverted to a copy of the gazette notice which was filed by the Plaintiff.
70. Nevertheless, the witness averred that the gazette notice speaking to the liquidation of the society was revoked. In this respect the witness pointed out that the gazette notice was revoked on the 28th November 2016.
71. On further cross-examination by learned counsel for the Plaintiff, the witness averred that the suit property was sold to the 1st and 2nd Defendants by Ite Farmers' Co-operative Society. In any event, the witness added that the transfer instrument was similarly sealed by the society and thereafter same [transfer instrument] was presented for registration on the 23rd of December 2012.
72. Upon being referred to the document at page 19 of the Plaintiff's bundle of documents, the witness averred that the document thereunder relates to a certificate of title in the name of Stephen Mwangi Maina. However, the witness stated that the said certificate of title is not genuine.
73. On cross-examination by learned counsel for the 2nd Defendant to the counter-claim, the witness averred that same has sued the Chief Land Registrar because the Chief Land Registrar is responsible for the issuance of the certificate of title in favour of the Plaintiff. However, the witness conceded that same has not seen any evidence that the Chief Land Registrar indeed issued the certificate of title in favour of the Plaintiff.
74. On the other hand, the witness averred that same has not seen the witness statement of Gildine Karani, the Principal Land Registrar. However, upon being shown the witness statement of Gildine Karani,



- the witness confirmed that the Chief Land Registrar has reiterated the suit property lawfully belongs to the 1st and 2nd Defendants.
75. The 2nd witness who testified on behalf of the 1st and 2nd Defendants is John Muinde. Same testified as DW2.
 76. It was the testimony of the witness [DW2] that same is currently a Superintendent of Police. Furthermore, the witness averred that same is also a qualified forensic document examiner. At any rate, the witness added that he is currently the head of forensic documents examination at the CID Headquarters.
 77. Other than on the foregoing, the witness averred that same received assorted documents for examination vide exhibit Memo form from Corporal Leonard Siele. It was the testimony of the witness that the exhibit memo form was dated the 26th of February 2020 and same forwarded various documents for examination.
 78. It was the testimony of the witness that upon receipt of the documents at the foot of the exhibit memo form, same [witness] proceeded to and conducted the requisite examination and thereafter same prepared a document examination report dated 12th of March 2020.
 79. The witness thereafter sought to produce the document examination report as an exhibit before the court. There being no objection to the production of the document examination report, same was produced as exhibit D33 on behalf of the 1st and 2nd Defendants.
 80. On cross-examination by learned counsel for the Plaintiff, the witness averred that the exhibit memo form was forwarded to him [witness] by the investigating officer. Furthermore, the witness averred that the exhibit memo form also alluded to the criminal offence in respect of which the examination related to.
 81. It was the further testimony of the witness that the exhibit memo form contained various documents and specimen signatures of Elizabeth N. Gicheha and which documents and signatures same [witness] was required to examine and thereafter prepare a report on. Besides the witness added that same indeed proceeded to and undertook the examination.
 82. It was the further testimony of the witness that the examination report, which same [[witness] has produced before the court has demonstrated his findings as well as methodology deployed towards arriving at the conclusions.
 83. On cross-examination by learned counsel for the 2nd Defendant to the counter-claim, the witness averred that the document at the foot of the exhibit memo form were forwarded to him by the investigating officer. Furthermore, the witness added that the specimen signatures of Elizabeth N. Gicheha were procured by the investigating officer.
 84. It was the further testimony of the witness that same proceeded to and undertook the requisite examination of the documents and the questioned signatures and thereafter prepared a report. In addition, the witness added that after undertaking the examination, the exhibits which had been forwarded vide exhibit memo form were returned to the Investigating Officer.
 85. The 3rd witness who testified on behalf of the 1st and 2nd Defendants was one Francis Kago Gathuo. Saem testified as DW3.
 86. It was the testimony of the witness that same [witness] is currently the Secretary of Ite Farmers' Co-operative Society Limited. The witness further added that by virtue of being the Secretary, same [witness] was therefore knowledgeable of the facts of the matter.



87. Other than the foregoing, the witness averred that same has since recorded a witness statement dated 29th of September 2021. In this regard, the witness sought to adopt and rely on the witness statement dated 29th September 2021. For good measure, the witness statement was adopted and constituted as the evidence in chief of the witness.
88. Other than the foregoing, the witness averred that same [witness] is conversant with the various documents which have been filed by the 1st and 2nd Defendants. In particular the witness referenced exhibit D8 and pointed out that same is a letter of offer which was duly executed by Ite Farmers Co-operative Society.
89. It was the further testimony of the witness that the society also executed a transfer instrument in favour of the 1st and 2nd Defendants. In this regard, the witness sought to produce a copy of the transfer instrument and the members' register of the society. Suffice to point out that the members register was tendered and produced before the court as exhibit D9.
90. Additionally, it was the further testimony of the witness that member number 47 was one Simon Peter Mburu Mucheke. Besides, the witness pointed out that same has an extract of the register showing that entry number 47 relates to the said Simon Peter Mburu Mucheke.
91. It was the further testimony of the witness that the original parcel of land namely LR No. 12672/79 was sub-divided by the society into various sub-divisions giving rise to inter-alia the suit property. At any rate, the witness averred that the suit property is captured in the registry index map.
92. While under further cross-examination, the witness averred that it is him [witness] who issued the letter of offer to the 1st and 2nd Defendants. In this regard, the witness sought to tender the letter of offer before the court.
93. On cross-examination by learned counsel for the Plaintiff, the witness pointed that the suit property was lawfully transferred to and registered in the name of the 1st and 2nd Defendants. For good measure, the witness averred that the suit property was registered in the name of the 1st and 2nd Defendants in the year 2013.
94. While under further cross-examination, the witness averred that same has seen the gazette notice published on the 3rd of July 2012. In any event, the witness added that the gazette notice related to the placement of the society under liquidation.
95. It was the further testimony of the witness that the society is still in operation. At any rate, the witness averred that the members' register of the society is under his [witness] custody. In addition, the witness also averred that the ballot register is also under his [witness] custody.
96. On further cross-examination by learned counsel for the Plaintiff, the witness averred that the suit property was allocated to Simon Peter Mburu Mucheke and thereafter same was transferred and registered in his name. However, the witness added that Simon Peter Mburu Mucheke subsequently re-transferred the suit property to the society.
97. While under further cross-examination, the witness averred that it is the society who sold the suit property to the 1st and 2nd Defendants. At any rate, the witness added that the property was sold to the 1st and 2nd Defendants for the sum of Kshs.15,000,000/=.
98. It was the further testimony of the witness that the society has one hundred and thirty (130) members. However, the witness added that the ballot register reflects a total of one hundred and thirty one (131) members. On the other hand, it was the testimony of the witness that the suit property was balloted



by the mother of Simon Peter Mburu Mucheke and thereafter same transferred the property to Simon Peter Mburu Mucheke.

99. On cross-examination by learned counsel for the 2nd Defendant to the counter-claim, the witness averred that the Plaintiff herein was not a member of the society. Furthermore, the witness added that the plaintiff's husband was also not a member of the society.
100. It was the testimony of the witness that the name of the plaintiff's husband does not appear in the register of members of the society. In this regard, the witness confirmed that the Plaintiff's husband could not therefore have been allowed to ballot.
101. On the other hand, it was the testimony of the witness that it is the society who sold and transferred the suit property to and in favour of the 1st and 2nd Defendants. At any rate the witness testified that the transfer documents were duly executed by the Chairperson, Treasurer and Secretary of the society.
102. Additionally, the witness averred if the suit property was to be transferred to and in favour of the Plaintiff, it is the society who would have executed the transfer instruments in favour of the Plaintiff. However, the witness added that the society did not transfer the suit property to the Plaintiff.
103. With the foregoing testimony the 1st and 2nd Defendants' case was closed.

c. The Case of the 2nd Defendant to the Counter Claim:

104. The case for the 2nd Defendant to the counter claim revolves around the evidence of one witness namely; Chief Inspector Daniel Wainaina. Same testified as DW4.
105. It was the testimony of the witness that same is currently a Chief Inspector of Police attached to the Directorate of Criminal Investigations [DCI]. Furthermore, the witness averred that he is the currently attached to the Land Fraud Investigations Unit.
106. In addition, it was the testimony of the witness that same is the Investigating Officer, who was tasked to undertake investigations relating to a complaint that was lodged by the 1st and 2nd Defendants pertaining to a fraudulent title held by the Plaintiff.
107. On the other hand, the witness averred that arising from his engagement with the facts of this case, same [witness] is therefore conversant with the issues in dispute. In this regard, the witness averred that same has since recorded a witness statement dated the 19th of July 2022 and which witness statement same [witness] sought to adopt as the evidence in chief.
108. Suffice to point out that the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness. Furthermore, the witness also adverted to a list and bundle of documents dated the 19th of July 2022, containing thirty (30) documents and which the witness sought to tender and produce before the court.
109. There being no objection to the production of the documents, same [documents] were produced and admitted in evidence as exhibit D1 to 30 respectively, on behalf of the 2nd Defendant to the counter-claim.
110. On cross-examination by learned counsel for the Plaintiff, the witness averred that in the course of his investigations, same established that the 1st and 2nd Defendants bought/purchased the suit property from Ite Farmers co-operative Society. However, the witness averred that same did not come across the sale agreement between Ite Farmers' Co-operative Society and the 1st and 2nd Defendants.



111. It was the further testimony of the witness that same did not peruse the transfer instrument between Ite Farmers' Co-operative Society and the 1st and 2nd Defendants. However, the witness clarified that same established that the suit property was sold for the sum of Kshs.15,000,000/- only.
112. While under further cross-examination, the witness averred that in the course of his investigations, same [witness] called both the Plaintiff and the 1st and 2nd Defendants to avail various documents that same held as pertains to the suit property. In this regard, the witness added that the Plaintiff herein availed to him photocopies of the certificate of title to the suit property as well as a letter from the Ministry of Lands, which indicated that there was an error in the certificate of title bearing the name of Stephen Mwangi Maina.
113. It was the further testimony of the witness that upon obtaining various documents from both the Plaintiffs and the 1st and 2nd Defendants, same [witness] forwarded the various documents to the Chief Land Registrar for purposes of verification. In this regard, the witness averred that subsequently, it was established that the certificate of title in favour of the Plaintiff was fraudulent.
114. On cross-examination by learned counsel for the 1st and 2nd Defendants, the witness averred that same conducted investigations relating to the propriety of the certificate of title held by the Plaintiff herein. Furthermore, the witness added that the investigations were precipitated by a complaint which was lodged by the 1st and 2nd Defendants.
115. While under further cross-examination, the witness averred that same undertook the requisite investigations and thereafter established that the certificate of title in favour of the Plaintiff was fraudulent.
116. Furthermore, it was the evidence of the witness that even though the Plaintiff had indicated that Stephen Mwangi Maina was a member of the society, the Plaintiff however, did not avail any document to demonstrate that same was indeed a member of the said society.
117. On re-examination by learned counsel for the 2nd Defendant to the counterclaim, the witness averred that the suit property was purchased by the 1st and 2nd Defendants in the year 2012. Furthermore, the witness further averred that subsequent to the acquisition of the suit property by the 1st and 2nd Defendants, same entered upon and took possession of the suit property.
118. With the foregoing testimony, the case for the 2nd Defendant to the counter-claim was closed.

The Parties' Submissions:

119. Following to the conclusion of the hearing, the Advocates for the parties covenanted to file and exchanged written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
120. Furthermore, it suffices to underscore that the parties herein thereafter proceeded to and indeed filed written submissions. For good measure the Plaintiff herein filed two [2] sets of written submissions dated the 26th January 2024 and further submissions dated 6th March 2024, whereas the 1st and 2nd Defendants also filed written submissions dated the 16th of July 2024.
121. However, despite being present when the directions for filing and exchange of written submission were given, the 2nd Defendant to the counter-claim did not file any written submissions.
122. Be that as it may, the written submissions [details in terms of paragraph 120 herein] form part of the record of the court and same shall be considered and taken into account in crafting the judgement beforehand.



123. Additionally, even though the court has neither rehashed nor reproduced the evidence by the parties in the body of the Judgement, it suffices to point out that the court has taken cognizance thereof.
124. In any event, the court is grateful to the parties for the comprehensive submissions filed and the case law highlighted thereunder.

Issues for Determination:

125. Having reviewed the pleadings filed by the parties, the evidence tendered and upon taking into account the written submission on behalf of the respective parties, the following issues do emerge[crystallise] and are thus worthy of determination:
 - i. Whether the Stephen Mwangi Maina [now deceased] and whose estate is represented by the Plaintiff lawfully acquired the suit property or otherwise.
 - ii. Whether the 1st and 2nd Defendants lawfully purchased the suit property from Ite Farmers Co-operative Society Limited and if so, whether the 1st and 2nd Defendants herein are bona fide purchasers for value without notice of any defect in the title.
 - iii. What reliefs if any ought to be granted.

Analysis and Determination: Issue Number One

i. Whether the Stephen Mwangi Maina [now deceased] and whose estate is represented by the Plaintiff lawfully acquired the suit property or otherwise.

126. The Plaintiff herein brought this suit beforehand contending that her late husband namely Stephen Mwangi Maina, now deceased, was a lawful member Ite Farmers' Co-operative Society Limited and that by virtue of being a member of the said society, her late husband was lawfully allocated the suit property.
127. Furthermore, it was the testimony of the witness that by virtue of being a member of Ite Farmers' Co-operative Society, her late husband was entitled to ballot and indeed balloted culminating into being assigned the suit property. For good measure, the averments that the deceased was a member of the society are elaborated at the foot of paragraphs 5, 6, 7, 8, 9, 11, 12 & 13 of the witness statement dated the 30th of August, 2021, which was duly adopted and constituted as the evidence in chief of the witness.
128. From the evidence in chief of PW1, what comes out clearly is that the Plaintiff's husband is said to have been a member of Ite Farmers' Co-operative Society and that same [deceased] procured and obtained the suit property through balloting.
129. To the extent that the Plaintiff had contended that her late husband was indeed a member of Ite Farmers' Co-operative Society and thereafter balloted culminating into the acquisition of the suit property, it was therefore incumbent upon the Plaintiff to place before the court plausible, cogent and credible evidence to underpin the contention that indeed the deceased was a member of the society.
130. Put differently, it was the Plaintiff's case that her late husband acquired and became the owner of the suit property by virtue of having being a member of the society. In this regard, the foundation of the Plaintiff's title to and in respect of the suit property stems from membership of the society and not otherwise.



131. Despite here contention that Stephen Mwangi Maina, now deceased, was a lawful member of Ite Farmers' Co-operative Society and thereafter proceeded to ballot, culminating into the assignment of the suit property unto him, the Plaintiff herein however, failed to tender and/or produce before the court any document to demonstrate that the deceased was indeed a member of the society.
132. For good measure, the Plaintiff herein who testified as PW1, conceded and acknowledged that same had neither tendered nor produced any certificate of membership on behalf of the deceased.
133. To this end, it suffices to reproduce the salient aspects of the evidence by PW1 while under cross-examination by learned counsel for the 1st and 2nd Defendants.
134. Same testified as hereunder;-

“My deceased husband was a member of Ite Farmers' Co-operative Society. However, I don't have any certificate to show that my husband was a member of the society. I informed my Advocates to write to the society to get a documents to show membership. I have seen the register of members of Ite Farmers' Co-operative Society. However, I have not seen the name of my husband.”

135. While under cross-examination by learned counsel for the 2nd Defendant to the counter-claim PW1 stated as hereunder;-

“I have never written a letter to Ite Farmers' Co-operative Society. I have not seen any document to confirm that my late husband was a member of the society.”

136. It was the Plaintiff who had contended that her late husband was a member of Ite Farmers Co-operative Society and that same [deceased] balloted culminating into being allocated the suit property. In this regard, it was the obligation of the Plaintiff to place before the court evidence to demonstrate that indeed her deceased husband was truly a member of the society. [See Section 107, 108 & 109 of the Evidence Act, Chapter 80 Laws of Kenya].
137. However, despite bearing the burden of proving that her late husband was indeed a member of the society, and thus entitled to ballot and to be allocated any portion of the society's land, the Plaintiff herein failed to tender and produce any document. Consequently, the foundation of the Plaintiff's claim to and in respect of the suit property, was neither established nor demonstrated.
138. Suffice to underscore, that it was the Plaintiff's obligation to first and foremost lay before the court credible evidence towards discharging the evidential burden, before the Defendants could be called upon to offer rebuttal. The burden herein is referred to as the evidential burden of proof.
139. In this respect it is imperative to take cognizance of [reference] the holding of the Supreme Court in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR, where the court stated and held thus;-
- (49) Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



50. This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:-

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

- (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.
140. The legal requirement that the Plaintiff/Claimant must discharge the evidential burden of proof was also elaborated by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the court stated and held as hereunder; -

Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

141. Furthermore, the burden and standard of proof was also highlighted by the Court of Appeal in the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, where the court stated and held as hereunder;

The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions* (1947) explained as follows:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

142. Simply put, it was the obligation of the Plaintiff to place before the court evidence to establish and demonstrate that her late husband, namely Stephen Mwangi Maina [now deceased] was first and foremost a member of ITE Farmers’ Cooperative Society Limited and similarly, that the deceased indeed balloted for the suit property.



143. Even though the Plaintiff failed to place before the court evidence to demonstrate that her late husband was a member of ITE Farmers' Cooperative Society Limited, evidence abound to show that the Plaintiff's late husband was never a member of the said society.
144. To this end, it is worthy to recall the testimony of DW3, namely Francis Kago Gathuo, who testified that same [witness] is the secretary of ITE Farmers' Cooperative Society Limited and thus chargeable with the custody of the records of the society, including the members and ballot register of the society.
145. In particular, it was the testimony of DW3 that the society had 130 members and that the names of all the members are reflected in the members' register which the witness tendered and produced before the court as exhibit D9. Furthermore, it was the testimony of DW3 that the name of Stephen Mwangi Maina was not reflected in the members' register.
146. While under cross-examination by learned counsel for the Plaintiff, DW3 stated as hereunder:
- “According to the register of member, there are 134 members. I do say that the society has 130 members. Member number 130 is known as Donald Kihoro. I also confirm that after number 130, there are other members. The other members arise from cancellation on the other pages. The members and ballot register are kept by myself. The ballot and members register cannot be altered. If there is any entry which is altered, then same must be countersigned.”
147. Furthermore, DW3 ventured forward and stated thus:
- “The property number 79 was balloted by the mother of Simon Peter Mburu Mucheke and thereafter she is the one who transferred the property to her son.”
148. While under cross-examination by learned counsel for the 1st and 2nd Defendants, DW3 stated as hereunder:
- “the Plaintiff herein was not a member of the society. The name of the Plaintiff is not contained in the register of members of the society.”
149. To my mind, the secretary of the society was able to tender and adduce before the court credible and believable evidence which demonstrated that the Plaintiff's late husband, namely Stephen Mwangi Maina [now deceased] was not a member of the society.
150. It is worthy to recall that the Plaintiff herein contended that the Certificate of title bearing the name of her late husband arose or stems from the fact that her late husband was a member of the ITE Farmers' Cooperative Society Limited. Furthermore, it was also the Plaintiff's testimony that her late husband balloted for the suit property. However, the position taken by the Plaintiff has been proven to be erroneous, mistaken and founded on misrepresentations.
151. Insofar as the basis upon which the Certificate of title in favour of Stephen Mwangi Maina has been vitiated, it thus becomes crystal clear that the certificate of title which underpins the Plaintiff's claim to the suit property was procured vide and illegal and irregular process and thus same cannot confer upon Stephen Mwangi Maina [now deceased] any lawful or legitimate rights to the suit property.
152. Suffice it to point out, that a certificate of title is as good as the process leading to its issuance. Consequently, where a certificate of title is procured unprocedurally, illegally and/or by a corrupt scheme, like the one beforehand, then such a certificate of title cannot found any valid claim to the designated property.



153. In this respect, it is imperative to take cognizance of the holding of the Court of Appeal in the case of *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR) (19 November 2021) (Judgment) where the court stated at paragraph 64 as hereunder:

64. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.

154. The importance of demonstrating the process leading to the issuance of a certificate of title was also elaborated by the Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* 2013 eKLR where the court stated and 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.

155. The mere fact that the Plaintiff's late husband namely, Stephen Mwangi Maina [now deceased] was in possession of certificate of title, irrespective of the manner in which same, [certificate of title] was acquired does not suffice. For coherence, mere possession of a certificate of title whose origin is dubious and incapable of justification cannot be vindicated on the basis of the principle of indefeasibility of title.

156. To buttress the foregoing exposition of the law, I can do no better than to cite and reference the holding of the Court of Appeal in the case of *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR where the court stated and held as hereunder:

“Even if I am wrong in this, on the second argument of ground two, I find that the suit land was neither trust land nor was it properly allocated. As I have pointed out, the 3rd respondent, relying on Section 23(1) of the Registration of Titles Act, Cap 281 of the Laws of Kenya, contended that the Grant of the suit land conferred on it an absolute and indefeasible title. I hasten to point out that that Section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

157. Before departing from the issue herein, it is also not lost on the court that the certificate of title which was been waved by the Plaintiff herein to stake a claim to the suit property was also purported to have been issued and signed by one E.N Gicheha, who was a principal land registrar

158. However, DW4 testified and tendered evidence that same undertook investigations to ascertain whether the said E. N Gicheha, principal land registrar, issued and signed the impugned certificate of title bearing the name of Stephen Mwangi Maina, now deceased.



159. In particular, it was the testimony of DW4, namely, chief inspector Daniel Wainaina, that in the course of his investigations, same ascertained and established that the signature of one Elizabeth N. Gicheha, principal land registrar, which had been affixed on the certificate of title propagated by the Plaintiff was fraudulent.
160. Arising for the foregoing analysis, my answer to issue number one is threefold. Firstly, the Plaintiff's husband, namely Stephen Mwangi Maina, now deceased was not a member of the ITE Farmers' Cooperative Society Limited and thus same could not have procured the certificate of title [sic] on the basis of being a member of the said society.
161. Secondly, the said Stephen Mwangi Maina, now deceased, did not ballot for the suit property. To the contrary, the suit property was balloted for by the mother of Simon Peter Mburu Mucheke who thereafter caused the suit property to be registered in the name of Simon Peter Mburu Mucheke.
162. Thirdly, the certificate of title which is propagated by the Plaintiff with a view to staking a claim to the suit property was procured irregularly, illegally and through a corrupt scheme. In this regard, the certificate of title is vitiated to the root and voided by illegality. [See the doctrine of *ex nihilo nihil fit* – out of nothing comes nothing].

Issue Number Two

ii. Whether the 1st and 2nd Defendants lawfully purchased the suit property from Ite Farmers' Cooperative Society Limited and if so, whether the 1st and 2nd Defendants herein are bona fide purchasers for value without notice of any defect in the title.

163. The 1st Defendant herein testified as DW1. According to the 1st Defendant, same was introduced to ITE Farmers' Cooperative Society Limited by a friend who knew about the suit property. Furthermore, DW1 stated that upon receipt of the information that the suit property was available for sale, same [DW1] made contact with the society who confirmed that the suit property was indeed owned by the society and that same was being sold.
164. It was the further testimony of DW1 that there after same [DW1] conducted due diligence over and in respect of the suit property with a view to ascertaining the ownership status thereof. For good measure, DW1 averred that same procured and obtained certificate of official search which demonstrated that the suit property belonged to the society.
165. In addition, it was the testimony of DW1, that thereafter same engaged with the society with a view to purchasing the suit property. In this regard, DW1 testified that the society proceeded to and issued a letter of offer which was duly accepted by both DW1 and the 2nd Defendant, respectively.
166. DW1 ventured forward and testified that thereafter both himself and the 2nd Defendant paid the agreed consideration of KES 15,000,000/- to and in favour of ITE Farmers' Cooperative Society Limited, culminating into the execution of a transfer instrument which was thereafter presented to the land registry for registration.
167. Suffice it to point out that the testimony of DW1 was corroborated by DW3, namely Francis Kago Gathuo, who is the secretary of ITE Farmers' Cooperative Society Limited.
168. Other than the foregoing, it is also worth recalling that DW4, namely chief inspector Daniel Wainaina, also testified that same carried out and/or undertook investigations to ascertain the validity of the certificate of title held by the Plaintiff and the 1st and 2nd Defendants, respectively.



169. It was the testimony of DW4 that in the course of these investigations, same [DW4] found and established that the certificate of title bearing the name of Stephen Mwangi Maina, now deceased, was neither traceable to nor obtainable at the land registry. On the contrary, DW4 posited that the certificate of title bearing the name of the 1st and 2nd Defendants was obtainable at the land registry and same [certificate of title] was confirmed to be valid.
170. Arising from the totality of the evidence on record, there is no gainsaying that the 1st and 2nd Defendants lawfully bought and/or purchased the suit property from the known owner namely ITE Farmers' Cooperative Society Limited, who proceeded to and thereafter facilitated the transfer of the suit property to the 1st and 2nd Defendant.
171. Furthermore, it is also crystal clear that the 1st and 2nd Defendants were subsequently issued with a certificate of title which is traceable to and obtainable at the land registry. To this end, it suffices to underscore that the 1st and 2nd Defendants hold a valid certificate of title to the suit property arising from a valid sale transaction.
172. To surmise, it is my finding and holding that the 1st and 2nd Defendants have placed before the court cogent, plausible and credible evidence to demonstrate that same [1st and 2nd Defendants] lawfully purchased the suit property and thus same fit within the circumspection of bona fide purchasers for value without notice.
173. To this end and without belabouring the point, I beg to cite and reference the holding of the Supreme Court in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) where the court discussed the ingredients underpinning a claim for bona fide purchase for value.
174. For coherence, the court stated and observed as hereunder:
90. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as: "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."
91. The Court of Appeal in Uganda in Katende v Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value as follows: "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:
1. he holds a certificate of title;
 2. he purchased the property in good faith;
 3. he had no knowledge of the fraud;
 4. he purchased for valuable consideration;
 5. the vendors had apparent valid title;
 6. he purchased without notice of any fraud; and
 7. he was not party to the fraud."



92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR* stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”
175. Borrowing from the ratio decidendi in the decision supra, my answer to issue number 2 is twofold. Firstly, the 1st and 2nd Defendants lawfully bought and/or purchased the suit property from ITE Farmers’ Cooperative Society Limited who was hitherto the undisputed proprietor/owner thereof.
176. Secondly, the 1st and 2nd Defendants carried out and undertook the requisite due diligence prior to and before purchasing the suit property. Furthermore, the 1st and 2nd Defendant paid valuable consideration at the foot of the purchase agreement and which consideration was acknowledged and confirmed by ITE Farmers’ Cooperative Society Limited. In this regard, the 1st and 2nd Defendants are truly bona fide purchasers for value of the suit property.

iii. What reliefs if any ought to be granted.

177. The Plaintiff herein sought for a plethora of reliefs at the foot of the Further Amended Plaint. Pertinently, the Plaintiff sought for a declaratory order that L.R No. 12672/79 [I.R No. 88456] which is the suit property lawfully belongs to the estate of Stephen Mwangi Maina, now deceased.
178. Be that as it may, while discussing issue number 1, the court has since found and held that Stephen Mwangi Maina[now deceased] was never a member of ITE Farmers’ Cooperative Society Limited. Furthermore, the court also found that the said deceased did not ballot for the suit property.
179. On the other hand, there is no gainsaying that the court also found and held that the certificate of title which was being propagated by and on behalf of the estate of the deceased was procured unprocedurally and illegally. In this regard, it was found that such a title cannot bestow upon the Plaintiff any legal right/interest over the suit property.
180. In the premises, the Plaintiff’s prayer for declaration that the suit property belongs to the estate of the deceased, namely, Stephen Mwangi Maina is not only misconceived but same is built on quick sand.
181. On the other hand, the Plaintiff had also sought for an order of permanent injunction as against the 1st and 2nd Defendants to restrain same from [sic] interfering the Plaintiff’s rights to the suit property. However, it suffices to observe that an order of permanent injunction can only issue to vindicate lawful and legitimate rights and not otherwise.
182. At any rate, it is not lost on the court, that an order of permanent injunction cannot issue to bar and/or prohibit the registered owner and/or proprietor of the designated property. To do so would be tantamount to negating the title of the proprietor and thus impugning the principle of indefeasibility. [See Sections 24 and 25 of the *Land Registration Act*].
183. On the other hand, the 1st and 2nd Defendants filed a counter-claim and wherein same [1st and 2nd Defendants] sought for a declaration that same are the lawful and legitimate proprietors of the suit property. Suffice it to underscore that evidence abound to demonstrate that indeed the 1st and 2nd Defendants are the true owners of the suit property.
184. By virtue of being the lawful and legitimate owners of the suit property, there is no gainsaying that the 1st and 2nd Defendants are entitled to partake of and benefit from the rights attendant to such



ownership. Such rights include but are not limited to exclusive occupation, possession and use of the suit property.

185. To underscore the extent and scope of the rights of a legitimate proprietor, the 1st and 2nd Defendants not excepted, it is apposite to cite and reference the holding in the case of Mohansons (Kenya) Limited v Registrar of Titles & 2 others [2017] eKLR where the court stated and held as hereunder:

- (18) As held by the Court of Appeal for East Africa held in Moya Drift Farm Ltd. v. Theuri (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

- (19) Similarly, in Park View Shopping Arcade v. Kangethe & 2 Ors. (KLR) (E&L) 592, Ojwang, Ag. J. (as he then was) considered the rights of a registered proprietor under section 23 of the Registration of Titles Act and held that-

“*The Constitution* safeguards the sanctity of private property. It was not proper for the defendants to forcibly occupy the plaintiff’s land and then plead public interest in environmental conservation to keep out registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation.”

186. Other than the prayer for declaration of ownership, which has been adverted to in the preceding paragraphs, the 1st and 2nd Defendants also sought for orders of permanent injunction to bar the Plaintiff either by herself, agents, servants or anyone claiming through her [Plaintiff] from interfering with the 1st and 2nd Defendants rights to and in respect of the suit property.

187. Having found and held that the 1st and 2nd Defendants are the lawful and legitimate proprietors of the suit property, there is no gainsaying that same are entitled to an order of permanent injunction. For good measure, such an order would go a long way in vindicating the rights and interests of the 1st and 2nd Defendants to the suit property. [See the holding in the case Waas Enterprises Limited v City Council of Nairobi & Another 2014 eKLR]



Final Disposition:

188. Flowing from the discussion, [whose details are highlighted in the body of the judgment], it is crystal clear that the Plaintiff herein has neither established nor demonstrated that same is entitled to the reliefs/ remedies sought at the foot of the Further amended Plaintiff.
189. On the contrary, the 1st and 2nd Defendants have ably placed before the court, plausible and credible evidence confirming the manner in which same acquired the suit property. Furthermore, evidence abound that it is actually the 1st and 2nd Defendants who are in occupation of the suit property.
190. In the premises, the court comes to the conclusion that the Plaintiff has failed to prove her claim to the suit property whereas the 1st and 2nd Defendants have proved the claims at the foot of the counterclaim.
191. In this regard, the court proceeds to and do hereby make the following final orders:
- a. The Plaintiff's suit be and is hereby dismissed with costs to the 1st and 2nd Defendants.
 - b. The counterclaim dated 30th October 2019 be and is hereby allowed in the following terms:
 - i. The 1st and 2nd Defendants be and are hereby declared to be the lawful and legitimate proprietors of L.R No. 12672/79.
 - ii. The certificate of title in respect of L.R No. 12672/79 [I.R No. 88456], bearing the name of Stephen Mwangi Maina, now deceased, be and is hereby cancelled and revoked.
 - iii. The Plaintiff herein be and is hereby ordered and directed to surrender the certificate of title L.R No. 12672/79 [I.R No. 88456] to the Chief Land Registrar for purposes of cancellation and same to be surrendered within 30 days from the date hereof.
 - iv. The Chief Land Registrar shall upon cancellation of the certificate of title in respect of L.R No. 12672/79 [I.R No. 88456] bearing the name of Stephen Mwangi Maina, now deceased, proceed to gazette the cancellation in the Kenya Gazette.
 - v. The costs/expenses in respect of the gazette in terms of clause iv hereof shall be borne by the 1st and 2nd Defendants.
 - vi. There be and is hereby granted an order of permanent injunction to restrain the Plaintiff/1st Defendant to the counterclaim restraining entry upon, trespass onto and/ or interference with the 1st and 2nd Defendants' rights to the suit property.
 - vii. The 1st and 2nd Defendants be and are hereby awarded costs of the counterclaim.
192. Having found and held that the 1st and 2nd Defendants are the lawful and legitimate proprietors of the suit property, same [1st and 2nd Defendants] would have been entitled to recompense on account of general damages. However, because no such damages were impleaded at the foot of the counterclaim, none is awardable.
193. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2024

OGUTTU MBOYA.

JUDGE



In the presence of:

Benson – court assistant

Mr. Njonjo for the Plaintiff

Mr. Gacheru for the 1st and 2nd Defendants/Counter claimers

Ms. Fatma Ali for the 2nd Defendant to the Counterclaim

