



**Brunlehner v Ngetich & 3 others (Environment & Land Case
224 of 2012) [2023] KEELC 17447 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 224 OF 2012**

LL NAIKUNI, J

MARCH 1, 2023

BETWEEN

NARIMANN KHAN BRUNLEHNER PLAINTIFF

AND

RICHARD KIPKORIR NGETICH 1ST DEFENDANT

SILAS TINDIRET LEMISO 2ND DEFENDANT

KWALE DISTRICT LANDS REGISTRAR 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment herein is regarding the Suit that was filed by the Plaintiff - Narimann Khan Brunlehner” through a Plaint on 16th October, 2012 dated even date. From the very onset, it will be noted that this is close to over ten (10) years ago while this matter has been pending before this Honorable Court for adjudication. It is a rather sorrowful episode. The Plaintiff sued 1st, 2nd, 3rd and 4th Defendants herein. Upon the Plaintiff serving the Summons to enter appearance the 1st, 2nd, 3rd and 4th Defendant entered appearance and filed Statement of Defence and Counter Claim dated 3rd December, 2012

II. The Plaintiff’s Case

2. Based on the filed pleadings, the Plaintiff herein averred that at all material times, he was absolute and registered owner of all that parcel of land known as Land Reference No. Kwale/Galu Kinondo/557 (Hereinafter referred to as “The Suit Land”). She further averred and maintained having quite enjoyment of the suit land since 23rd September, 1995. She held that despite this the 1st, 2nd and 3rd Defendants fraudulently and/or through misrepresentation caused the entry in the Green Card



at the Lands Registry offices at Kwale to be changed and read and/or indicate that the 1st and 2nd Defendants were the registered owners of the Suit Property. She provided the particulars of fraud and/or misrepresentation of the 1st, 2nd and 3rd Defendants under Paragraph 7 of the Plaint. Further, the 1st, 2nd and 3rd Defendants had knowingly and willfully sub-divided the Suit Property with intention of selling it to third parties. For these reasons the Plaintiff has been seriously aggrieved and inconvenienced by these illegal actions of the Defendants.

3. For these reasons the Plaintiff sought for the following orders: -
 - a. An order of Permanent Injunction do issue to restrain the Defendants herein by themselves, their employees, servants, agents and assigns of other person acting for them from Sub-dividing, selling, transferring, leasing, mortgaging, charging or in any other way dealing with the Suit Property known as Land Reference No. Kwale/Galu Kinondo/557 or its sub-plots.
 - b. A declaration that Sub-division on parcel of land known as Land Reference No. Kwale/Galu Kinondo/557 carried on at the behest of the 1st and 2nd Defendants and any registration by the 3rd Defendant is null and void and without any legal effect whatsoever.
 - c. All the entries in Kwale Lands Registry Office relating to parcel of land known as Land Reference No. Kwale/Galu Kinondo/557 together with any subsequent sub-division arising therein be removed from the records.
 - d. A declaration that the Plaintiff is the lawful registered owner of parcel of land known as Land Reference No. Kwale/Galu Kinondo/557 and the records be rectified to reflect the same.
 - e. Cost of the Land incidental to this Suit be provided for.
4. On 28th January, 2019 upon all the Parties having fully complied with the Provisions of Order 11 of Civil Procedure Rules, 2010, the Case commenced its hearing where the Plaintiff summoned its witnesses and who testified as follows: -

Examination in Chief of PW – 1, Mr. Muliro Advocate.

PW – 1 testified and was sworn in English language. She identified herself as Nariman Khan Brunlehner a female adult of sound mind and understanding. She was the Plaintiff in this case. She remembered signing a witness statement on 16th October, 2012 and filed on the same date. She wished to rely on it as her evidence in chief.
5. PW – 1 was aware of the property known as Land Reference Numbers Kwale/Galu Kinondo/557. She was the registered owner of this property. She purchased the property in the year 1995, from Nancy Wangari Njorog. She had a duly executed Sale Agreement dated 25th September, 1995. The purchase price was a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1, 200, 000.00/=). She produced the sale agreement dated 25th September, 1995 and marked as Plaintiff Exhibit 1. According to the sale agreement, the sum of Kenya Shillings One Hundred and Twenty (Kshs. 120,000/=) was paid to the agent as a deposit while the balance of a sum of Kenya Shillings One Million and Eighty Thousand (Kshs. 1,080,000/=) was paid to the seller. She had a petty cash voucher for Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000/=) dated 12th October, 1995 and the cheque number as well as petty cash voucher to Nancy Wangari Njorog. She produced the cheques and



marked as Plaintiff Exhibit numbers 2 and 3 and the petty cash vouchers Marked as Plaintiff Exhibits numbers 4 and 5.

6. PW – 1 testified that the suit property in the sale agreement was Land Reference numbers Kwale/Galu Kinondo/557. After the sale transaction, a transfer of the land was done and she got the Certificate of -title deed to the property. She produced the Certificate of Title Deed which was marked as Plaintiff Exhibit No. 6. She indicated that there had a boundary dispute with the neighbors in year 1997. She was summoned to the offices of the Land Registrar at Kwale on 18th March, 1997. The Land Registrar Kwale was the one who issued her with the summons. The Land Registrar was the 3rd Defendant in this suit.
7. According to the summons, she was the one described as the owner of the suit property. She produced the summons dated 18th March, 1997 which was marked as Plaintiff Exhibit number 7. Since the year 1995. She had been in occupation of the suit property. Sometimes in the year 2012, some people sub - divided the suit property into some 20 pieces. She went to the District Land Surveyor at Kwale and complained of these said sub - divisions. He said the sub - division was not done in Kwale but in Mombasa. He then wrote a letter to the Land Registrar, Kwale informing him that to his knowledge the land had not been sub-divided and should stay as one piece.
8. She never sold the property to anyone. She was shocked because she never caused any sub – division of the Plot. Indeed, the Land Surveyor was also shocked. After that she put a Caveats in the local newspapers. She produced the Caveat emptors dated 21st April, 2012 and 23rd April, 2012 marked as Plaintiff Exhibits numbers 8 and 9. She went and undertook an official search and got the names of the people who had sub - divided in her Certificate of title. She produced the search dated 28th June, 2012 marked as Plaintiff Exhibit number 10. She did not know one Mr. Anthony Pape whom they alleged they purchased the land from her. She had never met him nor these other people. She never sold the land to Anthony Pape nor anyone else. She was the lawful registered owner of the suit land and she still had the title. She wanted her property back. She prayed to be granted the reliefs sought in the Plaintiff.

Cross Examination by PW – 2, Mr. Obinju Advocate.

9. She purchased the property from Nancy Wangari Njoroge. She purchased it for a sum of Kenya Shillings One Million Two Hundred (Kshs. 1, 200, 000.00/=). There was a transfer form executed, transferring the property from her to herself. She did not have a copy of the transfer in court today.
10. She had seen a copy of the certified copy of the transfer at Page 25 in the 1st and 2nd Defendant's documents. The transfer showed the consideration as Kenya Shillings Thousand (Kshs. 600,000/=). She purchased the property for a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1, 200, 000.00/=). Subsequently, she was issued with the Certificate of title deed that she had produced in the Honorable Court as Plaintiff Exhibit number 6. She did not sell the property to anybody. She was shown a copy of the Certificate of Title Deed Plaintiff Exhibit Numbers 6 on Page 2 stated that she was issued with the Certificate of Title Deed on 24th October, 1995.

Entry No. 9 showed that the Title Deed was re-issued on 11th January, 2010 she was re - issued with the title deed. The original title deed was not lost. It was not destroyed.
11. She gave the Certificate of title to the registrar. She surrendered the old title deed and she was re - issued with a new one. She was not aware if entries were made in the register for the re-issuance but they must have been made. She had seen the Green Card filed by the 3rd and 4th Defendants Entry No. 7 confirmed that the property was registered in her name while Entry No. 8 Title Deed was issued to her. Entry No. 9 confirmed that she was re - issued with a title deed. She did not see any reasons indicated



for the re - issue of title deed. She was aware the title deed issued on 24th October, 1995 was cancelled. She had no evidence of Gazettement by the Registrar confirming re-issuance of the title deed. She was not physically in occupation and possession of the suit property at the moment. However, she lived near there.

Cross Examination by PW – 1 Mr. Mwanjeje Advocate.

12. She did not remember reporting to the police about the trespass. She did not have documents to support the re-issuance of the title deed, but she had the Certificate title deed with her. Her Certificate title deed orders not show the reason for the re – issue of the Certificate of title deed.

Re - Examination by PW - Mr. Muliro Advocate.

13. The title deed was re-issued in the year 2010. She did the process herself. She did not have a lawyer. The entries were done by the Land Registrar. The Certificate of Title Deed was issued by the Land Registrar. When she was re - issued with a new title, she surrendered the old one which they cancelled or destroyed. The re - issuance was necessitated by temporary with Green Cards in the lands office. She came to know of this because she had other properties. It was the Land Registrar who suggested that it would be better to change the titles. In the Green Card Entry No. 7, the property was registered in her name and Entry No. 8 dated 24th October, 1995 the Title Deed was issued. Entry No. 9 was Re-Issued and was dated 11th January, 2010. In both entries no reasons was given for the issuance and for the re - issuance. She was not living on the property but she passed there all the time.
14. On 23rd January, 2020 PW – 1 was recalled for further examination in chief and cross examination. She remembered having testified before this Court. It was not true that the Defendants were the owners of the suit property as claimed in the Counter Claim.

Cross Examination by PW – 1 Mr. Obinju Advocate.

Nil.

Cross Examination by PW – 1 Mr. Mwanjeje Advocate.

Nil.

III. The 1st and 2nd Defendant’s Case

15. On 3rd December, 2012, the 1st and 2nd Defendants filed the Defence and Counter Claim. The Defendants were the duly registered and absolute proprietors of the Suit Property since 8th October, 2008 when a valid title was issued in favour of the 1st and 2nd Defendants by the Land Registrar. The Defendants denied all the allegations and particulars of fraud and/or misrepresentation set out under Paragraph 7 of the Plaintiff. They averred that they had not been engaged in any fraudulent or illegal actions in the acquisition or dealing over the Suit Land. They held all allegations of fraud were a fabrication by the Plaintiff, who was desperately trying to wrestle away the 1st and 2nd Defendants legal title deed on the basis of a purported title dated 11th October, 2010.
16. They held that by the time of issuance of the Plaintiff’s title dated 11th October, 2010 the Suit Property was private property duly registered to the 1st and 2nd Defendants and the same was not available to the Plaintiff. They insisted that the records at the Land Registry confirmed that the land was for 1st and 2nd Defendants being the bona fide Purchasers for value and without notice of any defect in title. They averred that the registration was regular and denied the Plaintiff held any good title to the Suit Land as the title she held for 11th January, 2010 was acquired fraudulently as per the particulars set out under Paragraph 10 (a) to (h) of the Defence.



They held that from the time of acquiring the land they had enjoyed proprietary rights over it by causing development, erecting a concrete perimeter wall around the property and causing sub-division on it.

17. From the filed Counter Claim the 1st and 2nd Defendants sought for the declaration that they were the lawful registered and beneficial owners to the Suit Land and that the Plaintiff's title dated 11th January, 2010 was null and void. They also sought for Permanent Injunction restraining the Plaintiff by either herself, her employees, servants, agents, assignees or any person acting on her behalf from Sub-dividing, selling, transferring, alienating, leasing, mortgage, charging or in any other way dealing with the Suit Land.

Thus they prayed for Judgment to be entered against the Plaintiff in terms of the Counter Claim and the Plaintiff's Suit to be dismissed with Costs.

On 29th September, 2021, they summoned Witnesses who testified as follow: -

Examination in Chief of DW – 1, by Mr. Obinju Advocate

18. DW – 1 testified and sworn in English. She identified herself as Silas Tinderet Lemiso. He lived in Mombasa, Ganjoni. He was a Businessman. He prepared a witness dated 25th January, 2019 and which he adopted as his evidence in chief.

She relied on some documents – List of Documents filed on 25th January, 2019.

Plaintiff's Advocate.

19. Raises no objection save for documents item No. 76 – under Sections 67 and 68 of the *Evidence Act* – on Primary and Secondary. We have not been supplied with original PAGE 15.

Mr. Obinju Advocate.

He acknowledged and confirmed that the objections Counsels were valid. They never file the original documents. The reason, this property was sub-divided and they surrendered the original the Land Registry. Hence we are not able to produce it. This is an issue the Land Registrar may clarify when he is summoned to testify.

The Court: -

20. An objection has been raised on the production of the title deed bearing number Land Reference No. Kwale/Galu Kinondo/557 mearing 2.4 HA by the Learned Counsel by the Plaintiff. The 3rd and 4th Defendants under Sections 67 and 68 of Cap 80 .

The 1st and 2nd Defendants, Learned Counsel had indicated the title deed was surrendered for sub - division and hence it was no longer in their possession of his client. The Court had perused the record and realized that this parcel forms main part of the suit. Hence, it was imperative that the Land Registrar Kwale was summoned to produce the said records pertaining to the suit land. The Court hereby issued witness summons for Land Registrar Kwale to appear before this court during the next hearing date. Failure to which the documents risks being expunged from records. In the meantime, the documents could be marked for identification as the Defence hearing proceeds.

Examination in Chief by DW – 1 by Mr. Obinju Advocate.

21. Mr. Lemiso stated that they bought the property in May, 2008 from Antony Paul Pape, the registered owner of the suit land. They executed the sale agreement. They conducted due diligence. They never



send an application at the Land Control Board (LCB). After they were issued with title deed. They constructed a perimeter wall. Someone also claimed the land in the year 2010. She was re - issued with the title. On the ground there was nothing on it. She demolished the perimeter wall. The value of the land was a sum of Kenya Shillings Three Million (Kshs. 3, 000, 000.00/=) in the year 2008. It was a prime location. He urged Court to grant them the prayers as per the Defence and Counter Claim.

Cross Examination of DW – 1 by Mr. Muliro Advocate.

22. Mr. Anyony Paul Pape was described as the owner of the suit land. He was shown the sale agreement dated 20th May, 2008. The property described in the agreement was the same. He could not say whether it was the same as the title deed. Under paragraph 9 of the statement he said the title deed was cancelled. He was not aware who cancelled the title. The Plaintiff's title was re - issued in the year 2010. They acquired the suit land in the year 2008. The official search of the suit land was conducted by their Advocates.
23. He did not know the official search here. Their Advocate sought of Letters of Consent from Land Control Board. He had not seen it in Court. He was referred to documents marked as "DMF – 7" being the Certificate of title deed. They were issued with title in year 2008. His name was on entry No. 1 from the title. The title did not exist any more as it was sub - divided. In his Counter claim he was still claiming for the parcel of land known as Land Reference No. Kwale/Kinondo/551. Though the land had been sub - divided he was still claiming the same land. He was in possession at the moment. They constructed a perimeter wall and cleared the bush. He did not have any photographs.

Cross Examination of DW – 1 by Mr. Mwanjeje Advocate.

24. DW – 1 due diligence was undertaken by their lawyer. He did have any official search.

Re – Examination of DW – 2 by Mr. Obinju Advocate.

25. Nil.

Examination in Chief of DW – 3 by Mr. Mwanjeje Advocate

26. DW – 3 testified and sworn in English language. He identified himself as Mr. Nikweli S. Mwanguni and a holder of Employment Personal Number - P/No. 20200208244 and the Kenyan national Identification card bearing No. 25829603. His designation was Land Registrar based at the Land Registry, Kwale. He shown the documents by the Defendants which were numbered. On Page 15 – there was Certificate of title deed for Parcel numbers Kwale/Galu Kinondo/557. It was in the names of Richard Kipkorir Ngetich. PW – 3 informed Court that they did have the original Certificate of title. They did not have the application for the Letter of Consent made to the Land Control Board for the sub – division of the suit land. There was no sub – division of the suit land. Hence the copy could not be produced.
27. On Pages 16 to 25, he had a letter dated 17th April, 2016. He had the cancelled Certificate of title deed. The circumstances under which the Land Registrar could cancel the title were:-
- a. When a person was transferring property or
 - b. If the title was damaged or mutilated or
 - c. If there was forgery.



This particular one was mutilated. It was issued on 24th October, 1995 to M/s. Nariman Khan Brunhenler as seen on Page 17. The mutilated one was in the parcel file. For the year 2017, the Applicant had to make the application for the mutilated title to be re - issued with a new title deed. Currently, there was a prescribed form for that purpose.

On Page 21, there was title was in the name of Antony Paul Pape. It was for the parcel of land known as Land Reference No. Kwale/GaluKinondo/557 issued on 9th April, 2002. The cancelled title was therefor was for the suit parcel. He did not know the reason why there was no document explaining the cancellation.

28. The title was for Anthony Paul Pape. It does not march with the Entry Numbers 7, 8 and 9. Also the Green Card did not march. Further, even the entry No. 8 and 9 of the title had no explanation.

The Entry No. 7 in the Green Card of 14th October, 1995 showed it was for M/s. Nariman Khan Brunhenler a holder of the national identity card bearing No. 2184216/65.

Cross Examination of DW - 3 by Mr. Muliro Advocate

29. The description of the title for Anthony Paul Pape was Kwale/Galu Kinondo/557 there was no such properties by that description. The current registered owner was Nariman Khan Brunhenler.

Re - examination in Chief of DW - 3 by Mr. Mwanjeje Advocate

29. DW – 3 referred to the produced the Defendants Exhibits 1 to 19 of the List of documents dated 23rd March, 2016. The property known as Kwale/Galu Kinondo/557 measuring 2.4 HA – 1st registered owner was Juma Rashid Mwavubani on 15th November, 1974. He was given the title on 13th December, 1974. He sold it to Peter Gregory Njoroge on 19th January, 1996. He passed away and applied for the Grant Letters of Administration were issued to Nancy Wangari Njoroge and a Certificate of title was issued to her on 5th July, 1998.

Nancy Wanjiru Njoroge sold it to Nariman Khan on 24th October, 1995 and the title deed was issued on the same date. The title was re-issued to Nariman Khan on 11th January, 2010. On 16th October, 2016 a caution was registered against the property by the husband of Nariman Khan claiming Spousal Rights. On 19th February, 1996 the property was charged to the NBK for a sum of Kenya Shillings Nine Thousand (Kshs. 9,000/=) and it was discharged on 29th March, 1980. That was the brief history of the parcel of land. Neither the Green Card nor any record to showing how the property was transferred to 1st and 2nd Defendants. It was missing.

IV. The Plaintiff's Reply to the Defence and Counter Claim

30. On 30th September, 2019, the Plaintiff filed a fourteen (14) Paragraph Reply to the filed Defence and Counter Claim. She reiterated the contents of Paragraphs 7, 8, 9 and 10 of the Plaintiff by asserting that the Suit Land was never available for registration or transfer in favour of the 1st and 2nd Defendants as the same was still lawfully registered in favour of the Plaintiff who to that date was still lawfully owner and she had not transferred it to anyone.

She averred that indeed the Land Registrar the 3rd Defendant had confirmed that from the record in his possession the Suit Property belonged to the Plaintiff and had never belonged to the 1st and 2nd Defendants herein.

She held that the Defence of innocent Purchaser for value was not available for the 1st and 2nd Defendants having been actively involved in the fraud.



On the Counter Claim, the Plaintiff argued that the same was fatally defective, bad in law by virtue of the mandatory Provision of Order 7 Rule 5 (a) Order 2 Rules 3(1) and 10 of the Civil Procedure Rules, 2010 and hence should be struck out.

The Plaintiff averred that the 3rd and 4th Defendants through the office of the Land Registrar had already confirmed that the Plaintiff was the legally registered proprietor of the Suit Property and that there had never been any entries in the Green Card to demonstrate Change of ownership in favour of the 1st and 2nd Defendants.

In the long run, the Plaintiff prayed that the Counter Claim by the 1st and 2nd Defendants to be dismissed with costs and the Plaintiff and the Prayers sought thereof be allowed as prayed.

V. The 3rd Defendant's witness statement

31. On 5th April, 2016, the 3rd Defendant filed a Witness Statement sworn by one Mr. C.K Ngetich a Land Registrar at the Ministry of Lands and Housing based at Kwale Land Registry and dated 11th March, 2016. He stated as follows: -

- a. That the Suit Land was first registered on 15th November, 1974 to Juma Rashid Mwavumbani who transferred it to Peter Gregory Njoroge for Kenya Shillings Five Thousand (Kshs. 5,000.00).
- b. On 5th July, 1988 the Suit Land was transferred to Nancy Wangari Njoroge by virtue of inheritance from Peter Gregory Njoroge.
- c. On 24th October, 1995 the Suit Land was transferred to Narimann Khan Brunlehner the Plaintiff herein and a title deed issued in her favour.
- d. She was still the registered owner to-date. He referred Court to the records held at the Land Registry Offices, Kwale.

Defendant Witness DW-3 testified as follows:

VI. The Submissions

31. On 15th June, 2022 upon the close of the Case by both the Plaintiff and the 1st, 2nd and 3rd Defendants, the Parties were directed to file their Written Submissions with given stipulated time frame. Pursuant to that on 27th July, 2022 the Honorable Court reserved a date for the delivery of Judgment on Notice accordingly.

32. It is instructive to note that, on 16th February, 2023, M/s Oweya Advocate holding brief for Mr. Obinju Advocate informed the Honorable Court that the 1st and 2nd Defendants herein would not be filing any written submissions as already directed by this Honourable Court.

A. The Written Submissions for the Plaintiff

33. On 30th August, 2022, the Learned Counsel for the Plaintiff, the Law firm of Messrs. John Bwire & Associates filed their Written Submissions dated 26th August, 2022, Mr. Muliro Advocate commenced by providing a background of facts leading to the filing of this case by the Plaintiff and the filed Defences by the 1st, 2nd, 3rd and 4th Defendants herein.

He submitted on the following three (3) issues: -



Firstly, he held and based on the Provisions of Sections 24, 25 and 26 (1) of the [Land Registration Act](#) and the decision of “Elijah Makeri Nyangware v Stephen Mungai Njuguna and Another [2013] eKLR” averred that the Plaintiff was the legal and absolute registered owner of the Suit Property herein.

He argued that to prove this she produced the original Certificate of title deed to the Suit Property. Further she gave an account of how she acquired it and her evidence had been corroborated by that of the 3rd Defendant who was the custodian of all land records in Kwale. The Counsel averred that the only way to challenge the title held by the Plaintiff was outlined under the Provision of Section 26 of the [Land Registration Act](#) yet no evidence had been presented to demonstrate that either the Plaintiff’s title had been obtained through fraud, misrepresentation, illegally, unprocedurally or through Corrupt Scheme.

The Counsel’s contention that the allegation by the 1st and 2nd Defendants that the title held by the Plaintiff had been cancelled went to confirm the Plaintiff indeed had title to the property. Indeed, the said cancellation had been explained by both the Plaintiff and the 3rd Defendant to the effect that it was a request of the re-issuance of the title to Plaintiff in the year 2010.

The Counsel further pressed that the allegation of fraud or illegality by the 1st and 2nd Defendants had not been proved. As a matter of fact, from the evidence on record, it had been clearly demonstrated that the 1st and 2nd Defendants had never owned the Suit property. Besides, the person they claim sold them the land had never been registered as the owner of the Suit Property. He held that the 1st and 2nd Defendants never produced the original Certificate of the title deed issued in their names. Hence his argument was that the Plaintiff was the bona fide registered and legal owner to the Suit Property and her title could not be defected.

Secondly, the Counsel averred that the Plaintiff had a meritorious suit having proved he had indefeasible right, title and interest to the Suit Land.

Thirdly, the Counsel submitted that based on the evidence adduced herein the 1st and 2nd Defendants’ Defence and Counter Claim had no merit. He argued that it was fatally defective for failing to comply with the mandatory Provisions of Order 7 Rule (5) (a) of the Civil Procedure Rules , 2010 which provided that the Counter Claim had to be accompanied with a Verifying Affidavit. In the instant Case the Counter Claim had no Verifying Affidavit. On this point he relied on the Case of “Teclah Jepkiruiwilson Tuwei (Administrators of the estate of the late Malakwen Arap Cheruiyot) –Versus- Kimaiyo Chirchir [2021] eKLR” where the Court held such an omission could only be remedied before hearing and Judgment had been delivered.

In conclusion, he submitted the Plaintiff’s Suit had merit and ought to be allowed with Costs while the Counter Claim by the 1st and 2nd Defendants be dismissed with Costs.

B. The Written Submissions by the 3rd and 4th Defendants

34. On 30th August, 2022, the State Counsel from the Office of the Honorable Attorney General representing the 3rd and 4th Defendants herein filed their written submission. Mr. Mwandeje Advocate commenced his submission by providing a brief background of the matter herein as filed by the Plaintiff. The Learned Counsel submitted that the 3rd and 4th Defendants entered appearance, filed a Defence and List of documents before the hearing of the suit was scheduled. According to the records at the Lands Office and the testimony by the Land Registrar M/s. Siena Mwaguru the parcel file was registered on 15th November, 1974 to Juma Rashid Mwavumbani who later on transferred it to Peter Gregory Njoroge for a sum of Kenya Shilling Five Thousand (Kshs. 5,000). On 5th July 1988 the suit property was transferred to Nancy Wangari Njoroge by virtue of inheritance from Peter Gregory. On



24th October, 1995 the suit parcel was transferred to Nariman Khan Brunlehner the Plaintiff herein and a title deed issued in her favour and she still was the registered owner to date.

35. The Learned Counsel raised three (3) issues in his submissions. These were:-

Firstly, who the bona fide owner of the suit land was and according to him under the provisions of Article 91) of Constitution of Kenya 2010 Section 24 and 26 (a) (b) of the [Land Registration Act](#) the Plaintiff and the 1st and 2nd Defendants had the right to own the suit land as each brandished title deed for the suit land.

36. The Plaintiff owned the land from year 1995 while the 1st and 2nd Defendants came to own it in the year 2008. It was not in doubt that both the Plaintiff and 1st and 2nd Defendants lay claim to the suit land. Therefore, according to the Learned Counsel, it followed that the Plaintiff bore the burden of proving that indeed it brought the suit land and was issued with the title deed on 24.10.1995 on the burden of proof the Learned Counsel relied on the case of “Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR and the provisions of Section 107 and 109 of the [Evidence Act](#) Cap 80.

On this point the Plaintiff was able to provide a set of documents as her exhibits which included the sale agreement, payment vouchers and cheques and title to the property.

37. To buttress his point, the Learned Counsel relied on the case of Appeal Munyu Manza v Gathihia Maina [2013] eKLR on the root of title when a title is being challenged.

Therefore, the Learned Counsel argued that the color would have to determine which party had been able to show the root of their title. Since there were competing equities the court should rely on the Maximum of Equity which states “When two equities are equal, the first in time shall prevail” . He held that this position was emphasized in the case of Wreck Motors Enterprises v The Commissioner of Lands and Others Civil Appeal No. 71 of 1997 where the Court held:-

”where there are two competing titles the one registered earlier is the one that takes priority”

Likewise, he cited the case of:-

“Gitwany investment limited v Tafmall Limited & 3 others [2006] eKLR where court held that: -

“The first in time prevails so that in the event such as this one whereby a mistake that is admitted the commissioner of lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then then first in time must prevail”.

On the other hand, the Learned Counsel averred that going by the documents at the Land Offices which was the custodian of all land records, it was clear the Plaintiff was the owner of the suit land and her name had never changed whatsoever.

In conclusion he urged court to find that the Plaintiff was the bona fide owner to the suit land.

VII. Analysis and Determination

38. The Honorable Court had had an ample opportunity to critically assess the filed pleadings, the Plaintiff by the Plaintiff and the Defence and Counter Claim by the 1st and 2nd Defendants, Defence by the 3rd and 4th Defendants and the filed Replies to the Defence and Counter Claim by the Plaintiff, the oral and documentary evidence adduced by the Summoned Witnesses by the Parties, filed Submissions, Cited authorities, the relevant Provisions of [the Constitution](#) of Kenya, 2010 and the Statutes.



39. For this Honorable Court to be in a position to reach a plausible, reasonable, fair, just and equitable determination, it has crafted the following three (3) salient issues as guide. These are: -
- a. Whether the filed Suit by the Plaintiff against the 1st, 2nd, 3rd and 4th Defendants herein and the Counter Claim by the 1st and 2nd Defendants herein has any merit or otherwise.
 - b. Whether the Parties herein are entitled to the reliefs sought from the filed pleadings.
 - c. Who will meet the Costs of the Suit.

Issue No.(a) Whether the filed Suit by the Plaintiff against the 1st, 2nd, 3rd and 4th Defendants herein and the Counter Claim by the 1st and 2nd Defendants herein has any merit or otherwise.

Brief facts

40. Before proceeding on with the analysis of the issue under this sub-heading, it's important that the Court indulges on the brief facts of this Case. The said facts are derived from From the filed pleadings being the Plaint by the Plaintiff, the Defence by the 1st, 2nd, 3rd and 4th Defendants herein and the Counter Claim by the 1st and 2nd Defendants herein and the filed Replies to the Defence and Counter Claim by the Plaintiff, the oral and documentary evidence adduced by the Summoned Witnesses by the Parties, filed Submissions and Cited authorities. On 16th October, 2012, the Plaintiff instituted this suit by then before the High Court taking the this Court had not yet been established. She claimed to be the registered owner to all the suit property since 25th September, 1995 when she bought it from one Nancy Wangari Njoroge on terms and condition stipulated in the sale agreement. Upon pursuing all the transfer processes including the Land Control Board, she was issued a Certificate of Title deed into her names. In the year 1997 she learnt of a boundary dispute and on 11th January, 2010 on conducting an official search found out her green card was missing from the folio. The Land Registrar decided to re – issue he her with a new green card and another Certificate of Title Deed but bearing the same details. But on 20th April, 2012 she received information that there were people on her land and causing development there including fencing it. She put a caveat emptor in the newspapers. She therefore filed this suit seeking the orders from the Plaintiff.
41. It was later on from the filed pleadings – Statement of Defence and Counter Claim filed on 3rd December, 2012 - that the 1st and 2nd Defendants came calling and claiming to be the legal owners of the said suit land from 8th October, 2008 when a valid title was issued in their favour. Indeed, the records at the Land Registrar who is the custodian of land records confirmed the 1st and 2nd Defendants legal status in respect to the suit property. The 1st and 2nd Defendants refuted that the Plaintiff had any good title to the suit land as it was obtained fraudulently taking that her title was cancelled and what she was holding was a re – issued title by the Land Registrar. The sought for a declaration that they were the legal owners of the suit land and costs of the suit. That is enough on the brief facts of the case herein.
42. Now the Honorable Court wishes to turn to the issues for analysis under this sub - heading. The main issue of contention in this matter is that there are two (2) competing sets of Certificate of title and ownership between the Plaintiff on one hand and the 1st and 2nd Defendants on the other hand over the same Suit Property. The Honorable is caused by the parties herein to make a determination of which of the two parties and the Certificate of Title is legal. This sounds like a replica of the case of two Harlots in the Holy scripture in 1 Kings 3:16 to 28 who presented two children – one dead and another living one. Both of them were claiming to be the right parents to the alive child. King Solomon in the wisest decision ever made called for a sword in order to split the child into two portions for each Lady to retain a piece of the child. But at the verge of so doing one of the ladies raised her hand wailing



and offered the child be retained by the other lady. Clearly, the King knew whose child it was and the wailing lady took the day. Likewise, this Court would have to gather this wisdom in order to arrive at an informed decision based on facts and law.

43. It's trite law that according to the Provisions of Section 7 of the Land Act No. 6 of 2012 of the Laws of Kenya, one may acquire ownership to land through various means. These are: -

- a. Allocation;
- b. Land adjudication process;
- c. Compulsory acquisition;
- d. Prescription;
- e. Settlement program
- f. Transmission
- g. Transfer
- h. Long term leases exceeding twenty one (21) years created out private land; or
- i. Any other manner prescribed in an act of parliament.

The Provisions of Sections 24, 25 and 26 of the Land Registration Act provides as follows: -

Section 24 provides: - Interest conferred by registration

Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 provides: - Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 provide: - Certificate of title to be held as conclusive evidence of proprietorship



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
44. The Plaintiff claims to have legally acquired this parcel from the year 1995 from a purchase of it from the previous owner one Nancy Wanjiru Njoroge vide a duly executed Sale Agreement dated 25th September, 1995. The seller applied and obtained the letters of Consent from the Land Control Board and the transfer was complete by the Plaintiff being issued with a Certificate of Title Deed. The Plaintiff produced the sale agreement, payment vouchers, the transfer forms and a Copy of the title deed in Court. The Plaintiff relied on the records within the custody of the Land Registry. She alleged having enjoyed the quite possession of the land from that time a fact she holds is supported by the Land Registrar the 3rd Defendant. She claims she had good and indefeasible title rights and interest over the land from 11th January, 2010 and that it's the Defendants who acquired their title deed through fraud, misrepresentation of facts and illegality. She provided the particulars of these illegalities.
45. On the other hand the 1st and 2nd Defendants claim to be as innocent Purchasers for value without any notice of any defect bought the land from one Mr. Antony Paul Pape. According to them, the Plaintiff's title dated 11th January, 2010 was not available to be issued to her. It must have been acquired by fraudulent means as demonstrated by the particulars stated out under Paragraph 10 (a) to (h) of the Defence and Counter Claim.
46. This is an instant where the principle on root of title is critical. According to the decisions of the Court of Appeal:- "Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Herbert L. Martin and 2 others v Margaret J. Kamau and 5 others [2016] eKLR" where Court held that it is tasked with making a discovery as to which of two (2) competing titles should be upheld as in this instant case by stating as follows: -
- “..... This investigation must start at the root of the title and follow all processes and procedures that brought forth the two (2) titles at hand. It follows that the title is to be upheld is that which confirmed to procedure and can properly trace its root without break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No Party should take it for granted that simply because they have a title deed or Certificate of Leases, they have a right over the Property. The other Party also has a similar document and there is therefore one's case solely on the title document that they hold”.
47. Further, the Honorable Court held that where a registered proprietor's root of title was under challenge it was not sufficient to dangle the instrument of the title as proof of ownership. It was this instrument of title that was in challenge and hence the registered proprietor ought to go beyond the



instrument and prove the legality how he acquired the title and show the acquisition was legal, formal and free from any encumbrances.

All the land records are kept and maintained by the Land Registrar. From the information in the Green Card produced by the 3rd Defendant indicates the Suit Land known as Land Reference No. Galu Kinondo/557 measuring 2.4 Ha (approximately 6.58 acres) has the following entries: -

- i. On 15th November, 1974 registered in the names of Juma Rashid Mwavumbani;
- ii. On 15th December, 1976 transferred to Peter Gregory Njoroge;
- iii. 5th July, 1988 transferred to Nancy Wangari Njoroge; and
- iv. 24th October, 1995 to Nariman Khan Brunlehner.

48. From the Grant Letter of Administration to the estate of Peter Gregory Njoroge who died on 29th May, 1983 and whereby the widow Nancy Wangari Njoroge was appointed as the Legal Administratrix. There is a transfer document of the widow transferring the land to the Plaintiff. It cannot be gain said that the evidence of the 3rd Defendant is critical. He held the land belonged to the Plaintiff. He stated that there was cancellation of the Plaintiff's title the same having been overly mutilated.

However, she was later on issued with a replaced title dated 11th January, 2010. She paid a sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1,800,000.00). There was transfer documents showing from where the deceased had bought the land from which has been a clear demonstration of the root up which they acquired the Suit Property.

On the other hand the 1st and 2nd Defendants testified having bought the land through a Sale Agreement dated 20th May, 2008 from one Mr. Antony Paul Pape for a consideration of a sum of Kenya Shillings Three Million (Kshs 3,000,000.00).

From the Pleadings the land bought is described and "Kwale/Galu Kinondo/557" and not "Galu Kinondo/557". The 3rd Defendant indicated there was a discrepancy from this description as no such land existed. It is stated from a copy of the title it was registered on 9th April, 2002.

Despite these, the Honorable Court took cognizance that the Vendor never recorded any Witness Statement leave alone appearing to testify in Court. There was neither original Certificate of title nor Green Card with all these entries was produced. Due to these discrepancies, the Court has concluded that the 1st and 2nd Defendants were not the registered owners to the Suit Land. Although they claimed the Plaintiff might have acquired her title by irregular and fraudulent means there was no empirical evidence to prove this such as a report made at the Police for their investigation or Document Examiner.

Issue No.(b) Whether the Parties herein are entitled to the reliefs sought from the filed Pleadings.

49. The Honorable Court has been satisfied that the Plaintiff has been able to provide and demonstrate the root of the title to the Suit land. From the record kept by the Land Registrar being the Green Card, the Transfer Forms, the Payment of Stamp duty and Consent from the Land Board, the cancellation of her title was explained by the 3rd Defendant and Plaintiff was purely for the re-issue of a new/ replacement of title as the old one had been badly mutilated. This is purely and normal administrative procedure. The 1st and 2nd Defendant have failed to demonstrate how they acquired the land from whom, the Vendor who never recorded any Statement nor testified to at least shed light to Court how he acquired the Suit Land and his proprietary interest over it. There was no original Certificate of title produced for its authenticity and genuineness. The evidence by the 3rd Defendant who is the custodian of the



land record is extremely strong and surprisingly was never challenged. I am compelled to rely and adopt the submissions by the Learned Counsel for the 3rd Defendant when he cited the Maximum of Equity which states "When two equities are equal, the first in time shall prevail" and the two authorities of "Wreck Motors Enterprises (Supra) and "Gitwany investment limited (Supra) to the effect that when there are two competing and equal equities, in this case the two Certificate of Title deeds, the first in time shall prevail. The title for the Plaintiff was issued on 24th October, 1995 while the one for the 1st and 2nd Defendants was registered and issued on 9th April, 2002 almost nine years (9) thereafter. Therefore, this is "fait compli" case. In all fairness, it goes without saying that the Certificate of title deed by the Plaintiff carries the day.

50. Based on the surrounding facts and inferences in this matter, the Plaintiff is entitled to the orders of permanent injunction as prayed for from her pleadings. For these reason, it's my view that the 1st and 2nd Defendants have no title available to them. It follows, therefore, that the only remedy to them is to seek to be refunded their finances from the said Vendor - Mr. Antony Paul Pape for the breach of contract entered with them. Thus, their Counter Claim must fail.

Issue No. (c) Who will meet the Costs of the Suit.

51. It is now well established that the issue of Costs, it's the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of "Jasbir Rai Singh Rai v Tarchalon Singh [2014] eKLR; and the Co urt RoseMary Wambui Munene v Ihururu Dairies Co – Operative Limited [2014] eKLR, Kenya Sugar Board v Ndungu Gathini [2013] eKLR; and Cecilia Nyayo – v Barclays Bank of Kenya Limited [2016] eKLR" where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

52. In the instant case, the Plaintiff has been able to establish its case against the Defendant and therefore they are entitled to be awarded the costs of the suit. For these reasons, the Costs to be borne by the 1st and 2nd Defendants herein.

VIII. Conclusion and Disposal

53. Consequently, upon conducting such an in depth analysis to the framed issues hereof, the Honorable Court is completely persuaded that the Plaintiff on balance of preponderance of probability has established its case against the 1st, 2nd, 3rd and 4th Defendants. Specifically, the Honorable Court grants the following orders: -
- a. That Judgment be and is hereby entered in favour of the Plaintiff jointly and severally against the 1st, 2nd, 3rd and 4th Defendants.
 - b. Thatthere be a declaration to the effect that the Plaintiff is the legal and absolute registered owner to all that property known as Land Reference Number Galu/Kinondo/557 measuring two decimal four (2.4 HA) (approximately 5.9304 acres) with all its indefeasible title, interest and Rights vested on it by law.
 - c. That the Counter Claim filed by the 1st and 2nd Defendants herein be and is hereby dismissed.



d. That an order of Permanent Injunction granted in favour of the Plaintiff restraining the 1st and 2nd Defendants, their Servants, Agents, Assigns from causing Sub-dividing, selling, transferring, leasing, mortgaging, charging or in any other way dealing over the Suit Land.

e. That Costs awarded to the Plaintiff to be borne by the 1st and 2nd Defendants.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA ON THIS ST DAY OF MARCH,2023.

.....

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

**ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of

- a. M/s. Yumnah, the Court Assistant;**
- b. Mr. Muliro Advocate for the Plaintiff;**
- c. No appearance for the 1st and 2nd Defendants;**
- d. Mr. Mwandeje Advocates for the 3rd and 4th Defendants.**

