



REPUBLIC OF KENYA



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Hippoh & 6 others v Kimong & 2 others (Environment and Land Case Civil Suit 1413 of 2016) [2025] KEELC 6800 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1413 OF 2016
MD MWANGI, J
SEPTEMBER 26, 2025**

BETWEEN

**WILLIAM MUTHAMA HIPPOH 1ST PLAINTIFF
JOYCE NYOKABI 2ND PLAINTIFF
ESTHER MALIA KILWENGE 3RD PLAINTIFF
JOHN IRUNGU CHEGE 4TH PLAINTIFF
ROSEMARY WANJIRU 5TH PLAINTIFF
JULIUS MWEBIA KIRIGIA 6TH PLAINTIFF
MICHAEL ITHONG'A MUGO 7TH PLAINTIFF**

AND

**FABIAN OTTO KIMONG 1ST DEFENDANT
CHIEF LAND REGISTRAR, NAIROBI 2ND DEFENDANT
JOSEPHAT NYAGA KABIRU 3RD DEFENDANT**

JUDGMENT

Background

1. The matter before this Court was initiated vide a plaint dated 15th November 2016 and subsequently amended with leave of Court. The original plaint was instituted by the Plaintiffs herein, namely William Muthama Hippoh, Joyce Nyokabi, Esther Malia Kilwenge, John Irungu Chege, Rosemary Wanjiru, Julius Mwebia Kirigia, and Michael Ithonga Mugo.
2. In the initial pleadings, the Plaintiffs sought reliefs against the 1st Defendant, Fabian Otto Kimong, and the 2nd Defendant, the Chief Lands Registrar Nairobi. However, pursuant to leave granted by



this Court, the Plaintiffs filed an Amended Plaintiff dated and filed on 10th June 2021, through which they enjoined two additional parties; specifically, the 3rd Defendant, Josephat Nyaga Kabiru, and the 4th Defendant, the Attorney General, sued on behalf of the Chief Lands Registrar.

3. The Plaintiffs' case, as stated in the amended plaintiff, is that they are lawful purchasers and allottees of various subplots excised from Title No. Nairobi/Block 126/184, having allegedly purchased the same from the 3rd Defendant who was said to be acting with the authority of the late registered proprietor, one Claire Atieno Obare, mother to the 1st Defendant. They contend that they were issued with share certificates to their respective subplots, which they have developed and occupied for varying durations.
4. The grievance giving rise to the present suit is that, notwithstanding their alleged ownership, the 1st Defendant has since procured registration of the mother title, Title No. Nairobi/Block 126/184, to his name, allegedly through misrepresentation, and with the facilitation of the 2nd Defendant. The Plaintiffs assert that the 1st Defendant, through his advocates, has issued threats of eviction against them.
5. In consequence, the Plaintiffs pray for judgment against the Defendants jointly and severally for the following reliefs:
 - a. A permanent injunction restraining the 1st Defendant, his agents or servants from entering, evicting the Plaintiffs, constructing, disposing, transferring or in any other manner dealing with Title No. Nairobi/Block 126/184 having lawfully bought the plot.
 - b. A declaration that the Plaintiffs are the lawful owners of plots in Title No. Nairobi/Block 126/184.
 - c. A declaration that the 3rd Defendant sold the subplots with the consent and authority of the late Claire Atieno Obare, the then registered proprietor and mother to the 1st Defendant.
 - d. An order directing the 2nd Defendant to cancel the title in the name of the 1st Defendant and to effect transfer of the same in favour of the Plaintiffs as the lawful purchasers.
 - e. Costs of the suit.
6. The 1st Defendant entered appearance and filed a Statement of Defence and Counterclaim dated 25th June 2021. In his defence, the 1st Defendant avers that he is the sole beneficiary of the Estate of the late Claire Atieno Obare, having lawfully obtained registration of the suit property, Title No. Nairobi/Block 126/184, through transmission following the issuance of a confirmed Grant on 30th November 2009. He contends that his title is indefeasible and protected under the law, and denies that his late mother ever sanctioned the sale of the suit property to the Plaintiffs through the 3rd Defendant or otherwise.
7. The 1st Defendant further asserts that any authority previously given to the 3rd Defendant lapsed upon the death of the deceased, and that the Plaintiffs, without conducting due diligence, entered into void transactions with an unauthorized party. He maintains that the Plaintiffs are trespassers who have unlawfully encroached, erected structures, and in some instances converted portions of the land into a graveyard, thereby occasioning wastage, loss, and devaluation of his property.
8. In his counterclaim, the 1st Defendant avers that he is the registered proprietor of all that parcel of land known as Nairobi/Block 126/184 situated at Ruai-Kamulu area along Kangundo Road, Nairobi, measuring approximately 1.123 hectares. He alleges that the Plaintiffs unlawfully encroached upon the said land from 2007/08, subdivided it without requisite approvals, and erected permanent structures thereon to his detriment.



9. The 1st Defendant therefore prays for judgment against the Plaintiffs and the 3rd Defendant jointly and severally as follows:
 - a. An order of eviction against the Plaintiffs and demolition of structures erected on all that parcel of land known as Nairobi/Block 126/184, Ruai–Kamulu area along Kangundo Road, Nairobi, which is legitimately and legally owned by the 1st Defendant.
 - b. An order for vacant possession directed to the Plaintiffs and a permanent injunction restraining the Plaintiffs from dealing with Nairobi/Block 126/184, Ruai–Kamulu area along Kangundo Road, Nairobi.
 - c. Mesne profits from the year 2007 to date for loss of possession by the Plaintiffs.
 - d. Interest and costs of the suit.
10. Upon being served with the 1st Defendant’s Defence and Counterclaim, the Plaintiffs filed a Reply to Defence and Defence to Counterclaim dated 18th November 2021. In the said Reply, the Plaintiffs, save where the same consisted of admissions, joined issues with the 1st Defendant upon his Defence and reiterated the averments in the Plaint. They asserted that the late Claire Obare had expressly authorized the 3rd Defendant to subdivide and sell the sub-plots comprising the suit property, and therefore the 1st Defendant could not purport to revoke or ignore the transactions arising therefrom.
11. The Plaintiffs further averred that the transfer of L.R. No. Nairobi/Block 126/184 into the name of the 1st Defendant was tainted with misrepresentation, the 1st Defendant having full knowledge of their claims and interests at the material time. They contended that they dutifully verified the instructions granted to the 3rd Defendant and even attended at the offices of Hayanga & Company Advocates to confirm the said authority before purchasing the sub-plots.
12. In answer to the Counterclaim, the Plaintiffs denied that the 1st Defendant was the registered owner at the time of subdivision and sale, reiterating that their agreements were with the 3rd Defendant who had due authority of the late proprietor. They maintained that their respective developments on the sub-plots were therefore legally undertaken. The Plaintiffs specifically denied the allegations relating to burials conducted on the land without the 1st Defendant’s consent, maintaining that the 4th Plaintiff, being the lawful purchaser of his sub-plot, required no such consent. Save for paragraphs 31–33 of the Counterclaim which were admitted, the Plaintiffs denied all the remaining allegations and put the 1st Defendant to strict proof.
13. On the basis of the foregoing, the Plaintiffs prayed that the 1st Defendant’s Defence and Counterclaim be dismissed with costs, and that judgment be entered in their favour as sought in the Plaint.
14. The 3rd Defendant, for his part, filed a Defence wherein he admitted the descriptive averments in paragraphs 1 to 3B of the Amended Plaint, as well as the contents of paragraphs 4 and 5 thereof. He averred that he had been duly authorized by the late Claire Obare, then the registered proprietor of the suit property, to subdivide the suit property into twenty sub-plots and to procure purchasers for them. The 3rd Defendant contended that the subdivision and sale were lawfully undertaken with the full consent and authority of the late Claire Obare, and that the agreed purchase price was duly remitted to the deceased, her sister, and to the firm of Hayanga & Company Advocates.
15. The 3rd Defendant further pleaded that the acquisition of title by the 1st Defendant was unlawful, and that the threats issued by the 1st Defendant and his advocates to the Plaintiffs were malicious and in bad faith, given that the subdivision and sale had already been sanctioned by the then registered proprietor. He expressly admitted the Plaintiffs’ claim, associating himself with their position, and prayed that the Plaintiffs’ claim be allowed while the 1st Defendant’s Counterclaim be dismissed with costs.



16. The 2nd and 4th Defendants, represented by the Honourable Attorney General, filed an Amended Statement of Defence dated 13th October 2023. Their position, in summary, is that they deny each and every allegation contained in the Amended Complaint, save for the descriptive averments identifying the parties.
17. The 2nd and 4th Defendants denied that the Plaintiffs are the lawful owners of plots allegedly subdivided from Title No. NAIROBI/BLOCK 126/184, or that the Plaintiffs purchased such plots from the 3rd Defendant as an authorized agent of the late Claire Atieno Obare.
18. They further deny that the Plaintiffs were ever issued with share certificates in respect of any such plots, or that they have developed and settled on the property with any legal entitlement.
19. They dispute the allegation that the 1st Defendant unlawfully acquired Title No. NAIROBI/BLOCK 126/184, and further deny that the 2nd Defendant facilitated the transfer in favour of the 1st Defendant on the basis of false information.
20. The 2nd and 4th Defendants also deny knowledge of any authority allegedly given by the late Claire Atieno Obare to the 3rd Defendant to sub-divide and sell the suit property.
21. They contend that the Plaintiffs are not entitled to the reliefs sought, whether in the form of injunctive orders, declaration of ownership, or cancellation of the 1st Defendant's title.
22. While conceding that this Court is seized of jurisdiction to entertain the dispute, the 2nd and 4th Defendants maintain that the suit, as drawn, discloses no reasonable cause of action against them. Consequently, they pray that the Plaintiffs' suit against them be dismissed with costs.

Plaintiff's Evidence

23. The Plaintiffs called one witness, PW1, William Muthama, who is the 1st Plaintiff and who testified on behalf of all his co-Plaintiffs. He adopted his witness statement dated 5th February 2020 as his evidence-in-chief and produced the documents listed therein as Plaintiffs' Exhibits 1–5.
24. PW1 testified that he resides in Kisumu town, is a businessman, and had purchased three (3) plots carved out of the suit property, namely Plot Nos. 5, 6 and 7, at different times between 2007 and 2009, from one Josephat Nyaga Kabiru, also referred to as Joseph Kabiru. His evidence was that his co-plaintiffs also bought their respective plots from the same Kabiru, who presented himself as operating under the entity Sodalight Surveyors & Valuers (K), and as an agent of the late registered owner, Claire Atieno Obare.
25. PW1 stated that he, together with the other Plaintiffs, were issued with receipts and share certificates in respect of their plots and they proceeded to take possession and develop the same. He confirmed that he personally developed one of his three plots.
26. On cross-examination by learned counsel for the State, Miss Kubai, PW1 admitted that he did not receive any transfer documents from Kabiru, nor were any transfer instruments ever presented for registration before the Land Registrar. He further admitted that he did not conduct an official search of the title but relied on a search allegedly shown to him by Kabiru.
27. On cross-examination by learned counsel for the 1st Defendant, Mrs. Esonga, PW1 reiterated the purchase prices and dates of acquisition of his three plots. He admitted that although the receipts bore the name of Sodalight Surveyors & Valuers (K), he had no documentary proof that Kabiru was the proprietor of that entity, nor had he seen any title deed in its favour. He acknowledged that in his



witness statement he had stated that he bought the land from Sodalight Surveyors & Valuers (K), but in fact the direct dealings were with Kabiru.

28. PW1 further testified that he relied on a letter of authority dated 27th October 2006, purportedly issued by the late Claire Atieno Obare in favour of Kabiru. He confirmed that the letter he produced as an exhibit bore alterations to the reference number (crossing out “84” and inserting “184”) without any countersignature. He conceded that the authority expressly stated it was limited to 90 days, after which any transactions would be without authority.
29. PW1 further acknowledged that he was not aware of the date of death of Claire Atieno Obare, and only came to know from the Defendant’s bundle that she died on 29th December 2006. He nonetheless confirmed that several of the sale agreements relied upon by the Plaintiffs were entered into in 2007 and 2009, after the demise of Claire Atieno Obare.
30. He conceded that the Plaintiffs’ sale agreements did not have accompanying transfer documents, that no titles were ever processed, and that despite default clauses providing for refund of purchase price, none of the Plaintiffs had sought a refund from Kabiru. Instead, they proceeded to develop their plots on the basis of possession and the share certificates issued.
31. On cross-examination by counsel for the 3rd Defendant, Mr. Kabaka, PW1 admitted that he had seen a copy of the title deed in the name of Claire Obare and that there existed an agreement dated 15th May 2007 between Kabiru and the firm of Hayanga & Co. Advocates, purportedly acting for the estate of Claire Obare, which extended Kabiru’s authority by one year. He maintained that Kabiru had shown him subdivision maps and beacons on the ground and that all twenty (20) plots had been sold.
32. PW1 also admitted receiving a cautionary letter from Hayanga & Co. Advocates warning the Plaintiffs against dealings on the suit property, but by then he had already bought and developed. He confirmed that no individual titles were ever issued because Kabiru did not have the original mother title.
33. In re-examination, PW1 clarified that “Joseph Kabiru” and the “3rd Defendant, Josephat Nyaga Kabiru” were one and the same person. He reiterated that both letters of authority permitted the 3rd Defendant to subdivide the land, but conceded that none of the subplots were ever registered. He further confirmed that the Plaintiffs only became aware of the succession proceedings in the estate of Claire Obare after the title had already been transmitted to the 1st Defendant, and they had not lodged any objection therein.
34. From the foregoing evidence, it is clear that the Plaintiffs’ case rests primarily on the alleged authority granted to the 3rd Defendant, Josephat Nyaga Kabiru, to subdivide and sell the suit property, the receipts and share certificates issued to them by him, and their occupation and development of the land. However, PW1 candidly admitted that no registered transfers were ever executed, that some of the agreements were entered into after the death of Claire Atieno Obare, and that the authority letter was expressly time-bound for 90 days.

3rd Defendant’s Evidence

35. The 3rd Defendant, Josephat Nyaga Kabiru (DW1), testified that he is a land surveyor by profession, having served in that capacity in government since 1968 before retiring into private practice. He adopted his witness statement dated 25th November 2021 as his evidence in chief and produced the documents listed on the list of documents filed on the same date, which were admitted in evidence and marked as DE1 to DE6.
36. In his testimony, DW1 stated that in October 2006, the late Claire Atieno Obare, who was then the registered proprietor of the suit property, granted him written authority to subdivide and sell the land.



Relying on this authority, he subdivided the land into twenty (20) plots each measuring 50 feet by 100 feet, and subsequently sold all of them at prices ranging between Kshs. 150,000 and Kshs. 250,000. He averred that his mandate was to remit a total of Kshs. 2,000,000 to the deceased, and that he was furnished with a copy of the title deed to enable him to carry out the subdivision and sale.

37. DW1 testified that before he could complete remittance of the monies, the registered owner passed away. Thereafter, her sister, one Veronica Obare, took over the process and referred him to her advocates, Messrs. Hayanga & Company Advocates, whom he dealt with. He stated that he remitted various amounts to both Claire Obare and her sister Veronica, and produced vouchers and receipts in support, including a payment voucher of Kshs. 200,000, another of Kshs. 250,000, and a further one of Kshs. 300,000 to Claire in 2006. He also produced evidence of Kshs. 200,000 paid to Hayanga & Co. Advocates, Kshs. 50,000 to Veronica, and Kshs. 140,000 to Claire's account at Barclays Bank. In total, he claimed to have remitted Kshs. 890,000. He further stated that he was to charge Kshs. 560,000 for his professional services, leaving a balance of Kshs. 300,000 due to the estate, which he admitted he still owed and expressed willingness to pay.
38. During cross-examination by counsel for the Plaintiffs, DW1 confirmed that he sold the suit plots to the Plaintiffs who paid him the full purchase consideration. He maintained that he had been duly authorized to subdivide and sell the plots, and that the late Claire Obare never revoked his authority during her lifetime. He stated that some of the Plaintiffs had already settled on and developed the plots. He further indicated that his obligation was limited to submitting the monies received to the deceased, her sister, and the advocates. He denied knowledge of the grant of letters of administration in the estate of Claire Obare and only learnt of the transfer of the title to the 1st Defendant much later. He noted that all the plots were sold, identifiable, and that the estate of the deceased had never sued him for wrongful sale of the property.
39. Under cross-examination by State Counsel, DW1 conceded that the subdivision process was not completed in accordance with the law, as no approvals had been issued and no mutation forms were registered with the land registrar. He admitted that the Plaintiffs settled on the land without requisite approvals.
40. In re-examination, DW1 clarified that his arrangement with Claire Obare was that he would sell the plots and thereafter facilitate issuance of titles, but he could not do so as Claire had not surrendered the original title or lease to him. He reiterated his readiness to process the titles if availed with the necessary documents. He maintained that although Hayanga & Co. Advocates had alleged he was illegally selling the land; he had never been charged in any court of law in connection with the matter.

2nd and 4th Defendant's Evidence

41. The 2nd and 4th Defendants, did not call any witness in support of their respective positions. They accordingly closed their case without adducing oral evidence.

1st Defendant's Evidence

42. The 1st Defendant's case was presented through the testimony of DW2, Veronica Obare, who testified as the holder of a registered power of attorney donated by the 1st Defendant, Fabian Otto, and as an administrator of the estate of the late Claire Obare, the mother of the 1st Defendant. DW2 adopted the Witness statements on record, including that of the 1st Defendant dated 25th June 2021 and her own dated 16th November 2018, and produced twenty-one documents in support of the defence and counter-claim.



43. Her testimony challenged the validity and authenticity of the alleged agreement between the late Claire Obare and the 3rd Defendant, Josephat Nyaga Kabiru, particularly pointing to discrepancies between the version relied upon by the Plaintiffs and that in the 1st Defendant's bundle. The variances she highlighted included differences in the land reference numbers, the presence or absence of critical clauses, and inconsistencies in the signatures of the late Claire. DW2 maintained that the correct and genuine agreement was the one filed in the 1st Defendant's bundle, and she asserted that the document relied upon by the Plaintiffs was irregular and strange.
44. DW2 further testified that any authority given to the 3rd Defendant by Claire Obare was limited in duration, being valid for 90 days only, and in any event, the authority lapsed upon her death on 29th December 2006. She emphasized that any subdivision or sale conducted after that date was unlawful and void. She also relied on an agreement between Hayanga & Co. Advocates and the 3rd Defendant, which provided that all proceeds were to be remitted to the said firm, and that only a total of Ksh. 250,000 was ever acknowledged. On this basis, she contended that the original title could not have been released to the 3rd Defendant as the agreed sum of Ksh. 2,000,000 was never remitted.
45. DW2 further produced evidence of a caveat emptor notice published in the Daily Nation cautioning the public against dealing with the suit property, as well as correspondence between her advocates and the 3rd Defendant in which the latter was warned against selling the plots. She asserted that despite such notices and warnings, the 3rd Defendant unlawfully transacted with the Plaintiffs, who then purported to occupy the land without valid authority.
46. It was her evidence that the transfer of the suit property into the name of the 1st Defendant was done lawfully through transmission after confirmation of grant, and that he is the rightful registered proprietor. She denied the allegations of fraud and instead maintained that the Plaintiffs are trespassers on the land. Consequently, the 1st Defendant's counter-claim sought eviction of the Plaintiffs, mesne profits, and costs of the suit.
47. DW2 conceded that she was not privy to the transactions between the 3rd Defendant and the Plaintiffs, nor did she directly engage with the alleged purchasers. She admitted that despite observing developments on the land after her appointment as administrator, she did not institute any proceedings against the occupiers until the Plaintiffs had filed the current suit. She also acknowledged that the agreement between Hayanga & Co. Advocates and the 3rd Defendant did not expressly provide for purchasers to deal directly with the advocates, and that her information about the transactions came largely through her advocates and investigators.
48. DW2 admitted that to her knowledge, no subdivisions of the suit property were ever carried out, no approvals were sought, and no transfers were executed between her late sister and the Plaintiffs. She emphasized that the official search revealed no subdivisions, and that the registered owner of the land is the 1st Defendant. She further confirmed that she has no claim against the Chief Land Registrar.
49. During cross-examination by learned counsel for the 3rd Defendant, DW2 conceded that both her bundle and that of the 3rd Defendant contained documents dated 27th October 2006 purporting to authorize the 3rd Defendant to subdivide the property. She maintained, however, that the two documents were not identical: her version contained clauses requiring the remittance of Ksh. 2,000,000 into a specified account of the deceased and the maintenance of a register of purchasers before release of the title, whereas the 3rd Defendant's version omitted those terms.
50. She further stated that the signatures on the two documents differed, though she admitted she was not a handwriting expert. She acknowledged that in both versions, the 3rd Defendant was mandated to market and find buyers, and that the agreed sum for the property was Ksh. 2,000,000.



51. DW2 was also confronted with several petty cash vouchers allegedly signed by the late Claire Obare between November and December 2006 acknowledging receipt of Ksh. 750,000. She denied the authenticity of those signatures and insisted that, to her knowledge, only Ksh. 140,000 had ever been deposited into the deceased's account. She asserted that the vouchers were forgeries, though she admitted that no expert opinion had been sought to challenge them, and despite reports made to the police and the Directorate of Criminal Investigations, no prosecution had been undertaken against the 3rd Defendant.
52. She conceded that she personally received Ksh. 200,000 in 2008, which she claimed to have remitted to her advocates. She denied that the estate ever received the Ksh. 890,000 as alleged by the 3rd Defendant.
53. On further questioning, DW2 admitted that no suit was filed against the occupiers of the property until 2016 when the Plaintiffs commenced the present action, explaining that the estate lacked locus standi until the grant of letters of administration was confirmed in 2010.
54. She also confirmed that searches at the Ministry revealed no lawful subdivisions of the property, and she disowned the subdivision plan relied upon by the 3rd Defendant as unapproved.
55. In re-examination, DW2 clarified that the document relied upon by the 3rd Defendant at page 21 of his bundle bore no signature, approval, or certification, and in her view amounted to nothing more than a draft. She contrasted this with the valid agreement at page 8 of the 1st Defendant's documents dated 27th October 2006, which contained clear conditions including the remittance of Kshs. 2,000,000 into the deceased's account and the maintenance of a register of purchasers before release of the title deed.
56. She reiterated that the deceased, Clare Obare, passed away on 29th December 2006 before the said conditions were met, and therefore no valid authority to subdivide or develop the land was ever granted. According to DW2, the only sums she could confirm as received were Kshs. 390,000, comprising Kshs. 140,000 deposited directly into the deceased's Barclays account, Kshs. 200,000 received by Hayanga & Co. Advocates, and Kshs. 50,000 received by herself and remitted to the advocates.
57. As to the petty cash vouchers produced by the 3rd Defendant, DW2 maintained that the signatures thereon did not belong to her late sister. She noted further inconsistencies, including unsigned vouchers and vague references to "advance" payments with no particulars of the plots. She insisted that the only genuine payment evidenced was the bank deposit of Kshs. 140,000 into the deceased's account, and she confirmed the account details as correct.
58. DW2 further testified that no register of purchasers was ever produced, and that the original title was never released to the 3rd Defendant because the prerequisite payment of Kshs. 2,000,000 was never made. She also emphasized that neither she nor the estate's advocates ever authorized the developments on the land, since the contractual conditions were unfulfilled.
59. She disowned the subdivision plan produced by the 3rd Defendant, pointing out that even prior to the agreement of 27th October 2006, the deceased had rejected his proposal to carry out subdivisions without approvals, as shown by a letter dated 25th September 2006.
60. DW2 confirmed that her complaints regarding the 3rd Defendant's conduct were lodged with investigative agencies, but no prosecution ensued. She explained that the estate could not institute proceedings immediately upon discovering trespassers because the grant of letters of administration was not confirmed until 2010.
61. Finally, she acknowledged that attempts were made at out-of-court negotiations with some of the purported purchasers, but when these failed, the Plaintiffs commenced the present proceedings.



Analysis of Submissions

62. The Plaintiffs in their written submissions anchored their case on the authority bestowed upon the 3rd Defendant both by the late Claire Atieno Obare, the then registered proprietor, and subsequently by the firm of Hayanga & Company Advocates acting for her estate. They argued that, armed with such authority, the 3rd Defendant lawfully sub-divided the suit property, sold the resultant sub-plots to them, received full consideration, and remitted the proceeds to the estate of the deceased proprietor.
63. They submitted that they have been in continuous, peaceful occupation of their respective sub-plots, where they have carried out developments, until threats of eviction emerged after the transfer of the mother title to the 1st Defendant. According to them, the 1st Defendant did not deny either their possession or that the 3rd Defendant had been clothed with authority, but merely alleged incomplete remittance of the purchase price and insisted that part of the consideration constituted only a deposit. The Plaintiffs emphasized that no action was ever taken by the 1st Defendant or the estate against them or against the 3rd Defendant to recover the land or challenge the sales.
64. On the issue of their legal standing, the Plaintiffs placed reliance on the doctrine of a bona fide purchaser for value without notice. They cited Lawrence P. Mukiri Mungai & Another v Attorney General & 4 Others [2017] eKLR, in which the Court discussed the parameters of the doctrine, with reference to the Ugandan decision in Katende v Haridar & Company Ltd [2008] 2 EA 173. In their view, they met the tests set out in those authorities, having purchased the sub-plots in good faith, paid valuable consideration, taken possession, and developed the land without knowledge of any adverse claim or fraud.
65. The Plaintiffs further invoked the law of agency, submitting that an agent acting within the scope of their actual or apparent authority binds the principal notwithstanding allegations of fraud or self-interest. In this regard, they contended that the 3rd Defendant acted squarely within the mandate conferred upon him first by Claire Obare, and later by the estate through its advocates, and thus his acts are binding upon the estate and the 1st Defendant as successor in title.
66. The 3rd Defendant's aligned himself with the Plaintiffs' position and affirmed that he had been duly authorized by the late Claire Atieno Obare through an express agreement dated 27th October 2006 to sub-divide the suit property and secure purchasers. He further submitted that upon the demise of the said proprietor, one of her sisters, who was an administrator of the estate, together with the estate's advocates, instructed him to continue with the transaction in accordance with the initial authority. He asserted that the proceeds of sale were remitted to the deceased, her relatives, and the estate's advocates, with documentary evidence of payments being produced before court.
67. On this foundation, the 3rd Defendant argued that he acted lawfully as an agent within the scope of his mandate, and that the 1st Defendant's family, having benefited from the proceeds, could not now dissociate themselves from that position. To fortify this, he invoked the doctrine of equitable estoppel, as discussed in Muema v OM Shree Holdings Ltd (2024), and further supported by appellate pronouncements in John Mburu v Consolidated Bank of Kenya (2018) and Kenya National Assurance Co. v Kimani (1987), arguing that the 1st Defendant and his family were estopped from denying the very authority they had sanctioned and from which they derived benefit.
68. He also referred to section 2 of the *Estate Agents Act*, Cap 533, to demonstrate that his role fell within the legal scope of agency practice, contending that his mandate was well recognized in law. He relied on West Media Limited v Catherine Naliaka (2023), to submit that an agency relationship may be established not only by express agreement but also by conduct, and in this case, the dealings between himself, the estate, and the purchasers evidenced such a relationship.



69. On the fraud allegations levelled against him by the 1st Defendant, the 3rd Defendant argued that the same had not been proved to the requisite standard. He cited *Samuel Ndegwa Waithaka v Agnes Wangui Mathenge* (2017) to restate that the civil standard is proof on a balance of probabilities, and contrasted this with the higher standard required in cases alleging fraud. He relied on authorities such as *Christopher Ndaru Kagina v Esther Mbandi Kagina* (2016), *Central Bank of Kenya Ltd v Trust Bank Ltd, Re Estate of Thomas Mutua Mukumbu* (2014), and *Re Estate of Samuel Ngugi Mbugua* (2017), to emphasize that allegations of fraud must be specifically pleaded and strictly proved, often necessitating forensic or expert evidence, which the 1st Defendant had not provided.
70. He further invoked sections 107 and 108 of the *Evidence Act* on the burden of proof, and the reasoning in *Miller v Minister of Pensions* (1947) on the evidential threshold, arguing that the 1st Defendant's claim collapsed for want of proof.
71. On the counterclaim for mesne profits, the 3rd Defendant submitted that the 1st Defendant neither pleaded nor proved any specific sum. He referred to section 2 of the *Civil Procedure Act* defining mesne profits, and Order 21 rule 13 of the Civil Procedure Rules on the court's powers to decree them, but maintained that the evidentiary burden lay with the claimant. In support, he relied on *Peter Mwangi Mbuthia & Another v Samow Edin Osman* (2014) and *Stephen Makau Kanyia v Wilson Njeru Wega* (2021), where courts declined to award mesne profits for want of specific pleadings and supporting evidence.
72. The 2nd and 4th Defendants framed their submissions around the central question of whether the Plaintiffs had established any lawful proprietary interest in Title No. NAIROBI/BLOCK 126/184. They argued that the Plaintiffs' claim of ownership, resting on agreements entered into with the 3rd Defendant, was not supported by documentary evidence capable of conferring registrable rights. It was pointed out that the authority granted by the late Claire Obare to the 3rd Defendant on 27th October 2006 was for a limited duration of ninety days and had therefore lapsed. Any subsequent transactions by the 3rd Defendant, they submitted, were without legal force.
73. In relation to the Plaintiffs' evidence and the allegations in support of their claim, the 2nd and 4th Defendants stressed that no transfer documents or registered conveyances were produced before the court. They emphasized that the Plaintiffs' case rested on receipts and agreements, but these were insufficient to confer title in law. They relied on the reasoning that ownership of land in Kenya is perfected through registration, and absent such registration, the Plaintiffs' interest could only amount to an equitable claim without the protection of indefeasibility.
74. On the probative value of the 1st Defendant's title, the 2nd and 4th Defendants invoked section 26 of the *Land Registration Act*, citing decided cases such as *Zacharia Wambugu Gathimu v John Ndungu Maina and Elijah Makeri Nyangwra v Stephen Mungai Njuguna*. Their argument was that the 1st Defendant's certificate of lease constitutes prima facie evidence of absolute ownership and can only be impeached where fraud or illegality in the process of acquisition is demonstrated. They contended that no such evidence was placed before court to vitiate the 1st Defendant's root of title.
75. They further drew support from appellate court's decision in *Munyu Maina v Hiram Gathiha Maina*, as recently reaffirmed in *Lagat v Kebut* (2023), to the effect that when a registered proprietor's root of title is under challenge, it is not enough to merely dangle the instrument of title; the proprietor must demonstrate the legality of acquisition. They argued that in this instance, the 1st Defendant had discharged that burden by showing acquisition through transmission from the estate of the late Claire Obare, while the Plaintiffs had failed to show any formal or lawful transfer in their favour.



76. The submissions also addressed the doctrine of bona fide purchaser for value without notice. Relying on *Katende v Haridar & Co. Ltd* as adopted in *Weston Gitonga v Peter Rugu Gikanga*, they recited the elements necessary to establish such status, including holding a certificate of title, purchasing in good faith, and absence of knowledge of fraud. The 2nd and 4th Defendants maintained that the Plaintiffs could not meet this threshold since they neither obtained title deeds nor lodged transfer instruments with the land registry, and thus could not qualify as bona fide purchasers under the law.
77. Finally, they argued that there was no cause of action against the 2nd Defendant, the Land Registrar, since no documents had been lodged before his office for registration. In their view, the Plaintiffs had not demonstrated any omission or commission attributable to the 2nd Defendant to justify his joinder. On this basis, the 2nd and 4th Defendants urged dismissal of the Plaintiffs' case with costs, maintaining that the suit rested on unsubstantiated claims of ownership and unproven allegations of fraud.
78. The 1st Defendant's submissions opened by outlining the background, emphasizing that he is the registered proprietor of the suit property, NAIROBI/BLOCK 126/184, having acquired it lawfully through transmission from the estate of his late mother, Claire Atieno Obare. He argued that the Plaintiffs' claim is based on agreements entered with the 3rd Defendant, Joseph Nyaga Kabiru, under the banner of Sodalight Surveyors and Valuers, yet that entity's legal capacity was never established in the proceedings.
79. On the first issue of indefeasibility of title, the 1st Defendant placed reliance on the statutory provision under section 26 of the *Land Registration Act*, stressing that his certificate of lease is prima facie evidence of absolute ownership. He submitted that since the Plaintiffs neither pleaded nor proved fraud, illegality, or misrepresentation in the process of acquisition, his title stands insulated from attack. Counsel maintained that once a proprietor is registered, the burden rests squarely on the challenger to demonstrate vitiating factors, which the Plaintiffs had not discharged.
80. Turning to the validity of the agreements relied on by the Plaintiffs, the 1st Defendant contended that the sale agreements executed with Sodalight Surveyors and Valuers could not confer any registrable interest because the said entity was not shown to hold any title or to have been authorized to transfer interest in land. He drew attention to the disparity between the authority allegedly given by the late Claire Obare to the 3rd Defendant in his personal capacity and the transactions carried out in the name of Sodalight. He further highlighted that purported share certificates issued to the Plaintiffs under that entity had no legal effect absent proof of registration or corporate personality. He relied on judicial pronouncements elaborating on the principle of corporate separateness and the rule in *Foss v Harbottle*, to argue that the Plaintiffs' reliance on such an entity was fundamentally flawed.
81. On whether the 3rd Defendant had capacity to sell, the 1st Defendant stressed that the written authority granted on 27th October 2006 was for a limited period of ninety days and had long expired by the time the alleged sales were conducted. He argued that any dealings after expiry were void and incapable of conferring any rights. Further, he submitted that even if the agreement had survived, the death of the late Claire Obare on 27th December 2006 automatically extinguished such authority, given that only a duly appointed administrator under the *Law of Succession Act* can lawfully deal with the estate's property.
82. He challenged the agreement made on 15th May 2007 between the 3rd Defendant and Hayanga & Company Advocates, submitting that it was legally ineffective since, at the time, there was no confirmed grant. He relied on jurisprudence interpreting sections 55 and 82 of the *Law of Succession Act* to emphasize that immovable property of a deceased person cannot be validly disposed of prior to confirmation of grant. To reinforce this position, he referred to decisions where courts held that sales



- of a deceased estate's land before confirmation amounted to intermeddling, a criminal offence, and that such transactions are void ab initio.
83. Additionally, the 1st Defendant highlighted the fact that he was a minor at the time of the alleged agreement with Hayanga & Company Advocates, hence lacking capacity to contract under the general law of contracts. This, he submitted, further nullified any purported dealings relating to the suit land before the issuance and confirmation of grant in 2009, which ultimately vested the property in him as the rightful beneficiary.
 84. The 1st Defendant further fortified his case by citing judicial authority in *In re Estate of Wando Sande (Deceased)* [2021] eKLR, where the court reiterated that transactions undertaken over estate property without a grant of representation amount to intermeddling contrary to section 45 of the [*Law of Succession Act*](#). He argued that the Plaintiffs' reliance on dealings conducted after the demise of the late Claire Obare, and before confirmation of grant, fell squarely within the category of criminal intermeddling and were therefore null and void.
 85. On the question whether the Plaintiffs could properly be considered innocent purchasers for value, the 1st Defendant submitted that they had failed to meet the threshold. He contended that the burden of proving bona fides lies on the purchaser, requiring them to demonstrate due diligence, payment of valuable consideration, absence of notice of fraud, and acquisition from a person with apparent valid title. He argued that none of the Plaintiffs, save for the 1st Plaintiff, testified in court, leaving a gaping evidentiary hole on the issue. Even then, he stressed, all the transactions — from sale agreements to receipts and share certificates — were executed after the death of the registered proprietor, rendering them ineffectual in law.
 86. To support this line of argument, the 1st Defendant placed reliance on several authorities. He referred to *Moses Parantai & Peris Wanjiku Mukuru v Stephen Njoroge Macharia* [2020] eKLR, where the court applied the Katende test in defining the elements of a bona fide purchaser, and to *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR, where the court held that due diligence, value, and notice are issues of fact that must be proved by clear evidence. He also drew from *In re Estate of Paul M'Maria (Deceased)* [2017] eKLR, where the court held that notice can be actual or constructive, and that purchasers are presumed to know the law governing succession. He further cited *Esther Ndegi Njiru & Another v Leonard Gatei* (2014) eKLR, where courts cautioned purchasers that due diligence must go beyond a mere official search, particularly in light of rampant fraudulent dealings in land.
 87. On this basis, the 1st Defendant submitted that the Plaintiffs' defence of bona fide purchaser was not available to them, as they were either aware or ought to have been aware of the legal incapacity of the 3rd Defendant and the estate's administrators at the material time. He underscored this with reliance on *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, where the Court of Appeal affirmed that the doctrine of bona fide purchaser without notice only protects against prior equitable interests but cannot override a registered legal title.
 88. On remedies, the 1st Defendant submitted that since the Plaintiffs' occupation was unlawful, he was entitled to eviction orders and mesne profits dating back to 2007, being the period of alleged trespass. He cited *Attorney General v Halal Meat Products Ltd* (2016) eKLR, for the proposition that a person in wrongful occupation of land is liable to pay mesne profits for the duration of such unlawful possession.
 89. In conclusion, the 1st Defendant urged this Court to dismiss the Plaintiffs' suit with costs, issue eviction orders against them, declare his title to be indefeasible, and grant mesne profits. He further pressed for the counterclaim to be allowed, notwithstanding the fact that the Plaintiffs may have



developed the land while in occupation, on the basis that no valid title can arise from dealings tainted with illegality. He drew the Court's attention to the caveat emptor principle, noting that a public notice had been issued as early as August 2008 warning prospective purchasers that the property was not for sale, and that the Plaintiffs acted despite being aware of the 3rd Defendant's lack of authority.

Issues for Determination

90. Having considered the pleadings, the oral and documentary evidence tendered, and the rival submissions of the parties, this court finds that the following issues arise for determination:
- I. Whether the 3rd Defendant had the legal capacity and authority to sell and sub-divide the suit property, and if so, whether valid titles could pass to the Plaintiffs.
 - II. Whether the sale transactions undertaken by the 3rd Defendant after the demise of the registered proprietor amounted to intermeddling with the estate of a deceased person within the meaning of section 45 of the *Law of Succession Act*.
 - III. Whether the Plaintiffs acquired any valid or enforceable proprietary interest in the suit property, either under statute or under the equitable doctrine of bona fide purchaser for value without notice.
 - IV. Whether the estate of the late Claire Obare, having received proceeds from the sale of the sub-plots through her sister and advocates, is estopped from denying the transactions, and whether retention of such proceeds amounts to unjust enrichment.
 - V. Whether the 1st Defendant holds a valid and indefeasible title to the suit property within the meaning of section 26(1) of the *Land Registration Act*.
 - VI. Whether the Plaintiffs are entitled to the declaratory, injunctive, and cancellation orders sought in the Amended Plaint.
 - VII. Whether the 1st Defendant is entitled to the reliefs sought in the Counterclaim, including eviction and mesne profits.
 - VIII. Who should bear the costs of the suit and counterclaim.

Analysis and Determination

a. Whether the 3rd Defendant had the legal capacity and authority to sell and sub-divide the suit property, and if so, whether valid titles could pass to the Plaintiffs.

91. The Plaintiffs contend that the 3rd Defendant was expressly authorized by the then registered proprietor, the late Claire Atieno Obare, to sub-divide and sell the suit property into 20 sub-plots, and that pursuant to such authority he sold the plots to them, remitted proceeds to the deceased and her legal representatives, and allowed the Plaintiffs to take possession. The 3rd Defendant confirmed in his testimony that he acted under an authority dated 17th October 2006 and a subsequent agreement with the firm of Hayanga & Company Advocates dated 15th May 2007.
92. The general principle of agency is that an agent can bind his principal in all matters that fall within the scope of his actual or apparent authority. As was observed in *Kenya Commercial Bank Ltd v Osebe* [1982] KLR 296, authority may be either express or implied, and where the agent acts within such authority, the principal is bound by those actions. The Plaintiffs relied on this principle to argue that the 3rd Defendant's acts were within the scope of the authority granted by the proprietor.



93. However, under the regime of land law in Kenya, what ultimately passes interest in land is not authority alone but registration. Section 24(a) of the [Land Registration Act](#), 2012 provides:

“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.”

Further, Section 25(1) provides:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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...”

94. From the evidence before this Court, it is apparent that although the 3rd Defendant was clothed with written authority to market and receive proceeds of sale, he did not complete the statutory process of sub-division, registration, and transfer of legal title. No approved mutation forms or transfer instruments were produced, and no registration in favour of the Plaintiffs was demonstrated. Authority without registration cannot vest proprietary interest.

95. The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, reiterated the principle that a purchaser can only acquire such interest as the vendor himself holds, and that the doctrine of bona fide purchaser cannot override the absence of legal title.

96. In the result, while the 3rd Defendant may have had authority to sell in his capacity as an appointed agent of the registered proprietor, the absence of completed subdivision and transfer processes meant that no valid titles passed to the Plaintiffs. The Plaintiffs therefore only acquired equitable interests capable of protection in equity, but not indefeasible legal title.

97. There is more to transactions involving the sale of land in Kenya which is a highly regulated area and for good reason taking into consideration the emotive nature of land in this country. Sections 116 and 117 of the repealed Registered [Land Act](#), which was the applicable law at the alleged time of the transactions, contained the following framework on appointment of an agent for the purpose of disposing an interest in land registered under the Act: Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any interest in land, such power of attorney shall be entered in the register of powers of attorney and the original, or with the consent of the Registrar a copy thereof certified by the Registrar, shall be filed in the file of powers of attorney. Every such power of attorney shall be in the prescribed form or such other form as the Registrar may in any particular case approve, and shall be executed and verified in accordance with sections 109 and 110. (3) The donor of a power of attorney registered under this section may at any time give notice to the Registrar in the prescribed form that the power has been revoked, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney. (4) Any interested person may give notice in writing to the Registrar that a power of attorney which has been registered under subsection (1) has been revoked by the death, bankruptcy or disability of the donor or the death or disability of the donee, accompanied by such evidence as the Registrar requires, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney. (5) Subsections (3) and (4) do not apply to a power of attorney given for valuable consideration during any time during which it is, by virtue of the terms thereof, irrevocable. (6) If owing to the length of time since the execution of a power of attorney or for any other reason



the Registrar considers it desirable, he may require evidence that the power has not been revoked, and may refuse to register any disposition by the donee of the power of attorney until satisfactory evidence is produced.”

98. The 3rd Defendant did not have a power of attorney to transact on behalf of the late Clair Obare in respect of the suit property.

ii. Whether the sale transactions undertaken by the 3rd Defendant after the demise of the registered proprietor amounted to intermeddling with the estate of a deceased person within the meaning of section 45 of the Law of Succession Act.

99. Section 45 of the Law of Succession Act defines the offence of intermeddling and its civil consequence. It provides as follows:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”.

Further, Section 82 of the Act sets limits on the powers of personal representatives. It provides, inter alia:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers— ...

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that— ...

(ii) no immovable property shall be sold before confirmation of the grant.”

100. The combined effect of the above provisions is that any disposition of a deceased person’s free property, unless expressly authorized by the Act, by any other written law, or by a grant of representation, is unlawful. More critically, even where one is a personal representative, no immovable property of the estate may be sold prior to the confirmation of grant.

101. The courts have pronounced themselves clearly on this point. In *Re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR, Musyoka J. stated:

“Any act that is done without the authority of a grant amounts to intermeddling with the estate. The law takes a very serious view of intermeddling and makes it a criminal offence.”



102. Similarly, in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, Musyoka J. emphasized that:

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. A transaction that amounts to criminal activity cannot have any legitimacy, it cannot be valid nor lawful, and no rights can accrue from it.”

103. Turning to the present case, the evidence on record is that the late Claire Atieno Obare, the registered proprietor of the suit property, died on 29th December 2006. The authority given to the 3rd Defendant, which was dated 27th October 2006, lapsed by operation of law upon her death, as an agency relationship cannot survive the demise of the principal. Notwithstanding this, the 3rd Defendant proceeded to sell and subdivide the suit property and indeed entered into several sale agreements in 2007, 2008, and 2009, long after the demise of the registered proprietor.

104. It is also common ground that no confirmed grant of representation had been issued in respect of the estate of the deceased at the material time. Consequently, the 3rd Defendant had neither the legal authority nor capacity to deal with the suit property. His actions of selling and subdividing the same after the death of the deceased and before confirmation of grant amounted, in law, to intermeddling within the meaning of Section 45 of the *Law of Succession Act*.

105. The inescapable conclusion, therefore, is that all such transactions carried out by the 3rd Defendant after the demise of the deceased, and in the absence of a confirmed grant, were null and void ab initio. They conferred no valid title upon the purchasers, however bona fide they may have been.

ii. Whether the Plaintiffs acquired any valid or enforceable proprietary interest in the suit property, either under statute or under the equitable doctrine of bona fide purchaser for value without notice.

106. The Plaintiffs contended that they purchased the respective subplots from the 3rd Defendant, who had express authority from the deceased proprietor, the late Claire Atieno Obare, and subsequently from the estate’s advocates, Hayanga & Company Advocates. They argued further that they were innocent purchasers for value, having paid consideration in full, taken possession, developed the subplots, and occupied the same openly and without challenge for years. They placed reliance on the doctrine of the bona fide purchaser for value without notice.

107. The 1st Defendant, on the other hand, denied that any valid proprietary interest could accrue to the Plaintiffs, arguing that the 3rd Defendant lacked capacity to sell the land after the demise of the registered proprietor.

108. The starting point must be Section 24 and 25 of the *Land Registration Act*, No. 3 of 2012. Section 24(a) provides:

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



Section 25(1) further provides:

“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...”

109. The import of these provisions is that proprietary rights under Kenyan law are vested in the registered proprietor of the land. The Plaintiffs, therefore, cannot claim legal ownership under statute unless they hold a registered title deed — which they do not.

110. The Plaintiffs have also urged the Court to find in their favour under the equitable doctrine of the bona fide purchaser for value without notice. The Court of Appeal in *Lawrence P. Mukiri t/a Kinyua Mugambi & Co. Advocates v Attorney General & 4 Others* [2017] eKLR, cited with approval the Ugandan case of *Katende v Haridar & Company Ltd* [2008] 2 EA 173, where the Court stated:

“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: a) he holds a certificate of title; b) he purchased the property in good faith; c) he had no knowledge of fraud; d) he purchased for valuable consideration; e) the vendor had apparent valid title; f) he purchased without notice of any fraud; and g) he was not party to any fraud.”

From the above, it is clear that holding a valid certificate of title is a fundamental precondition to invoking the bona fide purchaser doctrine. The Plaintiffs in this case did not obtain title documents, since the sub-division was never completed and no transfers were registered in their favour.

111. This position was underscored by the Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, where the Court held that:

“It is our law and by now well settled, that even if a party is innocent and has no knowledge of fraud, it cannot get a valid title if the person from whom it purchased the land had no valid title.”

112. The principle *nemo dat quod non habet* — that one cannot give what one does not have — finds direct application here. The 3rd Defendant, having no title to the property, could not transfer valid legal ownership to the Plaintiffs.

ii. Whether the estate of the late Claire Obare, having received proceeds from the sale of the sub-plots through her sister and advocates, is estopped from denying the transactions, and whether retention of such proceeds amounts to unjust enrichment.

113. The Plaintiffs contended that even if the 3rd Defendant lacked legal authority to dispose of the suit property, the estate of the late Claire Obare, through her sister and advocates, benefitted directly from the purchase price paid for the sub-plots. They argued that the estate, having accepted such benefits, is estopped in equity from denying the transactions and that to allow the estate to retain both the land and the proceeds would unjustly enrich it at their expense.



114. Section 120 of the *Evidence Act*, Cap 80, Laws of Kenya provides that:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

Applying this provision, the question arises whether the estate, having received benefits from the impugned transactions, can be permitted to deny their validity.

115. In *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, the Court of Appeal emphasized that:

“The doctrine of estoppel is based on the maxim *allegans contraria non est audiendus* (a party is not to be heard to allege the contrary) and is meant to prevent a person from going back on his word where it would be unjust or inequitable to allow him to do so.”

Equally instructive is the decision in *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & Another* [2012] eKLR, where the Court stated:

“Equity frowns upon unjust enrichment. A party should not be allowed to keep an advantage he has obtained unjustly or without legal justification, at the expense of another.”

116. The evidence on record indicates that proceeds from the sale of the subplots were received not only by the 3rd Defendant but also by the deceased’s sister and her advocates, Hayanga & Co. Advocates. This fact, though it does not cure the lack of legal title in the transactions, places the estate in a peculiar position. By benefitting from the proceeds, the estate cannot now turn around to wholly repudiate the transactions without accounting for the sums received.

117. Whereas estoppel cannot be used to validate that which the law expressly prohibits — in this case, the sale of estate property without a grant of representation, which contravenes Section 45 of the *Law of Succession Act*. However, equity will intervene to prevent unjust enrichment. The Court of Appeal in *Chase International Investment Corporation & Another v Laxman Keshra & Others* [1978] eKLR, held that:

“Even where a contract is unenforceable for want of compliance with the law, if one party has received a benefit, the court may order restitution to prevent unjust enrichment.”

118. In the present case, although the Plaintiffs did not acquire legal proprietary interests, the estate having benefitted from their funds cannot purport to retain both the land and the purchase money; that would be unconscionable.

ii. Whether the 1st Defendant holds a valid and indefeasible title to the suit property within the meaning of section 26(1) of the *Land Registration Act*.

119. The 1st Defendant asserts that he is the legal owner of the suit property by virtue of transmission upon the demise of the registered proprietor, the late Claire Obare. He contends that the certificate of lease issued in her favour is conclusive proof of proprietorship and is indefeasible, save as provided under the law.



Section 26(1) of the *Land Registration Act*, No. 3 of 2012, provides:

“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.”

120. The jurisprudence on indefeasibility of title is settled. In *Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another* [2013] eKLR, the court held:

“The title of an innocent third party who is not a party to the fraud is protected. However, where the registered proprietor is proved to have acquired the land through fraud, misrepresentation, illegality, unprocedurally, or through a corrupt scheme, the court is entitled to nullify such registration.”

121. Similarly, in *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others* [2015] eKLR, the Court of Appeal emphasized:

“The law is extremely protective of title and provides only two instances for challenge; fraud or misrepresentation in which the person is proved to be involved, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme.”

122. In the present case, the 1st Defendant’s title arose from transmission upon succession to the estate of the late Claire Obare. There is no allegation or proof that the grant of representation, under which the transmission occurred, was obtained fraudulently or through illegality. Neither have the Plaintiffs adduced evidence to show that the registration of the 1st Defendant as proprietor was tainted by fraud, misrepresentation, or procedural irregularity.

123. What emerges, therefore, is that the 1st Defendant’s title, having been acquired through a lawful process of transmission, enjoys the protection of Section 26(1) of the *Land Registration Act*. The Plaintiffs’ claims of equitable interest, based on alleged purchases from the 3rd Defendant, cannot override the legal title held by the 1st Defendant. As was observed in *Arthi Highway Developers Ltd* (supra), equitable claims cannot dislodge a legal interest unless the title is impeached under the statutory grounds.

ii. Whether the Plaintiffs are entitled to the declaratory, injunctive, and cancellation orders sought in the Amended Plaint.

124. The Plaintiffs sought, inter alia, a permanent injunction restraining the 1st Defendant from interfering with their possession, a declaration that they are lawful owners of the respective sub-plots, an order directing cancellation of the 1st Defendant’s title, and costs of the suit.

125. The legal basis of these prayers must be tested against the findings already made in Issues I–V. First, on the question of ownership, the Court has found that the 3rd Defendant, could not pass valid title to the Plaintiffs.



126. Secondly, the transactions undertaken after the demise of the registered proprietor amounted to intermeddling within the meaning of Section 45(1) of the Law of Succession. Such transactions are void ab initio and confer no legal or equitable interest enforceable against the estate or its beneficiaries. In *In re Estate of Wando Sande (Deceased)* [2021] eKLR, the court underscored that dealings with estate property without a grant of representation amount to criminal intermeddling and cannot be sanctified by equity.
127. Thirdly, the Plaintiffs’ plea for cancellation of the 1st Defendant’s title is unsustainable. Section 26(1) of the *Land Registration Act* accords protection to the 1st Defendant’s certificate of title, unless it is shown to have been acquired fraudulently, unprocedurally, or through a corrupt scheme. No such proof was presented before the court. Instead, the evidence establishes that the 1st Defendant acquired his title lawfully through transmission.
128. Fourthly, the request for declaratory and injunctive relief is further weakened by the fact that equitable remedies cannot override statutory provisions. While the Court is mindful of the principle that equity abhors unjust enrichment, that question has been addressed separately under Issue IV. It cannot, however, translate into the grant of declaratory, injunctive, or cancellation reliefs where statutory law dictates otherwise.

ii. Whether the 1st Defendant is entitled to the reliefs sought in the Counterclaim, including eviction and mesne profits.

129. In his Counterclaim, the 1st Defendant sought, inter alia, a declaration that he is the lawful proprietor of the suit property, orders of eviction against the Plaintiffs, a permanent injunction restraining them from interfering with his ownership, and an award of mesne profits from 2007 to the date of possession.
130. The starting point is Section 24(a) of the *Land Registration Act*, 2012, which provides:
- “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.”
131. Further, Section 25(1) of the same Act reinforces that the rights of a registered proprietor are indefeasible, subject only to the limitations provided under the Act. The Court has already found under Issue V that the 1st Defendant holds a valid and indefeasible title under Section 26(1). It follows that the Plaintiffs’ continued occupation of the suit property, not being anchored on any valid or enforceable title, amounts to trespass.
132. On the question of eviction, the law is clear that a proprietor is entitled to exclusive possession and may lawfully seek to recover land from trespassers. The Court of Appeal in *Muthiora v Muthiora* [1982] KLR 1 held that once a registered owner demonstrates his title and the defendant is shown to be in unlawful possession, an order for eviction follows as of right. Accordingly, the 1st Defendant has established his entitlement to eviction orders against the Plaintiffs.
133. Turning to mesne profits, Section 2 of the *Civil Procedure Act* defines “mesne profits” as:
- “...those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.”



134. The principle was reiterated in *Attorney General v Halal Meat Products Ltd* [2016] eKLR, where the Court held:

“A person in wrongful occupation of land is liable to pay mesne profits for the period of unlawful possession.”

135. In the present case, the Plaintiffs have been in occupation since 2007 without lawful title. While the 1st Defendant has pleaded for mesne profits, it is trite that such profits must be specifically pleaded and strictly proved by evidence of the actual or potential income lost. The Court of Appeal in *Kenya Hotel Properties Ltd v Willesden Investments Ltd* [2009] KLR 126 emphasized that mesne profits are in the nature of special damages and must be proved to the required standard.

136. The 1st Defendant did not place before this Court cogent evidence quantifying the rental or user value of the property during the period of alleged unlawful possession. The Court finds that the 1st Defendant is entitled to a declaration of proprietorship, an eviction order, and a permanent injunction against the Plaintiffs. The prayer for mesne profits, however, fails for want of proof.

ii. Who should bear the costs of the suit and counterclaim.

137. The general principle is that costs follow the event. However, the Court cannot ignore the undisputed evidence that the Plaintiffs paid monies to the 3rd Defendant, which in turn were remitted in part to the deceased proprietor, her sister, and her advocates. To deprive the Plaintiffs of both the land and the monies would amount to unjust enrichment, which the law abhors. As was held in *Republic v Kenya Revenue Authority Ex parte Aberdare Freight Services Ltd* [2004] eKLR

“A court of law cannot, in good conscience, allow a party to enrich itself unjustly at the expense of another.”

138. Accordingly, while the Plaintiffs have failed in their claim to the land, they are nonetheless entitled to reimbursement of the purchase sums they proved to have paid. The liability for such reimbursement lies with the estate of the late Claire Obare, being the ultimate recipient of the proceeds.

139. In the circumstances, justice demands that each party bear their own costs of the suit, but the estate shall refund the purchase monies to the Plaintiffs, less any amounts already received by them directly.

140. From the totality of the pleadings, the evidence, and the law as analyzed above, the Court now enters judgment as follows:

- a. The Plaintiffs’ Amended Plaint seeking declaratory, injunctive, and cancellation orders over the suit property is hereby dismissed.
- b. The 1st Defendant’s Counterclaim succeeds in part.
- c. It is hereby declared that the 1st Defendant is the lawful and indefeasible proprietor of the suit property within the meaning of Section 26(1) of the *Land Registration Act*.
- d. The Plaintiffs, their servants, agents, and/or assigns are hereby ordered to vacate and deliver vacant possession of the suit property to the 1st Defendant within ninety (90) days from the date hereof, failing which eviction shall issue.
- e. A permanent injunction is hereby issued restraining the Plaintiffs, their servants, agents, or assigns from trespassing upon, interfering with, or in any manner dealing with the suit property.



- f. The 1st Defendant's claim for mesne profits is declined for want of proof.
- g. The estate of the late Claire Obare, through the 1st Defendant as legal representative, shall refund to the Plaintiffs jointly the sum of Kenya Shillings Eight Hundred and Ninety Thousand (Kshs. 890,000/=) being the admitted purchase monies received from the Plaintiffs, within one hundred and ninety (90) days of this judgment. In default, the said sum shall attract interest at court rates from the date of this judgment until payment in full.
- h. Each party shall bear their own costs of the suit and Counterclaim.

141. It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 26TH DAY OF SEPTEMBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Gatumuta for the Plaintiffs

Ms. Esonga for the 1st Defendant

Ms. Kubai for the 2nd and 4th Defendant

Mr. Kabaka for the 3rd Defendant

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

