



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 23 OF 2017(FORMARLY HCCC NO. 58 OF 2011)

GRACE AKINYI AJWANG

RICHARD OGENDO

(Suing as personal representatives

of the Estates of MANASON OGENDO BODO).....PLAINTIFFS

VERSUS

ROSEMARY ATIENO ABUTO.....1ST DEFENDANT

LEONIDA ACHIENG NYAGWARA

alias PHOEBE ATIENO NYAGUDI.....2ND DEFENDANT

SASAH GENERAL MERCHANTS LIMITED.....3RD DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....4TH DEFENDANT

COMMISSIONER OF LANDS.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

JUDGEMENT

1. Grace Akinyi Ajwang and Richard Ogendo, the Plaintiffs, commenced this proceedings as personal representatives and administrators of the estate of Manason Ogendo Bodo, deceased, through the plaint dated the 20th April 2011 against Rosemary Atieno Abuto, Leonida Achieng Nyagwara alias Phoebe Atieno Nyagudi, Sasah General Merchants Limited, National Bank of Kenya Limited, Commissioner of Lands and the Attorney General, the 1st to 6th Defendants respectively, seeking for the following:-

a) A declaration that the registration with Kisumu Municipality/Block 7/319 with 1st to 3rd Defendants by the 5th Defendant was null and void *ab initio* and ineffectual to confer any right, interest or title upon them and the subsequent charge to the 4th Defendant be declared void too, and an order to rectify the register and return the land to the estate be issued.

b) Alternatively, a declaration that the 3rd Defendant holds registration of Kisumu Municipality/Block 7/319 in trust for the Personal Representatives and the register be rectified accordingly.

c) Permanent injunction restraining the Defendants from trespassing onto, interfering with the Plaintiffs peaceful occupation and use, leasing, charging, transferring, entering upon, developing, or in any manner howsoever dealing with the land comprised in Kisumu municipality/Block 7/319.

d) General damages for fraud/trespass.

e) Costs of this suit and interest thereon.

f) Any other relief the court may deem fit and just.

The plaintiffs aver that the Kisumu Municipality/Block 7/319, the suit land, was at all material times registered in the name of Manason Ogendo Bodo, the deceased, and therefore is part of his estate and vested in them as Personal Representatives. That the Succession Cause in relation to the deceased estate was filed in Kisumu HCC No. 213 of 1991 and was decided on the 17th June 2010. That sometimes in August 2010, they discovered that the 1st and 2nd Defendants had wrongly and fraudulently been registered as owners of the suit land, and had subsequently transferred it to the 3rd Defendant without a valid grant of letters of administration, their knowledge and consent. That the 1st and 2nd Defendants had fraudulently filed a second Succession Cause in relation to the deceased's estate being Kisumu HCC No. 700 of 2009.

2. The 1st Defendant did not file any defence nor participate in the proceedings.

3. The 2nd Defendant filed her statement of defence dated the 14th August 2013, in which she among others averred that her name is Phoebe Atieno Nyagudi and not Leonida Achieng Nyangwara, who she learnt had impersonated her and sold or attempted to sell the suit land. That she is a daughter to the deceased, but has never been an administrator of the estate of her late father, and does not have the capacity to deal with the suit land. That as the said Leonida Achieng Nyangwara had impersonated her while transacting on the suit land, the entire sale and subsequent transactions were null and void. That the Plaintiffs' claim should be allowed against the 1st, 3rd to 6th Defendants, who should also pay her costs of the suit.

4. The 3rd Defendant denied the Plaintiffs' claim through their statement of defence dated the 3rd May 2011, and amended on the 5th June 2012 that contains a counterclaim following leave granted on the 13th April 2012. The 3rd Defendant avers that it was not registered with the suit land fraudulently or illegally. That due diligence was carried out before the suit land was transferred to its name and is therefore a bona fide purchaser. That the transaction carried out by personal representatives of the deceased cannot be nullified upon a subsequent defect in the grant. That it has taken possession of the suit land and the court has no power to order rectification of the register. That in their counterclaim against the Plaintiffs, sued as the Personal Representatives of the estate of Manason Ogendo Bodo – deceased, the 3rd Defendant who is now the Plaintiff in the counterclaim, but who will continue being referred to as the 3rd Defendant, averred that the two Plaintiffs, who are Defendants in the counterclaim but will continue being referred to as the Plaintiffs, had in March 2010 engaged an agent to source for a buyer for the suit land. That the land was duly registered with the 1st and 2nd Defendants to the main suit. That the agent approached the 3rd Defendant, who upon obtaining the documentation relating to the land, entered into a sale agreement with the 1st and 2nd Defendants in the main suit, who subsequently transferred the land to it on or about 4th June 2010. That the Plaintiffs have without any lawful cause, basis and rights entered upon, and trespassed onto the land, depriving the 3rd Defendant of its right and interests to the suit land since April 2011. The 3rd Defendant seeks for the following prayers against the Plaintiffs;-

- a) **Declaration that the 3rd Defendant is the lawful and bona fide owner of Kisumu Municipality/Block 7/319, the suit land.**
- b) **Eviction order against the Plaintiffs from the suit land.**
- c) **Permanent injunction against the Plaintiffs by themselves or those claiming under them from interfering with its use of the suit land.**
- d) **Mesne profits from 4th June 2010.**
- e) **Costs of the main suit and counterclaim.**
- f) **Such other relief the court deems fit and expedient.**

The Plaintiffs as Defendants to the counterclaim of the 3rd Defendant, filed their reply and defence to the counterclaim dated the 25th June 2012, denying trespassing onto the suit land and causing loss and damage to the 3rd Defendant.

5. The 4th Defendant responded to the Plaintiffs' claim through their statement of defence dated the 13th May 2011, averring as follows among others;

- **That the Plaintiffs have no valid cause of action against them as it gave a loan as a bona fide lender without notice, and the title to the suit land constitutes valuable security.**
- **That the Plaintiffs having discovered the charge in the land ownership in August 2010 did not file the suit in six (6) months as required under Section 2 (3) of the Law Reform Act Chapter 26 of laws of Kenya, and the suit is therefore incompetent, null and void *ab initio*.**
- **That there was nothing in the suit land's register to stop the registration of 3rd Defendant as proprietor upon transfer by the 1st and 2nd Defendants.**
- **That there was no restriction registered on the title when it was presented as security.**
- **That even if there was fraud in the transaction over the suit land, the Plaintiffs remedy would only be the value of the suit land as the title has exchanged hands to third parties, and those who have acquired interest on it including the 4th Defendant innocently.**

6. The 5th and 6th Defendants opposed the Plaintiffs claim through their statement of defence dated the 3rd June 2013, averring as follows;

- **That they dispute that the estate of Manason Ogendo Bodo is the registered proprietor of the suit land.**
- **That there was no fraud in registering the transfer through their office as the same was done procedurally and in accordance with the law.**

7. The hearing commenced on the 25th February 2016 with 2nd and 1st Plaintiffs testifying as PW1 and PW2 respectively. The Plaintiffs then called Derrick Omondi as a witness, and he testified as PW3. The Defendants case started with that of the 2nd Defendant who testified as DW1. In support of the 3rd Defendant defence, David Otieno, an advocate, and Samuel Odhiambo, a director with the 3rd Defendant, testified as DW2 and DW3 respectively. The 4th to 6th Defendants closed their cases without calling witnesses.

8. That upon closing the taking of oral evidence, the learned Counsel for the Plaintiffs, 2nd, 3rd, 4th, 5th and 6th Defendants filed their written submissions dated the 24th April 2018, 11th June 2018, 27th April 2018, 30th October 2018 and 29th October 2018 respectively.

9. The following are the issues for the court's determinations;

- a) **Whether the suit land was ever registered in the name of Manason Ogendo Bodo, deceased.**
- b) **Whether the Plaintiffs are the lawful legal representatives and administrators of the estate of the deceased.**
- c) **Whether the 1st and 2nd Defendants were the lawful legal Representatives and administrators of the estate of the deceased when they transacted on the suit land.**
- d) **Whether the 3rd Defendant obtained good title upon being registered with the suit land.**
- e) **Whether the charge in favour of 4th Defendant over the suit land is protected by the law.**
- f) **Whether the registrations transacted by 1st to 4th Defendants through the 5th Defendant, over the suit land were regular, legal and procedural.**
- g) **Whether the 1st and 2nd Defendants acted in collusion or with consent of the Plaintiffs in selling and transferring the suit land to the 3rd Defendant.**
- h) **Who between the Plaintiffs and 3rd Defendant is entitled to injunction order and or damages against the other.**
- i) **Who pays the costs of the main suit and counterclaim.**

10. The Court has after carefully considering the pleadings filed by the parties, oral and documentary evidence tendered, written submissions by Counsel and the decided authorities cited therein, come to the following conclusion;

- a) That the certified true copy of the green card (register) of Kisumu Municipality/Block 7/319 issued on the 21st September 2010, confirms that the suit land was first registered on the 28th September 1975 in the name of Manason Ogendo Bodo, at entry No. 1, who the court takes to be the deceased. That the certificates of death No. C368422 and No. 213573 shows the date of death of the deceased as the 17th February 1990.
- b) That the copies of the court documents availed confirms the existence of two succession causes filed in respect of the estate of the deceased. These are Kisumu H.C. Succession Cause No. 213 of 1991 and 700 of 2009. That in the former cause, and vide a consent letter dated the 17th June 2010 and filed with the Court on the 23rd June 2010, an order was issued on the 10th August 2010 among others confirming the Grant issued to **"Grace Akinyi Agwang, Richard Ogendo & Willis Ogendo (Deceased)"**, **"in favour of Grace Akinyi Ajwang and Richard Ogendo."** The order goes on to distribute the assets of the estate, including the suit land. That in respect of Kisumu H . C. Succession Cause No. 700 of 2009, the availed documents shows that it was filed by Phoebe Atieno Ogendo Nyagudi and Rosemary Atieno Abudo on the 10th November 2009, and Grant of Letters of Administration intestate issued in their favour on the 23rd February 2010. A copy of the Grant is among the documents in the 3rd Defendant's supplementary list.
- c) That the copy of the register to the suit land referred to earlier in (a) above, and the one in the 3rd Defendant's supplementary list of documents issued on the 26th February 2016, confirms that a restriction stopping dealings on the land had been registered under entry No. 4 of 22nd December 2009. That however, and without lifting that restriction, the names of Phoebe Atieno Nyagudi and Rosemary Atieno Abuto were entered under entry No. 5 of 26th February 2010, on the basis of the R.L 19, citing H. C. Succession Cause No. 700 of 2009.
- d) That the said copies of the register further shows that on the 4th June 2010, Sasah General Merchants Limited, the 3rd Defendant, became the registered proprietor of the suit land following a transfer under entry No. 8, and a certificate of lease was issued under entry No. 9 of the same date. That then a charge in favour of the 4th defendant was registered on the 2nd August 2010 to secure Kshs.

13,392,000/=. The last entry is No. 11 of 13th September 2010 restricting any dealings on the land for reasons that Succession Cause No. 700 of 2009 was reportedly a forgery.

e) That as held in (b) above, the Plaintiffs are by virtue of the consent order entered and issued on the 10th August 2010 in Kisumu H.C. Succession Cause No. 213 of 1991, the administrators of the estate of the late Manason Ogendo Bodo, deceased. That the said consent is a kin to a certificate of confirmation of grant, as it contains a schedule on the agreed distribution of the estate. That though the 3rd and 4th Defendant Counsel appear to question the Plaintiffs' capacity to file and prosecute this case in their filed written submission, the issue of the Plaintiffs' lack of capacity was not raised in their pleadings and is therefore not an issue for determination in this proceeding. That the 3rd Defendant's counterclaim clearly shows that the Plaintiffs are sued as the personal representatives of the estate of Manason Ogendo Bodo – deceased and the 3rd Defendant cannot turn around and challenge their capacity through written submissions. That **Order 2 Rule 4 of the Civil Procedure Rules** sets out the matters that a party should plead. The Court of Appeal in **DEN vs PNN [2015] eKLR** elaborated on this as follows-

***“Generally, the law is that the Courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts' determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case. See the Case of Chalicha FCS Ltd Vs Odhiambo & 9 Others [1987] KLR 182 for the proposition that “Cases must be decided on the issues on the record. The Court has no power to make an order, unless by consent, which is outside the pleadings; the Case of Galaxy Paints Co. Ltd vs Falcon Guards Ltd EALR (2000) 2EA 385 for the proposition that the issues for determination in a suit generally flow from the pleadings and a Court could only pronounce Judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. The Case of Anthony Francis Wareham & Others Vs Kenya Post Office Savings Bank C.A 5 and 48 of 2002. This Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings; Lastly the Case of Greenfield Investment Limited Vs Baber Alibhai Mainji, Civil Appeal No. 155 of 2004, for the proposition that “...A Court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination...”*”**

That for the reason that the Plaintiffs **locus standi** was not questioned through the pleadings filed, it is improper and irregular to raise that as an issue for determination through Counsel's submission.

f) That further to the finding in (b) above, it is clear there are two Succession Causes filed in respect of the administration of the estate of the late Manason Ogendo Bodo. These are Kisumu H. C. Succession Cause No. 213 of 1991 and 700 of 2009. That by virtue of the year of filing, Kisumu H. C. Succession Cause No. 213 of 1991 was filed before Kisumu H. C. Succession Cause No. 700 of 2009. That the Plaintiffs have confirmed that they were involved in filing Kisumu H.C Succession Cause No. 213 of 1991 and have proved through the order issued on 10th August 2010, confirming the Grant and distribution of the estate, that they are indeed the administrators of the said estate. That in respect of Kisumu H.C Succession Cause No. 700 of 2009, the 1st Defendant who was one of those listed as one of the petitioners, did not enter appearance in this suit. The 2nd defendant, who was allegedly the 2nd petitioner/administrator, denied participating in the filing of the Cause, and in the subsequent transaction involving the suit land. The foregoing brings to the fore the question whether the two petitioners/administrators in Kisumu H. C. Succession Cause No. 700 of 2009 had the capacity to be registered as proprietors of the suit land. That to start with, there is no certificate of confirmation of the grant issued in Kisumu H. C. Succession Cause No. 700 of 2009 on the 23rd February 2010. That the Grant was the basis of the entry at No. 5 of 26th February 2010 of the suit Lands' register through R.L 19 referred to earlier in (c) above. That even assuming that Kisumu H. C. Succession Cause No. 700 of 2009 was regularly and legally filed, and the Grant procedurally issued, the registration under entry No. 5 on the register could not, and did not confer the two Petitioners (administratrixes) with the powers and privileges of a registered proprietor to the suit land, in view of **Section 82 (b) (ii) of the Law of Succession Act, Chapter 160 of Laws of Kenya** that provides that ***“no immovable property shall be sold before confirmation of the grant.”*** That this court agrees with Gikonyo J, in the case of **In re Estate of M. Ajogi M'Ikingu (deceased) [2017] eKLR**, where the Court stated – ***“(4) Courts have said time and again – and I will not be tired of stating it again- that, under Sections 82 (b) (ii) of the Law of Succession Act, Sale of immovable property of the estate before confirmation of grant is prohibited. Again under Section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority to sell immovable property of the deceased before confirmation for grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficiary entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the Court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective share in the estate. See Section 71 of the Law of Succession Act. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate and vested in the administrator or executor as (sic) the estate as by law stated.”***

g) That flowing from the foregoing, the registration of the R.L. 7, or transmission of the suit land to the two Petitioners/Administrators in Kisumu H. C. Succession Cause No. 700 of 2009, under entry No. 6 of the register on the 26th February 2010, was irregular and unlawful and against the provision of the law. That the Land Registrar who processed the application to register the two, and made the entry without ensuring that a certificate of confirmation of Grant identifying the **person (s)** and share of the suit land that they are entitled to was availed, was not only negligent but by so doing, may be said to have participated or assisted in the intermeddling with the estate of the deceased, which is a criminal offence under **Section 45 of the Law of Succession Act**. The 5th and 6th Defendants have not denied in their statement of defence that the registration transactions were conducted through their offices.

h) That it follows that the two petitioners/administrators in Kisumu Succession Cause No. 700 of 2009, not being regularly and legally registered as the proprietors of the suit land, did not have a good title to pass to the 3rd Defendant when they entered into the sale agreement and attempted to transfer title of the suit land on the 4th June 2010. That as said by Gikonyo J in the case referred to

above, their sale agreement is therefore vitiated having been procured by vendors without legal capacity or lawful authority to sell an immovable asset/property of the estate. That apart from the illegality of the transfers taking place before confirmation of the grant, there is also no evidence that the consent to transfer the suit land was applied for and obtained from the Commissioner of Lands. That even though the 1st Defendant did not participate in this proceeding, and the 2nd Defendant has distanced herself from the transactions involving Kisumu H. C. Succession Cause No. 700 of 2009, and the suit land, if there was such a consent, the 3rd, 5th and 6th Defendants would have availed a copy to the court. That further and for reasons that the two Petitioners/Administrators got registered as proprietors of the suit land, and that they transferred it to the 3rd Defendant, while the restriction filed under entry No. 4 of 22nd December 2009 had not been lifted, the title they got was not protected by **Section 26 (1) of the Land Registration Act No. 3 of 2012**. The following decided cases are relevant-

John Kiguru Karume vs Kenya Institute of Administration & 4 Others [2017] eKLR, Kemei J, held;

“It will be noted that the new Act has expanded the grounds under which a title may be challenged to include illegality, unprocedural methods or corrupt scheme.”In the case of **Milinkumar Shah & 2 Others vs City Council of Nairobi & Attorney General (Nairobi HCCC No. 1024 of 2005 (OS))** the court held:-

“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law, and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or a body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

The concept of absolute and indefeasible ownership of land cannot clothe with legal and Constitutional protections if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the Commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Others vs Ag & Another, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality should nullify the title as required.”

That in the case of **Elijah Makori Nyangwara vs Stephen Mungai Njuguna & Another [2013] eKLR**, Munyao J, held as follows:

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heading import of Section 26 (1) (b) is to remove protection form an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not to have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

That in the case of **Nora Ogoti Rongai vs Samuel Kibati Osoro & Another, Kisumu CACA No. 85 of 2015** in a case where a widower had sold the land registered in the name of his deceased wife and their son, (appellant), had challenged the transaction, the Court of Appeal held as follows;

“...James Masaki Rongai did not at any time apply for grant of letters of administration of the estate of the deceased. What he did, spurred on by the bank, by purporting to sell the property to the 1st Respondent was tantamount to intermeddling with the estate of the deceased without a confirmed grant, the appellant’s did not, by dint of Sections 45 (1) and 55 of the Law of Succession Act, have the legal capacity to sell and transfer the deceased’s property. See the decisions of this court in Lly Odhiambo Onuka vs Ayub Odhiambo Migwalla [2005] eKLR and Peter Ombui Nyangoto vs Elizabeth Matundura & Another [2013] eKLR....We substitute therewith an order nullifying and cancelling the transfer of the suit property...from the name of the deceased. We order that the title shall revert into the name of the deceased.”

That the above Court of Appeal decision is binding to this court. That just like the transfer that had been done in that case without a confirmed grant were nullified and cancelled, the transfers over the suit land in entries 6 and 8 are hereby nullified as being null and void. The registration at entry No. 5 through the registration of R.L.19 may be pursued through the Succession Cause No. 700 of 2009.

i) That the 3rd Defendant did not obtain a good title to the suit, the transaction between them and the 4th Defendant, ostensibly to secure the financial facilities advanced on the suit land’s title, cannot be allowed to subsist. The testimonies given by DW2 and DW3 on the due diligence carried out in confirming the authenticity and genuineness of the title certificate of the vendors of the suit land appear to have been casual and the bare minimum. That there is no evidence availed to show from what source documents held at the Land Registrar’s office, the copies of the certificate of search that showed the title was free from all encumbrances, were based. That the copies of the register availed to the court as set out above shows a restriction still exist at entry No. 4. That fact, and the absence of consent to transfer the suit land, ought or should have jolted the 3rd Defendant, and its advocates, to do a thorough background check, including enquiring whether there existed a confirmed grant, under which the vendors obtained registration. That in the case of **Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others [2015] eKLR**, Munyao J, held that;

“I frankly do not see how the title of the 1st Respondent, the star fraudster, can be upheld and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But is so less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instant, the bank will have to pursue the 1st Respondent personally to recover its money.”

Further, in the case of **Esther Ndegi Njiru & Another vs Leonard Gatei [2014] eKLR** Mutungi J held that;

“Whereas the law respects and upholds sanctity of the title, the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search”. Article 40 (6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the Constitution coupled with the provision of Section 26 (1) (a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavor to ascertain the history and/or root of the title.”

That DW2 and DW3 appear to have taken the vendors’ title at face value without digging a little deeper to confirm whether they had acquired good title upon registration, that is capable of being passed on to the 3rd Defendant. The 4th Defendant should also done more to confirm whether the title the 3rd Defendant presented as security for the financial facility was regularly, legally and formally obtained. That whether or not the 4th Defendant carried out any due diligence, to confirm the 3rd defendant’s title cannot be confirmed as no oral evidence was tendered. That however, and as held in the decisions cited above, to uphold the 3rd Defendant’s title or that of the vendors’, who sold the suit land to it, while it is clear it was bad title procured without compliance with the provisions of the **Law of Succession Act**, would have the effect of depriving the Plaintiffs and other beneficiaries of part of the estate of their inheritance, the suit land. That the 4th Defendant has the option to follow the 3rd Defendant for its monies or alternative security.

j) That in view of the foregoing, it follows that the 3rd Defendant never obtained or acquired good title to the suit land and as such its counterclaim against the Plaintiffs has no basis and is dismissed with costs.

k) That the defence tendered by the 2nd Defendant appears generally unchallenged and it is possible her identity was unlawfully acquired to further the fraud perpetuated by those who colluded in filing Kisumu H. C. Succession Cause No. 700 of 2009. The 2nd Defendant is therefore not liable to pay costs of the suit. The court is also of the view that as the 3rd to 6th Defendants stand to suffer loss due to the nullification of the transaction involving the suit land at least through the costs, damages should not be awarded.

11. That flowing from the foregoing, the court finds that the Plaintiffs have proved their case against 1st, 3rd to 6th Defendants in accordance with the law. That the court orders as follows;

a) That prayers (a) (c) and (e) of the plaint dated 20th April 2011 are hereby granted.

b) That the 3rd Defendant’s counterclaim against the Plaintiffs vide their defence and counterclaim amended on the 5th June 2012 be and is hereby dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiffs 1st present

Defendants Samwel Odhiambo of 3rd defendant

present

Counsel Mr. Orengo for Oel for Plaintiffs

Mr. Odongo for Ogutu Mboya for the

3rd defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE