



**Kitele (Suing on Behalf of the Estate of Francis John Kitele) v  
Itumo & 6 others (Environment & Land Case E049 & E048 of 2021  
(Consolidated)) [2024] KEMC 51 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEMC 51 (KLR)

**REPUBLIC OF KENYA  
IN THE MACHAKOS LAW COURTS  
ENVIRONMENT & LAND CASE E049 & E048 OF 2021 (CONSOLIDATED)  
CN ONDIEKI, PM  
DECEMBER 11, 2024**

**BETWEEN**

**THERESA N. KITELE (SUING ON BEHALF OF THE ESTATE OF FRANCIS  
JOHN KITELE) ..... PLAINTIFF**

**AND**

**JOSHUA MULINGE ITUMO ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MAKAU KITELE ..... 2<sup>ND</sup> DEFENDANT**

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE  
SOCIETY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE E048 OF 2021**

**BETWEEN**

**THERESA N. KITELE (SUING ON BEHALF OF THE ESTATE OF FRANCIS  
JOHN KITELE) ..... PLAINTIFF**

**AND**

**HEZEKIAH MOTT AMBULA OSORE ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MAKAU KITELE ..... 2<sup>ND</sup> DEFENDANT**

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE  
SOCIETY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR MACHAKOS LAND REGISTRY ..... 4<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. MCELC Number E049 of 2021 was consolidated with MCELC Number E048 of 2021, with the MCELC E049 of 2021 declared the lead file. The consolidation was necessary on the premise that although the two suits relate to two separate parcels of land, the facts in both suits are similar and the common denominators in both suits are the Plaintiff and the 2<sup>nd</sup> Defendant, who are the principal parties in both suits.
2. One of the principal factors which can vitiate a contract is illegality. A contract for sale of property, forming part of the free property of the estate of the deceased, without authority expressed by way of a grant of letters of administration, amounts to an illegality known as intermeddling in the estate of the deceased. Such a contract - erected upon intermeddling - is a contract built on quick sand. It is void, ab initio.

### PART II: THE PLAINTIFF'S CASE

3. Regarding MCELC E049 of 2021, vide a Plaint dated 18<sup>th</sup> March 2021 and filed on 18<sup>th</sup> May 2021, the Plaintiff brought this action against the Defendants seeking Judgment for:
  - i. A declaration that all that land parcel Plot Number 555 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd belongs to Francis John Kitele (deceased).
  - ii. A declaration that the transfer of Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd Share Membership Number 1510 from Francis John Kitele (deceased) to the 2<sup>nd</sup> Defendant was fraudulent and/or illegal hence null and void.
  - iii. An Order be and is hereby issued directed to the 3<sup>rd</sup> Defendant to re-transfer the Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd Share Membership Number 1510 from the 2<sup>nd</sup> Defendant back to its rightful owner; Francis John Kitele (deceased).
  - iv. An Order be and is hereby issued directed to the 3<sup>rd</sup> Defendant to re-transfer the Plot Number 555 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd from the 1<sup>st</sup> Defendant back to its rightful owner; Francis John Kitele (deceased).
  - v. A permanent injunction restraining the 1<sup>st</sup> Defendant by himself, his agents and/or servants and/or nominees from entering onto and/or encroaching and/ or remaining on and/or constructing and/or continuing to construct or developing or in any other manner whatsoever interfering with land parcel Plot Number 555 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd.
  - vi. An EVICTION order to remove the 1<sup>st</sup> Defendant and any other person plus all structures and/or developments from the Plot Number 555 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd.
  - vii. That the orders of the Honourable Court be enforced by the OCS Makutano Junction Police Station.
  - viii. General Damages for Fraud, Trespass and loss of mesne profit from the year 2017 to be assessed by the Honourable Court and payable to the estate by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.



- ix. Cost of this suit and interest.
  - x. Any other relief that the Honourable Court deems fit and just to grant.
4. Regarding MCELC E048 of 2021, vide a Plaint dated 18<sup>th</sup> March 2021 and filed on 18<sup>th</sup> May 2021, the Plaintiff brought this action against the Defendants seeking Judgment for:
- i. A declaration that all that land parcel Athi River/Athi River Block 1/532 formerly Plot Number 1029 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd situated within Makutano (Kyumvi) Junction Mombasa Road - Machakos County, belongs to Francis John Kitele (deceased).
  - ii. A declaration that the transfer of Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd Share Membership Number 1510 from Francis John Kitele (deceased) to the 2<sup>nd</sup> Defendant was fraudulent and/or illegal hence null and void.
  - iii. An Order directed to the 3<sup>rd</sup> Defendant to re-transfer the Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd Share Membership Number 1510 from the 2<sup>nd</sup> Defendant back to its rightful owner; Francis John Kitele (deceased).
  - iv. An Order directed to the 4<sup>th</sup> Defendant to cancel from the register of the Title Number Athi River/Athi River Block 1/532 entries Number 4 & 5 thereof and to issue a new Title Deed in the names of Francis John Kitele (deceased).
  - v. A permanent injunction restraining the 1<sup>st</sup> Defendant by himself, his agents and/or servants and/or nominees from entering onto and/or encroaching and/ or remaining on and/or constructing and/or continuing to construct or developing or in any other manner whatsoever interfering with land parcel Athi River/Athi River Block 1/532 formerly Plot Number 1029 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd situated within Makutano (Kyumvi) Junction Mombasa Road - Machakos County.
  - vi. An eviction order to remove the 1<sup>st</sup> Defendant and any other person plus all structures and/or developments from the land parcel Athi River/Athi River Block 1/532 formerly Plot Number 1029 - Katelembo Athiani Muputi, Farming and Ranching, Co-Operative Society Ltd situated within Makutano (Kyumvi) Junction Mombasa Road - Machakos County.
  - vii. That the orders of the Honourable Court be enforced by the OCS Makutano Junction Police Station.
  - viii. General Damages for Fraud, Trespass, and loss of mesne profit from the year 2011 to be assessed by the Honourable Court and payable to the estate by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - ix. Cost of this suit and interest.
  - x. Any other relief that the Honourable Court deems fit and just to grant.
5. In both MCELC E049 of 2021 and MCELC E048 of 2021, the Plaintiff avers that she is the administrator of the estate of Francis John Kitele [deceased] who was member number 1510 of the 3<sup>rd</sup> Defendant in both suits. It is averred that by virtue of the deceased's membership, he was allocated plots numbers 555 and 1029 situated at Kyumbi, measuring approximately 2.04 acres, and now registered as Athi River/Athi River Block 1/532 (hereinafter collectively referred to as "the suit properties"). It is averred that when Francis John Kitele died, he still owned the suit properties (as he had neither sold nor transferred them). It is averred that in September 2020 or thereabouts, the 2<sup>nd</sup> Defendant who is described as the deceased's younger brother, illegally, without colour of right and fraudulently



- without undergoing the succession process, caused the suit properties to be transferred to his name and later disposed plot 555 to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and plot 1029 (now registered as Athi River/Athi River Block 1/532) to the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021, without the consent of the beneficiaries of the estate of the deceased.
6. The particulars of illegality and fraud were set out in at length as follows: (i) that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants intermeddled with the estate of Francis John Kitele (deceased) for dealing with the Share Membership Number 1510 and land parcel Plot Number 555 without a genuine and valid grant of letters of administration; (ii) that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants transferred the Share Membership Number 1510 from Francis John Kitele (deceased) to the 2<sup>nd</sup> Defendant without a genuine and valid certificate of confirmation of grant to the estate of Francis John Kitele (deceased), and without consent and knowledge of all the rightful beneficiaries to the estate of Francis John Kitele (deceased); (iii) that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered into a sale, purchase and transfer of land parcel Plot Number 555 from Francis John Kitele (deceased) to the 1<sup>st</sup> Defendant without a genuine and valid certificate of confirmation of grant to the estate of Francis John Kitele (deceased), and without consent and knowledge of all the rightful beneficiaries to the estate of Francis John Kitele (deceased); (iv) that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded and defrauded or attempted to defraud the estate of Francis John Kitele (deceased) of its genuine property and all the rightful beneficiaries to the estate of Francis John Kitele (deceased); (v) that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acted without clean hands, in bad faith in the circumstances; and (vi) that as a result, the transfer of the share number and sale, purchase and transfer of the suit property was fraudulent in nature.
  7. It is further averred that in September 2020 or thereabouts, the 1<sup>st</sup> Defendant started trespassing into plot number 555 and even constructed a temporary structure made of iron-sheets, without the consent of the beneficiaries of the estate of Francis John Kitele and thus deprived the beneficiaries of their right to peaceful and quiet enjoyment of plot number 555. It is averred that despite a demand to cease and desist, the Defendants declined to vacate. It is finally averred that the 2<sup>nd</sup> Defendant, who is described as the deceased's younger brother, fraudulently caused the suit properties to be transferred to his name and eventually disposed them to the 1<sup>st</sup> Defendant in both suits, without the consent of the beneficiaries of the estate of the deceased.
  8. At the hearing of the Plaintiff's case, PW1, Theresa N. Kitele, who lives in Alabama, USA, adopted her witness statement dated 18<sup>th</sup> March 2021 and filed together with the Plaint as her evidence in chief. In her said statement, the Plaintiff largely rehashes the facts as averred in the Plaint.
  9. In buttressing her claim, the Plaintiff exhibited the following documents: (i) a copy of grant of letters of administration in the estate of Francis John Kitele [deceased] as the Plaintiff's Exhibit 1; (ii) a copy of the Katelembo Athini Muputi Co-operative Society membership card number 1510 as the Plaintiff's Exhibit 2; (iii) copies of documents of ownership over plot 555 in Katelembo Athini Muputi Co-operative Society as the Plaintiff's Exhibit 3; (iv) photographs of plot 555 plus a certificate of photographs as the Plaintiff's Exhibit 5; (v) a demand letter addressed to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants dated 11<sup>th</sup> September 2020 as the Plaintiff's Exhibit 6; (vi) a demand letter addressed to 1<sup>st</sup> Defendant dated 11<sup>th</sup> September 2020 as the Plaintiff's Exhibit 6; (vii) a copy of the Grant of Letters of Administration over the estate of Francis John Kitele [deceased] as the Plaintiff's Exhibit 7; and (viii) a notice to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to produce the original copies of the Katelembo Athini Muputi Co-operative Society membership card number 1510 for Francis John Kitele [deceased]; and the original documents of ownership over plot 555 in Katelembo Athini Muputi Co-operative Society, as the Plaintiff's Exhibit 8.



10. In cross-examination by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in MCELC Number E049 of 2024, PW1 stated that she was appointed an administrator of the estate in 1987. She stated that she learnt of the incidents from her uncle (her father's brother) called Josephat Kitele who lives also lives in USA but who had visited Kenya. She stated that she was born in 1968. She stated that in 1976, she was 8 years old. She stated that she has never seen the letter from her father. She stated that she does not know any of her father's uncle called Angelo. She stated that she only knows Uncles Peter Kitele and Josephat Kitele. She stated that the claimed handwriting of her father was not authenticated. She stated that she had no information that her father had bought the plot for his mother. She stated that she is not the administrator of the estate of her grandmother (the deceased's mother). She stated that if it is true that the deceased bought it for his mother, then the deceased would have transferred it to his mother. She stated that she is not aware that the 2<sup>nd</sup> Defendant filed succession proceedings relating to the estate of Francis John Kitele (deceased). She stated that the reason of filing this suit was not to frustrate the succession matter alleged to be pending at the High Court.
11. In re-examination of PW1, she stated that she discovered the illegality in September 2020. She stated that she is not aware of a letter which was authored by the deceased in 1976 and the original of the document was not shared with the Court.
12. PW2, Josephat Mulli Kitele, who also lives in New Jersey, USA, adopted his witness statement dated 18<sup>th</sup> March 2021 and filed together with the Plaintiff as his evidence in chief. In his said statement, PW2 states that he is a brother to the late Francis John Kitele. He largely states that he is aware of the facts of this case, which facts reflect the averments in the said Plaintiff. He states that in September 2020, he learnt on 29<sup>th</sup> May 2017, the 2<sup>nd</sup> Defendant, who is also his brother, illegally and fraudulently caused the suit properties to be transferred to his name and later disposed them without the consent of the beneficiaries of the estate of the deceased. He states that he informed the Plaintiff about it.
13. In cross-examination by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in MCELC Number E049 of 2024, PW2 stated that he travelled to USA in 1989 when he was 31 years old. He stated that Francis John Kitele died in 1987 in a tragic road accident. He stated that the deceased migrated to USA in 1959. He stated that his other brother, Peter, is also in the USA. He stated that Peter migrated to USA in 1975. He stated that also the 2<sup>nd</sup> Defendant migrated to USA in 1976 but he returned home. He conceded that while he was in Kenya until 1989, all his brothers Francis, Peter and the 2<sup>nd</sup> Defendant were in the USA. He stated that he learnt of the illegality through a friend who lives in Katelembo, called Benson Muasya. He stated that he could not remember that the letter was sent from USA. He stated that he filed an application in the High Court to have the grant of letters of administration issued to the 2<sup>nd</sup> Defendant over the estate of their father, revoked. He stated that his intention in this matter is to scuttle the succession matter pending in the high Court. He stated that he realized that the 2<sup>nd</sup> Defendant had sold it to his step-brother.
14. In his written Submissions dated 12<sup>th</sup> July 2024 and filed on even date, learned Counsel Mr. Kiluva instructed by the Firm of Kivuva Omuga & Company Advocates, representing the Plaintiff, urges this Court to find that the Plaintiff has proved her case on a balance of probabilities, as per section 109 of the *Evidence Act*, citing *Kirugi & Another vs. Kabiya & 3 Others* [1987] eKLR.
15. It is submitted that it was un-controverted evidence that the Francis John Kitele died in 1987 and in law, anyone dealing with the deceased's affairs after his demise, must hold or be the holder of the requisite Letters of Administration to his estate as his personal representative(s), without which the dealing is criminal for intermeddling and any transaction(s) done, is null and void ab-initio.



16. It is submitted that the 2<sup>nd</sup> Defendant in both suits admitted that he transferred the deceased's Membership Number 1510, after his death, in collaboration with 3<sup>rd</sup> Defendant and that the 2<sup>nd</sup> Defendant, further admitted that he thereafter sold both Plot Numbers 555 and 1029 Katelembo Athiani Muputi, Farming and Ranching, Co-operative Society Ltd. It is submitted that for avoidance of doubt, the share was transferred from the names of the deceased and not any other person. It is submitted that it is irrefutable and demonstrable fact that the share was transferred so as to sell the land – the agenda was sale of the land. It is submitted that no admissible evidence was adduced/produced by the 2<sup>nd</sup> Defendant to show that the share was registered with the 3<sup>rd</sup> Defendant in trust for or for the benefit of any other person.
17. It is submitted that the 2<sup>nd</sup> Defendant had no authority or locus standi to deal with the deceased's properties, since he had no Letters of Administration granting him authority to act as the deceased's personal representative.
18. Further, it is submitted that the beneficiaries of the estate of Francis John Kitele was along not aware of the transfer of the membership and sale of the plots, making the transactions illegal and fraudulent.
19. It is submitted that the 1<sup>st</sup> Defendant did not adduce/produce in Court cogent evidence of ever having conducted any due diligence and, in any event, he did not absolve himself of collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to rob the estate herein of its rightful property and the 1<sup>st</sup> Defendant was legitimately expected to conduct a thorough and/or extensive due diligence especially the origin of the share from which the plot/land originated from, which clearly, he did not do. It is further submitted that save for the photographs adduced by the Plaintiff to show that the 1<sup>st</sup> Defendant constructed a temporary (mabati) structure on the land, in furtherance of the scheme to disenfranchise the estate, the 1<sup>st</sup> Defendant did not avail/adduce contrary photographs of the suit property to demonstrate his alleged contrary occupation, if any, and which is denied. Further, it is submitted that the 1<sup>st</sup> Defendant did also not plead or prosecute a counter-Claim against the Plaintiff or the 1<sup>st</sup> Defendant either claiming ownership of the plot or refund of the purchase price paid, if any and that for avoidance of doubt and to cement the fact that no counter-claim could be lodged by the 1<sup>st</sup> Defendant, there is no scintilla or iota of evidence to show payment of any purchase price by the 1<sup>st</sup> Defendant, either by way of cash, cheque, bank transfer or any other recognized and/or notorious means of payment of consideration in Kenya.
20. It is thus urged that the Sale Agreement dated 6<sup>th</sup> October 2017 is invalid, with no force of the law, vague and is made up of hollow averments because it is stated that the 2<sup>nd</sup> Defendant was selling as the registered owner whereas the plot has no title Deed and/or there is no such evidence, there is no description of the particular plot/land being sold; the exact location and its boundaries. It is further submitted that since 1,250,000 was a considerable amount of money in 2017 and there is no evidence of how it was paid, there is no clause for Completion of the sale, possession of the property, dispute resolution, Land Control Board Consent this being agricultural land among other relevant provisions for a valid contract for Sale of agricultural Land and bearing in mind that the land has no Title Deed, it was prudent to involve the society in the sale. It is thus concluded that there are glaring anomalies leading to the conclusion that the Sale Agreement dated 6<sup>th</sup> October 2017 is a just a cover up of the fraud and illegalities done by the Defendants. It also submitted that the same applies to the purported letter dated 13<sup>th</sup> October 2020 from the 3<sup>rd</sup> Defendant.
21. This Court is thus urged to find the 1<sup>st</sup> Defendants in both suits in trespass to land occurs where a person directly enters upon another's land without permission, or remains upon the land, or places or projects any object upon the land, citing Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01.” and Zacharia Onsongo Momanyi vs. Evans Omurwa Onchagwa [2014].



22. Regarding damages, it is submitted that the foregoing leads to the sole conclusion that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are grossly at fault, having contravened the Plaintiffs' and estate's right to property under Sections 75 and 82 of the former Constitution and Article 40 (1) and (3) of the current Constitution and the Plaintiff thus deserves damages, citing Halsbury's 4<sup>th</sup> ed, Vol 45, at para 26, 1503 and John Chumia Nganga vs. Attorney General & another [2019] eKLR; Milkah Muthoni Wagoco vs. County Council of Kirinyaga & 2 others [2017] eKLR; Cornel OduorAmam vs. Dan Odhiambo Ogwany [2014] eKLR. This Court is thus urged to award Kshs. 5,000,000 in damages.

**PART III: THE 1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS' CASE IN MCELC E049 OF 2021 AND THE 2<sup>ND</sup> DEFENDANT'S CASE IN MCELC E048 OF 2021**

23. In his separate Statement of Defence dated 30<sup>th</sup> June 2021 and filed on 9<sup>th</sup> July 2021, the 1<sup>st</sup> Defendant denied all the material facts averred by the Plaintiff. The 1<sup>st</sup> Defendant pleaded the doctrine of innocent purchaser of plot 555, for value without notice, from the 2<sup>nd</sup> Defendant.
24. In his separate Statement of Defence dated 30<sup>th</sup> June 2021 and filed on 9<sup>th</sup> July 2021, the 2<sup>nd</sup> Defendant denied all the material facts averred by the Plaintiff, except the fact that plot 555 was purchased by the deceased and that the deceased was member 1510. The 2<sup>nd</sup> Defendant claims that plot 555 was purchased by the deceased for their mother, who is now deceased, but their mother decided to register it in the names of Francis John Kitele instead of her own name. The 2<sup>nd</sup> Defendant thus claims that plot 555 is not part of the estate of Francis John Kitele, therefore. The 2<sup>nd</sup> Defendant claims that his said mother bequeathed the said plot upon him and she conveyed the information to the 3<sup>rd</sup> Defendant.
25. At the hearing of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case, DW1, Joseph Makau Kitele, the 2<sup>nd</sup> Defendant, adopted his witness statement dated 28<sup>th</sup> January 2022 and filed on 31<sup>st</sup> January 2022 as his evidence-in-chief. In his said statement, DW1 restates the substance of the defence.
26. In buttressing his defence, the 2<sup>nd</sup> Defendant exhibited the following documents: (i) a copy of letter from Francis John Kitele dated 12<sup>th</sup> July 1976 as the 2<sup>nd</sup> Defendant's Exhibit 1; (ii) a sale agreement dated 6<sup>th</sup> October 2017 between the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant as the 2<sup>nd</sup> Defendant's Exhibit 2; (iv) a letter from the Plaintiff's advocates to the said chief dated 23<sup>rd</sup> November 2020 as the 2<sup>nd</sup> Defendant's Exhibit 4; (v) a letter from the 2<sup>nd</sup> Defendant's advocates to the Plaintiff's advocates dated 24<sup>th</sup> November 2020 as the 2<sup>nd</sup> Defendant's Exhibit 5; and (vi) a letter from the 2<sup>nd</sup> Defendant's advocates to the Plaintiff's advocates dated 26<sup>th</sup> November 2020 as the 2<sup>nd</sup> Defendant's Exhibit 6.
27. In cross-examination of DW1 by counsel for the Plaintiff, DW1 stated that plot 555 was bought by the deceased, Francis John Kitele for their mother, who is now deceased. He stated that after his mother died, he was by consent allowed by the family to manage his mother's properties. He stated that he had a power of attorney but he could not exhibit a copy in Court. He stated that he had no grant of letters of administration over the estate of his mother. He conceded that he sold plot 555 to the 1<sup>st</sup> Defendant. He stated that the letter (the 2<sup>nd</sup> Defendant's Exhibit 2) was written by John, Peter and himself. He stated that their uncle, Angelo, was to locate the suitable land for purchase. He stated that the transfer documents over plot 555 from the name of Francis John Kitele to the 1<sup>st</sup> Defendant were signed by a neighbour and the 3<sup>rd</sup> Defendant's committee member who knew the history of the plot, because the beneficiaries of the estate of Francis John Kitele were unavailable to sign. He stated that since also his brother was dead and he could not possibly sign the transfer documents, the neighbour and committee member signed in his place. He denied the assertion that he took advantage of the situation.
28. DW2, Peter Muangano Kitele, who describes himself as the brother to both the deceased and the 2<sup>nd</sup> Defendant and who also lives in Mindoro Dr SE Rio Rancho, USA, adopted his witness statement



- dated 27<sup>th</sup> January 2022 and filed on 31<sup>st</sup> January 2022 as his evidence-in-chief. In his said statement, DW2 restates the substance of the 2<sup>nd</sup> Defendant's witness statement and especially about the letter (the 2<sup>nd</sup> Defendant's Exhibit 1).
29. In cross-examination of DW2 by counsel for the Plaintiff, DW2 stated that he migrated from Kenya in 1975. He stated that they jointly wrote the letter to uncle Angelo in 1976. He stated that he has evidence that the letter was delivered to Angelo. He stated that he is the one who mailed the letter. He stated that the handwriting in the letter is that of his late brother, Francis John Kitele. He stated that he did not have a sample of handwritings of the deceased. He stated that there was consensus in the family that the plot be sold by the 2<sup>nd</sup> Defendant.
  30. DW3, Patrick Nzuya Kitele, adopted his witness statement dated 31<sup>st</sup> January 2022 and filed on 31<sup>st</sup> January 2022 as his evidence-in-chief. In his said statement, DW3 restates the substance of the 2<sup>nd</sup> Defendant's witness statement and especially about the letter (the 2<sup>nd</sup> Defendant's Exhibit 1).
  31. In cross-examination of DW3 by counsel for the Plaintiff, DW3 stated that he had evidence to prove the fact that the deceased bought plot 555 for his mother. He said that there was a family agreement that the plot is sold and the 2<sup>nd</sup> Defendant merely effected the agreement.
  32. DW4, Joshua Itumo, the 1<sup>st</sup> Defendant, adopted his witness statement dated 27<sup>th</sup> January 2022 and filed on 31<sup>st</sup> January 2022 as his evidence-in-chief. In his said statement, DW4 restates the substance of his Statement of Defence that he is an innocent purchaser for value without notice.
  33. In buttressing his defence, the 1<sup>st</sup> Defendant exhibited the following documents: (i) a sale agreement dated 6<sup>th</sup> October 2017 between the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant as the 1<sup>st</sup> Defendant's Exhibit 1; (ii) a letter from the 2<sup>nd</sup> Defendant's advocates to the Plaintiff's advocates dated 24<sup>th</sup> November 2020 as the 1<sup>st</sup> Defendant's Exhibit 2 and (iii) a letter from the 3<sup>rd</sup> Defendant dated 13<sup>th</sup> October 2020 confirming that he is the owner of plot 555 as the 1<sup>st</sup> Defendant's DMFI 3.
  34. In cross-examination of DW4 by counsel for the Plaintiff, DW4 stated that Christine Wanza Wambua was his wife. He stated that the 2<sup>nd</sup> Defendant was the owner of plot 555. He stated that he used the letter from the 3<sup>rd</sup> Defendant to persuade himself that the 2<sup>nd</sup> Defendant was the owner. He stated that the name of the 2<sup>nd</sup> Defendant does not appear in the letter from the 3<sup>rd</sup> Defendant. He stated that he paid the purchase price but he did not have the documents to prove. He stated that the plot has not been registered by the land registry. He stated that he had not erected a temporary structure in the plot but a permanent house where he lives with his family.
  35. DW5, Simon Maithya Mbaluka, informed the Court that he is an Assistant Manager at the 3<sup>rd</sup> Defendant. He stated that the letter from the 3<sup>rd</sup> Defendant dated 13<sup>th</sup> October 2020 (the 1<sup>st</sup> Defendant's DMFI 3) was written by the 3<sup>rd</sup> Defendant. He produced it as the 1<sup>st</sup> Defendant's Exhibit 3.
  36. In cross-examination of DW5 by counsel for the Plaintiff, DW5 stated that he is not the author of the letter. He stated that he had not been issued with a resolution to represent the 3<sup>rd</sup> Defendant.
  37. In her written Submissions dated 20<sup>th</sup> August 2024 and filed on even date, learned Counsel Ms. Kalinga instructed by the Firm of Kalinga & Company Advocates, representing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in MCELC E049 of 2021 and the 2<sup>nd</sup> Defendant in MCELC E048 of 2021, urges this Court find that the Plaintiff has failed to discharge her burden of proof, on a balance of probabilities.
  38. For the specified Defendants, learned counsel summarized the case for the Plaintiff and the said Defendants and I find it unnecessary to regurgitate. Learned counsel proposed three issues for



determination as follows: (i) whether Parcel Number 555 at the 3<sup>rd</sup> Defendant comprised part of the estate of the late Francis John Kitele; (ii) Whether the transfer of the share to the 2<sup>nd</sup> Defendant and the sale to the 1<sup>st</sup> Defendant were fraudulent; and (iii) Whether the 1<sup>st</sup> Defendant is a bona fide purchaser for value without notice.

39. Concerning the question whether Parcel Number 555 at the 3<sup>rd</sup> Defendant comprised part of the estate of the late Francis John Kitele, it is submitted that it did not comprise part of the estate of the deceased. It is submitted that the deceased expressly wrote a letter dated 12<sup>th</sup> July 1976, which was exhibited by the 2<sup>nd</sup> Defendant, who was also a co-signatory thereto. It is submitted that in the said letter, the deceased had written to his uncle thus: “because of the problem with the home I want to build for mother at Katelembo from within the share which I bought for her”. It is urged that this singular statement makes it clear that the deceased was not the owner of the share as it belonged to his mother. It is submitted that the Plaintiff testified that she had no knowledge of the existence of the said parcel until PW2 nudged her and that she did not dispute the contents of the said letter and that it was her father’s signature on it and that she did not allege forgery thereof and that she did not seem to have seen the said letter, even after the same was served upon her advocates. It is submitted that the Plaintiff did not seem to know anything at all about the case except what PW 2 told her. It is submitted that this pegs the question whether the Plaintiff would have filed this suit if she had seen her father’s letter before filing it. It is submitted that PW2 knew all along that the share belonged to their mother. It is submitted that if truly the suit property belonged to the deceased, PW2 would have informed the Plaintiff as soon as she was appointed administrator in the year 1987 and he did not need to wait 34 years, or until the same had been sold, to inform the Plaintiff. In addition, it is submitted that PW2’s testimony as to how he came to learn of the sale of the property was vague and unconvincing. It is submitted that he stated that “In September 2020 we learned that on 29.05.2017 the 2<sup>nd</sup> Defendant ... changed the share membership...” but upon cross-examination, he claimed that he was informed of the transfer/sale by one Benson Mutisya, which must have been an afterthought or even a fictitious name, otherwise he would have stated so in his statement. It is submitted in addition that the said Benson Mutisya, if he does exist, was not called to testify to that effect, despite this alleged lack of knowledge on PW2’s part being a fact which was aggressively disputed by all his brothers, and considering the fact that the two parcels were sold 22 years apart, in the years 1995 and 2017. It is submitted that there was no explanation as to what suddenly prompted the said Benson to give PW2 this information in the year 2020 and that in the circumstances, it was necessary to call the said Benson to confirm if he was the one that informed him of the sale, and to be cross-examined on the circumstances under which he did so. It is urged that by judicial precedent, the failure to call Benson to testify ought to be taken to mean that the said witness either was imaginary, or would have contradicted PW2’s allegation and to be held against him. Besides, it is submitted that PW2’s brothers, being the 2<sup>nd</sup> Defendant, DW2 and DW3, all confirmed that the share belonged to his mother and they told the Court that as brothers they always discussed how to conduct the affairs of their home, and that the decision to sell the properties was reached with the full knowledge and consensus of all the brothers, including PW 2. It is submitted further that even DW2, who has lived in the USA much longer than PW 2, confirmed to the Court that he was and still is always informed of what decisions are being made about the home. It is thus argued that it is unbelievable that only PW2 would have been left out of these discussions. In addition, it is submitted that the overall testimony and conduct of PW2 renders him a witness who cannot be trusted and in particular the allegation that he had been ‘very close’ with his deceased brother is obviously untrue, since he did not go to the USA until 2 years after the death of the deceased, and he must have been just a young boy when the deceased left the country. It is submitted that he told the Court he was 31 years old when he went to the USA in the year 1989, and the Plaintiff told the Court that she was born in the USA in the year 1968, a time difference of 21 years, which means that PW2 was a mere boy when the deceased left Kenya.



40. In the circumstances, this Court is urged to find that the suit property was never owned by the deceased.
41. Regarding the question whether the transfer of the share to the 2<sup>nd</sup> Defendant and the sale to the 1<sup>st</sup> Defendant were fraudulent, it is submitted that the transfer and the sales constituted good faith actions carried out by family members in agreement with each other hence there was no fraud involved. Learned counsel cited the meaning of fraud as defined in Black's Law Dictionary, 11<sup>th</sup> Edition, as "A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment." Further reliance was placed upon the Court of Appeal decision in *Vijay Morjaria vs. Nansingh, Madhusingh Darbar & another* [2000] eKLR, where it was stated that "It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts." In this connection, it is urged that although fraud has been alleged and pleaded specifically, it has not been established, considering the compelling evidence tendered by the Defendants. On the contrary, this Court is urged to find the actions in good faith and by consensus of family members, relying on the definition of good faith in Black's Law Dictionary, Ninth Edition at pg. 713, where 'good faith' is defined as "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."
42. Turning to the question whether the 1<sup>st</sup> Defendant is a bona fide purchaser for value without notice, it is submitted that the 1<sup>st</sup> Defendant produced the sale agreement between him and the 2<sup>nd</sup> Defendant in respect of plot number 555, and confirmed that when he visited the offices of the 3<sup>rd</sup> Defendants, they confirmed to him that the parcel number 555 truly belonged to the 2<sup>nd</sup> Defendant and he stated that there was no mention of the deceased, and that he had no reason to doubt the information provided by the 3<sup>rd</sup> Defendant. It is submitted that he produced the letter from the 3<sup>rd</sup> Defendant confirming that he and his wife were the current proprietors of the parcel. It is submitted that the Black's Law Dictionary, 8th Edition, defines "bona fide purchaser" as "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims." To buttress this position, the holding of the Court of Appeal in *Mohamed vs. Duba & another* (Civil Appeal 83 of 2019) [2022] KECA 442 (KLR).
43. This Court is, consequently, urged to dismiss the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in MCELC E049 of 2021 and the suit against the 2<sup>nd</sup> Defendant in MCELC E048 of 2021, with costs.

#### **PART IV: THE 3<sup>rd</sup> DEFENDANT'S CASE, UNDER BOTH MCELC NUMBER E049 AND E048 OF 2021**

44. Despite service of process to the satisfaction of this Court evidenced by the Affidavit of Service sworn by one Dickson Wambua on 12<sup>th</sup> May 2021, the 3<sup>rd</sup> Defendant, under both MCELC Number E049 and E048 of 2021, did not enter appearance nor did it file a Statement of Defence.

#### **PART V: THE 1<sup>ST</sup> DEFENDANT'S CASE, UNDER MCELC NUMBER E048 OF 2021**

45. Despite service of process to the satisfaction of this Court evidenced by the Affidavit of Service sworn by one Dickson Wambua on 12<sup>th</sup> May 2021, the 1<sup>st</sup> Defendant, under MCELC Number E048 of 2021, did not enter appearance nor did it file a Statement of Defence.



## **PART VI: THE 4<sup>TH</sup> DEFENDANT'S CASE, UNDER MCELC NUMBER E048 OF 2021**

46. Despite service of process to the satisfaction of this Court evidenced by the Affidavit of Service sworn by one Dickson Wambua on 12<sup>th</sup> May 2021, the 4<sup>th</sup> Defendant, under MCELC Number E048 of 2021, did not enter appearance nor did it file a Statement of Defence.

## **PART VII: THE 5<sup>TH</sup> DEFENDANT'S CASE, UNDER MCELC NUMBER E048 OF 2021**

47. Despite service of process to the satisfaction of this Court evidenced by the Affidavit of Service sworn by one Dickson Wambua on 12<sup>th</sup> May 2021, the 5<sup>th</sup> Defendant, under MCELC Number E048 of 2021, did not enter appearance nor did it file a Statement of Defence.

## **PART VIII: QUESTIONS FOR DETERMINATION**

48. Emerging for determination - gleaned from the Plaintiffs in both suits, the Statements of Defence of Defence in both suits, and the rival written Submissions - are four questions as follows:
- i. First, whether the Plaintiff has proved - on a balance of probabilities – that the transfer of the suit properties namely plot numbers 555 situated at the 3<sup>rd</sup> Defendant, and 1029 also situated at the 3<sup>rd</sup> Defendant (but now registered as Athi River/Athi River Block 1/532) was effected illegally and/or fraudulently and/or through an unprocedural process, from the name of Francis John Kitele [deceased] to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021 respectively, on account of having been part of the free properties forming part of the estate of Francis John Kitele [deceased].
  - ii. Second, whether the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021 are trespassers in the suit properties.
  - iii. Third, appropriate remedies, if any.
  - iv. Fourth, which party should bear the costs of this suit?

## **PART IX: ANALYSIS OF THE LAW; EXAMINATION OF FACTS; EVALUATION OF EVIDENCE AND DETERMINATION**

49. The 3<sup>rd</sup> Defendant in both suits, and the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants in MCELC Number E048 of 2021, having failed to defend the respective suit and call evidence to controvert the Plaintiff's evidence, and having had notice of the respective suit but failed to take steps to defend, they are deemed to have admitted liability. This Court thus concludes that their liability is a foregone conclusion.
50. Turning to the case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in MCELC Number E049 of 2021 and the 2<sup>nd</sup> Defendant in MCELC Number E048 of 2021, this Court now embarks on analysis, interrogation, assessment and evaluation of each of the four questions, in turn.
- (i) First, whether the Plaintiff has proved - on a balance of probabilities – that the transfer of the suit properties namely plot numbers 555 situated at the 3<sup>rd</sup> Defendant, and 1029 also situated at the 3<sup>rd</sup> Defendant (but now registered as Athi River/Athi River Block 1/532) was effected illegally and/or fraudulently and/or through an unprocedural process, from the name of Francis John Kitele [deceased] to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021 respectively, on account of having been part of the free properties forming part of the estate of Francis John Kitele [deceased]



51. What is the approach deployed in resolving a dispute between persons who are not registered proprietors of the suit property? It has been appreciated that resolving a dispute of unregistered parcel of land is one that calls for patience of an angel and a keen eye of a jingo. In such cases, it is imperative to most scrupulously trace the root of ownership. Confronted with facts similar to this case where the Plaintiffs and Defendant were claiming ownership of the same suit property but none was registered as the owner and in which case, the Plaintiff was seeking orders similar to the prayers sought herein and in appreciating this arduous task and proposing scrupulous examination of documents to trace the root of ownership in *Danson Kimani Gacina & another vs. Embakasi Ranching Company Ltd* [2014] eKLR, J.L. Onguto, J. (as he then was) observed that: “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the Court must be left in no doubt that the holder of the documents proved is the one entitled to the property.” In this case and in coming to the conclusion that the documents which had been presented by the 1<sup>st</sup> Plaintiff had too many weak links as not to meet the standard of proof on a balance of probabilities, his Lordship proceeded to trace ownership in the following style: “The Plaintiffs claim ownership of Plots known as D355, D356, D355B, D356B, E12, E13, E12B and E13B on LR No. 10904/2. A total of eight Plots. The Plots were allocated to them for a consideration paid to the Defendant. PW1, like PW2, in an endeavor to prove ownership to the Plots produced receipts, share certificates and beacon certificates. Even though PW1 had testified that he purchased and paid for two Plots in 1976, he did not produce any evidence to show such payment in 1976. The only receipt availed for payment in 1976 was for the amount of Kshs. 2,200/= . It was not for 7,000/= and there was no other receipt. That receipt which was marked as PEx-2 was dated 13<sup>th</sup> November, 1976. It was receipt No. 10292 issued by M/s Gatuguta & Manek. It was not issued by the Defendant. That receipt also had the glaring inscription on its face horizontally reading “CANCELLED”. In my view, this remark took away the probative value of the receipt. Even then it was not proof that the 1<sup>st</sup> Plaintiff had paid the Defendant any money in 1976. The 1<sup>st</sup> Plaintiff also had three other receipts. The three receipts were issued by the Defendant on 3<sup>rd</sup> October, 1990, 16<sup>th</sup> December, 1998 and 18<sup>th</sup> November, 2008. The receipts were for the amounts of Kshs. 7,000/=, 2,000/= and 12,000/= respectively. The first of these three receipts was for the civil engineering works. It made reference to the Plots E12B and E13B. The second of the receipts being the receipt issued on 16<sup>th</sup> December, 1998 was for the bonus is shares. It is the receipt that led to the issuance of and allotment of Plot No. E12B and E13B as the bonus Plots. The two receipts certainly clash. It is not possible, nay practical, that the 1<sup>st</sup> Plaintiff already owned Plot No. E12B and E13B in the year 1990 to have been paying for the civil engineering works over the same. The two receipts issued on 3<sup>rd</sup> October, 1990 and 16<sup>th</sup> December, 1998 certainly clash and contradict the 1<sup>st</sup> Plaintiff’s own testimony that he originally owned Plots #E13 and E12 in 1976 and thereafter acquired Plots E12B and E13B in 1998 through bonus shares. Then there is the receipt issued on 18<sup>th</sup> November, 2008. This receipt related to the beacon certificate. The 1<sup>st</sup> Plaintiff testified that he was shown the Plots in 1982. In 2008 he was shown the beacons. It is apparent that this could have been so as the Beacons Certificate was only paid for in November, 2008. This was after the 1<sup>st</sup> Plaintiff discovered an intruder on his parcel of land. Interestingly, though both receipts as well as the Beacon Certificate made no mention of Plot No. E12B and E13B. The Plots now referred to in 2008 were E12B and E13B. I come to the conclusion that there are one too many weak links in the documentary claim of the 1<sup>st</sup> Plaintiffs evidence to satisfy me on a balance of probabilities as to which unregistered Plot or property was owned by the 1<sup>st</sup> Plaintiff.”



52. J.L. Onguto, J. (as he then was), was at it again in *Caroline Awinja Ochieng & another vs. Jane Anne Mbithe Gitau & 2 others* [2015] eKLR, where his Lordship employed the same approach he had employed in *Danson Kimani Gacina & another vs. Embakasi Ranching Company Ltd* [2014] eKLR, namely tracing back methodology and His Lordship had this to say: “24. In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. 25. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The Court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437. 26. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: Sale Agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”
53. Further, faced with facts similar to this case where the suit property (a Plot Number 30 Kabianga Market measuring 50 feet by 100 feet) was not registered in either names of the parties and in which case, the Plaintiff was seeking orders similar to the prayers sought herein in *Sara Leitich vs. Joshua Rutto & 2 others* [2021] eKLR, J.N. Onyango, J. adopted the approach enunciated by J.L. Onguto, J. in *Caroline Awinja Ochieng & another vs. Jane Anne Mbithe Gitau & 2 others* [2015] eKLR (discussed supra). See paragraph 30 of the decision.
54. So, in accord with the approach of tracing beneficial ownership as enunciated in *Danson Kimani Gacina & another vs. Embakasi Ranching Company Ltd* [2014] eKLR; *Caroline Awinja Ochieng & another vs. Jane Anne Mbithe Gitau & 2 others* [2015] eKLR; *Sara Leitich vs. Joshua Rutto & 2 others* [2021] eKLR; and *John Maina Kamwere vs. Njoki Mwangi* [2018] eKLR, all discussed supra, this Court embarks on a deep excavation to determine whether the Plaintiff has presented an unbroken chain of documents which are capable of generating persuasion in a judicial mind - on preponderance of probabilities - that it is more probable than not that he is the bonafide beneficial owner of the suit property.
55. Regarding the assertion that plot 555 was purchased by the deceased for his mother, beyond mere assertions, the 2<sup>nd</sup> Defendant failed to present evidence to persuade this Court that it is more probable than not, that it was purchased by Francis John Kitele for his late mother and that his mother had bequeathed the property to him before her demise in 1988. No documents were exhibited on this connection. Further, no evidence was exhibited that his mother’s estate was subjected to succession to enable the 2<sup>nd</sup> Defendant acquire the plot legally, if at all plot 555 belonged to the estate of his late mother. It follows that the manner in which plot 555 was transferred (instead of being transmitted) to the 2<sup>nd</sup> Defendant and the manner in which it was subsequently disposed to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021, was tainted with illegalities and fraud, having side-stepped the lawful process of succession.
56. Further, in his witness statement, the 2<sup>nd</sup> Defendant explained that he was a mere manager of the of the properties of his late mother, by consent of the whole family but in cross-examination, the 2<sup>nd</sup>



Defendant introduced a new angle of power of attorney which was purportedly issued in his favour by his late mother, to purportedly manage his late mother's properties. The 2<sup>nd</sup> Defendant, however, exhibited no power of attorney. That notwithstanding, even if he exhibited one, a power of attorney dies with the donor of the power and the law of succession sets in. In other words, none of the capacities explained by the 2<sup>nd</sup> Defendant - namely managing properties of his late mother as a trustee or holding a power of attorney - can possibly come to his aid by either dislodging or defeating the necessity of succession (transmission).

57. The bad situation was worsened by the fact that the 2<sup>nd</sup> Defendant stated in cross-examination that the transfer documents over plot 555 from the name of Francis John Kitele to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021, were signed by a neighbour who was a member of the management committee of the 3<sup>rd</sup> Defendant, who the 2<sup>nd</sup> Defendant explained that he knew the history of the plot. The 2<sup>nd</sup> Defendant further explained that the said neighbour was the only one available to sign, on account of the fact that the beneficiaries of the estate of Francis John Kitele were unavailable to sign the transfer documents. Stranger than fiction!
58. As if this was not bizarre enough, in cross-examination, the 2<sup>nd</sup> Defendant added that since his late brother was dead and he could not possibly sign the transfer documents, the said neighbour and committee member stepped in to sign in his place. The conduct of the 2<sup>nd</sup> Defendant, literally threw the law through the window. It seems to me that the law on succession was a serious impediment and unnecessary inconvenience to the 2<sup>nd</sup> Defendant. If this cannot be a text-book example of illegality, fraud, intermeddling and impunity combined, what can?
59. One of the principal factors which vitiate a contract is illegality. See *Nzilu vs. Ngungua* [2023] KEHC 24193 (KLR). If acquisition of the subject land was attained by illegality, Article 40(6) of *the Constitution* does not protect illegally acquired property and such a contract is void ab initio. See the Supreme Court holding in *Dina Management Limited vs. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).
60. Certainly, intermeddling is an illegality. Having taken note that there was no statutory definition thereof, Gikonyo, J. defined intermeddling in *Benson Mutuma Muriungi vs. C.E.O. Kenya Police Sacco & another* [2016] eKLR, as follows: "There is no specific definition of the term intermeddling provided in the *Law of Succession Act*. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; "for any purpose" and/or "otherwise intermeddle with" in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act* or any other written law. I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law." This definition was embraced and adopted fully by the Court of Appeal in *Kiragu & 2 others vs. Kiragu & 7 others* [2024] KECA 1600 (KLR).
61. It follows that the successive sequence of transactions - having not been built on lawful succession (transmission) - were all tainted with intermeddling. Faced with a similar state of affairs in *Alice Chemutai Too* (Suing in her capacity as the personal representative of Kipkoech Tele (Deceased)



vs. Nickson Kipkurui Korir, Attorney General (Sued on behalf of the Chief Land Registrar) & Consolidated Bank of Kenya [2015] KEELC 151 (KLR), where the Applicant in the OS sought cancellation of title on basis that of the title having been transferred from the name of deceased without succession, Munyao Sila, J. held that the transfer was coloured with fraud, illegality and unprocedural process and the third parties could not benefit from the doctrine of innocent purchaser without notice having not done due diligence. His Lordship stated as follows: “15. In our case, there is no doubt that in so far as the title of the 1st respondent is concerned, it was procured by way of fraud or misrepresentation, and there is no way that the 1st respondent could have procured title without his own involvement in the fraud or misrepresentation. The title of the 1st respondent is clearly impeachable by dint of the provisions of Section 26 (1) (a). It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions have to be cancelled as well, for they were entered into by a party who had no capacity to do so, he not having a title in the first place. 16. The position that a fraudulent title cannot be allowed to stand has been affirmed in a number of other cases. They are several and it is not necessary to set them out here. I will only mention one where the point was clearly made, that is the Court of Appeal decision in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal. 17. I find the submissions of Mr. Odhiambo curious, that because of the charge, the register cannot be rectified. Mr. Odhiambo was of the opinion that it would be a dangerous precedent to set if I proceed to cancel the charge. On the contrary, it is my view that it would be a dangerous precedent to set, if I were not to proceed to cancel the charge. It would mean that all a person needs to do is to fraudulently acquire title, then proceed to charge it, and because of that charge, his fraudulent transactions will be sanitized. The fraudster would end up being unjustly enriched, for he will have money in return for the charge, which money he will obviously have no incentive to pay, and the bank will still be able to recover its money by a sale of the property. The loser will of course be the proper title holder. 18. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists. ... 20. I do not see how Section 80 can assist the 3rd respondent. Section 80 may afford a defence against rectification of the register, where the person affected is in possession of the property, and acquired it without any vitiating factors. There may be argument that there is a conflict between Section 80 and Section 26 as asserted by Mr. Odhiambo, but I do not think that this is the forum to address this, for clearly, the 3rd respondent cannot afford itself the shelter (if any) of Section 80. This is because the 3rd respondent is a chargee, and she is not in possession of the suit property. Neither is the 1st respondent, the fraudster, in possession. The applicant has demonstrated that the 1st respondent has never been in possession, and that he is a complete stranger, to her and to the larger family of the deceased. The applicant has indeed shown that all along, she and the rest of the family of the deceased, are the ones who have continuously been in possession. Possession is key for any party to afford himself the shelter of Section 80, and I really do not see how Section 80 can protect the cancellation of the title in this instance, neither of the respondents being in possession.”

62. A transaction and/or contract entered by an intermeddler and the subsequent transfers have no feet to stand, granted that an intermeddler cannot pass good title. It's void ab initio. Faced with a similar situation and speaking to the legal effect of intermeddling in relation to a contract for sale of land which part of the free property of the estate In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) (Succession Cause 1974 of 2008) [2013] KEHC 1930 (KLR) (Family) (10 October 2013) (Ruling),



W. Musyoka, J. held that “The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence. In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made to him. The fact of having petitioned for the letters did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate, and they no doubt committed an offence under section 45(2) (a) of the Act. It is unfortunate that the prosecutorial authorities in do not focus on offences of this kind as prosecutions are hardly ever mounted over them. This explains why property of dead persons is routinely intermeddled with. As the respondent had no authority to sell the property in question, Felix Kinuthia acquired no interest in it at all as the seller had no title to it whatsoever. A buyer, such as Felix Kinuthia, is not in the same footing with a creditor, for the interest he alleges to have acquired in the estate was not acquired from the deceased during his lifetime or from a person authorized to sell the property. It should be noted that even where a grant of representation has been obtained, the grant-holder has no power to sell any immovable asset before confirmation of the grant. This is the law under section 82(b) (ii), which states... The sale to Felix Kinuthia of immovable property was done in contravention of the law. It amounted to criminal activity. Such transaction cannot be valid, and should not be upheld by the law.”

63. Being a child or son spouse by itself does not confer the capacity of a legal representative. W. Musyoka, J. reiterated the foregoing position In re Estate of Barasa Kanenje Many (Deceased) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) (30 July 2020) (Ruling), Musyoka, J. held that any transaction is void where property is sold by a person who is not an administrator of the estate and the mere fact that a person is the surviving spouse or child of the deceased does not make him or her a personal representative of the deceased. His Lordship held thus: “6. The mere fact that a person was a surviving spouse or child of the deceased did not make him or her a personal representative of the deceased. One only became a personal representative, usually known as an administrator, in the event of intestacy, upon being appointed by the Court as such. The property of the intestate would not vest in any person until such person was appointed administrator by the Court. Any transaction, entered into with a person who was yet to be appointed administrator, over estate assets, would be null and void, since such assets would not have vested in such a person, and such person would have no standing in law to transact over such property. Section 45 of the Law of Succession Act outlawed such dealings and designated them as amounting to intermeddling with the estate of the deceased, which was a criminal offence, according to that provision.”
64. It follows that the transactions upon which the transfers were built were, resultantly, void and as Lord Denning elegantly put it in Benjamin Leonard Mcfoy vs. United African Company Limited (UK) [1962] AC 152, “If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
65. On this ground alone, this suit will succeed. However, for completeness, I will proceed to examine all grounds.
66. The 1<sup>st</sup> Defendant pleaded the doctrine of innocent purchaser for value. The innocence was not well-grounded by demonstrating that when he conducted due diligence, he was persuaded that the property belonged to the seller, the 2<sup>nd</sup> Defendant. In the absence of that demonstration, the doctrine of innocent purchaser cannot come to aid of the 1<sup>st</sup> Defendant. I’m reminded of the decision of the Supreme Court of Kenya (hereinafter “SCORK”) in Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April



2023) (Judgment), where the Court held that unless the party citing the doctrine demonstrates that he exercised due diligence before purchasing, the doctrine will not be of help to that party. Effective 21<sup>st</sup> April 2023, the equitable doctrine of innocent purchaser for value, appears to have considerably diminished in the wake of the said decision in the Dina Management case. In this case, while discussing the doctrine of indefeasibility of title, SCORK - without saying it expressly – appears to have to have dropped the rationale underpinning the equitable doctrine of innocent purchaser for value and reverted to the common law position discussed supra namely non dat qui non habet - that no one gives what he does not have and nemo plus iuris ad alium transferre potest quam ipse habet – that one cannot transfer to another more rights than he has. It follows that once the root of the title is under challenge, a purchaser from a fraudster - even without knowledge or participation - acquires no good title. At paragraph 111, PM Mwilu, DCJ & V-P, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ reasoned that “Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

67. Courts are now underscoring the importance of tracing proper title before a purchaser embarks on finalizing the transaction. Had the 1<sup>st</sup> Defendants in both suits undertaken a basic inquiry, they would have learnt that the 2<sup>nd</sup> Defendant in both suits was not the lawful owner of the suit properties. They would have unraveled the fact that the 2<sup>nd</sup> Defendant in both suits was venturing into intermeddling in the estate of his late brother, Francis John Kitele. And so, in the Dina Management case, SCORK affirmed the judicial views which were expressed in Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others [2006] 1 KLR (E&L) 563, Maraga J. (as he then was); Esther Ndegei Njiru & Another vs. Leonard Gatei [2014] eKLR, J.M. Mutungi, J.; and Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR, per Visram, Koome & Otieno-Odek, JJA (as they then were). In Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others [2006] 1 KLR (E&L) 563, Maraga J. (as he then was) took a judicial view that “Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of Title Deed... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept.” Similarly, in Esther Ndegei Njiru & Another vs. Leonard Gatei [2014] eKLR, J.M. Mutungi, J. reasoned that “Whereas the law respects and upholds sanctity of 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 endeavour to ascertain the history and/or root of the title...” In the Court of Appeal decision in Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR, Visram, Koome & Otieno-Odek, JJA (as they then were) rendered themselves as follows: “The appellant denied he was a licensee. It is our considered view that the respondent did not discharge the evidential burden to rebut the testimony of the appellant that it was their deceased father who put both of them into



possession of the suit property and to occupy the same in equal share. We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

68. It's little that in *Iqbal Singh Rai vs. Mark Lecchini & another* (2013) eKLR, where a fraudster stole the identity of the owner, forged his signature and sold the plot to a bona fide buyer. The buyer unaware of the forgery, registered the transfer and pleaded innocent purchaser for value. Both original owner and buyer asserted that he had indefeasibility of title by virtue of s.23(1) of RTA upon registration of transfer. It was held that "A fraudster cannot transfer a valid title to another party even if that other party becomes the registered proprietor. The fraudulent transfer would be declared null and void and the second title would be cancelled."
69. Regarding the purposed letter written by the deceased, beyond assertions by the 2<sup>nd</sup> Defendant and DW2 that the handwriting in the letter is that of Francis John Kitele (deceased), the deceased's handwritings were not authenticated as required by law. And so, in keeping with sections 70, 71, 48 of the *Evidence Act*, the 2<sup>nd</sup> Defendant was obligated to prove the fact that the said handwriting belonged to the deceased.
70. The procedure for authentication of handwritings and signatures was not followed by the Plaintiff. In particular, when a signature is in question, section 70 of the *Evidence Act* stipulates that "If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."
71. Alternatively, section 48 of the *Evidence Act* provides that "(1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts."
72. Also, the alternative to section 48 afore-discussed namely section 76 of the *Evidence Act* which empowers a Court to compare the handwriting and signature with the known handwriting and signature was not invoked by the Plaintiff. It provides that "(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared by a witness or by the Court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. (2) The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. (3) This section applies with necessary modifications to finger impressions."
73. It is on this basis that this Court reaches a conclusion that the Plaintiff has proved - on a balance of probabilities - that the suit properties were illegally, fraudulently and unprocedurally transferred to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021, on account of the fact that they were free properties forming part of the estate of Francis John Kitele [deceased].



**(ii) Whether the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021 are trespassers in the suit properties**

74. It follows that this question must be answered in the affirmative.

**(iii) Appropriate remedies, if any**

76. Concerning the remedies sought by the Plaintiff, I turn to consider appropriate remedies for trespass and illegal transfer of land?
77. In *Judith Julia Wanjiro Njoroge vs. Samuel Ngeru Mwangi* [2019] eKLR, J.G. Kemei reasoned that “15. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to land has a right to possession, occupation and use of the suit land. The Plaintiff conducted evidence that shows that the Defendant has unlawfully taken possession of the suit land and is damaging trees, grass, tilling the land and erecting a house; those actions of the Defendant amount to violation of the Plaintiff’s right to property as guaranteed in Article 40 of *the Constitution* and must be stopped.” In this connection, the learned Judge issued the following orders: “a. A declaration that the Plaintiff is the bonafide and registered owner of land known as MURANGA/ITHANGA/PHASE II/244 (suit land). b. A declaration that the Defendant is a trespasser on land reference No. MURANGA/ITHANGA/PHASE II/244 c. A permanent injunction be issued restraining the Defendant, his employees, agents and or servants from trespassing and or interfering whatsoever with land reference No. MURANGA/ITHANGA/PHASE II/244. d. The Defendant is ordered to vacate the suit land within 15 days from the date of this judgment in default the Plaintiff to apply for eviction of the Defendant in strict compliance with the law.”
78. This Court is of the judicial view that the appropriate relief for illegal transfers is cancellation of the transactions which led to the transfers and rectification of the register. Concerning trespass, I consider appropriate a notice for voluntary vacation failing which an eviction will follow coupled with a perpetual injunction to boot. In the special circumstances of this case where the purported buyers believed they had good title, this Court exercises discretion against granting damages for trespass.

**SUBPARA (iv) Which party should bear the costs of this suit?**

79. Upon considering the cause of action and circumstances unique to this case including but not limited to the history of the matter, the actual cause of this suit are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in both suits. This Court has thus not found a good cause to depart from the general proposition of the law that costs follow the cause.

**PART X: DISPOSITION**

80. Wherefore this Court declares, orders and directs as follows:
- i. A declaration is hereby issued that the transfer of the suit properties namely plot numbers 555 situated at the 3<sup>rd</sup> Defendant and 1029 situated at the 3<sup>rd</sup> Defendant (but now registered as Athi River/Athi River Block 1/532) was effected illegally, fraudulently and unprocedurally by the 3<sup>rd</sup> Defendant from Francis John Kitele [deceased] to the 2<sup>nd</sup> Defendant and eventually to the 1<sup>st</sup> Defendant in MCELC Number E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC Number E048 of 2021 respectively, having been part of the free properties forming part of the estate of Francis John Kitele [deceased] and consequently null and void ab initio, on account of intermeddling with the estate of Francis John Kitele [deceased].



- ii. The title which was issued to the 1<sup>st</sup> Defendant in MCELC E048 of 2021 of title number Athi River/Athi River Block 1/532, is thus revoked.
- iii. An order is hereby issued directed at the 3<sup>rd</sup> Defendant in both suits to rectify the register of plot numbers 555 and 1029, by cancelling the names of the 1<sup>st</sup> Defendants in both suits, and substituting therewith the name of the Plaintiff herein, in her capacity as an administrator of the estate of Francis John Kitele.
- iv. An order is hereby issued directed at the 4<sup>th</sup> Defendant in MCELC E048 of 2021 to rectify the register of Athi River/Athi River Block 1/532, by substituting the name of the 1<sup>st</sup> Defendant in MCELC E048 of 2021 with the name of the Plaintiff herein, in her capacity as an administrator of the estate of Francis John Kitele.
- v. The 1<sup>st</sup> Defendant in MCELC E049 of 2021 and the 1<sup>st</sup> Defendant in MCELC E048 of 2021, are granted 90 days to vacate from the suit properties.
- vi. In the event they fail to vacate from the suit properties within the 90-day vacation notice, the Plaintiff shall be at liberty, without further recourse to this Court, to appoint an Auctioneer or Court Bailiff to evict the Defendant. In this regard, the Officer Commanding Kyumbi Police Station, is directed to provide security during the eviction exercise.
- vii. An order of permanent injunction is hereby issued against the Defendants by themselves, their agents, servants, employees and/or any other person claiming under their title, restraining them from continued trespass, re-entry, dealing and/or in any other way interfering with the suit properties, with effect from the date of expiry of the 90-day vacation notice issued under order (v) above.
- viii. The Plaintiff is awarded costs of this suit to be shouldered by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in both suits.

81. It is so ordered.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 11<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**C.N. ONDIEKI**

**PRINCIPAL MAGISTRATE**

Advocate for the Plaintiff: No Appearance

Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in MCELC E049 of 2021 and 2<sup>nd</sup> Defendant in MCELC E048 of 2021:  
No Appearance

3<sup>rd</sup> Defendant in both MCELC E049 of 2021 and MCELC E048 of 2021: Absent

1<sup>st</sup> Defendant in MCELC E048 of 2021: Absent

4<sup>th</sup> Defendant in MCELC E048 of 2021: Absent

5<sup>th</sup> Defendant in MCELC E048 of 2021: Absent

Court Assistant: Mr. Ndonge

