



REPUBLIC OF KENYA



**Ngari & another v Ochengo; Ogut (Third party) (Environment & Land
Case E002 of 2023) [2023] KEMC 111 (KLR) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEMC 111 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
ENVIRONMENT & LAND CASE E002 OF 2023**

CN ONDIEKI, PM

AUGUST 31, 2023

BETWEEN

MICHAEL GICHIHI NGARI 1ST PLAINTIFF

CATHERINE NJOKI KIRURI 2ND PLAINTIFF

AND

ERIC MOGOKO OCHENGO DEFENDANT

AND

MANASSEH ODHIAMBO OGUT THIRD PARTY

JUDGMENT

1. A land dispute is vastly impassioned fundamentally because land is not only a standard factor of production but also a scarce resource. Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya and land remains the most notable source of frequent conflicts between persons and communities.¹ Land ownership and land rights is both a historical and emotive subject in Kenya and a right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute.² The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions.³

¹ Per W. Ouko, P. (as he then was); Makhandia, JA and Musinga, JA in *Gitamaiyu Trading Company Ltd vs. Nyakinyua Mugumo Kiambaa Co. Ltd & 11 Others* [2019] eKLR.

² See *Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others* [2018] eKLR, per Githinji & Otieno-Odek, JJA (as they then were) and Mohammed, JA.

³ See *Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others* [2018] eKLR, per Githinji & Otieno-Odek, JJA (as they then were) and Mohammed, JA.



PART II: THE PLAINTIFF'S CASE

2. Vide an Amended Complaint dated 25th May 2017 and filed on 28th July 2017, the Plaintiffs brought this action against the Defendant seeking Judgment for: (aa) A permanent injunction restraining the Defendant either by himself or his agents, servants and surrogates or any other person or persons acting or purporting to act at the behest of the Defendant from interfering with the Plaintiffs' right of occupation and use of Title Number Mavoko Township Block 3 (WASWA) 3951 previously known as plot number 505/09 WASWA Estate, Lukenya Ranch. (bb) An order of cancellation of registration of title number Mavoko Township Block 3 (WASWA) 3951 in favour of the Defendant and substitution thereof with the 1st Plaintiff as the lawful and rightful owner of the said title. (bbb) An order of rectification of the RLA register or any other germane land register currently in force to give effect to prayer (bb) above. (bbbb) A declaration that the Defendant is holding title number Mavoko Township Block 3 (WASWA) 3951 in trust for the 1st Plaintiff. (c) The Defendant to bear the cost of this suit. (d) Any other relief the Court deems fit and just to grant in the circumstances.
3. The 1st Plaintiff claims that he used to work for Nairobi Water and Sewerage Company and retired in 2017. The 1st Plaintiff claims that he is a shareholder of WASWA Investment Company which was formerly known as WASWA Development Society (hereinafter "the society") a welfare society formed for the City Council Staff. The 1st Plaintiff claims that the society invited its members to contribute towards purchasing a parcel of land in Kamulu and that he made the said contribution through monthly salary check-offs. The 1st Plaintiff avers that on 24th June 1996, having completed payments thereafter, he was allotted plot number 505/09 (hereinafter "the suit property") and took possession thereof. The 1st Plaintiff avers that he later sold the plot to the 2nd Plaintiff who constructed a house thereon and settled her family. The 1st Plaintiff avers that around 2010, while making a follow-up for a title over the suit property, learnt that a person unknown to him named Eric Mogoko Ochengo had fraudulently acquired a title over the suit property. The 1st Plaintiff avers that he visited the offices of the society which confirmed that the plot was still registered in his name and that they were not aware that a title had been issued thereon.
4. At the hearing of the Plaintiffs' case, the 1st Plaintiff (PW1) adopted his witness statement dated 17th May 2016 and filed together with the original Complaint on 20th May 2016, as his evidence-in-chief. In his said statement, the 1st Plaintiff largely rehears the facts as averred in the Complaint. In buttressing her claim, the 1st Plaintiff exhibited the following documents: (i) a letter of allotment dated 24th June 1996 as the Plaintiffs' Exhibit 1; (ii) a copy of a Sale Agreement between the 1st Plaintiff and the 2nd Plaintiff the Plaintiffs' Exhibit 2; (iii) a copy of search and restriction as the Plaintiffs' Exhibit 3; (iv) a copy of a letter loading a complaint at the DCI as the Plaintiffs' Exhibit 4; (v) a statement by the 1st Plaintiff as the Plaintiffs' Exhibit 5; (vi) a transfer form as the Plaintiffs' Exhibit 6; (vii) photographs of development of the suit property as the Plaintiffs' Exhibit 7; (viii) a demand letter as the Plaintiffs' Exhibit 8; (ix) certain documents not on record as the Plaintiffs' Exhibit 9-22; (x) a letter of allotment as the Plaintiff Exhibit 23; (xi) a letter from WASWA dated 7th July 2022 as the Plaintiffs' Exhibit 24; (xii) a copy of the WASWA membership register as the Plaintiffs' Exhibit 25; (xiii) a copy of the WASWA application for membership as the Plaintiffs' Exhibit 26; (xiv) a copy of the WASWA salary deduction instruction authorization as the Plaintiffs' Exhibit 27; (xv) a copy of the WASWA proposed subdivision of plot 505/09 as the Plaintiffs' Exhibit 28; (xvi) the Survey of Kenya Registry Index Map for Machakos District Mavoko Town Block 3 (WASWA) as the Plaintiffs' Exhibit 29; (xvii) copies of chargesheets as the Plaintiffs' Exhibit 30; (xviii) a copy of the WASWA AGM minutes as the Plaintiffs' Exhibit 31; (xix) a copy of the 1st Plaintiff's Title Deed to a related property as the Plaintiffs' Exhibit 32; (xx) a copy of the official search as the Plaintiffs' Exhibit 33; (xxi) a copy of the Sale Agreement and



transfer form as the Plaintiffs' Exhibit 34; (xxi) a copy of the letter to the letter to DCIO and statement as the Plaintiffs' Exhibit 35; (xxii) photographs as the Plaintiffs' Exhibit 36; (xi) a copy of the demand letter as the Plaintiffs' Exhibit 37; and (xxiv) a statement by the Third Party as the Plaintiffs' Exhibit 38.

5. In cross-examination, the 1st Plaintiff stated that he was a founder member of the society. He stated that the officials at the time of allotment were as follows: the late Maguthu as the chairman; Newton Mukabue (PW2) as the secretary; and Charles Onchoke as the Treasurer. He stated that the Third Party was an ordinary member. He stated that the third party may have been allotted a plot but certainly not the suit property. When he was referred to document number 6 on the Defendant's list of documents, he stated that it initial started as WASWA development society and thereafter, they changed to WASWA Investment Limited. He stated that the suit property was transferred fraudulently since it was done by a person who was not the of the property. He stated that the third party has not been charged for a criminal offence. He stated that the suit property then was plot 505/09 but now Mavoko Township Block 3 (WASWA) 3951.
6. PW2, Newton Kagwandata Mukabue, adopted his witness statement dated 19th July 2022 and filed on the even date, as his evidence-in-chief. In his said statement, PW2 states that he was the secretary of WASWA Development Society at the material time when the suit property was allotted to the 1st Plaintiff. He stated that the signature on the allotment letter is his. He states that the 1st Plaintiff was allotted the suit property on 24th June 1996 and that he paid for the same through monthly salary check-offs. He stated that the third party was an employee of WASWA but he was not allotted the suit property. He stated that WASWA Investment Limited was initiated to pursue development of the plots and the third party became an official thereof. He stated that by the time WASWA Development Limited was incorporated, there were no plots available for allotment since all the plots had been allotted to members. He stated that later, officials of WASWA Investment Limited started to fraudulently sell member's properties to innocent buyers.
7. In cross-examination, PW2 stated that he was the secretary when the suit property was allotted to the 1st Plaintiff. He stated that he signed the allotment letter dated 24th June 1996. He stated that the 1st Plaintiff was a member of the society and he was allotted plot number 505/09. He stated that by the time it was incorporated, WASWA Investment Limited had no land to sell to prospective buyers since WASWA Development Society had accomplished its business of allotting plots. He stated that the third party was a member of the society. He stated that the mandate of WASWA was to secure development partners for the said properties.
8. In his written Submissions dated 27th April 2022 (sic) and filed on 4th May 2023, learned Counsel Mr. Nyende instructed by the Firm of Nyende & Company Advocates representing the Plaintiff, proposes four issues for determination as follows: (i) whether the 1st Plaintiff has proved on a balance of probabilities that he is the legal owner of the suit property; (ii) whether upon allotment, the suit property was available for allotment again; (iii) whether the title held by the Defendant was acquired unprocedurally and illegally; and (iv) whether the Plaintiffs are entitled to the prayers sought.
9. Regarding the question whether the 1st Plaintiff has proved on a balance of probabilities that he is the legal owner of the suit property, it is answered in the affirmative placing reliance on exhibits 1-5 and the fact that the Defendant failed to call the third party as his witness.
10. Regarding whether upon allotment, the suit property was available for allotment again by the same allotting authority, it is also answered in the negative placing reliance upon *John Muchiri Mbutia vs. Rebecca Were Mutanda & another* [2015] eKLR; and *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR.



11. Concerning the question whether the title held by the Defendant was acquired unprocedurally and illegally, it is answered in the affirmative. It is submitted that such a title does not enjoy protection of the law, citing section 26(2) of the [Land Registration Act](#) and the holding in *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR. Further, it is further submitted that no good title can be passed by a person who had no good title anchored on the principle of *nemo dat quod non habet*, staking reliance in *Dima Management Limited vs. County Government of Mombasa*, Supreme Court of Kenya, Petition No. 8 (E010) of 2021; *Land Commission vs. Afrison Export Import Limited 7 10 others* [2019] eKLR; *Lawrence P. Mukiri Mungai vs. Attorney General & 4 others* [2017] eKLR; *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR; *Samuel Kamere vs. Land Registrar Kajiado* [2015] eKLR and *Teresia Kamene vs. Harun Edward* [2019] eKLR.

PART III: THE DEFENDANT'S CASE

12. In his Amended Statement of Defence dated 12th January 2023 and filed on 13th January 2023, the Defendant denies every material averment in the Plaintiff. The Defendant avers that vide a Sale Agreement dated 20th June 2008, he bought the suit property from the third party after conducting due diligence and paid the third party the full purchase price in the sum of kshs. 70,000. He states that after the said purchase, he followed the due process and the property was registered in his name. The Defendant avers that the 1st Plaintiff sold to the 2nd Plaintiff entirely different property and they have colluded to deprive the Defendant of his property. The Defendant seeks Judgement against the Plaintiffs for: (a) A permanent injunction against the 1st and 2nd Plaintiffs, their agents, assigns, employees or anyone acting in their name or under the authority of the 1st and 2nd Plaintiffs from trespassing on the Defendant's property. (b) The 1st and 2nd Plaintiffs, their agents, assigns, employees or anyone acting in their name, under their authority be restrained from interfering with the quiet possession of the 1st Defendant in any way whatsoever including not interfering with his employees. (c) The 1st and 2nd Plaintiffs be restrained from harassing the 1st Defendant. (d) Eviction of the 1st and 2nd Plaintiffs from the suit property or any part thereof together with anyone acting in their names or authority. (e) The caution registered against the 1st Defendant be lifted. (f) That the Plaintiff's suit be dismissed with costs to the Defendants. (g) Any other relief the Court deems fit and just to grant in the circumstances.
13. The Defendant filed a third-party notice and on 17th October 2017, while this matter was pending in the ELC at Machakos, Angote, J. granted it and issued directions that the Defendant serves the third party and that the third party should enter appearance and file a Defence.
14. At the hearing of the Defendant's case, the Defendant adopted his witness statement dated 18th July 2017 and filed on the even date as his evidence-in-chief. In his said statement, the Defendant largely rehashes the facts as averred in his Defence. In buttressing his defence, the Defendant exhibited the following documents: (i) a copy of a Sale Agreement dated 20th June 2008 as the Defendant's Exhibit 1; (ii) a copy of the Title Deed for Mavoko Town Block 3 (WASWA) 3951 as the Defendant's Exhibit 2; (iii) a certificate of official search for 2009 as the Defendant's Exhibit 3; (iv) a copy of the official search for 2017 as the Defendant's Exhibit 4; (v) a copy of allotment letter as the Defendant's Exhibit 5; (vi) a copy of CR 12 of WASWA Development Company as the Defendant's Exhibit 6; (vii) a copy of the Sale Agreement dated 22nd April 2013 as the Defendant's Exhibit 7; (viii) a copy of the survey map for Mavoko Town Block 3 (WASWA) as the Defendant's Exhibit 8; (ix) a copy of the surveyor's Report dated 5th September 2019 as the Defendant's Exhibit 9; (x) a letter of acknowledgment of ownership of land parcel Mavoko Block 3 (WASWA) 3951 dated 3rd March 2007 as the Defendant's Exhibit 10; and (xi) copies of duly signed copies of transfer forms dated 10th March 2010 as the Defendant's Exhibit 11.



15. In cross-examination, the Defendant stated that he did not file a Counter-Claim. The Defendant was asked how come he prayed for eviction orders when he asserted in his defence that he is in possession of the suit property. He did not respond. He stated that although he works now at the land office, he was not working in the lands office at the material time. He denied abusing his office to acquire the suit property. The Defendant was referred to the Defendant's Exhibit 10 and asked why it indicates that the suit property was directly allotted to him. The Defendant responded that he bought the property and not allotted as shown in the said exhibit. He stated that he was not and has never been a member of the society. He stated that at the time he bought the property, the third party was the chairman of WASWA Investment Company. He stated that by the time he bought it, the property had already been registered in the name of the third party. The Defendant was referred the Defendant's Exhibit 11 which indicates the Defendant as the buyer and the Government of Kenya as the seller and he did not respond. He stated that he paid the purchase price in cash. He stated that the third party was the owner of the property. He was referred to the Defendant's exhibit 3 (a letter of allotment) signed by one person namely the third party and compared with the Plaintiffs' exhibit which was signed by three officials. He stated that when the third party signed the letter of allotment, he was the acting chairman. He was referred to the Plaintiffs' Exhibit 8 and he acknowledged that the third party is facing charges of fraudulent disposal of trust property. He stated that the Sale Agreement provides for indemnity. He was referred to the Defendant's Exhibit 2 which shows that the Defendant is the first owner directly from government and the third party does not appear as the initial owner. He admitted that the allotment he exhibited is dated 2003 and that of the 1st Plaintiff is issued in 1996.
16. In re-examination, the Defendant stated that he started working at the land registry in 2019. He stated that he did not conduct a search in the land registry because it was not registered at that time. He stated that the said surveyor's report states that the 2nd Plaintiff is a neighbour to his property. He stated that he is in possession of the property. He stated that the surrender was signed by the third party, the chairman at the material time.
17. In his written Submissions dated 3rd July 2023 and filed on 4th July 2023, learned Counsel Mr. Langalanga instructed by the Firm of Langalanga & Company Advocates representing the Defendant, proposes three issues for determination as follows: (i) whether the 1st Plaintiff has proved his case on a balance of probability; (ii) whether the Plaintiff's case can warrant cancellation of title to land parcel known as Mavoko Township/Block 3 (WASWA) 3951; and (iii) appropriate orders to issue and the party to bear costs.
18. Regarding whether the 1st Plaintiff has proved his case on a balance of probability, it is answered in the negative arguing that the 1st Plaintiff failed to join the allotting authority and thus failed to present evidence which can be said to meet the standard of proof on a balance of probabilities. It is submitted that although the 1st Plaintiff asserted that he is in possession of the suit property, he failed to prove having only presented photos which do not meet the standards of electronic evidence. It is submitted that PW2 did not prove that he was a secretary of the allotting authority at the material time. It is submitted that instead, using the Defendant's Exhibits 1, 2, 9, 10 and 11, the Defendant clearly proved how he acquired the suit property.
19. Concerning the question whether the Plaintiffs' case can warrant cancellation of title to land parcel known as Mavoko Township/Block 3 (WASWA) 3951, it is also answered in the negative. It is submitted that the Plaintiffs failed to present evidence to the standard befitting fraud, to warrant cancellation of the said title, placing reliance in *Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & another* [1979] eKLR. It is further submitted that contrary to rule 10(1) of the Civil Procedure Rules, the Plaintiffs failed to set out the particulars of fraud, staking reliance upon



Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR. Besides, it is submitted that the plaintiffs failed to prove that if there was fraud, the Defendant participated, relying on *Eveline Karigu (Suing as the Administratrix of Estate of Late Muriungi M’Gichuga) vs. M’Chabari Kinoro* [2022] eKLR; *Kinyanjui Kamau vs. George Kamau* [2015] eKLR; *Moses Parantai & Peris Wanjiku Mukuru (Suing as Legal representative of Estate of Sospeter Mukuru Mbeere [deceased]) vs. Stephen Njoroge Macharia* [2020] eKLR.

20. Ultimately, this Court is thus urged to dismiss the suit with costs to the Defendant.

PART IV: POINTS FOR DETERMINATION

21. Commending themselves for determination, gleaned from the said Amended Plaint; the said Amended Statement of Defence; and the rival written Submissions of the parties, are six questions for determination as follows:

- i. First, whether the 1st Plaintiff has adduced proof to the required standard - on a balance of probabilities – that the contested property is Plot Number 505/09 as asserted by the 1st Plaintiff (hereinafter “the suit property”).
- ii. Second, whether the 1st Plaintiff has adduced proof to the said required standard of proof that he is the bona fide owner of the suit property.
- iii. Third, whether the 1st Plaintiff has made a case for an order for rectification of the register by cancellation of the Defendant’s name as the registered proprietor of the suit property and registration of the 1st Plaintiff’s name as registered proprietor thereof.
- iv. Fourth, whether the Defendant has made a case for injunctive orders and eviction of the Plaintiffs from the suit property.
- v. Fifth, whether the Defendant has made a case for indemnity against the Third Party.
- vi. Sixth, which party should bear the costs of this suit?

PART V: ANALYSIS OF THE LAW; EXAMINATION OF FACTS; EVALUATION OF EVIDENCE AND DETERMINATION

22. I now embark on analysis, interrogation, assessment and evaluation of each of the six points for determination, seriatim.

- (i) Whether the 1st Plaintiff has adduced proof to the required standard - on a balance of probabilities – that the contested property is Plot Number 505/09 as asserted by the 1st Plaintiff

23. Whereas the 1st Plaintiff asserts that the parcel of land in dispute is Plot Number 505/09 which would later be registered in the name of the Defendant as Mavoko Town Block 3 (WASWA) 3951, the Defendant asserts that his parcel of land known as Mavoko Town Block 3 (WASWA) 3951 is different from Plot Number 505/09. It is thus expedient to resolve this issue on priority basis.

24. In support thereof, the 1st Plaintiff exhibited a letter of allotment dated 24th June 1996 (the Plaintiffs’ Exhibits 1 and 23) which indicates the plot number as 505/09 in WASWA estate, Lakenya Ranch; a copy of a Sale Agreement between the 1st Plaintiff and the 2nd Plaintiff (the Plaintiffs’ Exhibit 2); a transfer form between the 1st and 2nd Plaintiffs (the Plaintiffs’ Exhibit 6); and a letter from WASWA Investment Company Limited dated 7th July 2022 (the Plaintiffs’ Exhibit 24); a copy of the WASWA membership register (the Plaintiffs’ Exhibit 25); a copy of the WASWA application for membership (the Plaintiffs’ Exhibit 26); a copy of the WASWA salary deduction instruction authorization (the



- Plaintiffs' Exhibit 27); a copy of the WASWA proposed subdivision of plot 505/09 (the Plaintiffs' Exhibit 28); and a copy of the WASWA AGM minutes (the Plaintiffs' Exhibit 31).
25. On his part, the Defendant exhibited a letter of allotment dated 27th June 2003 issued by WASWA Investment Company Limited indicating that he was allotted Plot Number 505/9 in WASWA estate, Lakenya Ranch (the Defendant's Exhibit 5).
26. The 1st Plaintiff and the Defendant are thus talking about the same parcel of land. On basis of the foregoing factual findings, this Court concludes that the the 1st Plaintiff has adduced proof to the required standard - on a balance of probabilities – that the contested property is Plot Number 505/09 as correctly asserted by the 1st Plaintiff.
- (ii) Whether the 1st Plaintiff has adduced proof to the said required standard of proof that he is the bona fide owner of the suit property
27. What is the approach deployed in resolving a dispute where one or both parties to a dispute 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 1st 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 13th 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 1st Plaintiff had paid the Defendant any money in 1976. The 1st Plaintiff also had three other receipts. The three receipts were issued by the Defendant on 3rd October, 1990, 16th December, 1998 and 18th 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 16th 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 1st 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 3rd October, 1990 and 16th December, 1998 certainly clash and contradict the 1st 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 18th November, 2008. This receipt related to the beacon certificate. The 1st 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 1st 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 1st Plaintiff's evidence to satisfy me on a balance of probabilities as to which unregistered plot or property was owned by the 1st Plaintiff."

28. 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."
29. 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.
30. 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; and *Sara Leitich vs. Joshua Rutto & 2 others* [2021] 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 persuading a judicial mind, on preponderance of probabilities, that it is more probable than not that she is the bonafide beneficial owner of the suit property.



Determination

31. This Court has scrupulously examined all the chain of documents which were exhibited by the 1st Plaintiff in support of this assertion. This Court has also meticulously examined the Defendant's documentary exhibits.
32. The 1st Plaintiff exhibited evidence of allotment of plot number 505/09 on 24th June 1996 apparently signed by all officials of the allotting authority. The Defendant too exhibited a letter of allotment of the same plot dated 27th June 2003 signed by one official of the WASWA Investment Company Ltd who the Defendant revealed as the third party herein and explained that the subject parcel was later registered and a Title Deed issued as Mavoko Town Block 3 (WASWA) 3951.
33. When faced with such a quandary, he benefits that party who buttresses his/her oral evidence with the corroborative evidence of the officials of the allotting entity. The probative value of the evidence adduced by the allotting entity was discussed *Tabitha Muia vs. Beatrice Nyambura Kariuki & another* [2019] eKLR, where B.M. Eboso expressed the following judicial view and I submit to it: "10. The respondents produced a non-member share certificate dated 19/7/2000 in their name in which the suit property is designated as Plot MA 143. On her part, the appellant similarly produced a non-member share certificate dated 23/6/2000 in which the suit property is designated as P 928. In my view, to fully and effectually adjudicate and settle a land dispute of this nature, it was necessary to join the allocating entity as a party, or at the very least, get independent evidence from the allocating entity as to the ownership and physical location of the property(properties) in the rival share certificates. The parties to this appeal failed to see this important aspect."
34. First, in his evidence which remains uncontroverted, PW2 testified that was the secretary of WASWA Development Society at the material time when the suit property was allotted to the 1st Plaintiff and owned the signature appearing on the on the part of the secretary on the Plaintiff's allotment letter dated 24th June 1996. It was the further uncontroverted evidence a person who is not an employee of WASWA and a member of the society cannot be allotted a plot in WASWA and that WASWA Investment Company Limited was initiated to pursue development of the plots and by the time the company was incorporated, the society had completed its mandate of allotting plots to all its members and none was thus available for allotment. This Court gathers that the in regard to WASWA estate, the recognized allotting authority was WASWA Development Society and not WASWA Investment Company Limited. Allotment of plot number 505/09 to the 1st Plaintiff was not challenged at all. It follows that once a plot is allotted by the allotting authority, there is no way is can be available for allotment unless the initial allotment was cancelled, revoked or discharged or otherwise terminate by legally sanctioned action of the allotting authority or by the Court. Let alone being allotted by an unrecognized authority as was the case for the Defendant. See the holding in *John Muchiri Mbuthia vs. Rebecca Were Mutanda & another* [2015] eKLR; and *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR. In this case, there was no such evidence of cancellation, revocation, discharge or termination by any legal means by the allotting authority or Court.
35. Second, it is indisputable in circumstances where allotment of land is conditioned on membership of the allotting authority like was the case here, a person who is not a member of the allotting authority cannot legally so be allotted land. In this case, the 1st Plaintiff asserted that the Defendant was not a member of the allotting authority being WASWA Development Society and the Defendant so admitted. And so, it was surprising to see the Defendant exhibit an allotment letter (the Defendant's Exhibit 5).



36. Third, it became apparent that in the scheme of things, WASWA Development Society was the official and legal allotting authority and WASWA Investment Company Ltd was only an investment vehicle with no powers to allot plots since there none available for allotment by the time it was incorporated.
37. Fourth, while under cross-examination, the Defendant would not explain how the suit property was directly allotted to him when he was not a member of the society.
38. Fifth, while under cross-examination, the Defendant could not explain how – in reference to the duly signed copies of transfer forms dated 10th March 2010 (the Defendant’s Exhibit 11) it is indicated that Government of Kenya was the transferor of the suit property when the Defendant had all the time claimed that he bought it from the Third Party herein.
39. The foregoing reasons yield a conclusion that the Plaintiff has adduced proof to the required standard of proof - on a preponderance of probabilities - that he is the bona fide owner of the suit property.
- (iii) Whether the Plaintiff has made a case for an order for rectification of the register by cancellation of the Defendant’s name as the registered proprietor of the suit property and reverting the Plaintiff’s name as registered proprietor thereof
40. Before this question is settled, this Court desires to set down the wider framework by way of history.
41. Our current land registration system is a 19th Century conception called the Torrens System.⁴ The Torrens system stands on three intrepid pillars woven around the curtain, mirror and insurance principles. The first pillar is the mirror principle which posits that the register mirrors accurately and completely the current facts about the proprietor. The second pillar is the curtain principle which posits that a person interested to know the full, frank and true status of a piece of land does not need to go behind the curtain (the register or Certificate of title or lease). The third pillar is the insurance or indemnity principle which posits that if loss is occasioned by fraud or by errors made by the Registrar of Titles, the Government which is the guarantor of titles is responsible. The three pillars, read conjunctively, constitute the doctrine of indefeasibility of title. The Torrens system of registration, noticeably, places premium on the accuracy of the land register and insists that the register must mirror all currently active registrable interests affecting a particular parcel of land. Motivated by this curtain and mirror principle, this system of registration adopted the registration of Title in a public register as opposed to registration of private Deeds. The paramount object of the Torrens System was therefore to save a person dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title and to satisfy themselves of its validity. This system of registration vouches for sanctity of title. The doctrine of sanctity of title posits that once a bona fide purchaser for value without notice is registered as the proprietor of the subject parcel of land, it is conclusive evidence that the person named therein is the owner and thus indefeasible in rem (against the entire world including the original proprietor) except on grounds of fraud; misrepresentation; obtaining the title unprocedurally; illegality and obtaining the title through a corrupt scheme, all of which the beneficiary of the impugned title must have partaken and further, except on grounds of the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; liabilities, rights and interests as affect the same and are declared by section 28 of the [Land Registration Act](#) not to require noting on the register. In the foregoing context, this system of registration solemnly promised sanctity of title. It solemnly promised that a title, like money,

⁴ **Named after its avant-gardist, Sir Robert Richard Torrens, an Irish national who was a civil servant in the British Colony of South Australia (as a Colonial Treasurer and Registrar-General of Land) and who later became a Member of the House of Assembly of South Australia representing Adelaide City and Third Premier of South Australia.**



- is not just a piece of paper but a store of value and a solemn promise by the government that the document is authentic and undisputed in origin.
42. The paramount object of the Torrens System was summed up in Privy Council decision in *Gibbs vs. Messer* (1891) AC 28, at pages 248 and 254, as follows: “The main object of the Act and the legislative scheme for the attainment of that object are equally plain. The object is to save a person dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title...everyone who purchases in bona fide and for value, from a registered proprietor, and who enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.” In *Regal Constellation Hotel Ltd Re* 2004 CanLII 2006 Ontario C.A., at page 13 paragraph 42, the Court stated that “The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.”
 43. What then constitutes the doctrine of indefeasibility of title? The three pillars above are what constitute indefeasibility of title. See *Gibbs vs. Messer* (1891) AC 28 or 248.
 44. The Torrens system of registration vouches for sanctity of title. The doctrine of sanctity of title posits that once a bona fide purchaser for value without notice is registered as the proprietor of the subject parcel of land, it is conclusive evidence that the person named therein is the owner and thus indefeasible against the entire world including the original owner except on grounds of fraud; corruption; misrepresentation; being obtained unprocedurally; illegality; being obtained through a corrupt scheme; all of which the holder of the title must have partaken and further except on grounds of the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; liabilities, rights and interests as affect the same and are declared by section 28 of the [Land Registration Act](#) not to require noting on the register. In the foregoing context, this system of registration solemnly promised sanctity of title. It solemnly promised that a title, like money, is not just a piece of paper but a store of value and a solemn promise by the government that the document is authentic and undisputed in origin. As a result of this doctrine, a property owner is fortified in his belief that his home is his castle, where even the King may not enter, to paraphrase William Pitt 1st Earl of Chatham.
 45. In Kenya, the tenets of the Torrens System have been codified in both our [Constitution of Kenya, 2010](#) and the [Land Registration Act](#).
 46. Article 40 of [the Constitution](#) guarantees and protects the right to acquire and own property. This right encompasses inter alia the protection against arbitrary deprivation of property from the proprietor and the protection against limitations or restrictions laid in the way of enjoyment of the property. The text reads as follows: “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person— (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any



description, unless the deprivation— (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

47. The suit property is a freehold tenure. A Kenyan citizen can own, in Kenya, land of any tenure unlike an alien. Article 65 of [the Constitution](#) provides that a citizen can hold land of any tenure (whether freehold or leasehold). It states thus: “(1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years. (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine-year leasehold interest, and no more. (3) For purposes of this Article— (a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and (b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens. (4) Parliament may enact legislation to make further provision for the operation of this Article.”
48. In accord with the Torrens System, in Kenya, registration of a person as the proprietor of land vests in that person absolute ownership of that land and so is the registration of a person as a proprietor of a leasehold interest. Section 24 of the [Land Registration Act](#) provides for the interest conferred by registration in the following words: “Subject to this Act— (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
49. Further and in accord with the Torrens System, the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except on grounds of fraud; corruption; misrepresentation; being obtained unprocedurally; illegality; being obtained through a corrupt scheme; all of which the holder of the title must have partaken and further except on grounds of leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register. This doctrine of indefeasibility is enacted under section 25 of the [Land Registration Act](#) read with section 24 thereof and is modelled along the grains of section 91 of the Real Property Act, 1858 which read as follows: “91. It shall not be lawful for any person to institute or prosecute any action of ejectment for the recovery of land under the operation of this Act, against the registered proprietor, save and except only in the case of a mortgagee against his mortgagor, an encumbrancee against his encumbrancer, or a lessor against his lessee, in default, under the terms, conditions, or covenants of a bill of mortgage, bill of encumbrance, bill of trust, or lease, as the case may be, executed and registered in accordance with the provisions of this Act, or in the case of any person duly authorised by any Court having jurisdiction in cases of bankruptcy or insolvency, against a bankrupt or insolvent, or in case the registered proprietor has obtained such land by fraud or misrepresentation.” Section 25 of the [Land Registration Act](#) provides for rights of a proprietor in the following words: “(1) The rights of a proprietor, whether acquired



on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

50. In Kenya, the only noticeable departure from the Torrens system is that whereas in original prescription of the Torrens system, both the Certificate of Title and register were conclusive evidence of title, in Kenya only the register is conclusive evidence of title while a Certificate of Title or Lease is prima facie proof that the person’s name therein is the proprietor of the subject parcel of land. Section 33 of the Real Property Act, 1858 read as follows: “33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error.” In Kenya, this has since been modified to leave the register only as the conclusive evidence of title, rendering a Certificate of Title or Lease issued by the Registrar upon registration a mere prima facie evidence that the person named therein is the proprietor of the subject parcel of land. Section 26(1) of the [Land Registration Act](#) provides that “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” This departure of the evidentiary character of a Certificate of Title or Lease from being conclusive evidence in the original Torrens prescription to presenting prima facie evidence in the [Land Registration Act](#) regime, is apparently motivated by the local realities chiefly the forgery menace in Kenya infamously known as the ‘River Road Titles.’ In Kenya, therefore, conclusive evidence of proprietorship lies not in the Certificate of Title or lease but the register, so that the register is the title and the title is the register. Under the Torrens system, a certificate of title or lease is therefore not mandatory. Since under the Torrens System the register is the ultimate title and the ultimate title is the register. A Certificate Title or Lease is thus mere prima facie proof of proprietorship and thus founds a rebuttable presumption that the person named therein has been registered as the proprietor of the subject parcel of land. Part of the reasoning behind this position is that no interest in an instrument pass until it is registered. In this sense, a Certificate of Title or Lease is elective and not mandatory. The merit of this thinking is that if a Certificate of Title or Lease is lost for instance, it does not affect ownership. It only calls for a replacement. Likewise, if a certificate of title or lease forged, it does not affect the status of register itself in any way at all as title is separate entity. Being the child of the register, a certificate of title or lease is only defeasible on grounds of except on grounds of fraud; corruption; misrepresentation; being obtained unprocedurally; illegality; being obtained through a corrupt scheme; all of which the holder of the title must have partaken. Section 26 of the [Land Registration Act](#) provides thus: “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b)



where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.” Section 30 of the [Land Registration Act](#) provides that “(1) The Registrar may, if requested by a proprietor of land whose name appears in the register or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease. (2) Notwithstanding subsection (1)— (a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease; and (b) no certificate of title or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-one years. (3) A certificate of title or certificate of lease shall be prima facie evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register. (4) If there is more than one proprietor, unless they are tenants in common, the proprietors shall agree among themselves on which of them shall receive the certificate of title or the certificate of lease, and if they fail to agree, the certificate of title or the certificate of lease shall be filed in the registry. (5) The date of issue of a certificate of title or certificate of lease shall be noted in the register.” Further, a certificate of title or lease shall be prima facie evidence of the matters shown in the certificate. Section 30 of the [Land Registration Act](#) provides for the import and purport of issuance of a Certificate of title and Certificate of lease. It provides thus: “(1) The Registrar may, if requested by a proprietor of land whose name appears in the register or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease. (2) Notwithstanding subsection (1)— (a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease; and (b) no certificate of title or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-one years. (3) A certificate of title or certificate of lease shall be prima facie evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register. (4) If there is more than one proprietor, unless they are tenants in common, the proprietors shall agree among themselves on which of them shall receive the certificate of title or the certificate of lease, and if they fail to agree, the certificate of title or the certificate of lease shall be filed in the registry. (5) The date of issue of a certificate of title or certificate of lease shall be noted in the register.”

51. For the holding that a register is the title and certificate of title is a mere prima facie proof that the person named therein is the proprietor, see an Australian decision in *Breskvar vs. Wall* (1971) 126 CLR, at pages 4 and 14, Barwick CJ held that “The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void... He noted, as an important benefit of the new system, “cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown’. “This is an assertion that the title of each registered proprietor comes from the fact of registration, that is made the source of the title, rather than a retrospective approbation of it as derivative right...”
52. What are the interests which override a title even without being reflected in the register? Unless the contrary is expressed in the register, all registered land shall be subject to overriding interests without being noted on the register which interests are trusts including customary trusts; rights of way, rights of water and profits subsisting at the time of first registration under this Act; natural rights of light,



air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; charges for unpaid rates and other funds; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law and any other rights provided under any written law. Section 28 of the [Land Registration Act](#) provides for overriding interests. It states that “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) deleted by Act No. 28 of 2016, s. 11(a); (b) trusts including customary trusts; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support; (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (f) deleted by Act No. 28 of 2016, s. 11(b); (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and (j) any other rights provided under any written law, Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.” None of the rights falling under this category was adduced by the Defendants.

53. The principle of insurance or indemnity is enacted under section 53 of the [Land Registration Act](#) which is modelled along the lines of section 92 of the Real Property Act, 1858. Section 92 of the Real Property, 1858 provided as follows: “92. Any person who shall, by the decree of any Court having jurisdiction in such case, be declared to be the lawful heir to any land under the operation of this Act, or any person who shall by any such decree be declared to have been deprived of an estate or interest in such land, through the entry in the register book of any memorandum of sale or other instrument affecting such land, made, or procured to be made by fraud, error, misrepresentation, oversight, or deceit, may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who may, by fraud or other means as aforesaid, have become registered as proprietor of such land; and the Court or Jury before whom such action is tried shall, if such person obtains a verdict in his favour, find damages against the person so registered as proprietor through fraud, or error, or other means aforesaid, for such sum of money as the Court or Jury may think fit, not exceeding the value of such land at the time when such person did so wrongfully, or in error become registered as proprietor of the same, together with interest on the amount of such value, computed at Six Pounds in the One Hundred Pounds per annum, from the date when such person so became wrongfully, or in error, registered as proprietor.” Section 53 of the [Land Registration Act](#) reads as follows: “(1) If a person acquires or receives land in respect of which the Court could make an order for restoration or for the payment of reasonable compensation, the Court shall not make that order against that person if that person proves that the land was— (a) acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies; or (b) acquired or received through a person who acquired or received it in the circumstances set out in paragraph (a). (2) Reference to knowledge in this section shall include actual, constructive and imputed knowledge.”
54. In the original scheme of the Torrens system, the doctrine of indefeasibility is fortified by the doctrine of innocent purchaser for value who is then deemed to hold a good title, provided the register reflected the seller as the owner and the purchaser did not participate in the impugned fraud. See *David Peterson Kiengo & 2 Others vs. Kariuki Thuo* (2012) eKLR, per Prof. J.M. Ngugi, J.; *Joseph N.K. Arap Ng'ok*



- vs. *Moiyo Ole Keiwua & 4 others* (1997) eKLR, per Tunoi, Shah and Pall, JJA (as they then were); *Charles Karathe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others* (2013) eKLR, per Onyango Otieno, JA (as he then was), Gatembu and Mohammed, JJA.; *Hannah Wangui Ithebu & Other vs. Joel Nguigi Magu* (2005) eKLR, per Visram, J. (as he then was).
55. This doctrine of indefeasibility extends to charges, mortgages and property acquired through auctions as result on the exercise of the power to sell under the said charges and mortgages too. Unless there is proof that a chargee participated in the impugned illegality, an innocent chargee without notice of fraud or illegality gets a good indefeasible security. See *Dinshaw Byramjee & Sons Ltd vs. A.G. of Kenya* (1966) E.A. 198; and *Frazer vs. Walker* (1967) 649 ALL E.R.,
 56. And what is the position of a forged title in the Torrens system? A forged title is not good in favour of the forger but in favour of the bona fide purchaser for value. In *Gibbs vs. Messer* (1891) AC 28, at page 257, the Court stated that “... Although a forged transfer which is void at common law, will, where duly entered on the register, becomes the root of a valid title, in a bona fide purchaser.” Also, in *Assets Company Ltd vs. Mere Roihi and Others* (1905) A.C. 176, at page 18 para 1, the Privy Council had this to say: “... A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has better title than his vendor, even if title of the latter could be impeached ...”
 57. Even when original grant void, subsequent bona fide purchaser’s title is valid and indefeasible. In *Thomson vs. Edie et al* (2006) BCSC (CanLII) Supreme Court B.C. Canada, at page 22 para 61, it was found as a matter of fact that there was an irregularity in issue of the grant but by this time, the property had been sold to a bona fide purchaser. The Court held that “However, the Eadies are entitled to rely on the same protection of indefeasibility of title as if the grant had been valid. That is the intention and the effect of the LTA.”
 58. Also, in *Asset Co. Ltd. vs. Mere Roihi and others* (1905) AC 176, it was found as a matter of fact that in issuing grant to Native lands, there were several irregularities and subsequently the parcels of land issued under this irregular grant were sold successively to the bona fide buyers for which transfers were effected, buyers registered as new proprietors and certificates of title issued. The titles were challenged and the Privy Council held at page 2 that “... in the absence of fraud by the Company or its agents, registration is conclusive, and confers good title on the Company, and that in the proceedings in the Native Court even if proved, cannot affect the title of the Company, although such defects may possibly entitle the Natives to Compensation for any injury caused to them by improper registration...”
 59. In the same *Assets Company Ltd vs. Mere Roihi and Others* (1905) A.C. 176, the Privy Council held at page 18 that “... A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has better title than his vendor, even if title of the latter could be impeached ...”
 60. Even where there is alleged fraud or illegality, the Registrar of Lands cannot directly act on the allegations unless proved in a Court of law. In this sense, a Registrar of Lands does not have power to cancel a title unless through an order of the Court. See *Isaac Gathungu Wanjohi & Another vs. Attorney General & 6 Others* (2012) eKLR; and *Kuria Greens Limited vs. Registrar of Titles & Another* (2011) eKLR.
 61. Across the border in Uganda which also adopted the Torrens system of registration, in *C.R. Patel vs. Commissioner Land Registration & 2 Other* (Judgement Jan 2013), HCCC No. 87 of 2009, Uganda High Court at Kampala (Land Division), where the Registration of Titles Act of Uganda is substantially the same as the [Land Registration Act](#), a fraudster did what Njendu did in Kenya and managed to get a duplicate or provisional certificate of title without going through the process of Gazettement, forged a transfer, got registered and sold to an innocent purchaser for value without notice. It was held that despite irregularities and illegalities in issue of provisional certificate and



registering forged transfer, since buyer was a bona fide buyer and was not concerned about the past illegalities, his title was indefeasible and valid in rem. It was also stated that under Torrens system in fact register is the title and not certificate. Once duplicate or provisional certificate is issued, it replaces the old one.

62. Also, for the holding that a bona fide purchaser for value without notice from a registered proprietor shall acquire an indefeasible right, notwithstanding the infirmity of his author's title and that the purchaser has no obligation to go beyond the register to investigate the vendor's title, see *Shimoni Resort vs. Registrar of Titles & 5 others* (2016) eKLR (per Okongó, J); *Njilux Motors Ltd vs. KP&L & Another* Civil Appeal Number 206 of 1998; *Russel & Co. Ltd vs. Commercial Bank of Africa Ltd* (1986) KLR 633; *Wreck Motors Enterprises vs. Commissioner of Lands Nairobi*, Civil Appeal Number 71 of 1997 (Unreported); and *Permanent Markets Society & 11 Others vs. Salima Enterprises & 2 Others* Civil Appeal Number 185 of 1997.
63. However, there was a departure from this doctrine of indefeasibility of title 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. 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."
64. Against whom can the rightful owner sustain a cause? The rightful owner has a right to recover the parcel of land from the fraudster but after it passes hands to a bona fide purchaser, the right is defeated and thus left with the right to pursue damages. In the Australian case in *Breskvar vs. Wall* (1971) 126 CLR (High Court Aus), the Court held as follows: "...the Appellants were not deprived of their land when it was registered in the name of a rogue because by appropriate legal action they could have recovered the land from him. However, the Appellants irrevocably lost their land once the rogue sold to an innocent person who acquired a title superior to theirs."
65. How is this position of indefeasibility of title reconciled with the common law doctrine *videlicet non dat qui non habet*. This common law doctrine simply translated that no one gives what he does not have. Differently put, *nemo plus iuris ad alium transferre potest quam ipse habet*, which loosely translates that one cannot transfer to another more rights than they have, so that a purchaser from a fraudster acquires no good title. In a New Zealand leading decision in indefeasibility of title in *Boyd vs. Mayor of Wellington* (1924) NZLR 1174, the Plaintiff (Mr. Boyd) owned a parcel of land in Wellington until 1917 when the local council acquired it compulsorily to build part of the Wellington Tramway System. After the council was registered as the new proprietor of the property, it came to the Plaintiff's attention that because there was an existing building on the property, the council had no legal right to acquire the property without the owner's consent. The Plaintiff took legal action against the council to return the land back to his ownership. The Court ruled in favour of the council on grounds *inter alia* that the transfer was not obtained by way of fraud and the Wellington City Council had obtained an indefeasible title to the property. Salmond, J. elucidated the interface between *nemo dat* and indefeasibility of title and had the following to say about the person deemed an innocent purchaser for value without notice: "This case raises once more the important question of the scope and nature of the rule as to indefeasibility of title under the Land Transfer Act. I regret that I am unable to take the same view of this matter as is taken by a majority of the members of the Court. I think, on the contrary, that an instrument which is null and void before registration remains equally null and void *inter partes* notwithstanding and creates no indefeasible title until and unless the rights of some third person purchasing in good faith and for value on the faith of the registered instrument have supervened.



Until then it is the right and duty of which now arises for consideration is whether the District Land Registrar to rectify the Register registration by cancelling a registration which was wrongly procured and therefore ought not have to be continued.”

66. In Kenya, however, on 21st April 2023, the equitable doctrine of innocent purchaser for value appears to have considerably diminished in the recent decision of the Supreme Court of Kenya (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). In this case, while discussing the doctrine of indefeasibility of title, SCORK - without saying it expressly – appears 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 1st 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.” This decision has far-reaching implications on purchasers of land, since it bears a reverberating departure from the curtain, mirror and insurance principles of the Torrens System. The decision has shaken the very foundation of the equitable doctrine of innocent purchaser for value in the following respects. First, it seems to suggest that there will be no sanctity of title if the process followed prior to the issuance of the title did not comply with the law with the lethal effect that even an innocent purchaser cannot rely on the principle of indefeasibility of title if the root of the title is challenged. Second, the mirror principle has been rendered ineffectual. The implication of this is that a purchaser or lender or investor must walk the extra mile beyond the register which will include but not limited to investigating the comprehensive history of the property right from the first allocation to the potential vendor or chargor. Third, the burden has now shifted from the government to the purchaser or lender or investor to ensure legality of the title.
67. The SCORK decision in *Dina Management Limited*, supra, 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. Ultimately, despite the varied positions taken by other superior Courts as discussed at length supra, owing to the legal position that the SCORK binds all Courts below, this Court can only proceed on the footing of *Dina Management Limited vs. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).

Determination

69. It is common ground that the Defendant is now the registered proprietor of the suit property. From the foregoing confab, the Torrens System of land registration now adopted in Kenya imported the principle of sanctity of title – now housed in section 26(1) of the *Land Registration Act* - renders the registered proprietor the absolute and indefeasible owner thereof, subject only to such encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved.
70. The Plaintiffs claimed that the Defendant acquired the impugned title namely Mavoko Town Block 3 (WASWA) 3951 by fraud, illegality and unprocedural process. Whereas the ground of illegality and unprocedural process require a standard of proof of balance of probabilities, the ground of fraud requires a higher standard of proof than balance of probabilities but below beyond reasonable doubt. It is now trite law that the standard of proof required for claims grounded on fraud is the intermediate standard which is higher than balance of probabilities but lower than proof beyond reasonable doubt. In *Ratilal Gordhanbhai Patel vs. Lalji Makanji* [1957] 1 EA 314; *Sir Newnham Worley P, Sir Ronald Sinclair V-P and Lowe, J.* laid the following standard of proof for fraud, which standard has since been adopted in subsequent decisions of superior Courts: “There is one preliminary observation which we must make on the learned judge’s treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.” This standard of proof has since been adopted in *Mike Maina Kamau vs. Attorney General* [2017] eKLR by L. Gacheru, J.; *Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & another* [1979] eKLR, per Madan, Wambuzi and Law, JJA (as they then were), et alia. See also



Evans Kidero vs. Speaker Nairobi County Assembly [2015] eKLR; and Vijay Morjaria vs. Nansing Madhusingh Darbar & Others [2000] eKLR.

71. What yardstick is applied to measure this standard of proof? It will be noted that this distinctive intermediate standard of proof also applies to proof of any election petition grounds except election offences and data-specific grounds which require proof beyond reasonable doubt. The threshold of this standard is attained when a Court is satisfied as to be sure or driven to a point of certainty by cogent, specific, satisfactory, definitive and certain evidence.
72. Considering the five findings entered and the ultimate conclusion reached under question (ii) supra, the mind of this Court was left without doubt that the root of the title has irredeemably been shaken by the evidence that the Third Party acquired ownership of the suit property through fraud, misrepresentation of facts, a corrupt scheme, unprocedural process and thus vitiated with illegality.
73. It follows that the Third Party had good title to pass to the Defendant. *Non dat qui non habet* or put differently, *nemo dat quod non habet*. No one can give what he does not have. *Nemo plus iuris ad alium transferre potest quam ipse habet*. One cannot transfer to another more rights than he has.
74. Ultimately, the registration of the Defendant as the proprietor thereof cannot benefit from protection of law. 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); *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR; *Land Commission vs. Afrison Export Import Limited 7 10 others* [2019] eKLR; *Lawrence P. Mukiri Mungai vs. Attorney General & 4 others* [2017] eKLR; *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR; *Samuel Kamere vs. Land Registrar Kajiado* [2015] eKLR and *Teresia Kamene vs. Harun Edward* [2019] eKLR.
75. The foregoing findings have thus generated persuasion in the mind of this Court -prodigiously - that the 1st Plaintiff has made a case for an order for rectification of the register by cancellation of the Defendant as the registered proprietor of the suit property and entry of the 1st Plaintiff as registered proprietor thereof.
 - (iv) Whether the Defendant has made a case for injunctive orders and eviction of the Plaintiffs from the suit property
76. Having filed no Counter-Claim, it follows that the Defendant has not suit of his own upon which the said prayers can anchor. The Defendant's prayers must thus fail.
 - (v) Whether the Defendant has made a case for indemnity against the Third Party
77. This Court has herein above stated that the Defendant filed a third-party notice and on 17th October 2017, while this matter was pending in the ELC at Machakos, Angote, J. granted it and issued directions that the Defendant serves the third party and that the third party should enter appearance and file a Defence.
78. The Defendant seems to have abandoned the third-party notice. There was no service, no request to prosecute against the third-party and finally, no prosecution. It follows that the third-party claim has failed.
 - (vi) Which party should bear the costs of this suit?
79. The law on costs as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See *Morgan Air Cargo Ltd vs. Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court



aforesaid remains unscathed. See *Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another* [2016] eKLR, per C. Kariuki, J. How then is this discretion exercised? Discretion is not the same thing as *carte blanche*. Beacons demarcating how discretion is exercised are as follows.

80. The first beacon is that discretion ought to be exercised with circumspection and judiciously. See *Christopher Kiprotich vs. Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and Another vs. Shah* [1968] EA 93 and *Mohindra vs. Mohindra* (1953) 20 EACA 56; *Sharp vs. Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173, per Lord Halsbury L. C.; and *Rooke's case*, 5 Rep. 99b (1598), cited in approval by Mativo, J. in *Republic vs. Public Procurement Administrative Review Board & 2 others* [2018] eKLR.
81. The second beacon is that costs follow the event unless the Court finds a good cause to negate this trajectory. See *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR). In this context, the meaning ascribed to the words “costs shall follow the event” is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99; *Dipchem East Africa Limited vs. Karutturi Limited (In Receivership)* [2015] eKLR, per Gikonyo, J.; *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another* (2016) eKLR, per Mativo, J.; and *Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) *Ibrahim and Wanjala*, SCJJ.
82. The third beacon which is closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR, per Odunga, J.
83. The fourth beacon which is closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in *Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) *Ibrahim and Wanjala*, SCJJ.
84. The fifth beacon which connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. See *Orix Oil (Kenya) Ltd vs. Paul Kabeu & 2 Others* (2014) eKLR; and *Morgan Air Cargo Ltd vs. Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J.
85. Upon considering the cause of action and circumstances unique to this case including but not limited to the history of the matter, this Court does not find a good cause to depart from the general proposition of the law that costs follow the event.

PART VI: DISPOSITION

86. Wherefore this Court finds merit of the Plaintiffs’ claim and accordingly enters Judgment for the Plaintiffs (as against the Defendant) in the following terms:
 - i. A declaration is hereby issued that the contested plot located in WASWA Estate, Lukenya Ranch (the suit property) is Plot Number 505/09.
 - i. A declaration is hereby issued that the 1st Plaintiff is the bonafide beneficial owner of the suit property.



- ii. The Machakos County Land Registrar is hereby ordered to rectify the register of the parcel of land known as Mavoko Block 3 (WASWA) 3951 by cancelling the Defendant's name as the registered proprietor thereof and substituting therewith the 1st Plaintiff's name as registered proprietor thereof.
- iii. A permanent injunction is hereby issued restraining the Defendant either by himself or his agents, servants or any other person or persons acting or claiming to act at the behest of the Defendant, from interfering with the Plaintiffs' right of occupation and use of Title Number Mavoko Township Block 3 (WASWA) 3951, previously known as plot number 505/09 WASWA Estate, Lukenya Ranch.
- iv. The Defendant shall bear the costs of this suit.

87. It is so ordered.

Delivered, Signed and Dated in Open Court at Machakos Law Courts this 31st day of August 2023

.....

C.N. Ondieki

Principal Magistrate

Advocate for the Plaintiff:.....

Advocate for the Defendant:.....

The Third Party:.....

Court Assistant:.....

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