



**Musandu Nyagudi (Suing on behalf of the Estate of Shadrack Jprim Wamari  
Musandu) v Commissioner of Lands & 4 others (Environment and Land  
Case 50 of 2016) [2025] KEELC 5775 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5775 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE 50 OF 2016  
SO OKONG'O, J  
JULY 31, 2025**

**BETWEEN**

**NYAGUDI MUSANDU NYAGUDI (SUING ON BEHALF OF THE ESTATE OF  
SHADRACK JPRIM WAMARI MUSANDU) DECEASED ..... PLAINTIFF**

**AND**

**THE COMMISSIONER OF LANDS ..... 1<sup>ST</sup> DEFENDANT  
REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT  
GEORGE ADADA NYAGOWA ..... 4<sup>TH</sup> DEFENDANT  
CRATER AUTOMOBILE (NBI) LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was brought by Selyna Z. Musandu, the former administratrix of the estate of Shadrack Joram Wamari Musandu, deceased on 8<sup>th</sup> March 2016, through a plaint dated 4<sup>th</sup> March 2016. The plaint was amended on 12<sup>th</sup> March 2019 to add the 5<sup>th</sup> Defendant which was not a party to the suit when filed. Selyna Z. Musandu died on 27<sup>th</sup> May 2019 and was substituted with the current Plaintiff, Nyagudi Musandu Nyagudi. The substitution of the original Plaintiff necessitated further amendment of the plaint on 15<sup>th</sup> March 2023. In the further amended plaint, the Plaintiff averred that he was one of the administrators of the estate Shadrack Joram Wamari Musandu, deceased (hereinafter after referred to as “the deceased”). The Plaintiff averred that the deceased was registered as a lessee of the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> June 1993 in respect of all that parcel of land known as L.R.No. 18998, Grant Number I.R 64336 measuring 1.200 hectares situated within Kisumu Municipality (hereinafter referred to as “the suit property”).



2. The Plaintiff averred that the deceased was issued with Grant Number I.R 64336 in respect of the suit property on 30<sup>th</sup> December 1994, which was registered as No. I.R. 64336/1 on 6<sup>th</sup> January 1995. The Plaintiff averred that the said Grant had not been revoked. The Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, in collusion with the 4<sup>th</sup> Defendant, had fraudulently and unlawfully made a parallel Grant Number 153894 for a parcel of land known as L.R No. 29996, which was registered as No. I.R 153894/1 on 17<sup>th</sup> January 2014 (hereinafter referred to as “the second Plot”) in favour of the 4<sup>th</sup> Defendant.
3. The Plaintiff averred that the 4<sup>th</sup> Defendant and/or his assignees, servants and /or agents entered the suit property purporting that it was the second Plot and commenced construction of permanent structures thereon thereby interfering with the Plaintiff’s interest in the suit property. The Plaintiff averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had the mandate of managing public land on behalf of the National and County Governments were either complicit in the said actions or failed in their duties.
4. The Plaintiff averred that the purported registration of the 4<sup>th</sup> Defendant as the proprietor of the suit property and the subsequent dealings with the property were fraudulent and/or irregular, unlawful and void ab initio. The Plaintiff pleaded several particulars of fraud, illegality, contractual, statutory and constitutional violations. The Plaintiff averred that he had been denied quiet possession and use of the suit property and had suffered loss. The Plaintiff prayed for judgment against the Defendants jointly and severally for;
  1. A declaration that the registration of the 4<sup>th</sup> Defendant as the proprietor of the second Plot and any subsequent dealings with the property were unlawful and void ab initio.
  2. An order for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to forthwith annul, revoke and cancel the purported title for the second Plot.
  3. An injunction restraining the 4<sup>th</sup> Defendant, whether acting by himself, his servants, agents, representatives or any one of them howsoever from occupying, continuing to occupy or developing or in any way interfering with the Plaintiff’s quiet possession of the suit property.
  4. An injunction restraining the 4<sup>th</sup> Defendant whether by himself or his servants, agents or representatives from interfering with, selling, disposing of, leasing, charging, transferring or causing or suffering to be transferred any interest in the suit property which he holds falsely as the second Plot.
  5. General damages for trespass and loss of use.
  6. Costs of this suit.
  7. Further or other relief deemed just and appropriate by the court.
5. The Attorney General entered an appearance and filed a statement of defence on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 14<sup>th</sup> November 2016. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied all the allegations in the plaint save for the description of the parties. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants prayed that the suit be dismissed with costs.
6. The 4<sup>th</sup> Defendant filed a statement of defence on 18<sup>th</sup> May 2016. The 4<sup>th</sup> Defendant averred that he held an authentic and lawful Grant Number I.R 153894 in respect of land parcel, L.R No. 29996 (the second Plot). The 4<sup>th</sup> Defendant averred that a single parcel of land could not have two and/or separate registrations. The 4<sup>th</sup> Defendant averred that as the lawful registered proprietor of the second Plot, he had a right to peacefully make use of the property without any form of hindrance whatsoever. The 4<sup>th</sup>



Defendant averred that he was registered as the owner of the second Plot lawfully, after following all the laid-down procedures relating to survey and registration. The 4<sup>th</sup> Defendant averred that at the time of registration of the second Plot in his favour, the second Plot was vacant, unallocated and without any encumbrances whatsoever. The 4<sup>th</sup> Defendant prayed that the suit be dismissed with costs.

7. The 5<sup>th</sup> Defendant filed its statement of defence and counterclaim on 18<sup>th</sup> April 2019. The 5<sup>th</sup> Defendant denied all the allegations in the amended plaint save for the description of the parties. The 5<sup>th</sup> Defendant averred that it was a bona fide purchaser for value of the second Plot and held a valid title deed for the property. The 5<sup>th</sup> Defendant averred that it purchased the suit property from the 4<sup>th</sup> Defendant through a sale agreement dated 12<sup>th</sup> January 2015 after conducting due diligence. The 5<sup>th</sup> Defendant prayed that the suit be dismissed with costs.
8. In its counterclaim, the 5<sup>th</sup> Defendant reiterated that it acquired the suit property from the 4<sup>th</sup> Defendant through a sale agreement dated 12<sup>th</sup> January 2015. The 5<sup>th</sup> Defendant reiterated that it purchased the suit property after conducting due diligence and in reliance on the information contained in the records of ownership supplied by the 1<sup>st</sup>-4<sup>th</sup> Defendants, which information it believed to be true. The 5<sup>th</sup> Defendant prayed that the Plaintiff's suit be dismissed and judgment be entered against the Plaintiff for;
  1. A declaration that the second Plot belonged to the 5<sup>th</sup> Defendant, being the bona fide purchaser thereof for value.
  2. Costs of the suit and the counterclaim.
  3. Any other relief that the court may deem fit to grant.
8. At the trial, the Plaintiff, Nyagudi Musando Nyagudi (PW1) after introducing himself to the court adopted his witness statement dated 3<sup>rd</sup> May 2023 as part of his evidence in chief. He produced the documents attached to the Plaintiff's list of documents dated 4<sup>th</sup> March 2016 as a bundle as P.EXH.1.
9. On cross-examination by the advocate for the 4<sup>th</sup> and 5<sup>th</sup> Defendants, the Plaintiff stated as follows: The 5<sup>th</sup> Defendant purchased the second Plot after the filing of this suit and while there was an injunction in force prohibiting disposal of the property. He had not made any claim against the 5<sup>th</sup> Defendant in the plaint and did not file a defence to the 5<sup>th</sup> Defendant's counterclaim. The land in dispute was one parcel of land, and his deceased father was the first to acquire it. The Grant that was issued to the 4<sup>th</sup> Defendant after his father's Grant in respect of the parcel of land was fraudulent. Even the 5<sup>th</sup> Defendant had noted the fraudulent nature of the 4<sup>th</sup> Defendant's Grant.
10. The Plaintiff's next witness was John Dominic Obel (PW2). PW2 stated that he was a licensed land surveyor. He stated that he graduated in 1967 from the then University of East Africa. He stated that he worked with the Ministry of Lands for 30 years and retired in 1997. He stated that at the time of his testimony, he was practising as a private surveyor. He stated that he knew the Musandu family. He stated that he carried out a resurvey on the parcel of land in dispute in Kisumu and prepared a report on his findings dated 5<sup>th</sup> February 2016. He stated that the Commissioner of Lands issued two titles for one parcel of land at different times. He stated that the Commissioner of Lands issued another letter of allotment to the 4<sup>th</sup> Defendant for the disputed parcel of land while the Plaintiff's letter of allotment was subsisting. He stated that he also wondered how the Director of Survey could allow another survey to be conducted on top of an earlier survey. He recommended that the duplicated documentation be cancelled. He also recommended that his re-survey plan be accepted and that the Plaintiff be registered as the owner of the suit property. He recommended further that the Plaintiff seek compensation for the portion of his land that was taken by the road. He produced his report as P.EXH.2.



11. On cross-examination by the advocate for the 4<sup>th</sup> and 5<sup>th</sup> Defendants, PW2 admitted that the court was dealing with L.R No. 18998 and L.R No. 29996 in the names of Musandu, deceased and the 4<sup>th</sup> Defendant, respectively. He stated that the two (2) parcels of land had two different survey plans, but on the ground, he was only able to locate L.R No. 18998. He stated that he found that the two parcels of land were falling in the same position on the ground. He stated that he was a licensed surveyor number 123. He told the court that the two L.R. numbers were given by the Director of Surveys, and before a number is given, the Director of Surveys must ensure that there is a letter of allotment, a Part Development Plan (PDP) and a survey work. He stated that all these procedures were followed for the two L.R numbers. He stated that he had known the deceased, Mr. Musandu, for several years. He stated that they were with him in college while Musandu's wife was in school with his sister.
12. PW2 stated that the Survey Plan No. F/R 322/112 and No. F/R 250/156 were on different coordinate systems. He stated that Survey Plan No. F/R 250/156 showed the Plaintiff's plot but it was cancelled by the Director of Surveys and replaced with Survey Plan No. F/R 322/112. He stated that Survey Plan No. F/R 250/156 was shown as cancelled by the Director of Survey. He stated that Survey Plan No. F/R 250/156 was prepared based on the British Directorate of Overseas Surveys System (D.O.S), while Survey Plan No. F/R 322/112 was based on the Kenyan Major System. He stated that there was a technical section at the Director of Surveys that did the transformation of survey data from one system to the other. He stated that they normally rely on the Director of Surveys for the transformation of data. He stated that the transformation was done for him by the Director of Surveys. He admitted that he did not have a document showing that the Director of Surveys had transformed the data for him. He admitted that the titles were issued on the strength of different letters of allotment and survey plans submitted to the Director of Surveys. He stated that the titles and survey plans could be different, but the parcel of land in both was the same on the ground.
13. The 4<sup>th</sup> Defendant, George Adada Nyagowa (DW1), told the court that he was a businessman specialising in real estate. He adopted his witness statement dated 14<sup>th</sup> October 2016 as part of his evidence in chief. He stated that he applied for the second Plot and the same was allocated to him through a letter of allotment dated 8<sup>th</sup> July 1998. He stated that he complied with all the necessary procedures while acquiring the second Plot. He stated that he paid for the allotment in 2013 and the Grant was issued to him on 17<sup>th</sup> January 2014. He produced the documents in his list of documents dated 30<sup>th</sup> September 2017 as D.EXH.1 save for the survey report. He stated that he engaged a surveyor who prepared a report. He stated that the surveyor went to the ground on 17<sup>th</sup> June 2014, surveyed the land in dispute and prepared a survey report dated 15<sup>th</sup> May 2017. DW1 stated that the 5<sup>th</sup> Defendant, which purchased the second Plot from him, was unable to develop the same. He stated that his surveyor prepared a further report, which was contained in the 4<sup>th</sup> Defendant's Supplementary List of Documents filed on 27<sup>th</sup> February 2018. He stated that the suit property and the second Plot were in different locations. He stated that the two parcels of land had different survey plans and coordinates. He stated that the two (2) survey plans for the said parcels of land were on the same survey system and not on different systems as claimed by the Plaintiff's surveyor.
14. On cross-examination by the Plaintiff's advocate, DW1 stated that the parcel of land, L.R No. 29996, Grant No. I.R 153894 (the second Plot) was allocated to him as unsurveyed land. He stated that the Plaintiff's parcel of land and his parcel of land were different. He stated that he complied with the conditions in the letter of allotment. He stated that he sold the second Plot to the 5<sup>th</sup> Defendant. He stated that the 5<sup>th</sup> Defendant had not completed the payment of the purchase price because of the suit. DW1 stated that he was 52 years old.



15. The next witness was Mohamed Abdallah Mohamed (DW2). DW2 stated that he was a representative of the 5<sup>th</sup> Defendant. He stated that he was a manager with the 5<sup>th</sup> Defendant and had worked with the company for 20 years. DW2 adopted his witness statement dated 15<sup>th</sup> October 2024 as his evidence in chief and produced the 5<sup>th</sup> Defendant's bundle of documents dated 16<sup>th</sup> April 2019 as D.EXH. 2. He stated that the Plaintiff did not file a defence to the 5<sup>th</sup> Defendant's counterclaim. He prayed that the prayers in the counterclaim be granted.
16. On cross-examination by the advocate for the Plaintiff, DW2 stated that the 5<sup>th</sup> Defendant purchased the second Plot from the 4<sup>th</sup> Defendant. He stated that the property was not yet registered in the 5<sup>th</sup> Defendant's name. He stated that the property was still in the name of the 4<sup>th</sup> Defendant, although a transfer had been executed in the 5<sup>th</sup> Defendant's favour.
17. On re-examination by the 4<sup>th</sup> and 5<sup>th</sup> Defendant's advocate, DW2 stated that the title that he had produced was in the name of the 4<sup>th</sup> Defendant, but the property had been transferred to the 5<sup>th</sup> Defendant. He stated that there was an endorsement to that effect in the Grant.
18. The last witness was Bibiana Rabuku Omalla (DW3). DW3 stated that she was a licensed land surveyor No. 147. She stated that she prepared two reports. She stated that the first report was part of the 4<sup>th</sup> Defendant's bundle of documents filed on 5<sup>th</sup> October 2017 and was dated 15<sup>th</sup> May 2017. She stated that in the second report she realised that she was dealing with two survey plans. She stated that the report was for the confirmation of the physical location of L.R No. 29996 (the second Plot) and that it did not occupy the position of L.R No. 18998(the suit property) on the ground. She stated that her findings were that the two (2) plots occupied different positions on the ground according to the available coordinates. She stated that the data on the two survey plans could not be transformed, and even if they were transformed, they would still show that the two parcels of land were in different locations. She produced her report dated 15<sup>th</sup> May 2017 as D.EXH.3. DW3 told the court that the second report that she prepared was dated 23<sup>rd</sup> February 2018 and was part of the 4<sup>th</sup> Defendant's bundle of documents filed on 27<sup>th</sup> February 2018. She stated that the report was prepared following further investigation. She stated that she had demonstrated in the report that even if the data on the two survey plans were transformed, they would still show that the two parcels of land were in different positions on the ground. She stated that if the coordinates of the two plots were the same, they would fall on the same position on the ground. She stated that her conclusion was that the two parcels of land were not on the same position on the ground. She produced her second report together with the annexures as D.EXH.4.
19. On cross-examination by the advocate for the Plaintiff, DW3 stated as follows: She was registered as a surveyor on 29<sup>th</sup> August 1991. The Plaintiff was present when she conducted the survey although she had no document showing that he was present. The officials from the Lands Office were not present as there was no dispute. She was just doing an investigation. Her task was to show the physical position of the two parcels of land. The Google Map she produced showed that the suit property was developed with go-downs.
20. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not tender evidence at the trial in their defence. After the close of evidence, the court directed the parties to submit their closing arguments in writing. The Plaintiff and the 4<sup>th</sup> and 5<sup>th</sup> Defendants filed submissions while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not do so.

### **The Plaintiff's submissions**

21. The Plaintiff filed submissions dated 18<sup>th</sup> December 2024 in which he framed the following issues for determination;



- a. Whether the suit property, L.R No. 18998 (Grant No. I.R 64336) and the second Plot, L.R No. 29996 (Grant No.153894), were the same and lying on the same geographical coordinates.
  - b. Which survey report should be relied upon by the court?
22. On the first issue, the Plaintiff submitted that the report by PW2, J.D Obel dated 5<sup>th</sup> February 2016 noted that the suit property was first surveyed on 10<sup>th</sup> October 1993 and its survey plan registered as Folio No. 250 Register No. 156 (F.R 250/156) after it was authenticated by the Director of Surveys on 4<sup>th</sup> January 1994. The Plaintiff submitted that when PW2 sought and obtained the said survey plan in 2015, there was a note on the face of it, to the effect that it had been superseded by another Survey Plan No. F/R 322/112. The Plaintiff submitted that upon perusal of Survey Plan No. F/R 322/112, PW2 noted that the suit property was drawn at its correct position on the map, but intentionally left numberless and that a portion of the suit property was highlighted but shifted to the west of its correct position on the map and marked as “L.R 18998 F/R 250/156”
  23. The Plaintiff submitted that concerning the beacons, PW2 noted that the beacons for the suit property, namely, df, df1, df2, and df3, were shown on the numberless plot, but only df1 and df2 were shown on the plot shifted to the west part of the survey plan. The Plaintiff submitted that PW2 cross-referenced the positioning of the suit property and the second Plot allegedly owned by the 4<sup>th</sup> Defendant to answer the question of why there were two conflicting positions of the plots on the survey plans. The Plaintiff submitted that PW2 discovered that the Survey Plan No. F/R 250/156 for the suit property and Survey Plan No. F/R 322/112, which superseded it, were based on different survey coordinate systems.
  24. The Plaintiff submitted that PW2 requested the Technical Section of the Survey of Kenya, to transform the data (coordinates) on the Survey Plan No. F/R 250/156 (DOS SYSTEM) into that of the Survey Plan No. F/R 322/112 (Kenya Major System) so that he could conduct a survey to determine the correct positioning of the two land parcels. The Plaintiff submitted that PW2 came across a new Survey Plan No. F/R 550/140 showing a plot with its corner beacons described as df, df1, df2 and df3, which was the same size and at the same position as the suit property but with a different land reference number, L.R No. 29996 (the second Plot). The Plaintiff submitted that PW2 came across another Survey Plan No. F/R 322/112, which was a redrawing of the original plan, Survey Plan No. F/R 322/112 on 29<sup>th</sup> June 2012. The Plaintiff submitted that this survey plan was significantly different from the original plan.
  25. The Plaintiff submitted that the findings by PW2 in his report demonstrated anomalies authored intentionally or negligently by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiff submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not rebut the said findings. The Plaintiff submitted that the 4<sup>th</sup> Defendant could not rely on the said anomalies and illegalities to his benefit. The Plaintiff submitted that the report by DW3, Ms. Bibiana Rabuku Omalla, did not challenge the findings by PW2 in any material particular but affirmed the illegalities that were committed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to which the 4<sup>th</sup> Defendant was seeking to benefit from.
  26. On the second issue, the Plaintiff submitted that DW3 was biased in her report in that she did not interrogate the historical aspect of the suit property and the second Plot as PW2 did. The Plaintiff submitted that DW3 claimed that her report/survey was accurate as Survey Plan No. F/R 250/156 for the suit property and Survey Plan No. F.R 322/112 which superseded it were based on the Cassini Coordinates to which according to her was different from the British Directory of Overseas Survey System and the Kenya Major System referred to in PW2’s report. The Plaintiff submitted that the court should rely on the report by PW2.



27. The Plaintiff submitted that he had proved on a balance of probabilities that the 4<sup>th</sup> Defendant, in collusion with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, had illegally and fraudulently alienated the Plaintiff's parcel of land. The Plaintiff submitted that the 5<sup>th</sup> Defendant could not benefit from the interest which the 4<sup>th</sup> Defendant acquired illegally.

#### **The 4<sup>th</sup> and 5<sup>th</sup> Defendants' submissions**

28. The 4<sup>th</sup> and 5<sup>th</sup> Defendants filed submissions dated 20<sup>th</sup> November 2024 in which they framed the following issues for determination;
1. Whether the two parcels of land, the second Plot (L.R No. 29996) and the suit property (L.R No. 18998), existed.
  2. Whether the second Plot overlaps on the suit property and as such does not exist on the ground.
  3. Whether the 5<sup>th</sup> Defendant was the registered owner of the second Plot, L.R No.29996.
  4. Whether the Plaintiff had discharged burden of proof on a balance of probabilities.
  5. Who should bear the cost of the suit?
29. On the first issue, the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that it was common ground that records existed for the two parcels of land. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the second Plot was registered in the name of the 4<sup>th</sup> Defendant, who transferred the same to the 5<sup>th</sup> Defendant, while the suit property was registered in the name of one Selyna Z. Musandu (deceased) (sic). The 4<sup>th</sup> and 5<sup>th</sup> Defendants cited Embakasi Properties Limited & another v. Commissioner of Lands & another [2019] eKLR and submitted that unless there was proof of non-existence of the subject properties, it must be presumed that the existence of their titles connoted the existence of the said parcels of land and that of their registered proprietors.
30. On the second issue, the 4<sup>th</sup> and 5<sup>th</sup> Defendants cited Sections 107 to 109 of the *Evidence Act* and Margaret Wanjiru Ndirangu & 4 others v. A.G [2020] eKLR and submitted that it was upon the Plaintiff to prove that the second Plot overlapped the suit property and therefore did not exist. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the Plaintiff's surveyor (PW2) stated that there existed two survey plans for the suit property, No. F/R 250/156 and No. F/R 322/112 which were based on different datums (coordinate systems). The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that PW2 claimed that he requested the technical section of the office of the Director of Surveys to transform the data (coordinates) on Survey Plan F/R No. 250/156 (DOS system) into that of the Survey Plan F/R No. 322/112 (Kenya major system) to enable him carry out ground survey. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that there was no evidence before the court showing that the two survey plans were based on different coordinate systems. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that PW2's insistence on changing the coordinates was aimed at enabling him to come up with a specific narrative. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that PW2 admitted on cross-examination that he did not have proof of communication between him and the technical section of the Director of Surveys' office over the transformation of the coordinates.
31. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that PW2's report was rebutted by the survey report by the 4<sup>th</sup> Defendant's witness, DW3, also a registered surveyor. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the Survey Plan No. F/R 250/156 and Survey Plan No. F/R 322/112 were prepared under the same coordinate system (datums). The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that DW3 stated that it was impossible to transform the coordinates in the two survey plans for the reason that they were on the



same coordinate system. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that DW3 proceeded to give the exact location of the two parcels of land on the ground with a Google map impression. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the report and evidence of DW3 were compelling and believable as opposed to the far-fetched assertions of PW2. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the Plaintiff failed to prove that the second Plot overlapped the suit property. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the two parcels were different and distinct.

32. On the third issue, the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the 5<sup>th</sup> Defendant's counterclaim was undefended and, as such, unopposed. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the 5<sup>th</sup> Defendant's witness produced a copy of the title for the second Plot with an endorsement of a transfer in the 5<sup>th</sup> Defendant's favour. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the 4<sup>th</sup> Defendant also confirmed transferring the second Plot to the 5<sup>th</sup> Defendant. The 4<sup>th</sup> and 5<sup>th</sup> Defendants urged the court to find that the second Plot was registered in the name of the 5<sup>th</sup> Defendant as the lawful proprietor thereof.
33. On the fourth issue, the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the Plaintiff had fallen short of discharging the burden of proof placed upon him by law. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the Plaintiff's claim had no basis and must fail.
34. On the issue of costs, the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that costs follow the event. The 4<sup>th</sup> and 5<sup>th</sup> Defendants prayed that the Plaintiff's suit be dismissed with costs to the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

### **Analysis and Determination**

35. I have considered the pleadings, the evidence tendered by the parties in support of their respective cases, and the submissions by the advocates for the parties. From the pleadings, the following are the issues arising for determination in this suit and the counterclaim;
  1. Whether the parcel of land known as L.R No. 18998 (the suit property) registered in the name of Shadrack Jorim Wamari Musandu, deceased, and the parcel of land known as L.R No. 29996 (the second Plot) registered in the name of the 4<sup>th</sup> Defendant and sold to the 5<sup>th</sup> Defendant is the same parcel of land on the ground, with L.R No. 29996 wholly overlapping L.R No. 18998;
  2. Whether the parcel of land known as L.R No. 29996 (the second Plot) registered in the name of the 4<sup>th</sup> Defendant and sold to the 5<sup>th</sup> Defendant, was created fraudulently and illegally;
  3. Whether the Plaintiff is entitled to the reliefs sought in his amended plaint;
  4. Whether the 5<sup>th</sup> Defendant is entitled to the reliefs sought in its counterclaim; and
  5. Who should pay the costs of the suit?

**Whether the parcel of land known as L.R No. 18998 (the suit property) registered in the name of Shadrack Jorim Wamari Musandu, deceased, and the parcel of land known as L.R No. 29996 (the second Plot) registered in the name of the 4<sup>th</sup> Defendant and sold to the 5<sup>th</sup> Defendant is the same parcel of land on the ground, with L.R No. 29996 wholly overlapping L.R No. 18998;**

36. The suit property was created through Grant No. I.R 64336 dated 30<sup>th</sup> December 1994 and Deed Plan No. 188635 dated 8<sup>th</sup> August 1994. The Grant was registered in favour of Shadrack Jorim Wamari Musandu, deceased (hereinafter referred to only as "the Plaintiff") on 6<sup>th</sup> January 1995. The suit property measured 1.200 Ha. Deed Plan No. 188635 was a product of Survey Plan No. F/R 250/156 prepared on 10<sup>th</sup> November 1993 by a Government Surveyor and authenticated by the Director of



Surveys on 4<sup>th</sup> January 1994. Survey Plan No. F/R 250/156 has coordinates and beacons for identifying the suit property on the ground. It is common ground that Survey Plan No. F/R 250/156 for the suit property was superseded by Survey Plan No. F/R 322/112 also prepared by a Government Surveyor on 13<sup>th</sup> December 1996. Survey Plan No. 322/112 was authenticated on 23<sup>rd</sup> May 1997 and was prepared for L.R Nos 22900-22903. It is common ground that the Director of Surveys did not explain the reason for superseding the Survey Plan No. F/R 250/156 with Survey Plan No. F/R 322/112. Two versions of the Survey Plan No. F/R 322/112 were produced in evidence. The first version was the original Survey Plan No. F/R 322/112 that was prepared on 13<sup>th</sup> December 1996. This survey plan showed the suit property at the west top corner of the survey plan. The plan also showed an unnumbered parcel of land with the same measurement and same beacons as the suit property in the middle of the plan. The other version of the Survey Plan No. F/R 322/112 was “Redrawn by R.Aduol” on 29<sup>th</sup> June 2012. This version of Survey Plan No. F/R 322/112 does not refer to the suit property but introduces Survey Plan No. F/R550/140 for the second Plot owned by the 4<sup>th</sup> Defendant which is indicated as occupying the unnumbered parcel of land on the original Survey Plan No. F/R 322/112.

37. According to the Plaintiff and his witness, the suit property was the unnumbered parcel of land on the original Survey Plan No. F/R 322/112. The Plaintiff's witness, PW2, contended that the suit property was shown to be located west of the unnumbered parcel of land instead of being placed in the position of the unnumbered parcel of land due to the different coordinate systems that were used while preparing the Survey Plan No. F/R 250/156 for the suit property and the original Survey Plan No. F/R 322/112 that superseded it. PW2 told the court that with the assistance of the technical section of the office of the Director of Surveys, they transformed the data from Survey Plan No. F/R 250/156 into the original Survey Plan No. F/R 322/112. PW2 told the court that using the transformed coordinates (data), he conducted a ground survey on the suit property, which placed the property in its rightful place on the ground, which was the unnumbered land parcel on the original Survey Plan No. F/R 322/112. According to the Plaintiff and his witness, the second Plot, L.R No. 29996 registered in the name of the 4<sup>th</sup> Defendant, which has the same size and beacons as the suit property, was created on top of the suit property. PW2 described the situation as double allocation of the same parcel of land and recommended that the Survey Plan No. F/R 550/140 and the re-drawn Survey Plan No. F/R 322/112 be cancelled together with the 4<sup>th</sup> Defendant's Grant. PW2 produced his report dated 5<sup>th</sup> February 2016 in evidence as an exhibit.
38. The second Plot, L.R No. 29996 was created through Grant No. I.R 153894 dated 17<sup>th</sup> January 2014 and Deed Plan No. 361138. The second Plot also measured 1.200 Ha. Deed Plan No. 361138 was a product of Survey Plan No. F/R 550/140 prepared by an unnamed private surveyor on 5<sup>th</sup> August 2013. The survey plan was authenticated by the Director of Surveys in 2013 on a date which is unclear from a copy of the survey plan produced in evidence. This survey plan also has coordinates and beacons for identifying the property on the ground. According to the 4<sup>th</sup> and 5<sup>th</sup> Defendants and their witness, DW3, the suit property and the second Plot were separate and distinct and were situated in different locations on the ground. DW3 told the court that the Survey Plan No. F/R No. 250/156 and the Survey Plan No. F/R 322/112, which superseded it were prepared using the same coordinate systems and as such it was unnecessary and impossible to transform the coordinates from Survey Plan No. F/R 250/156 into the Survey Plan No. F/R 322/112. DW3 told the court that the suit property was placed at its rightful position on the Survey Plan No. F/R 322/112 where it was placed on the west of an unnumbered parcel of land which was later surveyed under Survey Plan No. F/R 550/140 and allocated to the 4<sup>th</sup> Defendant. DW3 told the court that the coordinates of an unnumbered parcel of land in Survey Plan No. F/R 322/112 which was allocated to the 4<sup>th</sup> Defendant and the coordinates of the suit property in Survey Plan No. F/R No. 250/156 which it superseded were not the same and that was evidence that the unnumbered parcel of land in Survey Plan No. F/R 322/112 which was



allocated to the 4<sup>th</sup> Defendant and registered as L.R No. 29996 and the suit property, L.R No 18998 were different parcels of land in paper and on the ground. DW3 contended that it was wrong for PW2 to use the coordinates in Survey Plan No. F/R 322/112 to establish the ground beacons and position of the suit property as the suit property was not part of Survey Plan No. F/R 322/112 and the survey plan did not contain the coordinates of the suit property. DW3 contended that the coordinates in Survey Plan No. F/R 322/112 could only be used to establish the ground beacons and positions of the unnumbered parcel of land which was allocated to the 4<sup>th</sup> Defendant and any other land that was represented by the survey.

39. DW3 told the court that she subsequently plotted the coordinates of the second Plot, L.R No. 29996 and the coordinates of the suit property, L.R No. 18998 into Google Earth WGS 84 Coordinates and generated a satellite imagery which demonstrated beyond doubt that the second Plot and the suit property were in different locations on the ground. DW3 produced her report and further report dated 15<sup>th</sup> May 2017 and 23<sup>rd</sup> February 2018 respectively as exhibits.
40. I have considered the evidence adduced by the parties on the issue of whether the suit property owned by the Plaintiff and the second Plot owned by the 4<sup>th</sup> Defendant and sold to the 5<sup>th</sup> Defendant are the same on the ground. I am persuaded by the evidence presented by the Plaintiff that the suit property and the second Plot are not two parcels of land. They are two parcels on paper, but one parcel of land on the ground. I have looked at the Survey Plan No. F/R 250/156 through which the suit property was created in 1993 and Survey Plan No. F/R 550/140 through which the second Plot was created 20 years later in 2013. It cannot be a coincidence that the two parcels of land have the same dimensions and beacon markings. It is also instructive to note that although the second Plot is said to be a product of Survey Plan No. F/R 550/140, it is common ground that the second Plot originated from the original Survey Plan No. F/R 322/112 (original is used to differentiate this survey plan from the redrawn version of the same survey plan). The confusion about the location of the suit property originated from the Survey Plan No. F/R 322/112. Although this survey plan is said to have superseded the Survey Plan No. F/R 250/156, that created the suit property, the suit property, as admitted by DW3, was not the subject of the Survey Plan No. F/R 322/112. It was this Survey Plan No. F/R 322/112 which placed the suit property as located on the top west corner of the plan and created unnumbered parcel of land with the same dimensions and beacons as the suit property, which was subsequently allocated to the 4<sup>th</sup> Defendant. I wonder how Survey Plan No. F/R 322/112 could be said to have superseded Survey Plan No. F/R 250/156 that created the suit property while it had nothing to do with the suit property. I am of the view that this survey plan which was for land parcels, L.R Nos. 22900-22903 was used to purportedly create another land parcel over the land that had already been allocated to the Plaintiff and a title used. That is the only way in which the claim by the Director of Surveys that Survey Plan No. F/R 250/156 was superseded by Survey Plan No. F/R 322/112 can be understood. Black's Law Dictionary, 10<sup>th</sup> Edition, defines the word "supersede" as:

“ 1. To annul, make void, or repeal by taking the place of...”

41. This means that, contrary to DW3's contention, the coordinates of the suit property in Survey Plan No. F/R 250/156 could not remain valid after the survey plan was superseded by Survey Plan No. F/R 322/112. The Survey Plan No. F/R 322/112 essentially nullified and replaced Survey Plan No. F/R 250/156. This means that the suit property was “erased from existence”, to use the words of PW2 in his report, and a new unnumbered parcel of land was created in its place, which was subsequently given a number and allocated to the 4<sup>th</sup> Defendant. This point is reinforced by the re-drawing of Survey Plan No. F/R 322/112 in 2012 before the Grant in favour of the 4<sup>th</sup> Defendant was issued. In the redrawn Survey Plan No. F/R 322/112, there is completely no reference to the suit property. Instead,



the location of the suit property according to the Plaintiff is indicated to have been taken by the second Plot surveyed through Survey Plan No. F/R 550/140. When the Survey Plan No. F/R 322/112 was re-drawn on 29<sup>th</sup> June 2012, the Survey Plan No. F/R 550/140 was not even in existence. This begs the question of how the Survey Plan No. F/R 550/140 prepared on 5<sup>th</sup> August 2013 found its way to the re-drawn Survey Plan No. F/R 322/112 prepared on 29<sup>th</sup> June 2012, if it was not to erase the suit property from the survey maps.

42. I am not persuaded by the evidence of DW3 that the suit property and the second Plot are different parcels of land which are separate and distinct. DW3 claimed that the coordinates of the second Plot and the coordinates of the suit property were different; and as such, the two parcels could not be at the same location on the ground. The problem I have with this conclusion is that in comparing the coordinates, DW3 used the coordinates of the suit property in the Survey Plan No. F/R 250/156, which were no longer valid as they had been superseded by the coordinates in the Survey Plan No. F/R 322/112. The Survey Plan No. F/R 322/112, as admitted by DW3, did not provide the coordinates for the suit property but did so for the new unnumbered parcel of land (the second Plot), which was allocated to the 4<sup>th</sup> Defendant. DW3 should have appreciated the fact that the purpose of superseding Survey Plan No. F/R 250/156 with survey plan No. F/R 322/112 was to do away with the suit property and create a new parcel of land in its place. That is why the Survey Plan No. F/R 322/112 did not provide for the coordinates for the suit property, but did so for the new unnumbered land parcel. The existence of the suit property in the said survey plan somewhere in west top corner of the plan in my view was inconsequential as the survey plan as admitted by DW3 was not a survey for the suit property but for the new unnumbered parcel of land and L.R Nos. 22900-22903. It should also be noted that in her first report, DW3 claimed that the Survey Plan No. F/R 250/156 and Survey Plan No. F/R 322/112 were based on the same coordinate systems, which she referred to as Bell Tower coordinates. DW3 admitted however that there was no evidence on Survey Plan No. F/R 322/112 showing that it was prepared using Bell Tower coordinates. In her further report dated 23<sup>rd</sup> February 2018, DW3 changed the story. She now claimed that she had established that the Survey Plan No. F/R 250/156 that created the suit property and Survey Plan No. F/R 322/112 which she claimed created the second Plot were based on Cassini Coordinates. While DW3 tried to justify her claim about the Bell Tower Coordinate system, she did not explain how she established that the two survey plans were prepared based on Cassini Coordinates. I am of the view that DW3 was out to justify the creation of the second Plot at any cost even when she had no answer to the purported superseding of the Survey Plan No. F/R 250/156 with Survey Plan No. F/R 322/112 and the creation of unnumbered parcel of land with the same dimensions and beacons as the suit property on a survey plan that was not intended for such a parcel of land. I am inclined to believe the evidence of PW2 over the evidence of DW3. DW3's reports were both prepared with this court case in mind to defend a position already taken by the 4<sup>th</sup> Defendant while PW3's report was prepared before the filing of the case. I find PW2's report more factual and DW3's reports rather defensive.
43. It is my finding that the Plaintiff has established on a balance of probability that the suit property and the second Plot are one and the same on the ground and that the second Plot was created over the suit property. As rightly observed by PW2, this was a case of double allocation of one parcel of land.



**Whether the parcel of land known as L.R No. 29996 (the second Plot), registered in the name of the 4<sup>th</sup> Defendant and sold to the 5<sup>th</sup> Defendant, was created fraudulently and illegally;**

44. The suit property, L.R No. 18998 and the second Plot, L.R No. 29996, were registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

45. Section 26 of the *Land Registration Act*, Act, 2012 which repealed the Registration of Titles Act, provides as follows:

“26.

- (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.”

46. In *Munyu Maina v. Hiram Gathiha Maina* [2013] eKLR the Court of Appeal stated as follows:

“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.”



47. In *Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

48. In the case of *Benja Properties Limited v. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, the Court of Appeal cited with approval the High Court case *Gitwany Investment Limited v. Tajmal Limited & 2 others*, (2006)eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. Commissioner of Lands, C.A. No. 71/1997* (unreported) “– is the grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs. J.B. Martin Glass Industries and 3 others* C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity...”

49. In *Republic v. City Council of Nairobi & 3 others* [2014] eKLR, the court stated as follows:

“From the case as presented by the Applicant they no doubt had beneficial interest in the suit plot. As was held by Warsame, J (as he then was) in *Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another* Kisumu HCCA No. 9 of 2004 once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

50. In *Kamau James Njendu v. Serah Wanjiru & another* [2018] eKLR the court stated as follows:

“In essence therefore I find that there could have been double allotment of the suit land and the blame would therefore lay squarely on the Settlement Fund Trustee. In the case of *M’ikiara M’Rinkanya & Another –v- Gilbert Kabeere M’Mbijiwe*, (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again.”



51. In Black's Law Dictionary 9th Edition at page 731 fraud is defined as:
- “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
52. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:
- “Allegation 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.”
53. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.
54. The Plaintiff claimed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, in collusion with the 4<sup>th</sup> Defendant, fraudulently and unlawfully purported to make a parallel title for L.R No. 29996 (the second Plot) in favour of the 4<sup>th</sup> Defendant for a parcel of land that was already allocated and registered in the name of the Plaintiff as L.R No. 18998. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a general defence but did not tender evidence in their defence at the trial. All the allegations made against them in the plaint were not controverted by evidence to the contrary. The Survey Plan No. F/R 250/156 was marked as having been superseded by the Survey Plan No. F/R 322/112 by the Director of Surveys. There was no explanation for this action by the Director of Surveys. There is no evidence that the Plaintiff was notified that the survey plan through which the suit property was created had been replaced by another survey plan, which did not even refer to the property. The Survey Plan No. F/R 322/112, which created the second Plot as an unnumbered parcel, was prepared by a Government Surveyor after the nullification (superseding) of Survey Plan No. F/R 250/156, which created the suit property. The 4<sup>th</sup> Defendant produced as part of D.EXH.3 a copy of a letter dated 9<sup>th</sup> October 2013 by the 3<sup>rd</sup> Defendant informing the Director of Surveys that the second Plot was allocated to the 4<sup>th</sup> Defendant on 8<sup>th</sup> July 1998 and that according to the 3<sup>rd</sup> Defendant's records, the 4<sup>th</sup> Defendant accepted the offer and paid all the fees required. This was not true. From the receipt produced by the 4<sup>th</sup> Defendant in evidence, he did not pay for the allotment until 11<sup>th</sup> December 2013. The 1<sup>st</sup> Defendant allocated the suit property to the 4<sup>th</sup> Defendant and had it registered in his favour as L.R No. 29996 with the full knowledge that the property had already been allocated to the Plaintiff and that the Plaintiff already had a title for the property. I am of the view that a title cannot be created on top of another without the element of fraud. In my view, the purported superseding of Survey Plan No. F/R 250/156 with Survey Plan No. F/R 322/112 and the creation of an unnumbered parcel of land with the same dimensions and beacons as the suit property in Survey Plan No. F/R 322/112 was a fraudulent scheme to dispossess the Plaintiff of his land. I doubt the innocence of the 4<sup>th</sup> Defendant in the whole scheme. I have noted that the 4<sup>th</sup> Defendant got registered as the owner of the second Plot on 26<sup>th</sup> February 2014 after paying Kshs. 173,730/- on 11<sup>th</sup> December 2013 and by 12<sup>th</sup> January 2015, the 4<sup>th</sup> Defendant had already sold the suit property to the 5<sup>th</sup> Defendant for 18,000,000/- to which the suit property was transferred on 13<sup>th</sup> April 2015. There is no evidence that the 4<sup>th</sup> Defendant, who had not even developed the property obtained the consent of the Commissioner of Lands to transfer the property to the 5<sup>th</sup> Defendant. I also wonder why the 4<sup>th</sup>



Defendant would have engaged DW3 in June 2014 to re-establish the beacons of the second Plot while the plot had been surveyed by his private surveyor on 5<sup>th</sup> August 2013 after allotment and beacons fixed. Even if the 4<sup>th</sup> Defendant was not a party to the fraud, he was the beneficiary of the fraudulent scheme performed through survey record manipulation. Assuming that the 4<sup>th</sup> Defendant was not a party to the fraud, I am of the view that if the 4<sup>th</sup> Defendant had conducted proper due diligence, he would have discovered that the land that was being allocated to him had already been allocated to the Plaintiff, who had a title to it.

55. It is my finding that the Plaintiff has proved that the suit property was created and registered in the name of the 4<sup>th</sup> Defendant fraudulently and illegally.

#### **Whether the Plaintiff is entitled to the reliefs sought in his amended plaint**

56. In his further amended plaint, the plaintiff sought a declaration that the registration of the 4<sup>th</sup> Defendant as the proprietor of the suit property and the subsequent transfer of the property to the 5<sup>th</sup> Defendant were unlawful, null and void, an order cancelling the title for the second Plot, an injunction restraining the 4<sup>th</sup> Defendant from interfering with the Plaintiff's possession of the suit property, an injunction restraining the 4<sup>th</sup> Defendant from disposing of the suit property, and general damages for trespass and costs.
57. I have held that the second Plot, L.R. No. 29996 was created and registered in the name of the 4<sup>th</sup> Defendant illegally and fraudulently. An illegal and fraudulent title is a nullity. Such a title is not protected by law. In *Adan Abdirahani Hassan & 2 others v. Registrar of Tiles & 2 others* [2013] eKLR, the court stated as follows:

“20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.”

58. Since the 4<sup>th</sup> Defendant held an invalid title, he could only pass to the 5<sup>th</sup> Defendant what he had. The 5<sup>th</sup> Defendant which contended that it was a bona fide purchaser of the second Plot for valuable consideration could not get from the 4<sup>th</sup> Defendant a better title than that which was held by the 4<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant's title to the second Plot was tainted with illegality and fraud and as such was similarly illegal, null and void. In Supreme Court Petition No. E033 of 2023, *Harcharan Singh Sehmi & another v. Tarabana Co. Limited & 5 others*, the court stated as follows:

“(ii) Whether the doctrine of Innocent Purchaser for value Without Notice protects a purchaser of an illegally/irregularly allocated title over public land

(66) This issue persistently continues to rear its head whenever the legality of a subsequent title over land following a purchase is called into question. The main bone of contention, has always revolved around the concept of “indefeasibility of title” where holders of such titles under challenge, not only erect the latter



as a shield, but also tend to fall back upon the doctrine of innocent purchaser for value without notice. This Court has since pronounced itself authoritatively and with finality on the question of indefeasibility of title in circumstances where a title is called into question regarding its legality. Holders of impugned titles, especially those acquired before the promulgation of the 2010 Constitution always call into service the provisions of Section 23 of the Registration of Titles Act Cap 281 (now repealed).

- (67) Pursuant to Section 23 of the repealed Act, a certificate of title was held as conclusive evidence of proprietorship. It read:

“23.

- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

- (68) Upon repeal (of the Registration of Titles Act), the effects of registration are now governed by Section 26 of the [Land Registration Act](#) No. 3 of 2012 which provides;

“26.

- (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. [Emphasis added].

59. This draws from Article 40 that the right to property does not extend to any “property that has been found to have been unlawfully acquired.” See Article 40(1) and (6) of *the Constitution*.

(69) It is important to take note of the critical shift in terminology from the repealed Act to the current statute. Under the Registration of Titles Act, a certificate of title was to be regarded by courts as conclusive evidence that the person named therein was the absolute and indefeasible owner of the land. However, under current legislation, a certificate of title is to be regarded by courts as prima facie evidence that the person named therein is the absolute and indefeasible



owner of the land. It is therefore no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.

[70] In *Dina Management Limited vs. County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), this Court held that to determine whether a party is a bona fide purchaser for value, a court must first go to the root of the title, we stated:

“94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”

60. The Plaintiff, who has established that the second Plot was created over or on top of the suit property, is entitled to the declarations and injunctive relief sought in the amended plaint. The Plaintiff has proved that the 4<sup>th</sup> Defendant trespassed on the suit property. The Plaintiff has, however, not proved that he suffered any actual loss as a result of the trespass. The Plaintiff is therefore entitled only to nominal damages for trespass. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

61. In *Halsbury’s Laws of England* 4<sup>th</sup> Edition Volume 45 para. 26 1503 the authors have stated as follows on assessment of damages for trespass:

- “a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

### **Whether the 5<sup>th</sup> Defendant is entitled to the reliefs sought in its counterclaim**

62. The 5<sup>th</sup> Defendant had sought a declaration that it was a bona fide purchaser of the second Plot and as such the owner thereof. I have held that the 5<sup>th</sup> Defendant acquired a void title from the 4<sup>th</sup> Defendant in respect of the second Plot. A void title could not confer upon the 5<sup>th</sup> Defendant any proprietary interest in the second Plot. The 5<sup>th</sup> Defendant is therefore not entitled to the declaration sought in its counter-claim.



### **Who should pay the costs of the suit and the counterclaim?**

63. Under Section 27 of the *Civil Procedure Act*, the costs of and incidental to a suit are at the discretion of the court and as a general rule, costs follow the event. In Halbury's Laws of England, 4th Edition (Re-issue), [2010] Vol. 10, para 16, the authors have stated as follows:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

64. The Plaintiff has succeeded in his claim against the Defendants while the 5<sup>th</sup> Defendant has failed to prove its counterclaim against the Plaintiff. The Plaintiff is entitled to the costs of the suit and the counterclaim. No reason has been given by the Defendant why the Plaintiff should be denied the said cost.

### **Conclusion**

65. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants for;

1. A declaration that the registration of the 4<sup>th</sup> Defendant as the proprietor of all that parcel of land known as L.R No. 29996, Grant Number I.R 153894 situated at Kisumu and the transfer of the property to the 5<sup>th</sup> Defendant was unlawful, null and void.
2. An order that the 2<sup>nd</sup> Defendant shall cancel forthwith Grant Number I.R 153894 for L.R No. 29996.
3. An injunction restraining the Defendants by themselves, or through their servants or agents, from selling, disposing of, transferring, leasing, charging, occupying, continuing to occupy, developing or interfering with the Plaintiff's quiet possession of all that parcel of land known as L.R No. 18998, which the Defendants wrongly claim to be L.R No. 29996.
4. Kshs. 100,000/- being general damages for trespass payable by the 4<sup>th</sup> Defendant.
5. The 5<sup>th</sup> Defendant's counterclaim is dismissed with costs to the Plaintiff.
6. Costs of the suit payable by the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

**DELIVERED AND SIGNED AT KISUMU ON THIS 31<sup>ST</sup> DAY OF JULY 2025**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. R.Odhiambo for the Plaintiff

Ms. Mwenda for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Abande for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Ms. J. Omondi-Court Assistant

