



**Mbaabu (The duly appointed Attorney of Githinji Kithinji
Mwirichia) v Abdulrahman & 4 others (Environment and Land Case
319 of 2021) [2025] KEELC 7511 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE 319 OF 2021**

AE DENA, J

OCTOBER 30, 2025

BETWEEN

**ARNOLD MBAABU (THE DULY APPOINTED ATTORNEY OF GITHINJI
KITHINJI MWIRICHIA) PLAINTIFF**

AND

MAHMOUD ABDULRAHMAN 1ST DEFENDANT

**GUY SPENCER ELMS & NILESHKUMAR SHAH (BEING THE PERSONAL
EXECUTORS OF THE ESTATE OF PRITAM SINGH PANESAR -
DECEASED) 2ND DEFENDANT**

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER -
KWALE 3RD DEFENDANT**

THE LAND REGISTRAR - KWALE 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

JUDGMENT

1. This suit was commenced in the High Court at Mombasa vide a Constitutional Petition dated 2nd April, 2014 and amended on 26th June, 2014. The Petition was later converted to a Plaint and the case is currently set out in the Further and Further Amended Plaint dated 15th May, 2024 through which the Plaintiffs now seek the following orders from this Honourable Court:-
 - a. Spent
 - b. A perpetual injunction be issued restraining the 2nd and 4th Defendants from registering any instrument, lease, charge, transfer, subdivision or any other document of any description disposing off of any interest in property comprised in Title Number Kwale/Shimoni/758



before consolidation of the said titles to excise therefrom the Plaintiff's land measuring 4.89 Ha and to revert it to the Plaintiff's original title no. Kwale/Shimoni/406 or in any new title as may be appropriate.

- c. Spent
- d. A declaration be made that the registration of the 1st Defendant as the proprietor of the suit premises, Kwale/Shimoni/406 be declared to have been fraudulent, illegal, unlawful and null and void.
- e. A declaration be made that ipso facto and on the face of it, the title held by the 2nd Defendant in respect of the then Kwale/Shimoni/406 was an illegal title and substantively that its transfer from the 1st Defendant who had no right over the land that it best owed upon the 2nd Defendant no enforceable right and therefore its consolidation into Kwale/Shimoni/758 was equally illegal.
- f. A declaration that the 1st Defendant had no legal or transferrable right and interest in the land compromised (sic) Title No. Kwale/Shimoni/406 which could be transferred to the 2nd Defendant whether with or without the knowledge of the 2nd Defendant and whether consideration was paid or not.
- g. A declaration be made that the closure of the Register and Title for property comprised in Title No. Kwale/Shimoni/406 and its amalgamation to create Kwale/Shimoni/758 was unlawful, fraudulent and null and void and did not pass any rights compromised (sic) in Kwale/Shimoni/406 lawfully into Kwale/Shimoni/758 and to the 2nd Defendant as part of Kwale/Shimoni/758.
- h. An order be issued cancelling and nullifying the registration of the 1st Defendant as proprietor of property then comprised in Title No. Kwale/Shimoni/406 which was subsequently and illegally consolidated into Kwale/Shimoni/758.
- i. An order be issued cancelling and nullifying the transfer and registration of property comprised in Title No. Kwale/Shimoni/406 in favour of the 2nd Respondent. A FURTHER ORDER DO ISSUE nullifying and cancelling the consolidation of property LR No. Kwale/Shimoni/406 with Kwale/Shimoni/412 and creating Kwale/Shimoni/758.
- j. An order do issue ordering the 4th Defendant to deconsolidate LR No. Kwale/Shimoni/758 and thereby restore the 4.89Ha originally comprised in Kwale/Shimoni/406 or its own title either as Kwale/Shimoni/406 into its appropriate title number as the registration process may create and cause its registration in the name of Gerald Kithinji Mwirichia as the first and only proprietor. All and any other entries inconsistent with the Plaintiff as the first and absolute owner of the 4.89Ha originally comprised in LR No. Kwale/Shimoni/406 be revoked, cancelled and nullified.
- k. An order that the Register relating to property comprised in Title No. Kwale/Shimoni/406 be rectified so as to show the Plaintiff as the first and only registered proprietor and all entries inconsistent with the Plaintiff's absolute ownership of the property be cancelled and nullified.
- l. A mandatory injunction be issued compelling the 1st, 2nd, 4th and 5th Defendants jointly and severally to surrender all Green Cards, Transfers, consolidations and titles relating to title No. Kwale/Shimoni/758 to the Court for destruction within 30 days of the Court's judgment and in default such records be considered destroyed, null and void.



- m. Spent
 - n. An order be issued against the 1st, 2nd, 3rd, 4th and 5th Defendant to restore the beacons defining the dimensions and area of property measuring the 4.89Ha originally comprised in Title No. Kwale/Shimoni/406.
 - o. A mandatory injunction be issued to compel the 4th and 5th Defendants jointly and severally to issue a title Deed to Gerald Kithinji Mwirachia naming Gerald Kithinji Mwirachia as the absolute Proprietor of property comprised in Title No. Kwale/Shimoni/406 in accordance with the adjudication records for Shimoni Adjudication Section in Kwale District and specifically within the terms of order (h) above.
 - p. The court do order and award general, punitive and aggravated damages against the 1st, 2nd, 3rd and 4th Defendants jointly and severally in such sufficient amount as to punish them for the fraud committed in relation to property comprised in the then Title No. Kwale/Shimoni/406 and for trespass thereupon, occupation and deprivation of the Plaintiff of its occupation and use from the year 2002 to the time of its restoration back to the Plaintiff.
 - q. In The Alternative to the foregoing reliefs, an order compelling the 1st, 2nd, 3rd, 4th and 5th Defendants to jointly and severally compensate the Plaintiff for loss of the 4.89Ha originally compromised (sic) in plot No. 406 - Shimoni Adjudication Section consequently registered as Kwale/Shimoni/406 and consolidated into Kwale/Shimoni/758 at the current market value thereof, to be proved and confirmed by the court with interest on the said award until full payment.
 - r. An order that the costs and incidental to this suit be paid to the Plaintiff by the Defendants jointly and severally.
2. The facts pleaded in support of the claim are that the Plaintiff purchased the land from the then owners, Hamisi Masudi Mwariale a.k.a Hamisi Masudi, Marinda Ali Jabir a.k.a Marinda Salimu, Mwanulu Fosi Toya a.k.a Mwaulu Bakari, Mwandasi Mwamadi Mwarambo a.k.a Mwandasi Mwangome and Ramtu Bakari Waramtu. The Plaintiff averred that the land was at the time still unregistered and undergoing adjudication. That there was an objection to the effect that the Vendors had sold their interest in the land, but the objection proceedings were properly dealt with and decided in favour of the Vendors and Gerald Kithinji Mwirichia.
 3. The Plaintiff avers that in the 3rd Defendant's Register, it was indicated that the objection no. 152/89/90 was allowed and that Plot No. 406 was transferred to Gerald Kithinji Mwirichia on completion of the adjudication process, and he was to receive title. Further, that by letters dated 27.03.1997 and 14.05.2014 the 3rd Defendant confirmed that Plot No. 406 Shimoni Adjudication Scheme was recorded in the name of Gerald Kithinji Mwirichia, and that there was no pending dispute.
 4. The Plaintiff avers that he has since discovered that the land was registered as Plot No. Kwale/Shimoni/406 in the name of the 1st Defendant on 9.4.2002. He averred that the Plaintiff never transferred the land to the 1st Defendant and it is not clear how the 1st Defendant became so registered. It is the Plaintiff's case that the 1st Defendant then purported to transfer it to the 2nd Defendant on 22.7.2009, who without his knowledge, consolidated it with parcel no. 412 creating plot no. Kwale/Shimoni/758, leading to the closure of the register for the suit property. The Plaintiff asserts that the aforesaid registration, transfer, consolidation, closure of register for the suit property and opening of the register of plot no. 758 were fraudulent and resulted in an illegal, unlawful and unconstitutional



loss of the Plaintiff's property. The Plaintiff set out the particulars of the alleged fraud on the part of the 1st, 2nd, 3rd and 4th Defendants.

5. The Plaintiff further avers that the aforementioned actions did not extinguish his interests in the suit property, and neither did they confer any interest on the 1st and 2nd Defendants. In addition, that the said actions were arrived at in total ignorance of the 3rd Defendant's records. He averred that the 4th Defendant had no power to register the suit land in favour of the 1st Defendant or anyone other than Gerald Kithinji Mwirichia, thus the said registration was a nullity ab initio. Further, that the registration violates Gerald Kithinji Mwirichia's rights under Section 75 of the repealed Constitution, as well as Article 40 and 23(3) of *the Constitution* of Kenya, 2010.
6. The Plaintiff also averred that the registration in favour of the 1st Defendant was done without any reference or notice to him, denying him the right to be heard and shrouded in secrecy. He claims therefore, that Gerald Kithinji Mwirichia remains the rightful owner of the suit land, which remains vacant and is thus entitled to have first registration thereof, and to have the beacons and dimensions of the land restored to the position obtaining at the conclusion of the adjudication process.

The 2nd Defendant's Response

7. The 2nd Defendant answered to the petition through a statement of Defence and Counterclaim dated 10th May, 2023 and Amended on 10th July, 2023. The 2nd Defendant denied every allegation set out in the Further and Further Amended Plaint dated 21/11/2022. The 2nd Defendant averred that the suit herein is time barred by Section 4(4) and Section 7 of the Limitations of Actions Act. The 2nd Defendants claimed that the order converting the suit into a Plaint and transferring it to the ELC were null and void thus the suit is a nullity. Further, that since no summons were taken out and served on any of the Defendants, the suit lapsed 30 days from 8th March, 2016, and there is no competent suit before this court against the Defendants.
8. Without prejudice to the foregoing, the 2nd Defendant denied the allegation that the Plaintiff acquired or was at any time the bonafide lawful or registered owner of the suit land. They averred that the persons that sold to the Plaintiff had no lawful interest or good title in the suit land capable of being passed to the Plaintiff, and further that there was want of compliance with the *Land Control Act*.
9. They averred that the 1st Defendant offered the suit land for sale to the 2nd Defendant and Mr. Satpal Singh Jowhal. That the two conducted due diligence and confirmed that the land was owned by the 1st Defendant, who faced no competing claims. They averred that the two agreed to buy the land for KShs. 13,200,000/- vide an agreement for sale dated 14th July, 2010 and they paid the purchase price in full. That the land was on 22/7/2010 transferred to them, title duly issued after compliance with relevant laws and procedures and they took immediate possession and have remained so to date.
10. They also averred that the 2nd Defendant and Mr. Jowhal later purchased plot no. Kwale/Shimoni/412 which is adjacent to the suit property, and applied to have the two consolidated. That the application was allowed and a new title for the consolidated parcel was issued as Title No. Kwale/Shimoni/758 to the 2nd Defendant on 10th June, 2011. That the 2nd Defendant and Mr. Jowhal were innocent purchasers for value and without notice of defects. According to the 2nd Defendant, the Plaintiff has no claim in law over the suit property as it is based on an unregistered plot and a non-existent plot since the title ceased to exist in 2010. They denied any fraud, illegality or unlawfulness in the registrations and entries in the register to the suit property, and also denied the particulars pleaded thereon.
11. In addition, it was asserted that the 2nd Defendant was the lawful, bonafide registered owner of the suit land. Further, that the land is not vacant since the 2nd Defendant took immediate possession and



remains in possession through his executors. They averred that the suit raises no suitable cause of action and asked that it be dismissed with costs.

12. In the counterclaim, it was averred that the 2nd Defendant has been in open, continuous and uninterrupted possession of the suit land at all times since its acquisition, through to its consolidation until his demise on 28/07/2010. That his executors took over possession upon his demise and continue to remain on the land, which is now comprised in Kwale/Shimoni Adj./758 to date, comprising a period of over 12 years since July, 2010. For this reason, it was alleged that the 2nd Defendant had acquired the suit land by way of adverse possession and the Plaintiff's interest, if any, extinguished on 9/04/2002 when the land was registered to the 1st Defendant or after the lapse of 12 years from 15/09/2020. They averred that the 2nd Defendant is thus entitled to retain the land as now comprised in Plot No. 758.
13. Through the Counterclaim, they sought the following reliefs:-
 - i. The suit by a Further and Further Amended Plaint dated 21st November, 2022 against the Defendants be dismissed.
 - ii. Further and in the alternative in terms of the Amended Counter-claim hereof;
 - a. A declaration that any interest in the suit property namely Title No. Kwale/Shimoni Adj./406 was extinguished by adverse possession of the suit property by the 2nd Defendant for a period of over 12 years.
 - b. A declaration that the 2nd Defendant acquired title to the suit property Title No. Kwale/Shimoni Adj./406 by adverse possession and is thus entitled to retain it as comprised in Title namely Kwale/Shimoni Adj./758.
 - c. A permanent injunction to restrain the Plaintiff whether by himself and or his servants or anyone claiming under him from trespassing, remaining on or any way interfering with the 2nd Defendants estates quiet enjoyment, use or dealings on the suit Title No. Kwale/Shimoni Adj./406 comprised in Title No. Kwale/Shimoni Adj./758.
 - iii. Costs of the suit and the counter claim.

The Plaintiff's Reply Defence & Defence to Counterclaim

14. In response, the Plaintiff filed a Reply to Defence and Defence to Counterclaim dated 29th June, 2023 where he denied all the allegations contained in the 2nd Defendant's Defence & Counterclaim. The Plaintiff asserted that he is a legally well constituted attorney and has locus standi to bring the suit. He denied the allegation that the 2nd Defendant is a bona fide purchaser for value and reiterated the particulars of fraud pleaded in the Plaint. He averred that the original purchaser Gerald Kithinji Mwirichia, is the beneficial and bona fide owner of the suit land.
15. In defence to the Counterclaim, the Plaintiff denied the allegation that the 2nd Defendant has been in continuous, exclusive and uninterrupted possession of the suit land for over 12 years, or that he is entitled to it by operation of law or adverse possession. He further alleged that prior to instituting the suit, he attempted to enter into the suit land but was repulsed by the 2nd Defendant's agents, hence the instant case. He averred that the 2nd Defendant's Counterclaim is untenable in law. He asked the court to dismiss the Defence and Counterclaim with costs.



Reply to the Defence to Counterclaim

16. The 2nd Defendant filed a Reply to the Defence to Counterclaim dated 5th July, 2023. He admitted the Plaintiff's attempted trespass was at all material times repulsed by the Defendant. In further response, he alleged that the Plaintiff had in effect admitted that he has never been in possession of the suit property. The 2nd Defendant asserted that the Counterclaim discloses a reasonable cause of action against the Plaintiff. The 2nd Defendant termed the Defence to Counterclaim a sham, and that it in turn did not disclose a reasonable defence in law, and was an abuse of court process.

The 3rd & 4th Defendant's Response

17. On behalf of the 3rd and 4th Defendants, the Attorney General filed a Statement of Defence dated 21st July, 2023 denying each and every allegation set out in the Further Amended Plaint. In particular, the 3rd and 4th Defendants denied authoring the letters dated 27.3.1997 and 14.5.2013 allegedly confirming that at demarcation the suit property was in the name of Gerald Kithinji Mwirichia. The 3rd and 4th Defendants denied taking part in any fraud resulting in the alleged unlawful registrations, as well as also the particulars of illegality pleaded against the 4th Defendant. They invited the Plaintiff to strict proof thereof.

Hearing And Evidence

18. Hearing of the suit commenced on 8th November, 2023 with the Plaintiff calling his witnesses.

Plaintiff's Case

19. Gerald Kithinji Mwirichia testified on oath as PW1. He stated that he had donated a Power of Attorney to Arnold Mbaabu in regards to the suit property. PW1 opted to rely on his Witness Statement dated 17th October, 2022 as his evidence-in-chief.
20. On cross-examination by Mr. Litoro, PW1 testified that he purchased the land in 1990 for KShs. 1,200,000/- and paid the entire purchase price. He however had no evidence that he cleared the balance. He said that he discovered in 2002 that the land was registered in the 1st Defendant's name. He explained that during the adjudication, he was the first person to be given the land. He testified that he did not know the 1st Defendant, and that he discovered about him in 2013. He claimed that there was fraud at the lands office and not the Lands Adjudication Office. He affirmed that he stood by the documents filed by his Attorney. He further testified that he only knew the 2nd Defendant through the transfer documents obtained by Arnold Mbaabu.
21. PW1 was also cross-examined by Mr. Mwandeje and he testified that the agreement for purchase of the land was made in 1990. He explained that he had presented an additional agreement in his bundle of documents which showed that there was an outstanding balance of KShs. 120,000/-, and he had nothing to show that he paid. He testified that he did not have the adjudication record to show that the 5 Vendors were registered therein, but that the adjudication officers assured him that he was still shown as the owner.
22. When he was re-examined, PW1 testified that he paid in cash, and there is an acknowledgement receipt showing that the vendors received the KShs. 120,000/-. He added that if he hadn't paid in full, there would be no confirmation from the land adjudication office. He testified that the initial agreement was oral. He testified that the objections that were withdrawn were endorsed by the Adjudication Office. He clarified that he had not revoked the Power of Attorney to Arnold Mbaabu.



23. Arnold Mbaabu testified under oath as PW2 and adopted his written statements dated 19/10/2022 and 21/07/2023 as his evidence-in-chief. PW2 produced the documents in his list of documents dated 25/10/2022 as his evidence and the documents were marked as PEXb 1-19 respectively. PW2 also produced the documents in his list of documents dated 21/7/2023 as PEXb20-22. PW2 testified that there were objections by the previous owners but they settled them with PW1. He testified that there was a transfer document showing that the original owners were transferring the land to PW1, alongside copies of the Objections and summary of the Adjudication register dated 27/3/1997 stating that the plot belongs to PW1. PW2 referred to the Replying Affidavit by Nicholas Sanya, who had deponed that there was no appeal on the final adjudication register.
24. PW2 testified that he applied for a search and was shown a record which showed PW1 as the owner of the land, and which he had produced in court. He testified that he discovered the land was transferred to a third party when he did a search at the lands office in 2013-2014, after which he commenced this suit in 2014. He told this court that he was not aware PW1 transferred the land to the 1st Defendant. He stated that the transfer of the land to the 1st Defendant and thereafter to the 2nd Defendant was rushed and that there was no valuation for stamp duty. He explained that he wrote to the adjudication office in Kwale and in Nairobi but never got the adjudication record. He further explained that when they bought the land, it was vacant, virgin/bushy land. He asked for the prayers as per the amended Plaintiff.
25. PW2 was cross-examined by Mr. Litoro and when questioned on the Affidavit of service he filed dated 4/5/2022, he confirmed that he is not a qualified court process server. PW2 testified that the agreement dated 16/10/1990 had an implied condition of payment. He testified that the transfer at page 15 of the Plaintiff's bundle of documents was only signed by the Land Adjudication Officer.
26. With regards to the decision on the objection, he conceded that the signatory did not indicate his name and designation, but that the Land Adjudication Office could supply those details. He also conceded that the decision was conditional upon payment of the balance, but he had no evidence that the balance was paid. PW2 testified that the 5 vendors were standing in for the rest of the family, which is why they had been authorised to sign documents before government officers. PW2 testified that when land is under adjudication, there is no need for LCB Consent. As to the transaction being rushed, PW2 admitted that Government of Kenya offices are supposed to be efficient. He also told this court that they did not know that the transfer had been lodged so they could not object to it.
27. On the absence of the valuation for stamp duty, PW2 said that the said document is retained by the registry. He acknowledged that the land was consolidated with another parcel in 2010, and currently Parcel No. 406 does not exist on paper. PW2 added that they placed caution on the land through PW1 but he does not know when it was removed. He also testified that they did not take immediate possession because they were waiting for title before taking possession of the land. That they tried to get the title in 2013 because PW1 wanted to develop the land, but he denied that they slept for 24 years before they went for their title.
28. PW2 was then cross-examined by Mr. Mwanjeje and he testified that the land was bought on 31/12/1990. He testified that according to paragraph 6 of the Affidavit by Nicholas Sanya, it shows there was an amendment in favour of PW1 in the adjudication record, although he had never seen it. On the discovery of the alleged fraud, he admitted that he never reported the issue to the Police.
29. The Plaintiff then called David Chege Kariuki, a registered, licensed valuer Registration No. VRB/32/23. He adopted his witness statement dated 25/7/2023 as his evidence-in-chief. He testified that the valuation report is on Parcel no. 406 which is consolidated with 758. He testified that they were instructed by PW2. He testified that they came up with the value of KShs. 120,000,000/-. He produced the report and invoices as PEXb 20-22.



30. On cross-examination by Mr. Litoro, he testified that he indeed went to value plot no. 406 as consolidated into plot no. 758. He admitted that on consolidation, plot no. 406 may not exist on paper. That he was shown a copy of title to the suit land and was given the Index Map for Plot 406, but they are not annexed to his report. He clarified that he did not value plot 758 or investigate the other property that was consolidated. He testified that he was given instructions in 2023 and he was accompanied by PW2 who holds a Power of Attorney from PW1. He further testified that the suit land is first row from the sea and has an acreage of 12.083 Acres, and that he identified it with the help of PW2. He told the court that there are no developments on plot no. 406, and that it is unoccupied and not fenced.
31. PW3 was cross-examined by Mr. Mwandeje and testified that he did the valuation on 21/7/2023, the date of the report. He stated that he went to the land office to confirm the property but was informed that the land had a dispute and he could not obtain the documents, although he managed to obtain the index map which showed him the area. He confirmed that PW2 had told him of the consolidation, but he valued plot no. 406 according to the index map.
32. He was re-examined and he testified that although he had not annexed a copy of the title over plot no. 406, a similar one is in the 2nd Defendant's Bundle of Documents. He reiterated that he was able to identify the area and that it is adjacent to the sea.

2nd Defendant's Case

33. On the part of the Defence, Guy Spencer Elms, and advocate of the High Court of Kenya admitted in 1996 as P105/3037/96, practicing at the firm of Raffman Danji Elms & Virdee. He testified that he is the executor of the estate of the 2nd Defendant alongside Nileshkumar Shah. He adopted his two witness statements dated 10/3/2023 and 7/7/2023 as his evidence-in-chief. He produced the documents in his list of documents dated 10/5/2023 as DEXb 1-13 respectively. He also produced the documents in his supplementary list of documents dated 10/7/2023 as DEXb 14-24 except the document no. 23 which was marked as MFI23.
34. DW1 testified that the estate of Pritam is in possession of the suit land and has been paying a caretaker on the property. DW1 admitted that Pritam acquired the suit land in 2010, and in 2011 it was indeed consolidated with plot no. 412 to create plot no. Kwale/Shimoni/758 whose title was issued on 20/06/2011. He testified that this suit ought to have been filed in the ELC in the first instance, and since it was transferred from the High Court to the ELC and started afresh in 2016, then it was time barred. On the allegations of fraud and prayer for de-consolidation of plot no. 758, he testified that Pritam bought the land from a local at the coast and has occupied it continuously. He trashed the claim that PW1, a non-local who came from Kajjado, had bought the land in 1990 since the land was in a settlement scheme. He asked the court to dismiss the suit and allow the counterclaim for the benefit of the estate.
35. On cross-examination by Mr. Mwandeje, DW1 testified that Pritam conducted due diligence as shown by the pre-sale search produced in court. As to why he referred to a title with joint names, DW1 testified that Mr. Satpal was an advocate who assisted Pritam, but he passed away and they could not trace the deceased's documents after death. He further testified that there had been no complaints from the Plaintiff on the issue in reference to any fraud.
36. DW1 was also cross-examined by Mr. Namada, upon which he testified that he wasn't involved when the matter was transferred to Kwale ELC, neither had he seen the orders that resulted in the said transfer. He testified that although the Plaintiff claims he got the land through the settlement scheme, in his experience land in settlement schemes is given to locals. He confirmed that the Letter in the



Plaintiff's bundle dated 27/3/1997 from the Ministry of Lands states that the land is recorded to Gerald Kithinji and that there is no dispute.

37. DW1 acknowledged that 5 individuals placed an objection against the sale to Gerald, and admitted that in one of the letters, the five individuals withdrew the objection. He also noted that there was a letter by one Salima indicating that owners acknowledged that Gerald bought the land and they had no objection. He expressed doubt as to the additional agreement stating that it did not comply with requirements existing in the year 1990.
38. DW1 admitted that although the first entry in the copy of the green card is the 1st Defendant, his name did not appear in any other documents. He admitted that the root of the 1st Defendant's title cannot be shown, but stated that a first registration cannot be invalidated. He also acknowledged that according to the letter from the ministry of lands dated 6/12/2002, plot 406 was not affected by appeals. DW1 also confirmed that the 1st Defendant's name was entered into the register on 9/4/2002 while the register was sent on 6/12/2002, and admitted that this was an anomaly.
39. DW1 testified that the land was initially owned jointly to Pritam and Satpal in equal shares, but was eventually transferred to the 2nd Defendant. Bearing all the above in mind, DW1 testified that he did not know if the transfer and title were valid. He had no documents to show that Jowhal indeed transferred his share to the 2nd Defendant. He however explained that Pritam had explained he was holding the land in trust for both himself and Satpal. He denied the allegation that the 1st and 2nd Defendants' titles are illegal. He testified that from the agreement for sale the purchase price was KShs. 13,200,000/- but he could not show that the balance was paid as he was not a party to the agreement.
40. DW1 further testified that in the counterclaim, they were claiming as both purchaser and adverse possessor. He denied the allegation that in seeking for adverse possession, he had admitted that the land belonged to Gerald Mwirichia. He testified that if Gerald Mwirichia is confirmed to be the owner, then they have complied with requirements for adverse possession.
41. On re-examination by Mr. Litoro, DW2 told this court that he did not have the originals for the consolidated parcels as they would have been surrendered. As to the alleged decision dated 24/7/1990, he testified that it does not show whose decision it is or who signed it. He testified that there was no evidence of payment of the balance of the purchase price, therefore the property ought not be transferred to Gerald. DW1 also testified that the register of objections produced by the Plaintiff is not signed by the Land Adjudication Officer.
42. DW1 pointed out that the names of the 5 individuals named in the Plaintiff differ from the ones listed in the affidavit of Nicholas Sanya, and there is no affidavit of names to clarify that they are the same persons. He also stated that there is no evidence that the letter forwarding the final adjudication register is dated 6/12/2002 was acknowledged by the Chief Registrar as the acknowledgment section is blank.
43. As regards to the transfer from Satpal to the Pritam, he testified that he is not aware that his estate has contested the same. As to the payment of the balance by Pritam, he testified that in the transfer form, the 1st Defendant confirmed that he had received the entire amount. He refuted the claim that Pritam acquired the land fraudulently. He challenged the valuation report produced, stating that in the year 2023 plot no. 406 did not exist thus there could not have been beacons.
44. The 2nd Defendant called Wilson Gichuhi, a chief inspector and Commander of Police, who testified on oath as DW2 and he told this court that he was a friend of Pritam. DW2 testified that Pritam initially approached him because he needed assistance with getting LCB Consent. He explained that the land in Shimoni was Plot No. 406 which had been confirmed as vacant and bushy, as well as Plot No. 412. That these two were consolidated to form Plot No. 758, and in 2013 he requested DW2 to find a caretaker to



- take care of the land. That DW2 found Lewa Mwachiro Mwasambu, who was always paid through M-Pesa. That after Pritam died, the executors took over and retained the caretaker and continued paying him the same amount and in the same manner. DW2 testified that nobody lives on the land currently and that it is not fenced. He produced his Affidavit sworn on 9/6/2022 (DW2 Exb 1).
45. DW2 was cross-examined by Mr. Mwandeje, he testified that at the time Pritam sought his help, the land had already been consolidated into Plot No. 758. He did not know how Pritam came to own Plot No. 406, only that he had bought it from one Abdurahman. Further, that Pritam also gave him a copy of the title to Plot No. 758.
 46. On cross-examination by Mr. Namada, he clarified that he had no participation in the working of the LCB Msambweni, only that Pritam sent him the papers to send to the LCB Msambweni, since his office was at the DC's Office. He testified that he did not attend the LCB in person since Pritam sent his agent, but the LCB consent was granted. He explained that when the papers were submitted to the LCB, the members were told that they came from the Chief Inspector as he had alerted them about the papers beforehand. That he had also told the DCC that the papers were his, and that they had been given to him by a client.
 47. He further testified that he never saw the seller of the land and that he doesn't know him. He then admitted that he had attended the LCB meeting on behalf of Pritam Panessar although he did not stand before the board. DW2 stated that to his knowledge, the seller had to appear at the LCB meeting, but in this instance, the seller did not attend the meeting or appear before the Board. He denied misusing his authority despite acknowledging that helping people obtain LCB Consent is not part of the duties of a Chief Inspector, but he told the court that he was only helping a friend.
 48. DW2 was re-examined and testified that he was not paid by Pritam to assist him in the LCB Consent, and he was only helping a friend. He also said that the DCC was his boss.
 49. Lewa Mwasambu Mwachiro, testified under oath as the 2nd Defendant's third witness (DW3). He testified that he was introduced to Pritam by his friend Wilson (DW2) since he was looking for someone to look after his land. Although he said he met Pritam only once in 2013, he confirmed that he was looking after his land in Shimoni. That the land is known as Plot No. 758 and according to him, it belongs to Pritam only. He produced his affidavit and the photographs in the Affidavit as DW3 EXb 1, claiming that it was given to him by Wilson and the contents explained to him before signing.
 50. DW3 testified that he was engaged to work on the land in 2013, and is paid KShs. 5,000/- monthly. While he doesn't live on the land, he goes there 3 or 4 times a week to check on it. Further, that nothing goes on in the land, save that he plants maize and vegetables, and the maize seen in the photos was planted in 2023. He testified that despite Pritam's death, he is still being paid. He testified that there is no one on the land, neither is there any house.
 51. On cross-examination by Mr. Mwandeje, DW3 testified that Pritam told him that the land belonged to him, but he was never shown a title. He added that he was shown the shamba by Wilson.
 52. DW3 also was cross-examined by Mr. Namada. He testified that when Wilson took Pritam to meet him in 2013, he told him the land belonged to him and he was shown 86 Acres. DW3 admitted that he doesn't know the indigenous owners of the suit land. DW3 reiterated that the Affidavit was brought to him in Shimoni by Wilson and he signed it, and that he never went to Mombasa. DW3 was not re-examined.



The 3rd and 4th Defendants' Case

53. On the part of the 3rd and 4th Defendants, the AG called Nicholas Sanya to testify as DW4. He told this court that he is a Land Surveyor by profession and was representing the Land Adjudication and Settlement Office and the County Land Co-ordination, Kwale. He adopted the list of documents dated 21/7/2023 as his evidence and it was produced as DW4 Exb 1. He testified that per the demarcation book in their custody, parcel 406 was first demarcated to four people; Hamisi Masuid, Warda Ali, Mwaulu Fosi and Mwandasi Mwamadi in common on 3/6/1980. He testified that upon completion of the adjudication process and publication of the register, an objection was raised by Gerald Kithinji Mwirachia claiming ownership by sale.
54. DW4 testified that the objection, registered as 152/89/90, was heard on 24/07/1990 and was allowed, and the land was transferred from the original allottees to Gerald Mwirichia. That after determination of the objections, they prepared and submitted it to the Director of Land Adjudication and Settlement to forward to the Chief Land Registrar. He explained that the land was not subject to Appeal and the title was prepared in the names of Gerald Mwirachia. He noted that the objection was noted in the objection register produced in court.
55. During cross-examination by Mr. Litoro, DW4 testified that he had certified the Adjudication Objection Register. He testified that the objections were also recorded in the land adjudication record. As to the decision, he admitted that the document does not show who made the decision, but that they were the makers of the document. DW4 testified that the alleged transfer was in actuality a request for transfer. He stated that the extract only shows 4 people, the fifth individual, Ramtu B. Waramtu was not named in the register.
56. DW4 further testified that he had no knowledge of the first registration as it fell on the Land Registrar. On the condition imposed on payment of the balance, he testified that the same was to be paid in December, 1990 but he could not tell if it was actually paid. He explained that in adjudication, land is given to locals since it is trust land. DW4 further explained that profiling is not allowed, as the process only verifies valid interests in land for registration and not tribe.
57. DW4 testified that they had the Certificate of finality in their records, but he did not have a copy in court. That they did supply the decision on the objection to the Land Registrar. He confirmed that the letter forwarding the final adjudication register to the Lands Register was acknowledged. With regards to the condition of payment of the balance, DW4 testified that if the condition was not fulfilled, the Land would revert back to the original owners. DW4 also explained that their mandate ended 22 years ago when the land was registered.
58. On cross-examination by Mr. Namada, DW4 showed the court the original of the register of the extract produced in court, and the court confirmed that it tallied. DW4 testified that the Plaintiff herein is the one who lodged a complaint, and it was made against the four individuals that were the first owners of the suit land, seeking a transfer in his favour. He reiterated that the objection was allowed in favour of Gerald Mwirichia.
59. DW4 testified that the Shimoni Adjudication Scheme was trust land inherited by the owners but which had no titles, for which they applied CAP 284. DW4 explained the process of adjudication of trust lands, and asserted that the said process was followed in the Kwale Shimoni Adjudication Area. He reiterated that the first owners of the suit land were the 4 individuals earlier mentioned. With regards to the decision not being signed, DW4 testified that the decision was signed by the officer in charge at the time. Further, that for them, the practice is only to note that the Land Adjudication Office (LAO) had made the decision, thus the missing name doesn't invalidate the decision.



60. DW4 testified that he did not have the final adjudication record as it is sent to the Director for onward transmission to the Land Registrar. However, he had the Original letter dated 6th December, 2002 from the Director of Land Adjudication & Settlement forwarding the Final Adjudication Register to the Chief Land Registrar. That the said letter noted the parcels that had pending appeals to the Minister and the suit property was not one of them.
61. DW4 explained that the Chief Land Registrar only issues titles according to what he receives, and that title for the suit land could not be issued prior to 6th December, 2002. He noted from the green card the land was first registered to Sheikh Mahmud Abdurahman, although his name never featured in the adjudication records, nor was there any authority from Gerald to transfer the land to him.
62. DW4 was re-examined and confirmed that the register does not capture the 1st Defendant. Further, that he had no record showing a reversal of the transfer to the Plaintiff. He asserted that the process was followed in Shimoni Adjudication Scheme.
63. The AG also called Susan Mweni, a Land registrar in Kwale employee no. 2015000474 to testify as DW5. She testified that according to records at the Lands Registry, the first registered owner is Sheikh Mahmoud Abdurahman, the 1st Defendant who was so registered on 9/4/2002 and issued with title on 6/3/2007. That the 1st Defendant transferred the land to Pritam on 22/7/2010 and title issued to him on the same day. That Pritam consolidated the land with Plot No. 412 to create plot no. 758. She had in the parcel file the original titles for parcels no. 406 and 412 surrendered upon consolidation, the consent to consolidate, the original green cards for parcel nos. 406 and 412, as well as the original application for LCB Consent to consolidate the two plots. The documents were produced as DW5 EXb 1-6. She explained that after consolidation, the green card for parcel no. 758 went missing and the said loss was gazetted.
64. DW5 was first Cross-examined by Mr. Litoro and she testified that the gazette notice is No. 140005 of 2/12/2022 but the said notice has not been registered. That the green card for plot no. 758 has not been opened, meaning that the process for opening the green card is still ongoing since it has not been signed by Land Registrar. She testified that without the registrar's signature on the green card, she could not confirm if the person named therein was the proprietor.
65. DW5 testified that before signing the register, the Land Registrar must see the Adjudication list brought from the Adjudication Office, which she confirmed is ideally kept in the parcel file. However, in this instance, these documents are not in the parcel file and she could not tell what name came from the Adjudication Office. DW2 testified that for the transfer and the consolidation to happen, the Registrar must have seen the transfer and relevant documents. She could not however tell if entries no. 1-5 on the green card were fraudulent. She further testified that the crossed entry with respect to Satpal was authorised by the Registrar. That the remark "error" against the said cancellation ought not to have been put there, and that she had no record that they crossed out Satpal's name from the register.
66. DW5 was then cross-examined by Mr. Namada upon which she testified that in land adjudication, the Adjudication Office prepares a list of those settled on the land and sends a copy to the Land Registrar. That until this point, the land is not registered. That the Land Registrar uses the adjudication record and accountability list to open the register known as the green card and thereafter title issued. She further confirmed that the adjudication record found in their files should mirror that of the adjudication file. She reiterated that the file for the suit land does not have the adjudication list or accountability list, but starts with the titles cancelled at consolidation.
67. DW5 was clear that in the absence of the two lists, she had no tangible evidence to support the entry of the 1st Defendant in the green card. As to the disparity in dates of forwarding the list and the date of



the first registration, she testified that it is not possible for someone to be registered as the proprietor before the list is sent to the Land Registrar. She noted that from the letter dated 27/3/1997 the land was to be registered to Gerald Mwirichia and she had seen no document indicating a change in favour of the 1st Defendant. She testified that a first registration may be cancelled by the court or the minister before registration, and after registration, by court order if there is fraud or misrepresentation. DW5 was not re-examined.

SUBMISSIONS

68. At the end of the hearing, the court directed the parties to file their final written submissions. The parties complied with the Plaintiff filing his submissions dated 22nd January, 2025 and Supplementary Submissions dated 21st March, 2025. The 2nd Defendants also filed their submissions which are dated 11th March, 2025. On the part of the 3rd and 4th Defendants, the AG filed submissions dated 5th March, 2025

Plaintiff's Submissions

69. The Plaintiff's Submissions are dated 22nd January, 2025. Counsel for the Plaintiff started by giving a summary of the facts and evidence adduced. Counsel pointed out that the Land Adjudication officer had clarified that the final adjudication register indicated that Gerald Kithinji Mwirachia was the owner of the suit land. Counsel then submitted that the 1st Defendant's name did not feature anywhere in the adjudication process, and questioned how he came upon title to the suit property. Counsel also referred to the fact that the 1st Defendant was registered before completion of the adjudication process. He contended that where the adjudication process cannot support the final registered owner, such registration must be concluded to have been borne out of fraud, malafides, misrepresentation and corruption on the part of the registered owner and the registering authority.
70. Counsel for the Plaintiff submitted that none of the land acquisition modalities set out at Section 7 of the Land Act, 2012 support the 1st Defendant's title and he relied on the case of Waweru vs Muhinja (Environment & Land Court Case 40 of 2021) (2024) eKLR. Counsel also cited the case of Dina Managemnet vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021 (2021) eKLR, where the Supreme Court held that where the title is challenged, the title holder is required to show and prove that the root of his title is valid. Counsel submitted that the 1st Defendant had not proved lawful acquisition, thus his title was only a piece of paper which gave him no right or interest over the suit property.
71. Citing Sections 143(1) of the Registered Land Act alongside Sections 26 and 80(1) of the Land Registration Act, Counsel submitted that the court has power to revoke/cancel a title, including a first registration, where it is shown that it was acquired through fraud, corruption or illegally. The Plaintiff's Advocate argued that all the ingredients for cancellation of title exists in this instance.
72. It was also submitted on behalf of the Plaintiff that in the circumstances, the 1st Defendant did not hold any valid title/right in the suit property. That since one can only transfer what they lawfully possess, the 1st Defendant had not acquired any interest that he could lawfully transfer to the 2nd Defendant. Counsel relied on the case of St. Thomas Academy Ltd vs Githumu Kangema Ltd & Others (ELC Case 281 of 2013). Counsel submitted that the 2nd Defendant's claim that he is an innocent purchaser for value without notice is false and cannot hold, since the 2nd Defendant could not acquire any right or title that the 1st Defendant never possessed to begin with.
73. Counsel cited Shibutse & Another vs Keya & 3 Others (ELC Case 247 & 237 of 2015 (Consolidated) (2022) KEELC 15047 (KLR), the Ugandan case of Katende vs Haridar & Company Limited (2008)2 EA 173. Counsel also argued that there was no valid LCB Consent since the consent used in the subject



transfer was issued in the absence of the vendor and the purchaser and he cited *Kahia vs Nganga* (2004) eKLR and *Nancy Chepkirui Soi vs Gideon Maritim* (2021) eKLR. Counsel argued that where the LCB Consent is acquired unlawfully, it is illegal and cannot validate a transfer. Counsel also submitted that the 2nd Defendant's title is inconsistent with the transfer documents from the 1st Defendant which was in favour of two transferees, being the 2nd Defendant and Satpal Singh Jowhal, yet the title is only in favour of the 2nd Defendant only.

74. Counsel pointed out that no government valuer assessed the value of the land to ascertain stamp duty payable on the transfer, further compounding the illegalities surrounding the 2nd Defendant's title. Counsel urged that having been acquired irregularly and unprocedurally, the 2nd Defendant's title was unlawful and should be surrendered to the Land Registrar (*Kimani vs Njeri & 3 Others* (ELC Case 10 of 2022) (2023)). Counsel further faulted the 2nd Defendant for failing to avail proof that he paid the alleged purchase price of KShs. 13,200,000/- stated in the sale agreement (*James Gatoru Kamande vs Ntari Ole Sankaire & Another* (Civil Appeal No. 1 of 2019) (2020) eKLR).
75. It was Counsel's submission that the consolidation with parcel no. 412 was a perpetuation of the fraudulent scheme, which was meant to erase the evidence of the suit property and make it harder for it to be recovered, hence the need for cancellation of the consolidation. Counsel argued that the transaction breached and violated the Plaintiff's right to own his land as secured under Section 75 of the repealed Constitution and Article 40 of *the Constitution* of Kenya, 2010. Counsel urged that the Plaintiff is entitled to the prayers in the Further and Further Amended Plaintiff, as well as costs of the case and interest on the award.

2nd Defendant's Submissions

80. In the 2nd Defendant's submissions dated 11th March, 2025 Counsel acknowledged that the suit was transferred to the ELC vide order of court made on 8th March, 2016. Counsel argued that no Plaintiff was filed in this suit after the transfer, yet the Plaintiff filed an Amended Plaintiff on 22nd November, 2022, and he contended that this is the date the suit was first lodged in this court. Counsel argued that since the Petition was originally filed in the High Court and not the ELC which has jurisdiction to hear land disputes, then it is a nullity. In addition, that the transfer thereof to this court and conversion to a civil action was ultra vires jurisdiction and equally a nullity, and that the failure to seek leave to convert the Plaintiff to a Petition was also irregular.
81. Counsel thus argued that the suit herein is irregular and incompetent. Counsel cited the case of *Phoenix of EA Assurance Company Limited vs S.M. Thiga t/a Newspaper Service* (2019) eKLR, *I&M Bank Limited vs Gilgil Treatment Industries & Another* (Civil Case 418 of 2018)(2024) KEHC 7065 (KLR), *Edward Muturi Mbaye vs Simon Mukindia Mbaye* (2017) eKLR, *Benjamin Leonard Mcfoy vs United African Company Limited (UK)* (1962) AC 152 and *Nicholas Kiptoo Arap Korir Salat vs the Independent Electoral and Boundaries Commissions & 7 Others* (2014) eKLR.
82. Counsel submitted that from the evidence produced by the Plaintiff, the alleged cause of action arose on 14th May, 2013. Counsel argued that the suit was formally lodged in this court on 22/11/2022, thus it is time barred since it was brought to court after over 20 years from the date of the first registration, and after over 9 years from the discovery of the cause of action. Counsel submitted that the Plaintiff's suit is therefore incompetent, still born as well as fatally and incurably defective, and bad in law. For these reasons, Counsel concluded that the court lacks jurisdiction to entertain the suit and the same should be struck out. In support of his contentions, Counsel cited *Edward Moonge Lengusuranga vs James Lanaiyara & Another* (2019) eKLR, *Justus Tureti Obara vs Peter Koipeitai* (2014) eKLR and *Bosire Ogero vs Royal Media Services* (2015) eKLR and *Margaret Wairimu Magugu vs Karura Investment Limited & 4 Others* (2019) eKLR.



83. The above notwithstanding, Counsel reiterated that the 2nd Defendant was an innocent purchaser for value and without notice of any defects. He submitted that no evidence was led to show that the 2nd Defendant had knowledge of the alleged fraud in acquiring the land, which is a key ingredient per Sections 23(1) of the RTA and 143 of the RLA (both repealed). Counsel submitted that the 1st Defendant acknowledged receipt of the purchase price in the transfer document, stamp duty was paid and LCB Consent obtained. Counsel argued that the executors had proved that the 2nd Defendant was an innocent purchaser and met the threshold in *Re Estate of Raphael Ngugi (Deceased)* (2022) eKLR and *Weston Gitonga & 10 Others vs Peter Rungu Gikanga & Anor* (2017) eKLR. Counsel also cited *Shibutse & Another vs Keya* (Supra).
84. On the alleged fraud, Counsel submitted that Order 2 Rule 10 of the Civil Procedure Rules requires a party to plead and particularise claims, and thus argued that the attempt to impeach the Defendants title on un-particularised ground of fraud, lacks basis in the pleadings. On this front, Counsel relied on *Kuria Kiarie & 2 Others vs Sammy Magera* (2018) eKLR, *Green & Another vs Kazungu & 2 Others* (Civil Appeal E017 of 2020) (2022) KECA 991 (KLR), *Demutilla Nanyama Pururmu vs Salim Mohamed Salim* (2021) eKLR and *Orieny & Another vs National Bank of Kenya* (Civil Appeal E016 of 2023) (2024) KEHC 6002 (KLR) among other cases. He termed the 3rd and 4th Defendants evidence and submissions a departure from their Statement of Defence without any basis in contravention of the rule that parties must be bound by their pleadings. All in all, Counsel for the 2nd Defendant submitted that no evidence had been adduced to prove the alleged fraud and thus the case ought to be dismissed.
86. Counsel contended that the Plaintiff had not proved his case against the 2nd Defendant. That his entry into the adjudication register was irregular, un-procedural and unlawful, and there is no proof that he paid the balance of the purchase price. Counsel further submitted that under Section 144 of the repealed RLA, any person who suffers loss of title shall be compensated from the consolidated fund. Counsel submitted that the remedies sought in the suit are not available to the Plaintiff.
87. Conversely, Counsel submitted that the 2nd Defendant had proved adverse possession of the land and asked the court to allow the counterclaim and dismiss the suit. Counsel also asked that costs be awarded to the 2nd Defendant. He placed reliance on the case of *Lelopa Ole Parsaurei* (Suing as a legal representative of the Estate of Masare Ole Alasero alias Marsarei Ole Alaseso (Deceased) vs County Land Registrar & 13 Others, Kajiado ELC Case No. 201/2018).

3rd and 4th Defendant's Submissions

88. On behalf of the 3rd and 4th Defendants, the AG filed submissions dated 5th March, 2025. The AG submitted that Article 40 of *the Constitution* elaborates the right to own property, while indefeasibility of title is at Section 26(1)(b) of the *Land Registration Act*. According to the AG, it came out clear that during the adjudication process the land was demarcated in the names of the indigenous individuals who then sold to the Plaintiff. The AG acknowledged that the 1st Defendant could not therefore have been registered as the proprietor of the land on first registration pursuant to Section 11(2)A and 14 of the RLA(repealed). The AG contended that fraud was not committed during the adjudication process, but after the completion thereof and forwarding the adjudication register to the Land Registrar for preparation and issuance of titles.
89. The AG also submitted that considering that the records at adjudication ought to be the same ones forwarded to the lands registry, it was a mystery how the details of the Plaintiff went missing from the records at the lands office. The AG opined that the 1st Defendant's actions of acquiring the suit property were illegal, null and void, and as such could not confer ownership upon the 2nd Defendant.



Further, that the 1st Defendant's title cannot enjoy the protection accorded a first registration under Section 143(1) of the RLA (repealed) on account of fraud or mistake.

90. The AG cited Sections 107 and 108 of the *Evidence Act* to the effect that whoever lays a claim before the court against another has the burden to prove it. Counsel submitted that although the 2nd Defendant claims the suit land, there is no evidence showing how the 1st Defendant acquired the land, noting that the adjudication records do not reflect his name. The AG further submitted that the 2nd Defendant's claim being hinged on acquisition of the property from the 1st Defendant, it was impossible for the 1st Defendant to confer what he did not have. Counsel urged that he had placed before the court authorities and the law to enable it make a sound judgment, and asked the court to consider them in the interest of justice.

Plaintiff's Supplementary Submissions

91. In response to issues raised in the 2nd Defendant's Submissions, the Plaintiff filed Supplementary Submissions dated 21st March, 2025. Counsel submitted that under section 4(4) of the *Limitation of Actions Act*, an action founded on fraud should be commenced within 3 years of the discovery of fraud. That under Section 26 thereof, time starts to run from the date of discovery of the fraud. Counsel explained that the fraud was discovered in 2013 and the suit herein initiated on 2014 as Petition No. 20 of 2014, thus falling within the statutory time frame.
92. Counsel reiterated that as acknowledged by the Land Adjudication Officer, the Plaintiff purchased the suit land before the adjudication process commenced, and at the close thereof, he was the owner of the land. Counsel accused the 2nd Defendant of mischief since he had not produced any document to show how the 1st Defendant acquired title. He cited the case of *Dina Management vs Mombasa County Government* (Supra), pointing out that the 2nd Defendant could not defend the root of the title. Counsel also cited *Rebecca Nadupoi Supeyo & Isaac Tipariko Supeyo* (suing as the Administrators of the Estate of Keziah Gathoni Supeyo) vs *Millennium Dream Homes Limited & 3 Others* (2025) eKLR, where the court held that once the original acquisition is found to lack legality, the title to subsequent owners even if innocent cannot be protected.
93. Counsel further argued that Section 26 of the Registered *Land Act* is meant to protect real title holders from unscrupulous persons who aim to benefit where they did not sow (*Athi Highway Developers Limited vs West End Butchery Limited & 6 Others* (2015) and *Urmilla w/o Mahendra Shah vs Barclays Bank International Bank & Another* (1979) KLR 76). In addition, Counsel submitted that the 1st and 2nd Defendants had violated the constitutional and legal rights of the Plaintiff to own his land. He added that the protection under Article 40 does not extend to property that was illegally acquired. Counsel urged that the Plaintiff is entitled to the remedies and damages sought in the Plaintiff herein.

Analysis And Determination

94. I have read considered the pleadings filed by the parties herein, the witness testimonies as well as the evidence adduced before this court. I have also read and considered the submissions filed by the Advocates herein on behalf of their respective clients. From the pleadings, testimonies and evidence, along with the written submissions from the parties, the following issues commend determination by the court; -
- i. Whether there is a competent suit for determination by this court
 - ii. Whether the Plaintiff is the bonafide lawful owner of the suit property Kwale/Shimoni/406



- iii. Whether the 1st Defendant held any valid interest on the suit land capable of being transferred to the 2nd Defendant
- iv. Whether the 1st Defendant's registration, being a first registration may be challenged
- v. Whether the 2nd Defendant is a bona fide purchaser for value and without any notice of defects in the title
- vi. Whether the 2nd Defendant's claim for adverse possession is merited
- vii. What orders should issue in this instance?
- viii. Who shall bear the costs of both the suit and the counterclaim.

Whether there is a competent suit for determination by this court

- 95. The 2nd Defendant challenged the plaintiffs suit on grounds that it was commenced by way of petition in the High Court at Mombasa. That this being a land matter, the High court had no jurisdiction to handle the matter, therefore the suit was incompetent as at the moment of its inception.
- 96. Indeed, this suit was commenced by way of a Constitutional Petition registered in the High Court at Mombasa as HC Petition No. 20 of 2014. By a Chamber Summons application dated and filed on 26th June, 2014 the Plaintiff herein, then the Petitioner, sought inter alia an order that an investigation be conducted by the District Land Registrar and the National Land Commission and to disclose to the court the manner in which the 1st Defendant came to be registered as the owner of the suit property.
- 97. The Chamber Summons application was dismissed by the Hon. Justice Anyara Emukule (Rtd) in his ruling delivered on 9th March, 2016 (see Arnold Mbaabuh the Duly Appointed Attorney of Gerald Kithinji Mwirichia vs Sheikh Mahmoud Abdulrahman & 4 others (2016) eKLR). The Hon. Judge also directed that the Petition be transferred to the Environment and Land Court to be given a new number in that court, and be prosecuted in priority as an ordinary civil action. The matter was then transferred to the ELC at Mombasa and registered as Mombasa ELC Case No. 33 of 2016.
- 98. I note that the 2nd Defendant has not told this court that the ruling of the court delivered on 9th March, 2016 was ever challenged through Appeal, even though he was represented by Counsel who is presumed to know the proper procedure to challenge court orders and/or decisions. The 2nd Defendant has had sufficient time to challenge the said decision since it was made in 2016, but this was never done. The 2nd Defendant remained mute on the issue.
- 99. At this point however, any determination by this court on the issue of the transfer of the suit property from the High Court to the ELC will amount to the court sitting on Appeal on a decision made by a court of equal status, a matter for which it has no jurisdiction. Consequently, for as long as the ruling/order made on 9th March, 2016 transferring the case to the ELC is not challenged through the requisite mechanisms, it remains valid.
- 100. The above conclusion also applies to the contention that the suit is time barred. But assuming I could be wrong I have reviewed the provisions of section 4(4) of the *Limitation of Actions Act* read together with section 26 thereof. The former provides that an action founded on fraud should be commenced within 3 years of the discovery of fraud. Time starts to run from the date of discovery of the fraud. Fraud was discovered in 2013 and the suit herein initiated in 2014 as Petition No. 20 of 2014, thus falling within the statutory time frame.



101. It is the finding of this court that the suit before this court is a competent suit for determination and is properly before this court.
102. Moreover, courts exist to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as enunciated in *Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR..*

Whether the Plaintiff is the bonafide owner of the suit property

103. The Plaintiff contends to own the land parcel Kwale/Shimoni/406 but that the title was instead fraudulently and illegally issued to the 1st defendant who transferred it to the 2nd defendant. In the present suit the plaintiffs principal order was for the cancellation of the titles issued.
104. To be able to impeach the above titles the plaintiff had to first demonstrate that he has an interest in the suit property, without which he would have no business to impeach the 1st and 2nd defendants titles herein. This is the burden of proof that the plaintiff has to discharge as envisaged under the provisions of section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya which provides as follows; -

Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.
105. The burden is discharged on a balance of probabilities.
106. Based on the Plaintiffs claim and evidence Gerald Kithinji Mwirichia purchased the land when adjudication for the Shimoni adjudication area process was in progress, meaning it had not been registered. The land was purchased from Hamisi Masudi Mwariale a.k.a Hamisi Masudi, Marinda Ali Jabir a.k.a Marinda Salimu, Mwanaulu Fosi Toya a.k.a Mwaulu Bakari, Mwandasi Mwamadi Mwarambo a.k.a Mwandasi Mwangome and Ramtu Bakari Waramtu. PW1 produced the sale agreement made on 16/10/1990.
107. The suit land herein was on adjudication demarcated to Hamisi Masudi, Marinda Ali, Mwanaulu Fosi and Mwandasi Mwamadi. On publication of the register, there was an objection lodged on their entry by Gerald Kithinji Mwirichia claiming ownership by reason that he had purchased the land. This court has been told that the Objection was heard and allowed as indicated in the extract of the Register of Objections produced before this court at page 13 of the Plaintiff's bundle of documents.
108. The plaintiff also adduced in evidence a letter dated 27th March, 1997 from the Land Adjudication and Settlement Officer at Kwale. My perusal of the same confirms that Plot No. 406 Shimoni Adjudication Section was as at that date recorded in Nairobi in the name of Gerald Kithinji Mwirichia. It is also stated that there was no dispute pending over the plot and that the said Mr. Mwirichia would be issued with a Title Deed once adjudication was completed. An extract of the Adjudication Register produced (page 13 of the plaintiffs bundle) before this court dated 14/5/2013 affirms Plot No. 406 is recorded against the name of Gerald Kithinji Mwirichia.
109. The plaintiff also produced in evidence a letter from the Land Adjudication and Settlement Office dated 14th May, 2013 again confirming that Plot No. 406 Shimoni Adjudication Section was recorded in the names of Gerald Kithinji Mwirichia. Notably, the Final Adjudication Register for the Shimoni Adjudication Section was forwarded to the Chief Lands Registrar vide letter dated 6th December, 2002. The said letter indicates the parcels that were affected by Appeals lodged before the Cabinet Minister as well as pending court cases. Plot no. 406 was not among the listed parcels. This means therefore that



the decision allowing the objection and registration of the suit parcel to Gerald Kithinji Mwirichia was never challenged.

110. Concerns emerged that the decision of the Land Adjudication Office does not indicate the name of its maker. However Mr. Sanya DW4 affirmed that the missing name of the maker does not invalidate the decision since the practice is to just indicate that the decision was made by the Land Adjudication Office. DW4 also presented to the Court the original objection and application for transfer, copies of which are at page 7-9 of the Plaintiff's bundle. DW4 also presented before court the original adjudication record and confirmed the demarcation book in their custody indicated parcel 406 was first demarcated to four people; Hamisi Masuid, Warda Ali, Mwaulu Fosi and Mwandasi Mwamadi in common on 3/6/1980. However an objection was raised by Mr. Mwirichia against their registration claiming purchasers interest which was resolved in his favor and the land was transferred from the original allottees to Gerald Mwirichia.
111. I'm inclined to address the allegation by the 2nd Defendant that the Plaintiff's claim over the land is defective for failure to comply with provisions of the Land Control Act. It must be noted that although Gerald Kithinji Mwirichia purchased the land from the original owners, at the time it indeed did not have a title. But this was prior to adjudication, and when the adjudication process was set in motion, he was noted as a person with an interest over the land arising out of the sale. Therefore, since Gerald Kithinji Mwirichia's claim was noted and verified during the adjudication process, the LCB Consent was not required as ideally the land would have been transferred to him from the government.
112. Similarly, on the condition of payment of the balance of the purchase price made on settlement of the objection, it was upon the vendors to pursue the balance from the Plaintiff and not the Land Adjudication Office. So far, I see no evidence that the said vendors challenged his interest over an unpaid balance.
113. Based on the foregoing it is the courts finding that the plaintiff sufficiently established his bonafide lawful interest in the plot 406 Shimoni Adjudication Section Kwale District to warrant him the standing to question the titles issued to the 1st defendant and subsequently the 2nd defendants.
114. Having made the above finding then I will proceed to the next issue.

Whether the 1st Defendants title was lawful Whether the 1st Defendant held any valid interest on the suit land capable of being transferred to the 2nd Defendant

115. The suit property is registered under the Registered Land Act. Ownership is founded on the document of title which should reflect the information in the register of titles. It was first registered in the name of the 1st Defendant, who then sold it to the 2nd Defendant and a Mr. Satpal Singh Jowhal, and eventually it made its way to the 2nd Defendant as the sole proprietor. This was corroborated from the parcel file by the evidence of DW5 who is the Land Registrar based at the Kwale Land Registry. The 2nd defendant also produced documents in this regard.
116. The Plaintiff however claims that the land belongs to him, his interest having been captured at the time of adjudication. He therefore claims that he should have been registered as the proprietor at the conclusion of the adjudication process. He alleged that there is nothing to show how the 1st Defendant came to be registered as the owner of the land, since he never transferred his interests to him thus the 1st Defendant had no interest to sell the land to the 2nd Defendant. That the said registration was fraudulent and illegal.
117. It is trite that fraud must be specifically pleaded, particularised and proved at a slightly higher standard than that of a balance of probabilities. The particulars are pleaded at paragraph 18A. Notably, the



registration of the 1st defendant in the land register for plot 406 herein without any basis as he had no provable legal or equitable interest or ancestry or purchase; falsifying documents between the 3rd and 4th defendants, collusion of 1st 3rd and 4th defendants, registration of the 1st defendant without genuine documents, 1st defendant transferring the title to the 2nd defendants whereas he did not have good title, unauthenticated cancellation of the name of Satpal Singh Jowhal in the land register as a co-proprietor as a sign of malafides indicative of fraudulent intent, registering the 1st defendant as the first registered owner of parcel 406 before completion of the adjudication process. The consolidation of parcel 406 and 412 herein is termed fraudulently as it was to make extinct the existence of the former to make its recovery impossible. These particulars in my view are sufficient notice.

118. Were the above particulars proved? The 1st defendant did not defend this suit however the burden of proof still lay with the plaintiff. It does not matter that the 1st defendant did not give evidence. This is enunciated aptly in the following dictum of Munyao J in the case of Rosemary Wanjiru Njiraini v Officer In Charge of Station, Molo Police Station & another [2017] eKLR -

‘17. It has been the law, and it still is the law, that the Certificate of Title issued to a person is prima facie evidence, that the said person holds title to the land noted therein. In the pre-2012 land regime, this was provided for in Section 28 of the Registered *Land Act* and Section 23 of the Registration of Titles Act which were drawn as follows :-

RLA S.27. 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;
- (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 and expressed agreements, liabilities and incidents of the lease.

RTA S.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.
- (2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

18. The current law is in Section 26 of the *Land Registration Act*, 2012, which 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.

19. It follows that when a person has been issued with a Certificate of Title, that title, prima facie, demonstrates that the individual named therein is the proper owner of the freehold or leasehold title noted in the said certificate. The law already presumes that the said title is a good title, and therefore if another person claims that the said title is not genuine, then the burden of proof is upon the person claiming as much. Such person must tender evidence, that despite what is noted in the Certificate of Title or register, the said title is not a good title and can seek to have it revoked.' (Emphasis is mine)

119. I have already discussed elsewhere in this judgement the history of the plaintiffs claim culminating to Mwirichia's interest being recorded in the adjudication record as the allottee of the land awaiting title. These facts notwithstanding, the green card for Plot No. Kwale/Shimoni Adj./406 shows that the register was opened in the name of Sheikh Mahmoud Abdurahman, the 1st Defendant, on 9th April, 2002. The 1st Defendant was issued with a title deed in the name of Sheikh Mahmoud Abdurahman dated 6th March, 2007. On behalf of the 2nd Defendant, a Certificate of Official Search dated 8th July, 2010 was produced showing that as of that date the suit land still belonged to Sheikh Mahmoud Abdurahman. These entries were also confirmed by DW5 as contained in the parcel register.

120. So was Sheikh Mahmoud Abdurahman interest recorded at adjudication?

It trite that a title obtained by Adjudication, the procedure that ought to be followed is set out in the Land Adjudication Act. DW4 explained this process in detail, from the declaration of an adjudication section upto the submission of the final adjudication register to the Chief Land Registrar. This court has been told that at the point of conclusion of the adjudication process, the suit land was recorded in the name of Gerald Kithinji Mwirichia and this was the name forwarded to the Chief Land Registrar in the Final Adjudication Register with regards to the suit property.

121. The court has also seen the letter dated 6th December, 2002 from the Director of Land Adjudication & Settlement forwarding the Final Adjudication Register to the Chief Land Registrar. DW4 explained the adjudication process in court, noting specifically that the Chief Land Registrar only issues titles according to what he receives. DW5, a Land Registrar, also testified that it is not possible for someone to be registered as the proprietor before the Final Adjudication List is sent to the Registrar. Going by these two testimonies, it is clear that the register for plot 406 could not have been opened before the final adjudication register was forwarded to the Chief Land Registrar.

122. It is thus questionable that the register for the suit property was opened on 9th April, 2002 in favour of the 1st Defendant's, 9 months before the letter forwarding the completed adjudication register dated 6th December, 2002. DW5 testified that she could not determine where the 1st Defendant's name came from. Indeed the court respectfully agrees with this observation as the court was not led into any



- evidence that linked the 1st defendant to the adjudication process. DW1 confirmed in cross examination that he had no document showing that before 6/12/2002 another list was sent to the Chief Land Registrar which list may have contained the 1st defendant's name.
123. Is it possible that the 1st defendant may have acquired the property by other lawful means? The court in *Waweru v Muhinja* (Environment & Land Case 40 of 2021) [2024] cited by the counsel for the plaintiff stated that pursuant to section 7 of the *Land Act*, 2012, title to land may be acquired through :- a) allocation, b) land adjudication process, c) compulsory acquisition, d) prescription, e) settlement programs, f) transmissions, g) transfers h) long term leases exceeding twenty-one years created out of private land; or i) any other manner prescribed in an Act of Parliament. The court had no such evidence that the 1st defendant's title was acquired in any of this manner.
124. Moreover none of the 2nd defendant's witnesses ever saw the said Sheikh Mahmoud Abdurahman. DW3 Lewa Mwachiro the caretaker admitted he does not know the indigenous owners of the land. DW2 who testified as Pritam's friend and who seems to have been privy to matters of the property admitted in cross examination he never saw the person who sold the land to Pritam neither did he know him.
125. What has been the jurisprudence on root of title? The Court of Appeal in the case of *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR stated 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 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.”
126. The Supreme Court of Kenya in *Dina Management Ltd v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), upheld the determination of the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (Supra). The court also took the position that where the registered proprietor's root of title is under challenge, it must be shown beyond peradventure that the acquisition was legal and complied with the existing laws and procedures.
127. In the present case it is clear that the acquisition of the suit land by the 1st Defendant was through a questionable process. Since the land was in an adjudication scheme, the 1st Defendant's name ought to have appeared in the adjudication register forwarded to the Chief Land Registrar. However, there is no documentation to support the 1st Defendant's title in this regard. Clearly from the foregoing there can be no other explanation other than that the 1st defendant perpetrated fraud and illegalities in acquisition of the title. It cannot be termed as a title lawfully obtained. It is fraudulent.
128. Arising from the foregoing the acquisition of the land by the 1st Defendant was not regular, consequently, the root of his title cannot be said to be clean, and neither can his title be valid.
129. The above then leads me to the 2nd Defendant's title whose root is the 1st defendant's title. To determine whether the 2nd Defendant acquired good and valid title from the 1st Defendant, it was necessary to interrogate the root of the 1st Defendant's title from the documentary evidence presented by the parties which I have already done.
130. It is a well-established principle of law that one cannot sell that which he does not own, and neither can he pass better title than he himself holds.



131. The above concept is captured in the common law principle of *nemo dat quod non habet*. In *Onsongo vs Njagi & 2 others (Civil Appeal E008 of 2022) (2024) KEHC 3648 (KLR)*, the court was dealing with sale of a motor vehicle, however, it explained the principle astutely in the following words:-

“26. Moreover, the 1st Respondent was barred from the private law principle of *nemo dat quod non habet* from selling the motor vehicle since he did not hold the title to the motor vehicle and therefore could not sell it. In *Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR* the Honourable Court pronounced itself as follows:-

‘The *nemo dat* principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract.’

27. The Appellant could not benefit from the exceptions above since he did not prove that he carried out a background check to verify the ownership of the motor vehicle or he exercised due diligence. There was no transfer forms signed and he was not given the log book.”

132. It is alleged by the administrators of the 2nd Defendants estate, that the 2nd Defendant acquired the land through an Agreement for Sale dated 14th July, 2010 between Sheikh Mahmoud Abdurahman, the Vendor and Pritam Singh Panessar and Satpal Singh Jowhal as the purchasers. The land was transferred to the 2nd Defendant vide a document of Transfer dated 15th July, 2010 from the vendor to the two purchasers. The transfer document was presented on 22nd July, 2010 and was registered on the same date.

133. The court has its own concerns regarding how the land came to be registered solely in the name of the 2nd Defendant. As indicated in the preceding paragraph, the transfer presented on 22nd July, 2010 listed both the 2nd Defendant and Satpal Singh Jowhal, however, the title was issued to only the 2nd Defendant. There is no indication as to what happened to Mr. Jowhal since the Transfer presented listed two transferees. I respectfully agree with the submission that the title is clearly not consistent with the Transfer documents presented.

134. I note also that on the green card, the name of Satpal Singh Jowhal was entered alongside that of the 2nd Defendant, but was later cancelled and the word error endorsed against the cancellation. In my view Jowhal’s name cannot have been an error since it was on the transfer document that was presented. It is not enough for DW1 to state that there has been no complaint from Jowhal estate. The intimation by the 2nd defendant that Jowhal transferred his share in the land to the 2nd Defendant is therefore false and misleading. In any event the court was not led to any evidence of the alleged transfer. DW1 agreed



that for the property to have been registered only in the name of Pritam there would have to be a fresh transfer. The court also further notes that even though it was claimed that the 2nd Defendant held the land in trust for Jowhal this was not indicated on the title. The 2nd Defendant cannot claim to have been entirely honest in his dealing over the suit property either. This will speak to the plea of bonafide purchaser, which is discussed later in this judgement. There was no bonafides on the part of the 2nd defendant.

135. Based on the foregoing firstly the 2nd defendants title cannot stand because the 1st defendant had no good title for which he could pass a good title to the 2nd defendant. The 2nd defendant title can also not stand in view of the foregoing glaring irregularities. Moreover they need not have participated in the fraud as long as title was obtained irregularly without following due process which is the import of section 26(1)(b) of the Registration of Title Act 2012.

Whether the 1st Defendant's registration, being a first registration may be challenged

136. The 2nd Defendant's estate has opposed the suit on the ground that the Plaintiff's case was challenging a first registration. In their submissions, they argued that the applicable law in this instance is the Registration of Titles Act (repealed) which at Section 23 thereof provided that:-

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.

137. From the face of the Titles produced before this court, it is evident that the suit property was registered under the repealed Registered *Land Act* (RLA) and not the Registration of Titles Act (RTA). Under the RLA (repealed), the protection of a first registration is to be found at Section 143(1) which provided that:-

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

138. To be clear however, under both statutes, a first registration could be challenged on grounds of fraud or misrepresentation to which a proprietor is proved to be a party under Section 23 of the RTA, and on grounds of fraud and mistake under Section 143(1) of the RLA. That is exactly the case in this matter, the Plaintiff has challenged the 2nd Defendant's title acquired from the 1st Defendant who was the first registered proprietor on grounds of fraud and irregularities.

139. In any event, while the registration was done under the repealed Registered *Land Act*, this suit was initially commenced in 2014 after the commencement of the *Land Registration Act*, 2012. Therefore, in this instance, it is the *Land registration Act* that applies to this suit, and at Section 26(1) it reads:-

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

140. What has come out clearly in this case is that the 1st Defendant's acquisition of the suit property has been called into question for lack of supporting documents. As submitted by the AG, the irregularity and/or fraud did not happen during the adjudication process but at the titling stage, after completion of adjudication and forwarding of the final adjudication register. That fraud cannot have been done without the instigation and/or collusion of the 1st Defendant who benefitted from the sale to the 2nd Defendant allegedly to the tune of KShs. 13,000,000/-.
141. Consequently, the acquisition of the suit land by the 1st Defendant was illegal, null and void. It could not have conferred upon him any legal interest on the land, and as such neither could he confer good title or ownership upon the 2nd Defendant. The 1st Defendant's title cannot therefore enjoy the protection accorded to a first registration under both the repealed and current laws. It is therefore liable to cancellation by the court.
142. But having arrived at the foregoing conclusion is the plea of bonafide purchaser for value without notice of defect in title available to the 2nd defendant and or his estate?

Whether the 2nd Defendant is a bona fide purchaser for value and without any notice of defects in the title

143. In their Amended Defence, the estate of the 2nd Defendant pleaded that he was a bona fide purchaser for value, without notice of any defects in title. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:-

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

144. In the case of Dina Management Case (Supra), the Supreme Court cited the case of Katende vs Haridar & Company Ltd (2008)2 EA 173, in which it was held that:-

“91. The Court of Appeal in Uganda in Katende vs Haridar & Company Ltd (2008) 2 EA 173, defined a bona fide purchaser for value as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that: 1. he holds a certificate of title; 2. he purchased the property in good faith; 3. he had no knowledge of the fraud; 4. he purchased for valuable consideration; 5. the vendors had apparent valid title; 6. he purchased without notice of any fraud; and 7. he was not party to the fraud.”



145. A party claiming to be a bona fide purchaser must also show that they purchased the land without notice of any defect in the title. It is for this reason that a party claiming to be a bona fide purchaser must demonstrate that they conducted sufficient due diligence before the purchase. Courts have repeatedly held that in the wake of fraudulent land deals, due diligence goes beyond a mere search in the Lands Registry. The Court of Appeal in *Samuel Kamere vs Lands Registrar, Kajiado Civil Appeal No 28 of 2005* (2015) eKLR stated thus:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

146. In this case, it appears that the only due diligence the 2nd Defendant conducted was the application for a certificate of Official Search and nothing else. This court has not been told, and neither was there any evidence to the effect that the 2nd Defendant made any further inquiries about the land before purchasing. Although a search is a very necessary first step, it does not reveal irregularities in the history of the title or the process of acquisition as is the case here. It may also not reveal any overriding interests not registered over the land. Comprehensive due diligence involves a multifaceted investigation covering not just the issue of proprietorship, but might in some instances cover legal, physical, financial, and regulatory aspects where necessary.

147. In addition, I have seen the Agreement for Sale of the land by the 1st Defendant to the 2nd Defendant, which shows that he purchased the land for an agreed consideration. No evidence was furnished as to how the total of purchase sums of money was transferred to the 1st Defendant. Did value really pass? DW1 conceded he could not demonstrate how the balance of the purchase price was paid. He noted he had not seen any document from the 1st defendant acknowledging the balance whether in cash or cheque. The land was undoubtedly transferred and the 2nd Defendant now holds title to the suit land. However, it must be noted that this court has found that the 1st Defendant’s acquisition of the suit land was irregularly acquired.

148. Whereas Article 40(1) of *the Constitution* protects the right of all citizens to own property. This protection is however not definite as it is subject to the limitations. In particular, Article 40(6) limits the protection of the right to property when the land in question is found to have been unlawfully and/or irregularly acquired. In the *Dina Management Case* (supra), the court held: -

“Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired. As the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter could not be protected under article 40. The root of the title having been challenged, the appellant could not benefit from the doctrine of bona fide purchaser.”

149. Similarly, as the 1st Defendant did not acquire title regularly, the transfer and registration of the suit land to the 2nd Defendant cannot be protected under Article 40 of *the Constitution*. The root of the title having been challenged successfully, the 2nd Defendant cannot benefit from the doctrine of bona fide purchaser.

150. Is the plea for adverse possession available to the 2nd Defendant?



Whether the 2nd Defendant's claim for adverse possession is merited

151. According to the 2nd Defendant, this suit involves a land dispute commenced as a Petition in the High Court which lacked jurisdiction to entertain the case as at the date of inception. It was asserted that since the suit was transferred to the ELC in March, 2016 then the Plaintiff is deemed to have filed the suit on 8th March, 2016 or 22nd November, 2022. If that be the case, then the 2nd Defendants claims that the Plaintiff's suit is barred under Section 7 of the *Limitation of Actions Act*, since it was filed 14 years after the cause of action arose.
152. It is for the above reason that the 2nd Defendants in their Counter-claim crave that Pritam Singh Panessar (deceased) and now his estate, have acquired the land by way of adverse possession.
153. The acquisition of land through the doctrine of adverse possession is recognized under Kenyan Law. The doctrine of adverse possession was summarised by the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR as follows: -
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act...*”
154. Section 7 of the *Limitation of Actions Act* provides as follows: -
7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
155. In the case of *Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* (2017) eKLR, this Court stated as follows:-
- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario...*”
156. From the witness testimonies and the evidence adduced before this court, there is no doubt that the Plaintiff is not in possession of the suit property. The 2nd Defendants claim that Pritam Singh Panessar (deceased) has been on the land since he purchased it in 2010. That although there is no structure on the land and it is not fenced, the deceased always retained a caretaker on the land who has been checking up on it. The said caretaker, Lewa Mwasambu Mwachiro, testified as DW3, confirming that he has been taking care of the land and planting seasonal crops like maize as shown in the photographs produced before court.
157. To lend credence to this, the Plaintiff also told this court that he has tried to gain entry into the land but was repelled by the 2nd Defendant agents. This confirms the allegation that it is the 2nd Defendant who was in occupation of the land, and upon his demise, his estate took over that possession.



158. However, for a party to claim adverse possession they must show that they have been on the land for a period of 12 years. To be able to compute time for adverse possession, it must be clear when time started to run. According to the 2nd Defendant, the cause of action arose in 2002, which is when the register for the suit property was opened in favour of the 1st Defendant. It is claimed that by the time the Plaintiff came to the ELC in 2016, they had been on the land for over 14 years, hence the claim for adverse possession.
159. This court has already found that the 1st Defendant's title was irregularly acquired. At the point of the purported acquisition, the land was unregistered land for which no claim for adverse possession could be raised. Having invalidated the 1st Defendant's title, as well as the 2nd Defendant's title that flows from it, the land must revert back to the state it was in before the said irregular registration. Time cannot begin to run until the land is registered in favour of a person against whom time for adverse possession can run.
160. Moreover, it is an important element that in seeking adverse possession, the claim must be made against an owner of the land. Order 37 Rule 7 of the Civil Procedure Rules, 2010 provides that an Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons. The summons must be supported by an affidavit annexing a copy of the title of the land in question. This is necessary because an order of adverse possession can only be made against not just an owner, but specifically, a registered owner of the land in question.
161. There is no doubt that the 2nd Defendant herein is claiming the land as the registered proprietor. His estate's claim is predicated on the title issued to him in his name, which he obtained upon purchase and transfer of the land from the 1st Defendant. Since he is the registered owner of the land, the only interpretation herein is that the 2nd defendant is seeking adverse possession against his own title, which claim is untenable.
162. In the same vein, a claim of adverse possession is predicated on the presumption that the ownership is not in dispute. In the case of *Catherine Koriko & 3 Others vs Evaline Rosa (2020) eKLR*, the Court of Appeal held that:-
- “A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property...”
163. The same position was also taken in the case of *Haro Yonda Juaje vs Sadaka Dzenzo Mbauro & Kenya Commercial Bank (2014) eKLR*, where the Court stated that one cannot succeed in a claim for adverse possession before conceding the validity of the owner's claim. Similarly, in the present suit, the 2nd Defendants cannot be heard to impugn the Plaintiff's interest in the suit property on one hand, while advancing the claim for adverse possession on the other hand. Therefore, since the estate of the 2nd Defendant has been emphatic that the 2nd Defendant is currently the registered owner of the suit land, it cannot be heard to claim adverse possession, and at the same time deny that the land belongs to Gerald Mwirichia. Indeed DW1 conceded that he does not agree that the land belongs to Mwirichia.
164. For the foregoing reasons, it is evident that the 2nd Defendant's claim that the estate of Pritam Singh Panessar acquired the land by way of adverse possession is defective and must fail. Notably, the 2nd Defendant's Counterclaim is mainly premised on the claim for adverse possession. Under the circumstances, the claim on adverse possession having failed, the Counterclaim equally fails along with it.



What orders should issue in the circumstances

165. The next step is to determine the orders that can issue from this court. The Plaintiff sought a declaration that the registration of the 1st Defendant as the proprietor of the suit land, Kwale/Shimoni/406 be declared to have been fraudulent, illegal, unlawful and null and void. Further that the transfer and registration in favour of the 2nd Defendant is equally illegal, null and void and of no consequence. From the above findings of this court, the prayers in the Plaint relating to the issue illegality and invalidity of ownership by the 1st Defendant and the transfer to the 2nd Defendant are merited and must therefore be allowed.
166. The Plaintiff also sought to have the title issued to the 1st Defendant as well as the transfer and registration of the 2nd Defendant as proprietor of the land, and any entries relating thereto cancelled. It is trite that title over land acquired through unlawful and improper means cannot be sustained or benefit from the protection offered by the law. This court being a court of law as well as a court of equity, cannot countenance that an illegality remains unchecked. The consequence that must befall the irregularly acquired title over the suit property by the 1st Defendants is cancellation. Since the 2nd Defendant's title flows from the 1st Defendant's irregular title, it follows that the 2nd Defendant did not acquire any good title as nothing comes from an illegality. The 2nd Defendant title which flowed from it must face the same end.
167. Arising from the foregoing there is need to rectify the register to reflect the Plaintiff as the legal proprietor of the suit property, and/or in the alternative, to open a new register indicating the Plaintiff as the sole owner of Kwale/Shimoni/406. The power of this court to order the cancellation of the title and rectification of the register is donated under the provisions of Section 80 of the [Land Registration Act](#) which provides:
80. Rectification by order of Court
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
168. Attendant to the above cancellation, there is no dispute that the parcel known as Title No. Kwale/Shimoni Adj./406 no longer exists as it was consolidated with Title No. Kwale/Shimoni Adj./412 to create Kwale/Shimoni Adj./758. Consequently, in rectification of the register, there is need to undo the said consolidation to enable a separation of the Plaintiff's property from Plot No. 412 to facilitate the plaintiffs registration as the owner of the land, and this is so ordered.
169. I am also convinced that since there has been an order for cancellation of the titles issued to the 1st and 2nd Defendants, as well as the consolidation, it is only prudent that the said documents and registers relating to Parcel no. 406 and parcel no. 758 be destroyed to prevent them from being used to perpetuate further illegalities. The prayer for destruction of the said records is in my view merited.
170. The court has been moved to find in favor of the plaintiff for general, punitive and aggravated damages against the 1st, 2nd, 3rd and 4th Defendants jointly and severally in such sufficient amount as to punish them for the fraud committed in relation to property comprised in the then Title No. Kwale/



Shimoni/406. The damages are to also cover for trespass on the land, occupation and deprivation of the Plaintiff of its occupation and use from the year 2002 to the time of its restoration back to the Plaintiff.

171. Gerald Kithinji Mwirichia, though entitled to the land, did not follow up on the issuance of his title. It is his indolence that allowed a land grabber to come in and illegally procure registration of the land in his favour in the first place, and even purport to sell to the 2nd Defendant. In the circumstances, the court is not persuaded that he is entitled to any damages and I decline to grant this relief.
172. In addition, I note that the 1st Defendant who is the party that most probably orchestrated the illegalities committed in the registration of the suit property did not participate in these proceedings. The Plaintiff was not able to locate him and even had to resort to service by substituted means through advertisement. I am not convinced that he will be able to pursue any damages from him even if the order is made seeing as he told this court that he does not know him, therefore this court will in effect be issuing the said orders in vain.
173. As to the alleged trespass, the only person who gained entry into and has been using the land is the 2nd Defendant. It is evident that the 2nd Defendant did not go into the land as a trespasser, but as one believing himself to be an owner thereof. All in all, the prayer for damages for trespass must also fail.
174. An alternative prayer for compensation for the loss of the suit property at market value and for interest thereon has been made. Since the main prayers in the Further and Further Amended Plaint have been allowed, then the alternative prayer automatically fails.

Who shall bear the costs of the suit and counterclaim

175. Finally, the Plaintiff also asked for costs and interests of this suit at court rates. Costs are awarded pursuant to Section 27(1) of the [Civil Procedure Act](#), which provides that:-

27.' Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

176. Costs therefore ordinarily follow the event, meaning the successful party in any litigation is entitled to costs of the suit. It is also trite that the court is given discretion to determine which party will meet the costs and to what extent, and further, that the court may for good reason decline to award costs to a successful party. The Plaintiff has demonstrated to this court that Gerald Kithinji Mwirichia deserves to be declared and registered as the rightful proprietor of the suit property, he is therefore entitled to the costs of the suit.
177. As to who will be liable to pay those costs, in the instant suit, the 1st and 5th Defendant did not participate in these proceedings. The 2nd Defendants in particular have failed in their counter-claim and also failed to defend their interest as against that of the Plaintiff. The 3rd Defendant has demonstrated to the court that it carried out its duties without fault, and submitted the name of Gerald Kithinji



Mwirichia as the person with a valid interest in the suit land. As to the 4th Defendant, it is clear that the fault lies with them however I will reprimand them to avoid burdening the tax payer.

178. In the circumstances, the court has in this case determined the suit in favour of the Plaintiff and there is no justifiable reason why the Plaintiff should be denied costs. For above reasons, the court finds that the Plaintiff is entitled to the costs of this suit, which costs shall be borne by the 2nd Defendants.

Conclusion & Disposition

179. The upshot of the foregoing is that the Plaintiff stands in a better position. They have provided sufficient evidence to prove their claim that Gerald Kithinji Mwirichia is the lawful owner of the parcel of land known as Kwale/Shimoni Adj./406. I am inclined to find that the Plaintiff have discharged the burden of proving their case on a balance of probabilities as required by law.

180. Judgement is hereby entered for the Plaintiff on the basis of the Further and Further Amended Plaint dated 15th May, 2024 against the Defendants jointly and severally in the following terms:-

- i. A perpetual injunction be and is hereby issued restraining the 2nd and 4th Defendants from registering any instrument, lease, charge, transfer, subdivision or any other document of any description disposing off of any interest in property comprised in Title Number Kwale/Shimoni/758 before consolidation of the said titles to excise therefrom the Plaintiff's land measuring 4.89 Ha and to revert it to the Plaintiff's original title no. Kwale/Shimoni/406 or in any new title as may be appropriate.
- ii. That the registration of the 1st Defendant as the proprietor of the suit premises, Kwale/Shimoni/406 be declared to have been fraudulent, illegal, unlawful and null and void.
- iii. That ipso facto and on the face of it, the title held by the 2nd Defendant in respect of the then Kwale/Shimoni/406 was an illegal title and substantively that its transfer from the 1st Defendant who had no right over the land that it best owed upon the 2nd Defendant no enforceable right and therefore its consolidation into Kwale/Shimoni/758 was equally illegal.
- iv. That the 1st Defendant had no legal or transferrable right and interest in the land comprised in Title No. Kwale/Shimoni/406 which could be transferred to the 2nd Defendant whether with or without the knowledge of the 2nd Defendant and whether consideration was paid or not.
- v. That the closure of the Register and Title for property comprised in Title No. Kwale/Shimoni/406 and its amalgamation to create Kwale/Shimoni/758 was unlawful, fraudulent and null and void and did not pass any rights comprised in Kwale/Shimoni/406 lawfully into Kwale/Shimoni/758 and to the 2nd Defendant as part of Kwale/Shimoni/758.
- vi. That the registration of the 1st Defendant as proprietor of property then comprised in Title No. Kwale/Shimoni/406 which was subsequently and illegally consolidated into Kwale/Shimoni/758 be and is hereby cancelled and nullified.
- vii. That the transfer and registration of property comprised in Title No. Kwale/Shimoni/406 in favour of the 2nd Respondent be and is hereby cancelled and nullified.
- viii. That the consolidation of property LR No. Kwale/Shimoni/406 with Kwale/Shimoni/412 and creating Kwale/Shimoni/758 is illegal and is hereby cancelled.
- ix. The 4th Defendant is hereby directed to deconsolidate LR No. Kwale/Shimoni/758 and restore the 4.89Ha originally comprised in Kwale/Shimoni/406, or create its own title either as Kwale/



Shimoni/406 into its appropriate title number as the registration process may create, and cause its registration in the name of Gerald Kithinji Mwirichia as the first and only proprietor.

- x. That all and any other entries inconsistent with Gerald Kithinji Mwirichia as the first and absolute owner of the 4.89Ha originally comprised in LR No. Kwale/Shimoni/406 be and are hereby revoked, cancelled and nullified, and that the Register relating to property comprised in Title No. Kwale/Shimoni/406 be rectified so as to show Gerald Kithinji Mwirichia as the first and only registered proprietor and all entries inconsistent with his absolute ownership of the property be cancelled and nullified.
- xi. A mandatory injunction be and is hereby be issued compelling the 1st, 2nd, 4th and 5th Defendants jointly and severally to surrender all Green Cards, Transfers, consolidations and titles relating to title No. Kwale/Shimoni/758 to the Court for destruction within 60 days of the Court's judgment and in default such records be considered destroyed, null and void.
- xii. That the 1st, 2nd, 3rd, 4th and 5th Defendants are hereby ordered to restore the beacons defining the dimensions and area of property measuring the 4.89Ha originally comprised in Title No. Kwale/Shimoni/406.
- xiii. A mandatory injunction be and is hereby issued to compel the 4th and 5th Defendants jointly and severally to issue a title Deed to Gerald Kithinji Mwirichia naming Gerald Kithinji Mwirichia as the absolute Proprietor of property comprised in Title No. Kwale/Shimoni/406 in accordance with the adjudication records for Shimoni Adjudication Section in Kwale District.
- xiv. The 2nd defendant shall bear the costs of this suit but there shall be no costs on the counterclaim.

Orders accordingly

JUDGEMENT DATED SIGNED AND DELIVERED THIS 30TH DAY OF OCTOBER 2025 .

HON. LADY JUSTICE A.E DENA

JUDGE

30.10.2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform;-

In the presence of:

Mr. Namada for the Plaintiff

Mr. Litoro for the 2nd Defendant

No appearance for the 1st Defendant

No appearance for the 3rd and 4th Defendants

No appearance for the 5th Defendant

Mr. Daniel Disii – Court Assistant.

