

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC NO. E017 OF 2024

**GENEVIEVE MALESI NGAIRA.....
PLAINTIFF**

VERSUS

**JOSEPH ONYAMBU ONKOBA.....1ST
DEFENDANT**

**ISAAC MANOTI BOYAMBI (Suing as the Administrator
of the Estate of the late TERESIA BOYANI ERENEO)2ND
DEFENDANT**

JUDGMENT

1. Vide a Plaint dated 20th May 2024 and Amended on 28th October, 2024, the Plaintiff herein sought for judgement against the Defendants for the following orders:

- i. A permanent injunction restraining the Defendants and any other person claiming from or under them, from in any way or at all entering into, trespassing, occupying, fencing, cultivating, building and constructing, engaging in any acts of possession and/or dealing in all that property known as L.R. No. Naivasha/OI Jorai Phase II/8573;
- ii. An order of eviction from all that property known as L.R. No. Naivasha/OI Jorai Phase II/8573 to issue against the Defendants and any other person claiming from or under them and that the same be undertaken by the Court Bailiff or a Licensed Auctioneer under the supervision of a Police Officer in charge of the Police Station within whose jurisdiction the Suit Property is situated.
- iii. Vacant possession of that part of the land consisting of L.R. No. Naivasha/OI Jorai Phase II/8573 which is occupied by the Defendants.
- iv. Damages or mesne profits at the rate of Ksh 100,000/= per

month from the date of illegal occupation until vacant possession of the land occupied by the Defendants is delivered up to the Plaintiff.

- v. Costs of the suit plus interest thereon at Court Rates from the date of Judgment until settlement in full.
- vi. Further or other relief that the Honourable Court may deem just and fit to grant.

2. Upon service, the 1st and 2nd Defendants filed their Amended Statement of Defence and Counterclaim dated 14th February 2025 denying the contents contained in the amended Plaintiff while putting the Plaintiff to strict proof. In their defence, the 1st Defendant argued that he did not have any interest or claim any interest whatsoever on the suit property thus he had been improperly joined in the suit herein. That the suit property belongs to the estate of the late Teresia Boyani Ereneo who had purchased it from the then beneficial owner one Esther Namyaiti on 28th November 2012.
3. That Teresia been in occupation of the said parcel of land wherein she had constructed houses and had been cultivating, until her demise on 30th November 2019 and she had been interred thereon. That the 2nd Defendant together with his siblings had been in occupation of the suit property peacefully until the year 2021 when the Plaintiff through proxies and agents started threatening to evict them.
4. That the Plaintiff had fraudulently conspired with other individuals to have the suit property registered in her name thus particularizing the fraud as follows:
 - i. Misrepresenting herself as the owner of the suit property.
 - ii. Fraudulently registering the suit property under her name.
 - iii. Conspiring with the 2nd Defendant in the counterclaim who misrepresented as the owner of the suit land.
 - iv. Obtaining registration of the suit land fraudulently.
 - v. Processing the title deed to the suit property while being aware that it belonged to the late Teresia Boyani Ereneo.
 - vi. Concealing the true proprietorship of the suit land.
5. That the instant matter was not properly before the court by virtue of

pecuniary jurisdiction owing to the value of the suit property. They denied having been served with a demand letter or any intention to sue stating that the Plaintiff's claim against them was misconceived, bad in law and ought to be struck out with costs to the Defendants.

6. The 1st Defendant in his counterclaim, against Genevieve Malesi Ngaira (the Plaintiff herein), David Akamais Lowuallan and Esther Nanyaiti as the 1st, 2nd and 3rd Defendants respectively, reiterated the contents of the Statement of Defence adding that on 28th November 2012, the late Teresia Boyani Ereneo purchased from the 3rd Defendant, half an acre of land to be excised from L.R. No. Naivasha/OI Jorai Phase II/8573 thereby paying the full purchase and taking immediate occupation. That the Defendants then fraudulently conspired to have the suit property registered in the name of the 1st Defendant.
7. The 1st Defendant (now Plaintiff) sought for the 2nd Defendant's (**sic**) suit against the estate be dismissed with costs and that judgement be entered against the Defendants for the following orders:
 - i. A declaration that the Plaintiff in the counterclaim is the beneficial proprietor of all that parcel of land known as L.R. No. Naivasha/OI Jorai Phase II/8573.
 - ii. A cancellation of the title held by the 2nd Defendant for all that parcel of land known as L.R. No. Naivasha/OI Jorai Phase II/8573.
 - iii. A permanent injunction restraining the Defendants whether by themselves, their employees, servants, agents, or otherwise howsoever from entering, occupying, charging, carrying on any development, cultivating, or dealing with all that parcel of land known as L.R. No. Naivasha/OI Jorai Phase II/8573 in any manner prejudicial to the interest of the Plaintiff.
 - iv. Costs of the suit and counterclaim.
 - v. Any other relief that the court will deem fit and just to grant.

8. In response to the 1st and 2nd Defendant's Amended Defence and

Counterclaim, the Plaintiff reiterated the contents of her Amended Plaintiff stating that the 1st Defendant had been in illegal and wrongful occupation of the suit land hence the reason he had been joined in the instant proceedings. That her constitutional right to property as protected under the provisions of Article 40 of the Constitution stood to be infringed unless the prayers sought in the Amended Plaintiff were granted.

9. In her Defence to the 1st Defendant's Counterclaim, the Plaintiff denied the allegation of fraud contained in the Counterclaim putting the 1st Defendant to strict proof. She reiterated the contents of the Amended Plaintiff and the Reply to Defence contending that the prayers sought in the Counterclaim is misconceived and unsustainable. The Plaintiff/1st Defendant in the Counterclaim thus prayed for the following orders:

- i. That Judgment be and is hereby entered for the Plaintiff as prayed for in the Amended Plaintiff.
- ii. That the Defendants' Statement of Defence and Counterclaim be and is hereby dismissed.
- iii. That the Costs for the proceedings be and are hereby awarded to the Plaintiff and 1st Defendant in the Counterclaim, together with interest thereon at court rates from the date of filing suit until settlement in full.

10. The 2nd and 3rd Defendants in the Counterclaim denied all allegations in the Counterclaim, putting the Plaintiff in the Counterclaim to strict proof. They stated that the 1st Defendant in the Counterclaim (D/C) is, and was at all material times, the registered proprietor and entitled to possession of L.R. No. Naivasha/OI Jorai Phase II/8573 ("Suit Property"). That she had acquired it for valuable consideration from the 2nd Defendant in the counterclaim and had been in continuous occupation since acquisition.

11. They denied that the Suit Property belonged to the Estate of the late Teresia Boyani Ereneo or that the deceased had ever possessed, constructed upon, or cultivated the land. They also denied that the 1st Defendants in the Counterclaim had conspired with anyone to have the Suit Property registered in her name. Their position was that the Counterclaim was defective for non-joinder of the Land Registrar, despite allegations of

fraud, misrepresentation, and fraudulent registration against the 1st Defendants in the counterclaim.

12. That the Plaintiff in the counter claim had jointly and severally with others forcefully and illegally entered and wrongfully occupied the Suit Property, thus constituting trespass.
13. That the 1st Defendant in the counterclaim had been deprived of the use and enjoyment of the land due to the Plaintiff in the counterclaim's trespass and was suffering loss and damage. That the Plaintiff in the counterclaim had failed, refused, and/or neglected to deliver up vacant possession despite demands and a notice of intention to sue and therefore was the one squatting on the property.
14. That the constitutional right to property of the 1st Defendant was being infringed, thus causing irredeemable harm unless the prayers sought in the Amended Plaintiff (main suit) are granted.
15. They also stated that the prayers in their counter claim was for a declaration of beneficial proprietorship, cancellation of the 1st Defendant in the counter claim's title, and a permanent injunction were misconceived and unsustainable and therefore the Counterclaim to be dismissed with costs.
16. In response to the Defence to Counterclaim by Plaintiff in the Counterclaim, the Plaintiff in the Counterclaim denied the allegations in the 2nd, 3rd and 3rd Defendants in the counterclaim's Statement of Defence, putting them to strict proof. They reiterated the contents of his Statement of Defence and Counterclaim.
17. After the parties had complied with the pre-trial directions, the matter proceeded for hearing on the 6th May, 2025 wherein the Plaintiff Genevieve Malesi Ngaira, adopted her statement as her evidence in chief and sought to rely on her filed documents. She then proceeded to testify that she was the owner of the land parcel No. Naivasha Oljorai Phase II/8573 (suit property) having bought the same in January 2012 from one David Akamis vide an informal agreement. That at the time, she was working with the African Union in Addis Ababa and used to send money to her husband back home, in instalments, to pay David.
18. That at the time, David had just been allocated the suit property in the

year 2012, and therefore had no title deed. The title to LR No. Naivasha/OlJORAI Phase II/8573 (suit property) had however been issued in the year 2018.

19. That when she bought the land, she took possession and built a semi-permanent house in the year 2013, planted trees, dug a pit latrine, and started ploughing.
20. She clarified that the 1st agreement in 2012 had been informal because David had not received a title, but they had later formalised the sale vide an agreement dated 19th February 2019 when they finished paying and when she return from work. She produced the Agreement as Pf exh 1.
21. That after David had been issued with a title deed in his name, he had given her for safe keeping. She produced the said title deed as Pf exh 2. That he had not been in a hurry to transfer the title into her name as she was still out of the country, but the process of the transfer began in the year 2021 wherein on 2nd February 2021 it had been transferred in her name. She produced title deed in her name as Pf exh 3.
22. Her evidence was that in the year 2019, she found trespassers on her land, specifically mentioning a woman named Teresa Boyani Ereneo, who sometimes lived there and sometimes at a rented house in Kongasis. That a dispute was lodged with the Chief but Teresa and her brother, Joseph Onyambu, insisted the land was theirs and Joseph asked her to give the "small parcel of land" to his sister since she had many parcels of land. That the Chief had advised the people to leave by September 2019 so that they could harvest the maize that had been planted on her land. They refused to comply.
23. That in November 2019, she had gone back to Kongasis and met with Teresa and inquired from her why she had not left her land but Teresia informed her that the land was hers and she would not leave. That she went back to Nairobi wherein later, that same year she had received a call from Mr. John, former Assistant Chief of Kongasis who and informed that Teresa had passed away. She called the Assistant Chief to let him know that she hoped Teresa would not be buried on her land wherein he had assured her that a disputed land could not be used to bury anyone.

24. That it was while she was in Ethiopia for final clearance, David called her informed her that “those” people were threatening to bury Teresia on the land. That she called the chief who was with Joseph and his brother, and whereas he had assured her that it would not be possible to bury Teresia in the suit property, on the hand, Joseph asked her to permit them to bury Teresia on her land. She told them to await her arrival in two weeks so that they could talk as the land was hers.
25. That despite her resistant, Joseph and his brother insisted on burying Teresia on the Suit Property. They eventually buried her there in December 2019. After numerous unsuccessful attempts to resolve the issue with the Chief which lasted up to the year 2024, she was advised to file a suit.
26. She explained that before she filed the suit herein, she had served the Defendants with a Notice of Eviction which Notice had been served by Emmanuel Omondi. She produced the Notice of Eviction and Affidavit of Service as Pf exh 4 (a-b) and then stated that she would like the court to evict the Defendants from her land and order them to pay all the costs that she had incurred as well as the cost of damages on usage of her land as they were trespassers.
27. That she had also conducted an official search that had confirmed the land as hers. She produced a Green Card as Pf exh 5.
28. When she was examined by the court, she confirmed that the land had costed her Kshs. 500,000/= monies which she paid in cash and that she had been in and out of the land as she had rented a house in Kongasis Centre.
29. When she was cross-examined, she confirmed that she had bought the suit property informally in January 2012 because David had no title yet. She also confirmed that David was allocated the land in 2012 and issued with the title in 2018. That she did not know if the land belonged to David prior to 2012. She admitted David did not give her any papers in 2012 and she did not know his prior ownership status.
30. She also confirmed that in the year 2012 the land was bear and vacant. That whereas she had come to know Teresia in the year 2019, as at that time, nobody was living on the land save for when they had trespassed and started living in the semi-permanent house that she had built in the year

2013.

31. She confirmed that Joseph Onyambu who was not the owner of the land, but who was Teresia's brother, had allowed the people to live on her land and he had been the one who had asked that her to allow Teresia be buried on the land.
32. That the case against the deceased's estate was one of trespass to her land the deceased having trespassed on her land in the year 2019 and having refused to leave despite being asked to leave. That she knew David Akamasi who had sold her the land. That she did not know if Teresia was on the land in the year 2019 because she used to live there occasionally.
33. She confirmed that the agreement was executed in the year 2019 in her lawyer's office in Nairobi. That she however could not remember when they effected the transfer, for which the forms were in the land's office but she could not recall filing them. She confirmed that her husband was the one who used to cultivate the land after she purchased it because he used to live there and used to plough all her other parcels of land.
34. She conceded that she had seen documents showing that Teresia had bought the land in 2012 and an agreement to that effect but denied that Teresia lived on then land continuously from the year 2012-2019 when she had died stating that she (Teresia) lived in the centre.
35. She explained that the last time, she had built a semi-permanent house, and her husband had planted trees and dug a pit latrine. She had reported the dispute to the chief who did not resolve it. That in the year 2019 when she had been informed of the death of Teresia, she had tried in vain to block her burial on the suit land. She had sent David who had gone to the chief and later to the OCS after sending him Ksh. 3,000/= from Ethiopia. That however, she would not know if David was prevented from stopping the burial because he was followed everywhere he went.
36. That whereas she was aware that the deceased had been buried on the suit property, she did not know that she had a family had also trespassed on her land, but maintained that they were squatters on her land who had insisted that her husband looks after the land.
37. That she did not know if David had sold the land to Teresia or if her

husband had been involved in the writing of the sale agreement with Teresia. She confirmed that Teresia had been buried in November 2019 while she had filed the instant suit in the year 2024 despite knowing that the said Teresia had been buried on her land.

38. That whereas she had asked for eviction orders, she had not asked for the deceased's body to be exhumed from her land. That nevertheless, she did not know why the deceased had been buried on her land since ordinarily, a one would not be buried on a parcel of land that was not his/hers. That whilst she did not have any written document to the effect that she had reported the matter to the chief, if the said Chief was summoned, he would testify in court.
39. That although she had sought for damages, she did not have a valuation report neither did she have any proof of how she was utilizing the land before. That she wanted to evict the people who were living on the suit land including Joseph, Wycliffe, Isaac and John. That in the year 2019, she had found Wycliffe on the suit property and that she was aware that they were still on the land hence she had filed the instant suit against all of them.
40. She confirmed that she was aware that Joseph had an interest on the land because he had asked her to leave it for his sister, and had also called her and asked her to let his sister be buried on the suit property. She wondered why the said Joseph would want to bury his sister on the suit property yet he knew that the said land had a dispute. She confirmed that she knew Esther Nanyali.
41. In re-examination, she confirmed that Teresa was alone on the suit property. That she came to know about Joseph Onyambu in the year 2019 when she had asked Teresia to leave her land. That Teresia had informed her brothers Joseph, John and Paul about the dispute because she met them when she had gone to the chief. That she however did not know what Joseph was doing on her land as she had not permitted him to occupy the same.
42. She maintained that when she had bought the suit property, with the money she had sent to her husband who also bought the iron sheets built the house and planted the trees on the land. She confirmed that she had filed the instant suit in the year 2024. That they had been trying to solve the

case with the Chief since Teresa's death in the year 2019 to the year 2024. That it was when Joseph had suggested that they take the matter before the elders that the chief had told them that we could not settle but file suit. That whereas the chief did not give them any papers, he was ready to testify.

43. David Akamis Lowuallan, testified as PW2, to the effect that he was the initial registered proprietor of land parcel No. LR Naivasha Oljorai Phase II/8573 (suit property) which land he had sold to the Plaintiff in the month of April 2012 at a purchase price of Ksh. 500,000/= money which had been paid in instalments. That he had received the title deed to the land in the year 2018 wherein the land had been transferred to the Plaintiff in the year 2019.
44. That Esther Nanyaiti was his elder sister and there had been no relationship between her and the suit property. He also confirmed that he used to see Teresia.
45. In cross-examination, he confirmed that he lives in Kongasis and that Joseph Onyambu and Isaac Menoli were from the same family. That he used to see them and that he had known Teresia for a long time having met her at the centre. That Joseph and Isaac lived just ahead of the Centre wherein Teresia lived at the Centre. He confirmed that Teresia had been buried on the suit property that he had sold to the Plaintiff.
46. When he was referred to an agreement dated 28th November 2012 filed by Defendant, he distanced himself from it but confirmed that he could see his name thereon. He denied the signature appended therein maintaining that Esther had no land. He also confirmed to having known one Hellen by just seeing her and that he knew the witnesses in the agreement.
47. He stated that in the year 2012, nobody was living on the suit property wherein the Plaintiff started developing the same between the years 2016 - 2019. That it had been the Plaintiff's husband who had brought the raw materials and built a mud house. That the Plaintiff use to pay occasional visits but nobody used to plough the land.
48. He confirmed that the land he sold in the year 2012 measured ½ an acre for the price of Ksh. 500,000/= which money was paid in cash and was

completed in the year 2019 at which time some young people were living on the suit property.

49. He confirmed that currently $\frac{1}{2}$ an acre of land sold between Ksh 800,000/= and Ksh 900,000/=. He also confirmed that he had been shown the Defendants' documents which showed that they bought the land stating that the deceased went to the suit property in the year 2019 wherein she had been buried because she refused, she had refused to leave the land.
50. That in the year 2019, they had threatened him when he had tried to stop the burial and since the owner had not been near, he could not do anything. That he had gone to Elementaita Police post wherein he had been asked to stay away. That he was not a witness to the sale of the land to the deceased, which land had been transferred to him in the year 2006. He confirmed that he neither had any proof of the same or that he had taken any papers to the land's office.
51. On being referred to the caution forms, he testified that he did not recognize the said papers since he did not execute them. His testimony was that he had neither placed any caution anywhere, but had just handed over the title to the Plaintiff when they had executed the sale agreement. That there was a young man called Isaac who lived on the suit property although he did not know how he entered therein. He confirmed that Teresia got onto the suit property in the year 2019 and that he knew that George, the Plaintiff's husband.
52. He was referred to the Defendant's photographs, which he confirmed that he knew the place. He pointed out to the house stating that it had been built by the Plaintiff's husband. That the deceased went to live in the said house in the year 2019. He confirmed that he had attended the deceased's funeral adding that he did not object to her being buried on the land because he had been warned earlier. That whilst he did not confirm that the deceased was the owner of the land, when they were burying her, they knew that there was a dispute on the suit property. He however testified that at the moment, the deceased's children had been ploughing the suit land.

53. He stated that whereas he had seen that his sister Esther Nanyaiti had sold the land, he was not a participant in the sale agreement. Further, that whilst there had been a letter from the chief in the year 2019, he did not know about the letter of the year 2021. That there was no dispute after the deceased had died. That he was aware that the people who were on the land had been told to leave the as owner wanted to use the land.
54. In re-examination, he was referred to Defendant's agreement dated 28th November 2012, wherein he reiterated that he did not witness the same. That whereas his names were David Akamais Lowuoallan, the agreement bore the name of Daudi Kamasi and was not specific as to what land was being sold.
55. That whilst he did not remember when the house had been built on the suit property, yet he was sure that Mr. George Milimo, the Plaintiff's husband was the one who had built the same. He confirmed that he had spoken at the deceased's funeral wherein he had conveyed his condolences and told them that they could be together with them but he did not object to the burial because the owners of the suit property were far. That he could not remember saying that the suit property belonged to Teresa.
56. Esther Nanyaiti testified as PW3 to the effect that she was a casual labourer who lives in Kongasis. That the suit property belonged to her brother David. That she did not know Teresia Boyani and had never sold any land because she did not have any land. That however, she did not remember what she wrote in her statement as she did not go to school. That she could not remember when David had sold the land. That whereas she did not know the Plaintiff, she knew that the suit property belonged to David and that she had never been allocated land.
57. In cross-examination, she confirmed that she lives in Kongasis and was born in Lake Nakuru Lodge. That whereas her parents used to live in Kongasis where they had a parcel of land, she was married in Lodwar and just visited Kongasis occasionally. She confirmed that her parent's land was still available. That however, the young man who used to plough the said land had gone to Naivasha.

58. That she was a visitor at her sister's house. That she did not remember when her parents had gone to Kongasis neither could she remember where she was in the year 2012. That she did not have a birth certificate to know her age and that she did not go to school. That she had added some years in her Identity Card (ID) so that she could go and work.
59. That she did not know why she was in court, as she had just been summoned. That she had not gone to an Advocate's office. She confirmed that she was senior to David. That the suit property belongs to David although she was not there when he was allocated the same.
60. She reiterated that she did not know Teresia and that she had not lived in Kongasis for a long time hence she would not know the people therein. That David's land was near her sister's house. That she had never been to the suit property. She explained that it was not easy for girls to be given land. That subsequently, if David had sold the land, it was his business. That she was not there when the land was sold.

The Plaintiff thus closed her case.

61. The Defence case opened with the evidence of Joseph Onkoba Ombaki alias Onyambu who testified as DW 1 to the effect that he did not know Genevieve Malesi Ngaira, the Plaintiff herein but that he knew Isaac Manoti who is his sister's son. That Teresia Boyani was his sister. He adopted his witness statement dated the 14th February 2025 as his evidence in chief and then proceeded to testify that in the year 2012, his sister Teresia who was a business lady went looking for land to buy and settle wherein she had bought the suit property from David that same year 2012 and she took possession and occupation of the same.
62. That after she had completed paying for the land, she constructed a house and started living there with her family from the year 2013 up to her death in the year 2019. That he had not been involved in the purchase but his sister had just showed him the land and he was satisfied with it.
63. He explained that the suit property herein had been David's grandmother's land and that there were witnesses to the effect that the said David had sold the same. That David had been given the land by his

grandmother to sub-divide to his siblings, which he had done and was in fact now living nearby on another piece of their land. That David's siblings had also sold their shares. That the suit property was Esther's shares.

64. That it was not true that David had sold the suit property to the Plaintiff because in the year 2019 his sister had been living on the land up to her death. That in any case, at the time that his sister lived on the land, nobody had raised any objections. He maintained that the semi-permanent (mud) house on the land had been built by his sister and that there was nothing else on the suit property.
65. That it was not true that George had built the house and that the said George and David had been witnesses to the sale agreement. He explained that George Milimo was the Plaintiff's husband and that his sister had been buried on the land where she used to live wherein during the funeral, nobody had raised any objection.
66. He confirmed that Esther Nanyaiti, PW2 was David's sister. That she had not told the truth as the suit property herein was her portion which she had sold to his sister. That the dispute over the land happened when his sister was alive wherein they had gone before the chief and it had been discovered that the land was his sister's there having been a sale agreement to that effect.
67. That they had subsequently registered a caution on the land in the year 2021 because his sister's children had been receiving threats from "Doctor," David's brother who was now deceased. He testified that he was in the company of David when they went to register the caution wherein David had confirmed the land to be his.
68. His evidence was that initially David had asked for Ksh. 20,000/= so that he could get a title. That since David's brother wanted the money, he had told them not to give it to David and after they had placed the caution, they knew that the land was safe. That "Doctor" died soon after his sister's death. That Doctor was a greedy person who wanted the money because he used to sell land. That he used to sell one parcel of land even three times but David was not like that.

69. That he was not involved in any way with the suit property. That he lived on his own land which was far away from the suit property. That indeed, there was a video that had been taken during his sister's funeral wherein David could be heard saying that the land belonged to the orphans and nobody should disturb them. He asked the court to take stern action against the people who gave false evidence stating that the Plaintiff was not known on the ground.
70. In Cross-examination he confirmed that he was a brother to Teresa who had bought the suit property. That Genevieve, the Plaintiff herein had told lies to the court. That after the death of his sister, nobody had laid claim to the land.
71. That the Plaintiff and David had jointly and fraudulently obtained the title to the land wherein she had registered herself as the owner of the same. He confirmed that Teresia did not get a title to the suit property because at the time in the year 2012 there had been no titles to the land. That he had an agreement dated 28th November 2012 to that effect although he was not there when the said agreement had been executed.
72. He explained that in the said agreement, Esther was the one who had been selling the land while David was the one who was overseeing the land and also a witness to the agreement. However, on further probe, he testified that David had given the land to his sister and agreed that she sells it. He admitted that Esther did not have the succession documents when she was selling the land and that Hellen, Teresa's sister was one of the witnesses to the sale agreement.
73. That whereas George Milimo had signed the agreement where his wife was now claiming ownership of the land, they did not call George as a witness. That nonetheless, they as siblings had come to testify in court over the agreement. He explained that they did not call George because they knew that their evidence was enough. That secondly, since his wife was the one claiming ownership, they we did not know what had transpired.
74. He confirmed that Isaac Manoti was a son to his sister Teresia (deceased) and was the one who had been threatened. That the said Isaac had been left

on the land with his parents hence he was claiming the same. he maintained that they were with David when they had gone to register the cautions.

75. When he was Referred to a document, he confirmed that the date of the said Caution was 26th January 2020 and that “Doctor” who was David’s bother had been threatening them since he wanted the purchase price of the land.
76. That they did not deem it fit to call the Land Registrar because they knew that they had enough evidence to confirm that the land belonged to the deceased. He confirmed that he was Isaac’s uncle and that during the land dispute, they knew the land was Isaac’s mother’s. That they had gone to see the Chief over the dispute to state that somebody had laid claim to land which was not hers.
77. That however, they did not know what the Plaintiff’s claim was because the deceased was buried on the suit property and Isaac was living on the land. He confirmed that the suit land had been bought in the year 2012 at a purchase price of Kshs. 40,000/= which land was subsequently sold for Ksh. 500,000/= according to the claim by the Plaintiff.
78. He maintained that his sister had built the house on the suit property although he had nothing to show for it. He also confirmed that there were mature trees on the land. That Esther had been given her portion by David who was present when she sold the land and it would therefore be a lie for Esther to testify that she had not sold the land since knowing that on the ground everybody knew that she had sold the same.
79. In re-examination he confirmed that David had overseen the sale of Esther’s portion of land just like how he had overseen the sale of all his siblings’ parcels of land. He maintained that David had sold the suit property on behalf of his sister.
80. That his sister had reported the dispute to the Chief. He also reiterated that his sister was the one who had built the house and planted the trees on the suit property with her child. He confirmed that he had no claim over the suit property.
81. When he was examined by the court, he confirmed that Teresia got onto

the land in the year 2013 after completion of payment and had died in the year 2019. That her children had been living on the land to date. That they had just been threatened but had never left the land.

82. DW2, one Isaac Manoti Boyambi testified that he did not know Genevieve Malesi, the Plaintiff herein. That Joseph Onyambi who is his uncle and Teresia (deceased) was his mother.
83. He adopted his witness statement dated 14th February 2025 as his evidence in chief before testifying that the suit property belonged to his mother. That after his mother had died, he had obtained a Grant ad Litem issued on the 4th September 2024 in Naivasha Magistrate Court Succession E078/2024 which Grant he produced as Df exh 1.
84. That his mother was a businesswoman, who was looking for a parcel of land wherein David had informed her that his sister had land which she was selling. That thereafter, his mother had met with David's sister and bargained on the price of the land which she subsequently bought in the year 2012.
85. He then produced his mother's Death Certificate issued on 26th November 2020 and the Photographs of the homestead and graveyard as Df exh 2 and 3 (a -b) respectively before proceeding to testify that his mother bought the land, and signed a sale agreement dated 28th November 2012 which he produced as Df exh 4. He confirmed that he had been present during the execution sale agreement.
86. That after his mother had bought the land in the year 2012, he had gone to live therein in the year 2013. That the photographs that he had produced showed the house that his mother had built. That his mother had bought trees which they had planted and that they used to cultivate the land and plant their food. That the said trees could be seen in the photographs.
87. That his mother had bought the suit property herein measuring $\frac{1}{2}$ an acre at a purchase price of Kshs. 40,000/= which amount she had paid in full. He explained that the first house had been built by his mother. That however, after completing his form four, he had done some casual work and built the second house. That there had been no dispute when his mother

was living on the land. That nonetheless, they had registered a caution because after his mother's death, he and his two siblings had been left on the suit property.

88. That whilst they living on the land, David's brother started threatening them wherein they had reported the said threats to their uncle who advised them to accompany him to "doctor's elder brother, David who had told them that he was aware that the land was theirs. That thereafter, the said David had advised them to place a caution on the suit property. That they were accompanied by David and their uncle to the land's office where they had filled the forms, which he produced as Df exh 5 (a -b).
89. That after placing the caution, things had cooled off. He confirmed that his mother was buried on the suit property where they were still living to date. That there had been no objection raised at her funeral, for her to be buried on the suit land. That indeed, David had consoled them and told them that he was "together with them" and that nobody should lay claim on the land.
90. That the house had been built when he was a child, wherein they had been the ones who had looked for the sticks to build the same. He testified that George did not build the house. That he did not see how the land could have been sold in the year 2019 when his mother was dead and buried on the same and they were living therein. He asserted that they had been left in the suit property as orphans and that it was therein that they had grown up and had known as their home. He thus prayed that the title being held by the Plaintiff be cancelled and they be issued with the same. He confirmed that Esther Nanyaiti was David's sister and that she told lies to the court.
91. In cross-examination, he confirmed that he was 27 years old and had completed form 4 in the year 2017. He also confirmed that his mother had built the house in the year 2013 while he had built his own house in the year 2019 wherein his mother had died before he had completed building his house.
92. That he was not there when an agreement for sale had been drawn since he was young. He confirmed that they had a shop. That his mother had told

him that she had found a land which she paid for it in instalments. That the first installment was for Kshs. 15,000/= which money she had taken from the shop when he was at the counter. That the second installment was for Kshs. 10,000/= which he had counted for her and thereafter she had taken another Kshs. 10,000/=. That the last installment of Kshs. 5,000/= she had taken as a debt.

93. He maintained that the suit property had been sold for Kshs. 40,000/= and that his mother had bought it from Esther Nanyaiti. That the Plaintiff, in cohort with David, had fraudulently procured title to the land. That they came to know that fraud had been committed when they were served with the pleadings.
94. That since the case had been filed, they did not go to the land Registrar. That George, who had vied for councillorship and had even paid some of his school fees was the only person who was a bit learned in that area hence he had assisted in drafting the sale agreement and witnessed the same. That because he respects him, he did not want to disturb him by bringing him to court.
95. In re-examination he confirmed that they had come to know that the Plaintiff had the title to the suit property upon being served with the pleadings. That David used to oversee the suit property on behalf of his sister. That they had been in possession and occupation of the suit land hence the Plaintiff should not have been issued the same.
96. That in any case, the Plaintiff had never gone to the land. That whereas in the year 2012, the suit property had no title, the same belonged to the family. He maintained that the suit land was left to David in trust for his siblings.
97. When he was examined by the court, he confirmed that they were still on the suit property to date.
98. Hellen Bosibori Ereno testified as DW3 to the effect that she did not know Genevieve Malesi, the Plaintiff herein but Joseph was her brother and Isaac was a son to her late sister Teresia.
99. She adopted her witness statement dated 28th October 2024 as her

evidence in chief and then testified that she had been in the company of Teresia when she bought the suit property. That David and George had come together with Vinny, George's herds boy. That David had told Teresia that he was the one with land that Esther his sister was selling land and that he had been sent on behalf of Esther.

100. That afterwards, he had asked for Kshs. 20,000/= as a down payment to preserve the land. That George had then asked for a paper to write an agreement wherein Teresia got one of the books she used to sell and tore a paper. She explained that George, who was the secretary had written the agreement wherein she had been a witness. That they had written the first agreement on the said day wherein she, David and George had signed as witnesses.
101. That her sister had then given George Kshs.15,000/= who had then passed the money to "Davy". That her sister used to inform her whenever she would go to pay the money which she had paid in instalments. That after she had finished paying, she started constructing her house in the year 2013.
102. When she was referred to photographs Df exh 3 (a - b)), she confirmed that the same was the house that her sister had built in 2013. She confirmed that her sister used to live at the center but after she had finished paying for the land, she had moved therein where she had lived up to the year 2019 when she died. That during her stay on the land, nobody ever objected or lay claim. That indeed, even when she died, nobody raised an objection to her being buried on the land.
103. That it was not true that the Plaintiff had bought the land from David since the land could not have been sold twice. That it was Teresia that had built the house and not George. That in fact, some of the sticks used to build the said house had come from her place/home.
104. He confirmed that the Deceased's children live on that land and that she would like to ask the court to follow the truth. She maintained that David who was the Plaintiff's husband (sic) had sold the suit property. That he was a secretary who had written the agreement. She wondered why David could

sell the suit property to her sister on behalf of his sister then turn around and sell to Teresia (sic)

105. That land could not have two titles. That Teresia had not taken her title as she got sick. That however, she had gone to the chief and everybody knew that the suit property belonged to Teresia and had been left to her children.

106. In cross-examination, she confirmed that she knew Esther, PW3 herein and that the suit property had been Esther's land which she had given to David her brother to sell it as she had not been nearby. That however, Esther had come during the last stages of the agreement although David was the one who had signed the same. That whereas George was present in court, he was not their witness.

107. In re-examination she confirmed that the land was Esther's land which land she had been given by her grandmother since she used to take care of her grandmother. That they used to go there for Christian fellowship. That Esther was married and lived far but David used to be near. That nonetheless, their grandmother had given them each a portion of land. That Esther had given David authority to get a customer to buy the land wherein he got Teresia. She maintained that the suit land was Esther's inheritance.

108. DW 4, John Kibasu testified that he lived in Gilgil - Elementaita in Kongasis sub-location and that he did not know Genevieve, the Plaintiff herein but he knew Joseph who was his brother. That he also knew Isaac, who is a son to his sister Teresia (Deceased).

109. He adopted his witness statement dated 14th February 2025 as his evidence in chief and proceeded to testify that the suit land belongs to the deceased Teresia having had bought it from Esther in the year 2012 vide a sale agreement herein produced as Df exh 4. That the said agreement had been executed by David, George and his sister. That George was the one who had written the same.

110. That his sister had bought the land and paid for it in 4 installments after which she had built one house therein. That the land had been bare at the time. That his sister had been a business woman who had a shop. That he was also a business person, and had a pick up and was also a human rights

person.

111. That Teresia had asked for his pick up on a Tuesday 17th December 2013 so that he could help her to go to the land wherein he had taken her to the suit property. That upon reaching there, she had called David who had been digging a pit latrine for her to help her offload the luggage that nonetheless, he and David did not talk about the land.
112. That in the year 2019, in the month of November on 30th, Teresia had passed away. That Subsequently, on a Sunday, they had gathered at her home as a family, David's family and neighbors wherein they had arranged for her funeral. That thereafter, he had gone to the chief to get a burial permit allowing them to collect some contribution for the funeral.
113. That David had been asked to dig the grave as he was the expert and they had prepared a funeral program together with David's family and neighbors. That indeed, on the funeral day David had spoken on behalf of their family and was captured in video. That he had made a transcription and certificate of the video. (The video was played in court) and the transcript and certificate were produced as Defence Exhibit 6 (a-b).
114. That what David had stated at the funeral was the truth as compared with his testimony in court which was not the truth. That the funeral had been conducted during the daytime and that the church and neighbors were present. That nobody had laid any claim or objected.
115. That the Plaintiff's documents were were fraudulent. That whereas the agreement had shown that the Plaintiff had bought land, the said land could have been different from the deceased's land. That it was after the funeral that the Plaintiff had started claiming ownership of the land because she had a title.
116. He confirmed that David and Joseph had placed a caution on the suit property because there had been a dispute between David and his sibling who wanted him to sell the land to the Plaintiff. That when David had refused, he asked his brother Joseph that they look for money to place a caution on the land. That David placed the caution on the land stating that he had been given, the same by his grandmother.

117. That David had lied to the court that he had been registered to the land in the year 2006. He explained that the suit property initially belonged to ADC and that it had been allocated to David's parents in the year 2010 wherein his family agreed that he be registered so that he could sub-divide it for them. That all his siblings got their shares and sold their portions.
118. He maintained that his sister had bought Esther's portion and that the said Esther had lied to the court that girls in their family had not been given land, that he was shocked because they had been in good terms with her family from the beginning but the issue of land had separated them.
119. That when he heard that there was a dispute, he had gone to the DCIO and reported that the Plaintiff had obtained a title to the deceased's land. That the DCIO had then advised him to go and write a letter for the chief and village elder to sign because he could also be a fraud. That he had written the letter as directed, which letter had been signed by the village elder, who was his colleague in the human right. He produced the said letter dated 12th October 2021 as Df exh 7. That they had recorded that the deceased's children were the owners of the land.
120. That thereafter, they had taken the said letter to the DCIO - Nakuru who had advised them to go to court since the Plaintiff had obtained a title. That it was by good luck that the Plaintiff had filed the instant suit. That the title held by the Plaintiff was not for the suit land but refers to another land that she had bought in the year 2019 because she could not have bought the deceased's land when her children were in occupation. That he was just praying for justice for the deceased's children.
121. He asked that both George and David be sued for perjury for having given false evidence because after George had drawn the agreement together with David, they had gone ahead and prepared a title for the Plaintiff on the same land. That he would also like the court to visit the site to see what was on the ground and confirm that the deceased's children were on the suit land so that the people who had falsely testified could be dealt with as an example to others. He testified that the Plaintiff should not have been given a title to the deceased's land.

122. In cross examination, he confirmed that he was a business person, selling spares, had a pick-up for transport, was a human right defender and had also studied law. He confirmed that the deceased had no title to the land. That whereas they could not go to the land's office by ourselves, Joseph had gone wherein the Registrar had told him that the Plaintiff had received a title.
123. That they did not sue the Plaintiff. That George was a witness to the sale agreement who ought to have been called as a witness wherein his advocate had told him that they had forgotten to include him as such. He confirmed that the suit property had been sold to Teresia by Esther and David.
124. When he was referred to Df exh 4, he confirmed that the agreement was to the effect that Esther had sold $\frac{1}{2}$ acre of land to Teresia for Kshs. 40,000/= wherein the witnesses had been David and Hellen. That the agreement had been done on the land which had no title at the time. That David was the Administrator of the whole land.
125. Upon being referred to Df exh 5 (a-b), he testified that whereas the same bore David's name as the registered proprietor of the land, he still maintained that David was an administrator and that he was the cause of the instant suit. That he had gone to the DCIO to report wherein he had been advised to write a letter to the Chief which letter he had taken back to the DCIO. That whereas the chief had signed the letter (Df Exh. 7) on the knowledge that he was signing on behalf of the owners of the land, he did not say that the land belonged to Teresia. That was not present when the caution was placed on the land.
126. When he was referred to Df exh 5, he confirmed that the Registry had acknowledged the Caution for which he had receipts that had been issued at the registrar's office. That in the video, David had spoken of the suit property having been sold to Teresia by Esther. That whilst David had told the court that they had forced him to speak at the funeral, this could not be true because they had even given him work at the funeral since he was a pit latrine digger.

127. In re-examination in reference to Def exh 4, he confirmed that the agreement was to await the title and that the person who had written the agreement was supposed to be in court. That the said agreement showed that Esther had sold land to Teresia. That the said Esther had given permission/authority to David to sell the land. That his sister had no debt.

128. His evidence was that David's family opined that he be registered so that he could share out the land. That indeed, in the video, David and his sister had confirmed that the suit property belonged to the deceased and it did not depict any kind of force asserted to him. David had spoken out of his heart. He confirmed that the chief knew everything in that area together with the village elder hence he asked the court to visit the ground.

The Defence had thus closed their case.

129. Directions were issued that parties file their written submissions wherein I shall proceed to summarize as herein under.

Plaintiff's Submissions.

130. The Plaintiff vide her submissions dated 30th September 2025 summarized the factual background of the matter and the evidence that had been adduced in court before framing her issues for determination as follows:

- i. Whether the Plaintiff obtained the title to the suit land properly.
- ii. Whether the Plaintiff in the counterclaim is the beneficial owner of the suit land.
- iii. Whether the counterclaim is merited.
- iv. Whether the Plaintiff merits the orders sought.
- v. Who should bear the costs of the suit and the counterclaim claim herein?

131. On the first issue for determination as to whether she had obtained the

Title to the suit property, the Plaintiffs' submission was that her title was unimpeachable and legally protected. She argued that she had conducted due diligence, and transacted with the first registered proprietor (David Akamais Lowuallan), and was thus a bona fide purchaser for value without notice. That her title is protected by law.

132. That the Defendants had failed to meet the high burden of proof required for allegations of fraud. She placed reliance on the provisions of Section 26 of the Land Registration Act and the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** to submit that allegations of fraud must be strictly proved, a standard higher than a balance of probabilities, which the Defendants did not meet. That further, the Defendants did not enjoin the Land Registrar to testify on any procedural illegalities.

133. On the second issue for determination, as to whether the Defendants were the beneficial owners, she submitted that the Defendants' claim to beneficial ownership was without merit because their root of title is void. That their claim was predicated on a 2012 agreement with Esther Nanyaiti wherein she had demonstrated through the official Green Card and Esther Nanyaiti's sworn testimony (PW3) that Esther was never the registered proprietor and held no legal interest in the Suit Property to sell. She relied on the principle of *Nemo Dat Quod Non Habet* (One cannot give what one does not have) The Plaintiff argued that the alleged 2012 transaction was a nullity from its inception, as Esther could not legally transfer ownership.

134. That on the other hand, she had derived her title directly from the legally empowered person, David Akamais Lowuallan who was the first registered proprietor and therefore any grievance for monies paid was a personal claim against Esther Nanyaiti, not a proprietary claim against her land. That the Defendants had introduced the concept of a constructive trust for the first time in their submissions which was a procedural flaw because submissions could not be a substitute for pleadings or evidence. Reliance was placed on the case in **Independent Electoral and Boundaries Commission & Anor v Stephen Mule & 3 others [2014] eKLR** which cited **Malawi**

Railways Ltd v Nyasulu [1998] MWSC 3), that had affirmed that a court cannot decide a case on an issue not raised in the pleadings.

135. On the third issue for determination as to whether the Counterclaim is Merited, it was the Plaintiff's submission that the counterclaim was fundamentally misconceived and unmerited, being "a house built on sand." That in order to succeed, the Defendants needed to prove a valid purchase, a nexus to the Suit Property, and fraud and that they had failed on all three counts. That the counterclaim's foundation was on the 2012 agreement which was void for lack of capacity and uncertainty, and the allegations of fraud are unsubstantiated.

136. As to whether the Plaintiff merited the orders sought, she submitted that as the lawful and registered proprietor, she was entitled to the full protection of the law. That the Defendants were in occupation of the property without her consent, which constituted trespass. That she was entitled to the right of exclusive use and possession under the provisions of Article 40 of the Constitution. That the court should issue orders of eviction and a permanent injunction to restore her proprietary rights, as affirmed in the Supreme Court case of **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others [2021] eKLR**, which held that the right to property was sacrosanct and unlawful occupiers cannot be allowed to remain.

137. She thus sought that costs follow the event, and she, being the successful party, was entitled to the costs of both the main suit and the counterclaim. That the Defendants had forced the suit by continuing to trespass and compounded the matter by filing a baseless counterclaim. She relied on the decision in the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR**, where the Supreme Court affirmed that costs follow the event and that the conduct of the parties is a relevant factor.

The Defendants' Submission.

138. The Defendants on the other hand in their submissions dated summarized the factual background of the matter before framing their issues for determination as follows:

- i. Whether the Plaintiff obtained the title to the suit land properly.
- ii. Whether the Plaintiff merits the orders sought
- iii. Whether the Plaintiff in the counterclaim is the beneficial owner of the suit land? Whether the counterclaim is merited.
- iv. Who should bear the costs of the suit and the counterclaim claim herein?

139. On the first issue for determination, they based their submission on the priority of interest and actual possession of the suit land submitting that the deceased was the first to buy the land and the first to take possession and occupation. That the deceased bought the land in 2012 from Esther Nanyaiti (David's sister), wherein the sale was witnessed by David and the Plaintiff's husband, George Milimo. That this date was earlier than the Plaintiff's formalized agreement of 2019 and her registration in 2021. That the deceased's family has been in continuous, visible, and undisputed possession since 2013 and post the deceased's death in 2019, wherein her children remain in possession to date. That the deceased had also developed the land by putting up a semi-permanent house, planting trees, and cultivating the land, thus proving an active proprietary interest. That further, the deceased's burial on the suit property in December 2019 was successful and without any legal objection from the Plaintiff or David to underscore their claim to actual control and ownership.

140. On the second issue for determination, the Defendants submitted that despite the Plaintiff's registered title, they maintained that it was jointly obtained fraudulently by the Plaintiff and David Akamis Lowuallan through collusion. They argued that the Plaintiff processed her title through a transfer in 2021 with full knowledge of the dispute and the deceased's burial on the land which occurred in December 2019, thus rendering her title susceptible to challenge.

141. That further by remaining on the land and placing a caution thereon in January 2020, the Defendants had asserted their interest, coupled with possession, established a superior equitable claim over the subsequent legal title fraudulently obtained by the Plaintiff.

142. As to whether their counterclaim was merited, the Defendants countered the Plaintiff's reliance on the principle of *nemo dat* rule (supra) that Esther, having no title, could sell none to submit that the land was originally Esther's grandmother's land which had been left to David in trust for his siblings, including Esther. Esther's sale of her portion, overseen by David, was therefore valid within the context of a family arrangement, even if Esther was not the registered proprietor. David's role in the sale and in advising them to place a caution supports this claim. That the initial low purchase price of Kshs. 40,000/= in 2012 was due to the absence of a formal title at that time, which was common in such settlement areas.
143. Lastly, the Defendants submitted that the Honourable Court should cancel the Plaintiff's fraudulently procured title deed and declare the deceased's estate represented by Isaac Manoti Boyambi as the rightful owner of the suit property and that they be issued with a new title. That the Plaintiff's suit be dismissed with costs.

Determination.

144. I have considered the Plaintiffs' Complaint, the Defendants' defence and counter claim, the evidence adduced by both parties in court, their submissions, the authorities cited and the applicable law. What is before me is a dispute which revolves around the ownership and possession of land parcel No. Naivasha Oljorai Phase II/8573 (the suit property).
145. The Plaintiff's case was that she was the lawful registered owner of the suit property, having purchased it from the initial registered proprietor, David Akamis Lowuallan who testified as PW2, for Ksh 500,000/=, in January 2012. She admitted that she bought the land informally in 2012 and David did not give her any papers then wherein they had entered into an informal agreement as no title had been issued yet. That she had continued to pay for the land in installments up to 19th February 2019 when the title deed was issued in David's name and a formal agreement was drawn. That the title was subsequently transferred to her name on 2nd February 2021 wherein she had also conducted an official search confirming her ownership.

146. That she took possession of the land and built a semi-permanent house in 2013, planted trees, dug a pit latrine, and started ploughing through her husband since she worked in Ethiopia.
147. That subsequently the Defendants including Teresa Boyani Ereneo (deceased), had trespassed on her land in 2019 wherein the Chief's attempts to resolve the matter were unsuccessful as the deceased and her brother Joseph Onyambu (DW1) refused to leave. Subsequently Teresa Boyani Ereneo passed away in that same year and was buried on the suit land despite her objection.
148. She admitted that she bought the land informally in 2012 and David did not give her any papers then. She denied that Teresa lived on the land continuously. David (PW2) denied selling the land to the deceased or recognizing the Defendant's sale agreement/signature. Esther (PW3), David's sister, denied selling the land or knowing Teresa.
149. She now sought orders to evict the Defendants Joseph Onyambu, Wycliffe, Isaac, and John as trespassers, and payment for costs and damages for the usage of her land.
150. The Defendants case on the other hand was that the suit property belongs to the deceased, Teresa Boyani Ereneo who bought it earlier from David's sister, Esther Nanyaiti (PW3) vide a Sale Agreement dated 28th November 2012, for Ksh. 40,000/=. That David and the Plaintiff's husband, George Milimo, were witnesses to this sale after which Teresa took possession and occupation in 2012, constructed a house in 2013, where she lived with her family until her demise in 2019 and she was buried on the land.
151. That it had been the deceased and her son Isaac (DW2) who built the houses and planted trees as per the Photographs of the homestead and graveyard produced in evidence. That the dispute arose when Teresa was alive, and it was discovered that the land was hers after going before the Chief. They claimed that David was present when they registered a caution on the land in January 2020 after Teresa's death due to threats from David's deceased brother who was known as "Doctor."

152. They played a video in court where David was recorded at Teresa's funeral saying the land belonged to the orphans. Teresa was buried on the suit property in December 2019 where she had lived. They maintained no one raised any objection at the funeral, and David had conveyed his condolences. That the burial on the land was presented as an act of ownership and undisturbed possession.

153. In their Counterclaim, they sought that there be cancellation of the Plaintiff's title and for a title deed to be issued in their favour. They implied that the deceased's interest, though not registered, was protected by the family arrangement and the fact of their physical occupation.

154. Having summarized the case as it were, I find the issues herein arising for my determination as follows:

- i. Whether the sale agreements of January 2012 and 28th November 2012 conferred any interest to both the Plaintiff and the deceased Teresia Boyani Ereneo?
- ii. whether physical possession and prior interest (though equitable) is superior to the Plaintiff's illegal registered title as advanced in the counterclaim.

155. On the first issue for determination as to whether the sale agreements of January 2012 and 28th November 2012 conferred any interest to both the Plaintiff and the deceased Teresia Boyani Ereneo, I find that a title deed is the fundamental document that proves ownership and legal rights over a piece of land. It is conclusive evidence of proprietorship. The Land Registration Act, is the primary legislation governing land registration and establishes a clear legal process for land registration, security of tenure, and aims to prevent land fraud.

156. Section 24 of the Land Registration Act provides as follows

Subject to this Act—

the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

157. Section 25 of the Land Registration Act provides as follows

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

158. Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.

157 . It was held in the case of **Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR**, that statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the Land Registration Act. The court is also aware of the attribute of Section 26(1) (a) and (b) of the Land Registration Act which provides that a Title to land shall not be absolute and indefeasible because it can be impeached where it is shown to have been obtained through fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme.

158 . In this case, the Plaintiff’s argument was that she had bought the suit land No. Naivasha Oljorai Phase II/8573 (suit property) from its owner David

Akamis in January 2012 for Ksh 500,000/= through an informal agreement because at the time he had no title. That subsequently she took possession of the land, built a semi-permanent house in the year 2013, planted trees, dug a pit latrine, and started ploughing. The sale agreement was formalised on 19th February 2019 after David had received the title herein in the year 2018.

159. The Defendants evidence on the other had was that the deceased Teresia Boyani Ereneo bought the land from its owner Esther Nanyaiti vide a sale agreement of on 28th November 2012 for Ksh 40,000/=. That she had then taken possession and occupation of the same where she constructed a house and had been cultivating until her demise in 2019. That she was buried on the land leaving her children in occupation of the same.

160. Up to this point, to effectively resolve the parties conflicting claims to the disputed land, it is necessary to interrogate the root of the title held by either party to prove that the owner has a good title. There is not contestation that at the time the sellers of the suit land being David Akamis and Esther Nanyaiti sold the land to the Plaintiff herein M/s Genevive Malesi Ngaira and Teresia Boyani Erene respectively, none of them had title to the land as no evidence was adduced to the effect that either of the vendors to the sale agreements herein above cited had acquired the Title to the suit land before sale of the same as no title to this effect had been produced. Indeed, from the Plaintiff's own evidence, she had entered into an informal agreement with David as no title had been issued. No explanation had been given as to why it had taken 6 years from 2012 to 2018 for the issuance of a title to David. Neither of the vendors therefore had any interest to pass in the suit parcel of land. Section 107(1) of the Evidence Act, provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist.

161. The sale of land without a title deed pursuant to the agreements of 2012, I hold, was fraught, not permissible, illegal, null and void *abi nitio* as '*Nemo Dat Quod Non Habet*' (no one can give what they do not have.) The sellers

lacked a valid title, and therefore could not legally transfer valid ownership.

162. The title deed herein adduced as Pf exh 2 in the name of David Akamais Lowuallan was issued on the 30th May 2018 which was 6 years after the informal sale agreement between him and the Plaintiff. The Title deed produced as Pf exh 3 in the name of the Plaintiff Genevive Malesi Ngaira which was issued on the 2nd February 2021 pursuant to a transfer was not accompanied by the usual documents of a valid transfer like the executed transfer forms, Land Rates Clearance Certificate, Land Rent Clearance Certificate, Land Control Board Consent, KRA Stamp Duty Payment Receipts, copies of KRA PINs and IDs/Passports for both parties.

163. In the Supreme Court's holding in **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**

"Where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge, and therefore, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal, and free from any encumbrance, including interests which would not be noted in the register."

164. The Defendants' Defence and Counterclaim was to the effect that the Plaintiff had fraudulently conspired with other individuals to have the suit property registered in her name. They particularized the aspect of the fraud as follows;

- i. Fraudulently registering the suit property under her name.
- ii. Conspiring with the 2nd Defendant in the counterclaim who misrepresented as the owner of the suit land.
- iii. Obtaining registration of the suit land fraudulently.
- iv. Processing the title deed to the suit property while being aware that it belonged to the late Teresia Boyani Ereneo.
- v. Concealing the true proprietorship of the suit land.

165. The Supreme Court in the **Dina Management Ltd case** (Supra) firmly held that a title is not protected if the root of the title (the initial process) was illegal, irregular, or un-procedural. That the absence of vital documents (like LCB Consent or KRA payments) was prima facie evidence that the process was illegal or unprocedural. This being the case, I find that the Plaintiff's title issued on the 2nd February 2021 was illegal, irregular, or un-procedural.
166. Infact, the Defendants' prior physical possession since 2012 which I shall address later, served as constructive notice to the Plaintiff that a rival interest existed. Acquiring a registered title after ignoring this possession strongly supports the finding that the Plaintiff's title was acquired un-procedurally or through a corrupt scheme designed to defeat the known equitable claim.
167. Evidence was led in court by both the Plaintiff and the Defendants that whereas the Plaintiff took possession and built a semi-permanent house on the suit land in the year 2013, planted trees, dug a pit latrine, and started ploughing, of significance to note is that whereas the Plaintiff testified that she worked in Ethiopia and used to send money to her husband who bought the land and even built the temporal house, she did not deem it of importance to call him as a witness to buttress her evidence that she was in occupation of the land. The court would thus not be wrong to infer that the evidence of the uncalled witnesses would have tended to be adverse to the Plaintiff. Further her prayers to have the Defendants evicted from the land also confirm that she was not in possession of the same.
168. On the other hand, the defence case was that the deceased Teresa Boyani Ereneo took possession and occupation of the same suit land in the year 2012 wherein she had constructed a house in 2013, where she lived with her family until her demise in 2019 and was buried on the land. This evidence was supported by both pictorial evidence and a transcript produced in evidence of her physical possession.
169. There having been evidence of the Defendants' possession and occupation of the suit land, the next issue for determination would thus be

whether physical possession and prior interest (though equitable) is superior to the Plaintiff's illegal registered title as advanced in the counterclaim.

170. An equitable interest is often created when a buyer acts on a contract for sale by fulfilling their part of the obligation, even if the formal legal title transfer fails. The deceased Teresa Boyani Ereneo paid the purchase price of Kshs. 40,000/= wherein they relied on the void agreement by moving onto the land, building a house (in 2013), planting trees, and occupying it continuously. These actions, I find constituted part performance of the contract and their actual, visible, and continuous possession since 2012 was a basis for equity and a constructive notice to the entire world, including the Plaintiff (Genevieve Malesi Ngaira), that a competing interest existed on the land.

171. In **Obiero v Otwenya (Civil Appeal 145 of 2019) [2025] KECA 541 (KLR) (21 March 2025) (Judgment)**, the Court of Appeal sitting in Kisumu while agreeing with Mutungi J's holding had inter alia observed as follows at paragraphs 26 and 27

"It was the learned judge's view that in the circumstances thereof, a constructive trust was created in favour of the respondent, and his possession was an overriding interest over the land that required no noting in the land register. At the pertinent portion of the judgment, the learned Judge had the following to say:

"...28. In the instant suit on the evidence and the facts, I am satisfied that the plaintiff was let into possession of the suit land following the agreement of sale and payment of the purchase price. All that remained was for the parties to obtain the consent of the Land Control Board for the subdivision and transfer. Although consent for the subdivision was obtained no consent for transfer was obtained. The plaintiff remained in possession and effected developments on the suit premises. On the facts and evidence, a constructive trust was created in favour of the plaintiff such that the 1st defendant held title to the portion the

plaintiff had purchased in trust for the plaintiff. The possession and occupation of the land by the plaintiff constituted an overriding interest within the provisions of Section 28 of the Land Registration Act, Cap 300 Laws of Kenya”

*We completely agree with the learned Judge’s analysis of the case on both the facts and the law. Indeed, it is our view that the facts were not seriously contested. What was in question was whether the learned Judge was correct to apply the concept of constructive trust to rescue the respondent from the otherwise oppressive situation he would have found himself in on account of the provisions of the Land Control Act. As the learned Judge correctly observed, this Court has now spoken with authority on that question in the **Willy Kimutai Kitilit Case (supra)**. We happily affirm this Court’s holding in that case; and we find the present case to be on all fours with it.”*

172. The Supreme Court in the case of **Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)**, while deciding on whether a constructive trust can be imported into a land sale agreement to defeat a registered title, held as follows:

“...While sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust.

We have found that the doctrines of equity are part of our laws by virtue of section 3 of the Judicature Act. And while the Constitution entitles every person to the right to property at article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while sections 25 and 26 of the Land Registration Act provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title."(my emphasis)

173. From the above finding, the Supreme Court had concluded that the law supports the importation of a constructive trust where required by equity and good conscience to prevent unjust enrichment, and this imposition acts as an overriding interest that defeats the claim of the registered proprietor under the framework of the Land Registration Act and the Constitution.

174. The Plaintiff having acquired her title subsequently in the year 2021, and with notice of the Defendants' physical presence, the Defendants' prior equitable interest was therefore superior to the Plaintiff's later, illegally procured title, applying the maxim *Qui prior est tempore potior est jure* (He who is earlier in time is stronger in law).

175. In effect therefore I find in favour of the Defendants Counterclaim and

proceed to dismiss the Plaintiff's suit. The Defendants shall have costs of both the suit and Counterclaim.

Dated and delivered via Teams Microsoft at Naivasha this 6th day of November 2025.



M.C. OUNDO

ENVIRONMENT & LAND COURT- JUDGE