



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC CASE NO. 270 OF 2018

GRACE NJERI HARRISON.....
.....PLAINTIFF

VERSUS

MONICAH MUTHONI KIMANI.....1ST
DEFENDANT

JOHN NJIRU NJUE.....2ND
DEFENDANT

ANTHONY KIMANI MUMBI.....3RD
DEFENDANT

GLADYS WAMBUI THIIRU.....4TH
DEFENDANT

TOM SAMUEL MACAU THUKU.....5TH
DEFENDANT

CAROLINE MUKAMI MURIUKI.....6TH
DEFENDANT

ZEBEDEE NGARI WANGAI.....7TH
DEFENDANT

MARY WANGUI MAINA.....8TH
DEFENDANT

HARUN MWANGI WACHIRA.....9TH
DEFENDANT

**WYCLIFFE ODHIAMBO MURWAYI.....10TH
DEFENDANT**

**DOUGLAS MWANGI GATHIMU.....11TH
DEFENDANT**

**THE HON. ATTORNEY GENERAL.....12TH
DEFENDANT**

**PETER MUKOMA MBUTHA.....13TH
DEFENDANT**

AND

**THE CO-OPERATIVE BANK (K) LIMITED.....
INTERESTED PARTY**

JUDGMENT

1. At the heart of the dispute are several parcels of land namely **THIKA MUNICIPALITY/BLOCK 19/449, THIKA MUNICIPALITY/BLOCK 19/836** and **THIKA MUNICIPALITY/BLOCK 19/1224** (hereinafter the '**suit properties**') situated at Thika Municipality in Kiambu County.
2. The Plaintiff filed an application contemporaneously with the Plaint seeking for a temporary injunction restraining the Defendants from interfering with the suit land pending the hearing and determination of the case which was allowed by consent of both parties.
3. The background of the dispute starts with the description of the parties, the Plaintiff describes herself as a female adult of sound mind and who is suing as the legal representative

of the Estate of the late Harrison Mbari Waithaka who is the registered owner of land **THIKA MUNICIPALITY/BLOCK 19/449, THIKA MUNICIPALITY/BLOCK.19/836** and **THIKA MUNICIPALITY/BLOCK. 19/1224** which were all acquired in 1989.

4. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th - 11th are described as female and male Defendants who according to the Plaintiff she discovered on or about August 2011 that the 1st Defendant had fraudulently transferred the suit land **MUNICIPALITY/BLOCK 19/449, THIKA** to herself and thereafter to the 2nd Defendant, **MUNICIPALITY/BLOCK.19/836** to herself and thereafter to the 3rd Defendant sometimes on March 2011 who in turn transferred it to the 4th Defendant and the 4th Defendant transferred it to the 5th and 6th Defendants for valuable consideration on 3rd March 2013.
5. At the same time that on or about 24th January 2011 the 1st Defendant fraudulently transferred land parcel No. **THIKA MUNICIPALITY/BLOCK. 19/1224** to the 7th and 8th Defendants who in turn transferred it to the 9th Defendant and the 9th Defendant transferred it to 10th Defendant and the 10th Defendant transferred it to the 11th Defendant on or about 6th April 2018.
6. The Plaintiff avers that the 1st Defendant fraudulently registered the suit properties in her names and her registration was fraudulent and the subsequent transfers null

and void since the 1st Defendant did not have good title to enable her transfer the suit properties to third parties.

7. At paragraph 7 the Plaintiff listed the particulars of **fraud, malfeasance and misrepresentation on the part of the 1st Defendant** as the following:

- a) Causing the land to be transferred to her when she knew that she had no capacity to transact on behalf of the estate of the late Harrison Mbari Waithaka.
- b) Irregularly and illegal causing the suit lands to be transferred to herself with the sole purpose of disinheriting the beneficiaries of the estate.
- c) Presenting forged and irregularly acquired documents to effect the transfer.
- d) Embarking on a process that was manifestly and patently illegal from the outset.
- e) Conniving with land officials, individuals to defraud the Plaintiff of her land.

She also lists **particulars of fraud, malfeasance and misrepresentation on the part of the Land Registrar, Thika and Police Officers at Thika Police Station as:**

- a) Conniving with 1st Defendant to accept and register documents whose authenticity was questionable.
- b) Accepting to register transfer documents when it was apparent that the bonafide owner has not executed them.

- c) Failing to carry out due diligence before accepting the documents.
 - d) Issuing a new title deed when the original one had not been surrendered as the procedure requires.
 - e) The Land Registrar was complicit in the whole transaction in that he paid a blind eye to the known procedures when effecting the transfer issuance of new titles.
 - f) Aiding in commission of a crime in that the act of effecting the transfer amounted to intermeddling.
 - g) Colluding with Police Officers from Thika Police Station to have the restriction removed when it was apparent there was an ongoing Criminal Case whose effect was to facilitate further transactions.
 - h) Thika Police Station Officers acted fraudulently in not ensuring that the suit lands were safer by not maintaining restrictions to preserve the suit lands.
8. The Plaintiff lodged a complaint with the Police upon which the 1st Defendant was arrested and charged in Chief Magistrate's Court at **Thika Law Court Criminal Case No. 4005 of 2011** and was convicted and sentenced accordingly.
9. Consequently, the Plaintiff sought Judgment against the Defendants for the following:
- 1) A declaration that the 1st Defendant having acquired ownership and titles of **THIKA MUNICIPALITY/BLOCK**

19/449, THIKA MUNICIPALITY/BLOCK.19/836 and **THIKA MUNICIPALITY/BLOCK. 19/1224** through fraud, her titles and the subsequent transfers are null and void in that she had no valid titles capable of conferring proprietary interests to third parties.

- 2) The 2nd Defendant registration as the registered proprietor of **THIKA MUNICIPALITY/BLOCK. 19/1224**, 5th and 6th Defendant titles as the registered proprietors of **THIKA MUNICIPALITY/BLOCK.19/836** and the 11th Defendant's title as the registered proprietor of **THIKA MUNICIPALITY/BLOCK 19/449, MUNICIPALITY/BLOCK.19/836** and **THIKA MUNICIPALITY/BLOCK. 19/1224** be deleted and the name of **HARRISON MBARI WAITHAKA** be restored as the registered proprietor free from all encumbrances.
- 3) THAT an injunction do issue restraining the 2nd, 5th, 6th and 11th Respondents/Defendants and/or their servants/agents from dealing with the lands in any manner that may prejudice the interest of the Plaintiff in the lands which include sale, transfer, encumbering, leasing out, charging or from doing any act aimed at further developments of the parcels known as **THIKA MUNICIPALITY/BLOCK 19/449, MUNICIPALITY/BLOCK.19/836** and **THIKA MUNICIPALITY/BLOCK. 19/1224** and an eviction order do issue directing the 2nd, 5th, 6th and 11th to

vacate **THIKA MUNICIPALITY/BLOCK 19/449, MUNICIPALITY/BLOCK.19/836** and **THIKA MUNICIPALITY/BLOCK. 19/1224** respectively.

4) Costs of this suit and interest.

10. On 20.11.2018 the Interested Party filed an application for joinder which was granted by the Court.

11. Consequently, the Plaintiff sought Judgment against the Defendants for the following:-

a) A declaration that the 1st Defendant having acquired ownership and titles through fraud her titles and the subsequent transfers are null and void in that she had no valid titles capable of conferring proprietary interests to third parties.

b) The 2nd Defendant registration as the registered proprietor of **THIKA MUNICIPALITY/BLOCK.19/449**, 5th and 6th Defendants as the registered proprietor of **THIKA MUNICIPALITY/BLOCK 19/836** and the 11th Defendant's title as the registered proprietor of **THIKA MUNICIPALITY/BLOCK 19/1224** be cancelled and their names as the registered proprietors of **THIKA MUNICIPALITY/BLOCK.19/449,** **THIKA MUNICIPALITY/BLOCK 19/836,** **THIKA MUNICIPALITY/BLOCK 19/1224** be deleted and the name of **HARRISON MBARI WAITHAKA** be restored as the registered proprietor free from all encumbrances.

c) THAT an injunction do issue restraining the 2nd, 5th, 6th and 11th Respondents/Defendants and/or their servants/agents from dealing with lands in any manner that may prejudice the interest of the Plaintiff in the lands which include sale, transfer, encumbering, leasing out, charging or from doing any act aimed at further developments/use of the parcels known as **THIKA MUNICIPALITY/BLOCK.19/449,** **THIKA MUNICIPALITY/BLOCK 19/836,** **THIKA MUNICIPALITY/BLOCK 19/1224** and an eviction order do issue directing the 2nd, 5th, 6th and 11th to vacate **THIKA MUNICIPALITY/BLOCK.19/449,** **THIKA MUNICIPALITY/BLOCK 19/836** and **THIKA MUNICIPALITY/BLOCK 19/1224** respectively.

d) Costs of this suit and interest.

12. Upon service of the Summons, the 5th and 6th Defendants entered appearance by filing a Memorandum of Appearance and their Statement of Defence dated 29/11/2018. The 5th and 6th Defendant jointly denied the averments in the Plaint and stated that they bought the suit property **THIKA MUNICIPALITY/BLOCK 19/836,** from the 4th Defendant and that they are innocent purchasers for valuable consideration.

13. They also stated that they are strangers to the particulars of fraud as stated in the Plaint. Shortly thereafter,

the said law firm ceased acting for want of instructions from its client, the 1st Defendant.

14. The 2nd Defendant vide its Statement of Defence and Counter-claim dated 10/11/2018 denied the Plaintiff's claim and sought to put the Plaintiff into strict proof. Specifically, it denied the particulars of fraud, illegality and negligence and contended that if at all he bought **THIKA MUNICIPALITY/BLOCK.19/449** without any notice of defect of title from one **Peter Mukoma Mbutha** after undertaking due diligence, applying for search and getting all necessary documents of transfer.
15. He avers that he took possession and has constructed his home and has lived on the suit land since 6/12/2010. He states that the Plaintiff should seek compensation from 1st Defendant if she did not have proper title to sell or transfer.
16. The 2nd Defendant reiterates the contents of his **Defence in the Counter-claim**. It is his contention that if the title is not valid then he should be compensated by the said Peter Mukoma Mbutha and the Government of Kenya through the Ministry of Lands represented by the 12th Defendant in this instant suit.
17. The 2nd Defendant therefore prays that the Plaintiff's suit be struck out and/or dismissed with costs and /or in the alternative and without prejudice he seeks the following orders:

a) An order do issue compelling Peter Mukoma Mbutha, and the Government of Kenya through the Ministry of Lands and Housing to compensate the 2nd Defendant for the current market value of plot number Thika Municipality Block 19/449 together with all the developments thereon to be assessed by the Court.

b) Costs of the suit.

18. Due to the many Defendants, the Plaintiff sought a Court order on to serve the 3rd, 4th, 7th and 8th Defendants by Substituted service which was granted by the Court on 4/03/2019 and the Plaintiff placed an advertisement in the **Daily Nation Newspaper dated 26/03/2019** and listed all the Defendants. At the same time the Plaintiff sought Judgment from the Court on **15/05/2019** against the 3rd, 4th, 7th and 8th Defendants after the lapse of the notice period. The Court did not however issue the interlocutory Judgment this being a land matter.
19. On his part the 10th Defendant filed his Statement of Defence dated 20/05/2019 and denied having fraudulently sold land parcel number **THIKA MUNICIPALITY/BLOCK.19/1229** to the 11th Defendant. And he denied contents in the Plaint at paragraph 7 and put the Plaintiff to strict proof. He also denied having ere was any registration, transfer and subdivision of the suit land, the

same was done in accordance with the documents presented to its offices which exercised due diligence and belief that the documents were genuine and accurate. Further it decried the failure by the 1st Defendant to serve it with the mandatory notice of intention to sue which in its opinion rendered the suit fatal.

20. On 18/05/2021, the 11th Defendant and the Interested Party filed a Co-Defendant Notice under Order 1 Rule 24 (1) (a), & (c), (2) & (3) of the Civil Procedure Rules against the 10th and 12th Defendants. It is their averment that in the event this Honourable Court will hold and/or find in favour of the Plaintiff relating to the alleged fraud on the title of one of the suit property known as **Title No. Thika Municipality/Block 19/1224** the 10th Defendant who sold the parcels to the 11th Defendant and the Thika District Land Registrar on whose behalf the 12th Defendant has been enjoined in the suit shall be liable to him and the 11th Defendant seeking the following orders:

- a) The 11th Defendant acquired from the 10th Defendant the said suit property known as Title No. Thika Municipality/Block 19/1224 at a valuable consideration without notice of the alleged fraud and/or want of title on the part of the 10th Defendant.
- b) Prior to the acquisition of the said suit property Title No. Thika Municipality/Block 19/1224, the 11th Defendant conducted a search at Thika District

Registry and which search confirmed that the 10th Defendant was the registered proprietor thereof and the title was free of any circumstance and which formed the basis of his acquisition.

c) The 10th Defendant confirmed to the 11th Defendant that he was the legitimate and bona fide owner and which fact was also confirmed by the said official search, as being the then registered owner and thereby making the 11th Defendant to enter into the said sale transaction of that suit property.

21. At the same time the 10th Defendant WYCLIFFE ODHIAMBO MURWAYI filed a **Co-Defendant Notice** dated **4/05/2021** brought under Order 1 Rule 24 (1) (a) & (c) & (3) of the Civil Procedure Rules against the 9th and 12th Defendants namely HARUN MWANGI WACHIRA and THE HON. ATTORNEY GENERAL jointly and severally seeking the following orders:

a) He is entitled to the full compensation and/or indemnity from you, the 9th and 12th Defendants herein for the loss, costs and/or damages that he may suffer and/or incur in respect of the said suit property known as **Title No. Thika Municipality Block 19/1224** inclusive the developments thereon [with current market value of Kshs 17 million] and registered in his name pursuant to such Judgment/Decree that may be made in favour of the Plaintiff.

22.The application is based on the grounds on the face of it.
The grounds articulated are that:

a) The 10th Defendant acquired from the 9th Defendant the said suit property known as **Title No. Thika Municipality Block 19/1224** at valuable consideration without notice of alleged fraud and/or want of title on the part of the 9th Defendant.

b) Prior to the acquisition of the said property **Title No. Thika Municipality Block 19/1224**, the 10th Defendant conducted a search at Thika District Lands Registry and which search confirmed that the 9th Defendant was the registered proprietor thereof and the title was free of any circumference (I think he meant encumbrance) and which formed the basis of his acquisition.

c) The 9th Defendant confirmed to the 10th Defendant that he was the legitimate and Bonafide owner and which fact was also confirmed by the said official search, as being the then registered owner and thereby making the 10th Defendant to enter into the said sale transaction of the aforesaid suit property.

23.Following which the 10th Defendant prayed for adoption of the stated claim against the 9th Defendant and that if they do not file any rebuttal then the 10th Defendant's Co-Defendant claim will stand.

24. At the same time the 10th Defendant filed a Statement of Defence dated 31/05/2021 and claimed to have rightfully and legally acquired **Title No. Thika Municipality Block 19/1224** which he subsequently sold to the 11th Defendant.
25. He claims that he never used fraud to acquire the said parcel - **Title No. Thika Municipality Block 19/1224** and that he neither used fraud to sell and transfer the said parcel to the 11th Defendant. He therefore prays that the Plaintiff's suit be dismissed with costs.
26. The 9th Defendant filed his Statement of Defence sworn by Harun Mwangi Wachira dated 12/07/2021 and averred that he sold parcel **Title No. Thika Municipality Block 19/1224** and executed all the necessary transfer documents and that he never used any fraud to sell and transfer the said parcel to the 10th Defendant. He thus prays that the claim against him for transfer of the parcel **LR No. Thika Municipality Block 19/1224** be dismissed with costs and interest to him.
27. The 12th Defendant filed their Statement of Defence sworn on 7/03/2019 and in their statement they denied the contents in the Plaint and especially paragraph 5 and 6 of the Plaint. The 12th Defendant avers that in the alternative and without prejudice that if at all **THIKA MUNICIPALITY/BLOCK.19/449,** **THIKA MUNICIPALITY/BLOCK 19/836,** **THIKA MUNICIPALITY/BLOCK 19/1224** were registered in the

names of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th Defendants he averred that it was because there were documents presented before the 12th Defendant's office and the 12th Defendant having exercised due diligence believed the documents to be genuine and then they were registered. It is the considered view to the 12th Defendant that he had performed due diligence as per the law.

28. The 12th Defendant also denied claims of fraud, malfeasance and misrepresentation against the Land Registrar and Police Officers at Thika Police Station.

29. Further it stated that it was not served with Notice of Intention to sue and reserves the right to raise a Preliminary Objection under Section 13A of the Government Proceedings Act. Also, that the suit as drawn does not disclose any cause of action against the 2nd Defendant (I believe they meant 12th Defendant). The 12th Defendant thus prays that the Plaintiff's suit against them be dismissed with costs.

30. The 2nd Defendant also filed a Co-Defendant notice dated 1/07/2021 against the 12th and 13th Defendants namely the Hon Attorney General and Peter Mukoma Mbutia jointly and severally in the event this Court found that the suit property **LR No. THIKA MUNICIPALITY/BLOCK 19/1224**, then the 13th Defendant being the one who sold and transferred to the 2nd Defendant and the Thika District Land Registrar on whose behalf the 12th Defendant has been enjoined shall be liable to him and the 2nd Defendant will seek the following:

a) He is entitled to full compensation and/or indemnity from you, the 12th and 13th Defendants herein for the loss, costs and/or damage that he may suffer and/or incur in respect of the said suit property known as Title No. **LR No. THIKA MUNICIPALITY/BLOCK 19/1224** inclusive of the development thereon with current market value of Kesh 12,000,000 and registered in his name pursuant to such Judgment/Decree that may be made in favour of the Plaintiff.

31.The grounds that the 2nd Defendant has relied on are on the face of the application and the 2nd Defendant notifies the 12th and 13th Defendants that his claim against them is that they are bound jointly and severally to compensate and indemnify the 2nd Defendant in the event the Judgment is entered in favour of the Plaintiff.

32.The 13th Defendant in opposition to the Plaintiff's suit filed a Statement of Defence and Counter-claim dated 18/03/2025 and denied any involvement in fraud or misrepresentation. It is his contention that by the time he was selling the suit property, the title of **LR No. THIKA MUNICIPALITY/BLOCK 19/449** to the 2nd Defendant, the title had not yet been transferred to the 13th Defendant.

33.The 2nd Defendant still went ahead with the transaction which was done in good faith based on the representation and legal advice provided by the 2nd Defendant's own Advocate who acted for both the seller and purchaser. The

13th Defendant has purchased the suit property from Monica Muthoni Kimani and the transfer had not been completed which fact the 13th Defendant had informed the 2nd Defendant.

34. That this fact was included explicitly in the Sale Agreement. Also, that the 2nd Defendant has all the opportunity to conduct due diligence and he confirmed having done so before completing the purchase. So, at the time of the entering into a sale agreement with the 13th Defendant by the 2nd Defendant, the 13th Defendant only had a beneficial interest in the suit property.

35. Further that the formal transfer of the property was effected directly by the 1st Defendant Monica Muthoni Kimani to the 2nd Defendant John Njiru Njue without any involvement of the 13th Defendant in execution of the transfer.

36. The 13th Defendant avers to be wrongly enjoined to the proceedings since he was not involved in any alleged fraudulent transfer. That any misguidance or failure to conduct property legal due diligence is the liability of the 2nd Defendant and his Counsel who facilitated the transaction. Consequently, the 13th Defendant filed a Counter claim.

13th Defendant's Counter- Claim

37. In the Counter-Claim, the 13th Defendant reiterated the contents of his Statement of Defence and stated that there was no evidence or any parallel claim to the parcel of land number **LR No. THIKA MUNICIPALITY/BLOCK 19/449.**

38. He also states on a without prejudice basis that if the Court finds that there are any defects, irregularities, or unlawful elements in the ownership of the suit property that adversely affect the Plaintiff or any other party:

- a) The 1st Defendant, Monica Muthoni Kimani, being the original seller and registered owner at the time, should bear full responsibility and indemnify the 13th Defendant for any claims, damages, or legal costs imposed on him.
- b) The 12th Defendant, by virtue of their dealings or involvement, should similarly indemnify the 13th Defendant for any finance, loss, damages or costs arising from the transactions.

39. The 13th Defendant therefore prays for judgment against the 2nd and 1st Defendants for:

- a) A declaration that the 2nd Defendant's Statement of Defense and the Co-Defendant's Notice be dismissed with costs to the 2nd Defendant.
- b) A declaration that the 2nd Defendant voluntarily purchased the suit property with full knowledge of its legal status and cannot hold the 13th Defendant liable for any claims arising herein.
- c) An order directing the 1st and 12th Defendants to fully indemnify the 13th Defendant for any amount that the Honorable Court may find payable by him to any party to the suit.

d) Costs of this suit.

40. On 13/12/2022 the Court gave directions on hearing of the suit which commenced with the Plaintiff's suit on 15/05/2023.

Plaintiff's Case

41. **PW1- GRACE NJERI HARRISON** testified and stated that she is a business lady and that she is the Plaintiff. She adopted her witness statement dated 6/11/2018 as her evidence in chief and she produced her List of Documents of even date which included:

- a) Ad Litem Grant
- b) Abstract of title
- c) Official Search
- d) Proceedings and Judgment

as Pexh No. 1-4.

42. Upon cross-examination by Counsel **Jesse Kariuki**, she testified that she did not know the 2nd Defendant. She further stated that she is aware that when the land was registered in the name of the 1st Defendant it was sold to other third parties. She also stated that she is aware that due diligence is necessary before one purchases land.

43. That according to her the land was not properly transferred to the 2nd Defendant. Further that she was not aware that the property was sold to Mukoma, she told the Court she discovered this fact later. She testified having been shown an agreement by **Mr Mwaniki** her Counsel which showed

that the property was sold to the 2nd Defendant. However, she stated that she is not aware if the 2nd Defendant paid for the land. That everything happened behind her back. The suit properties she said, belonged to her father.

44. It was her testimony that the 2nd Defendant would not have been aware about the proprietorship of her father. She stated that she is aware that the land is now changed to the County Government of Kiambu. That if this be the case then it acquired the property illegally.

45. She told the Court that she is aware that the 2nd Defendant has constructed a house on the land (See page 32 of the 2nd Defendant's trial bundle). However, according to her the plots belonged to her father.

46. When she was cross-examined by Counsel for the 5th and 6th Defendants, **Ms Kimani**, she told the Court that she knew in 2011 that the suit properties had been transferred. That she received a letter through the post office which had changed from her father to the 1st Defendant who is a wife to her late brother.

47. She testified that she reported to the Police the apparent change of ownership but that she never visited the land in 2011 but she visited during the Criminal Case in 2012. She also testified that she never registered any restrictions at the Land Office.

48. It was her testimony that her father died in 1995 and his Estate was succeeded in 1997. That Esther Wamboi Mbari

and her uncle Kamau Waithaka were the administrators of the Estate. That however the titles were never registered in the name of the beneficiary, who is the Plaintiff's mum. That the plots were held by her father and another partner. Further that parcel **LR Title Number THIKA MUNICIPALITY/BLOCK.19/836** the title was never changed from her father's name. Also, that there is no legal administrator over the Estate of her mother.

49. She testified that the 5th and 6th Defendants are not known to her. Although at pages 94-97 of the 5th and 6th Defendant's trial bundle, the titles were registered in the name of the 6th Defendant in 2013. That although she discovered the transaction in 2011, she did not lodge a caution /restriction. She also testified to not have enjoined Equity Bank Kenya Ltd.

50. She told the Court when cross-examined further that the bank could not have lend money to the 5th and 6th Defendants if there was a problem with the title.

51. When she was cross-examined by the Counsel for the 9th and 10th Defendants, she told the Court that she is administrator of the Estate of the late Harrison who is her father. She also testified that the 1st Defendant was her sister-in-law. It was her testimony that her brother was not the registered owner of the suit property. She testified that she did not know the 10th Defendant.

52. According to her the Green Card of parcel No. 1224 indicated that the land was registered in the name of the 10th Defendant on 22/12/14. She stated that she discovered in 2011 that the title had been changed from her father's name to the 1st Defendant. She filed the civil case in 2018 and that there is nothing else she did to protect the land between 2011-2018.
53. She told the Court that there is a Criminal Case ongoing and the Police put a restriction on the suit property which they later removed mysteriously. She testified to have visited the suit property in 2012 and she found that there was ongoing construction on the land especially portion 1224.
54. When she visited the land and found construction, she testified to have issued a notice to the parties on the land because there was an ongoing Criminal Case from which the 1st Defendant was convicted on 30/04/2018. The Court however did not issue orders to stop any transactions on the land.
55. PW1 was cross-examined by **Mr Kimondo** for the Interested Party and she testified that she did not know the 11th Defendant and she stated that her father's Estate was administered by Esther Wambui Mbari (Mother) and her uncle Kamau Waithaka or James Kamau Waithaka. Although her mother died in 2009 and her uncle James died earlier in 2005 there was no rectification or substitution of the legal representatives.

56. She told the Court that she had a Limited Grant ad Litem dated 2/08/2018 which she got long after the administrators were long deceased. That as a matter of fact there is a Grant which is valid issued to her mother and uncle but she got another Grant to allow her litigate thus there are two Grants.
57. She testified to have discovered fraud in 2011 and that she was aware that the land changed hands to the name of the 1st Defendant. She also testified that there was a restriction as evidenced by Entry No. 7 and that for Entry No. 8 it shows that the restriction was removed on 10/12/2013. That by the time the 11th Defendant bought the land the restriction had been removed.
58. From her evidence she brought out the fact that Entry No. 2 of parcel 1224 shows that the land was registered in the name of Samuel Mungai Mbugua and Harrison Mbari to hold in common in equal shares.
59. According to her she told the Court she was in Court on behalf of the Estate of Harrison Mbugua and that she had no authority to act on behalf of the other owner - Samuel Mungai Mbugua since the representatives of Samuel Mbugua are in Court. According to her, the title had not been partitioned and she told the Court that she wanted the title to remain the way it was before.
60. She referred to the Sale Agreement page 1-6; dated 16/02/2018 between the 10th and the 11th Defendants where the purchase price is indicated as Ksh 3.150 million and at

page 7-9 the Land Control Board application and the Consent is dated 1/03/2018.

61. The 11th Defendant obtained Land Control Board Consent and there was no restriction when the 11th Defendant purchased the land. That he followed the right process in acquiring the land and that at page 10 of the bundle the Search dated 8/03/2018 shows the 10th Defendant owned the land. This was the seller of the land. At page 11 there is evidence of payment by the 11th Defendant to the 10th Defendant.

62. It was her testimony that she cannot blame 11th Defendant in the way he acquired the land and also that the 11th Defendant has constructed a house on the land. That the Valuation Report filed at page 14 shows the 11th Defendant had constructed house.

63. She testified that there is no evidence that the 11th Defendant knew about the ownership and issues relating to the title.

64. It is her testimony that in the Plea at page 2 she has not made any allegations against the 11th Defendant. The 1st Defendant she told the Court is her sister -in-law; a wife to her brother, Benjamin Kimani Mhuri who was an older brother to her and he died in 2010 in May. That whereas her mother and uncle were administrators to the father's Estate who died in 1995 and her mother died in 2009 but that no

Letters of Administration have been taken out in respect of her mother's Estate.

65. She told the Court that Samuel Mungai Mbugua is deceased but she had not produced any evidence of Succession of his Estate but she stated that she cannot be blamed for taking no action on the Estate.

66. Upon re-examination by Counsel **Mr Mwaniki** she told the Court that she did not know what a Rectification of Grant is and that she did not know what happens to a Grant once the holder dies. She told the Court that the Search is dated 8/3/2018 as per page 10 of the 11th Defendant's trial bundle. The consent was granted on 1/3/2018 as at page 9 of the 11th Defendant's trial bundle. The Land Control Board Consent application is dated 1/3/2018.

67. She told the Court that the matter was reported to the Police who registered the restriction. With that they closed their case.

Defence Case

1st Defendant's Case

68. Hearing resumed on 18/09/2023 for the Defence case. However, when the 1st Defendant's name was called out in Court and outside the Court, she was not present despite having been served vide an Affidavit of Service filed on 15/09/2023. Given the circumstances, the Court decreed the 1st Defendant's case is deemed as closed.

2nd Defendant's Case

69. **DW2 - John Njumi Njue** testified as the 1st Defendant and he stated that they live on the suit land Block 19/449 and that he works with Kiambu County as an MCA for Hospital Ward and that he is also the Deputy Speaker of Kiambu County. He testified that he is relying on the following documents:

- a) Defence and Counter-Claim against the 13th Defendant,
- b) Witness statement dated 14/08/2019,

Which he prayed that they may be adapted as his evidence in chief.

70. He also adopted his List of Documents dated 14/08/2019 with all the exhibits '**DW1Exh 1- 10**' and he also filed a 3rd Defendant's Claim.

71. The Counsel for the 12th Defendant objected to the production of the Valuation Report on the basis that the witness is not the maker of the document. The Counsel for the 2nd Defendant raised a Counter-Objection stating that the objection was being raised too late since Pre-Trial Conference was concluded and no objection was raised by the Counsel for the 12th Defendant. However, the Counsel for 12th Defendant, **Ms Ndundu** insisted that the report having been prepared by an expert who needed to produce it themselves.

72. The objection was upheld by the Court and so the Valuation Report was marked as '**MF I**' for production by the maker.

73.DW2 testified and stated that before he purchased the land, he carried out due diligence by way of an official Search. According to him the 13th Defendant was registered as owner and that the title of the 1st Defendant was clear. He stated that he seeks his prayers in the Plaintiff.

74.Upon cross-examination by the Counsel for the 12th Defendant **Ms Ndundu**, he testified that he purchased the land from the 13th Defendant for Ksh 800,000 which he paid. He told the Court that he is not aware of any Criminal Case against the 1st Defendant where she was found liable for the illegal transfers on the register. Also, he testified that he was not aware that Land Registrar was ever held liable for the transfers.

75.He told the Court that he had constructed a house on the land. That the valuation was based on the inspection by the Valuer. He however had no material receipts but that he obtained the approvals and occupation permit upon payment of the requisite fees although he had not produced the receipts in respect of the payments made on 24/03/2011.

76.When cross-examined further by **Ms Waititu**, he told the Court that he bought the land from **Peter Mukoma** and that he conducted a Search before the purchase. The land that he bought was registered in the name of the 1st Defendant. That he had attended the Land Control Board meeting with the 1st and 13th Defendants and he obtained the Land Control Board Consent. He however testified that he had **produced the**

Land Control Board consent since he had submitted all the documents to the Land's Office.

77. When asked about **Pexh No. 2** which is the Green Card, he told the Court that the 13th Defendant is not registered as the owner of the land but that it was registered in the name of the 1st Defendant on 2/11/2010 and that he became registered on 8/12/2010 which is one month later. He denied being aware of the Criminal Case concerning the 1st Defendant. That the 1st Defendant was in possession of the land and the said land was not developed.

78. According to the 2nd Defendant, the 13th Defendant was an agent. He told the Court that he did not remember the documents that were presented to the Land Registrar. He recalled signing the transfer but he stated that he did not have a copy of the transfer.

79. On re-examination by his Counsel **Mr. Jesse Kariuki**, he told the Court that the transfer together with the LCB Consent were presented before the Land Registrar who issued a title to him. That he paid the money to the Council through mpesa and was issued with approval. He also told the Court that there is nothing wrong in the time taken to transfer the land to him from the 1st Defendant. That the Valuation Report is a proper opinion with respect to the value of the land.

80. With this, Counsel for 2nd Defendant applied for another hearing date to enable him call the Valuer to produce the report '**MFI**'.

81. Hearing resumed on 30/04/2024 with the Valuer testifying as DW3- **Zacharia Mackenzi Ndeti**. He told the Court that he is a registered Practicing Valuer and that he holds a Business in Economics Degree, he was registered 2001 and he had a 2021 Practising Certificate which means that the valuation he carried out was legally sound. He testified that he practices under Zanconsult Valuers and Management Company Ltd. It was his testimony that he carried out a re-evaluation as per the report dated 24/06/2021 upon receiving instructions from the 2nd Defendant. Having valued the land in 2018 for mortgage purposes.

82. He testified that in 2021 he asked for a re-evaluation based on forced sale value and open sale value. This is because he intended to get funding from Kiambu County Assembly Services Board. A Search of the title showed that there was a charge of Kesh 3 million in favour of Kiambu Services Board (See pages 28 of the 2nd Defendant's Valuation Report).

83. DW3 testified to have valued the property based on the property and developments in the sum of Kesh 12 million open market value and Kesh 9 million for forced sale value. He therefore produced the Valuation Report and marked as '**DExh No. 11A**' and also he produced his Practising Certificate for 2021 marked as '**DExh 11B**'. He concluded by

stating that in his opinion the current market value is Kesh 13 million.

84. Upon cross-examination by Counsel for the 12th Defendant, he told the Court that he visited the property in 2018 and 2021 and he took photographs of the same. He testified that he had oral instruction to carry out valuation and the methodology used is stated at page 10 of the Valuation Report although he did not include the comparables which however he knows.

85. When he was cross-examined by **Ms Waititu** Counsel for the Plaintiff, he told the Court that he received oral instructions for the valuation and that he confirmed that the land belonged to the 2nd Defendant. He pointed the Court to page 37 of the Valuation Report and he testified that the Valuation Report has included the market value of the land which is compromised of the developments thereon. According to him the land was valued at Kesh 5 million and the building thereon was valued at Kesh 6.5 million but that in his opinion the value now is Kesh 13 million.

86. With this DW2 closed his case after the testimony of the Valuer and production of the Valuation Report.

5th and 6th Defendants' Case

87. **DW4 - Caroline Mukami** testified and identified herself as the 6th Defendant, she told the Court that the 5th Defendant is her husband. She adopted her witness statement and produced her documents which are pages 6-100 marked as

'DExh No. 12-24'. Her testimony was that their purchase of the suit property was above board. That they entered into agreement with the seller, obtained LCB consent, paid deposit and the bank financed the balance of the property cost.

88. She testified that on the property there was an unfinished house and she further told the Court that they were not aware of any litigation in Court. She urged the Court to dismiss the Plaintiff's suit.

89. Upon cross-examination by Counsel for the Plaintiff, she testified that they took possession of the land in 2020. According to her, there was a mansion house which was incomplete and it belonged to the 4th Defendant. She testified that since they attended LCB she was not aware of any Criminal proceedings in respect of the land.

90. That in 2011 fraud was discovered by the Plaintiff and it is her position that she does not know how the Plaintiff discovered the said fraud. That whereas it is her husband who handled the transaction she read the Plaintiff's pleadings which included documentation of Criminal proceedings in 2011, where the Judgment was delivered in 2018.

91. It was her case that she was not aware of the Criminal proceedings. That they carried out due diligence, she did a Search which to her showed that the 4th Defendant was registered as the owner of the suit land.

92. When she was shown the Green Card for parcel 836 she told the Court that she was seeing the document for the 1st time in Court and that she does not know what a Green Card means. She testified that despite having done due diligence she did not request for a copy of the Green Card and that she does not know the history of the land.

93. When she was asked to consider the copy of the Green Card that she was being shown by the Plaintiff's Counsel she confirmed that there were other owners before the 5th and 6th Defendants. She also confirmed that the Search she did does not show the history of the land it only showed the immediate owner who was the 4th Defendant. She told the Court that she was still in occupation of the land.

94. On re-examination she told the Court that the Plaintiff stated that they discovered the fraud in 2011 as per paragraph 5 of the Plaint. On the issue of Green Card of parcel 836, she told the Court that there was no caution/restriction on the land and that even when they did the Search there was no caution/restriction on the land, no encumbrances and so she had no knowledge of previous owners of the land but that she knew the 4th Defendant whom they transacted on the land.

95. Regarding the Criminal proceedings, she testified that although the 1st Defendant was charged, she was not aware of the Criminal proceedings. She stated that she bought the

land in 2012 and they were not informed of the criminal proceedings.

96. With this Counsel for the 5th and 6th Defendants **Mrs Kimani** closed their case.

9th Defendant's Case

97. The 9th Defendant **Mr Harun Mwangi Wachira** adopted his witness statement as his evidence in chief and he produced documents which he requested to be marked as exhibits, **DExh No. 25-30** in support of his defence.

98. He testified having bought the land from the 7th and 8th Defendants having entered into an agreement and paid Kesh 2.4 million and he paid a deposit of Kesh 500,000 and Kesh 1.9 million was paid later. He testified to having inspected the land but found no buildings on the land.

99. With regard to the Criminal Case he testified not having been aware of any criminal matter in respect of the property.

100. When he was cross-examined by the Counsel for the Plaintiff, he told the Court that he has not utilized the land since he got title in February 2014 and he sold the land to the 10th Defendant in December 2014. He also told the Court that he bought the land from the 7th and 8th Defendants (who were a couple) that he had not known before and even now he does not have their contact.

101. He even told the Court that he could not recall the name of the Lawyer who drew the Sale Agreement between him and the 7th and 8th Defendants although he paid Kesh

10,000 for the Sale Agreement and he was issued with a receipt. He also testified that he attended LCB but the he did not get the Consent but that it is the Lawyer that attended LCB and then he processed the title in 2014. He also testified that he signed the transfer but he relied on the Lawyer to process the title.

102. On further cross-examination he told the Court that he does not recall whether he obtained LCB Consent but he sold the land for Kesh 2.5 million. He testified that he was not aware that there was a restriction on the title to the property.

103. He could not recall attending LCB with the Vendors and that he was not aware of how the Vendors acquired the land. At the same time, he said that he was not aware that the 1st Defendant had been charged with a Criminal Case and he does not know the outcome of the Criminal Case. He also told the Court that he was not familiar with the process of buying land when he acquired the land. Further that he is not familiar with the LCB procedure.

104. The witness was re-examined by his Counsel and he reiterated that he sold the land in 2014 and that he has not had interactions with the Vendors since he bought the land. That the Sale Agreement is dated 20/2/2014 and it is witnessed by **Macharia JO Advocate** at whose office the parties signed the said agreement.

105. He also told the Court that the 12th Defendant's bundle has the application for LCB Consent which they applied for on 22/2/2014.

106. With that, the Counsel for the 9th Defendant **Ms Kaprop** closed their case.

10th Defendant's Case

107. DW5 introduced himself as **Wycliffe Odhiambo Mururayi** he adopted his witness statement dated 31/05/2021 and produced documents marked as **DExh Nos. 31-34** in support of his Defence relating to parcel No. Block 19/1224 which he testified to have purchased from the 9th Defendant in 2014. He told the Court that he attended LCB to obtain Consent and he confirmed payment for the property.

108. When he was cross-examined by Counsel **Kiprop** he stated that he had purchased the land from the 9th Defendant. That he carried out due diligence where the Search done confirmed the 9th Defendant had a valid title which had no encumbrances and so he obtained a Consent from LCB.

109. Upon further cross-examination by Counsel **Kimondo**, he told the Court that he sold the land to the 11th Defendant. However, he denied being aware of any issue relating to the land since acquisition in 2014 because he then sold it in early 2018, having had the land for a period of 3.5 years.

110. During the said period he had someone tiling the land and there was no interruption of his possession during the entire time. It was his testimony that he acquired a clean title and passed it on to the 11th Defendant. He informed the Court that he filed a Co-Defendant notice on 24/06/2021. That the 3rd party notice is by the 11th Defendant.
111. He also stated that he was not aware of a Criminal Case relating to the suit property.
112. When he was cross-examined by Counsel for the 12th Defendant, he stated that the property was not developed when he bought it. Further he testified that he did not develop the land but that he farmed on the land for 3.5 years and no one challenged his occupation of the suit property.
113. He told the Court upon being cross-examined by Counsel for the Plaintiff that he took possession of the land in 2014 and that before purchase he carried out due diligence. That the 9th Defendant was not in possession of the land it was vacant and he paid the purchase price to the 9th Defendant. On the land he testified that he did subsistence farming and that he had a caretaker who was stationed on the land.
114. It was his testimony that before he bought the land, he did not know the 9th Defendant he was introduced to him by a broker. After purchasing the land, he sold it to the 11th

Defendant and that he was not aware of any Criminal Case concerning the land.

115. He was re-examined by his Counsel **Ms Kiarie** and he told the Court that he was not called upon to testify in the Criminal proceedings. That also no one claimed the land when he held it and the transfer of the suit property was registered because he obtained consent from LCB. Further that there was no case against him in relation to the property and that it belonged to the 9th Defendant.

116. He testified that the due diligence led him to believe that he had a clean title, that he acquired a good title.

117. With that **Ms Kiarie**, Counsel for the 10th Defendant closed his case.

11th Defendant's Case

118. The 11th Defendant testified as DW-6 he told the Court that his name is **Douglas M Gatimu** working with Cooperative Bank and he produced his witness statement as evidence in chief and he produced documents marked as '**DExh No. 35 to 47**' and the Valuation Report which is marked as '**DExh No. 48**'.

119. He told the Court that he bought the suit property from the 10th Defendant vide an Agreement for Sale with the 10th Defendant. Like other Defendants he testified that he did due diligence and the Search showed that the land belonged to the 10th Defendant. According to him the title was clean

with no encumbrances and that he was not aware of any Criminal proceedings.

120. That he took possession since February 2018 and that he lives on the land with his family and there has been no interruptions since then. Until when he was served with Summons about the instant case around November 2018.

121. It is his testimony that he has filed a Co-Defendant's notice against the 10th Defendant and the Attorney General for purposes of compensation. He also said that there was no caution against the title. According to 11th Defendant, he carried out land Searches twice and no issues were raised in both Searches and the land was confirmed to belonging to the 10th Defendant.

122. When he was cross-examined by the Counsel for the 6th Defendant **Ms Kiarie**, the 11th Defendant stated that he filed a Co-Defendants notice against the 10th Defendant. He also stated that he was satisfied that the title he acquired was lawful. That he has had no interruption of his occupation no challenge to his title since 2018 when he acquired the land.

123. Upon cross-examination by Counsel for the 12th Defendant, he told the Court that he conducted due diligence only and that he did not obtain a copy of the Green Card from the Land Registrar who was privy to the Sale Agreement. That he paid the purchase price to the 10th Defendant as confirmed by the Land Registrar as the owner.

124. On cross-examination by the Counsel for the Plaintiff he testified that he conducted a Search of the land and it showed the 10th Defendant to be the owner. That the Search guided him in purchasing the suit property.
125. It is his case that when he purchased the land in 2018, he was not aware of any injunctive orders in the case against him. That his interest is on entry number 12 and that he carried out due diligence by way of land Search. When he was shown a copy of the Green Card for parcel 1224 Entry No. 8 he told the Court that the entry was a restriction by CID but he stated that he was not aware of investigation by the CID.
126. Further he testified that he was not aware of any Criminal Case in the matter and that he took possession in February 2018 and the case was concluded in April 2018. That when he inspected the land it was vacant. It was under maize plantation by the 10th Defendant's care taker. Developments on the land were done between April/May to October 2018. And that this case has been ongoing since 2018. He stated that he did not know the Vendor before he purchased the land. He also told the Court that he developed the land in 2018 and that he has a house on the land.
127. On re-examination he testified that the restriction that had been placed as Entry No. 8 on 10/12/2013 had been removed by the time he purchased the suit property before

the 10th Defendant became registered as owner of the suit property.

128. With that the Counsel for the 11th Defendant closed their case.

129. Counsel for the 12th Defendant requested for an adjournment to call the Land Registrar. Further hearing of the case was re-scheduled to 22/07/2024.

12th Defendant's Case

130. The Land Registrar in Thika **Reynard Ngina** told the Court that he has been working at the Registry for four years and that he came to Court to produce records touching on the suit property. He told the Court that he filed documents in respect to the parcel files dated 29/09/2022 and 5/10/2022 containing three Lists of Documents which he produced to be marked as '**DW12 Exh 1-3**'.

131. At the same time, he also filed another list dated 18/07/2024 with 45 documents which was also filed and he wanted to produce it and have it marked as '**DW12 Exh 4-49**' and his witness statement which he sought to produce as evidence in chief dated 11/06/2024. He told the Court that he had original copies of the exhibits filed in Court.

132. It was his testimony that in respect of the transfer of Thika Municipality Block19/836 he stated that he never issued a certified copy to the Attorney General because their file was an original file and it was collected by one Nicholas Omondi on 26/08/2011. That the copy he had contains a

transfer from one **Harison Mbari Waithaka** to **Monica Muthoni Kimani** and it was presented to the Land Registrar on 15/11/2010 and was registered on 15/07/2011.

133. It was his testimony that there was also a copy of the LCB Letter and copies of ID of respective parties and there is an application for consent and a copy of the surrendered title deed for Thika Municipality Block 19/836 and a payment receipt of Kesh 1000 fees for registration.

134. Upon cross-examination by **Ms Waititu** Counsel for the Plaintiff, he told the Court that at their office the documents lodged for transfer in respect of Monica Muthoni for Thika Municipality Block 19/836 is a transfer. The transferor Harrison Mburi Waithaka and transferee Monica Muthoni both signed the transfer before an Advocate on 15/11/2010.

135. According to DW12 there is a letter of consent from the Board of Thika West dated 4/11/2010 and there is an application for Consent executed by both parties on 17/10/2010. He told the Court that once the parties lodged the application, the office of the Registrar does not inquire from the Applicants before they issue title since they appeared before the Land Boards.

136. That once documents are booked the Registrar's office verifies that they are originals and that registration fees is paid and documents are properly executed then if there is a surrender of the original title for cancellation then the registration at the Land Registrar office is always done.

137. It was his testimony that he was not aware that the transferor had died on 7/09/1995 since the documents that were presented were signed by transferor. He also testified that he was not aware that the 1st Defendant was charged with fraud. As to why the DCI collected original documents DW12 testified that he did not know why that happened because they usually give them certified copies.
138. For parcel number Thika Municipality Block 19/449 he stated that from the abstract of title the 2nd entry shows that one Samuel Mbai Mbugua and Harrison Mbari title was issued on 20/01/1989 and the 4th entry is for Monica Muthoni Kimani.
139. He said that the entries show that before the transfer to Monica was done the documents presented included a transfer form, the transferor was Samuel Mbugua and Harrison Mbari and the transferee is Monica Muthoni Kimani but the transfer is undated and unsigned and there is a copy for the application for consent and it only bears the 1st page there is no 2nd page and it is therefore not signed. The Letter of Consent was obtained on 7/10/2010 from Thika Municipality. Further he told the Court that the transfer form is a photocopy and there are no copies of IDs provided. He stated that he was not aware that the transferors were long dead.
140. When asked about the requirements that have to be in place for issuance of title he said one needs the following:

- 1) Original Transfer Forms in Triplicate duly executed.
 - 2) Certified Copies of the Identity Cards (IDs) of the Parties transacting.
 - 3) Original Title Deed.
 - 4) Land Control Board Consent where needed.
 - 5) Booking Forms.
 - 6) Stamp Duty Payment Receipts and Original Booking Registration Receipts.
141. Therefore, he told the Court that for these parcels of land there are no certified copies of the IDs presented not even in the parcel file. So according to him he did not know why the title was issued.
142. On parcel No. Thika Municipality Block 19/1224 entry number 3 a title deed to the suit property was issued in 1989 in the name of Samuel Mungai Mbugua and Harrison Mbai, the documents issued to the Land Registrar's office were, original transfer forms dated 2/11/2010 and only Letter of Consent from Thika Municipality dated 7/10/2010. The transfer form is dated 2/11/2010 and then there is undated transfer from Harrison Mbari Waithaka. The said transfer has been executed by the two owners and an Advocate.
143. He told the Court that the said transfers were an anomaly since it is not possible that a transferee can lodge two transfers at their offices concerning one parcel of land. He testified that the undated transfer was presented in the

Land Registrar's offices on 3/03/2010 and the accompanying documents were only the undated single page of transfer.

144. On further cross-examination he told the Court that the transferors died in 1993 for Samuel Mungai Mbugua and Harrison Mbari Waithaka died in 1995. It was his testimony that despite this fact, they never required the physical presence of transferors they just use the Consent and Transfer Form. According to him since the documents are franked then stamp duty was paid.

145. On cross examination by Counsel for the 2nd Defendant **Mr Jesse Kariuki**, he testified that before a Consent is issued there must be a copy of a recent Search. That according to their records the registered owner was Monica Muthoni Kimani and the Search is certified by the Registrar's office. Thus the 2nd Defendant, **Mr John Njiru Njue** would not have gone anywhere else to seek information by the Registrar's office.

146. He reiterated his earlier testimony that the transfer was registered on 8/10/2010 and letter of consent is dated 3/11/2010 and both parties provided their IDs. He told the Court that the records they have show that the DCI despite collecting records from the Registrar's office they did not place a restriction on the suit property. Also, the Plaintiff never placed any caveat or caution on the suit property nor was the Registrar served with any documents showing that

the 1st Defendant Monica was charged with a Criminal offence.

147. In Block 19/449 DW12 testified that there has been a charge registered on 2/03/2018 in favour of Kiambu County Assembly and other further charges and it was his testimony that before an institution charges a property they must do due diligence.

148. He told the Court that if as has been raised by others the owners of the suit property were dead then he advised the owners to place a restriction on the suit property. The Land Registrar guaranteed the 2nd Defendant.

149. On behalf of the 5th and 6th Defendants, the Registrar told the Court that he has a transfer form for the 5th, 6th and 4th Defendants. At the same time he had a requisition for valuation and also confirmation of payment of stamp duty and PIN for the Vendor. He testified that he had the LCB consent from that Gladys gave to Tom and then to Caroline and there are copies of their IDs and PIN and original transfer form indicating the transfer was registered on 3/01/2013.

150. He testified that since there were criminal proceedings against the 1st Defendant which started in 2011 a restriction should have been registered which would have stopped any transfer. He stated that the property is charged the charge having been registered on 7/01/2013 with Equity Bank and further charge registered on 20/08/2013 and the chargors

are 5th and 6th Defendants. That there is no restriction on parcel No. Thika Block 19/836.

151. Counsel for 9th Defendant **Mr Kiprop** on cross-examining the Registrar, he told the Court that in relation to the entries for Thika Block 19/1224 all requisite documents were lodged from Zebedee and Mary to Harun as indicated at Entry No. 7 of the Green Card and there is a restriction stating that title was under investigation but the restriction was removed via a letter from DCI.

152. That the entry in relation 31/07/2014 to Harun Mwangi and all requisite documents were provided and according to him the transfer was valid it was not flagged for any irregularities.

153. On further cross-examination Counsel for the 10th Defendant, he told the Court that legitimacy of title is not only by their office sometimes the Registrar's office uses DCI. That when the 10th Defendant conducted a Search the Land's office issue a Search and a confirmation. However, he testified that sitting at their offices he cannot confirm whether proprietors of a piece of land are alive or dead.

154. Therefore, he testified that between 1995 and 2022 there was no restriction and that at the removal of the restriction in 2013 he was not aware that there were criminal charges preferred against the 1st Defendant. As per his records the transaction between the 10th Defendant and 9th Defendant were in order.

155. Counsel for the 11th Defendant also cross-examined the Registrar with regard to parcel Thika Municipality Block 19/1224 and Entry No. 10. He stated that the owner was Wycliffe Odhiambo so for the 11th Defendant to deal with the 10th Defendant there was nothing wrong. The restriction at Entry No. 8 was removed and so when the 11th Defendant was registered there was no restriction.
156. It is his testimony that documents produced for further List of Documents as No. 31 show transfer of land and all documents were submitted although there is no indication for payment of stamp duty. A Search confirms the current registration status. That since the 11th Defendant was registered as owner, he had charged the suit property to Co-operative Bank.
157. On re-examination he told the Court that for the three parcels there were duly executed forms and a letter of consent. Further that for parcel Thika Municipality Block 19/836 there was a duly executed transfer form and this was the one that the DCI collected the original forms, that there was a duly executed form from Harrison Mbaru Waithaka to Monica Muthoni Kimani. Monica was issued with title in November 2010.
158. The same for parcel Thika Municipality Block 19/449 where there was a transfer from Samuel to Monica and also from Harrison to Monica. The title was issued on 9/11/2010.

That there was nothing in the parcel file to show that the transferor is deceased and also there was no restriction.

159. And that for 1224 the transfer was registered to Monica on 2/11/2020 and equally there was no restriction. That indeed Monica never informed the Land Office that she was dealing with deceased transferors. He testified that there are no charges preferred against officers of Thika Land Office.

160. That parcel No. 449 was purchased by 2nd Defendant from Monica Muthoni Kimani. Further that in respect of parcel No. 1224 the Land Registrar testified that he had receipt (original) from Harun Mwangi to Wycliffe Odhiambo but that he did not have the original receipt from 10th Defendant to 11th Defendant. That there is no evidence of payment of stamp duty for the transfer from 10th to 11th Defendants. Apart from 1224 which had restriction the other parcels had none. With this the 12th Defendant closed his case.

161. At this point, the 13th Defendant's Counsel arrived in Court at 12:37 pm for a matter that had been listed for hearing at 10:30 am and sought to be allowed to have the 13th Defendant give his oral evidence in view of the fact that his pleadings were struck out. This was strenuously opposed by the Plaintiff's Counsel and Counsel for the 2nd Defendant who stated that evidence is offered based on a pleading. That the 13th Defendant had no pleadings on record and so there is no basis upon which he can stand to give oral evidence.

162. The Court delivered a brief Ruling dismissing the oral application made by the 13th Defendant noting that the Defendant had been given all the opportunities to put their house in order but they chose not to take up the chances given to them.

Interested Party's Case

163. The Interested Party **Lawrence Karanja** testified that he worked with Cooperative Bank in the Legal Department and that he was a team leader in charge of Legal Services. He produced his witness statement as his evidence in chief.

164. Upon cross-examination by Counsel for the Plaintiff, he stated that they charged Thika Municipality Block 19/1224 for Kesh 8 million. That the Valuation Report shows the property is valued at Kesh 3.2 million as the land alone since there was no improvement on the land. That this was the value as at 2018 and the current value is not known.

165. On further cross-examination by Counsel of the 2nd Defendant he stated that upon approval for a valuation the bank can instruct Counsel to register a charge. That the external valuer has to consider acreage, status improved or if there are other claims, he gets the name of the registered owner from Land Registry. That the bank will not proceed to perfect a charge if there are encumbrances which would affect title.

166. He testified that Banks do due diligence before registering a charge and any dispute on root of title means

the bank cannot proceed to register the charge and all this information the bank can only get from the land's office.

167. The Interested Party stated that apart from doing due diligence the bank visited the suit property in relation to Block 1224 and that procedure for charging went smoothly. He also testified that whereas the value of the suit property was Kesh 3.2 million a charge was registered for Kes 8 million and that he stated that it is normal for mortgage facilities to be given especially since the mortgage increases as construction continues.

168. He told the Court that he had not presented a statement of the loan to show how much has been released no evidence has been filed in Court.

169. Upon re-examination, he told the Court that the bank paid out Kesh 3,150,000 to the 11th Defendant and that the additional funds are released in the form of construction loans as the construction proceeds. With that the Interested Party closed their case.

170. At the close of the hearing, parties elected to file written submissions.

The Parties Submissions

171. The parties filed their written submissions starting with the Plaintiff whose submissions are dated 19/05/2025, the 2nd Defendant's written submissions are dated 29/07/2025, the 13th Defendant filed their submissions on the same date as the 2nd Defendant and they are dated 29/07/2025, the 11th

Defendant and Interested Party filed joint submissions dated 30/07/2025, the 5th and 6th Defendants filed joint submissions dated 25/08/2025, the 12th Defendant's submissions are dated 2/09/2025 and the 9th Defendant filed their submissions dated 10/09/2025.

172. I have taken time to read the filed submissions which are well researched and considered the authorities cited therein. I must say each party spent a considerable amount of time to research on the issues they have articulated in their submissions.

173. The Plaintiff's Counsel submitted that the Plaintiff has provided evidence to show that parcels Thika Municipality Block 19/449, Block 1224 belonged to Samuel Mungai Mbugua and Harrison Mbari as proprietors in common with equal shares. Further that Block 19/836 was owned by Harrison Mbari Waithaka and the title was issued to him on 17/11/2010.

174. This being the case the 1st Defendant obtained the titles through fraud, misrepresentation and illegality as was affirmed in the **CM Criminal Case No. 4005 of 2011** in which the 1st Defendant was found guilty of offence of intermeddling with property of the deceased person and obtaining registration by false pretense. In that Criminal Case the 1st Defendant was convicted and sentenced to serve time in prison.

175. It was submitted that the 2nd Defendant's assertions that he did due diligence before acquiring Block 19/449 does not hold substance since the 12th Defendant - Registrar was not able to produce signed transfer form, there were no ID cards, KRA PIN numbers of the Vendors and even purchaser which documents are necessary to effect a transfer for issuance of title.
176. The Plaintiff submitted that there were no stamp duty receipts either from the 1st or 2nd Defendant and even the consent forms did not indicate the consideration paid. The consent forms filed on 2/11/2010 indicated a consideration of Kesh 500,000 the one for 3/11/2010 showed a consideration of Kesh 500,000 and the testimony of DW2 stated that he paid Kesh 800,000. Plaintiff placed reliance on several Court cases which I have considered.
177. The Plaintiff pleaded the particulars of fraud against the 1st Defendant who was the immediate registered owner after the deceased. The 1st Defendant who alleges to have had the suit property transferred to her and then she initialized the process of the suit properties getting into the hands of the 2nd to 11th Defendants.
178. The 1st Defendant did not enter appearance. Infact the day the matter was listed for defence hearing she was said to be within the Court precincts but despite her name being called out she never attended Court. As a matter of fact, she had not even filed a Defence Statement. Therefore, the

averments by the Plaintiff against the 1st Defendant are uncontroverted.

179. Vide the present suit, the Plaintiff seeks inter-alia, a declaration that the 1st Defendant acquired the ownership and titles through fraud and so subsequent transfers are null and void since she had no valid titles capable of conferring proprietary interests to third parties.

180. She sought for an order for the cancellation of the titles in the names of the 2nd, 5th, 6th and 11th Defendants and the charge over the suit property as proprietors of **THIKA MUNICIPALITY/BLOCK.19/449**, **THIKA MUNICIPALITY/BLOCK 19/836** and **MUNICIPALITY/BLOCK 19/1224** be deleted and the name of **HARRISON MBARI WAITHAKA** be restored as the registered proprietor free from all encumbrances.

181. The Plaintiff also sought for an injunction restraining the 2nd, 5th, 6th and 11th Defendants and their servants from dealing with the lands in any manner and an eviction order to issue directing the 2nd, 5th, 6th and 11th Defendants to vacate the suit parcels namely; **THIKA MUNICIPALITY/BLOCK 19/449**, **MUNICIPALITY/BLOCK.19/836** and **THIKA MUNICIPALITY/BLOCK. 19/1224**

182. It is the Plaintiff's case that the Estate of Harun Mbari Waithaka is the legitimate owner of the suit property.

183. The 2nd Defendant identified four issues and submitted on the same namely:

- i. Whether the Plaintiff has legal capacity to bring forth this suit.**
- ii. Whether the 2nd Defendant is a bona fide purchaser for value without any defect as to title and is therefore the lawful owner of land parcel Thika Municipality Block 19/449.**
- iii. Without prejudice to (ii) above whether the 2nd Defendant is entitled to indemnify and therefore compensation from the 12th and 13th Defendants herein.**
- iv. Who is to pay the costs of the suit?**

184. The 2nd Defendant submitted on these issues and concluded that the Plaintiff lacked capacity to bring the matter to Court since a Grant had been issued for the suit property. Further that since Parcel Block 19/449 was jointly owned then she lacked capacity to bring the matter on behalf of Estate of Samuel Mungai Mbugua.

185. It is the submission of the Counsel of the 2nd Defendant that he is a Bonafide purchaser for value. That he did due diligence and entered into a Sale Agreement with the 13th Defendant and so according to Section 25 and 26 of the Land Registration Act he has an indefeasible title.

186. On his part, the 13th Defendant equally identified four issues for determination and submitted on the same. Namely:

- i. **Whether the allegations of fraud have been proven against the 13th Defendant.**
 - ii. **Whether the 13th Defendant is an innocent purchaser for value without notice of any irregularities.**
 - iii. **Whether the 13th Defendant has established a case for indemnity and contribution against the 1st and 12th Defendants in his co-Defendant's notice.**
187. The gist of the submissions was that the 13th Defendant declared that he had a beneficial interest in the Parcel Block 19/449 and that the registration was still in the 1st Defendant's name. That eventually the transfer was done directly by 1st Defendant to the 2nd Defendant and this was facilitated by the 2nd Defendant's Counsel.
188. According to him there is no nexus between the 13th Defendant and alleged fraud and no evidence was presented by Plaintiff to link him to fraud. That is protected as a bona fide purchaser as was stated in **Katende vs Haridar & Co. Ltd [2008] 2EA 173**. He further submitted that since he established that the 1st Defendant was the legal proprietor of the suit property then the 1st Defendant should bear the responsibility of the irregularities and liability.
189. Additionally that the 12th Defendant is equally a necessary party as was held in **Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & 4**

Others [2019]eKLR, where it was held that innocent parties cannot be penalized for the omission and commission or procedural failures of Public Officers.

190. From the submissions of the 12th Defendant, they identified the following four issues for determination:

- i. Whether the suit is time-barred.**
- ii. Whether the Plaintiff has proven the particulars of fraud against the 12th Defendant.**
- iii. Whether the 12th Defendant are liable to indemnify the Defendants.**
- iv. If liable what is the proper quantum of compensation payable to the Plaintiff.**

191. The gist of the submissions is that fraud being a common tort then the Plaintiff is time-barred for discovering the fraud in 2011 and only taking action in 2018. On the issue of indemnity, he submits that the claim is not against the 12th Defendant since he only acted on the documents presented for registration. That the 1st Defendant needs to indemnify the Defendants namely the 2nd to 11th Defendants since their transfer emanated from the transfer and registration of the 1st Defendant as owner of the 3 suit properties.

192. Regarding the 2nd Defendant the 12th Defendant submitted that the 2nd Defendant's claim for indemnity is untenable because the Sale Agreement produced in Court was between the 2nd Defendant and the 13th Defendant, Peter Mukoma who as per the Green Cards produced by the 12th

Defendant, was never registered as owner of the land. Therefore, as to whether there was an agent-principal relationship between the 1st Defendant who was the registered owner and the said Peter Mukoma is contractual between the 3 parties and the Land Registrar was not privy to the said relationship. This means that the 2nd Defendant's claim for indemnity lies at the door step of the 13th and 1st Defendants.

193. For the 9th Defendant he submitted that his purchase of Block 19/1224 is beyond reproach having done due diligence and also having paid up fully. He identified one issue for consideration which is

i. Whether the 9th Defendant is a bona fide purchaser for value without notice and thus entitled to protection under the law.

194. He denied being a party to any fraud and thus held that he is a bona fide purchaser of the parcel for value.

195. On their part the 5th and 6th Defendants filed joint submissions dated 25/08/2025 and identified five issues for determination which are:

a) Is the Plaintiff's suit time barred?

b) Has any fraud been proved against the 5th and 6th Defendants?

c) Were the 5th and 6th Defendants innocent purchasers for value with no notice of any fraud?

d) Is the Plaintiff entitled to the orders sought?

e) Who bears the cost of this suit?

196. The 5th and 6th Defendants submit that the suit is time-barred being founded on fraud and that the Plaintiff should have submitted the claim within one year. They also hold the view that they are innocent purchasers for value since the Plaintiff has not alleged and proved fraud against them.

197. It is their prayer that the suit against them should be dismissed with costs.

198. The 11th and Interested Party filed joint submissions dated 30/07/2025 where they identified five issues for determination as follows:

i) Whether the suit herein is time barred under the Limitation of Actions Act.

ii) Whether the allegation of fraud have been proven against the 11th Defendant.

iii) Whether 11th Defendant is an innocent purchaser for value without notice of any irregularities.

iv) Whether the Plaintiff is entitled to the reliefs sought.

v) Whether the 11th Defendant has established a case for indemnity and contribution against the 10th and 12th Defendants in his Co-Defendant's Notice.

199. They submit that the claim before the Court is time-

barred by dint of the provisions of Limitations of Actions Act, Cap 22 Laws of Kenya. That the 1st Defendant transferred the third suit property to herself then 7th Defendant, then 9th Defendant and the last transfer being the 11th Defendant's from the 10th Defendant. Further that the Criminal Case was lodged at Thika CM's Court in 2011.

200. According to the 11th Defendant and Interested Party the limitation period is 3 years and so the time started running for the Plaintiff in 2011. Also, that the allegation of fraud has not been proved against them.

201. It is their submission that they are innocent purchasers for value without notice of irregularities. Therefore, that the Plaintiff is not entitled to the reliefs sought and the suit should be dismissed.

202. They also submit that since the 10th Defendant assured them that he was the owner of the suit property and the 12th Defendant Officers confirmed this fact prior to the acquisition they submit that the 11th Defendant has established a claim for full indemnity and contribution as prayed in his Co-Defendant's notice.

Analysis and determination

203. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;

- i. Whether the suit property was sold by the deceased prior to his death;***

- ii. Whether the conveyance of the suit property was done through fraud or illegality;**
- iii. Whether the Defendants were bona fide purchasers for value;**
- iv. Whether the 2nd and 13th Defendant's Counter Claim is merited;**
- v. What are the appropriate reliefs to issue?**

204. In addition to the above questions, this Court will proceed to determine the merit or otherwise of the Co-Defendant notices filed by the Defendants.

205. The 1st question is whether or not the suit property was sold prior to or after the demise of Harun Mbari Waithaka - deceased. I am referring to Harun Mbari Waithaka because the suit has been brought by the Plaintiff who is the legal representative of the Estate of Harun Mbari and not Samuel Muigai Mbugua. The first two parcels are owned in common and in equal shares.

206. It is not in dispute that the transfer of the suit properties conferring interest on the 1st Defendant was done in 1989. It is also not in dispute that Harun Mbari Waithaka - deceased died on 7/09/1995. Further, it is not contested that there was no transaction as between the deceased and the 1st Defendant Monica Muthoni Kimani got the suit land Thika Municipality Block 19/449 registered in her name on 2/11/2010 and the title was issued on 9/11/2010.

207. By the time of issuance and registration of title in the name of the 1st Defendant, Harun Mbari Waithaka who owns half of the suit property was long dead.

208. Block 19/1224 was equally owned in common and the entire suit property was registered by the 1st Defendant in her name on 9/11/2010 and the title was issued to her. From the evidence that was provided by the 12th Defendant, the Land Registrar, there is no indication of how the transfer was done the same was registered to the 7th and 8th Defendants on 24/01/2011 and thereafter a title was issued on 28/01/2011

209. Despite a restriction having been placed on the title it was removed under unclear circumstances since the Registrar was unable to tell the Court how this happened.

210. For Block 19/836 the title was issued on 19/01/1989 in the name of Harrison Mbari Waithaka, however, on 17/11/2010 the 1st Defendant got registered as the owner and the parcel was then registered in the names of the 3rd and 4th Defendant and now it is in the names of the 5th and 6th Defendants. Instructive to note that the 3rd and 4th Defendants never entered appearance and a Judgment was entered against them.

211. I must first handle the issue of jurisdiction and locus standi which has been raised by the 2nd and 12th Defendants without which the Court cannot proceed.

212. In a situation such as what we have where the property is owned in common, it is the right of a party in this case the Plaintiff with a Limited Grant of Letters of Administration *ad*

litem to litigate for the deceased's specific, undivided share of a property held in tenancy in common. This authority is primarily derived from the Law of Succession Act, Chapter 160 of the Laws of Kenya, and the Civil Procedure Act and Rules, which allow for the appointment of a representative to manage legal actions concerning a deceased person's Estate. The specific authority is found in the interplay of several laws and rules:

- i. **Section 82 of the Law of Succession Act:** This section grants personal representatives (including administrators *ad litem*, though with limitations) the power to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death.
- ii. Section 54 of the Law of Succession Act (and the Fifth Schedule, paragraph 14): This allows the High Court to grant limited letters of administration for specific purposes, such as initiating or defending a lawsuit, where a full grant has not been issued or is not immediately possible.
- iii. The Probate and Administration Rules (specifically Rule 12 and Form 19 P&A) outline the procedural mechanism for applying for such limited grants.

213. The Administrator *Ad Litem*'s Role is to represent the deceased's Estate in a specific legal proceeding. However, in a

tenancy in common situation like the instant suit the administrator *ad litem* role will be to ensure that:

- i. The administrator litigates for the deceased's distinct, though undivided, share in the whole property, not a specific physical portion.
- ii. The share of a deceased tenant in common forms part of their estate and passes to their heirs, not automatically to the other co-owners (as in joint tenancy).
- iii. The administrator's powers are limited to the pending litigation and do not extend to general administration or distribution of the estate unless a full grant is obtained and confirmed.

214. Therefore, the administrator *ad litem* has the legal standing (*locus standi*) to pursue an action related to the deceased's share in the property within the scope defined by the Court order appointing them.

215. On the issue of limitation, the 11th Defendant and Interested Party and the 12th Defendant have submitted that the suit is time barred.

216. Section 7 of the Limitation of Actions Act provides as follows:

"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."

217. From the facts of this case the Plaintiff filed this suit in 2018 for a fraudulent land transfer that occurred between 2010 and 2011. The limitation period for fraud claims in Kenya typically runs from the date the fraud was discovered, not the date of the transaction itself.

218. Therefore, from the above provision of the law it is clear that an action for recovery of land must be filed before the end of 12 years from the date when the cause of action arose. However, for fraud cases the limitation period is three (3) years from when the fraud was discovered. In the instant suit, the Plaintiff noticed that the suit property had been interfered with in 2011.

219. However, it is important to note that at paragraph 3 of the Plaintiff the 4th Defendant transferred Thika Block 19/836 to 5th and 6th Defendants on **3/03/2013**. This fact is not contested. Yet Thika Block 19/1224 was transferred to 7th and 8th Defendants to the 9th Defendant who transferred to the 10th Defendant who in turn transferred to the 11th Defendant on **6/04/2018**.

220. The fraudulent transfer of the parcels was going on up and till 2018 and it therefore follows that the Plaintiff had to be seized of the facts relating to all the parcels before laying her claim before the Court in 2018. The suit is therefore not time-

barred as claimed by the 11th Defendant and Interested Party and the 12th Defendant.

221. Section 26 of the Limitation of Actions Act which provides as follows:

“ Where in an action for which a period of limitation is prescribed either-

a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent or

b) the right of action is concealed by the fraud of any such person as aforesaid; or

c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud, or the mistake or could with reasonable diligence have discovered it. Provided that this section does not enable an action to be brought to recover or enforce any mortgage upon, or set aside any transaction affecting any property which

i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii. in the case of mistake has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

222. Considering the fact that the Plaintiff discovered the acts of fraud in 2011 and followed through the acts till 2018 this case falls within the provisions of Section 26(c) of the Limitation of Actions Act. The Court in **Kuria Tharao & Another v Joseph Kinyanjui Mwai & 3 Others (2014) eKLR** where the Court observed as follows:

“The significant words are that “the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.” In such an event the limitation period starts running from the discovery of the fraud or the period when the Plaintiff could have discovered the fraud by exercise of reasonable diligence.

.... From the foregoing legal provisions, there is no doubt that this Court has the power at any stage to strike out a pleading including a Plaint. However, the Courts have been asked to be slow in using their inherent and discretionary powers in striking out pleadings as it is a harsh and drastic move that can

drive a litigant from the seat of justice. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case and can only be granted where the case is plain, obvious and weak and one that cannot be redeemed by amendment.”

223. In view of the foregoing, I am of the view that the suit is not time-barred since the first discovery of the fraud was in 2011 and subsequent fraudulent transfers lasted until April 2018. All this time the suit property owner had died in 1995 and so the person engaged in the fraudulent transfers had absolutely no capacity to transact and was thus passing no title to anyone. The root of title was wanting.

224. On the second issue regarding fraud and illegality, the Court is alive to the provisions of Sections 107 - 109 of the Evidence Act which places the burden of proof on the Plaintiff as the party who was alleging that the sale took place when the owner of the suit property was deceased and also the 1st Defendant had not obtained Letters of Administration and so the actions of transferring the three parcels was based on fraud.

225. Fraud must be specifically proved. There are a plethora of cases that speak to the legal principles applicable to the question of fraud in land cases. I shall refer to some below to illustrate the point for more clarity and effect.

226. In this old English case of **Davy V Garrett (1878) 7 ch.D. 473 at 489** the Court had this to say: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

227. As regards standard of proof in respect to a charge of fraud, the law is quite clear. In the case of **R.G. Patel v. Lalji Makanji (1957) EA 314** the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable

doubt, something more than a mere balance of probabilities is required.”

228. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

229. It is a general principle of law that fraud must as of necessity be pleaded and proved. Arising from the pleadings cited in the preceding paras, the Court is satisfied that the Plaintiff has not only pleaded but particularized fraud under para 7 of the Plaint. The Court is therefore being called upon to determine whether the Plaintiff has proven fraud and illegality on the part of the 1st Defendant and the 12th Defendant being the Land Registrar. The Plaintiff has also stated that the Police did connive with the 1st Defendant but she did not sue them and therefore will not condemn the

Police unheard with respect to the transfer, registration and subdivision of the suit land.

230. From the analysis of the registration processes of the three parcels it is the 1st Defendant who transferred the parcels to herself and then the Defendants. On 2/11/2010 she got Thika Municipality Block 19/449 registered in her name and title issued on 9/11/2010, the 13th Defendant who bought it sold it without title to the 2nd Defendant. The proprietor of the suit property was long dead having passed in 1995.

231. The 2nd Defendant who claimed to have done due diligence surprised the Court this is because how could he claim to have done due diligence but bought property which was not registered in the 13th Defendant's name. He entered into a Sale Agreement with the 13th Defendant who had no title to his name so then how and what kind of due diligence did the 2nd Defendant do?

232. Parcel Thika Block 19/1224 had 1st Defendant registering it in her name on 9/11/2010 and there is no indication of how the transfer was done, yet the 12th Defendant allowed it to be registered on 24/01/2011 to 7th and 8th Defendants who never attended Court. Yet they are the ones who sold the suit property to the 9th Defendant through a Sale Agreement dated 20/02/2024. The title passed on had no roots because it is not clear how the 1st Defendant got it and then registration moved to the 7th and 8th Defendants.

233. For Thika Mun Block 19/836 the 1st Defendant again had it registered in her name on 17/11/2011 and it was transferred to the 3rd and 4th Defendants who then sold it to 5th and 6th Defendants.

234. Registration of land in Kenya is provided for in Statute. Section 44 of the Registered Land Act provides as follows;

“Executions of instruments in writing”

(1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.

(2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person’s signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.

(3) The execution of any instrument referred to in Section (1) by a corporate body, association, cooperative society or other organisation shall be effected in accordance with the provisions of the relevant applicable law and in the absence of provisions on execution of instruments, the execution shall be effected in the presence

of either an advocate of the High Court of Kenya, a Magistrate, a Judge or a Notary Public.3(A)Where practicable, an instrument processed and executed electronically by persons consenting to it by way of an advanced electronic signature or an electronic signature shall be Deemed a validly executed document.

(4) An instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe.

(5) The transferee shall in addition to executing the instrument, attach the following—

(a)A copy of an identity card or passport; and

(b)A copy of a personal identification number certificate;

(c)Passport-size photographs;

(d)Where applicable, a marriage certificate; or

(e) A copy of the Certificate of Incorporation, in the case of a corporate entity; or

(f) Such other identification documents as the Cabinet Secretary may prescribe.”

235. None of these documents were produced before the Court not even by the custodian of the official land documents in the country the Land Registrar. On her part the 1st Defendant despite service of the Summons and the hearing notice having been served, failed to lead any evidence as to how she acquired the suit parcels by simply not showing up in Court.

236. PW1 was emphatic in her evidence that the late Harrison Mbari Waithaka did not transfer the suit parcels to the 1st Defendant in his lifetime. The question then is under what circumstances did the 1st Defendant become registered as owner of the suit parcels? Regrettably PW3, the Land Registrar did not mince words when he stated in Court that some of the documents supporting the transfer of the suit parcels are incomplete, undated, unsupported and therefore he does not understand how the title to the parcel Block 19/449 was issued and this can be said about all parcel.

237. The DCI though not sued are party to this mess because the restriction placed by Police as Entry No. 8 on parcel number Thika Block 19/1224 was removed and the

Registrar could not tell the Court how or who issued orders for removal of the restriction. I could go on and on.

238. This is a very intriguing case and I am sorry if I have written for so long about the happenings but I was appalled at how the Land Registrar's Office is clear a collaborator to the problems bedeviling land registration in this country. What was most shocking is for the Registrar to testify with a straight face about issuance of title deeds where due process was not followed.

239. That he came to Court and felt no remorse and even had the audacity to file submissions blaming the very Kenyans who are relying on the office to make things right and he just shrugged things off like this is a small matter.

240. The import of this evidence invariably is in support of the Plaintiff's case that the transfers were unsupported and worse still that none other than the custodian of Government records is confirming so.

241. On his part the Plaintiff also proved that the Criminal Case filed against the 1st Defendant, in **Thika CM Criminal Case No. 4005 of 2011**, found the 1st Defendant guilty of the offence of intermeddling with property of a deceased person and obtaining registration by false pretense and she was convicted.

242. On the 4th issue of bona fide purchasers for value, I will refer to the Supreme Court decision in a landmark Judgment delivered on 21st April 2023 in the case of **Dina Management**

Limited v County Government of Mombasa & 5 Others (2023) eKLR, where the Apex Court held that the protection offered to a *bona fide* purchaser for value without notice does not apply where the Title to the property was obtained irregularly or illegally.

243. In the instant case irregularity, illegality and misrepresentation is the hallmark of the entire process of entire transfer of the parcels starting with the 1st, 2nd, 5th, 6th and 11th Defendants. The 2nd Defendant had the land parcel Block 19/449 transferred to him by the 1st Defendant but he claims to have entered into a Sale Agreement with the 13th Defendant. So, the question then is how did he obtain Letters of Consent from LCB if the seller is different from the person who transferred the parcel to him.

244. The 1st Defendant who did not have a Sale Agreement with the 2nd Defendant and did not have Letters of Administration for the late Harrison Mbari Waithaka was intermeddling in the Estate of the deceased for which offence she was convicted.

245. The Supreme Court in arriving at the above decision, held that a Title document is not sufficient proof of ownership of property where the origin of that Title has been challenged. The holder of the Title document must go beyond the instrument itself and show that the process of acquisition from inception was legal.

246. The Supreme Court held that a registered proprietor acquires a valid Title only if the **original allocation** (*Emphasis added*) was legal. Therefore, in the instant case the onus is on each Defendant save for them to carry out the necessary due diligence before purchasing the suit property, as they would have discovered the defects in the Title, in this case the lack of proprietary documents by the 1st Defendant.

247. It is therefore my position that the protection offered to a *bona fide* purchaser in this suit does not apply to the 2nd to 11th Defendants since they acquired a title whose root was challengeable starting with acquisition by the 1st Defendant of a deceased person's title. She passed on what she did not own.

248. See the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR**, where it was held that the Appellant was determined not to be a *bona fide* purchaser, as it knew about the challenge relating to the Title to the suit property. In the referenced case, fraudsters sold the suit property to the Appellant who in turn sub-divided it into various parcels for sale. The Court of Appeal held that no valid Title passed to the Appellant, which in turn meant that Titles acquired by the subsequent purchasers of the subdivisions were also null and void.

249. The issue of root of title is important because it prioritizes the legality of the initial acquisition process (the "**root of title**") over the innocence of subsequent purchasers

and one must consider the following issues that the Supreme Court underscored:

- i. That illegally Acquired Title is Void: Article 40(6) of the Constitution of Kenya states that the constitutional right to property does not extend to property found to have been unlawfully acquired. If the original title was obtained through intermeddling (a serious criminal offense under the Law of Succession Act) and false pretenses, it is considered void from the beginning ("*ab initio*").
- ii. "*Nemo dat quod non habet*": The legal maxim "you cannot give what you do not have" applies. If the seller's title was fundamentally defective or void, they had no valid title to pass on to subsequent buyers, regardless of the buyers' good faith.
- iii. Due Diligence Requirement: The Supreme Court of Kenya has emphasized that purchasers have a duty to conduct thorough due diligence, including investigating the root of the title. A purchaser cannot be considered *bona fide* if their due diligence would have revealed the illegality or if they were negligent in their investigations.
- iv. Rectification of the Register: The Court has the power under Section 80 of the Land Registration Act to order the rectification or cancellation of a register if the registration was obtained by fraud or mistake,

which includes titles acquired illegally, unprocedurally, or through a corrupt scheme.

- v. Conviction as Proof: A criminal conviction of the Defendant for intermeddling and obtaining registration by false pretenses provides strong evidence that the title's root is illegal and unprocedural.

250. The Apex Court need not say more. Its decision is clear that there can be no protection offered to a purchaser with respect to a title whose root is defective or marred by illegality.

251. On whether the 2nd and 13th Defendant's Counter-claim is merited, by now it should be obvious that the two Counter-claims are unmerited since they are both premised upon a title whose root is questionable and is challenged. The alleged proprietor of the title was convicted for intermeddling. The 12th Defendant who the 2nd Defendant is claiming from correctly sums up the illegal processes in its submission thus:

“The 12th Defendant submits that the 1st Defendant did not pass any registrable right/interest in the 1st suit property to the 2nd Defendant or the 2nd suit property to the 3rd Defendant or the 3rd suit property to the 7th and 8th Defendants. Consequently, the 4th Defendant had nothing to transfer to the 5th and 6th Defendants and the 5th and 6th Defendants had nothing to transfer to the 9th Defendant who

transferred to the 10th Defendant and later the 11th Defendant.”

252. The 13th Defendant who sold Parcel LR Block 19/449 to the 2nd Defendant has in fact distanced himself from the whole transaction choosing to lay blame at the door of the 2nd Defendant. He alleges that he never transferred the suit property for which he had a Sale Agreement with the 2nd Defendant because he only had an interest in the parcel. How then can he claim to be compensated by the 1st and 12th Defendants?

253. As aforesaid, the Plaintiff has established that the titles to the parcels of land should be reverted to the Estate of the late Harrison Mbari Waithaka being the legitimate owner. She is therefore entitled to a declaration in that respect as well as vacant possession of the suit properties and injunctive orders restraining interference with the suit properties.

254. Having affirmed the Plaintiff's proprietorship, the 2nd to 11th Defendant's titles are liable to be impeached as per Section 26 (1) and Section 80(1).

255. **Section 26(1)** establishes that a Certificate of Title is considered *prima facie* evidence of ownership but outlines exceptions where this indefeasibility can be challenged. A title can be impeached if it is proven that the proprietor:

a) Was a party to the fraud or misrepresentation that led to the issuance of the certificate of title.

***b) Acquired the certificate of title illegally, unprocedurally, or through a corrupt scheme
Section 80(1) of the Land Registration Act provides that***

“(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.”

256. For those reasons, the Court finds that the Plaintiff has established her case on a balance of probabilities.

257. However before making the disposal orders the Court will consider the Co-Defendant notices filed by the 2nd - 11th Defendants.

258. A Co-Defendant's application for indemnification by the Land Registrar under **Order 1 Rule 24 of the Kenya Civil**

Procedure Rules qualifies when the following conditions are met:

- a) A right to indemnity exists: The basis for the claim must be established, such as a breach of warranty in a sale agreement or an error/fraud on the part of the Land Registrar during the registration process.
- b) A common question of law or fact: The claim for indemnification must involve a question or issue that is substantially the same as a question or issue arising between the Plaintiff and the Defendant and should be properly determined in the existing suit to avoid multiple proceedings.
- c) Proper procedure is followed: The Defendant must issue and serve a notice on the co-Defendant (who is treated as a third party for the purpose of the indemnity claim) detailing the claim for indemnity.
- d) The Plaintiff's rights are not prejudiced: The determination of the indemnity claim between the co-Defendants must not negatively impact the Plaintiff's rights in the main action.
- e) The claim is proven on merit: The Court will hear and determine the indemnity claim as if it were a third-party claim. The co-Defendant seeking indemnity must prove their case with evidence, such as sale agreements, receipts, and proof that their loss

resulted directly from the other party's actions or the Land Registrar's actions/negligence.

259. Save for the 12th Defendant who responded to the Co-Defendant indemnity claim made by the 12th Defendant the other Defendants did not specifically address the indemnity claims with specificity. For the 12th Defendant he contended that the parties purchased the parcels Block 19/1224 and Block 19/836 from the 1st Defendant who is the fraudster and they should seek compensation from him. This position he has attributed to the 5th, 6th, 9th, 10th and 11th Defendants. For the 2nd Defendant the 12th Defendant avers that he purchased the suit property from the 13th Defendant who is also known and therefore he should direct his indemnity claim from him.

260. Whereas I find the 12th Defendant culpable and indeed the office of the Registrar needs to be held liable for the non-challant way in which the address, serious, emotive and life-threatening issues of the land in Kenya, the Plaintiff did not file an indemnity claim. If this had happened, I would have gone ahead and held them responsible for the entire mess witnessed in this instant matter.

What are the appropriate reliefs to issue?

261. I therefore do not find the 12th Defendant culpable on the part of the transactions between the Defendants if anything I find that they were all conniving to transfer parcels of land belonging to the Plaintiff as fast as they could to beat the law, unfortunately in the new era the law quickly catches

up with you and as the Apex Court decreed you can run but you cannot hide - infact the good book is so clear on this. All that you do under the table shall be shouted on roof tops one of these days. Again, we are told that the old and wise said "Siku za mwizi ni arubaini". So, the 40 days are over and I therefore make the following dispositions:

- i) A declaration is hereby made that 1st Defendant having acquired ownership and titles of THIKA MUNICIPALITY/BLOCK 19/449, THIKA MUNICIPALITY/BLOCK.19/836 and THIKA MUNICIPALITY/BLOCK. 19/1224 through fraud, her titles and the subsequent transfers are null and void.***
- ii) The 2nd Defendant registration as the registered proprietor of THIKA MUNICIPALITY/BLOCK. 19/1224, 5th and 6th Defendant titles as the registered proprietor of THIKA MUNICIPALITY/BLOCK.19/836 and the 11th Defendant's title as the registered proprietor of THIKA MUNICIPALITY/BLOCK 19/449, MUNICIPALITY/BLOCK.19/836 and THIKA MUNICIPALITY/BLOCK. 19/1224 are hereby forthwith deleted and the name of HARRISON MBARI WAITHAKA is promptly restored as the registered proprietor free from all encumbrances.***

- iii) The Court issues permanent injunction restraining the 2nd, 5th, 6th and 11th Respondents/Defendants and/or their servants/agents from dealing with the lands in any manner that may prejudice the interest of the Plaintiff in the lands which include sale, transfer, encumbering, leasing out, charging or from doing any act aimed at further developments/us of the parcels known as THIKA MUNICIPALITY/BLOCK 19/449, MUNICIPALITY/BLOCK.19/836 and THIKA MUNICIPALITY/BLOCK. 19/1224 and an eviction order do issue directing the 2nd, 5th, 6th and 11th to vacate THIKA MUNICIPALITY/BLOCK 19/449, MUNICIPALITY/BLOCK.19/836 and THIKA MUNICIPALITY/BLOCK. 19/1224 respectively within 60 days of delivery of this Judgment.***
- iv) The Counter-Claims filed by the 2nd and 13th Defendants are unmerited.***
- v) The Co-Defendant claims filed by the 2nd, 9th, 11th and 13th Defendants are unmerited.***
- vi) Costs of this suit and interest is awarded to the Plaintiff to be paid for jointly and severally by the 2nd, 5th, 6th, 9th, 11th 12th and 13th Defendants.***

It is so ordered.

DATED, SIGNED AND DELIVERED IN THIKA VIA MICROSOFT TEAMS THIS 26TH DAY OF NOVEMBER, 2025

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MOGENI J

JUDGE

In the presence of:

Plaintiff - Absent

1st Defendant - Absent

Mr. Jesse Kariuki for 2nd Defendant

3rd, 4th, 5th, 6th and 7th Defendants - Absent

Ms. Kiarie holding brief for Mr. Mwaura for 9th Defendant

Ms. Kiprop for 10th Defendant

Ms. Mwangi holding brief for Mr. Kimondo for 11th Defendant

12th and 13th Defendant - Absent

Ms. Mwangi holding brief for Mr. Kimondo for Interested Party

Melita - Court Assistant

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MOGENI J

JUDGE