



THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT IN NAROK**  
**ELCLA NO E008 OF 2024**

**TERESIAH WAMBUI.....**  
**APPELLANT**

**VERSUS**

**MARTINE OLE KUSAI.....1<sup>ST</sup>**  
**RESPONDENT**

**JACKSON LONGISA NGURUMWA.....2<sup>ND</sup>**  
**RESPONDENT**

**JULIUS TIAPAI KOROS.....3<sup>RD</sup>**  
**RESPONDENT**

**THE LAND REGISTRAR NAROK.....4<sup>TH</sup>**  
**RESPONDENT**

**(Being an Appeal against the Judgment and Orders of Hon. P.L Shinyanda (Principal Magistrate) delivered on the 10<sup>th</sup> July 2024 in Narok CMELC NO.30 of 2019(OS).**

**JUDGMENT**

1. The Appellant herein **Teresiah Wambui**, was the Plaintiff in the above mentioned case **Narok CMELC No. 30 of 2019(OS)**, wherein she had sued the Respondents as the Defendants thereon and sought for determination of the following questions;

- i. That the Plaintiff who obtained a Judgment in Nakuru H.CCC No.376 of 2008(O.S) against Maritim Ole Kusai on 18<sup>th</sup> November 2009 for 4.5 acres of land in L.R. No. Cis-Mara/Enaibelibeli/Enengetia/183, by way of adverse possession should first get her share of the 4.5 acres of land.***
- ii. In the face of the Judgment delivered on 18<sup>th</sup> November 2009(Teresiah Wambui vs Maritim Ole Kusai in Nakuru HCCC No. 376 of 2008 (O.S)), which was not set aside or varied or appealed against can Maritim Ole Kusa lawfully, procedurally and legitimately sell, transfer or assign the 4.5 acres of land comprise in L. R. No. Cis-Mara Enaibelibeli/Enengetia/183 to the Defendant?***
- iii. In the face of the decree issued in the aforesaid case which was duly served, registered and paid for with the Land Registrar, Narok North District could the Defendants be heard to feign ignorance and innocence in transacting, transferring and selling the aforesaid parcel of land inclusive of the 4.5 acres adjudged to belong to the Plaintiff by a competent court?***
- iv. What is the position in law where the Defendants in utter disregard of a***

**competent and valid decree disregard the same and transact on a parcel of land where a Learned Judge of the High Court had adjudged the same to belong to the Plaintiff?**

- v. Is the transfer and sale of the subject parcel of land from Maritim Ole Kusai to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants valid?**
- vi. Is the Plaintiff's rights and interests on the 4.5 acres of land comprised in L.R. No. Cis-Mara Enaibelibeli/Enengetia/183, still available for this court to carve out from the Defendant's titles?**
- vii. Can the Plaintiff's decree, rights and entitlements in the 4.5 acres of land be defeated by the mere transfer of the entire parcel of land from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants?**
- viii. Whether this court has jurisdiction to stamp its authority and cancel all the Titles to the Defendants in the spirit of enforcing its decree in the aforesaid parcel of land, order for the excision of 4.5 acres of land therefrom and have the same registered in the Plaintiff's names and the remainder to go to the Defendants.**

- ix. Does change of ownership by a recalcitrant party in a decree extinguish the Decree Holder's rights and judgment?**
- x. Does transfer of land alter the rights of an adverse possessor?**
- xi. What are the Plaintiff's remedies against the Defendants?**

2. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein as the Defendants in the above stated **Originating Summons** contested the said suit, via the Replying Affidavit of **Jackson Longisa Nkurumwa**, sworn on **7<sup>th</sup> July 2014**, who averred that the basis of the Plaintiff's case was the decree of the court in **Nakuru HCCC No. 376 of 2008**, wherein the court declared that the Plaintiff (**Teresia Wambui**) was entitled to a portion of the land in dispute by way of **adverse possession**. However, the deponent claimed the said Judgement was obtained through **fraud**. It was his averments that the Plaintiff's case had no basis, and he urged the court to dismiss it with costs.

3. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (Respondents) contested the suit through the Replying Affidavit of **Julius Tipati Koros**, the 3<sup>rd</sup> Respondent herein, who averred that together with 2<sup>nd</sup> Defendant, they were bonafide purchasers of the suit property, and were jointly issued with the title deed from **16<sup>th</sup> October 2013**.

4. He also averred that they were not parties in ***Nakuru HCCC No. 376 of 2008***, and that they ***took possession*** of the suit property immediately after they finalized the transaction. He claimed that they are protected under ***Article 40*** of the ***Constitution***, as they acquired the suit property legally and procedurally.
5. The Plaintiff filed Supplementary Affidavit and averred that after obtaining the decree in ***Nakuru HCCC No. 376 of 2008***; the ***Land Control Board*** granted a consent to the registered owners to partition the suit property and carve out her ***4.5 acres***. Further, that she served the Decree to the ***Land Registrar in Narok***, and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not bother to conduct a search before purchasing the suit property. She urged the court to dismiss the Defendants(Respondents) averments and allow her Claim.
6. On ***16<sup>th</sup> May 2016***, directions were taken under ***Order 37*** of the ***Civil Procedure Rules***, and the ***Originating Summons*** was treated as the Plaint and Replying Affidavit as the Defence, and parties were directed to file their trial bundles and witness statements. The matter proceeded for hearing via viva voce evidence.
7. The Plaintiff(Appellant) gave evidence for herself and did not call any witness. The Appellant told the court that she bought ***4.5 acres*** out of the suit land which was jointly owned by ***Sadera Ole Lolakupai, Kingori Ole Lolakupai and***

**Martine Ole Kusa.** However, **Sadera** died before the portion of land could be transferred to her, and later the Defendants started to lay claim to the whole suit land, and thus she filed a suit in **Nakuru High Court**, which was ruled in her favour.

8. The Defendants gave evidence through the 3<sup>rd</sup> Defendant **Julius Tiapai Koros**, who alleged that they purchased the suit property from the 1<sup>st</sup> Defendant **Martine Ole Kusa**, who is now deceased, though he owned the land with two others being **Jackson Longisa Ole Nkurumwa and Tipatis Ole Koros**. It was his evidence that the initial registered owners of the suit land had died, and the land had been distributed through succession proceedings.
9. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants obtained a title for the suit land **16<sup>th</sup> October 2013**, and they also **took possession** of the suit property after purchase. The 3<sup>rd</sup> Defendant (Now Respondent) denied ever demolishing any house belonging to the Plaintiff(Appellant). He also testified that the 1<sup>st</sup> Defendant is deceased, and he was never served with any documents for the court case in **Nakuru HCCC No. 376 of 2008**.
10. After the inter- parties hearing and filing of respective written submissions, the trial court delivered its Judgment on **10<sup>th</sup> July 2024**, and **dismissed** the Plaintiff's(Appellant's) case for having been commenced vide an **Originating Summons**

dated **7<sup>th</sup> May 2014**, with an order that each party to bear their own costs.

11. Aggrieved by the Judgment of the trial court, the **Appellant (As Plaintiff)** filed this Appeal vide a **Memo of Appeal** dated **12<sup>th</sup> August 2024**, wherein she urged the court to allow the Appeal by **setting aside** of the entire Judgment of the trial court, and that the court to **re-consider, re-analyze** and **re-assess** the evidence on record and render its own judgment. That the Respondents be ordered to pay costs of this Appeal and the lower court.
12. The Appeal is supported by the following grounds;
  - i. The Leaned Magistrate grossly erred both in law and in fact, misdirected herself and failed to appreciate and address her mind to the Provisions of Order 37 Rule 19(1) of the Civil Procedure Rules.*
  - ii. The Learned Magistrate erred in law and in fact and misdirected her mind in holding that the Originating Summons were ill suited and suit could not succeed, by failing to appreciate the fact that the Originating Summons dated 7<sup>th</sup> May 2014 were converted into a Complaint/Pleadings by Court on 16<sup>th</sup> May 2016, therefore the suit was properly in Court, hence arriving at a wrong conclusion.*

- iii. The learned Magistrate erred in law and in fact by failing to appreciate that the suit was heard by way of viva voce evidence.**
- iv. The leaned Magistrate erred in law and infact and misdirected her mind by striking out the Appellant's suit.**
- v. The learned Magistrate erred in both law and in fact in considering and holding that the Originating Summons as filed was ill suited, by failing to appreciate that the issue was not pleaded.**
- vi. The learned Magistrate erred in law and fact by not considering all the evidence tabled by the appellant and totally failed and refused to scrutinize the documents before court and relied on a procedural technicality, against the weight of the evidence adduced during trial and on court's record.**
- vii. That the learned Magistrate erred in law and fact in failing to consider appropriately the evidence adduced by the appellant hence arrived at a wrong conclusion that the appellant did not prove fraud to the required standards.**
- viii. The learned Magistrate erred both in law and in fact in failing to consider that no transfer instrument/documents nor evidence of purchase were produce.**

- ix. The learned Magistrate erred both in law and in fact in failing to consider that the grant transferring the suit property by the 1<sup>st</sup> Respondent was revoked by Court.*
- x. The learned Magistrate erred both in law and in fact in failing to appreciate that a Court of law is functus officio and cannot re-litigate fresh matters/not pleaded post judgment, and that being the case, it is legally justifiable to file a suit where all parties are given opportunity to be heard.*
- xi. The learned Magistrate erred in law and in fact in failing to exercise judgment and consider all material factual and legal matters placed before court to determination through pleadings and submissions.*
- xii. That the decision of the learned trial Magistrate is insupportable by law and inconsistent with the facts brought to the court's attention through pleadings and submissions by the parties.*

13. The brief facts of the Plaintiff's/ Appellant's case are that sometime in **1979**, the Plaintiff bought **4.5 acres** from **Sadera Ole Lolikupai**, being part of his share in land parcel No **Cis Mara/ Enabelbel Enengetia/ 183**, as was evident from a copy of the Sale Agreement produced as exhibit. That

she took possession of the **4.5 acres**, and put up her house, and have been living on the suit land since then, without interruption for over **35 years**.

14. That prior to **Sadera's** demise, the Plaintiff and Sadera had appeared before the **Land Control Board**, which gave them consent to partition and transfer the land to the Plaintiff, but Sadera passed on in **1995**, before he could transfer his shares to her.
15. Later the 1<sup>st</sup> Defendant started to claim the **4.5Acres** from the Plaintiff, and she subsequently filed a case in Nakuru being **Nakuru HCCC No 376 of 2008**, for a claim on adverse possession and Judgement was entered in her favour on **18<sup>th</sup> November 2009**.
16. That she served the **Narok Land Registrar** with the Decree of the High Court, and applied to the **Land Control Board** for **consent** for subdivision on **9<sup>th</sup> May 2013**. As she waited for her title deed to be processed, and subdivision to be done, the 1<sup>st</sup> Defendant went to the Lands office and caused the whole land to be transferred to his name by way of transmission, vide a rectified grant, which was nullified.
17. Later the 1<sup>st</sup> Defendant transferred the land to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who entered into the suit land and started to plough it and planted potatoes therein. That the 4<sup>th</sup> Defendant agreed to process a title deed in favor of the 2<sup>nd</sup>

and 3<sup>rd</sup> Defendants while knowing very well that there was a valid court decree, and he should therefore not have transferred the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

18. Briefly, the Respondents case is that the 1<sup>st</sup> Defendant is deceased, and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants purchased the suit land from 1<sup>st</sup> Defendant, and were issued with the title deed thereafter. They took possession of the suit land, and they do not know the Plaintiff **Teresia Wambui**. It was their case that the 1<sup>st</sup> Defendant sold the suit land to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, but he died on **11<sup>th</sup> January 2020**. The 3<sup>rd</sup> Defendant who gave evidence on behalf of 2<sup>nd</sup> Defendant and himself denied having razed down the Plaintiff's(Appellant's) house, and he alleged that he saw her in court for the first time.
19. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants(Respondents) claimed that their title deed has never been **cancelled**, and they were not parties in the **Nakuru High Court (HCCC No.376 of 2008)**, case, and therefore, they are the rightful owners of the suit land, being bonafide purchasers.
20. After the Appeal was admitted, the court directed the same to be canvassed by way of written submissions. In compliance thereto, the Appellant herein filed her written submissions through **Haki na Amani Advocates dated 23<sup>rd</sup> June 2025**, and urged the court to allow the instant Appeal entirely.

21. The Appellants relied on **Order 37 Rule 19** of the Civil Procedure Rules, which state;

***“(1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.***

***(2) Where the court makes an order under sub-rule (1), Order 11 shall apply.***

***(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.***

***(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under sub-rule (1).***

22. The Appellants urged the court to allow their Appeal as prayed.
23. The Appellant argued grounds **Nos 1, 2, 3, 4, 5, and 12** of the Memo of Appeal together, and submitted that on **16<sup>th</sup> May 2016**, the court issued orders to convert the **Originating Summons** into a Complaint, and directed the Respondents to file their list of documents and witness statements within **21 days**. The matter proceeded for hearing on **13<sup>th</sup> July 2023**, and **17<sup>th</sup> August 2023**, through viva voce evidence. Despite the case being in court for 10 years, the trial court dismissed the suit on technical grounds without considering the directions issued earlier.
24. That **Order 37 Rule 19(1)** of the **Civil Procedure Rules** explicitly allows the court to convert an **Originating Summons** into a Complaint at any stage of the proceedings, which was done in this case. The court had previously allowed the suit to proceed as a Complaint and granted the Respondents time to file their witness statements and documents, making the suit properly before the court. However, the trial magistrate dismissed the case, stating that the **Originating Summons** was ill-suited for the complex issues raised, ignoring the fact that it had been converted into a Complaint.
25. The Appellant relied on the case of **Ogutu & 59 others v Teresia Wairimu Kirima & Anne Wangari Kirima (As the**

***Administrators of the Estate of the Late Gerishon Kirima) & another (Environmental and Land Originating Summons 4 of 2023) [2024] KEELC 3385 (KLR)***, wherein the court held that an Originating Summons converted into a Plaint should not be penalized for not being initiated as a Plaint.

26. The Appellant also submitted that the trial court disregarded the provisions of **Article 159(2)(d)** of the **Constitution**, which emphasizes the need for courts to administer justice without undue regard to procedural technicalities. Reliance was also sought in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR**, where the court emphasized the importance of focusing on substantive justice rather than technicalities.
27. Further, that the trial court failed to apply the provisions of **Order 37 Rule 19(1)** of the **Civil Procedure Rules**, and ignored the fact that the matter proceeded through **viva voce evidence**, which was in line with the court's directions. The dismissal of the Appellant's suit was based on a **misapplication of the law and facts**, as the suit was properly before the court.
28. Further, the Appellant argued grounds **Nos 6, 7 and 8** together and submitted that the trial court failed to consider the evidence presented by the Appellant, and instead relied on technicalities to dismiss the case, ignoring the real issues

for determination. She argued that the Respondents did not provide any evidence to demonstrate that the acquisition of the suit property was lawful or formal.

29. Further, that following the Judgment in ***Nakuru High Court Case No. 376 of 2008***, the decree required the Land Registrar Narok to rectify the register for land parcel ***Narok CIS/Mara-Enabelbel/Enengetia/183***, to reflect the Appellant as the owner of ***4.5 acres***, and then issue her with a title deed for her portion of land. However, the Respondents did not provide evidence of how the entire suit property, including the Appellant's ***4.5 acres***, was transferred to the 1<sup>st</sup> Respondent and subsequently to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, despite the decree being registered with the Land Registrar Narok.
  
30. That the Appellant's entitlement to the ***4.5 acres*** was established in the ***Nakuru High Court Judgment***, which Judgement was ***never set aside*** or appealed against. Additionally, the ***Land Control Board*** gave ***Consent*** for the partition of the suit property into three portions on ***9<sup>th</sup> May 2013***.
  
31. It was the appellant's further submissions that the trial court misapplied the facts and failed to consider that the nullification of the grant revoked any distribution of the estate, as established in ***Julius K. Atunga v Naumy Jebyegon Kemboi [2014] eKLR***. Further, the trial court

also failed to scrutinize the lack of evidence provided by the Respondents, including the absence of a sale agreement, transfer instruments, payment of stamp duty, Land Control Board consent, or any other documentation to validate the transfer of the suit property.

32. Reliance was sought in the case of ***Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)***, where the Supreme Court of Kenya held that when the root of a title is challenged, the registered proprietor must prove the legality of the title, and demonstrate that the acquisition was ***legal, formal, and free from encumbrances***. That the Respondents failed to discharge this burden of proof, and the trial court erred in not addressing these deficiencies.
33. Further, that the trial court also ignored the uncertainty surrounding the removal of the caution registered against the suit property, and the subsequent transfer to the 1<sup>st</sup> Respondent(deceased) and later to 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, which was done without due process. The Appellant argued that the transfer was a deliberate attempt to deny her rightful ownership of her property, and the trial court failed to consider this evidence.
34. On ground ***No 9***, the Appellant submitted that the trial court failed to consider the implications of the revocation of the Grant of Letters of Administration, which was used by the 1<sup>st</sup>

Respondent to transfer the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That despite the nullification, the suit property was transferred to the 1<sup>st</sup> Respondent, and subsequently to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, raising questions about the legality of the transfer.

35. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not plead or provide evidence to show that they were purchasers for value without notice, nor did they prove the sanctity of the purchase. The trial court overlooked these critical issues, which undermined the validity of the transfer of the suit property.
36. It was the Appellant's argument that the transfer was unlawful and was orchestrated to deny her rightful ownership, and the trial court erred in failing to consider the impact of the nullified grant on the transfer of the property. That the trial court's failure to address these legal and factual issues led to an erroneous conclusion.
37. On Ground **No 10**, the Appellant argued that the trial court erred in its interpretation of **Section 34** of the **Civil Procedure Act** by stating that the Appellant should have executed the decree from **Nakuru High Court Case No. 376 of 2008**, against the 2<sup>nd</sup> to 4<sup>th</sup> Respondents. The Appellant argued that **Section 34** only applies to questions between parties to the original suit, and the 2<sup>nd</sup> to 4<sup>th</sup> Respondents were not parties to the Nakuru case. The trial

court misapplied this provision of law, as the 1st Respondent was not a representative of the 2<sup>nd</sup> to 4<sup>th</sup> Respondents in the Nakuru case.

38. That the trial court failed to recognize that executing the Nakuru decree against non-parties would violate **Article 47** of the Constitution on fair administrative action and **Article 50** on the right to be heard. The Appellant could not execute the said decree against the 2<sup>nd</sup> to 4<sup>th</sup> Respondents without a Judgment against them, as this would amount to condemning them unheard.
39. The Appellant argued that the questions of cancellation of title and the validity of the transfer to the 1st, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents could only be addressed through a substantive suit, not through an application for execution.
40. Reliance was sought in the case of ***Waituika v Waituika; Waituika & 2 others (Third Party) (Environment and Land Appeal E006 of 2022) [2024] KEELC 1505 (KLR)***, where the court held that cancellation of title deeds held by third parties requires a substantive suit to allow all parties to present their case. The trial court failed to recognize that the Nakuru Court was ***functus officio*** after delivering its judgment, and could not address new issues such as cancellation of title or the rights of third parties. Therefore, this misinterpretation of **Section 34** led to an incorrect decision.

41. Ultimately, the Appellant submitted that the trial court erred in dismissing her case on technicalities without addressing the substantive issues. The Originating Summons had been lawfully converted into a Plaint under **Order 37 Rule 19(1)** of the **Civil Procedure Rules**, and the matter proceeded through viva voce evidence with the Respondents given adequate time to file their witness statements and documents.
42. Further that the trial court failed to consider the evidence presented, including the decree from **Nakuru High Court Case No. 376 of 2008**, which was served and entered against the suit property with the **Land Registrar Narok**. Additionally, the court ignored the removal of a caution on the suit property without due **notice**, and the lack of evidence from the Respondents regarding the sale, purchase, and transfer of the property.
43. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their written submissions dated **22<sup>nd</sup> July 2025** through **Kamwaro & Co Advocates**, and after setting out the background of the case, they raised these issues for determination;
- i) What is the duty of this court with respect to this Appeal?**
  - ii) What is the important of the provision of Section 34 of the Civil Procedure Act?**
  - iii) Whether the Doctrine of Re judicata applies**

- iv) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are innocent purchaser for value?**
- v) Whether fraud has been pleaded and proved against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent?**
- vi) What orders are as to costs?**

44. **On what is the duty of this court with respect to this Appeal**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on the provisions of **Section 13(4)** of the **Environment and Land Court Act**, which mandates this court to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court. They submitted that as a first appellate Court, the Court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny, and make its own conclusions about it. They relied in the case of **Selle vs Associated Motor Boat Co. [1968] EA 123**.

45. **On What is the import of the provisions of section 34 of the Civil Procedure Act**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the import and tenor of the provisions of **Section 34** of the **Civil Procedure Act**, is that first the questions must arise between the parties to the suit in which the decree was passed, or their representatives. Further, the questions must relate to the execution, discharge or satisfaction or the decree.

46. It was their submissions that the issues pertaining to execution, enforcement, implementation, satisfaction and/or discharge of the decree issued by a court shall be addressed and/or dealt with by the court which issued the said decree, and in respect of the said suit and not otherwise. Therefore, one is not required to file a new suit for purposes of execution and/or implementation of the decree issued in another suit or at all.
47. The Respondents relied in the case of ***John Muthee Ngunjiri & 4 others vs Attorney General & 3 others; Kenya Power & Lighting Co. Ltd & another (interested Parties) [3021] eklr*** in support the argument that the trial court could not become a court for purposes of execution of a decree issued by a Superior court of competent jurisdiction.
48. They also relied on the cases of ***Nazir Jinnah vs Asmahan Peterson & 2 others - Milimani Commercial & Admiralty Division) Civil case No.746 of 2012***. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also submitted that equity aids the vigilant and not the indolent, and delay defeats equity. Reliance was sought in the case ***Ibrahim Mungara Mwangi vs Francis Ndegwa Mwangi [2014] eklr***.
49. ***On whether the Doctrine of Res judicata applies***, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that this doctrine applies to both suits and applications as was held in the case of ***Abok James Odera vs John Patrick Machira Civil***

**Application No. Nai 49 of 2001.** They further submitted that it is trite law that the mere addition of parties in a subsequent suit does not necessarily render the **doctrine as res judicata** inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings.

50. **On whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are innocent purchasers for value**, they relied on the cases of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 others, Nairobi Civil Appeal No.146 of 2014**, where the Court of Appeal cited with approval the case of **Katende vs Haridar & Company Ltd (2008) 2 EA 173, Uganda**. They also relied on the case of **Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another (2013) eklr**, where the court held that the title in the hands of an **innocent third party** can be impeached if it is proved that the title was **obtained illegally, un-procedurally** or through **a corrupt scheme**.
51. **On whether fraud has been pleaded and proved against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Appellant in the **Originating Summons** never pleaded that the title held by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was obtained by fraud or misrepresentation. They also submitted that no allegations of fraud were ever raised or irregularities pleaded and that the contention by the Appellant that the trial Magistrate had a duty to consider the

same notwithstanding the merits and or whether fraud was proved or not proved as pleaded is untenable. Reliance was sought in the case of **Vijay Morjaria vs Nansingh Madhusingh & another (2000) eklr.**

52. On **who should bear the costs of this suit**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the general rule is that costs shall follow the event in accordance to the provision of **Section 27** of the **Civil Procedure Act (Cap 21)**.
53. The above is the evidence adduced by the parties as contained in the Record and Supplementary Record of Appeal, the Memo of Appeal and the rival written submissions, and this court in its appellate jurisdiction renders itself as follows; -
54. This being a **first Appeal**, the Court will be guided by the provisions of Section **65(1)(b)** of the **Civil Procedure Act**, wherein the court is called upon to consider both the question of facts and the law. Further, **Section 78** of the same Act obligates the court to **re-consider, re-analyze, re-assess and re-examine** the evidence adduced before the trial court, and then come up with its own independent conclusion, while considering that it did not see and assess the demeanor of the witnesses as did the trial court. See the case of **Selle vs Associated Motor Boat Co Ltd (1968) EA 123**, where the Court held;

***“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”***

55. Therefore, this court will give deference to the findings of the trial court, and will not just overturn and /or upset the said decision, just because it has been moved in an Appeal. See the case of ***Mbogo vs Shah (1968) EA 93***, where the court held; -

***“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”***

56. From the available evidence and the rival written submissions, the court finds the issues for determination are;

- i. Whether the doctrine of Re-judicata applies in this case.***
- ii. What is the import of the provisions of section 34 of the Civil Procedure Act?***
- iii. What is the implication of taking directions under Order 37 Rule 19(1) Of Civil Procedure Rules;***
- iv. Whether the Appellant's claim ought to have been determined in Nakuru HCCC No.376 of 2008.***
- v. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are innocent purchasers for value?***
- vi. Whether the Appeal herein is merited.***
- vii. Who should pay costs of the Appeal.***

**i). *Whether the doctrine of Re-judicata applies in this case.***

57. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions that the Originating Summons before the trial court was ***res - judicata*** the ***Nakuru HCCC No.376 of 2008***, since the issue of adverse possession was determined in the Nakuru Case, and the Appellant brought it out in the Originating Summons before the trial court, which is against the provisions of ***Section 7*** of the ***Civil Procedure Act***.

58. The doctrine of the doctrine of ***res- judicata*** is crucial in bringing finality in litigation, preventing re-litigation of issues already decided by competent courts between the same

parties or their representatives. Its import is to ensure judicial efficiency, prevent harassment, and promote certainty by barring fresh suits on substantially the same matter that was directly in issue and finally decided in a prior case, even including matters that ought to have been raised. See the case of ***John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eklr.***

59. For this doctrine to apply, these conditions must be satisfied. The suit involves the ***same parties***, which means the parties, or those claiming under them, must be the same; further, the suit should involve the ***same matter***, with the previous decided matter. The issue must be directly and substantially the same in both suits. Thirdly, the previous or former suit must have been decided by a ***competent Court***: Fourthly, there the former suit should have a ***Final Decision***, which mean the matter must have been heard and finally decided in the previous suit. See the case of ***Independent Electoral & Boundaries Commission - Versus - Maina Kiai & 5 Others [2017] eklr.***

60. It is evident that the Appellant herein had filed a suit at ***Nakuru High Court being Nakuru HCCC No,376 of 2008***, which was a claim on ***adverse possession***, and which was decided in her favour. In the said Nakuru Case, the Appellant had sued the ***Martine Ole Kusa***, and others and after the Decree, she was entitled to ***4.5 acres***.

61. However, in the Originating Summons before the trial court, the Appellant had sought for determination of some questions, among them being whether the 1<sup>st</sup> Defendant in the said suit (Originating Summons), **Martine Ole Kusa** could legally have the whole suit **Cis Mara /Enabelbel/Enengetia/183**, registered in his name without first curving out **4.5 acres** which the court in Nakuru had decreed that it belonged to the appellant by virtue of doctrine of adverse possession.
62. The parties in **Nakuru Hccc 376 of 2008**, and the parties in the **Originating Summons No. 30 of 2019**, before the trial court are different. Though the subject matter is land parcel No **Cis Mara /Enabelbel/Enengetia/183**, the issues are different. In Nakuru Hccc 376 of 2008, the issue was whether the Appellant was entitled to 4.5 acres through adverse possession, while in **Originating Summons No 30 of 2019**, before the trial court, the issue was whether the whole suit property could have been registered in the name of 1<sup>st</sup> Defendant **Martine Ole Kusa** by transmission, without partitioning the **4.5 acres** for the Plaintiff( Appellant) and later transferring the whole suit land to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants(Respondents), without any recourse for the Appellant.
63. Clearly, the issues in both suits are different and **could not** have been decided in the same case. Therefore, this court

finds and holds that the suit before the trial court, which has brought about this Appeal was not Res-judicata **Nakuru Hccc 376 of 2008**, and thus the doctrine of res-judicata cannot apply herein.

ii. **What is the import of the provisions of section 34 of the Civil Procedure Act?**

64. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that since the issue of the Appellant **4.5 acres** had been decided in **Nakuru Hccc 376 of 2008**, then the issue raised in the **Originating Summons** before the trial court ought to have been raised in the said Nakuru Case as provided by **Section 34** of the **Civil Procedure Act**. it was submitted that the Appellant ought not to have filed a new suit for purposes of execution or implementation of the decree in another suit.
65. The court has considered the prayers in the **Originating Summons** before the trial court, and the issues involved questions of whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (Respondents) acquired a good title in view of the fact that the Appellant was entitled to 4.5 acres from the suit land, and cancellation of the said title, which was allegedly acquired illegally.
66. The above issues could certainly not be determined in **Nakuru Hccc No 376 of 2008**, as the court had become **functus officio** after determination of the Originating Summons on adverse possession. These issues are new

issues, which cannot be determined through execution of the decree in ***Nakuru Hccc 376 of 2008***.

67. This court finds and holds that ***Section 34*** of the ***Civil Procedure Act***, could not apply, and the import of the said section was not applicable in the said Originating Summons before the trial court.

***iii. What is the implication of taking directions under Order 37 Rule 19(1) Of Civil Procedure Rules***

68. It is evident that the Appellant filed the suit before the trial court as an ***Originating Summons***, wherein she sought for determination of various issues among them; whether having obtained a Judgement in ***Nakuru HCCC No 376 of 2008***, of being entitled to ***4.5 acres*** out of the suit land, then would the sale and transfer of the whole parcel of land by ***Martine Ole Kusa*** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants(Respondents) valid?

69. In its Judgment the trial court in Para 35, held “***if the plaintiff had not had her suit determined against any of the parties herein in a previous suit, can cancellation of tile deed that was issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ succeed by way of Originating Summons?***”

70. The trial court went further to observe that “***it has been held that institution of suits by way of Originating Summons should be limited to ad-hoc or summary determination of points of law....and that Originating***”

***Summons should not be applied in cases where serious questions are involved or where facts are disputed and have to be determined.***

71. For the above reasons, the trial court proceeded to dismiss the Plaintiff's(Appellant's) case for having been commenced by way of Originating Summons instead of an ordinary Civil suit.
72. However, from the court record, it is evident that on **16<sup>th</sup> May 2016**, directions were taken and the parties elected to call viva voce evidence. Consequently, the Originating Summons was converted into a Plaint and the Replying Affidavit was converted to a Defence. Further, the court directed parties to file their trial bundles within *21 days* and a date was set to confirm readiness for trial.
73. When the matter was finally ready for hearing, Plaintiff gave evidence, she produced exhibits, and was cross examined and re-examined. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants gave evidence through the 3<sup>rd</sup> Defendant, who was also cross-examined and re-examined. In essence when the Originating Summons was converted into a Plaint, and Replying Affidavit into a Defence, the Originating Summons was converted into a normal suit, wherein all complex issues could be addressed and determined.

74. What are the implications of converting an Originating Summons into a Complaint? The Conversion of an Originating Summons (OS) to a Complaint is guided by **Order 37, Rule 19** of the **Civil Procedure Rules**, which allows the court to treat the case as if it had started with a formal Complaint, shifting from Affidavit-based arguments to full trial procedures where viva voce evidence is taken, adding details, even new parties, and allowing for broader relief, moving beyond the OS's limited scope to fully determine complex disputes.
75. In the case of **Mary Nduta Mutungi, Lawrence Njenga Mutungi, Rose Wambui Mutungi, Francis Mathu Mutungi, Benson Muthee Mutungi & John Muchai Mutungi V. Wambui Njenga, Wilfred Ng'ang'a Njenga & Njuguna Njenga (2017) JELR 99237 (CA)** the Court of Appeal held;

***“Thus a claim to land by adverse possession by a procedure other than the prescribed procedure does not go to the jurisdiction of the court to entertain the claim. It is merely a procedural irregularity which the court in its discretion and in the interest of justice can waive under Article 159(2)(d) of the Constitution which provides that in exercising judicial authority, the court shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. It is the law that originating summons is not the appropriate procedure for***

***determining contentions disputes. That must be one of the reasons why the rules give power to the High Court to convert proceedings brought by originating summons into proceedings brought by a plaint even where such proceedings would not have been brought by way of a plaint. It follows that where there is a breach of prescribed procedure, the main consideration is not the form but the nature of the proceedings and whether the procedure adopted will result in a just, efficacious and expeditious resolution of the dispute.”***

76. Therefore, when directions were taken on **16<sup>th</sup> May 2016**, the suit was converted to an ordinary suit, which could resolve all complex issues. Further, the trial court ought to have been guided by the provisions of **Article 159(2)(d)** of the Constitution and decide the matter before it on substantive justice rather than technicalities. In any event, the Originating Summons had long been converted to a Plaint and the Replying Affidavit to a Defence.
77. Consequently, the effects of conversion of an Originating Summons to a plaint are; **Procedural Shift**: The case transitions from summary procedure, through Affidavits to full litigation, where there are formal pleadings like Plaint, Defence, Counterclaim, and oral testimony/ viva voce evidence in open court. **Expanded Scope**: the conversion allows for more complex claims, joinder of more parties, and

reliefs which may not easily be granted by way of OS. **Pleadings are Formalized:** Existing Affidavits could be converted to pleadings, and parties are also granted leave to amend or add particulars, clarifying the dispute. **Full Trial:** The case proceeds to a full hearing with viva voce (oral) evidence, rather than just Affidavit evidence, thus allowing thorough examination.

78. Courts have severally made determination on this issue. In the case of **Emily Chepkor Chepkwony v Paul Arap Chandoek [2021] eKLR Nakuru ELC No. 35 of 2019**, the court observed as follows:

***“It is not lost to the court that in the majority of cases where the plaintiff instituted a claim for title on the basis of adverse possession commenced by an originating summons, the court invariably directs that the originating summons be deemed to be a plaint and the response thereof a defence and that the suit be heard by way of Viva voce evidence. This essentially is to enable the evidence of the parties to be tested under cross examination. Order 37 Rule 19 of the Civil procedure empowers the court to convert an originating summons into a plaint and to proceed with the hearing of the matter as if the action had been commenced by way of a plaint.”***

79. Further the court will concur with the cited authorities by the Appellant being; **Ogutu & 59 Others vs Teresia Wairimu Kirima & Anne Wangari Kirima( As the Administrators of the estate of the late Gerishon Kirima & Another ( ELC OS NO.4 of 2023)( 2024) KEELC 3385(KLR) 18<sup>th</sup> April 2024)(RULING)**, and finds that an **Originating Summons** duly converted to a Plaint by dint of **Order 37 Rule 19**, can deal with complex issues, and the Court cannot penalize a party for failing to institute the suit by way of a Plaint.

80. The court finds and holds that the trial court erred in law and facts in finding and holding that the issues raised by the Appellant in the **Originating Summons No 30 of 2019**, could not be determined in the said suit, which had not been institute through a Plaint.

**iv. Whether the Appellant's claim ought to have been determined in Nakuru HCCC No.376 of 2008.**

81. The trial court went a great deal in dealing with **Section 34** of the **Civil Procedure Act**, which deals questions arising between parties in a suit and relating to execution of the decree. However, it is clear that the parties in the **Nakuru Hccc 376 of 2008**, are different from the parties herein. In the **Originating Summons** before the trial court, the Plaintiff /Appellant had sought for determination of some questions. Those questions could not be dealt with in a

matter that was already determined by a court, and which court had become ***functus officio***.

82. This court in issue ***No ii*** above has held that the import of ***Section 34*** of the ***Civil Procedure Act*** was not applicable in the Originating Summons before the trial court. The court is persuaded by the holding of the court in the case of ***Waituika vs Waituika; Waituika & 2 others (Third Party) (ECL Appeal No. E006 of 2022)[2024] KEELC 1505(KLR)*** that held;

***“Respondent herein vide herein vide her Application dated 20<sup>th</sup> January 2022, sought for cancellation of title deeds held by the third parties. These are substantive prayers which cannot just be issued in an interlocutory application, specifically a post judgement application. Maybe, the Respondent ought to have filed a substantive suit, against the third parties and/or even the Appellant herein, seeking cancellation of the said title deeds. The third parties would have gotten an opportunity to appear in court and defend their position.”***

83. The court concurs with the Appellant’s submissions that only a substantive suit could deal with the substantive issues raised by the Appellant in her suit before the trial court. Therefore, the trial court was erred in its holding, and thus misapplied the law.

v. **Whether the Appeal herein is merited**

84. Having found that the trial court was erred in holding that the suit could not succeed having been brought as an **Originating Summons** and that the issues raised thereon ought to have been dealt in the **Nakuru HCCC No.376 of 2008**, this court will now turn to the merit of the evidence adduced before the trial court to come to its own independent conclusion.
85. It is evident that the Appellant was a successful litigant in **Nakuru Hccc No 376 of 2008**, wherein a Judgement was entered in her favour, to the effect that she was entitled to **4.5 acres** from the suit land, **Cis Mara /Enabelbel/Enengetia/183**, by way of adverse possession.
86. It was her evidence that she served the **Land Registrar-Narok** with the said Judgment and Decree of the Court. This judgment has not been **set aside or nullified**, and it is thus a valid court Judgement, which ought to be obeyed and is enforceable.
87. The said Judgement was entered on **18<sup>th</sup> November 2009**, and there is no evidence that any of the Defendants thereon appealed against the said Judgement and Decree. It is evident that the 1<sup>st</sup> Defendant who is now deceased was a party to the said **Nakuru Case**, but he went ahead and sold the whole suit land to 2<sup>nd</sup> and 3<sup>rd</sup> Respondents regardless of

the existing Judgement in favour of the Appellant herein. He therefore contravened the findings and holdings of the court in the Nakuru case.

88. The Appellant testified that she served the **Land Registrar-Narok, 4<sup>th</sup> Respondent herein**, with the said Judgment and decree, but he went ahead and registered the whole land in the names of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in disobedience and/ or total disregard of the Judgment of the court in **Nakuru 376 of 2008**, which Judgment was issued in favour of the appellant herein.
89. It is trite that any Judgement entered by a competent Court remains valid and enforceable unless set aside by the court. The Nakuru Judgement has not been set aside, and that Judgement is enforceable and remains in force. See the case of **M.A Koinange vs Joyce Ganchuku & 2 others [2015]eklr**, where the court held;

***“The judgment once pronounced is valid and enforceable unless the execution of the same is stayed and/or set aside by the appellate court. Until a decision by the appellate court is rendered the decision on the court appealed from remains valid and lawful, and the decree holder is entitled to execute the same”***

90. The Court of Appeal in the case of **George Owen Nandy vs Ruth Waitiri Kibe( 2016) eklr** held;

***“We think it is important at this stage to remind ourselves of the effect of a judgment once entered. In James Karuri Ndegwa & Another v Ndegwa Mbiti & Another [2008] eklr, the Court stated as follows:-***

***“.....a court order remains a valid court order until and unless it is set aside on appeal and or reviewed. As long as the court order has not been challenged, overturned, set aside and or reviewed, it remains a valid court order which has to be obeyed and or enforced. By whichever means it was obtained, until a competent court is moved to vary or set aside the said order, the same remains in force and binding to all parties.”***

91. Therefore, with a valid decree, the **Land Registrar, Narok** ( 4<sup>th</sup> Respondent),ought to have partition the suit property first and curve out **4.5 acres** belonging to the Appellant before registering the title deed in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

92. Even if the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the registered proprietors of the suit land, their title is impeachable under **Section 26(1)a & b** of the **Land Registration Act**, which states;-

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”***

93. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had submitted that being the registered proprietors of the suit land, they are protected by **Article 40** of the **Constitution**, which is on the right to property. However, it is clear that right to property do not extend to **illegally** or **unlawfully acquired property**. The root of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ title is tainted with illegality, and therefore theirs is not a lawful property that can enjoy protection of **Article 40** of the Constitution. See the case of ***Dima & another v Kenya Ports Authority & another [2024] KEELC 7286 (KLR)***

vi. **Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are innocent purchasers for value?**

94. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents alleged that they were innocent purchasers for value without prior notice, however, it is evident that the 1<sup>st</sup> Defendant (now deceased) **illegally** or **irregularly** caused the whole suit land to be registered in his name through transmission, and later sold the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Therefore, the root of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is shaky and Martine Ole Kusa could not pass a good title to them because he had disregarded the court order and registered the whole suit land in his name, without partitioning the 4.5 acres which the Appellant was entitled to.
95. In any event, the Grant that **Martine Ole Kusa** used to have the land transmitted to himself was latter nullified, and the root of the 1<sup>st</sup> Defendant (now deceased) who sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent is questionable. Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cannot wave the Certificate of title as prove of their genuine or bonafide ownership of the suit land. See the case of Munyu **Maina vs Hiram Gathiha Maina Civil Appeal No 239 of 2009, eklr** where the Court of Appeal held;

***“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered***

***proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”***

96. Further the court will rely on the decision of the Supreme court in the case of ***Dina Management Ltd vs County Government of Mombasa & 5 Others (Petition 8 (E010 OF 2021 (2023) KESC 30 (KLR)***, where it held; -

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

97. Having analyzed the available evidence as above, this court finds and holds that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not innocent purchasers for value without notice, and their Certificate of title is not protected by law.

98. For the above reasons, the court finds and holds that the Appellant herein is entitled to her **4.5acres** out of the suit

land as per the Judgement and Decree of the court in **Nakuru HCCC No 376 of 2008**. The sale and transfer of the whole land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was irregular, and thus null and void.

99. Consequently, the court finds and holds that the Appeal herein is **merited**, and the court in its appellate jurisdiction proceeds to allow the Appeal in terms **prayer No (a)** of the **Memo of Appeal** entirely.
100. Further in respect to **prayer No (b)**, the court has **re-considered** the available evidence as per the Record of Appeal and proceeds to determine the questions as raised in the Originating Summons dated **7<sup>th</sup> May 2014** as follows; the following questions are answered in affirmative; **prayer No1**, and **No, 6**.
101. For question **No 2**, the court finds and holds that in light of the Judgement in **Nakuru Hccc No 376 of 2008(OS)**, **Martine Ole Kusa** could not **lawfully and procedurally** transfer the whole suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents(Defendants) together with **4.5 acres** for the Appellant(Plaintiff). The appellant is entitled to her **4.5 acres** as per the decree of the court.
102. For **prayer No 4**, the action of the Land Registrar, Narok (4<sup>th</sup> Respondent) to have the whole land **Cis Mara/Enabel/Enenetia/183, registered** in the names of 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in disregard of a lawful Judgement of

a competent court is a nullity. Therefore, the transfer of the suit land to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants(Respondents) is not valid. The transfer of the suit land did not defeat the Appellant's entitlement to her **4.5 acres**.

103. Having found and held that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Certificate of title was not acquired **regularly or legally**, this court finds and holds that the said Certificate of title is a candidate for cancellation as provided by **Section 80(1)** of the **Land Registration Act**, which provides;

***“(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.***

104. Consequently, in answer to **question No 8**, this court proceeds to order for rectification of the register by issuing an order of cancellation of the Certificate of title deed issued in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein (Defendants in on OS) on **16<sup>th</sup> May 2013**, which certificate of title was acquired illegally and is not protected by the law and or Article 40 of the Constitution.

105. After the cancellation of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' title, the Appellant is entitled to **4.5 acres** out of the suit land, which should be transferred to her by the estate of **Martine**

**Ole Kusa.** The said illegal transfer of the suit land did not defeat the Appellant's claim of adverse possession, which had already been settled by a competent court.

106. Having carefully considered the available evidence before the trial court, the instant Appeal is **found merited** and the same is **allowed** as above.

**viii. Who should bear costs of the Appeal?**

107. Ordinary, costs are awarded at the discretion of the court. See **Section 27** of the **Civil Procedure Act**. However, costs follow the events and are awarded to the successful litigant, unless there is a special circumstance that would warrant the court to depart from that principle. This court finds none herein, and consequently, the Appellant being the successful litigant is awarded costs of this Appeal, and costs before the trial court.

108. The upshot of the foregoing is that this court finds and holds that the instant Appeal is **merited**, and the same is allowed entirely as outlined above with costs to the Appellant as prayed in the Memo of Appeal dated **12<sup>th</sup> August 2024**.

***Appeal is allowed accordingly***

***Dated, signed and delivered virtually at Narok, this 11<sup>th</sup> day of December 2025***

***L. Gacheru***

**Judge**

**Delivered online in the presence of.**

**Elijah Meyoki - Court Assistant.**

**Ms. Wangui for the Appellant.**

**N/A for 1<sup>st</sup> Respondent**

**Mr. Kipella holding brief Mr. Kamwaro for 2<sup>nd</sup> and 3<sup>rd</sup>  
Respondent**

**N/A for 4<sup>th</sup> Respondent**

**L. Gacheru**

**Judge**