



Wanjiku (Suing as the Heir and Administrator of the Estate of the Late Stephen Juma Sapaya) v Kombo & 4 others (Environment and Land Case 165 of 2014) [2025] KEELC 8576 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KEELC 8576 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 165 OF 2014
LL NAIKUNI, J
DECEMBER 5, 2025**

BETWEEN

VALENTINE WANJIKU (SUING AS THE HEIR AND ADMINISTRATOR OF THE ESTATE OF THE LATE STEPHEN JUMA SAPAYA) PLAINTIFF

AND

KOMBANA BINTI SALIM KOMBO 1ST DEFENDANT

REGISTRAR OF TITLES NOW KNOWN AS THE LAND REGISTRAR 2ND DEFENDANT

FRANCIS KOMBA NZAI 3RD DEFENDANT

JACOB JAN 4TH DEFENDANT

SERAH FOK NDUMBU 5TH DEFENDANT

JUDGMENT

I. Preliminaries

1. This Honourable Court has been called upon to determine the claim by Valentine Wanjiku (Suing as the heir and administrator of the Estate of the late Stephen Juma Sapaya), the Plaintiff against Kombana BintiSalim Kombo, Registrar of Title now known as the Land Registrar, Francis Komba Nzai, Jacob Jan and Serah Fok Ndumbu, the Defendants herein by way of a Further Further Amended Plaint dated 29th March, 2023.
2. Upon filling and service of the Plaint, the 2nd Defendant filed its Statement of Defence dated 12th October, 2021 and the 4th and 5th Defendant filed their Statement of Defence 10th May, 2023.



II. The description of the Parties

3. The Plaintiff is described as the heir and duly appointed Legal Administrator of the estate of Stephen Juma Sapaya and a female adult of sound mind residing and working for gain in the County of Mombasa. The 1st Defendant was described as a female adult of sound mind and understanding residing and working for gain within the Republic of Kenya and the 2nd Defendant is the Registrar of Titles Land Registrar duly appointed under the provisions of the Registration of Titles Act, Chapter 281 Laws of Kenya, Section 12 of the Land Registrar Act Number 3 of 2012
4. The 3rd, 4th and 5th Defendant were described as adults of sound mind and understanding residing and working for gain in Mombasa within the Republic of Kenya.

III. Court directions before the hearing

5. On 6th October, 2020, after confirming that the Plaintiff and the Defendants had complied with the provision of Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 22nd February, 2021. The Plaintiff called testified and called her witnesses on 22nd February, 2021 and was recalled on 7th October, 2024 after which the Plaintiff closed her case. The 2nd Defendant called their 1st witness on 4th July, 2022 and the 4th and 5th Defendant called their first witness on 8th October, 2024 and they closed their case.

IV. The Plaintiff's case

6. From the pleadings before court, the Plaintiff pleaded as follows that:-
 - a. By a sale agreement dated 5th August 1989, the late Stephen Juma Sapaya bought two plots namely 3717 (Original Number 539/405 Section III Mainland North as delineated on land survey plan Number 237291 and sub-division number 3715 (Original No. 539/4040) Section II Mainland North as delineated on Land Survey Plan number 633/III/MN Mtwapa from first the Defendant herein wherein he paid part of the purchase price and the balance was paid by the Plaintiff herein, and in turn the Land Control Board application forms for obtaining the Letter of Consent to transfer were prepared and executed by the Defendant.
 - b. At the time of the purchase the subsisting plot was plot number 633/III/MN Mtwapa. Of which the deceased purchased two plots at first marked out as sub – plot numbers 10 and 11 of 633/III/MN before being given the current numbers.
 - c. In all these transactions regarding the sale of the various plots to the sixteen plots that were being sold by the 1st Defendant herein, were conducted by her son Mohamed Sheikh Ali Kenny who was now deceased as an authorized agent with implied and/or express authority from the 1st Defendant.
 - d. Sometimes in January 2003, the 1st Defendant herein purportedly sold the aforesaid parcel of land to a third party, who was trying to fence then claiming ownership. On this transaction, the 1st Defendant lacked the authority to transact as the Plaintiff was the legal owner.
 - e. The Plaintiff stated that the purported subsequent sale to a third party was illegal as she had paid for the entire purchase price. Further, the Plaintiff had been occupying the suit premises for the last thirteen (13) years and had built a permanent house on it.
 - f. On 9th April 2003, the court Issued an order of injunction and a caveat restraining Kombana BintiSalim Khamisi Kombo, the 1st Defendant from transferring the plots herein to a third



party pending the determination of this case. A caveat was duly lodged and registered with the 2nd defendant on 14th April, 2003, and all the injunctive orders served upon the 1st defendant. During the pendency of the caveat and or restraining order the 2nd Defendant on 23rd April 2003 Issued a Certificate of Title No. C. R. 36445 and C.R. No. 36443 to the 3rd Defendant hence effectively transferring the parcel of land from the 1st Defendant.

- g. The issuance of titles to the 3rd Defendant by the 2nd Defendant at the instigation of the 1st Defendant was not only fraudulent, but mischievous and an action in contempt of court. That also applied to the transfer of the property from the 3rd Defendant to the 4th and 5th Defendants herein.
7. On the particulars of the Defendants' fraud, the Plaintiff relied on the following:
 - a. Clandestinely transferring the Plaintiff's land to the 3rd Defendant and subsequently to the 4th and 5th Defendants.
 - b. Effecting a transfer in the Register of Titles while a caveat was still in place.
 - c. The 1st Defendant masquerading that he could pass a proper title to the 3rd Defendant, while the 3rd Defendant masquerading that he could pass good title to the 4th and 5th Defendants.
 - d. Effecting a transfer in the presence of a court order restraining them from so doing.
 - e. The 3rd Defendant effecting the transfer to himself while well aware that the true owner of the land was the Plaintiff and subsequently transferring to the 4th and 5th Defendants.
 - f. Effecting the transfers while the matters were pendelite and in contempt of court injunctive orders.
 8. The Plaintiff averred that there was no other suit pending nor previous proceedings between the parties herein over the same subject matter. That despite numerous demands and notice to rectify the same, the defendants have has totally refused and or ignored to sign the transfer forms thus rendering this suit necessary. The cause of action arose in Mombasa within the jurisdiction of this court.
 9. On the 23rd April, 2003, the Law firm of Messrs. Rukaria Mulwa & Co. Advocates then acting for the 1st Defendant and while this suit was subsisting did a transaction for the 1st Defendant transferring the property to the 3rd Defendant despite there being injunctive orders in place against the transfer and also a caveat. Mr. Mulwa Advocate then subsequently while acting for the 4th and 5th Defendants and while the injunctive orders and caveat were in place filed a miscellaneous application for the 2nd Defendant without disclosing that this case subsisted and obtained orders removing the caveat.
 10. The Law firm of Mulwa Nduya & Co. Advocates then undertook another transaction transferring the property from the 3rd Defendant to the 4th and 5th Defendants. Mr. Mulwa Advocate now acted for the 4th and 5th Defendants to sustain what on the face of it was an abuse of the court process and attempt to undermine and defeat the judicial process. The 4th and 5th Defendants' title had been obtained pendelite and in contempt of court orders and is subject to the plaintiff's rights.
 11. The 4th and 5th Defendants' title was also passed on by a party who also was injuncted and had a caveat against transfer hence could not pass good title. That a title passed on pendelite must fall under the principle of "the Les Pendants" . Further that the title passed on in contempt of court cannot pass a valid title.



12. The Plaintiffs prayed for Judgement to be entered against the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and or severally for:-
- a. An order of permanent injunction restraining the defendants, their her agents employees and or servants from transferring the aforesaid plots sub-division number 3717 (Original Number 539/405 Section III Mainland North as delineated on land survey plan Number 237291 and sub-division number 3715 (Original No. 539/4040) Section II Mainland North as delineated on land survey plan number 633/III/MN Mtwapa to any .other person or interfering with them in any way.
 - b. An order of the court ordering the Registrar of Titles Land Registrar to extend the caveat already in place.
 - c. That a declaration be Issued to declare that the plaintiff is the bona fide purchaser for value of the plots sub-division number 3717 (Original Number 539/405 Section III Mainland North as delineated on land survey plan Number 237291 and sub-division number 3715 (Original No. 539/4040) Section II Mainland North as delineated on land survey plan number 633/III/MN Mtwapa.
 - d. That a mandatory injunction do Issue compelling the 4th and 5th defendants herein to execute the transfer in favour of the plaintiff and to the 2nd defendant to correct the land register and indicate on the record/register a registration in favour of the Plaintiff in the aforesaid plots sub-division number 3717 (Original Number 539/405 Section III Mainland North as delineated on land survey plan Number 237291 and sub-division number 3715 (Original No. 539/4040) Section II Mainland North as delineated on land survey plan number 633/III/MN Mtwapa.
 - e. A declaration that the purported transfer of the parcel of land to the 3rd, 4th and 5th Defendants was a nullity and void ab-initio.
 - f. General damages, interest and costs of this suit.
 - g. In the alternative and without prejudice to the foregoing, the court do decree under doctrine of adverse possession, that the Plaintiff herein had obtained title through adverse possession.
 - h. Costs of the suit.
13. The Plaintiff testified as PW - 1 on 22nd February, 2021 who testified as follows: -

A. Examination in Chief of PW - 1 by Mr. Jengo Advocate.

14. PW - 1 was sworn and testified in English language. She identified herself as VALENTINE WANJIKU MBURU, a citizen of Kenya holding the national identify card bearing all the particulars as shown to Court at the commencement of the hearing. She was in Court as the duly appointed Legal Administrator of the late Stephen Juma Sapaya. She recorded a witness statement dated 16th August, 2018 and filed on 20th August, 2018 and wished for the same to be adopted as her evidence in chief. She also filed a list of documents dated 22nd March, 2019 on 25th March, 2019; which he produced as his Plaintiff Exhibits numbers 1 to 15 in the order in which they appeared. Her late husband had bought two (2) plots in the year 1989. Unfortunately, as fate would have it, he passed on 12th December, 1992. She took over the management of the property after obtaining the Grand Letters of administration. She built herself a permanent two (2) bedroomed house where she was staying with her four children.
15. In early the year 2003, the 3rd Defendant appeared claiming to be the owner of the Plots. PW - 1 went to Court and applied for an injunctive orders in the civil suit numbers Mombasa CMCC No.



1647 of 2003, and which later on was transferred to this Court and given ELC No. 165 of 2014. The Court granted her the injunctive orders over the Plot No. 3715 and 3717 (Org. 633/13/II/MN). The injunction order was one of her exhibits. She recalled that on 23rd April, 2003, when they went back to court, the said orders of injunction and caveat were extended. The fresh order was served on 23rd April, 2003. The Court Process Server did an Affidavit of Service. However, the Registrar of Titles stated that there was no order on 23rd April, 2003 to be registered. The orders were Issued on 9th April, 2003 and were to last for 14 days. He confirmed that the orders were extended, but still the Registrar Issued title deeds and did not respect the Court orders. The Registration and issuance of the titles was not done legally. She prayed that the Court grants her the reliefs sought in the filed further Amended Plaintiff.

B. Cross examination of PW - 1 by Ms. Kiti Advocate.

16. PW - 1 confirmed that the suit property belonged to her late husband. They never had a title but they had a sale agreement. After obtaining the Grand Letters of Administration, she went to the person who had sold the property to her late husband and she paid a sum of Kenya Shillings Two Thousand (Kshs. 2,000/-) for purposes of processing the title. Her late husband had not paid the full purchase until she paid. The gentleman who sold the property to her late husband told her he had authority from his mother to sell and he took her the money. She did not have the sale agreement in court. She never filed an application for contempt against the Land Registrar who allegedly had disobeyed the Court orders.
17. The Plaintiff called PW - 2 on 16th March, 2022 at 4.00 pm who testified as follows:
SUBPARA - A. Examination in Chief of PW - 2 by Mr. Jengo Advocate.
18. PW - 2 was sworn and testified in Swahili language. He was called Imani Athmani Mohamed, a Citizen of Kenya, holding the national identity card bearing all the details as shown to Court at the commencement of his testimony. He was a farmer. He knew Valentine Wanjiku who was his neighbor. He also knew Stephen Juma Sapaya who was the husband of PW - 1. He had recorded his witness statement dated 9th April, 2019 and filed on the same day. He got into the land in the year 1991. He wished to have the Court adopt the said statement as his evidence in Chief.

B. Cross examination of PW - 2 by Ms. Kiti Advocate.

19. PW - 2 reiterated that he went to his Advocate for the purchase of the land. He did not have the title deed as yet.
20. The Plaintiff called PW - 3 on 4th July, 2022 at 11.30 am who testified that: -

A. Examination In Chief of PW - 3 by Mr. Jengo Advocate.

21. PW - 3 testified under oath and in Swahili and English Languages. He was called HARUN NJORA IRWARE, a citizen of Kenya holding the national identity card bearing all the particulars as shown to Court during the hearing. He stated having known PW - 1. She was his neighbor at Mtwapa. He had recorded his statement. He wished to have it adopted as his evidence in chief in support of the case.

B. Cross examination of PW - 3 by Ms. Kiti Advocate.

22. PW - 3 confirmed that they bought the plots No. 3715 and 3717.
SUBPARA - B. Re – examination of PW 3 by Mr. Jengo Advocate: -
23. PW - 3 confirmed that two (2) plots were No. 3717/ Section 3.
24. On 7th October 2024 the Plaintiff was recalled for examination in chief and she testified as follows:-



A. Recalled for Examination in Chief of PW 1 by Mr. Jengo Advocate.

25. PW - 1 recalled that she had testified earlier on; she filed a statement dated 14th June, 2023 and she wished to adopt it. She also filed documents – Plaintiff Exhibit numbers 1 to 11 dated 14th June, 2023. There were Jacob Jan and Serah Fox Ndumbu – She did not know them. She was surprised that they were claiming to be the owners of the two parcels of land yet he had filed restrictions by the time the two claimed to have been registered as the owners of the land the matter was still pending in Court. She did not recognize their title deeds at all.

B. Cross examination of PW - 1 by Mr. Oluga Advocate.

26. On being referred to the contents of Paragraph 4 of the witness statement, PW - 1 stated that the property in the Sale Agreement were two plots. Referred to the Sale Agreement – they were the Plot No. 633/III/MN. Hence, she confirmed the two in the suit being numbers 3715 and 3717 were not in the agreement. According to her there was nothing to show that the numbers changed to the current ones. The agreement was between Kenny and her husband. By that time, he was the Legal Administrator acting for the mother. He was acting as an Attorney.
27. According to the witness, the agreement he was referred to i.e. signing as the son on behalf of the mother. She never saw any authority given to Kenny by the mother. On being referred to the conditions on the sale agreement Kombana never signed the consent and the transfer. She could not tell anything on the monthly installments. Thus, she could not know whether it was paid or not.
28. On the 2nd sale agreement of 8th April, 1993. She used the Grant Letters of Administration to cause the transfer. They were Issued on 24th August, 1993. The Certificate of Confirmation was dated 23rd June, 1994. The transfer of the land was dated 8th April, 1993 when she took over. With reference to the original sale agreement dated 5th August, 1989 there were no witnesses. She never processed the title deed in the name of her husband nor herself.
29. On being referred to a court order of 11th April, 2003 (paragraph 2) – the Defendant – Kombana was restrained from transferring Plot No. 3715 & 3717 (Original No. 663/13/MN). Indeed, the original numbers of the Plot is 633/III/MN. Mtwapa beacons. Hence the one in the Court order was 633/13/III/MN sub-divided into 16 parts. She stated that she had bought the two (2) plots – No. 3715 and 3717 – from Kenny, though she had not had the Sale Agreement. She referred to Plaintiff Exhibit No. 10, the Court Order of 23rd April, 2003. The Plot Reference Number had been the order in respect of Plot Nos. 3715 and 3717 (Original No. 633/13/III/MN). She testified that she had sued the Defendant, Kombana BintiSalim Khamis Kombo. She said she had seen the documents and had observed that, at that time, the Defendant had not been the registered owner of the suit plots, notwithstanding that there had been a Court order.
30. PW - 1 was referred to the contents of Paragraph 4 of her Witness Statement and stated that the Plot Number had been alienated from 633/III/MN. She explained that the Plot had originally belonged to Kombana BintiSalim Kombo. From the pleadings filed in the High Court, the Defendant had been described with three names, whereas in the Chief Magistrate's Court she had been described with four names. She emphasized that there had therefore been discrepancies in the manner in which the Defendant's names had been recorded across the two courts.
31. She testified that she had been evicted from the Plot in December 2011 by Francis Komba Nzai. She stated that it had been a permanent two-bedroomed house, which she had constructed herself, although she had built it gradually and had therefore never kept any receipts. She confirmed that the photographs she had produced bore no dates. She explained that it had been her children, neighbors,



and relatives who had taken the photographs. She clarified that the persons who had taken the photographs had not been witnesses in the matter.

B. Re – examination of PW - 1 by Mr. Jengo Advocate.

32. PW - 1 testified that she had filed the civil case CMCC No. 1647 of 2003, which had subsequently been transferred to the High Court. She was referred to the letter dated 19th February, 2003, and explained that by that time Kenny had already been deceased. She stated that the Chief had confirmed that the payment had already been made earlier.
33. She was referred to the Court Orders of 11th April, 2003 and 23rd April, 2003. She stated that the original parcel was Plot No. 633/13/III/MN had been sub - divided into sixteen portions, including Plot Nos. 3715 and 3717. She was referred to the Sale Agreement and noted that none of the parties, including Kombana, had been called to dispute the contents of the Agreement. She explained that the Agreement had referred to two plots and had specified their sizes as 55 feet and 75 feet respectively. She further testified that when the orders had been registered, there had been no confirmation of the land being referred to. She stated that the first transfer had been from Kombana to Francis Kombo Nzai, and that there had been a Court Order to that effect.
34. The Plaintiff marked her case closed on 7th October, 2024 through her Counsel, Mr. Jengo Advocate.

V. The 2nd Defendant's case

35. The 2nd Defendant responded to the Plaintiff's claim through a statement of defence where it averred that:
 - a. The 2nd Defendant denied each and every allegation contained in the further amended plaint as if the same was herein set out seriatim and verbatim traversed save for what was herein expressly admitted to them.
 - b. The 2nd Defendant stated that they were not privy and denied the contents of Paragraph 3 of the further Amended Plaint, and the Plaintiff was put to strict proof thereof.
 - c. The 2nd Defendant stated that they were not privy to the contents of Paragraph 4 of the further Amended Plaint, and the Plaintiff was put to strict proof thereof.
 - d. The 2nd Defendant stated that they were not privy to the contents of the transaction as stated at Paragraphs 5 and 6 of the further Amended Plaint, and the Plaintiff was put to strict proof thereof.
 - e. The 2nd Defendant stated that what was in their records was that the Plaintiff had recorded a caveat dated 17th January, 2003 claiming purchaser's interest.
 - f. In response to Paragraphs 7 and 8 of the further Amended Plaint, the 2nd Defendant stated that their office had received a court order dated 9th April, 2003, which was registered on 14th April, 2003.
 - g. The 2nd Defendant denied the averments as stated by the Plaintiff at Paragraph 9 of the further Amended Plaint, and the Plaintiff was put to strict proof thereof.
 - h. In the alternative and without prejudice to the foregoing, if the Plaintiff stated that the transactions and/or entries made were a mistake, then the 2nd Defendant stated that it was as a result of the other Defendants misrepresenting and/or misguiding the office of the 2nd Defendant.



- i. In reply to paragraph 10 of the further Amended Plaintiff, the 2nd Defendant denied the same, together with the particulars of fraud and/or illegality enumerated therein from (a) to (e), and further stated that they had had no knowledge whatsoever of the existence of fraud, and that the allegations attributed to the 2nd Defendant were in the circumstances misconceived.
 - j. The 2nd Defendant denied and were not privy to the averments at paragraph 12 of the further Amended Plaintiff, and the Plaintiff was put to strict proof thereof.
 - k. The cause of action arose within the jurisdiction of this Honourable Court.
 - l. For the foregoing reasons, the 2nd Defendant stated that the reliefs sought by the Plaintiff were neither available nor merited.
36. The 2nd Defendant prayed that the Plaintiff's suit be dismissed as against them with costs.
37. On 4th July, 2022, the 2nd Defendant called their first witness who testified as follows: -

A. Examination in Chief of DW - 1 by Ms. Kiti Advocate.

38. DW - 1 was sworn and testified in English language. He identified himself as Samuel Kariuki Mwangi. He was the Land Registrar, Mombasa. He had brought the parcel files for the two (2) parcels of land Plot No. 3715 and 3717. They were both registered and the title were Issued as a result of a sub – division; it meant the land was one Plot No. 539 owned by the 1st Defendant where the registration were - the 1st Entry was 23rd April, 2003 benefit of Francis Kombe Nzai – the 3rd Defendant.
39. DW - 1 told the court that he got the benefit of perusing the title deed title entries 237 and 238 as per the day of the testimony the current owners were documented as FOX JACOB JAN – 19/20 share and FOX Serah Ndumbu 1/20 share for Plot No. 3715/III/MN Search of 5/7/2012 (0.0392) and MR. FOX JACOB JAN 19/20 share and FOX Serah Ndumbu 1/20 share for official search 5th July, 2022. Plot No. 3717 measuring 0.0392 Ha.
40. DW - 1 stated noted that at the time of the registration the documents were presented 27th January, 2003 and the presented No. 130 and 131 of that day, but the Land Registrar could not register them. This was because there was a caveat registered by Valentine Sapaya – the Plaintiff claiming a purchaser's interest of the two (2) parcels of land. On 14th April, 2003, the Registry received a court order in Civil No. 1647 of 2003 which extended the caveat to year 2003. On 23rd April, 2003, the Land Registrar removed the caveat and the two parcels were registered. On the same day, a court order was received in effect extending the caveat but the same could not be registered as the same had already been overtaken by event. The purpose for the registration of the caveat on the title was to prevent any transaction on the title from taking place. The Caveat was removed as the owner of the land moved Court and obtained the removal of the caveat orders by the Magistrate Court; There were transfer of the properties. There was no entry of the names of Stephen Juma Sapaya to indicate any sale. The only entry were the caveats.

B. Cross examination of DW - 1 by Mr. Jengo Advocate.

41. DW - 1 reiterated that he was not the current Registrar in Mombasa. PW - 1 had gotten the injunctive court order dated 9th April, 2003. It was to be in place for 14 days – 24th April, 2003. By the time of the removal of the caveat, there was a court order and even after the extension of the Court order, still the Registrar on 23rd April, 2003, it was irregular to do that. The Land Registrar agreed that anything done contrary to a court order became a nullity. He affirmed that one could give what he did not have – could not give a bad title that he could not pass. The witness assumed it to be a good title.



B. Clarification from the DW - 1 by the Court.

42. DW - 1 informed Court that the Transfers were done to Mr. Fox Jacob Jan and Fox Serah Ndumba on 3rd December, 2018. The transfer was in the file. The Plaintiff were not in possession of the suit land any more. They used to be but they were evicted.
43. On 7th October, 2024 DW - 1 was recalled and he testified as follows:-

B. Cross examination of DW - 1 by Mr. Oluga Advocate.

44. DW - 1 referred to the original No. CR 9087, being a sub-division of 325 pursuant to several sub-divisions of 539/MN. He stated that there had been shares in Plot Nos. 3715 and 3717, and that Deed No. 633/13/MN had been Issued by the Director of Survey. He testified that a cancellation had been effected and signed by the Director of Survey, and that the transfer had thereafter been made to Francis Kombo Nzai. He explained that the alteration had not been clear as to what had been changed from and to, and he emphasized that the said instrument had not been produced in Court.
45. He referred to the title deed and stated that it had borne several entries made by Francis Kombo Nzai on 23rd April, 2003. Specifically Entry Nos. 234 and 237, by which the property had transitioned to Francis Kombo Nzai. He testified that, by the time of the Court Orders, the property had not been in the name of Kombana BintiSalim Kombo and had therefore not been capable of being implemented. He further stated that, on 14th November, 2012, the property had been in the name of Francis Nzai, and that there had been no Court Order restraining him from transferring it to any other person.
46. He testified that Entries Nos. 232 and 233 had been cancelled owing to the existence of the Court Order. He explained that, thereafter, Entry No. 236 had been made when the Land Registrar, exercising his discretion, had removed the caveat under Section 108 of the *Land Act*. He stated that the Court Orders had thereby been surpassed. He further testified that the Court Order had subsequently been extended, as the previous one had already lapsed after the expiry of fourteen days, pursuant to Order 40 of the Civil Procedure Rules, 2010.

VI. The 4th and 5th Defendant's case

47. The 4th and 5th Defendant called their first witness DW - 2 on 8th October, 2024 who testified that:-

A. Examination in chief of the 4th Defendant by Mr. Oluga Advocate.

48. The 4th Defendant was sworn and testified in the English language. He was called JACOB JAN. He testified that he had been a Dutch national and that he had visited Kenya many times. He explained that he had been married to Serah Fox Ndumbu, who had since become his former wife. He recalled that he had signed a witness statement on 7th August, 2023, which he wished to adopt as his evidence-in-chief. He had further filed the List of Documents dated 27th March, 2023. He confirmed that they were nineteen (19) documents, marked as 4th Defendant Exhibits No. 1 to 19 produced in that order.
49. He was referred to the Sale Agreement dated 5th August, 1989, between the seller, Kenny, and himself. He testified that he sympathized with Ms. Valentine Wanjiku, as she had been misled by Kenny, who had not been representing the mother. He stated that she had been a victim of serious fraud perpetrated by Kenny, who had purported to sell land that had not belonged to him.
50. The witness testified that he had seen the Defence filed by Kombana BintiSalim Kombo on 25th November, 2003 and dated 20th November, 2003. He stated that the mother of Kenny had denied ever selling the property. He emphasized that it had been clear that the original owner had denied selling



any land to any party. He further testified that she had passed away on 25th May, 2005, and that he had never met her as she had died before he had come to Kenya.

51. He testified that he had bought the plot from Mr. Michael Arina Knight. He stated that he had instructed his Advocate to conduct due diligence, and the Advocate had returned with information confirming that the land had been proper for sale. He explained that he had seen the title deed for the land and that an official search had been conducted against the property. He referred to the Certificate of Official Search dated 27th August, 2018. He further testified that he had entered into the Agreement on 29th September, 2018.
52. The witness told that court that, before buying the plot, he had visited the place many times and had found the plots to have been in good order. He stated that there had been a car wash business operating on the land, and that he had allowed them to continue using it. He explained that his wife had advised him that the land should continue being used, as it had not been a good idea to leave it idle. He further testified that the plot had been fenced all around.
53. The witness testified that he had never seen any structure in the form of a house on the property as alleged by the Plaintiff, and that the land had been vacant when he had purchased it. He referred to a letter dated 24th February, 2003 from the Ministry of Lands regarding the removal of a caveat. He stated that he had learnt that the caveat had been removed or lifted, and that the land had thereafter been sold to Michael Arina Knight. He emphasized that Mr. Knight had not been sued, and that he had been surprised by that omission. He further testified that he had also instituted proceedings against the Plaintiff seeking reliefs under his Counterclaim, and that he had suffered significant loss.

B. Cross examination of the 4th Defendant by Ms. Kiti Advocate.

54. He confirmed that he had bought the land from Mr. Michael Arina Knight. He testified that he had engaged an Advocate, who had conducted due diligence and had presented him with clean documents, upon which he had decided to purchase the land. He stated that he had not been aware of any encumbrances on the land, such as pending Court cases. He further testified that Mr. Knight had been very decent, and that the neighbors had been happy with the transaction.

C. Cross examination of the 4th Defendant by Mr. Jengo Advocate.

55. The witness testified that he had first come to Kenya in the year 2016. He stated that Serah Fox Ndumbu and himself had divorced in the year 2018. He explained that the Agreement had been signed on 28th September, 2018, but that he had not been physically present, as he had given his wife a Power of Attorney. He further testified that when the transfer had been signed in December 2018, he had not been in Kenya. He added that he could not recall the number of times he had visited Kenya. He testified that it had been a Land Agent who had identified the land and had informed his Advocate. He stated that they had driven around and had viewed many properties, but that he had seen this particular one several times and had liked it. He confirmed that he had been the one who had purchased the land.
56. He testified that Mr. Mulwa Advocate had never informed him that he had effected a transfer of land from Francis Nzai to Kombana Kombo. He stated that he had been aware that due diligence had involved checking whether there had existed any Court cases pending over the land in which Mr. Mulwa Advocate had been involved, as well as conducting inquiries from the Kilifi Land Office.
57. The witness told the court that had all the information been involved, he would still have bought the land as the cases had been old. He stated that the caveat had been lifted and the land had been sold to Michael Arina Knight, who had thereafter passed a good title to him. He explained that he had conducted a search at the Kilifi Land Offices, which had confirmed that Mr. Michael had held a



good title. He emphasized that, had the title been defective, he would not have purchased the land. He testified that he had trusted the legal system in Kenya and had therefore proceeded to buy the land. He added that he had been aware that, had he been informed of any encumbrances or Court Orders affecting the property, he would not have purchased it, but no one had ever told him of any such Court Order.

58. He testified that he had not been aware that he would have refrained from buying the land had it been the subject matter of a Court case. He stated that it had only been recently that he had been made aware of the Court Order through his Advocate. He explained that he had not been in Kenya at present, and that he had last been in Kenya in the year 2023, when he had visited the land. He referred to the documents marked as the 4th Defendant Exhibits No. 1 to 19 and confirmed that there had been no Power of Attorney included among those documents.

D. Re - examination of the 4th Defendant by Mr. Oluga Advocate.

59. The witness reiterated that Serah had signed the Agreement on his behalf through the Power of Attorney. He stated that he had been asked whether Mr. Mulwa Advocate had also acted for Ms. Kombana Binti. He referred to the Agreement for Sale, specifically at page 7, and explained that his Advocate had been Ms. Nduya Mulwa Advocate, while the Advocates for the 1st Defendant had been M/s. Rukaria Mulwa & Company Advocates, clearly showing that they had been two (2) different law firms. He testified that the case had been filed in the year 2003, and that Mr. Michael Arina Knight had not been a party to the suit. He emphasized that Mr. Mulwa Advocate had been a decent Advocate, who had even assisted him in acquiring an apartment.
60. On 8th October, 2024, the 4th and 5th Defendant through their advocate Mr. Oluga marked their case closed.

VII. Submissions

61. On 8th October, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable Court reserved a date to deliver its Judgement on 5th December, 2025 accordingly.

A. The Written Submissions by the 2nd Defendant

62. The 2nd Defendant through the Attorney General's office and Principal State Counsel Nimwaka K. Muema, filed their written submissions dated 27th November, 2024. M/s. Kiti, the Principal State Counsel submitted that before the Court was the further, further Amended Plaint dated 2nd March, 2023 through which the Plaintiff sought the above stated orders.
63. To counter the same, the Defendants filed their further, further Statement of Defence dated 2nd May, 2023, and a list of documents dated October, 2021 denying the averments contained in the Plaint. The Plaintiff claimed that the late husband, Stephen Juma Sapaya, had bought the suit property from the 1st Defendant through her son, one Mohamed Sheikh Ali Kenny, vide a sale agreement dated 5th August, 1989. However, the sale did not materialize as it was never registered at the offices of the 2nd Defendant and the records did not reflect the same.
64. From the records by the 2nd Defendant, a transfer was registered on 1st January, 2003 from the 1st Defendant to the 3rd Defendant. From the Certificate of Title - C.R 9087 it reflected that the Defendant was the owner/had beneficial interest of the suit property as tenant in common in equal share together with two others. At entry number 234 of the Defendants' list of documents (the Certificate of Title),



the Plaintiff registered a caveat on 20th January, 2003 claiming purchaser's interest against parcel numbers 3715 and 3717.

65. Vide a letter dated 24th February, 2003, the 2nd Defendant notified the Plaintiff that the caveat was going to be removed in terms of Section 57 (6) of the Registration of Titles Act, Cap. 282 (now repealed) once the timelines had lapsed. On 23rd April, 2003, the caveat was removed having not received any orders/restriction, and the suit property was transferred to the 3rd Defendant by the registered proprietor. On 24th April, 2003, an order of extension was brought to the attention of the Defendant. The same could not be registered as the suit property had already been transferred to the 3rd Defendant, thus the order had been overtaken by events.

66. To buttress her point, the Learned Counsel relied on the case of "Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002", Bosire J (as he then was) held that:

"On the basis of the provisions of section 57 of the Registered Titles Act, it was clear that a caveat might be registered only pursuant to a contractual relationship or otherwise. However, it was expressly provided that the interest being claimed must be such as was registrable under the Act."

67. Likewise, the provision of Section 71 (1) of the Land Registered Act No. 3 of 2012 states as follows:-

"A person who-

- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

68. While the provision of Section 73 of the aforementioned Act states as follows:-

- "(1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

69. The timeline of the subsisting order had lapsed and their being a transfer lodged by the 3, a Defendant, the same was registered. In the case of "Julius Mutiga & 16 others v Ministry of Agriculture & 3 others (2020) eKLR" where Korir, J relying on the Court of Appeal decision in "Ernie Campbell & Co Ltd v National Housing Corporation (2019) eKLR" held that where the substratum of the case had ceased to exist and/or had been overtaken by events such a case would no longer be fit for determination. The Judge stated in the Judgment at Paragraphs 17 and 18 thus:-

17. "These provisions superseded the impugned directive Issued by the respondent in 2014. The 3rd interested party was therefore correct that this petition had been overtaken by events and was no longer fit for determination. The impugned directive was no longer in existence and determining its constitutionality had become moot."



18. “Court should not determine moot matters as was held by the Court of Appeal in *Ernie Campbell & Company Limited v National Housing Corporation* (2019) eKLR as follows:
- ‘Further, we noted that the tender was re-advertised on 2nd November 2016 and the appellant submitted its bid. On 2nd February, 2017, the tender was awarded to M/s Endeavours Construction Company Limited. The contract having been awarded to M/s Endeavours Construction Company Limited, the prayers sought in the applicant’s Notice of Motion of 5th February, 2016 were clearly overtaken by events.’”
70. The Plaintiff accused the 1st, 2nd, 3rd & 4th Defendants of committing fraud. Without prejudice, we further submitted that courts had on numerous occasions pronounced on the threshold of proving allegations of fraud. Case in point, this Court sitting at Chuka in “*Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M’Chuka alias Miriungu M’Gichuga) v M’Chabari Kinoro* [2022] eKLR” observed at Paragraph 41:-
- “To succeed in claiming fraud, the Plaintiff not only needed to plead but also particularize it by laying out watertight evidence upon which the Court would make such finding. It was therefore trite law that any allegations of fraud must be pleaded and strictly proved.”
71. The Court of Appeal in “*Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR” held:
- ‘The next and only other Issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:
- “It was 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 was also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it was not allowable to leave fraud to be inferred from the facts.”
72. As regards the standard of proof, this court in the case of “*Kinyanjui Kamau v George Kamau* [2015] eKLR” expressed itself as follows;- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See “*Ndolo v Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in *Criminal Cases*...”
73. It was then the Learned Counsel’s humble submission that the 2nd Defendant conducted his duties in accordance with the laid out procedures as provided under the [land registration Act](#) pertaining to his duties and responsibilities and the Plaintiff has failed to demonstrate a watertight case of fraud on the 2nd Defendant.
74. Further the necessity and essence of undertaking proper due diligence has been emphasized by this Honourable court. It is the Purchaser’s obligation and duty to conduct due diligence and satisfy themselves that they are obtaining good title. From the pleadings filed and during the course of hearing the matter it emerged that the plaintiff entered into a sale agreement with the son of the 1st Defendant in their defence filed before the court denied ever having given authority to the son to conduct any transaction, no power of attorney has been produced to rebut this allegation. The provision of Section



48 of the *Land Registration Act*, No. 3 of 2012 provides, “(1) Except as provided in subsection (3), no instrument executed by any person as agent for any other person shall be accepted by the Registrar unless the person executing it was authorized in that behalf by a power of attorney executed and verified in accordance with section 45.”

75. For instance, this court sitting at Nairobi in the case of:- “Mohamed Shahanaz Butt & another v Kenya Revenue Authority & 2 others [2020] eKLR” whilst dismissing an Application by the Plaintiffs/Applicants on the grounds that they did not properly conduct due diligence before purchasing property remarked that:-

“This meant that the Plaintiffs/Applicants ought to have done due diligence before purchasing the suit property..... I reiterate that failure by the Plaintiffs/Applicants to do due diligence before purchasing this suit property has put them in this position.”

76. The Plaintiff's witness number two one, Mr. Harun Njoka Irware in his statement casts doubt as to the conduct of Mohamed Sheikh Ali Kenny in his dealings in selling the properties, he states at paragraph 3, “Mohamed sheikh Ali Kenny the vendor who sold us the plots had some bad dealings as I was also a victim of his bad dealings. There was a time I went to Europe when I was back in the country I found out that he had sold a piece of my plot to another person.”
77. The Learned Counsel submitted that from the evidence brought before this Court, the Plaintiff could not claim any allegations of fraud, misrepresentation or collusion as against the 2nd Defendant, the actions taken by the land registrar in all the transactions were procedural, regular, lawful and within their statutory mandate. For the reasons above, they urged this Court to dismiss the suit with costs to the Defendants.

B. The written submissions of the 4th and 5th Defendants

78. The 4th and 5th Defendants through the Law firm of Messrs. Oluga & Company Advocates filed their written submissions dated 22nd November, 2024. Mr. Oluga Advocate submitted that the suit was originally filed in the Magistrates Court on 9th April 2003 as Civil Suit No. 1647 of 2003. The 1st Defendant herein was the sole Defendant in the case at the time of its original filing. Contemporaneously with the Plaint, the Plaintiff filed an application dated 9th April 2003 seeking an order of injunction to restrain the 1st Defendant from transferring the suit properties identified as Plot Nos. 3715 and 3717 to third parties. On 9th April 2003, the magistrate granted interim orders restraining the 1st Defendant from transferring the suit properties to third parties.
79. On 17th November 2003, the Plaintiff filed an Amended Plaint dated 15th November 2003. The case was subsequently transferred to this Court and assigned its current number, being ELC No. 165 of 2014. The Plaintiff alleged that by a sale agreement dated 5th August 1989, her late husband, Stephen Juma Sapaya, had bought two Plots namely numbers 3715 and 3717 from the 1st Defendant. The Plaintiff alleged that the sale was conducted by the 1st Defendant's son, Mohamed Sheikh Ali Kenny, as an authorized agent of the 1st Defendant with implied and/or express authority.
80. The Plaintiff further alleged that in January 2003, the 1st Defendant purportedly sold the parcel of land to a third party and that the 1st Defendant lacked authority to transact as the Plaintiff was the legal owner of the suit properties. The Plaintiff averred that the subsequent sale to the third party was illegal as she had paid the entire purchase price and had been occupying the suit property for 13 years. The Plaintiff prayed for the following orders:-



- a. Permanent injunction restraining the Defendant from transferring the plots to any other person or interfering with them.
 - b. An order of the Court directing the Registrar of Titles to extend the caveat already in place.
 - c. A declaration that the Plaintiff was the bona fide purchaser for value of the plots.
 - d. A mandatory injunction compelling the Defendant to execute the transfer in favour of the Plaintiff for the plots.
 - e. General damages and costs.
 - f. In the alternative, a decree that the Plaintiff had obtained the plots through adverse possession.
81. In the Magistrates Court, the 1st Defendant, Kombana Binti Salim Khamis Kombo, who was then the only Defendant, filed a Statement of Defence dated 20th November 2003 through the Law firm of Messrs. Rukaria, Mulwa & Co. Advocates. In her said Statement of Defence, the 1st Defendant denied the Plaintiff's allegations. She specifically denied that she had sold the suit property to the Plaintiff and put the Plaintiff to strict proof of her allegations.
82. The 1st Defendant further averred that her son, Mohamed Sheikh Ali Kenny, had no authority, express or implied, to deal with the plots and was not her agent. With those denials, the 1st Defendant prayed that the Plaintiff's suit be dismissed with costs. While the suit was still in the Magistrates Court, in December 2004, the Plaintiff filed a Further Amended Plaintiff dated 16th December 2004 in which she introduced the Registrar of Titles as the 2nd Defendant and Francis Kombe Nzai as the 3rd Defendant.
83. The Plaintiff pleaded in the Further Amended Plaintiff that on 9th April 2003, the Magistrates Court had Issued an order of injunction and caveat restraining the 1st Defendant from transferring the plots to a third party. That during the pendency of the caveat and the order of injunction, the 2nd Defendant Issued a Certificate of Title to the 3rd Defendant. The Plaintiff averred that the issuance of the titles to the 3rd Defendant by the 2nd Defendant at the instigation of the 1st Defendant was fraudulent, mischievous, and an action in contempt of Court. She sought a declaration that the transfer of the land to the 3rd Defendant was a nullity and void ab initio.
84. On 17th February 2005, the 3rd Defendant filed his Statement of Defence and Counter - claim dated 3rd February 2005. In his Defence, he denied the Plaintiff's allegations, pleaded that he was the legal owner of the suit properties, and Counter - Claimed for an eviction order against the Plaintiff. The file then moved to this Court. On 4th July 2022, when the Land Registrar was testifying, he revealed that the suit properties had exchanged hands and that the 4th and 5th Defendants were the current owners. It was in light of that revelation that the 4th and 5th Defendants were added to the suit pursuant to a ruling delivered on 10th March 2023 which granted the Plaintiff leave to further amend the Plaintiff.
85. Subsequently, the Plaintiff filed a Further Further Amended Plaintiff dated 29th March 2023. In addition to what had been previously pleaded, she introduced new facts, namely, that while the suit was subsisting, on 23rd April 2003, the Law firm of Messrs. Rukaria Mulwa & Co. Advocates, then acting for the 1st Defendant, transferred the suit property to the 3rd Defendant despite injunctive orders being in place. That the suit properties were later transferred from the 3rd Defendant to the 4th and 5th Defendants. She alleged that the 4th and 5th Defendants' title was obtained pendente lite and in contempt of Court orders and that the titles must fall under the principle of *les pendens*.
86. The 4th and 5th Defendants filed their Defence and Counter - Claim dated 10th May 2023 in which they denied the Plaintiff's claim. In their Counter - Claim, they sought, 'inter alia', a declaration that



they were the bona fide and lawful owners of the suit properties. With the above introduction, the Defendants addressed the Honourable Court on the Issues for determination.

87. The Learned Counsel relied on the following three (3) Issues for determination. Firstly, on whether the Plaintiff was a bona fide purchaser for value, the Learned Counsel submitted that the basis of the Plaintiff's claim was the agreement for sale dated 5th August 1989 between Stephen Sapaya (the Plaintiff's deceased husband) and M.S.A Kenny (the 1st Defendant's son). However, the Plaintiff changed the face of her claim in her Further Further Amended Plaint to include the doctrine of *les pendens* and sought to be awarded the suit properties on the basis that the 1st Defendant had transferred the same to the 3rd Defendant in violation of an existing court order. The Defendants submitted that violation of an interlocutory order of injunction could not give the Plaintiff rights over the suit property.
88. The Plaintiff appeared to have operated under the misguided notion that if the Court found that the transfer of the suit properties was in violation of the court order, such a finding would entitle her to the suit properties. That was a wrong assumption. If the Court had concluded that the 1st Defendant violated the court order by transferring the suit properties to the 3rd Defendant, the consequence would have been to revoke the transfer in favour of the 3rd Defendant and revert ownership of the suit properties to the 1st Defendant, not to the Plaintiff. It appeared that the Plaintiff had lost the main basis of her claim—the agreement for sale—and had focused her attention on the alleged violation of the court order which did not entitle her to the suit properties.
89. The Defendants then addressed the question of whether the Plaintiff was a bona fide purchaser for value. It was their humble submission that the agreement for sale dated 5th August 1989 did not and could not give the Plaintiff any rights over the suit properties.
90. First, there was no dispute that the 1st Defendant did not sign the agreement for sale despite being the registered owner of the suit properties as at 5th August 1989 when the agreement came into existence. Instead, the agreement for sale was signed by the 1st Defendant's son.
91. The question that the Defendants urged the Court to address was whether the 1st Defendant's son had authority, express or implied, to enter into the agreement for sale on behalf of the 1st Defendant. In her Statement of Defence, the 1st Defendant had pleaded:
- “The Defendant specifically denied selling the suit property to the Plaintiff and/or transferring the said plots to the Plaintiff and put the Plaintiff to strict proof thereof.”
92. That averment left no doubt that the 1st Defendant had not sold the suit properties to the Plaintiff and therefore had not authorized her son to sign the agreement for sale on her behalf. There was no evidence that M.S.A Kenny, the person who signed the agreement for sale, had the express or implied authority of the 1st Defendant to do so. He was not the 1st Defendant's duly appointed attorney. There was no duly registered power of attorney at all. The Plaintiff did not produce any form of authority whatsoever to demonstrate that Kenny was authorized to sign the agreement for sale on behalf of the 1st Defendant. The mere fact that he was the 1st Defendant's son did not clothe him with authority, capacity, or rights to sign the agreement for sale.
93. Therefore, the agreement for sale was executed by a person who did not have the 1st Defendant's authority to do so. The same was illegal, unlawful, and unenforceable for having been signed by a person who was not authorized by the 1st Defendant and therefore had no capacity to enter into the contract for sale of the suit properties. The Plaintiff and her late husband were defrauded by a person who did not have authority to sell the suit properties.



94. If the Court had upheld and allowed the agreement for sale to stand, it would have set a dangerous precedent where children entered into agreements to sell their parents' land without the parents' knowledge or authority. The mere fact that one is a child does not give the person any right to sell their parent's land.
95. The second reason why the agreement for sale did not and could not confer any legal and enforceable rights to the Plaintiff was because the purchase price was not paid to the 1st Defendant. The agreement clearly showed that the purchase price was received by Kenny and not the 1st Defendant.
96. Even the balance of the purchase price of Kenya Shillings Seventy Thousand (Kshs.70,000.00/=) was paid by the Plaintiff, not to the 1st Defendant, but to S.M.A Kenny, as evidenced by the comments embossed on the second page of the agreement for sale on 8th April 1993. Indeed, the letter dated 19th February 2003 authored by the Chief of Mtwapa Location and which was produced in court by the Plaintiff, it is confirmed that it was M.S.A Kenny who received the balance of the purchase price as follows:

“I summoned Mr. Kenny to my office. He came and said that he did that (allowed a third party to fence the plot) because valentine (the Plaintiff) had not paid for the second plot. They (the Plaintiff and Kenny) agreed and Valentine paid Mr. Kenny seventy thousand for the second plot.”

97. Payment of purchase price (consideration) was a key legal requirement in land purchase transactions. If the consideration was not paid, the contract was null and void. In this case, the 1st Defendant, who was the registered owner of the properties at the material time, did not receive the purchase price at all. In fact, even S.M.A Kenny was not paid the entire purchase price. The purchase price was for a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00/=). The Plaintiff's late husband paid a deposit of a sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/=) leaving a balance of a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) which was to be paid at a sum of Kenya Shillings One Thousand (Kshs. 1,000.00/=) per month. The Plaintiff's husband did not pay the balance, either monthly or at all. Instead, it was the Plaintiff who paid a lumpsum amount of Kenya Shillings Seventy Thousand (Kshs.70,000.00/=) on 8th April 1993, four (4) years after the agreement for sale had been signed. The total amount paid was a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) and not the agreed price of a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00/=). A sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/=) was NOT paid.
98. Other than the fact that the payments were made to S.M.A Kenny and not the 1st Defendant who was the owner of the suit properties, even those payments that were made did not comply with the terms of the agreement for sale because the entire purchase price/consideration was not paid.
99. According to the Learned Counsel, payment of consideration is a key requirement of a contract for sale of land. Where the consideration is not paid as required by the agreement, then the agreement cannot be enforced. We rely on the case of “Kihuba Holdings Limited v Charo Karisa Ngulu [2021] eKLR” where the court faulted the purchaser for failing to complete paying the purchase price as follows: -

“22. From the foregoing, I am not in doubt that it was actually the Plaintiff and not the Defendant who breached the contract by failing to provide the balance of the purchase price within the completion period of 90 days. The Defendant stated that he proceeded to repossess his title deed when the money was not available and I cannot blame him for doing so, for the sale agreement did



provide that if the balance was not paid within the completion period, then the agreement would be declared null and void...

24. I do not see why the Plaintiff is alleging that the Defendant breached the contract. It is the Plaintiff who failed to make available the balance of the purchase price within time and she cannot complain.”

100. The other reason why the agreement for sale cannot give the Plaintiff any right over the suit property was because the same was not signed by the purchaser himself. The first page of the Agreement of Sale contained two signatures in the space provided for the vendor to sign in the presence of a witness. Those two signatures were for the Vendor and his witness. On the second page, in the space provided for the purchaser to sign, there was no signature of either the purchaser or any witness. It was all blank.
101. The provision of Section 3(3) of the Law of Contract Act, Cap. 23 required contracts for disposition of land to be signed by all parties and witnessed. The agreement did not comply. Courts had held that unsigned contracts were nullities. The Plaintiff's husband had not signed, nor had his witness. The agreement for sale indicated that the 1st Defendant was to sign consent forms and the transfer later. She did not sign them, confirming she had not authorized Kenny to sell the properties. The agreement referred to Plot No. 633/III/M.N, not the suit properties 3717 and 3715. No nexus was shown between them. No survey evidence was produced. The Plaintiff failed to prove why she picked those two plots out of 16 sub - divisions. Another reason was that the Plaintiff did not have capacity to take over the agreement from her late husband before Grant Letters of Administration were Issued. She purported to assume rights illegally before succession was completed.
102. The Learned Counsel contended that they had given enough legal reasons to demonstrate that the Plaintiff cannot enforce or derive any rights from the agreement for sale and is therefore not entitled to the suit properties. In summary, those reasons are as follows:
- i. The 1st Defendant who is the owner of the suit properties did not sign the agreement for sale. The person who signed the agreement for sale, one S.M.A Kenny, did not have legal authority to enter into the contract. The 1st Defendant categorically denied that she sold the suit properties to the Plaintiff.
 - ii. The agreement for sale is unenforceable because it did not comply with Section 3(3) of the Law of Contract Act for the reason that it was not signed by the purchaser and was not witnessed.
 - iii. The Plaintiff purported to assume and take over rights and obligations of her husband ensuing from the agreement for sale before Grant of Letters of Administration of the Estate of the Plaintiff's deceased husband had been Issued. The Plaintiff had no legal rights/ capacity to take over the agreement before the succession was done.
 - iv. There was breach of the agreement for sale because the purchase price was not paid in accordance with the terms thereof and a sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/=) had never been paid to date. The contract was unenforceable for want of consideration.
 - v. The agreement for sale referred to Plot No. 663/III/N.M which has no connection with the suit properties L.R No. 3715 and L.R No. 3717. There was an attempt to allege that the two suit properties were subdivisions of Plot No. 633/III/M.N but no single evidence was tendered to prove the said allegation. There was totally no nexus shown between Plot No. 663/III/M.N which was purchased by the Plaintiff's husband and the two suit properties.



103. The Learned Counsel asserted that in light of the foregoing reasons, they urged the Court to find that the Plaintiff did not purchase the suit properties and had no rights or claims over them. Another important legal point that this court must bear in mind is that the Plaintiff's case is seeking to enforce an agreement against the 1st Defendant therein, Kombana Binti Salim Khamis Kombo. The Plaintiff is asking this court to make a finding and declare that she was a bona fide purchaser of the suit properties from the 1st Defendant. That prayer (prayer c in the plaint) and the averments relating thereto, including the allegation that the Plaintiff bought the suit properties from the 1st Defendant were legally unattainable because the 1st Defendant is dead.
104. In the ruling of this court delivered on 10th March 2023, Justice L.L Naikuni held as follows:-
- “59. The occurrence of the death of the 1st Defendant is not disputed by the Plaintiff. Evidently, from the record, there has been no application done to substitute the deceased-1st Defendant. Thus, for this very reason and based on the principles and based on the principles and operation of law, it is my considered opinion that the suit against the 1st Defendant has abated.” [underlining ours]
105. There is an express ruling of this court that the suit against the 1st Defendant had abated. The ruling had not been appealed against and was binding. Legally speaking, all allegations against the 1st Defendant and the prayers seeking to enforce the agreement for sale and to recover the suit properties from the 1st Defendant were dead. The Plaintiff's allegations that the 1st Defendant sold the suit property to her and her prayer seeking to be declared as the bona fide purchaser of the suit properties cannot be granted since the suit against the 1st Defendant, who allegedly sold the suit properties to the Plaintiff, had abated. Any and all Issues revolving around the agreement for sale dated 5th August 1989 which the Plaintiff relies on to claim rights over the suit properties cannot be determined in the absence the 1st Defendant against whom the suit has abated.
106. All the remaining Defendants, including the 4th and 5th Defendants, were subsequent purchasers who bought from the 1st Defendant. Since the suit against the 1st Defendant abated, the subsequent purchasers' titles could not be impugned in the absence of a suit against the original owner, the 1st Defendant. Put differently, the sale and transfer of the suit properties to Francis Komba Nzai, the 3rd Defendant which was done by the 1st Defendant cannot be nullified or impugned in the absence of a proper suit against the 1st Defendant who sold the suit properties to the 3rd Defendant. Ultimately, the transfer by the 1st Defendant to the 3rd Defendant cannot be declared a nullity and so is the transfer from the 3rd Defendant to MICHAEL ARINA KNIGHT and the ultimate transfer from the said MICHAEL ARINA KNIGHT to the 4th and 5th Defendants.
107. Prayer (e) in the Plaint sought an order to compel the 4th and 5th Defendants to execute a transfer in favor of the Plaintiff. That prayer could not be granted because: -
- i. The 4th and 5th Defendants were not parties to the agreement of sale executed by the Plaintiff's husband. They could not be ordered to transfer the suit properties to the Plaintiff as doing so would amount to enforcing the agreement of sale which the 4th and 5th Defendants were not parties to.
 - ii. The 1st Defendant who is alleged to have sold the suit properties to the Plaintiff's husband is dead and the suit against her has abated. Ordering transfer of the suit property amounts to specific performance of the agreement of sale against the 1st Defendant who is dead.



- iii. The 4th and 5th Defendants bought the suit properties from MICHAEL ARINA KNIGHT who was not a party to this suit and whose title and ownership has not been challenged in this suit. Since the title of the person who sold the suit properties to the 4th and 5th Defendants had not been questioned, it naturally follows that the title of the 4th and 5th Defendants who were innocent purchasers for value could not be impugned and must remain intact. Perhaps, the Plaintiff made a tactical blunder by failing to join MICHAEL ARINA KNIGHT to this suit since he was the person who sold the suit properties to the 4th and 5th Defendants.
108. According to the Learned Counsel, one more very important Issue which they brought to this court's attention was the fact that Plot No. 633/III/M.N which the Plaintiff alleged to have purchased was listed in the Certificate of Confirmation of Grant of the estate of the Plaintiff's late husband dated 23rd June 1994 and the Plaintiff was listed as the beneficiary thereof. The law is clear that once a certificate of confirmation of grant in which a property and beneficiary thereof are identified, the next step is to enforce the Confirmation of Grant by extracting and registering a vesting order. If Plot No. 633/III/M.N genuinely belonged to the deceased, the Plaintiff ought to have enforced the Certificate of Confirmation of Grant. This court was an ELC Court and not a succession court. Therefore, this court has no jurisdiction to distribute and award to the Plaintiff Plot No. 633/III/MN because the same was already listed in the Certificate of Confirmation of Grant dated 23rd June 1994 as part of the estate of the deceased and the same could only be enforced through the succession court. For the above reasons, the Learned Counsel submitted that the Plaintiff was not entitled to the prayers sought in the Plaintiff.
109. Secondly, on whether the transfer of the suit properties from the 1st Defendant to the 3rd Defendant and the subsequent transfer to the 4th and 5th Defendants was a nullity and void abinitio. The Learned Counsel submitted that in the Amended Plaintiff, the Further Amended Plaintiff and Further Further Amended Plaintiff, the Plaintiff attacks the Defendants' title on the basis that the 1st Defendant transferred the same to the 3rd Defendants while there existed a caveat and the court order Issued on 11th April 2003 (hereinafter referred to as "the court order").
110. The Plaintiff's allegation that the 1st Defendant transferred the suit properties to the 3rd Defendant in violation of the court order and an existing caveat had no basis in law for the reasons they would address shortly in the subsequent paragraphs.
111. First, they had shown that the complaint against the 1st Defendant and whether the 1st Defendant violated an existing court order and caveat could not be addressed or determined by this court because the 1st Defendant was dead and the suit against her had been declared as abated vide the ruling of this court delivered by Justice L.L Naikuni on 10th March 2023. That meant that the question of whether the 1st Defendant transferred the suit properties to the 3rd Defendant in violation of the court order and caveat could not be touched, addressed and determined by this court as that Issue suffered legal death when the suit against the 1st Defendant abated.
112. However, even if the Issue of alleged violation of the court order and caveat by the 1st Defendant were alive and available for determination by this court on merits, it was the Counsel's submission that the 1st Defendant never violated the court order and caveat. The court order which the 1st Defendant was alleged to have violated when she transferred the suit properties to the 3rd Defendant was the order Issued by Chief Magistrate on 9th April 2023. The relevant part of the order provided as follows:-

“That Defendant by himself, agent, servants or otherwise are (sic) hereby restrained by induction (sic) from transferring plot Number 633/13/III/MN to any other person for



fourteen (14) days. THAT the Registrar of Titles to extend the caveat registered against Plot Number 3715 and 3717 for fourteen (14) days.”

113. At the time the said order was Issued on 9th April 2003, the only Defendant to the case was Kombana BintiSalim Khamis Kombo, the 1st Defendant herein. It followed that the order was directed at one specific person. It was only Kombana BintiSalim Khamis Kombo - the 1st Defendant herein who was restrained by the said order from transferring the suit properties. It was not the Land Registrar or any other Defendants in this case or any other person.
114. There was an affidavit of service of the said order sworn by Arthur Ochieng on 9th October 2003 (listed as document No. 15 in the Plaintiff's Bundle of Documents dated 22nd March 2019 and filed on 25th March 2019). They had attached the said affidavit to these submissions for quick reference although the same was part of the Plaintiff's documents which were produced in court as exhibits. A quick reading of the said affidavit of service clearly shows that the 1st Defendant was not served with the order Issued on 9th April 2003. The process server averred as follows on oath:
- “2. That on 14th April 2003 I received instructions to serve the order dated 9th April 2003 upon the Registrar of Titles. 3. That on the same day I proceeded to the Lands Office whereby I lodged the order in triplicate to be registered in a day book No. 106.” (underlining ours)
115. A reading of the entire affidavit of service never revealed that the 1st Defendant was served. Paragraph 2 of the affidavit of service clearly shows that the person that the process server was instructed to serve the Registrar of Titles, not the 1st Defendant. In fact, the 1st Defendant was not mentioned in the whole affidavit of service. The Plaintiff focused the court order on the Land Registrar and even had it registered on the Registrar. However, it was not the Land Registrar who had been restrained by the court order. The 1st Defendant was the one who had been restrained yet she was not served with the court order. There was no affidavit of service in the court record showing that the 1st Defendant was served with the court order.
116. Having failed to serve the court order upon the 1st Defendant, the Plaintiff could not claim that the 1st Defendant violated the court order when she transferred the suit properties to the 3rd Defendant. The legal option available to redress violation of a court order was to file an application for contempt of court order against the perpetrator. In the instant case, the Plaintiff never filed any application for contempt. The Plaintiff did not file an application for contempt because she was aware that she did not serve the 1st Defendant with court order. Instead of filing an application for contempt of court as a way of redressing the alleged violation of the court order, the Plaintiff amended her Plaint so as to seek revocation of the titles Issued to the people whom the 1st Defendant had transferred the said properties to.
117. They did not understand the Plaintiff's obsession with the allegation that the 1st Defendant transferred the suit properties in violation of the court order. The consequence of violating a court order was punishment for contempt of court. In this case, the Counsel noted that the Plaintiff was under the misguided notion that the court order gave her ownership rights over the suit properties. The Plaintiff was behaving as if the court order made by the Magistrate on 9th April 2003 made the Plaintiff the owner of the suit properties. That was not the case. The court order was made on interim basis to preserve the suit properties pending hearing and determination of this case. The Plaintiff ought to have served it on the 1st Defendant which she did not. She was the author of her own misfortune for failing to serve the person against whom the order was directed. And, if there was violation of the court order, the Plaintiff ought to have filed an application for contempt of court. She did not. The said court order



was made on interim basis but the Plaintiff is still under obligation to prove her case at the full trial. She has miserably failed to prove her case. The Plaintiff's whole case was pegged on the agreement for sale dated 5th August 1989 which they had already demonstrated could not give the Plaintiff any rights over the suit properties for the reasons discussed hereinabove.

118. The 1st Defendant did not sell the suit properties to the Plaintiff. In fact, the Plaintiff had no basis at all to seek the court orders of 9th April 2003 in the first place because she had no rights whatsoever over the suit properties.
119. In short that they were saying was that even if this court were to find that the 1st Defendant transferred the suit properties to the 3rd Defendant in violation of the court order Issued on 9th April 2003, the court would punish the 1st Defendant for contempt of court, not award the suit properties to the Plaintiff. Secondly, if this court were to find that the transfer of the suit properties from the 1st Defendant to the 3rd Defendant was a nullity for having been done in violation of the court order, what this court would do is to revert the suit properties to the 1st Defendant and not award them to the Plaintiff. Put differently, a finding that the transfer was in violation of the court order would not make the Plaintiff the owner of the suit properties. The Plaintiff must be disabused of the notion that the alleged violation of the court order would make her the owner of the suit properties.
120. Indeed, they had already shown that the question of whether the 1st Defendant violated the court order could not be determined by this court because the 1st Defendant was dead and this court had already ruled that the suit against the 1st Defendant abated. Further, the Plaintiff only served the Land Registrar with the court order as clearly pleaded in the affidavit of service of the Plaintiff's own process server and not the 1st Defendant who was the one who was restrained by the order.
121. On the Plaintiff's allegation that the 1st Defendant transferred the suit properties to the 3rd Defendant against an existing caveat, the same arguments would apply. The 1st Defendant was the one who was alleged to have breached the caveat by transferring the suit properties to the 3rd Defendant. The 1st Defendant was dead and this court already declared the suit against her as abated. The Issue of breach of caveat was therefore not available for determination.
122. At this juncture, they wished to bring a very important point of law to the Court's attention. The question of whether the transfer of the suit properties to the 3rd Defendant should be revoked or quashed is res judicata having been determined in the case of "Mombasa High Court Misc. Application No. 650 of 2003" Republic v Land Registrar Mombasa, Mr. J.B Kiriago & 2 others" (hereinafter referred to as "HC MISC. No. 165 of 2003"). For full understanding and appreciation, they attached to these submissions the Judgment delivered by Justice J. Khaminwa on 26th October 2004 in HC MISC. No. 165 of 2003. The Plaintiff deliberately concealed Justice Khaminwa's Judgment from this court yet she was represented in the said case by her present advocates.
123. In HC MISC. No. 165 of 2003, the Plaintiff herein sought judicial review orders of certiorari to quash the granting of the title CR. 36445 and CR. 36443 Issued on 23rd April 2003 transferring the suit properties from the 1st Defendant to the 3rd Defendant herein. The basis upon which the Plaintiff sought to quash the 3rd Defendant's title to the suit properties were the same reasons pleaded in this case, to wit:
 - i. That the registration in favour of the 3rd Defendant was in violation of the court order Issued on 9th April 2003.
 - ii. That the registration in favour of the 3rd Defendant was done in violation of an existing caveat.



124. The Plaintiff contended in HC MISC. No. 165 of 2003 that the Land Registrar, the 2nd Defendant herein, removed the caveat when the court order was in existence and Issued title to the 3rd Defendant before the suit could be determined. Those were the same Issues that the Plaintiff had raised in this case. The Plaintiff was relitigating the same Issue she had previously raised before Justice Khaminwa in HC MISC. No. 165 of 2003. In her judgment, Justice Khaminwa did not find any fault with the Land Registrar's actions. The Learned Judge held as follows:-
- “ And mainly I have not found any ground to find fault with the manner the Registrar applied his powers under them Registration of Titles Act Sec. 57 rule 6 as to removal of a caveat. No particular fraud have been shown against him. For these reasons, I dismiss the application with costs.”
125. On the Issue of breach of the court order, Justice Khaminwa held that the Plaintiff ought to have pursued contempt of court:
- “...Further more, the applicant had an alternative procedure of punishing for contempt of court orders.”
126. It is therefore clear that Justice Khaminwa had already determined the question of whether the transfer of the suit properties from the 1st Defendant to the 3rd Defendant was in violation of the court order and the caveat, which she answered in the negative. Justice Khaminwa ruled that the 3rd Defendant's titles to the suit properties cannot be quashed because the Registrar of Titles (2nd Defendant) did not commit any fraud and was not at fault by lifting the caveat and registering the suit properties in the name of the 3rd Defendant. Justice Khaminwa also rejected the Plaintiff's invitation to quash the 3rd Defendant's title on the allegation that the same were transferred against the court order and ruled that the Plaintiff had remedy in contempt of court.
127. The 3rd Defendant's title could not, therefore, be impugned on the same grounds that Justice Khaminwa rejected. The Judgment by Justice Khaminwa remained in force to date and had not been overturned. In fact, the Plaintiff did not appeal. Instead of appealing, the Plaintiff amended her Pleint and pleaded the same Issues that Justice Khaminwa had determined. The Plaintiff was having a second bite at the cherry and trying her luck a second time. It was unacceptable.
128. The challenge mounted by the Plaintiff against the Defendants' title to the suit property on the basis that the same were Issued in violation of an existing court order and caveat was res judicata. It was not available for this court to determine because the same had been determined by Justice Khaminwa. The Respondents in HC MISC. No. 165 of 2003 were the same ones listed as 1st, 2nd and 3rd Defendants in this case. Therefore the parties in HC MISC. No. 165 of 2003 were the same ones in this suit, save for the belated addition of the 4th and 5th Defendants.
129. It was now well settled that a court of law could not determine an Issue that had previously been determined by a competent court as between the same parties. The Plaintiff could not run away from the binding Judgment by Justice Khaminwa. The Plaintiff was under obligation to disclose the said Judgment but she deliberately concealed the Judgment from this court so as to have a second bite at the cherry.
130. The Plaintiff produced a letter by Registrar of Titles dated 24th February 2003 (listed as Document No. 5 in the Plaintiff's List of Documents dated 22nd March 2019). In that letter, the Registrar gave the Plaintiff notice to remove the caveat which was finally removed and Justice Khaminwa upheld the removal. The Plaintiff could not therefore allege that the transfer from the 1st Defendant to the 3rd



Defendant was done in breach of an existing caveat. The caveat was removed after the Plaintiff had been given a notice, which the Plaintiff was the one who had brought to court.

131. Before they concluded, there was an attempt by the Plaintiff to impugn the 4th and 5th Defendants' title on the basis that the same were transferred by Mr. Mulwa Advocate who was the one representing the 1st Defendant in this case. The Learned Counsel's response on that Issue was two-fold:
- a. First, it was not true that the transfer in favour of the 4th and 5th Defendants was done by the same law firm that was representing the 1st Defendant in this case. The 1st Defendant was represented in this case by a law firm Messrs. Rukaria, Mulwa & Co. Advocates while the transfer in favour of the 4th and 5th Defendants was done by Law firm of Messrs. Mulwa Ndunya & Co. Advocates (see page 27 of the 4th and 5th Defendants' Bundle of Documents). The Plaintiff never tabled any evidence in the form of registration documents to prove that the proprietors of those two firms were the same. Those were two different and separate firms.
 - b. Secondly, it is not Mr. Mulwa Advocate who was on trial here. If the Plaintiff wanted to try Mr. Mulwa, she ought to have named him as a Defendant and pleaded the claim against him so as to give him a chance to defend himself.
132. Thirdly, on whether the Counter - claim by the 4th and 5th Defendants should be allowed. The Learned Counsel averred that since the Plaintiff's suit had no merits and was for dismissal, it naturally followed that the orders sought in the 4th and 5th Defendants' Counter - Claim should be allowed.
133. In conclusion, the Learned Counsel submitted that they had shown the Plaintiff's case could not go anywhere. The case was destined to suffer only one fate dismissal. The Plaintiff's husband was duped by M.S.A Kenny who lied to him that he had authority to sell the suit properties. It turned out that he did not have such authority. The Plaintiff and her husband ought to have been more careful and diligent. While they were aware that the properties they were allegedly purchasing belonged to the 1st Defendant, they did not bother to establish whether the person they were dealing with had authority to sell the properties. They did not pay the purchase price to the 1st Defendant, the registered owner of the suit properties. They simply dealt with a stranger and paid that same stranger. In fact, they did not even finish paying the purchase price. To date, they had never paid a sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/=) out of the agreed purchase price of a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00/=).
134. Even the Plaintiff's husband never signed the agreement for sale that the Plaintiff's suit was based on. No witness signed it. The Plaintiff fell victim of being lied to by a person who had no capacity to sell the suit properties. The Plaintiff ought to have been advised by her advocates on record to count her losses and go home. They sent their sympathies to her.
135. By now it was clear that the Plaintiff's suit was for dismissal. They urged the Court to dismiss the suit and award costs of the same to the 4th and 5th Defendants.

B. The Written response submissions by the Plaintiff to the 4th and 5th Defendants' submissions

136. The Plaintiff through the firm of Messrs. Jengo Associates filed their written submissions dated 10th December, 2024 wherein they submitted that in response to the 4th and 5th Defendants submissions. Mr. Jengo Advocate held that they would like to reiterate their submissions dated 4th November 2024 and reply as here below:-
137. The 2nd Defendant witness was very categorical that the registration done by his office from the 1st Defendant to the 3rd Defendant was irregular and illegal as there was a court order and a caveat in



place. The first order was made on 9th April 2003. It was for fourteen (14) days so it was to lapse on the midnight of 23rd April 2003 so a registration before midnight of 23rd April 2003 was in contempt of the court. Additionally, as the court would note an extension of the order was made on the 23rd April 2003 in the presence of the 1st Defendant's Advocate so even in the absence of service but being aware of the order they could not purport just to violate it even if not served or registered.

138. In a nutshell, the argument that there was no order was void and could not be subject of the extraneous proceedings, documents and evidence the 4th Defendant was trying to introduce through submissions. In any event, its trite law that submissions are neither pleadings nor evidence. For a party to raise Issues in pleadings, they must be underpinned by the following: -

- i. They must be about pleaded Issues.
- ii. They must be Issues over which evidence has been tendered.

139. The 4th and 5th Defendants never pleaded doctrine of res judicata and also never tendered any evidence on the Issue hence cannot purport to introduce the Issue through submissions. This was on the authority of "Muthoni Nduati – v – Wanyoike Kamau & 5 Others (2004) eKLR" where it was held: -

“Pleadings play a pivotal role in litigation. As stated in Bullen & Leak (12th Edition) at page 3 under the rubric Nature of Pleadings;-

“The system of pleadings operated to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the court will be called upon to adjudicate between them. It thus serves the two told purpose of informing each other what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the Issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

My reading of the foregoing decision is that if a trial court deals with an Issue which is not properly before it, that would be wrong.”

140. Similarly, the Issue of the validity of the agreement between the Plaintiff and the 1st Defendant was neither pleaded nor defended by the 1st Defendant who had the option of having his estate enjoined in the proceedings if they felt they wanted to challenge anything. The 4th and 5th Defendants could not purport to be defending the case on behalf of the 1st Defendant. It's imperative to note that the 4th Defendant was very emphatic in his evidence that fraud had been perpetuated against the plaintiff who is the widow herein.

141. The 4th Defendant title flows from the fraud he admitted happened hence that title could not be sustained. In any event, it's a title obtained his pendency hence a nullity. Lastly, the the 4th and 5th Defendants at paragraph 70 of the submission refer to a Judgement that are annexed. However, in the physical submissions served, the documents was not annexed hence they had no way of responding and the paragraph should be expunged. In any event the *Evidence Act* at Section 34 sets out conditions that first need to be met before a witness produces evidence from previous proceedings.

142. They submitted that the conditions necessary for the production of evidence from previous court proceedings had not been met in the current circumstances. For any application of this nature to succeed the court must be alive to the provisions of Article 47 and 50 of *the Constitution* of Kenya and the rules of natural justice i.e. a party should not be condemned unheard which includes being given an opportunity to cross examine witnesses.



143. Dealing with the Issue under the Repealed Kenyan Constitution which was less liberal than our current constitution, the Court of Appeal in the case of:- “Moses Ngichu Kariuki v Republic (2009) eKLR” had this to say:-

“In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. In our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.”

144. In the case of:- “Anyona vWells Oil Limited & 2 Others (Civil Appeal E091 of 2022) (2023)KEHC 26833 (KLR) (20 December 2023) (Judgement)” the High Court held:-

- “ 39. I will briefly discuss what cross examination is and examine its importance.
40. Cross-examination occurs after examination in chief and is the process of questioning the opponent’s witness. As the word suggests, cross-examination is to cross-examine the opposition witnesses’ testimony. During cross-examination, the cross examiner is able to challenge the truth or accuracy of the opponent’s witness’s version over disputed events.
41. As to why cross examination is important, first and foremost is that it is a sure way of guaranteeing a party the right to a fair hearing and in criminal cases, the right to a fair trial. Cross-examination allows the accused in criminal cases or the defendant in civil cases to thoroughly analyses and challenge the evidence brought forward by opposing witnesses.
42. According to John Wigmore, “Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. In the same way, a lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it.” Cross-examination seeks out the truth. When a witness brings their account of disputed events, cross-examination gives the cross-examiner the ability to question all evidence brought forward by the witness. Separating lies from the truth is essential during cross - examination.”
43. Cross examination also establishes inaccuracies in a case. Determining inaccuracies in a witness’ statement can damage the overall case brought forward by the opposing party.
44. Cross examination also tests the credibility of the witness. The credibility of a witness relates to their sincerity and whether they are speaking the truth as they believe it to be.
45. Cross examination also challenges the reliability of the witness and the evidence adduced Challenging the reliability of the witness’s testimony will make or break a case. If the witness brought forward unreliable evidence in their testimony, it is the duty of the cross-examiner to challenge such a



testimony. Points such as accuracy, truthfulness, and credibility all come in play here. If the cross-examiner notices questionable areas in a testimony, they can challenge the reliability of these areas to ensure that the evidence presented in the case is true, reliable, and fair.

46. F.Dennis Saylor IV and Daniel I. Small) June 29, 2017 on “The why of cross-examination” writes that,

“First is the belief that “truth” is not that simple, that there is often more than one version, or at least more than one perspective. The Greek fabulist Aesop, writing in the sixth century BC, put it remarkably well:

“Every truth has two sides, it is well to look at both, before we commit ourselves to either.” Second is our recognition that human beings are not perfect.

All people make mistakes. And too many of them are willing to fabricate testimony, even in a formal, sworn courtroom setting. Because those mistakes (and lies) may favor one side of a dispute, it is the advocate for the other side who has the strongest motive and understanding to bring them to light.

A witness who is telling the truth need not be cross-examined. Unfortunately, human beings often make mistakes and sometimes lie.

Martin Luther King Jr. said: “Darkness cannot drive out darkness. Only light can do that.”

In a court of law, we rely on the advocate for the opposing side to shine the light on false statements and other forms of darkness.

Everything about cross-examination reflects that basic reliance on the lawyer as advocate and truth-seeker. The focus of cross is on the lawyer, including the form of questions (leading), the positioning and attitude in court (the lawyer on center stage), and the subject matter (the lawyer choosing specific points of substance or credibility, not just having the witness repeat or tell a story.

Cross-examination is one of our system’s essential means for testing the evidence, and thus finding the truth...”

47. I can't agree more with the above statements. In the instant case, the appellant's evidence in chief was put to test and it failed the test. What she had told the court as to how the accident in question happened changed completely to be something totally different.”

145. To allow evidence to go in without the Plaintiff being accorded an opportunity to cross examine would be a violation of the Plaintiff's rights to a fair hearing. On the requirements of Section 34 of the [Evidence Act](#) the High Court in the case of:- “Abdi Adan Mohamed v Republic (2017) eKLR” held:-

“Because of their relevance to the question before us we reproduce the two sections herebelow:

“34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances-



- (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding-
 - (b) the proceeding is between the same parties or their representatives in interest; and
 - (c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and
 - (d) the questions in Issue were substantially the same in the first as in the second proceeding.
- (2) For the purposes of this section-
- (a) the expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and
 - (b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused”. (Our emphasis).

The section has been applied in civil as well as criminal cases.”

The judges then went further ahead to state;-

“The language of Section 34 is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under Section 34, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the questions in Issue were substantially the same in the first as in the second proceeding.”

146. Applying the above passages, it’s apparent that for the provision of Section 34 to apply both parties must have participated in the initial proceedings and the other party must have had an opportunity to cross examine the witness. In the instant case, it’s a matter of fact that the initial proceedings were ex parte and the defendant did not have an opportunity to cross examine the witness. The upshot of that is that the 4th and 5th defendants have not met the pre-requisites for application of Section 34 of the [Evidence Act](#) Chapter 80 Laws of Kenya.

147. On the case of “Charles Mwithali v Julius Barium M’ltobi (1988) eKLR” referred to by plaintiff, the judges stated as here below;-

“As the evidence of the document examiner was given in judicial proceedings between the same parties, that evidence could be admitted under the liberal regime of section 34 of the [Evidence Act](#), (cap 80) if the conditions laid down by that section were fulfilled. No facts



were given in evidence on which it can be held that the factual conditions laid down by that section were met. It did not even appear that the learned judge was aware that the former testimony of the document examiner was inadmissible in proof of the authorship of the offensive documents.”

148. In any event, judicial review proceedings could not determine the right of between private citizens like the Plaintiff and the 1st Defendant, 3rd Defendant and 4th and 5th Defendants. It also could not determine the merits of the Registrar’s decision. Judicial review is never a bar to a suit to determine substantive rights of parties. Indeed in the case of:- “Supermarine Handling Services Ltd v Kenya Revenue Authority (2010) eKLR” annexed in the submissions was the foundation of a subsequent suit determining the substantive right of parties after analyzing evidence.

149. The court of appeal in the case of:- “Energy Regulatory Commission v SGS Kenya Limited & 2 Others (Civil Appeal 341 of 2017) (2018) KECA 616 (KLR) (11 May 2018) (Judgement)” had this to say:-

“In order to decide whether the learned Judge erred in the case at bar, it is worth recalling that the true province of judicial review is to deal with and correct procedural improprieties but not the merits of the decision itself. See *Chief Constable v Evans* [1982] 3 ALL ER 141 where Lord Brightman sounded the caution that unless the restriction to process as opposed to merits is observed, “the court will,...under the guise of preventing abuse of power, be itself guilty of usurping power”. He went on make clear that “judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.” (At P 155 para C The main basis for the learned Judge’s grant of the judicial review prayers was that the Board was wrong to find that there was technological change when no sufficient evidence of the same had been availed by the appellant.

It seems obvious that the learned Judge was here pre-occupied with the sufficiency of the evidence of technological change. Words such as the said evidence beingclear?,cogent?substantial?real?tangible?significant?, and the like, can only mean that the learned Judge was embarking on an exercise of making value judgments regarding the evidence, weighing it and minutely examining or interrogating it to determine whether it reached a certain standard of acceptance. With respect, that approach is far removed from process, the purpose and province of judicial review, and is a delving into the merits of the decision as one would do were he dealing with an appeal.

In so doing, the learned Judge fell into error. Our holding on this point is consistent with a long line of decision of this Court including, quite recently, in *OJSC Power Machines Limited, Trans century Limited & Civicon Limited (consortium) v Public Procurement Administrative Review Board & 2 Others* [2017] eKLR where it was stated that;

Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See

Republic v Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body’s decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must,



however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review.

See *East African Railways Corp. v Anthony Sefu Far-Es-Salaam* (1973) EA 327. “See also *Biren Amritlal Shah & Anor v Republic & 3 Others* [2013] eKLR.”

150. According to the Learned Counsel, the Issue of *res judicata* was thus not raised. Thus, they urged the Court to enter Judgment for the Plaintiff as prayed in their main submissions.

VIII. Analysis and Determination

151. I have carefully considered the parties’ pleadings, all the oral and documentary evidence and testimonies, the written submissions and the myriad of cited authorities, as well as the relevant provision of *the Constitution* of Kenya, 2010, the applicable statutory and case law. I shall address the Issues sequentially as guided by their legal and factual complexity.
152. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) Issues for its determination. These are: -
- a. Whether the Plaintiff proved purchase of the suit properties from the 1st Defendant as innocent bona fide purchaser for value on notice.
 - b. Whether the transfers of the suit properties to the 3rd, 4th, and 5th Defendants were fraudulent, illegal, or void ab initio.
 - c. Whether the Plaintiff acquired title by way of land adverse possession.
 - d. Whether the Plaintiff was entitled to the reliefs sought;
 - e. Who shall bear the costs of the suit.

Issue No. a). Whether the Plaintiff proved purchase of the suit properties from the 1st Defendant as innocent bona fide purchaser for value on notice.

153. Under this sub-heading the Court is called upon to examine whether the Plaintiff discharged the burden of proof in establishing that her late husband, Stephen Juma Sapaya, lawfully purchased the suit properties known as Land Reference Numbers 3715 and 3717 respectively as an innocent purchaser for value from the 1st Defendant, the late M/s. Kombana BintiSalim Kombo (now deceased). From the testimony adduced, she obtained the Grand letters of Administration to the Estate of her husband upon his demise.
154. To demonstrate this assertion, the Plaintiff heavily relied on a sale agreement dated 5th August 1989 terms and conditions stipulated thereof ostensibly duly executed between her late husband and one Mohamed Sheikh Ali Kenny, the son of the 1st Defendant. The Plaintiff contended that Mr. M.S.A Kenny acted as an agent of the 1st Defendant with implied or express authority. Critically, and with all due respect to all the parties, the Honourable Court has managed to point out numerous discrepancies and flaws surrounding this transaction and shall pointing them out hereinbelow.



155. Legally speaking, and from the very onset, the Court notes that the provisions of Sections 3 (3) of the Law of Contract Act, Cap. 23 and Section 38 (1) of the Land Act, No. 6 of 2012 all of the Laws of Kenya. Section 3 provides:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties thereto, and the signature of each party signing has been attested by a witness present when the contract was signed by such party.”

156. While the provision of Section 38 (1) provides:-

“Validity of contracts in sale of land. – Other than as provided by this Act or by any other written law no suit shall be brought upon a contract for the disposition of an interest in land:-

- a). the contract upon which the suit is founded
 - i). is in writing;
 - ii). is signed by all the parties thereto; and
- b). the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party”.

157. From the evidence tendered showed, and which was not a disputed fact, the alleged sale agreement entered between the husband of the Plaintiff and the 1st Defendant was not signed by both the 1st Defendant, the registered owner of the properties, nor by the purchaser himself. There was no Power of Attorney was produced to demonstrate that Mr. M.S. A Kenny had the express authority to bind his mother. To back up the Court on this fundamental point is the case of:- “Leo Investment Limited v Estuarine Estate Limited [2017] eKLR”, where the Court held that a suit seeking to enforce an unsigned contract for disposition of land is a nullity ab initio. Time without numbers, the Courts have stressed that it does not re – write contracts for parties in any transaction. This is not an exceptional case.

158. Further, the provision of Section 48 of the Land Registration Act, No. 3 of 2012 stipulates that no instrument executed by an agent shall be accepted by the Registrar unless the agent was duly authorized by a Power of Attorney executed and verified in accordance with the provision of Section 45 of the said Act. As already indicated, no such authority was produced in this case.

159. The payment of purchase price (consideration) was a key legal requirement in land purchase transactions. If the consideration was not paid, the contract was null and void. In this case, the 1st Defendant, who was the registered owner of the properties at the material time, did not receive the purchase price at all. In fact, even S.M.A Kenny was not paid the entire purchase price. The purchase price was for a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00/=). The Plaintiff's late husband paid a deposit of a sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/=) leaving a balance of a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) which was to be paid at a sum of Kenya Shillings One Thousand (Kshs. 1,000.00/=) per month. The Plaintiff's husband did not pay the balance, either monthly or at all. Instead, it was the Plaintiff who paid a lumpsum amount of Kenya Shillings Seventy Thousand (Kshs.70,000.00/=) on 8th April 1993, four (4) years after the agreement for sale had been signed. The total amount paid was a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) and not the agreed price of a sum of Kenya Shillings Ninety Thousand



(Kshs. 90,000.00/=). A sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/=) was not paid. In other words, there was outright breach of contract.

160. Indeed, it was testified that the said payments were made to Mr. M.S.A Kenny rather than to the 1st Defendant, the alleged registered proprietor to the suit property. In the case of: “Kihuba Holdings Limited v Charo Karisa Ngulu [2021] eKLR”, the Court faulted a purchaser for failing to complete payment of the purchase price, holding that non-payment rendered the contract unenforceable.
161. Fundamentally, the Plaintiff strongly pleaded and made it a major part of her submissions that the 1st, 2nd, 3rd, 4th and 5th Defendants acquired the Certificate of the title to the suit land through fraudulent scheme, irregularities and illegalities. To deal with this assertion, the Court seeks refuge from the principles of “the Burden of Proof” as it is graphically spelt out under the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 that he who alleges has to prove. Further, the Court is guided by the case of: “Vijay Morjaria v Nansingh Darbar & Another [2000] eKLR”, where Tunoi JA emphasized that fraud must be distinctly pleaded and strictly proved. Here, the Plaintiff alleged that Mr. M.S.A Kenny acted fraudulently, but no cogent evidence was produced to link the 1st Defendant to the transaction or to demonstrate that she authorized her son to sell the land. Moreover, and crucially as has been elaborately submitted by the Learned Counsel for the 4th and 5th Defendants herein, based on the provision of Order 24 (1), (2), 3) and (4) of the Civil Procedure Rules, 2010, the suit against the 1st Defendant already has abated. This Court, per Justice Naikuni, has already so ruled a pronouncement which was never challenged in any known legal form of either preference of an appeal, review, setting aside nor varying. This means that this Court cannot make any orders for or against the 1st Defendant, including a finding that her transfer to the 3rd Defendant was unlawful. That Issue has been extinguished by the abatement. The Plaintiff’s attempt to use this violation as a sword to claim the property herself is therefore legally untenable.
162. In light of the foregoing, therefore, the Court finds that the Plaintiff failed to prove purchase of the suit properties from the 1st Defendant. I reiterate that the alleged sale agreement did not comply with the mandatory requirements of law being the provisions of Section 3 (3) of the *Law of Contract Act*, Cap. 23 and Sections 38 (1) of the *Land Act*, No. 6 of 2012. Furthermore, it also lacked authority under the provision of Section 48 of the *Land Registration Act*, No. 3 of 2012 and the fact that the consideration was not fully paid to the registered owner. Outrightly, the Plaintiff’s claim of purchase therefore collapses at the threshold.

Issue No. b). Whether the transfers to the 3rd, 4th, and 5th Defendants were fraudulent, illegal, or void ab initio

163. Under this sub-heading the Court is called upon to examine whether the subsequent transfers of the suit properties from the 1st Defendant to the 3rd Defendant, and thereafter to the 4th and 5th Defendants, were tainted with fraud, illegality, or contempt of court orders, as alleged. Thus, whether the transaction and the title should be declared nullities. The Plaintiff has extensively alleged that the transfers were effected clandestinely while caveats and injunctive orders were in place, and that the 1st and the 2nd Defendants acted in contempt of court. To buttress her point and allegations, she relied on “the doctrine of lis pendens” and urged the Court to nullify the titles held by the 3rd, 4th, and 5th Defendants altogether.
164. The Honourable Court wishes to deliberate exhaustively on two (2) broad Issues here which are great significance having expansively bedeviled the pleadings by the Plaintiff whatsoever. Firstly, the legal concept of Cautions and/or Caveats and Secondly, the Issue of the Court order.



165. On the Caution and Caveats. These are legal provisions or powers vested onto the Land Registrars to forbid or prevent any transaction of land for a particular time on the grounds of preserving certain interests on land in the meantime. For instance, either purchasers or other beneficiary interests affecting the Cautioner. The whole process is well crafted and governed by the principles of natural justice – whereby notices are Issued and the Land Registrar convenes parties for a “Quasi Judicial” session and upon conducting a full hearing a final decision is arrived at. That decision is subject for an appeal before the Chief Land Registrar or a Judicial review before the High Court. Primarily, the Court notes that the provision of Section 71 of the [Land Registration Act, 2012](#) permits the lodging of cautions to protect interests in land, while Section 73 empowers the Registrar to remove cautions upon lapse of time or by order of the Court. The evidence showed that the Plaintiff lodged a caveat on 17th January 2003 claiming purchaser’s interest, which was extended by a court order dated 9th April 2003. However, the caveat was removed on 23rd April 2003, and titles were Issued to the 3rd Defendant. By the time extension orders were served, the transfer had already been registered. In the case of “Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 Others [2009] eKLR”, the Court of Appeal held that a caveat only protects registrable interests. The Plaintiff’s interest, founded on an invalid contract, was not registrable under the Act.
166. While making this allegation of the caution having been removed or tampered with by the Defendants, the Plaintiff further alleged fraud. Taking that the Court in this Judgement will deal with Issue of fraud in depth later, I wish to state briefly that fraud must be specifically pleaded and strictly proved. This legal position was soundly held in “Vijay Morjaria v Nansingh Darbar & Another [supra]” and reaffirmed in “Kinyanjui Kamau v George Kamau [2015] eKLR”. The Plaintiff did not tender cogent evidence linking the Defendants to fraudulent conduct. Mere suspicion or inference is insufficient. The doctrine of *lis pendens* was also invoked. The principle, codified in Section 52 of the Transfer of Property Act (Indian statute of general application), provides that during the pendency of litigation involving rights to immovable property, no party shall transfer or otherwise deal with the property so as to affect the rights of any other party. However, as explained in the case of: - “Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR”, the doctrine does not automatically invalidate transfers; rather, it protects the rights of parties pending determination. Here, the Plaintiff’s underlying claim was itself defective, and therefore the doctrine could not confer rights where none existed.
167. On the Court Order. The Plaintiff pleaded in the Further Amended Plaint that on 9th April 2003, the Magistrates Court had Issued an order of injunction and caveat restraining the 1st Defendant from transferring the suit plots to a third party. According to the Plaintiff, during the pendency of the caveat and the order of injunction, the 2nd Defendant disregarded the Court order by irregularly issuing a Certificate of Title to the 3rd Defendant. The Plaintiff averred that the issuance of the titles to the 3rd Defendant by the 2nd Defendant at the instigation of the 1st Defendant was fraudulent, mischievous, and an action in contempt of Court. She sought a declaration that the transfer of the land to the 3rd Defendant was a nullity and void ab initio. As already indicated, and ably submitted by the Learned Counsel for the 4th and 5th Defendants, the Plaintiff appeared to have operated under the misguided notion that if the Court found that the transfer of the suit properties was in violation of the court order, such a finding would entitle her to the suit properties. If the Court had concluded that the 1st Defendant violated the court order by transferring the suit properties to the 3rd Defendant, the consequence would have been to revoke the transfer in favour of the 3rd Defendant and revert ownership of the suit properties to the 1st Defendant, not to the Plaintiff. The alleged violation of the court order never entitled her to the suit properties. On whether the 1st Defendant violated an existing court order and caveat could not be addressed or determined by this court because the 1st Defendant was dead and the suit against her had been declared as abated vide the ruling of this court delivered by



Justice L.L Naikuni on 10th March 2023. That meant that the question of whether the 1st Defendant transferred the suit properties to the 3rd Defendant in violation of the court order and caveat could not be touched, addresses and determined by this court as that Issue suffered legal death when the suit against the 1st Defendant abated.

168. On critical assessment of the court order Issued by Chief Magistrate on 9th April 2023, I have taken judicial notice and fully concur with the Learned Counsel for the 4th & 5th Defendants that the Court order was directed at one specific person. That was only Kombana BintiSalim Khamis Kombo – who was the only Defendant in the lower court case and now the 1st Defendant herein. She was the one who was restrained by the said order from transferring the suit properties. It was not the Land Registrar or any other Defendants in this case or any other person. A quick look at the affidavit of service of the said order sworn by Arthur Ochieng on 9th October 2003 shows that the 1st Defendant was not served with the order Issued on 9th April 2003. The process server only served the Registrar of Titles, the 2nd Defendant herein. The 1st Defendant was served. The Plaintiff focused the court order on the Land Registrar and even had it registered on the Registrar. However, it was not the Land Registrar who had been restrained by the court order. The 1st Defendant was the one who had been restrained yet she was not served with the court order. Therefore, having failed to serve the court order upon the 1st Defendant, the Plaintiff could not claim that the 1st Defendant violated the court order when she transferred the suit properties to the 3rd Defendant. The legal option available to redress violation of a court order was to file an application for contempt of court order against the perpetrator. In the instant case, the Plaintiff never filed any application for contempt. I can only assume perhaps the Plaintiff failed to file an application for contempt for being aware that service of the order had not been properly effected against the 1st Defendant. Instead of filing an application for contempt of court as a way of redressing the alleged violation of the court order, the Plaintiff opted to amend her Plaint so as to seek revocation of the titles Issued to the people whom the 1st Defendant had transferred the said properties to. I reiterate that injunctive Court orders never confer ownership to land.
169. Be that as it may, the 4th and 5th Defendants demonstrated that they purchased the properties from Michael Arina Knight after conducting due diligence, obtaining official searches, and seeing clean titles. They were innocent purchasers for value without notice. The provisions of Sections 24, 25 and 26(1) of the *Land Registration Act*, No. 3 of 2012 protects such titles unless acquired through fraud or misrepresentation to which the holder is proved to be a party. No such proof was tendered. In the case of:- “Law Society of Kenya v Commissioner of Lands & Others [2001] eKLR”, the Court emphasized that titles Issued pursuant to statutory procedure are indefeasible unless fraud is strictly proved. Similarly, in the case of “Arthi Highway Developers Ltd v West End Butchery Ltd & Others [2015] eKLR”, the Court of Appeal held that innocent purchasers for value are protected where fraud is not established against them.
170. Accordingly, the Court finds that the transfers to the 3rd, 4th, and 5th Defendants were not fraudulent, illegal, or void ab initio. The Plaintiff failed to prove fraud, contempt, or illegality to the required standard. I strongly hold that the 4th and 5th Defendants’ titles are indefeasible with all the rights, title and interest vested in them by . They are valid and protected under the provision of Sections 24, 25 and Section 26 (1) of the *Land Registration Act*, No. 3 of 2012.

Issue No. c). Whether the Plaintiff acquired title by way of land adverse possession

171. Under this sub–heading the Court is called upon to examine whether the Plaintiff, in the alternative to her claim of purchase, acquired title to the suit properties by way of land adverse possession. The Plaintiff contended that she had occupied the suit properties for over thirteen years, constructed a permanent house, and therefore acquired ownership under the doctrine of adverse possession. The law



on adverse possession is settled. The provision of Sections 7, 13 and 38 of the Limitation of Actions Act, Cap. 22 Laws of Kenya. Section 7 provides:

“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.”

172. Further, the provision of Section 38 of the same Act empowers a person who claims to have become entitled to land by adverse possession to apply to the Court for an order that he be registered as proprietor. The principles governing adverse possession were laid down in the case of: - “Kasuve v Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184”, where the Court of Appeal held: -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right, without interruption, for a period of twelve years, either after dispossessing the owner or by discontinuance of possession by the owner.”

173. Similarly, in “Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR”, the Court emphasized that adverse possession is not established merely by occupation, but by occupation that is hostile to the title of the true owner and without permission. Applying these principles to the present case, the Plaintiff’s occupation was not adverse. She entered the land pursuant to a sale agreement, albeit defective, and therefore her possession was by consent and contractual arrangement. I further make reference to the case of: - “Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others [2012] eKLR”, the Supreme Court underscored that possession founded on a contract cannot be adverse until and unless the contract is repudiated and the purchaser remains in possession without the vendor’s consent.

174. The Plaintiff further admitted that she was evicted in December 2011 by the 3rd Defendant. This interruption broke the continuity of possession. The requirement of twelve years of uninterrupted, exclusive possession was therefore not satisfied.

175. Moreover, the Plaintiff did not demonstrate that her occupation was hostile to the title of the registered owners. Her claim was consistently premised on purchase, not on adverse possession. In “Mbira v Gachuhi [2002] 1 E.A. 137”, the Court held that for adverse possession to succeed, the claimant must show that the possession was “nec vi, nec clam, nec precario” — that is, peaceful, open, and without permission. The Plaintiff’s occupation was neither hostile nor without permission, but rather pursuant to a purported sale.

176. Accordingly, the Court finds that the Plaintiff did not acquire title to the suit properties by Land adverse possession.

Issue No. d). Whether the Plaintiff was entitled to the reliefs sought

177. Under this sub-heading the Court is called upon to examine whether, in light of the findings on purchase, transfers, and adverse possession, the Plaintiff was entitled to the injunctive, declaratory, and mandatory reliefs sought in her Further Further Amended Plaintiff. The Plaintiff prayed for:

- a. Permanent injunction restraining the Defendants from transferring or interfering with the suit properties.
- b. Extension of caveats.
- c. Declaration that she was the bona fide purchaser for value.



- d. Mandatory injunction compelling transfer in her favour.
 - e. Declaration that transfers to the 3rd, 4th, and 5th Defendants were nullities.
 - f. General damages, interest, and costs.
 - g. In the alternative, title by adverse possession.
178. Having already found that the alleged sale agreement was unenforceable under the provision of Sections 3(3) of the Law of Contract Act and Section 38 (1) of the Land Act. No. 6 of 2012, that the transfers to the 3rd, 4th, and 5th Defendants were valid and protected under Sections 24, 25 and 26 (1) of the Land Registration Act, No. 3 of 2012 and that the Plaintiff did not satisfy the requirements of adverse possession under the provision of Sections 7, 13 and 38 of the Limitation of Actions Act, Cap. 22 the Court holds that the Plaintiff was not entitled to any of the substantive reliefs sought.
179. In the case of “Ernie Campbell & Co Ltd v National Housing Corporation [2019] eKLR”, the Court of Appeal cautioned against granting reliefs where the substratum of the case had been overtaken by events. Similarly, in “Muchanga Investments Limited (Supra)”, the Court emphasized that equitable remedies such as injunctions cannot be granted where the claimant has no registrable or enforceable interest.
180. The Plaintiff’s claim for damages also fails. In the case of “Kinyanjui Kamau v George Kamau [2015] eKLR”, the Court reiterated that damages cannot be awarded where the underlying claim collapses for want of proof.

Issue No. e). Who bears the costs of the suit

181. It is now well established that the Issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
182. In “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products v Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”



183. In the present case, the Costs of the suit are awarded to the 1st, 2nd, 3rd, 4th & 5th Defendants jointly and severally.

IX. Conclusion and Disposition

184. Ultimately, having caused such an in-depth analysis to the framed Issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has failed to establish her case against the 1st, 2nd, 3rd, 4th & 5th Defendants. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered against the Plaintiff, and in favour of the 1st, 2nd, 3rd, 4th & 5th Defendants in respect to their Statement of Defence, the Counter – Claim dated 10th May, 2023 by the 4th and 5th Defendants and in respect to the Further Further Amended Plaint dated 29th March 2023 and filed on the same day, the Plaintiff's claim having failed in its entirety for lack of proof and is hereby dismissed with costs.
- b. That for avoidance of doubt, accordingly, having considered the pleadings, evidence, submissions, and applicable law, the Court makes the following orders:
 - i. the Plaintiff's claim founded on the sale agreement dated 5th August 1989 is dismissed for want of compliance with Section 3(3) of the Law of Contract Act, Cap. 23 and Section 38 (1) of the Land Act, No. 6 of 2012.
 - ii. the Plaintiff's prayer for declarations of ownership and mandatory transfer is declined, the Court having found that the 4th and 5th Defendants are bona fide purchasers for value protected under Sections 24, 25 & 26(1) of the Land Registration Act, No. 3 of 2012.
 - iii. the Plaintiff's alternative claim for adverse possession is dismissed, the Court having found that her occupation was interrupted and not adverse within the meaning of Sections 7, 13 and 38 of the Limitation of Actions Act, Cap 22.
- c. That a declaration be and is hereby Issued that the transfers to the 3rd, 4th, and 5th Defendants were validly registered and are not void ab initio, the Plaintiff having failed to prove fraud or illegality to the required standard.
- d. That a declaration be and is hereby Issued that the titles held by the 4th and 5th Defendants are indefeasible rights, interest and tiles vested in them under the provision of Sections, 24, 25 & 26 (1) of the Land Registration Act, No. 3 of 2012.
- e. That the Plaintiff's prayers for injunctions, damages, and costs are declined.
- f. That the Plaintiff shall bear the costs of the suit, which are awarded to the Defendants jointly and severally.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF DECEMBER 2025.

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HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT MOMBASA



Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Kioko Advocate holding brief for Mr. Jengo Advocate for the Plaintiff.
- c. M/s. Kiti Advocate for the 2nd Defendant.
- d. Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate for the 4th & 5th Defendants.
- e. No appearance for the 1st & 3rd Defendants.

