REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 118 OF 1985

[AS CONSOLIDATED WITH MERU ELC 57 OF 2012]

AND

[AS CONSOLIDATED WITH MERU ELC 124 OF 2012]

BETWEEN

JOSEPH MURORI M'NKANATA [Legal Representative of the Estate of M'NKANATA M'MWIRICHIA]…….……... PLAINTIFF

VERSUS

STANLEY GAITI……..1ST DEFENDANT
GODFREY GIKUNDA …….2ND DEFENDANT
SIMON KIAMBI…….. ……3RD DEFENDANT
CHARLES KIRUJA ……4TH DEFENDANT
NUTUMA M'INOTI ……5TH DEFENDANT
JASPHAT KIOGORA ……..6TH DEFENDANT

JUDGMENT

1. The instant suit was filed *vide* Plaint dated the **16th December 1985**. This means that the subject matter/dispute has graced the corridors of justice for a duration in excess of 4 decades [40 years]. Quite interestingly, the duration taken before the suit was heard and brought to Judgment does not fit within the prescription of **Article 159 [2] [b] of the Constitution, 2010**. Be that as it may, it is my hope that going forward, cases and disputes [more particularly touching on land] shall be heard and brought to conclusion expeditiously; and shall not be allowed to delay in the corridors of Justice.

2. Additionally, it is imperative to echo the words of the Court of Appeal in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] KECA 284 (KLR),** where it was stated as hereunder:

> ***"Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases.***

3. The words and sentiments highlighted [supra] ought not to remain aspirational. It is high time that the maxim and the Constitutional imperative under Article 159 [2] [b] of the Constitution be a lived reality. Not an aspiration. Not a mirage; or a dream. Hopefully, we shall get there.

4. Back to the pleadings. The original Plaintiff, namely; M'NKANATA MWIRICHIA [now Deceased] approached the Court *vide* Plaint dated the **16th December 1985** and wherein the said Plaintiff sought the following reliefs:

    i. **The Plaintiff be declared the sole proprietor by prescription or by limitation of Action Act of all that 4.00 acres of land Title No. Gaitu/318.**

    ii. **That the Defendant be ordered to pay costs of this suit.**

    iii. **Other orders as the Court shall deem fit and just.**

5. During the pendency of the suit *vide* ELC NO. 118 OF 1985, the 1st Defendant herein, who had been constituted as the Legal

Administrator of the Estate of N'KAANJA KAYAUTHI [Deceased] proceeded to and commenced to sell portions of the suit property. In addition, the various persons to whom the 1st Defendant had sold portions of the suit property started to encroach onto the suit property and thus provoking the filing of the second suit, *namely*: MERU ELC NO. 124 OF 2012, in an endeavour to avert interference with his occupation and possession of the designated portion of the suit property.

6. The reliefs sought at the foot of the Plaint dated the **9th October 2012** are as hereunder:

    a) **Permanent Injunction against all the Defendants from entering the Plaintiff's land under any guise whatsoever until HCC NO. 118 OF 1985 is heard and determined.**

    b) **For orders of inhibition restraining any further sub-division or transfers of three parcels of land or resultant parcels thereof from the original Title until this whole suit is heard and determined.**

    c) **Costs of the suit and damages occasioned to the Plaintiff as a result of the Defendants forcible entry and trespass and illegal occupation of the Plaintiff's land be assessed by this Court and be awarded to the Plaintiff.**

7. The 1st and 2nd Defendants duly entered appearance and filed their Statement of Defence in respect of the instant matter. The statement of defence by the 1st and 2nd Defendants are dated the **19th June 1985** and wherein the named Defendants denied the claims by the Plaintiff. In particular, it was denied that the Plaintiff's Father [now Deceased] bought a portion measuring 4 acres out of the suit property.

8. On the contrary, it was contended that the Plaintiff's Father Leased a portion of the land in **1975** and thereafter constructed/erected a grass thatched- mud house on the portion in question in a bid to stake a claim to the portion of land.

9. The 2nd – 5th Defendants at the foot of ELC NO. 124 OF 2012 [which has since been consolidated with the subject matter], similarly entered appearance; filed a statement of Defence and Counterclaim dated the **21st May 2025** and wherein the named Defendants have denied the claims at the foot of the Plaint dated the **9th October 2012.**

10. Furthermore, the 2nd – 5th Defendants have also sought various reliefs at the foot of the Counterclaim. The reliefs sought at the foot of the Counterclaim are as hereunder:

    a) **An order directing the land Registrar Meru to revoke and cancel the resultant parcels after the sub-division of Land Parcel No. ABOTHUGUCHI/GAITU/318 and to subsequently reinstate the former sub-division emanating from ABOTHUGUCHI/GAITU/318 to wit ABOTHUGUCHI/GAITU/219 measuring 1 acre to be registered in the name of CELESTINO MUTUMA M'INOTI the 5th Defendant, ABOTHUGUCHI/GAITU/2198, ABOTHUGUCHI/GAITU/2199 and ABOTHUGUCHI/GAITU/2200.**

    b) **An order directing the Meru district/County Surveyor, to hive off the 1 acre to cover the dwelling place of CELESTINO MUTUMA M'INOTI, the 5th Defendant.**

c) **An order authorizing the Deputy Registrar to sign all the requisite documents to facilitate the implementation of the orders herein.**

d) **An order directing the Land Registrar Meru to rectify the records in respect of the Title Deed issued to the 5th Defendant bearing Land Reference No. ABOTHUGUCHI/GAITU/2197 to be in conformity with the resister in respect thereof.**

e) **The Plaintiff does pay costs and interest of the suit herein from the date of the Judgment.**

11. Following the close of pleadings, the subject matter was heard and disposed of *vide* Judgment rendered on the **13th February 2019**, by Lady Justice L. N Mbugua – Judge. However, the Judgment under reference was the subject of an Appeal to the court of Appeal whereupon the Court of Appeal proceeded to and set aside the Judgment and thereafter directed the re-hearing of the matter.

12. On the **30th July 2025** the subject matter came up for directions before me whereupon the parties confirmed compliance with the various directions that had hitherto been given, including the filing of the comprehensive trial bundles.; list of witnesses and witness statements. In addition, the parties also confirmed that the matter was ready for hearing. To this end, the Court proceeded to and confirmed the matter ready for hearing and thereafter set down the matter for hearing on the **6th of October 2025 and 7th October 2025**, both days inclusive.

13. The Plaintiff's case is premised on the evidence of three [3] witnesses, namely; JOSEPH MURORI NKANATA, DAVID NKANDO MBIRIA and STANLEY IRIGA. Same testified as PW1, PW2 and PW3, respectively.

14. It was the testimony of PW1 [JOSEPH MURORI NKANATA] that same is the Plaintiff in respect of the matter. In addition, the witness averred that the subject suit was filed by N'KANATA MWIRICHIA – now Deceased. The witness further averred that following the death of the original Plaintiff, same procured Grant of Letters of Administration Ad Litem on the **22nd September 1999** and thereafter sought to be substituted in place of the Deceased.

15. Moreover, the witness testified that by virtue of being the current Plaintiff, same is conversant with the facts of the case. To this end, the witness posited that same has since recorded and filed an elaborate witness statement dated the **6th July 2025** and which witness statement the witness sought to adopt and rely on as his evidence in chief. The witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.

16. Additionally, the witness referenced the list and bundle of documents dated the **6th July 2025**, containing [16] sixteen documents and which documents, the witness sought to adopt and produce before the Court. There being no objection to the production of the documents, same were tendered and marked as exhibits P1 – P16, respectively, on behalf of the Plaintiff.

17. Furthermore, the witness adverted to the Plaint dated the **16th December 1985** and which Plaint the witness sought to adopt and rely on. In addition, the witness implored the Court to grant the reliefs sought at the foot of the said Plaint.

18. On cross examination by Learned Counsel for the 1st – 5th Defendants, the witness averred that NKANATA MWIRICHIA [now Deceased] was his Father. In addition, the witness testified that the deceased died in the year of El-nino. Nevertheless, the witness testified that he cannot recall the exact year when the Deceased died.

19. Upon being referred to the documents at page 60 of trial bundle, the witness averred that the document is a copy of the proceedings and Order of the court relating to the Estate of NKANATA MWIRICHIA – deceased. Furthermore, the witness averred that the proceedings and the order refer to an Applicant, but the Applicant is not identified by name. Besides, the witness testified that even though he was pointed and constituted as the Legal Administrator of the Estate of NKANATA MWIRICHIA, same has not produced before the Court a copy of the Grant of Letters of Administration Ad Litem.

20. Regarding the document at page 4 of the trial bundle, the witness averred that same is a copy of the sale agreement dated the **22nd August 1973**, which was entered into between his Father now deceased and the owner of the suit property. Additionally, the witness testified that the sale agreement speaks to the acreage that was being sold to/bought by his Father. In particular, the witness averred that his Father bought a portion measuring 4 acres.

21. It was the further testimony of the witness that upon the purchase of the 4 acres, his Father [now deceased] entered upon and took possession of

the land. Moreover, the witness testified that his father was shown the portion of land that was sold. However, the witness conceded that the 4 acres portion was not surveyed.

22. Regarding the document at page 22 of the Plaintiff's trial bundle, the witness averred that the document in question is an order of the Court. The witness clarified that the order prohibited the sale and alienation of the suit property. Moreover, the witness added that the Estate of NKAANJA N'KAIYUTHI had not been distributed.

23. Upon being referred to the document at page 21 of the Defendants' trial bundle, the witness averred that the document in question is a copy of the Certificate of Confirmation of Grant. Furthermore, the witness testified that the document shows that the suit property was distributed to STANLEY GAITI [the 1st Defendant herein].

24. It was the further testimony of the witness that even though the transfer to the 1st Defendant was done, there was an order that barred the transfer of the land. In addition the witness testified that the transfer of the suit property into the name of the 1st Defendant was done after the issuance of the Certificate of Confirmation of Grant.

25. While still under cross examination, the witness averred that his late Father and himself have been living on the portion of the suit property which was sold. However, the witness conceded that same has not brought to court any photographs to show that he has been living on the land.

26. It was the further evidence of the witness that the suit property is still in existence. Nevertheless, the witness conceded that same is aware that the suit property has since been sub-divided in to various portions, namely,

LR NO'S 5843 and 5844, respectively. Besides, the witness testified that the two parcels are currently registered in the name of JOSEPH NGARUNI MABEA.

27. The second witness who testified on behalf of the Plaintiff was DAVID NKANDO MBIRIA. Same testified as PW2.

28. It was the testimony of the witness that same is familiar with the facts of this case. Moreover, the witness averred that same has since recorded and filed a witness statement dated the **6th July 2025**. To this end, the witness sought to adopt and rely on the witness statement as his evidence in chief. Suffice it to state that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

29. On cross examination by Learned Counsel for the 1st – 5th Defendants, the witness averred that his witness statement relates to the suit property. Nevertheless, the witness conceded that same has not expressly referenced the suit property in his witness statement. In addition, the witness averred that the 4 acres which was sold to NKANATA MWARICHIA, have not been hived out of the suit property.

30. On re-examination, the witness testified that same is conversant with the suit property. Moreover, the witness averred that he knows the suit property because he is a neighbour.

31. The third witness who testified on behalf of the Plaintiff was STANLEY IRIGA MWITARI. Same testified as PW3.

32. It was the testimony of the witness [PW3], that same is familiar with the facts of the case. Additionally, the witness averred that he has since recorded and filed a witness statement dated the **11th April 2025** and which witness statement, the witness sought to adopt and rely on as his

evidence in chief. Suffice it to state that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

33. On cross examination by Learned Counsel for the 1st – 5th Defendants, the witness averred that the contents of the witness statement are correct. Nevertheless, the witness conceded that he has not indicated that the Plaintiff resides on the suit property.

34. It was the further testimony of the witness that the Plaintiff herein occupies the entire portion measuring 4 acres which was the subject of the sale agreement. However, the witness admitted that no surveyor has visited the land in question.

35. On re-examination, it was the testimony of the witness that it is the Plaintiff who occupies the 4 acres of land. However, the witness shortly changed tune and averred that the Plaintiff was denied use of the other portions of the 4 acres.

36. With the foregoing testimony, the Plaintiff's case was closed.

37. The case for the 1st – 5th Defendants is anchored on the evidence of two witnesses. The witness are namely; GODFREY GIKUNDA and CELESTIMO MUTUMA INOTI. Same testified as DW1 and DW2, respectively.

38. It was the testimony of DW1 [GODFREY GIKUNDA] that same is the 2nd Defendant in respect of the instant matter. Additionally, the witness averred that by virtue of being the 2nd Defendant, same is familiar and conversant with the facts of the case. Moreover, the witness testified that he has since recorded and filed a witness statement dated the **21st May 2025** and which witness statement, the witness sought to adopt

and rely on as his evidence in chief. The witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

39. Furthermore, the witness referenced the list and bundle of documents dated the **21st May 2025**, containing 10 documents and which documents the witness sought to tender and produce before the Court. There being no objection to the production of the documents, same were admitted and marked as exhibit D1 – D10, respectively.

40. On the other hand, the witness referenced the statement of defence and Counterclaim dated the **21st May 2025** and thereafter sought to rely thereon. In addition, the witness implored the Court to grant the reliefs sought thereunder.

41. On cross examination by Learned Counsel for the Plaintiff, the witness testified that same bought his parcel of land from STANLEY GAITI [the 1st Defendant]. The witness added that he bought his land in the year **2000.** Moreover, it was the testimony of the witness that the 1st Defendant and himself entered into and executed a sale agreement. Nevertheless, the witness clarified that the sale agreement is not one of the documents which has been tendered before the court. In addition, the witness posited that the sale agreement was burnt in his house.

42. It was the further testimony of the witness that he followed the due process in purchasing/acquiring his parcel of land. The witness added that he procured and obtained the requisite land Control Board Consent. However, the witness admitted that he has not produced a copy of the Land Control Board Consent before the court. On the contrary, the witness testified that same has produced a copy of the Transfer Form.

43. Regarding the document at page 21 of the Defendants' trial bundle, the witness stated that the document in question is a copy of the Certificate of Confirmation of Grant. Furthermore, the witness averred that the confirmation of Grant shows that the land was distributed to the 1st Defendant herein.

44. On further cross examination, the witness testified that he bought his portion of land in the year **2000.** Moreover, the witness testified that upon buying his land, he did not enter and take possession thereof immediately. On the contrary, the witness testified that he started to use the land in the year **2012.**

45. It was the further testimony of the witness that the Plaintiff herein was using a bit of his land. Furthermore, the witness added that the Plaintiff entered upon a portion of his land and as a result of the Plaintiff's entry onto a portion of his land; he [witness] was constrained to file a case seeking for eviction. In this regard, the witness stated that he filed the case at Tigania and that a copy of the pleadings/documents have been tendered before the court. To this end, the witness referenced the document at page 27 of the Defendants' bundle of documents.

46. The witness further testified that when he bought his portion of land, he did not know that the Plaintiff had filed a case against the 1st Defendant. In any event, the witness testified that he was joined in the case in the year **2012**.

47. While under further cross examination, the witness testified that when he bought a portion of the suit property, he did not know of any order barring the distribution of the suit property. Nevertheless, the witness reiterated that he entered upon and took possession of his portion of land in the year **2012.**

48. It was the further testimony of the witness that after filing the case at Tigania Law Courts, same procured and obtained an Order. In addition, the witness averred that the Order was subsequently implemented.

49. Other than the foregoing, it was the testimony of the witness that same has since sold his portion of land to ISAAC MUGANIA. Moreover, the witness confirmed that the land was indeed sold and transferred to ISAAC MUGANIA. Be that as it may, the witness testified that he is before the Court because he is the one who sold the land to ISAAC MUGANIA.

50. The second witness who testified on behalf of the Defendants is CELESTIMO MUTUMA INOTI. Same testified as DW2.

51. It was the testimony of the witness that same is the 5th Defendant. In this regard, the witness posited that same is therefore familiar and conversant with the facts of this case. Moreover, the witness averred that he has since recorded and filed a witness statement dated the **21st May 2025** and which witness statement the witness sought to adopt and rely on as his evidence in chief. Instructively, the witness statement was duly adopted and constituted as the evidence in chief.

52. Additionally, the witness referenced the list and bundle of documents dated the **21st October 2025** and thereafter sought to produce the documents as exhibits before the Court. There being no objection to the production, the documents were tendered and admitted as exhibits D1 – D10 on behalf of the 5th Defendant.

53. Other than the foregoing, the witness alluded to the statement of defence and Counterclaim dated the **21st May 2025** and sought to rely on the contents thereon. In addition, the witness implored the Court to grant the reliefs sought thereunder.

54. On cross examination by Learned Counsel for the Plaintiff, the witness testified that he was previously a Councillor between the years **2007 – 2013.** In particular, the witness testified that he is conversant with the area where the suit property is located. Additionally, the witness testified that he approached NKANATA MWIRICHIA to allow him to pass through his [MWIRICHIA'S] land.

55. While still under cross examination, the witness averred that he approached MWIRICHIA to allow him to pass through MWIRICHIA'S land in the year **2012.** Nevertheless, the witness stated that he did not know of the case by the time when he approached MWIRICHIA to allow him [witness] to pass through the land.

56. It was the further testimony of the witness that he bought his portion of land from one JOSEPH KIOGORA. Moreover, the witness admitted that his parcel of land arose from the suit property, namely, PARCEL NO. 318.

57. Regarding the document at page 22 of the Plaintiff's trial bundle, the witness averred that the document is a copy of a Court order. However, the witness clarified that the same was not aware of the said Court Order. In any event, it was the testimony of the witness that when he bought his portion of land in the year **2011**, there was not one who was in occupation thereon.

58. While still under cross examination, the witness testified that when he bought his portion of land, he did not know the Plaintiff herein. Moreover, the witness clarified that the Plaintiff is not in occupation of PLOT/PARCEL NO. 2197.

59. On re-examination, the witness testified that there was no one in occupation of PLOT NO. 2197 at the time when he [witness] bought the land. Moreover, the witness reiterated that the land/portion of land which he bought was vacant.

60. At the end of the testimony of DW2, Learned Counsel for the Defendants intimated to the Court that same would not be calling any further witness. Furthermore, Learned Counsel sought to close the case for the 1st – 5th Defendants.

61. Other than the foregoing, it is also instructive to note that the 6th Defendant had died before the commencement of the hearing. To this end, Learned Counsel for the Plaintiff sought to have the suit against the 6th Defendant to be withdrawn. In this regard, the Court proceeded to and endorsed an Order on the **16th June 2025**, marking the case against the 6th Defendant as withdrawn.

62. The Advocates for the parties thereafter sought time to file and exchange written submissions. To this end, the Court granted time to the Advocates to file and exchange written submissions. Furthermore, the Court also circumscribed the timelines.

63. The Plaintiff filed written submissions dated the **10th November 2025** and wherein the Plaintiff has highlighted four [4] key issues, namely: the Plaintiff has established and proved occupation and possession of the portion of the suit property; that the sub-divisions and consequential

transfers arising from the suit property were illegal and unlawful; the Plaintiff has proved and established his claim as pertains to adverse possession in respect of the portion measuring 4 acres; and finally that the Plaintiff is entitled to the declaration of adverse possession.

64. The 1st – 5th Defendants filed written submissions dated **18th November 2025** and wherein same has highlighted/canvased three [3] key issues. The issues highlighted on behalf of the named Defendants are: the Plaintiff is bereft of the requisite *locus standi* to initiate the subject suit; the Plaintiff has failed to prove/demonstrate the claim based on adverse possession; and the 2nd – 5th Defendants lawfully acquired their Titles arising from the suit property and hence same are the lawful and legitimate proprietors thereto. Moreover, the 2nd – 5th Defendants have also invoked the provisions of Section 93 of the Law of Succession Act, Chapter 160 Laws of Kenya as pertains to the sanctity of transfer arising from the sale of an immoveable property by the personal representative.

65. In view of the foregoing, the 2nd – 5th Defendant have ventured forward and invited the court to find and hold that the Plaintiff's suit is devoid of merits. On the contrary, it has been contended that the Counterclaim is meritorious.

66. Having reviewed the pleadings filed by/on behalf of the parties; the evidence tendered [both oral and documentary]; and upon consideration of the written submissions filed by the parties, I come to the conclusion that five [5] key issues crystalize for determination. The issues are namely: whether the Plaintiff herein is seized of the requisite locus standi to initiate the suit or otherwise; whether the Counterclaim by the 2nd – 5th Defendants is legally competent or otherwise; whether the Plaintiff has established and proved the requisite ingredients underpinning a claim for adverse possession; whether the 2nd – 5th Defendants are lawful owners of

the designated parcels of lands arising from the suit property; and what reliefs [if at all] ought to be granted.

67. Regarding the first issue, Learned Counsel for the 1st – 5th Defendants [hereinafter referred to as the named Defendants] has contended that the Plaintiff herein is devoid of the requisite locus standi to initiate and maintain the subject suit. Learned Counsel has posited that the Plaintiff herein did not tender or produce before the Court a copy of the Grant of Letters of Administration AD Litem [if any] that was issued in his favour.

68. Additionally, Learned Counsel for the named Defendants has submitted that even though the Plaintiff tendered and produced before the Court a copy of the proceedings and Order made *vide* MERU MISC. SUCCESSION APPLICATION NO. 89 OF 1999, the said proceedings and Order do not reference/identify the Plaintiff as the Applicant in whose favour the Grant AD Litem was issued.

69. It was the further contention by Learned Counsel for the named Defendants that the suit which was previously filed by NKANATA MWIRICHIA [now deceased] can only be prosecuted by his Legal representative and not otherwise. Simply put, Learned Counsel invited the Court to find and hold that the Plaintiff herein has no capacity to maintain and prosecute the suit.

70. It important to state and outline that the instant suit was filed by NKANATA MWIRICHIA [now deceased]. It is the said deceased who initiated the suit and not the current Plaintiff. To this end, the contention by Learned Counsel for the named Defendants that the Plaintiff herein is bereft of the legal capacity to initiate [meaning originate] the suit is misconceived and premised on misapprehension of the terminology in question.

71. Notwithstanding the foregoing, it is also important to highlight that following the death of NAKANATHA MWIRICHIA, an Application was made before the Probate and Administration Court, vide MERU HCC MISC. SUCCESSION CAUSE NO. 89 OF 1999 and wherein Grant of Letters of Administration AD Litem was issued. Notably, the Court granted an Order on the **22nd September 1999**.

72. The fact that the proceedings do not expressly reference the name of the Plaintiff herein as the Applicant can only be attributed to the manner in which the proceedings and the resultant order were typed and extracted. However, it is not lost on me that the Plaintiff herein indicated clearly at the foot of paragraph 2 of his witness statement dated the **6th July 2025** that the Grant AD Litem was issued in his favour.

73. Other than the foregoing, it is also important to recall and reiterate that the current Plaintiff was substituted in place of NKANATA MWIRICHIA [deceased] pursuant to a Court Order. Obviously, the substitution of the current Plaintiff was undertaken in accordance with the provisions of Order 24 of the Civil Procedure Rules.

74. The substitution of the Plaintiff in place of the deceased was no doubt undertaken by a Judge. The Orders of the Judge who substituted the Plaintiff in place of the Deceased have neither been impugned and/or impeached. Moreover, it is worth recalling that the substitution was undertaken upon Notice to and with the involvement of the Learned Counsel who was previously on record for the Defendants.

75. It is also important to point out that the original file in respect of this very old matter is reported to have been lost; misplaced and or mislaid. The fact pertaining to the loss or misplacement of the original file was aptly

captured at the foot of the proceedings by my predecessor. [See paragraph 11 of the Judgment dated the **13th February 2019,** which was set aside by the Court of Appeal.]. Notably, the reference herein only relate to the fact pertaining to the loss of the original file.

76. In view of the foregoing and taking into account the provisions of Order 24 Rule 5 of the Civil Procedure Rules, I come to the conclusion that the issue of lack of locus standi is premature, misconceived and a red-herring. In any event, there is no gainsaying that the Defendants herein have never challenged the substitution of the Plaintiff in lieu of the Deceased.

77. *In a nutshell*, it is my finding and holding that the Plaintiff herein was duly issued with the requisite Grant of Letters of Administration in terms of the proceedings and Order that was produced as exhibit P16. To this end, I am not persuaded by the arguments propagated on behalf of the Defendants.

78. Moreover, it is important to underscore that the issue as to whether the Plaintiff herein was seized of the requisite locus standi to prosecute the suit or better still, whether the Plaintiff had been issued with the Grant of Letters of Administration was only canvassed during the cross examination by Learned Counsel for the Defendants and thereafter in the written submissions. Notably, the issue was not pleaded in the statement of defence or in the Counterclaim. In this regard, I hold the view that the issue of locus standi was an afterthought and a subtle ploy by Learned Counsel for the Defendants to spring a surprise or ambush against the Plaintiff.

79. Additionally, there is no gainsaying that such an issue ought to have been raised and canvassed in the pleadings and insofar as the issue was not captured in the pleadings by the Defendants, same cannot now be made an issue for [sic] determination. The raising of the said issue is misconceived and must equally be frowned upon.

80. In the case of **Roselyn Dola Ouko and another [suing as the personal representatives and Administrators of the Estate of Jason Atinda Ouko - deceased -vs- Rahab Wangui Kageni [sued as the personal representative and Administrator of Samwel Muhika Kageni – deceased, Judgment delivered on the 5th December 2025 [unreported]**, the Court of Appeal considered a similar situation where an issued attacking competence and capacity of a party to sue was being raised for the first time *vide* cross examination and the Court held that such a scenario must not be countenanced.

81. For coherence, the Court stated thus:

***32. we have painstakingly gone through the entire record and we note that the issue of the Respondent's capacity was not raised in the pleadings and only arose during cross examination of the Respondent. Even in the Appellant's List of issues dated 29th May 2016, appearing at pages 227 and 228 of the Record of Appeal, this issue was not raised. In Ann Wairimu Wanjoi -vs- James Wambiru Mukabi [2021] KECA 476, the Court,* when confronted with issues not raised in the pleadings held that:**

[33] We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.

In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be

amended to bring in all the issues, <u>Odd Jobs vs Mubia</u> (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.

82. Furthermore, the Court in the decision [supra] ventured forward and stated as hereunder:

> ***We associate ourselves with the cited decision and therefore find no error in the Learned Judges appreciation of the import of Order 1 Rule 9 and Order 31 Rules 1 and 2 of the Civil Procedure Rules and his conclusion on the question as to whether the Respondent's claim was effective. <u>We agreed that the issue was raised late in the day and could not be the basis for striking out the Respondent's suit.</u>***

83. The position highlighted by the Court of Appeal in the decision [supra], applies with equal force to the matter beforehand. Quite clearly, the Defendants who were party to the substitution of the Plaintiff, are now seeking to bring forth an issue through the back door. Such conduct does not sit well with the established rules of practice; and I dare add, with the Constitutional imperative of Fair Hearing.[See the provisions of Article 50[1] of the Constitution, 2010].

84. Before concluding on this issue, I beg to add that the case law which were highlighted and referenced by Learned Counsel for the named Defendants, namely: **Sigei and Another –vs- Malel [Sued as the administrator of the late Martha Chepkoech Berenge [2023] KEELC and Juliana ADoyo Ongunga & another –vs- Francis Kibarenge Bondeva[2016] eKLR,** were cited out of context. For good measure, the

holding in the said decisions are explicit. Nevertheless, the holdings thereunder relates to where a suit has been filed and/or commenced by a person prior to obtaining the requisite Grant of Letters of Administration [whether full or Limited, whichever is the case].

85. Turning to the second issue, it is important to highlight that a Counterclaim is a cross suit. Furthermore, the provisions of Order 7 Rule 5 of the Civil Procedure Rules,2010; commands that a Counterclaim shall be a companied by a Verifying affidavit in a like manner as a Plaint.

86. The provisions of **Order 7 Rule 5 of the civil procedure Rules, 2010**; stipulates thus:

> ***5. Documents to accompany defence or counterclaim [Order 7, rule 5]***
>
> ***The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—***
>
> ***(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;***
>
> ***(b)a list of witnesses to be called at the trial;***
>
> ***(c) Written statements signed by the witnesses except expert witnesses; and***
>
> ***(d) Copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.***

87. My reading and understanding of the provisions [supra], drives me to the conclusion that where a Defendant raises a Counterclaim, same [Defendant] is enjoined to file a verifying affidavit. Moreover, the terminology deployed is the word "shall". This means that the verifying affidavit is mandatory or peremptory.

88. I have looked at the statement of Defence and Counterclaim dated the **21st May 2025** and the entire bundle of documents that were filed on behalf of the named Defendants. I must confess that I have not come across any verifying affidavit or at all. In this regard, what becomes apparent is that the Counterclaim dated the **21st May 2025** in incompetent and thus invalid in the eyes of the law.

89. The significance of a verifying affidavit which by law must accompany a Plaint or a Counterclaim [whichever is the case] cannot be gainsaid. It suffices to reference the holding in the case of **RESEARCH INTERNATIONAL EAST AFRICA LTD v JULIUS ARISI & 213 OTHERS [2007] KECA 506 (KLR)** where the Court of Appeal stated thus:

> ***"Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.***
>
> ***The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule."***

90. I am alive to the fact that the Court has a discretion on whether or not to allow the filing of the verifying affidavit *ex post facto*. However, the discretion of the Court is subject to a suitable application and plausible explanation on behalf of the defaulting party. In this regard, no application was made and no efforts were put in place to remedy the lapse or the default.

91. In the circumstances, it is my finding and holding that the Counterclaim dated the **21st May 2025** is *ex facie* incompetent and thus invalid.

92. Moving on to the third issue, namely; whether the Plaintiff has proven the requisite ingredients underpinning a claim of adverse possession or otherwise. To start with, it was the evidence of the Plaintiff that his late Father, NKANATA MWIRICHIA- deceased entered into a sale agreement with N'KAANJA M'KAYUITHI, whereby his late Father purchased a portion measuring 4 acres of the suit property. Furthermore, evidence was tendered that the deceased paid to and in favour of the Vendor the entire consideration of **Kshs. 4,000/= only** and which sum was duly received and acknowledged.

93. Additionally, evidence was tendered that the Vendor allowed the deceased [Plaintiff's Father] to enter upon and take possession of the sold portion of land. For good measure, the sale agreement dated the **22nd August 1973**, was tendered and produced as exhibit P1.

94. It is important to highlight that the entry of the deceased and by extension the Plaintiff on a portion of the suit property was contractual and based on the contract. However, there is no gainsaying that the contract in question was subject to the Vendor obtaining the consent from the Land Control Board within **3 months** from the date of entry into or execution of the sale agreement.

95. The legal implication of the land Control Board Consent cannot be gainsaid. Nevertheless, it suffices to highlight that the failure to obtain the consent would render the sale agreement void. Simply put, the sale agreement was voided by operation of the law.

96. To the extent that the sale agreement was *voided* by operation of the law and taking into account that the vendor [now deceased] did not rescind the contract, the continued occupation of the portion measuring 4 acres by NKANATA MWIRICHIA – now deceased and by extension the Plaintiff became adverse.

97. In the case of **Sisto Wambugu -vs- Kamau Njuguna [1983] KECA 69**, the Court of Appeal considered that circumstances where adverse possession would arise in matters where the claimant is placed in occupation of the suit property or a portion thereof pursuant to a sale agreement [contract].

98. The Court stated thus:

> *"**There have been several cases, of which Livingstone Ndeete case is one, in which the claimant of land puts his case in the alternative, that is to say, by pleading the agreement under which he entered, and then asking for an order based on subsequent adverse possession. For instance, in Hosea -vs- Njiru & others [1974] EA 526, Simpson J, following bridges -vs- Mees [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price has been effected, the purchaser's possession became adverse to the Vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as the proprietor thereof.***

99. In respect of the instant matter, the sale agreement between NKANATA MWIRICHIA was not only voided by lack of the consent, but the occupation also became adverse the moment the vendor failed to commence eviction/recovery proceedings. To this end, it is my finding and holding that with effect from **December 1973,** the occupation of the 4 acres portion by NKANATA MWIRICHIA – deceased, was adverse/hostile to the rights of the vendor and hence by the time the suit was filed the statutory twelve-year period had accrued/materialized.

100. Additionally, it is also important to point out that the occupation of a portion of the suit property by the deceased and by extension the Plaintiff herein has been conceded by inter alia, STANLEY GAITI [the 1st Defendant]. For good measures, paragraph 3 of the statement of defence which was filed in respect of MERU ELC NO. 118 OF 1985 confirms the fact that the deceased was in occupation of the suit property.

101. For ease of appreciation, paragraph 3 of the statement of the defence states thus:

> *The 1st Defendant states that during the year 1975 the Plaintiff hired/leased a portion of the suit land for Kshs. 100/= per year and the* ***Plaintiff constructed a small thatched-mad house after the death of the deceased so that he could sue in this case.***

102. Even though the 1st Defendant has adverted to a Lease/Hire [which has not been proven], what is apparent is that the 1st Defendant was clearly conceding that NKANATA MURICHIA was actually in possession and occupation of the suit property.

103. It is also important to underscore that the 1st Defendant [STANLEY GAIT] was constituted as the Legal Administrator of the Estate of NKAANJA M'KAYUTHI [now deceased] vide Certificate of Confirmation of Grant issued on the **5th November 1992**, but same has never filed any proceedings for purposes of recovery of the portion of land from the Plaintiff.

104. First forward, it is worthy to recall and reiterate that the 1st Defendant herein who was privy to the entry of NKANATA MWIRICHIA on to the suit land, did not testify before the Court. I must state that the Defendants case is anchored on the evidence tendered by the 2nd and 5th defendants only.

105. The question does arise as to why the 1st Defendant, who is the Legal Administrator of NKAANHA M'TUKAYUTHI failed to attend Court and to testify. I beg to underscore that I was not entitled to any reason why the said 1st Defendant chose not to testify. However, it is instructive to highlight that the failure by the 1st Defendant [who is a critical witness] founds a credible basis to warrant the invocation and application of the Doctrine of Adverse Inference.

106. In the case of **General & another v Hussein & 3 others (Civil Appeal 100 (ELD NO. 32) of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment);** the Court of Appeal considered the circumstances where reasonable/adverse inference may be drawn. The Court stated thus:

> ***".....In Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd [1979] (1) SA 621 (A) it was held that: "where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts***

unfavorable to him should be drawn would depend on the facts peculiar to the case where the question arises."

37.In Just Names Properties II CC & Another v Fourie & Others 2007 (3) SA. 1 (W) the court held that:"In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her nonappearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision..."

107. Other than the foregoing, it is also important to reference the evidence tendered by DW1 [GODFREY GIKUNDA]. In particular, the witness herein confirmed that upon purchasing/acquiring his parcel of land, the Plaintiff encroached and/or trespassed thereon. Moreover, he posited that the Plaintiff kept on disturbing him and as a result, he was constrained to file a suit before the Tigania Magistrates Court for purposes of obtaining an appropriate Order to tame the offensive activities by the Plaintiff.

108. For ease of understanding, it is imperative to reproduce verbatim the evidence of DW1 while under cross examination by Learned Counsel for the Plaintiff. DW1 stated thus:

" I do wish to confirm that the Plaintiff is known to me. I got to know him when I was selling my land. I got to know him when I sued him. The Plaintiff herein was using a beat of my land. The Plaintiff herein entered upon a portion of my land. I got to know that the Plaintiff was using my land I later filed a Court case for purposes of evicting the Plaintiff from the land.

109. My reading and understanding of the except which has been reproduced above is testament to the fact that the Plaintiff was indeed in occupation and possession of the designated portion of the suit property. Moreover, there is no gainsaying that when the 2nd Defendant entered onto the portion of land in the year **2012**, the Plaintiff was already [in situ].

110. It is also important to take into account the evidence of PW3 [STANLEY IRIGA MWITARE]. The witness herein confirmed that the Plaintiff has been in possession of the 4 acres piece of land which was bought by NKAATA MWIRICHIA [deceased]. Suffice it to posit that the evidence of PW3 was neither controverted not impeached. In any event, the only person who could impeach the testimony of the said witness was STANLEY GAITI [the 1st Defendant] who however, failed to testify before the Court for reasons best known to himself.

111. From the totality of the evidence on record, I come to the conclusion that the Plaintiff herein has established and proven the ingredients, namely; *nec vi; nec clam; and nec precurio* [without force, without secrecy and without permission].

112. In the case of Richard **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR** the Court of Appeal expounded on the ingredients that underpin a claim of Adverse possession. After reviewing various decisions, the Court stated as hereunder:

> ***36. For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.***

37. In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was nec vi, nec clam, nec precario. (See Kimani Ruchine -v- Swift, Rutherfords Co. Ltd. [1980] KLR 1500 and Karnataka Board of Wakf -v- Governemnt of India & Others [2004] 10 SCC 779).

38. In this appeal, the learned judge held that the appellant's occupation of the suit property was interrupted in 1992 when he filed suit before the Bungoma Principal Magistrate's Court.

39. In Wambugu –v- Njuguna, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:

(a) On what date he came into possession.

(b) What was the nature of his possession?

(c) Whether the fact of his possession was known to the other party.

(d) For how long his possession has continued and

(e) That the possession was open and undisturbed for the requisite 12 years.

113. To my mind, the Plaintiff and his witnesses have established and proven that his occupation, possession and use of the 4 acre portion of the suit property was hostile and adverse to the interests of NKAANJA M'KAIYUTHI [now deceased]; the 1st Defendant [being the Legal Administrator thereof] and the rest of the Defendants who were [sic] purchasers of portions of the suit property which was under occupation

by the Plaintiff. [**See the holding in the case of Samwel Kihamba -vs- Mary Mbaisi [2015] KECA 853].**

114. Before concluding on this issue, I beg to state that the mere fact that the 1st Defendant [STANLEY GAITI] proceeded to sub-divide and thereafter sell portions of the suit property which was under adverse occupation by the Plaintiff, did not [does not] defeat accrued adverse possessory rights. In any event, by the time when the 1st Defendant was purporting to sell portions of the suit property, the 1st Defendant's rights to and in respect of the 4 acre portion of land occupied by the Plaintiff had lapsed and stood extinguished. [See Section 7 of the Limitation of Actions Act].

Finally, it is instructive to recall and reiterate the holding in the case of **Githu vs Ndeete (1984) KLR 776** where the Court of Appeal stated as hereunder:

> ***"The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession"."***

115. Next is the issue as to whether the Title documents held by the 1st – 5th Defendants are lawful and valid and thus deserving of the protection/vindication by the Court. The Learned Counsel for the named Defendants has submitted that the Defendants herein purchased and acquired their portions of land from the 1st Defendant, who was the Legal Administrator of the Estate of NKAANJA M'KAIYUTHI. To this end, it has been posited that the transfer to and in favour of the named Defendants is protected by the provisions of **Section 93 [1] of the Law of Succession Act, Chapter 160, Laws of Kenya.**

116. Additionally, it has also been contended that the named Defendants are bona-fide purchasers who bought their respective portions from the 1st Defendant, without Notice of any defect in the 1st Defendant's Title. For good measures, DW1 and DW2 posited that before purchasing their respective portions, they complied with the due process of the law including undertaking Search and obtaining the Land Control Board consent.

117. Furthermore, it was also contended that the suit property was lawfully transferred to and registered in the name of the 1st Defendant after the issuance of a Certificate of Confirmation of Grant. To this end, the Defendants heavily relied on the Certificate of confirmation of Grant dated the **21st June 1993**.

118. Three sub-issues do arise and merit consideration. Firstly, the Order of the Court confirming the Grant in favour of the 1st Defendant was explicit. Instructively, the Court directed that the Grant was being confirmed for purposes of Administration only and that no sale or alienation could be undertaken in favour of new purchasers until further orders of the Court. In my understanding, the Order of the Court issued on the **5th November 1992** placed a caveat, restriction and/or limitation on the powers of the 1st Defendant [the appointed Legal Administrator].

119. For ease of reference, the Order of the Court confirming the Grant stated as hereunder:

*"By **Consent, Letters of Administration is confirmed Limited only to Administration without disposal of the land to new purchasers till further notice."***

120. No evidence was placed before the Court that the Order of the Judge, whose import and tenor are clear was ever varied, reviewed or set aside. For as long as the said Order remains alive, no alienation, sale or disposal could be undertaken by the 1st Defendant in respect of the suit property. Moreover, there is not gainsaying that any sale or alienation undertaken on the face of the said Court Order would be illegal, null and invalid.

121. In the case of **Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment)**, the court of Appeal elaborated on the obtaining Jurisprudence and highlighted that a Court of Law cannot sanction or sanitize a Certificate of Title procured on the basis of a contrived Decree or Order.

122. For coherence, the Court stated thus:

> ***64.The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.***

123. The second sub-issue relate to the Certificate of Confirmation that was relied upon by the 1st Defendant to transfer the suit property unto his name and thereafter facilitate the sub-division and subsequent sale. Notably, the impugned Certificate of Confirmation of Grant is at variance

with the Order of the Judge issued on the **5th November 1992**. To the extent of variation, the Certificate of Confirmation of Grant is null and void.

124. Additionally, it is not lost on me that the Certificate of Confirmation of Grant [which is at variance with the Orders of the Judge] was signed and sealed by the Deputy Registrar contrary to the requirements of the law. It is common knowledge that a Certificate of Confirmation of Grant issued by the High Court can only be signed by the Judge and not by a Deputy Registrar. To this end, the Certificate of Confirmation of Grant which was relied upon by the 1st Defendant was ex facie a nullity.

125. The legal implication [s] of an Order or action which is void were highlighted by the Court [privy Council] in the case of **MACFOY VS UNITED AFRICA LTD (1961) 3 All F.R. 1169, where Lord Denning MR;** stated as hereunder:

> ***"If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expert it to stay there. It will collapse."***

126. In my humble view, something happened in respect of the Succession Cause no. 65 of 1991 and the strange happening, namely; the usurpation of the powers of the Judge by the Deputy Registrar, led to the illegalities which coloured/vitiated the subsequent sub-divisions and alienations of portions of the suit property.

127. The last sub-issue relates to the import and tenor of the Doctrine of *Lis pendence*. It is worthy to recall that the subject suit was filed in **1985** and same remained in existence to date. The 1st Defendant was duly impleaded and indeed filed a Statement of Defence on or about **January 1986**.

128. Notwithstanding the fact that the subject suit remained in existence and despite the fact that the 1st Defendant was privy to same, he 1st Defendant proceeded to and indulged in the sale and alienation of portions thereof. The sales and alienations by and on behalf of the 1st Defendant were tactically intended to defeat the pending suit. Such endeavours are contrary to and frowned upon by the Doctrine of *lis pendence.*

129. In the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)**, the Court of Appeal expounded on the scope of the Doctrine in the following manner:

> **"…….The Supreme Court of India in the case of KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others [2013] INSC 1069 stated that the doctrine is based on the legal maxim '*ut lite pendente nihil innovetur*' (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.**
>
> **51. Our previous land legislation regime expressly embraced the doctrine under *Section 52* of the repealed *(Indian) Transfer of Property Act (ITPA) 1882* by stipulating that:**
>
> > ***"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in***

> ***question, <u>the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose</u>." Emphasis added.***
>
> **52. Do courts still recognize the doctrine? The *ITPA* was repealed by the *Land Registration Act (LRA) Number 3 of 2013; whose Section 107 (1)* of the *LRA* provides for the saving and transitional provisions of the Act, and provides that:-**
>
> > ***"Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."***

130. To my mind, the Certificates of Title that were procured by and issued in favour of the 2nd – 5th Defendants were plagued with illegalities and thus same were invalid. [See the Provisions of Section 26 [1] [b] of the Land Registration Act, 2012].

131. *In a nutshell*, I am not prepared to hold that the Certificates of Titles possessed by the 2nd to 5th Defendants vest any legal rights or interests in their favour. Such a holding [if at all] would be tantamount to sweeping the enormous illegalities beneath the carpet under the guise of indefeasibility of Title. Moreover, it is trite and established that the Doctrine of indefeasibility of Title cannot be deployed to sanction illegality.

132. In the case of **Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)**, the Supreme Court of Kenya expounded on the scope and tenor of the Doctrine of indefeasibility of Title and stated as hereunder:

> ***"……Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:"...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."***

133. The last issue for consideration touches on the reliefs [if any] to be granted. The Plaintiff has sought various reliefs at the foot of the Plaint that was filed in respect of ELC NO. 118 OF 1985; and the Plaint underpinning the suit vide ELC NO. 124 OF 2012, respectively.

134. Regarding the instant suit, the Plaintiff has sought a declaration that same has since acquired adverse possessory rights to and in respect of a portion measuring 4 acres out of LR NO. GAITU/318 [the suit property]. While dealing with issue number three elsewhere herein before, I had the occasion to interrogate the nature of evidence that was tendered on behalf of the Plaintiff. Similarly, I observed that the evidence tendered by the Plaintiff was neither controverted nor impeached.

135. Furthermore, it is not lost on me that DW1 confirmed and corroborated the Plaintiff's evidence as pertains to occupation of a portion of the suit property. Notably, it was the evidence of DW1 that upon purchase of his portion of the suit property, he was constrained to mount a suit at Tigania Law Courts in an endeavour to evict the Plaintiff.

136. Simply put, the totality of the evidence on record confirm and establish that the Plaintiff, who is the Legal Representative of NKAATA MWIRICHIA- deceased, has since acquired adverse possessory rights to and in respect of the portion measuring 4 acres. In this regard, I find and hold that the Plaintiff has proven his claim to the portion measuring 4 acres.

137. Having found and held that the Plaintiff has proved and established the claim based on adverse possession, it then means that the portion of land measuring 4 acres is held by the 1st Defendant albeit on Trust for the Plaintiff and to this end, the said portion ought to be excised from the suit property and thereafter be transferred to and registered in the name of the Plaintiff.

138. In the premises, the consequential Order that does arise is to the effect that the suit property shall be sub-divided into two portions, with one portion measuring 4 acres being transferred to the Plaintiff. To this end, it suffices to Decree that the 1st Defendant shall execute the requisite instruments of conveyance to facilitate the realization of the terms of the Judgment.

139. Nevertheless, should the 1st Defendant decline and/or neglect to comply, then the Deputy Registrar of the Court shall be at liberty to execute the requisite instruments of conveyance on behalf of the 1st Defendant. Instructively, such execution shall enable the Judgment of the Court to be realized and/or actualized.

140. Additionally, there is not gainsaying that once the portion measuring 4 acres shall have been excised from the suit property and registered in the name of the Plaintiff, same [Plaintiff] shall be entitled to exclusive possession, occupation and use. To vindicate such rights, it is imperative to Decree an Order of Permanent Injunction, whose net effect is to restrain or prohibit the Defendants from interfering with the Plaintiff's possessory

rights over the designated portion. [See the holding in the case of **Moya Drift farm Limited –vs- Theuri [1973] EA].**

141. Other than the Plaintiff, the 2nd and 5th Defendants had filed a Counterclaim seeking various reliefs. Nevertheless, in the course of dealing with issue number four [4], I interrogated the root of the Titles that are being relied upon by the named Defendants and I came to the conclusion that the impugned Titles were vitiated by illegalities. Instructively, a Title is as good as the process that birthed same. Where the Certificate of Title was acquired un-procedurally, illegally or on the basis of a corrupt scheme, such a Title cannot accrue the protections of the Court.

142. In my humble view, the 2nd and 5th Defendants do not have any lawful rights to and in respect of the impugned Certificates of Title. In any event, it is worth stating that the 2nd Defendant himself testified and stated that he had sold his piece of land to one ISAAC MUGANIA. In this regard, the question that begs the answer is what rights [if any] does the 2nd Defendant have so as to mount a Counterclaim.

143. Regarding the question of Costs, it is important to underscore that costs follow the event unless there exists a good and plausible reason to warrant exercise of discretion of the Court to the contrary. Simply put, the Court has a discretion on the question of award of costs, but like all Judicial discretions, it must be exercised on sound principles. In this case, the Plaintiff has proven his claim. Consequently, there is no gainsaying that the Plaintiff is entitled to Costs.

SUMMARY OF FINDINGS

144. In the course of the Judgment, I have made various findings and conclusions. Nevertheless, it is imperative to summarize the findings for ease of appreciation and comprehension.

145. To this end, the findings are summarized as hereunder:

(i) ***The Plaintiff herein is seized of the requisite locus standi to prosecute the subject suit insofar as same was duly issued with the Grant of Letters of Administration Ad Litem.***

(ii) ***The question of the Plaintiff's capacity to be substituted in lieu of the Deceased and to prosecute the suit was dealt with in accordance with Order 24 Rule 5 of the Civil Procedure Rules.***

(iii) ***The Counterclaim by the 2nd and 5th Defendants offends the provisions of Order 7 Rule 5 of the Civil Procedure Rules as read together with Order 4 Rule 1 [2] of the Civil Procedure Rules, 2010.***

(iv) ***The Certificate of Confirmation of Grant that was relied upon by the 1st Defendant to transfer the suit property into his name and thereafter to alienate the suit property was at variance with the Orders of the Judge made on the 5th November 1992.***

(v) ***The powers of the 1st Defendant under the Confirmation of Grant were limited and circumscribed.***

(vi) ***The Certificate of Confirmation of Grant that was signed by the Deputy Registrar and not the Judge [and which in any event, was at variance with the Orders of the Judge] was/is a nullity.***

(vii) ***The Certificates of Titles arising from the sub-division of the suit property were procured illegally and are void for all intents and purposes.***

(viii) ***The Plaintiff has established and proved his claim as pertains to adverse possession in respect of the portion measuring 4 acres.***

(ix) ***The Plaintiff has established a basis for the issuance of an* Order of permanent Injunction.**

FINAL DISPOSITION

146. Flowing from the analysis and the summary of findings [whose details are enumerated in the body of the Judgment], I come to the conclusion that the Plaintiff has proven his claim to the requisite standard. On the contrary, the 2nd and 5th Defendants have neither established nor proven the Counterclaim dated the **21st May 2025**.

147. In the upshot, and for the reasons alluded to; the final Orders that commend themselves to me are as hereunder:

(i) ***A declaration be and is hereby issued that the Plaintiff has acquired adverse possessory rights to and in respect of a portion measuring 4 acres out of LR NO. ABOTHUGUCHI/GAITU/318.***

(ii) ***The Plaintiff is entitled to the said portion measuring 4 acres which comprises of the portion that was highlighted at the foot of the sale agreement dated the 22nd August 1973 and which was thereafter occupied the NKAATA MWIRICHIA- now deceased.***

(iii) ***The sub-divisions arising from the suit property, including LR NO'S ABOTHUGUCHI/GAITU/2197, 2198, 2199 and 2200; or 5843 and 5844, respectively; or any other Title arising therefrom, be and are hereby <u>revoked and cancelled</u>.***

(iv) ***The Register in respect of LR NO. ABOTHUGUCHI/GAITU/318 shall be rectified and thereafter the Title be reinstated as it were at the onset.***

(v) ***The Title in respect of LR NO. ABOTHUGUCHI/GAITU/318 shall thereafter be sub-divided into two portions and the portions measuring 4 acres [comprising of the portion occupied by the Plaintiff] shall be transferred to and registered in the name of the Plaintiff.***

(vi) ***The remainder portion of the suit property shall be registered in the name of the 1st Defendant [STANLEY GAITI], the Legal Administrator of the Estate of NKAANJA M'KAIYUTHI – deceased, to be dealt with in accordance with the provisions of the Law of Succession subject to the Orders of the Judge that were issued on the 5th November 1992 vide MERU HCC NO. 65 OF 1991 [the confirmation Orders].***

(vii) ***The 1st Defendant be and is hereby Ordered to execute the Application for Land Control Board Consent; the Mutation; the Transfer Instrument and all other instruments of conveyance to facilitate the sub-division of the suit property and the consequential transfer of the 4 acre portion thereof to the Plaintiff.***

(viii) ***The 1st Defendant be and is hereby ordered to execute the documents in terms of clause [viii] within 45 days of the delivery of the Judgment.***

(ix) ***In default by the 1st Defendant to execute the Instruments of conveyance in the manner prescribed. The Deputy Registrar of the Court shall proceed to and execute the requisite instruments of transfer of behalf of the 1st Defendant.***

(x) ***The Plaintiff herein shall bear the Costs of sub-division, survey fees, registration fees and the Stamp duty [if any].***

(xi) ***The Defendants or any of them, who has encroached onto the portion belonging to the Plaintiff in line with the Judgment herein shall vacate forthwith.***

(xii) ***There be and is hereby issued an Order of permanent Injunction to restrain the Defendants by themselves, agents, servants and/or any one acting under the named Defendants from interfering with the Plaintiff's rights to and in respect of the designated 4 acre portion of the suit property and by extension, the Title that shall be issued subject to the sub-division of the suit property.***

(xiii) ***Costs of the suit be and are hereby awarded to the Plaintiff.***

(xiv) ***The Counterclaim by the 2nd and 5th Defendants be and is hereby Dismissed.***

(xv) ***Costs of the Counterclaim be and hereby awarded to the 1st Defendant to the Counterclaim [the Plaintiff in the main suit].***

(xvi) ***The suit vide MERU ELC NO. 57 OF 2012 be and is hereby Dismissed.***

(xvii) ***Any other Order not expressly granted is hereby*** **declined**.

148. The Judgment herein relates to three suits, *namely*: MERU ELC 118 OF 1985; MERU ELC NO. 124 OF 2012 and MERU ELC NO. 57 OF 2012. Consequently, the three [3] suits be and hereby determined in terms of the Orders highlighted in the preceding paragraph.

149. It is so Ordered.

DATED, SIGNED AND DELIVERED AT MERU this 15th of January 2026.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant.

Mr. Iriga for the Plaintiff.

Ms. Wambui Mwai for the 1st, 2nd, 3rd, 4th and 5th Defendants

No appearance for the 6th Defendant [suit withdrawn].