IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KIAGE, KORIR & ODUNGA,

JJ.A) CIVIL APPEAL NO. E682 OF 2024

BETWEEN

WILLIAMS & KENNEDY LIMITED.....APPELLANT

AND

DAVID KIMANI GICHARU.....1ST RESPONDENT
PETER MBURU BURUGU.....2ND RESPONDENT JUMCHEM HEALTHCARE LIMITED alias RUNDA PALMS LIMITED.....3RD RESPONDENT CHIEF LAND REGISTRAR.....4TH RESPONDENT
MARY WANJIKU JUMA (sued as the Administrator Of the Estate of Juma Muchemi).....5TH RESPONDENT
KENYA DEPOSIT INSURANCE CORPORATION (as liquidator of Post Bank Credit Limited).....6th RESPONDENT

CONSOLIDATED WITH
CIVIL APPEAL NO. E686 OF 2024

BETWEEN

MARY WANJIKU JUMA (Suing as the Administratix of the Estate of the late Juma Muchemi).....APPELLANT

AND

DAVID KIMANI GICHARU……1ST RESPONDENT

PETER MBURU BURUGU……2ND RESPONDENT JUMCHEM HEALTHCARE LIMITED alias RUNDA PALMS LIMITED……3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT WILLIAMS & KENNEDY LTD.....5TH RESPONDENT
KENYA DEPOSIT INSURANCE CORPORATION (as liquidator of Post Bank Credit Limited).....6th RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. E705 OF 2024

BETWEEN

PETER MBURU BURUGU.....1ST APPELLANT
JUMCHEM HEALTHCARE LIMITED alias RUNDA PALMS LIMITED.....2ND APPELLANT

AND

DAVID KIMANI GICHARU.....1ST RESPONDENT
CHIEF LAND REGISTRAR.....2ND RESPONDENT
WILLIAMS & KENNEDY LTD.....3RD RESPONDENT
MARY WANJIKU JUMA (Sued as the Administratix Of the Estate of the late Juma Muchemi).....4th RESPONDENT KENYA DEPOSIT INSURANCE CORPORATION (as liquidator of Post Bank Credit Limited).....5th RESPONDENT

(An appeal against the Judgment and Decree of the Environment and Land Court at Nairobi (E. K. Wabwoto, J.) dated 11th July, 2024.

in

ELC Case No. 348 of 2019)

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JUDGMENT OF THE COURT

These consolidated appeals emanate from the judgment of the Environment and Land Court at Nairobi (E. K. Wabwoto, J.) dated 11th July 2024, where the learned Judge, faced with multiple competing claims over ownership of a prime property in upmarket Runda, found in favour of the 1st respondent herein. David Kimani Gicharu ('1st respondent') was the plaintiff. He had filed suit against Peter Mburu Burugu ('Burugu'), Jumchem Healthcare Ltd ('Jumchem') alias Runda Palms Limited ('Runda Palms'), (which names are used interchangeably herein); The Chief Lands Registrar (CLR), Williams & Kennedy Ltd (WKL) and Mary Wanjiku Juma ('Mary') as the 1st to 5th defendants, respectively.

By an 'Amended Amended Amended Plaint' dated 30th July 2020, it was deposed that the 1st respondent had at all times material to the suit been the lawful and registered proprietor of the properties known as Land Reference Number 5989/56, 5989/57, 5989/58, 5989/59,

5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87,

5989/88, 5989/89, 5989/90 and 5989/231-243), as well as

5989/5/2, 5989/5/3 and 5989/5/4 (all formerly known as **L.R. No. 5989/5 (the suit property))**, situated in Nairobi City County. The 1st respondent purchased the suit property on or about August 2000 from the then registered owner, **Zena Grace Linsley** (Zena) at a consideration of Ksh.20,000,000. Upon payment of the full purchase price, Zena and he executed a conveyance dated and registered on 5th September 2000 transferring the vendor's interest over the suit property to him. It was averred that prior to the registration of the conveyance, the 1st respondent applied for and obtained the consent to transfer from the Land Control Board; obtained the rates clearance certificate from the defunct Nairobi City Council; and applied for valuation of the suit property following which the Collector of Stamp Duty valued it at Ksh.20,000,000 and directed payment of stamp duty in the sum of Ksh.400,000, which he paid. It was averred that subsequent to registering the suit property in his favour, the 1st respondent took possession. Years Later, he applied for its sub-division and the property was sub-divided into 44 parcels, as set out above, and certificates of title were issued on 10th December 2018 and 21st February 2020.

All was well and calm until on or about 2nd November 2019 when Burugu and Runda Palms and their agents entered the suit property and, harassed and intimidated the 1st respondent together with his employees who were working on the same. They also destroyed a steel gate he had constructed and carted away construction material to his loss. On 4th April 2019, Burugu disclosed to him that they owned the suit property and threatened that they would continue to interfere with his possessory rights. The 1st respondent claimed that Burugu, Runda Palms, WKL and Mary continued interfering with his quiet possession of the property in violation of his rights under **Article 40** of the **Constitution** and he would be hindered from possession and putting the suit property to good use to his irreparable loss, unless the court intervened.

It was alleged that WKL was laying claim over the property on the strength of a title document that was fraudulently issued by the CLR on 19th October 1983. Particulars of the fraud were enumerated as follows;

a) Purporting to hold a grant in respect of the suit property issued to it on 19th October 1983, by the President of the Republic of Kenya when it is evident that this Company had been dissolved and wound pursuant to resolutions passed on 23rd November 1973 and Gazette Notice No. 3596 dated 23rd

November 1973, and has neither been reinstated nor incorporated to date.

b) Procuring Deed Plan Number 106270 dated 22nd March 1979 to aid their claim over the suit property when it is evident that there was in force Deed Plan Number 45300 issued on and dated 22nd March 1950, and the suit property had neither been re-surveyed nor the title and the Deed Plan thereof surrendered to give rise to a new Deed Plan.

c) Purporting to cause the sub-division of the suit property, being L.R. No. 5989/5, Grant No. 35803, Deed Plan No. 106270 into four parcels and obtaining title thereof vide entry numbers 12, 13, 14 and 15 without the surrender of Deed Plan Number 106270 and/or a resurvey thereof.

d) Purporting to charge the property known as L.R. No. 5989/5/R to Post Bank Credit Limited vide entry numbers 16 and 17 while fully aware that it neither existed nor lawfully owned the land.

e) Purporting to purchase the suit property from the genuine Williams and Kennedy Ltd through a letter of offer dated 13th October 1983, which was way before its alleged certificate of title was registered on 19th October 1983.

f) Purporting to appoint Emu Registrars Limited as its Company Secretary on 13th August 1987 to facilitate its operations when it is evident that Emu was registered on 3rd October 1991 and its proprietor became a member of the Institute of Certified Public Secretaries on 23rd November 1990.

g) Presenting the title document namely Grant No. 35802, L.R No. 5989/5 as genuine and uttering false entries thereon.

h) Presenting false and misleading returns to the Registrar of Companies when fully aware that it does not exist.

i) Purporting to open a parallel land register in respect to the suit property.

The 1st respondent pleaded that he further learnt that Runda Palms, through Burugu, was laying claim over the suit property on the basis of a transfer from WKL, which transfer was fraudulently obtained and registered. The particulars of fraud were:

a) Purportedly procuring registration of the transfer of the suit property in its favour vide an alleged entry number 19 without the removal of the caveat appearing as entry number 18 on its purported title document.

b) Attaining registration of the suit property on 23rd May 2007 vide entry number 19 on the alleged title document and purporting to transfer it to its associated company known as Runda Gardens Development Limited vide entry number 20 on the same day.

c) Purporting to own the property known as L.R. No. 5989/5/R and the 1st defendant [Mr. Burugu] swearing documents on behalf of Jumchem Healthcare Limited while fully aware that, Jumchem Healthcare Limited ceased to exist on 3rd December 2009.

d) Procuring publication of Gazette Notice Number 3735 on 29th May 2020 communicating its intention to reconstruct the land register for the suit property while fully aware that the said register does not and has never existed in the records of the 3rd defendant [Chief Land Registrar].

e) Procuring publication of Gazette Notice Number 3735 on 29th May 2020 communicating its intention to reconstruct the land register for the suit property while fully aware that the 3rd defendant [Chief Land Registrar] has taken the position that its records do not exist and the court is seized of the dispute herein.

f) Making false entries on Grant Number 35802, L.R No. 5989/5/R and presenting them as genuine.

g) Purporting to hold a valid title in respect of Grant Number 35802, L.R No. 5989/5/R while fully aware that Deed Plan Number 106270 dated 22nd March 1979, that allegedly gave rise to the subdivision in L.R. No. 5959/5/R has never been surrendered.

h) Purporting to open a parallel land register in respect to the suit property.

i) Purporting to lay claim on the entire suit property which measures 9.88Ha while the alleged title documents that he has presented in court suggests that what was allegedly transferred to him measures 6.5796Ha.

j) Presenting purported title documents to government agencies while fully aware the same to be altered and/or forged.

It was claimed that while Runda Palms alleged that it purchased the property known as L.R. No. 5959/5/R from WKL, the entries contained in the title documents which the duo presented were materially different. In particular, entries numbers 16,17,19 and 20 on the two title documents were inconsistent as set out below, thereby confirming the illegality of the said title documents:

i. While entry number 16 on the title that is held by the 4th defendant [Williams and Kennedy Ltd] does not indicate the value of the charge allegedly held by Post Credit Bank Limited – in liquidation, entry number 16 on the title allegedly held by the 2nd defendant [Runda Palms Ltd], presumably purchased from the 4th defendant indicates the value of the charge as

Kshs.7,000,000.

ii. While entry number 17 on the title held by Williams and Kennedy Ltd does not indicate the value of the further charge allegedly held by Post Credit Bank Limited – in liquidation, entry number 17 on the title allegedly held by Runda Palms Ltd indicated the value of the charge as Kshs.2,000,000.

iii. The word 'if demanded' in entry number 15 on the title allegedly held by Runda Palms Ltd is in brackets and not preceded by a hyphen while the same word in the title document allegedly held by Williams and Kennedy Ltd is not in brackets and is preceded by a hyphen.

iv. Entry number 19 which deals with the transfer of the land to Jumchem Healthcare Limited on the title documents held by Runda Palms Ltd and Williams and Kennedy Ltd are different. Whereas this entry on the title held by Runda Palms Ltd indicates the value as Kshs.18,000,000, the entry on the title held by Williams and Kennedy Ltd does not indicate the value of the transfer.

The 1st respondent averred that while entries number 2 and 17 on the title document held by WKL were succeeded by cancelled entries, no such cancellations succeeded entries number 2 and 7 of the title documents held by Runda Palms, thereby confirming the illegality of the instruments. Further illegality of the title documents was demonstrated by the variance in the registrar signatures in entries number 3,4,5,9 and 18.

The 1st respondent averred that it came to his attention that Mary laid that claim on the suit property on account of an alleged sale between WKL and the estate of her late husband Juma

Muchemi.

Particulars of the illegality were that, WKL had never held a good title over the suit properties and was therefore not able to pass good title as alleged or at all, and the properties subject of the alleged sale resulted from a subdivision illegal for failure to surrender deed plan number 106270 dated 22nd March 1979.

By reason of the defendants' actions, David had been forced to stop developments at the suit property, was exposed to third party contractors therefor, was deprived of the us and enjoyment of the same as the lawful purchaser and registered proprietor thereof and thus stood to suffer irreparable loss unless the defendants were restrained from trespassing thereon and interfering with his quiet possession. He thus sought various orders which we set out verbatim;

a) A permanent injunction be issued restraining the defendants either by themselves, their agents or servants or otherwise howsoever from interfering with the plaintiff's quiet and peaceful possession and occupation of the suit property known as Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238, 5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 all formerly known as L.R. No. 58989/5 situated in Nairobi

City County.

b) A permanent injunction against the defendants prohibiting whether by themselves, their agents or servants from entering upon, remaining upon, transferring, occupying, leasing, charging, assigning or interfering with the plaintiff quiet possession of the suit property known as Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238, 5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 all formerly known as L.R. No. 58989/5 situated in Nairobi City County.

c) A mandatory injunction compelling the defendants, their servants and/or their agents and any other person occupying the suit properties known as Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238, 5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 all formerly known as L.R. No. 58989/5 situated in Nairobi City County, to vacate unconditionally and remove any materials deposited or erected thereon at their own costs, in default of which an eviction order do issue against the defendants and the officer commanding station, Runda Police Station in Nairobi or any other nearest police station to ensure compliance.

d) A declaration that the plaintiff is entitled to ownership and occupation of the suit properties known as Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73,

5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79,

5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238, 5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 all formerly known as L.R. No. 58989/5 situated in Nairobi City County, to the exclusion of the defendants herein.

e) A mandatory injunction compelling the 3rd defendant to annul or cancel any instrument purporting to confer interest in properties known as Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238, 5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 all formerly known as L.R. No. 58989/5 situated in Nairobi City County, to the 1st, 2nd, 4th and 5th defendants herein.

f) Damages for trespass against the defendants.

g) Costs of the suit.

h) A declaration be and is hereby issued that all ownership or proprietary documents held by the defendants in relation to
L.R. No. 5989/5 and its sub-divisions thereon including but not limited to Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238,

5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 is a nullity and of no force in law.

i) A declaration be and is hereby issued declaring that any interest conferred by the 4th defendant to either the 1st, 2nd, 5th or any other person in respect to the property known as
L.R No. 5989/5 and its sub-divisions thereon including but not limited to Land Reference Numbers 5989/56, 5989/57, 5989/58, 5989/59, 5989/60, 5989/61, 5989/63, 5989/64, 5989/65, 5989/72, 5989/73, 5989/74, 5989/75, 5989/76, 5989/77, 5989/78, 5989/79, 5989/80, 5989/81, 5989/82, 5989/83, 5989/84, 5989/85, 5989/86, 5989/87, 5989/88, 5989/89, 5989/90 as well as 5989/5/2, 5989/5/3 and 5989/5/4 as well as 5989/231, 5989/232, 5989/233, 589/234, 5989/235, 5989/236, 5989/237, 5989/238, 5989/239, 5989/240, 5989/241, 5989/242 and 5989/243 is a nullity and of no force in law.

The triple-amended plaint was supported by the 1st respondent's affidavit sworn on 30th July 2020, whereby he affirmed the correctness of the averments therein.

Burugu and Runda Palms responded through a joint statement of defence dated 18th February 2020 and later amended on a date in 2020 that is not indicated, in which they asserted that Runda Palms was the corporate name to which Jumchem was changed. They denied that the 1st respondent legally owned the suit property, and denied the averments as to his requisition, registration and sub-division thereof. They asserted that his claim over the suit property was predicated on

falsehoods and fraudulently processed documents, which they particularized as follows;

i. Tampering with the genuine official records held at the lands office and attempting to create a fake parallel parent file on the suit property complete with the creation of fake title documents arising from the said fake and falsified records.

ii. Purporting to have purchased the suit property from a non-existent vendor alleged to be called ‘Zena Grace Linsley’ who neither actually existed at the material time, nor owned the said property not could the already deceased person pass any title of the same to the plaintiff as alleged, and without exhibiting any written agreement for sale forming the basis of the alleged sale transaction.

iii. Purporting to have paid a sum Ksh.20 Million in cash as purchase price through a deceased advocate (Joseph M. Rioba) so as to conveniently conceal the fraudulent scheme.

iv. Purporting to have sub-divided the suit property into numerous sub-plots without any evidence of the alleged sub-division on the ground whatsoever, and indeed uttering forged and/or fake sub- division schemes and documents in support of the purported but false sub-divisions.

v. Using false, fake and forged documents to substantiate the plaintiff’s otherwise blatant illegal claim to the suit property.

vi. Knowingly and deliberately presenting and uttering fake documents both at the Lands Office and before the Honourable Court.

According to them, the true and correct position with regard to L.R. No. 5989/5/R was that the title document for L.R. No. 5989/5 under Land Survey Map/Deed Plan Number 106270 and Grant No. 35802 was duly

registered in favour of WKL on 19th October 1983 at 3.40pm. The land title L.R. No. 5989/5 was thereafter the subject of numerous entries at the Lands Office including, entries on compulsory acquisition of a portion of the property measuring 9.575 acres (3.875 Ha) by the Government of Kenya under the Land Acquisition Act; entries on court orders, caveats and their withdrawals; surrenders of 6.03 acres (0.4182 Ha and 2.491 acres (1.008 Ha) to Government of Kenya; four sub- divisions effected on 27th May 1991 and titles thereof issued to WKL; charges to banks registered against the said title, eventually culminating with (sic) the transfer of ownership of the remainder of the property to Jumchem on 23rd May 2007. The transferred property was at that stage registered as L.R. No. 5989/5/R, with the letter "R" denoting that the subject of that transfer was the 'remainder' of the land after the compulsory acquisition, surrenders and sub-divisions and comprising 16.259 acres (6.5796 Ha) out of the initial land area of

24.70 acres (9.999 ha) under the original Grant No. 35802.

Runda Palms purchased L.R. No. 5989/5/R from the Deposit Protection Fund Board (the liquidator of Post Bank Credit Ltd) which had exercised its rights as the chargee to recover funds owed to it by

WKL. WKL thereafter instituted **Nairobi HCCC No. 710 of 2009**

(Commercial & Admiralty Division) seeking to challenge the process through which the Bank had exercised its power to realise the security held by it in selling the said property to Runda Palms Ltd. An interim court order was issued on 10th December 2009 and eventually duly registered against the title of the property, directing the preservation of the suit property's *status quo* pending the hearing and determination of that suit. The joint defendants claimed that *"by reason of that order, the change of the 2nd defendant's corporate name from* ***Jumchem Healthcare Ltd*** *to* ***Runda Palms Ltd*** *which had just been effected in the same month of December 2009 could not be endorsed on the title records of the property which have to date remained as per the transfer of ownership that was registered on 23rd May 2007 (as amended)."* It was averred that from the time of registration of ownership in May 2007, Runda Palms had "maintained actual physical possession of the said property" including "having security guards full time" and rearing livestock thereon. In 2014 it erected a permanent stone wall to ward off threats of squatter invasion – after executing an agreement with the plaintiff in HCCC No. 710 of 2009.

They claimed that way before the 1st respondent's purported

purchase of the entire property WKL had in 1991 subdivided that said

LR 5989/5 with four certificates of title, namely LR 5989/66, LR 5989/67, LR 5989/68 and LR 5969/91 issued to it, on the last of which the family of the Directors of WKL, called Mr. & Mrs. Ng'ang'a Gicharu, have always and do indeed reside in an old permanent stone house erected thereon.

They accused the 1st respondent of having orchestrated an invasion of LR 5989/5/R on Saturday 2nd November 2019 by hired goons who attempted to take possession thereof by attacking the security guards and damaging the erected gate. Burugu and Runda Palms had to seek assistance from Runda Police Station, leading to the arrest of seven of the attackers.

Denying the allegations of illegality of their documents and entries made on their titles, they asserted that the same were lawful and regular, reflective of transactions validly effected, and instead accused the 1st respondent of exhibiting false, fraudulent and invalid documents in a "poorly planned but blatant (sic) attempt to irregularly dispossess the defendants of their property." They termed the suit as "purely based on deliberate falsehoods" and predicated on suspicious, non-genuine documents."

Burugu and Runda Palms denied the particulars of fraud made against them and prayed that the 1st respondent's suit be dismissed with costs.

The 3rd defendant, the CLR, responded to the suit through a statement of defence first dated 18th February 2020 then amended on 11th September 2020. He first denied the corporate status of Jumchem alias Runda Palms and declared himself a stranger to the 1st respondent's ownership of the suit property and its subdivisions, as he was not privy to their antecedents. He (in a complete reversal of the previous pleading) explained, that as per their records, there is no indication that surrender for subdivision was presented and/or received at the Central Land Registry in respect of the suit land LR/5989/5 under day book no. 2410. That, according to their records, day book no. 2410 of September 2018 is a caveat in respect of IR 168818. Further, the records showed that the deed plans giving rise to the titles held by the 1st respondent were presented and received at the Central Land Registry under day book nos. 699-730 of 10th December 2018 under title IR 35802. It was pleaded that according to records held by the CLR, the documents presented in respect of the subdivision of L.R. No. 5989/5 were rejected and they were not

resubmitted

officially for registration. There was also compulsory acquisition of approximately 9.575 acres of L.R. No. 5989/5 vide gazette notice no. 3439 and 3440 of 20th November 1970 and compensation paid out pursuant to compensation schedule ref. 154/4/79 dated 23/12/1970. Moreover, there were surrenders of two portions of the suit property to the Government of Kenya as follows; L.R. No. 5989/5/2 measuring 0.2182Ha and L.R. No. 5989/5/1 measuring 1.008Ha. He was a stranger to valuation and payment of stamp duty and denied knowledge of 1st respondent's occupation of the suit property. The court was urged to dismiss the 1st respondent's case against the CLR.

WKL, stating it was a limited liability company but not under the Companies Act, 2015, opposed the suit through a statement of defence dated 13th August 2020. It contested, the 1st respondent's ownership of the suit property and asserted that it was the bona fide registered owner thereof having been issued with a title on 19th October 1983, under the provisions of section 23 of the Registration of Titles Act (Repealed), "after purchasing the same from one Mr. B. G Mitton," and held a valid title unchallenged for over 30 years. It was a stranger to the 1st respondent's alleged purchase of the same from Zena, who had no right to the property in 2002, and so could

not pass any title to the

1st respondent. It termed his "purported payment" of Kshs.20 million in cash, "conveniently to a deceased advocate in the absence of a sale agreement," a blatant and egregious attempt to dispossess it of its lawfully and legally acquired land**.** It next alleged that in collusion with the CLR and "a coterie of unknown land fraudsters orchestrated the most obnoxious, preposterous and daring scheme and fraudulently forged documents in the land office and purported to grant the 1st respondent a non-existent title to the suit property reminiscent of a wild west soap opera." Terming the suit as one seeking to sanitize the scheme through a judicial process, it alleged fraud between the 1st respondent and the CLR enumerated as follows;

i. Purporting to register a transfer and issue titles when the 4th defendant's title was still in existence.

ii. Openly obliterating the existing title documents in favour of the 4th defendant by creating a parallel fake title documents in the lands office.

iii. Exhibiting fake subdivision scheme (s) on paper which does not exist on the ground.

iv. Purporting to have purchased land from a non-existent entity who had no title documents or claim on the suit property.

v. Creating a false parallel parent file in the land's office in total ignorance of the existing one which has been subject of the court process.

vi. Purporting to have paid Kshs.20,000,000 allegedly in cash to a deceased advocate to conveniently conceal the fraudulent scheme.

vii. Knowingly uttering forged and/or fake documents to the land office and to this court.

viii. Making false and/or forged title documents and subdivisions without authority.

Denying 1st respondent's possession, WKL averred that it has been in actual possession and occupation of the suit property since the year 1983 and the 1st respondent had "never set foot on it." It asserted that all the entries on its title documents were regular, lawful and legal. Further, it denied the allegations of trespass, illegality and particulars of fraud.

Save that Runda Palms was laying claim over the suit property, WKL denied transferring the same to the former, and pleaded the existence of HCCC No. 710 of 2009 in which it challenges the legality and seeks cancellation of the said transfer. It denies that Runda Palms purchased LR 5989/5/R from it. WKL defended all entries on its title documents as regular, lawful and legal and/or registered by the CLR in accordance with actual transactions. It averred that in contrast the sub-divisions effected by the 1st respondent were unlawful, irregular, illegal, null and void.

It denied that Mary's claim was founded on a sale transaction between itself and the estate of Juma Muchemi (deceased) and pointed to HCCC No. 710 of 2009 in which it challenges his acquisition thereof pursuant to Post Bank Credit Ltd's (IL) purported exercise of a power of sale. The 1st respondent's complaint about loss for being deprived of the use and enjoyment of the suit property was denied as was his entitlement thereto. It disputed his claim that there was no other suit pending between the parties and finally averred that the suit was statue barred having been brought 36 years after WKL obtained title to property, and without leave.

The 5th defendant, **Mary** responded to the suit vide a defence dated 4th August 2020. She averred that by an agreement dated 23rd April 1993, her late husband Juma Muchemi purchased land parcels L.R. No. 5989/91, 5989/68, 5989/66, 5989/5 and 5989/91, at a total purchase price of Ksh.30 million, from **WKL,** a transaction that is subject of HCCC No. 2459 of 1997. It was further pleaded that by an agreement dated 1st March 2006, her deceased husband purchased land parcel no. L.R. No. 5989/5/R, at a cost of Ksh.18 million, from Postbank Credit Limited through the exercise of its chargee's power of sale, which is also subject of HCCC No. 710 of 2009. It was

claimed

that **Mary's** family had physical possession of the said land and custody of title documents until when her husband passed on in December 2018, upon which the directors of the WKL forcibly trespassed on to the suit premises. Further, it was alleged that the 1st respondent herein is a fraudster with no legitimate claim over the suit property. His fraud was particularized as:

a) Using fake and forged land documents to claim title.
b) Purporting to have purchased land from a non-existent seller.
c) Purporting to have paid a purchase price of Ksh.20 million in cash.
d) Conveniently using the names of a deceased advocate as proof of receipt of the said purchase price.
e) Purporting to have sub-divided the land into numerous sub-plots without any evidence of such sub-division on the ground.
f) Creating a parallel file at the Ministry of Lands in an attempt to authenticate his fraudulent activity.
g) Used of forged fake documents to substantiate his claim.

She prayed that the suit be dismissed with costs.

In answer to the defence by Burugu and Runda Palms, the 1st respondent lodged a reply dated 12th March 2020, in which he averred that the suit property was surveyed on 10th October 1949 and Deed Plan number 45300 dated 22nd March 1950 issued in respect to its title known as L.R. No. 5989/5 measuring 24.7 acres. He asserted that Deed Plan No. 106270 dated 22nd March 1979, upon which Burugu and Runda Palms Ltd lay claim on the suit property,

was illegal, null

and void as Deed Plan No. 45300 dated 22nd March 1950, which forms the foundation of his claim, had not been surrendered. Nor was the property re-surveyed to support the issuance of Deed Plan No. 106270. Further, the title document in respect to the suit property was first issued in favour of an entity known as Saint Benoist Plantation Ltd, which transferred the suit property to Basil George Mitton vide an indenture dated 25th July 1950. It was, therefore, fraudulent and misleading for Burugu and Runda Palms to allege that the suit property was first registered in favour of an entity known as WKL "in a failed attempt to establish root of title." Moreover, they misrepresented to the court that Jumchem, which ceased to exist on 3rd December 2009 was an existing entity capable of owning property. The alleged entries on their title documents are illegal, null and void and of no legal effect as are their alleged sub-divisions, for being anchored on the unlawful Deed Plan No. 106270 dated 22nd March 1979.

The 1st respondent denied WKL's pleaded ownership of the suit property as well as Burugu and Runda Palms' alleged purchase thereof from the liquidators of Post Bank Credit Ltd in exercise of statutory powers of sale. He, finally, disputed the jurisdiction of the

to determine the legality of the title allegedly held by the duo in HCCC No. 710 of 2009.

The 1st respondent also filed a reply to the amended defence of the CLR dated 6th October 2020, in which he once again explained sequentially how he acquired and got registered as proprietor of the suit property and later sub-divided it into 44 parcels. He asserted that he surrendered his original title for LR No. 5989/5 for subdivision, the scheme whereof was duly approved and registered following lawful booking. Not being responsible for assignment of day book numbers, he protested the CLR's attempt to blame him for any alleged errors. He also pleaded that Deed Plan giving rise to the 44 parcels were duly presented for registration and titles issued, terming the CLR's allegation of their being rejected a mere machination.

Reiterating the sequence of events regarding the intended compulsory acquisition of part of LR 5989/5 vide Gazette Notice 3439 of 20th November 1970 with Basil George Mitton pointing out to the Commissioner of Lands that he, and not WKL, was the owner of the land, which the Commissioner acknowledged and indicated the *status quo* would be maintained, the 1st respondent asserted that the

acquisition never materialized. He repeated that he conducted and

obtained lawful searches from CLR in June 2000 indicating that Zena was the lawful proprietor of LR 5989/5. He finally rejected claims that WKL surrendered the title for the property, seeing its number remained unchanged.

By a reply dated 6th October 2020, the 1st respondent answered the averments by WKL which he pleaded does not exist as it was dissolved in 1973 and has neither been re-incorporated nor reinstated in the Companies Registry to date. It was, therefore, inconceivable that a non- existent company could purport to purchase the suit property from the alleged Mr. B. G. Mitton, originate a Deed Plan, and be registered as proprietor of the suit property on 18th October 1983. Such title is thus illegal and fraudulent used to extort or swindle third parties. He averred that he only learnt of the existence of the documents held by WKL on or about 12th November 2019 when Burugu and Runda Palms served him with an affidavit sworn by Mr. Burugu. Time started running then and, therefore, these proceedings challenging the legality of title on grounds of fraud were not time-barred. He denied the allegations of fraud made against him and insisted that he acquired title over the suit property procedurally and sub-divided it into 44

parcels, for which he had tendered sufficient evidence, including payment receipts and a duly executed indenture.

He reiterated that WKL had never owned the suit property and was not its owner when he bought it in August 2000 from Zena, the then owner as confirmed by search, having been dissolved in 1973. The unfortunate demise of Joseph M. Rioba Advocate who represented the parties to the transaction, did not negate the legality of the title he validly acquired and continued to hold. He lamented WKL's attempt to fraudulently exploit the demise of that advocate to cast aspersions and unlawfully deprive him of his property.

The 1st respondent re-asserted the validity of his acquisition of LR 5989/5 which he procedurally subdivided into 44 parcels and therefore denied all the allegations of fraud levelled against him. He affirmed that he took vacant possession upon purchase, which he enjoyed uninterrupted until 2nd November 2019, when WKL and/or those claiming under it trespassed thereon without colour of right.

He termed as based on fraud the proceedings in HCCC No. 2459 of 1997 and HCCC No. 710 of 2009 which he was never aware of before the defendants' trespass, as WKL ceased to exist in 1973, had never owned the suit property and could not originate a deed on 22nd

March

1979 nor be registered as owner in 1983. Moreover, he was not a party to the suits which were based on causes of action unrelated to the ownership of the suit property and are before courts bereft of jurisdiction to determine validity of title thereto.

In answer to **Mary's** defence dated 6th October 2020, the 1st respondent insisted that it was inconceivable for Williams & Kennedy Ltd to enter into an agreement for sale of properties to **Mr. Juma,** when it had ceased to exist. Accordingly, he urged that the title documents in respect of the properties that her husband had acquired neither existed, nor were they lawfully and procedurally acquired. Moreover, the alleged charge to Post Bank Credit Ltd and the purported exercise of the statutory power of sale were a nullity and incapable of conferring any valid interest, as WKL had been dissolved in 1973 and, therefore, it did not, and could not, hold any valid interest.

The matter proceeded for trial before Wabwoto, J. on 15th December 2021. We have meticulously gone through the witness testimony as we must as a first appellate court that must make factual determinations. As PW1 **David** starting off, adopted his witness statement dated 29th July 2020 together with the supporting

documents. He, expounded on his claim as pleaded in the triple

amended plaint, asserting that he was the registered owner of the suit property. On 6th May 2022, the trial court did a site visit of the suit property in the presence of the parties and counsel. PW1 led the court to specific site features and he was cross-examined on the same. To avoid repetition, we shall address the totality of his evidence especially in cross examination, at analysis stage.

Next to testify was **Patrick Maloba (PW2),** a Chief Inspector of Police, at the Directorate of Criminal Investigations who produced an investigative report dated 29th July 2020, regarding L.R. No. 5989/5. He explained how he conducted the investigation and expounded on the findings of the investigative report. He pointed out how one Francis Ng'ang'a Gicharu (Francis) who was to later testify as DW8 as the Managing Director of WKL, brought him a copy of the title deed for LR 5989/5, while Burugu brought another for the same property. He compared the same and even made table for 23 entries before coming to the conclusion that they "were different and obtained by different persons at different times with the intention of mislead." He recorded statements from several people, some of whom later testified before court and received documents from the Ministry of Lands, the Registrar of Companies and the Institute of Certified

Secretaries. He concluded

that WKL "was wound up from 23rd November 1973 and ceased to exist," that Emu Registrar's was registered on 3rd October 1991 and could not therefore have made annual returns between 1984 and 1987 for WKL. Nor could its proprietor one Owen Njegu Koimburi, lawfully file those returns because it was not until 23rd November 1990 that he was registered as a certified secretary. The law firm of Hamilton Harrison and Mathews never acted for WKL in any transaction over the suit property and documents indicating it did were fraudulent. So also was a document purporting that Fred Ngatia, Advocate, witnessed payment of survey fees. He interviewed several Ministry of Lands officials who indicated the documents in their files belonged to the 1st respondent. The Ag. CLR David Nyandoro was summoned several times but he never appeared.

PW2 defended his report as "a complete report" which was addressed to the Attorney General who had asked for an investigation, with copy to the Solicitor General. He did not know how the 1st respondent got hold of it as it was not copied to him and it was not true that he had laid a complaint. PW2 did not establish the business of 1st respondent's company as "it was not an issue under investigation. The 1st respondent had only the transfer, and referred

to an advocate who

was deceased. PW2 did not dispute the reasons he gave for having transacted in cash from himself and borrowed from relatives. He noted that the 1st respondent's receipts had alterations. He observed in the course of cross examination that "every individual had problems in explaining himself." Further, some of the postal searches that were subject of the investigation were found not to have been obtained from the Ministry of Lands and were, therefore, not genuine. He remained emphatic that WKL wound up on 23rd November 1973 and was no longer in existence.

No. 231671, Alex Mwongera, an Assistant Superintendent of Police and an expert forensic document examiner of 15 years' experience, testified as PW3. He confirmed receiving certain documents for examination including postal searches, a certificate of title and a deed plan. Upon examination, he found that the signatures on those documents were dissimilar and distinguishable to the known signatures of Joseph Wangombe, Edwin Wafula, Betty Otieno and Fred Ngatia, and were forgeries. **Wafula Edwin Munoko (PW4),** a Land Registrar equally adopted his statements dated 8th March 2023 and 26th June 2020 and produced various documents which he said he obtained from the Land Registry. The documents

included, an

indenture of 19th July 1950 between **Saint Bernoist Plantation Ltd** and Basil George Mitton, referring to L.R No. 5989; another indenture dated 5th June 1991 making reference to L.R. No. 5989/5; a conveyance between Zena and the 1st respondent with respect to the same property, and certificates of title relating to sub-divisions of L.R. No. 5989.

He produced the certificates of title for the subdivisions which indicated the 1st respondent as the registered owner, as well as a surrender dated 15th August 2000, relating to LR 5989/5. He indicated that he obtained those documents from the deed file kept in the strong room. They were also the basis of his witness statement dated 18th February 2020 which was drawn by the Hon. Attorney General, and were filed in court. He had provided them all to the office of the Attorney General to prepare a defence. In cross examination he said he could not comment much on the statement of his boss, Nyandoro, and affirmed that his role was to present the documents he found in the file. He was in court pursuant to summons and was not out to sabotage his employer as had been suggested by learned counsel Mr. Mwiti and Mr. Njuguna on cross examination. He also answered Mr. Eredi that on receiving the court summons, without which he

would

not have gone to testify, he did inform the CLR but did not seek his permission, and that though an advocate, he was in court simply as a witness. He stood by the statements he had rendered.

Priscilla Njeri Wango (PW5), a land surveyor working at the Ministry of Lands, Housing and Urban Development relied on her statements dated 8th March 2023 and then one to the DCI dated 19th February 2020. She produced various documents in the 1st respondent's Trial Bundle 2, including deed plans. She stated that her duties included going to court and giving instructions to the Attorney General and she had given such upon request by Allan Kamau, State Counsel. She was in court pursuant to summons. She commenced on the statement of Polly Gatimu, who later became Director of Survey, by stating that the records did not indicate there was a proposed road. Nor did they show a change of user. The record shows that Deed Plans for 5989/56-90 were collected from the Director of Surveys office by someone from surveyor Mugenya's office. The work was commenced or done in 1990 but the documents were collected in 2018. She did see approvals for the subdivision and she stood by her statements.

Steve Rogers, a licensed surveyor, testified as **PW6** and

adopted his statement dated 8th March 2023. He explained that he

amalgamated and sub-divided L.R. Nos. 5989/66,67,68 and 91. This was pursuant to an application to the Nairobi County Government dated 22nd August 2018, and approval thereof issued on 18th April 2019. He produced various letters on the work he did, as well as the deed plans. The certificate of title was the evidence of his having completed the amalgamation and subdivision. He denied that the 4 titles mentioned by Burugu and Runda Palms were the ones issued on the property and asserted that the work earlier done by Mugenya was not completed and processed into titles.

He was emphatic that he visited the suit property in 2019 with a team of 4 surveyor assistants namely; **David Chepkirop**, **Silvester Onyango, John Muiruri** and **Akaras Muli**, and worked with them for 2 weeks without objection or opposition. He ascertained that the 1st respondent was the owner as part of due diligence and he placed beacons using iron pins in concrete in accordance with original deed plan which he received from the 1st respondent and then confirmed to be genuine at the Director of Surveys offices. Beacons are not permanent fixtures, however, and can be destroyed, He also said that one deed plan cannot separate two titles. He produced letters from survey of Kenya signed by **A. A. Athman** and **Maritim**

Weldon, and

completed his testimony by stating that the documents he produced were genuine and had not been discounted by the authorities. With that the Plaintiff closed his case.

82-year-old **John Frankland Beakbare (DW1)** was the first defence witness. He relied on his statement dated 5th February 2021. He stated that **Zena,** the vendor who allegedly sold the suit property to the 1st respondent, was his mother and she died on 22nd October 1999. He, however, did not produce any form of identification in evidence to confirm his identity or show that he was the son of the said Zena. Nor was he administrator of her estate He also denounced the claim that the suit property belonged to her.

George Kimathi Mugenyu, a land surveyor, gave evidence as **DW2** and relied on his statement dated 22nd February 2021. He indicated that deed plans produced by the 1st respondent, supposedly generated by him, were false and untrue. He claimed that he was instructed by WKL through Francis (PW7) which he said was the owner of the suit property, to do subdivision work.

He owned the survey plan in Burugu and Runda Palm's documents which was approved on 9th November 1990. The Nairobi City Council did not give the owner allowance to proceed with all

the

deed plans because the conditions were not fulfilled. He proceeded to obtain 4 deed plans which later produced title deeds. All the deed plans and titles were issued on 27th May 1991. He denied having collected several deed plans as stated in the statement of **Priscilla Wango**, and denied preparing deed plans dated December 2018. He stated that the title deeds of the subdivisions were not generated from his deed plans. He still had the deeds he had prepared at the behest of WKL as he was waiting for it to come back to him. No title could issue without a deed plan.

In cross examination, he said he confirmed WKL's ownership through DW7. He felt aggrieved that deed plans and for titles issued to the 1st respondent through the work of a different surveyor and termed the resultant titles "illegalities," he was not consulted. He was to produce 38 deed plans but did only 5 as WKL never reverted to him. Answering Mr. Rapado for the 1st respondent, he admitted that he used to prepare some survey documents which he would submit to a licensed surveyor to execute, before he was licensed in 1988.

He conceded that the deed plans in the 1st respondent's bundle of documents bore his name but did not know under what

circumstance they were made, then stated that some of them were copies of his deed

plans and bore his name and signature. While maintaining that another surveyor could not take over the work of another who was still alive per the Survey Manual, he could not point out the specific provision. He defended as “not unusual” his having been the Chief Lands Registrar at Nairobi County Commission and also working as a private surveyor. He defended an acknowledgement of fee payment allegedly witnessed by Fred Ngati Advocate.

The witness stated that WKL did not show any minutes or resolution on the basis of which he under took their work. He denied, as a forgery he did not author, a document dated 4th August 1990 acknowledging Kshs.600,000 from Zena as fees. He did not, however, report the forgery. Referred to the DCI report finding that Fred Ngatia Advocate‘s signature had been forged, he denied being a criminal notwithstanding it is he that presented the document, but said he did nothing to challenges DCI’s recommendations. He denied ever knowing surveyor one **Francis Maina Ndegwa** who said he worked at the witnesses’ firm, and that they did received instructions and did some work for Zena in 2018.

Re-examined, he told the court he had undertaken subdivision of 5989/5 and that 5989/R was a road reserve. He, however, indicated

that LR 5989/5/R was unknown to him. He reiterated that according the law any deed plan prepared without his acknowledge herein was invalid. He stated that DW7 was in most cases in touch with Mwai Kariuki (who was since deceased) who used to run errands for DW2. It is with **Mwai Kariuki** that **Francis Maina Ndegwa** worked. He disowned all the deed plans attached to the 1st respondent's titles. He concluded that the accusations that he, DW2, had forged any documents was "of no value or consequences."

Burugu (DW3), the Director of Runda Palms testified for himself and the company. He adopted his statement dated 12th November 2020, together with his bundle of documents and affidavits dated 5th February 2021. He reiterated that he purchased L.R. No. 5989/5/R from Deposit Protection Fund Board under **Jumchem Healthcare Ltd,** the former name of **Runda Palms**, for Kshs.18 million free from all encumbrances and took possession. The sale was, however, challenged by WKL in court and at the time of his testimony, the suit was pending. They tried to register the preferred name Runda Palms as they did not like Jumchem Health Care but the former was declined by the CLR. He had "presented the names of the two transfers" but "the second transfer was not proved."

They took possession in 2007 and he employed a Maasi watchman. He also had “livestock and goats” on the property. Later, they started getting threats from some squatters and he sought “permission and built a stone wall in (sic) the land” after an agreement with WKL. His fence went round properties owned by WKL, the directors of which live in the main house. He stated that “the land became fully mine in 2007. I bought Jumchem Health thereafter I stated paying land rates from 2009 under the name WKL.” He had not paid any rates since 2020 and the land was invaded by goons on 2nd November 2019.

Cross examined by Mr. Eredi Advocate he stated the only owed 5989/5 and that “the fenced portion includes the surrendered land and Government land.” The intended acquisition by Government did not go through. He termed as “an error” the entry showing that what Juma Muchemi was purchasing from Post Bank Credit (K) was 5989/R Kiambu when “the property it was purchasing was 5989/5/R.” He purchased the land in 2007 but the agreement was dated 1st March 2006. He did not have a copy of the transfer and there was no evidence of discharge of the Kshs.7 million charge to Post Bank Credit (IL). He admitted the other assess did not involve the 1st

respondent but denied that he lived on the land.

He said Jumchem still existed. He denied that Juma Muchemi was ever a director of Runda Palms. He knew nothing about consent of the Commissioner of Lands, did not have a rate clearance certificate, and had no evidence of caveat removal. He had no evidence of payment. He agreed that he legitimacy of his interest would be anchored on the charge created by WKL. He admitted that the acreage on his deed plan of 9.999 Ha was different from the acreage of the land he owned of 6.5796 Ha. He admitted that a company search for Jumchem on 17th April 2009, which he had not challenged, did not show him as a director. He said he took possession of the suit property in May 2007 as Director of Jumchem, but had no evidence. At the time, "the owners of WKL were in one of the subdivisions and the only structures were those owned by Mr. and Mrs. Gicheru." The police were used to kick him out but he went back. He was present at the site visit but did not show the court any goats and livestock. The user of property was indicated as residential. He put up the wall in 2014 but got approval from City Hall in 2015. He stated they never updated their records at City Hall and "at the moment we do not have records of Jumchem at City Hall." He made payments under WKL. He also swore that he as helping Muchemi to raise funds to

buy the land. He had not put the

land to any commercial use after the fencing and he had some workers and livestock on it, he said in re-examination.

Nyandoro David Nyambaso (DW4), a Senior Assistant Chief Land Registrar adopted his statement dated 14th September 2020. With respect to the suit property, he indicated that some records were missing but they had records of scanned images of L.R. No. 5989/5, 5989/66, 5989/91, 5989/67 and 5989/68. DW4 illustrated the various transactions that were done with respect to the suit property as reflected by the various entries in the file. He stated that according to their records, title to the suit property was issued initially to WKL and so did the subdivisions. The title was given as I.R 35802 pursuant to surrender from Government Land registered in 19th October 1983. He said there was an error on his statement on the size of the land. He could not tell whether compulsory acquisition occurred.

There were 4 sub divisions initially done by WKL. The file had scanned copies of the indenture issued in 1950. Assessment for Stamp Duty was done on 1st September whereas the indenture was dated 5th September 2000 relating to LR 5989/5. There were searches in the file issued by Jacob, a registrar at the Central

Registry and they shared the same folio 107 when they should have been different.

Cross examined by **Mr. Mwiti Advocate** for Burugu and Runda Palms, the witness stated there was no other deed plan for the property. He added that there was “no hard rule to have separate entries for discharge of charge and other encumbrances [as] the transfer instruments discharge all encumbrances.” To him, since Runda Palms had a portion of the land after sub-divisions in 1991, it was not available for purchase as a whole in 2000. He also asserted that “the sub-divisions due to the plaintiff originated from the Ministry but the procedure was irregular.” He explained that it was not the practice for two officers to given conflicting testimony but stated that “Mr. Wafula (DW4) used the documents that had the information in the other file but that all documents were produced in the office of CLR” and “we have instances in duplication of titles,” he replied to Mr. Mutiso.

Answering Mr. Rapando, he stated that the office of CLR was established before Independence and there cannot be a registration of documents on a Saturday or Sunday. In the present case he did not see a surrender instrument. He did not establish how WKL acquired the property and did not interact with the deed plan. He stated that the land was registered way before 1983. He believed in

the veracity of

documents held by Government institutions and reports of those charged with investigations of forgeries and fraud but did not send documents to DCI for investigation. He also did not record a statement with them.

Whereas a deed plan precedes issuance of title and must be prepared before an LR number is given, there was none for LR 5989/R. He stated that where there is a sale by private treaty there must be a discharge before the transfer is registered. He did not dispute the indenture between Saint Benoists Plantation Ltd and Basil George Mitton which was extant in their file.

The 1st respondent's indenture registered in 2000 was also found in their file but DW4 was not working at the Ministry then. **Edwin Munoko** was one of their registrars and he confirmed the existence of a surrender and the same had not been disowned. The surrender was assessed and stamped by the collector of Stamp Duty on 15th August 2018 and registered by **Owino Jacob Carttwright** who acted on the surrender and issued a title. There were no similar documents from WKL. Whereas he stated that 'RR' indicated that some documents were rejected and returned, the witness could not point at a table or abbreviations, found no reasons for the alleged

rejection, and was

himself not involved in registering or rejecting documents. From the records, the 1st respondent did present his documents for registration. Further, he had not seen any originals of WKL's subdivision titles. He could not contradict **Priscilla Njeri Waga** on the deed plans used for the 1st respondent's registration. He could not tell how WKL acquired title.

DW4 was **Wilfred Muchere Kabue** an Assistant Director of Survey, who relied in chief on his statement dated 22nd June 2023 and the supporting documents. His evidence was to the effect that subdivisions of the suit property were carried out by Surveyor Mugenyu in 1990, although he did not know who was the current owner of the property. He added that sub-divisions can be carried out under instructions of a registered surveyor. He did not know when change of user was done. Some 4 deed plans were issued on 5th December 2018 but he did not know whether titles were issued. Deed plans are issued to the surveyor on record or his appointed agent or assistant. **Francis Maina Ndegwa** would have been entitled to collect them. He did not have a deed plan for 9.75 acres acquired by the Government. The deed plan number and I.R number would change if there was a change of user. The 1st

respondent’s deed plan indicated who “compared” it as a quality

control measure as “failure to compare is a huge omission [and] titles issued pursuant to the same would be questionable.”

The witness referred to a letter dated 30th October 2020 from the Director of Survey Maritim Welson to an officer there A. A. Athumani which referred to 4 parcels that were amalgamated. He had nothing to contradict the fact of amalgamation. He did not see any deed plan for 5989/R and was clear that a title cannot be registered without one unless fraudulent and irregular.

Paul Owino Odak, an Assistant Director of Survey at Kenya Urban Roads Agency (KURA) testified as **DW5.** He adopted his statement of 27th November 2020 and filed documents. He stated that according to records in his custody, Williams & Kennedy were listed as the owners of the suit property. He referred to a Gazette Notice dated 12th November 1970 for initiation of inquiry and which listed WKL as the owner of LR 5989/5 and according to him 9.575 was acquired. He referred to some surrenders to Government but he did not know what for. Cross-examined by Ms. Gitau, the witness stated that the road was re-aligned to a new location. From the indenture dated 1950, between St Benoist Plantation & Basil George Mitton, he conceded the land belonged to the latter then and he

had not come across any award to

him. He repeated Mitton's ownership and stated that he did not see any minutes or recommendations of an inquiry. There was no title document showing WKL owned the land in 1970 nor was there an entry that 9.75 acres was hived off. WKL actually denied ownership as at 1970 as well as acquisition. He reiterated on re-examination that Government did not take the land and the acquisition was never completed.

Nabiswa Rose (DW6) a valuer with the Ministry of Lands and Physical Planning relied on his statement dated 9th November 2023. She produced copies of gazette notices that were published of intention to acquire the suit property and the invitation for an inquiry but there was no proof on award or acceptance of it by the owner. The Gazette Notice was not conclusive of acquisition until enquiry was completed and it was not, and there were no minutes or recommendations.

Francis Ng'ang'a Gicharu, the MD for WKL, holder of a degree in Accounting and a Masters in Banking from the U.K, testified as **DW7.** He adopted his statements dated 4th September 2020 and 10th December 2021. He explained how he acquired the suit property in 1983 through purchase of shares in the company and stating that he

has been in its possession since February 1984. He subdivided it in

1991 and got four (4) separate titles namely, 5989/66, 5989/67, 5989/68 and 5989/91. He then used the remainder of the title to borrow some money from Post Bank but the property was later disposed of by the bank when he defaulted. He did not agree with the bank and he challenged the sale through HCCC No. 710 of 2009. The case was still pending in court as at the time of trial. DW7 explained that when he failed to pay the loan he decided to sell the land to **Juma Muchemi** who did not honour the sale agreement resulting in HCCC no. 2459 of 1997. He asserted that WKL still exists since the winding up process was never finalised.

He exhibited documents to show transfers of shares by **John Michael Kennedy** and **Pamela Sawage** to himself and denied that WKL ceased to exist in 1973. He averred that had that been so, Central Bank would not have allowed it to borrow funds. He insisted the company still existed and that "the plaintiff ought to have brought the Registrar of Companies to confirm otherwise." He stated that some two people **Peter Maina Ndegwa** and **Regina Nyokabi**, listed the directors, took shares fraudulently from WKL per CR12 dated 15th March 2016 and a complaint was made to the DCI.

The witness said he did not know the 1st respondent despite sharing surnames. WKL still owned the property in 2000 and the subdivisions thereof were fraudulent. He asserted that the 1st respondent did not go to the land in 2018. He asked the court to dismiss the 1st respondent's claim and "rule in my favour as owner of the property" which he had resided on since 1994. He said Burugu was in possession for the remainder of the fenced land adjacent to his, where DW7 had seen him rearing goats.

In answer to Mr. Eredi's question, he stated; "I bought the land in 1983. The land was about 24.7 acres I bought shares in the company. The company did not have any assets." He said that after subdivision, 4 titles issued and the mother title had 31 plots which were charged and he defaulted. And in answering Mr. Rapando, he said he was 70 years old and was the Managing Director of Rural Urban Credit Ltd when it collapsed and went to Sweden. He denied that he fled thereto. He did not have any resolutions for WKL and denied selling to Juma Muchemi who sued him for breach of contract, to which he responded with a counterclaim. He had scant information of how WKL acquired the property from Basil George Mitton on 1955 and had no resolution authorizing, or a title showing, transfer of

interest. He was surprised

that the registration happened on 17th September 1955 which was on a weekend. When he bought shares, he did not first obtain CR 12, nor was he shown a title by the directors of WKL. The letter of offer for the shares contained contradictory figures and the transfer of shares form was dated 1904 yet WKL was incorporated in 1953. He also had no proof that consideration was paid for the shares. When a director, they filed annual returns through Emu Registrars whom they appointed on 13th August 1987 yet they were registered on 3rd October 1991 and its proprietor Owen Nyaga Koimbui was registered on 23rd November 1990.

He admitted and had nothing to contradict WKL's declaration of solvency and the resolution to wind up WKL with **Mr. Silcok** and **Mr. Bell** being appointed joint liquidators. He dealt with one Donald Vincent but had no resolution from the company, nor was Gazette Notice No. 3596 of 30th November 1973 either revoked or challenged in court.

He went on to say that the land he had an interest in was 5080/5/5 which he occupied between September 1984 and 2007. He said he and his wife were the current directors of WKL but had no resolution appointing his wife as such, nor did he have a CR 12 on

the

current status. He had no sale agreement, transfer or copy of title showing the moving of interest from Basil George Mitton who he said owned the land in 1955, to WKL. He denied the DCI report stating that he had forged the signature of James Raymond Njenga but he had done nothing to challenge the report.

Mary Wanjiku Jung (DW8), the administrator of the estate of Juma Muchemi, who died in December 2018, relied on her statement dated 11th January 2021 and the bundle of documents of equal date. She referred to the sale agreement dated 23rd April 1993 by which WKL sold some 5 properties to the deceased, and another agreement dated 1st March 2006, between Postbank Ltd and the deceased. DW8 also cited the two cases pending in court concerning the suit property in which the 1st respondent, whom she did not know personally, was not involved. He was claiming the land but she had never seen him there.

Cross examined by Mr. Mutai Advocate, she said her husband bought 5 properties but they never completed payment. She said they were staying on the land until 2018 when Francis (DW7) came in and construed thereafter. While answering Mr. Rapando, Mary said the agreement dated 23rd April 1993 between Jung Muchemi and WKL

was not preceded by any search, nor did they search the Company Registry.

The agreement showed ‘five’ crossed and replaced by ‘six’ and there was and no title in the name of Jung Muchemi. Jumchem Limited did not appear in the agreement. She said they paid money to Post Bank but did not have any evidence of the payment or anything to show that the property was to be registered in the name of Jumchem.

In re-examination, she said the ‘R’ in the LR Number of the property was an error. She also stated that “when we bought the land, it was vacant. There was nothing. Francis Ng’ang’a constructed a house after my husband’s death.”

The parties thereafter filed submissions and Wabwoto, J. delivered his judgment, challenged herein, on 11th July 2024, granting prayers (a), (c), (d), (e), (g), (h), (i) of the ‘amended amended amended’ plaint. The learned Judge also ordered that the 4th defendant, WKL its agents and or servants are granted sixty(60) days to vacate the suit property known as Land Reference Number 5989/91 failing which eviction shall issue and the Officer Commanding Runda Police Station or any other nearest police station was directed to ensure compliance.

Dissatisfied with that judgment, WKL, Mary and Burugu jointly with Runda Palms respectively lodged **Civil Appeals Nos. E682, E686**

and E705, (all of 2024) based on memoranda of appeal raising extensive

grounds as summarized below. The appellants contend that the learned Judge erred by;

1. Delivering a judgment which was inconsistent with the law, pleadings and framed issues for determination.

2. Holding that the 1st respondent's suit was not time barred.

3. Holding that the 1st respondent was the bona fide and legitimate owner of the suit property.

4. Failing to take into consideration the law of contract prior to 1st June 2003 which required the 1st respondent to prove possession.

5. Holding that the 1st respondent had discharged his burden of proving the root of his title.

6. Disregarding the appellants' cross-examination of the 1st respondent and his witnesses over the irregularities and illegalities in his alleged purchase and transfer of the suit property.

7. Holding that the 1st respondent had proved the particulars of fraud as against the appellants.

8. Holding that the 1st respondent had been in possession of the suit property since the year 2000.

9. Holding that the 1st respondent had proved his case on a balance of probabilities.

10. Holding that Williams & Kennedy Ltd was operating contrary to sections 274 and 275 of the repealed Companies Act, Cap 486.

11. Ignoring the uncontroverted evidence of the witnesses of Williams & Kennedy Ltd as custodians of public records to the effect that despite there being two parallel files, Williams & Kennedy Ltd was the bona fide owner.

12. Ordering the appellants to vacate the suit property within sixty (60) days.

13. Granting the reliefs sought by the 1st respondent.

14. Failing to appreciate the jurisdiction and powers conferred on the Environment and Land Court by the Constitution of Kenya and the Environment and Land Court Act, 2011 and the guiding principles thereunder.

15. Failing his constitutional, statutory and judicial mandate of investigating, inquiring and adjudicating the origin, validity and authenticity of the titles under contestation.

16. Failing to appreciate the effect of absence of a sale agreement by the 1st respondent.

17. Failing in his analysis of the tendered evidence on the origin, validity and authenticity of the appellants' title.

18. Failing to consider the objections raised on the glaring contradictions, insufficiencies and outright lies in the evidence of the 1st respondent's witnesses.

19. Disregarding the unchallenged, cogent documentary evidence and registration of the appellants' documents by Chief Land Registrar.

20. Upholding the 1st respondent's impugned title documents.

21. Failing to address the question of the credibility of the 1st respondent's evidence.

22. Failing to properly consider the legitimacy of the altered documents tendered in evidence and relied upon by the 1st respondent.

23. Reaching a determination without regard to the documents, submissions and evidence led on behalf of the appellants.

24. Failing to fully and properly record the court proceedings and findings.

25. Failing to handle the matter for the purpose of attaining a just determination.

26. Failing to apply correctly judicial precedents from the Supreme Court and this Court.

27. Failing to find that the 1st respondent's claim to the suit property was a fraudulent scheme to validate illegally acquired titles.

In the end, the appellants beseech us to set aside the impugned judgment and allow the appeal as against 1st respondent, the common 1st respondent.

We have gone to great lengths to set out the evidence on record, after painstakingly going through the pages going into thousands, in obedience to our duty as a first appellate court to proceed as a re-hearing of the case with a view to making our own inferences of fact and arriving at independent conclusions after a fresh and exhaustive re-appraisal and analysis of the entire evidence. We do so while

paying

respect to the conclusions made by the first instance Judge, but are at

liberty to depart therefrom if the evidence so commands. See ***SELLE Vs. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] EA 123.***

In preparation for the hearing, all parties filed written submissions together with their case digests, which we have read, and which were orally highlighted before us by counsel. By an order of this Court on 2nd April 2025, the **Kenya Deposit Insurance Corporation,** as liquidator of Post Bank Credit Limited, was joined to this matter as the 6th respondent.

At the hearing, learned counsel **Ms. Martha Karua, SC** and **Ms. Liz Gitau** appeared for **WKL**, the appellant in **Civil Appeal No. E682 of 2024; Mr. Ochieng Oduol, SC, Mr. Mwiti** appeared for Burugu and Runda Palms the appellants in **Civil Appeal No. E705 of 2024,** and **Mr. Mutiso** appeared for Mary, the appellant in **Civil Appeal No. E686 of 2024**; **Messrs Githu Muigai, SC, Victor Rapando, David Angwenyi, Mr. Odunga** and **Ms. Brenda Nyabinge** appeared for the 1st respondent; **Mr. Eredi,** learned Chief State Counsel appeared for CLR, while **Mr. Chacha Odera** and **Ms. Jessica Oliwa** appeared for the 6th respondent**.** The three (3) appeals were consolidated with **Civil Appeal No. E682 of 2024**

being made the lead file.

For **WKL**, **Ms. Karua, SC** began by narrating how the company acquired the suit property. She faulted the learned Judge for holding that the 1st respondent's suit was not time barred since he only discovered the alleged fraud and/or claim to the suit property in the year 2019, when WKL allegedly evicted him from the property. Counsel rejected that argument urging that the 1st respondent could not have discovered WKL's claim to the property in 2019 because, the company had been in possession of the property for 17 years prior to his alleged acquisition in 2000. Further, pursuant to a consent, WKL and Burugu and Runda Palms constructed a perimeter wall on the suit property in the year 2013 to preserve it from invasion and thus that wall was a clear indication that WKL had a claim to the property. In addition, there have been two pending and active suits in court between WKL, Burugu, Runda Palms and Mary, the subject matter whereof is the suit property. Therefore, had the 1st respondent exercised due diligence, he would have discovered WKL's claim to the property. It was contended that the 1st respondent's suit offended **section 7** of **the Limitation of Actions Act** for having been filed 36 years after WKL obtained title in 1983, and 19 years after he obtained title.

The learned Judge was faulted for finding that WKL was not a legally existing company as per **sections 274** and **275** of the repealed **Companies Act. Ms. Karua, SC** argued that even though it had passed a resolution to wind up and had appointed a liquidator through the Gazette Notices on pages 335 and 336, no evidence was adduced to show that the appointed liquidator took over the running of the company or that the winding up proceeded beyond the gazette notice giving intention. Further, it was contended that paragraph 4A of the amended plaint affirmed the existence of WKL and therefore the learned Judge erred in revisiting this issue. Counsel submitted that the company filed its annual returns with the Registrar of Companies in year 2020 and that was conclusive evidence of its existence.

It was contended that despite representatives of the CLR leading "overwhelming evidence" to the effect that the 1st respondent's title was illegal and irregular, the learned Judge ignored that evidence and went on to uphold that title. Moreover, even though the learned Judge personally "witnessed WKL's actual possession and occupation of the suit property," he still made an order that it should vacate the property within 60 days. The learned Judge was castigated for failing

to acknowledge that the mother title of the suit property being L.R. No.

5989/5, and the initial subdivisions that is, L.R. Nos. 5989/66, 5989/67, 5989/68 and 5989/91 are still intact and subject of HCCC No. 2459 of 1997 and HCCC No. 710 of 2009, to the exclusion of the 1st respondent.

The learned Judge was faulted for finding and holding that the 1st respondent's title to the suit property was legally and/or regularly acquired. It was urged that despite claiming that he bought the suit property from Zena he did not produce a sale agreement to that effect or a copy of the title. Counsel criticised the learned Judge for placing reliance on documents marked for identification when determining who between WKL and the 1st respondent had good title, contrary to this Court's holding in ***KENNETH NYAGA MWIGE Vs. AUSTIN KIGUTA & OTHERS [2015] eKLR.*** It was contended that the fact that the 1st respondent did not have evidence to prove how he acquired title to the suit property, was enough reason for this suit to fail. To buttress this argument, s**ection 3(3)** of the **Law of Contract Act** on disposition of an interest in law was cited. Further, it was argued that the 1st respondent did not meet requirements of **sections 107, 108 and 109** of the **Evidence Act.** On the premise of the decisions in ***CAROGET INVESTMENT LIMITED Vs. ASTER***

HOLDINGS LIMITED & 4

OTHERS ***[2019]eKLR*** and ***CHIEF LAND REGISTRAR & 4 OTHERS***

Vs. NATHAN TIROP KOECH & 4 OTHERS, it was submitted that a party making a claim for a declaration of a title must succeed on the strength of his case and not on the weakness of the defence.

It was urged that the learned Judge disregarded the requirement prior to the amendment of **section 3(3) of the Law of Contract Act, 2003,** for a party to a contract for disposition of an interest in land to demonstrate that he had taken possession of the property in part performance of the contract. Counsel contended that the 1st respondent was never in possession of the suit property prior to 2nd November 2024. The learned Judge was faulted for failing to consider unchallenged irregularities in his title and instead shifting the burden of proof to the appellants. It was submitted that it was wrong for the learned Judge to find that the 1st respondent had proved the particulars of fraud as against the appellants since the Director of Criminal Investigations (DCI) report that implicated them "was based on hearsay evidence," contrary to the rules of evidence. Counsel contended that the DCI report and the forensic report produced by PW2 and PW3, which showed forgeries of various entries and signatures on the part of the appellants as well as the lands registry,

were based on statements that were not made on oath and the makers of the said statements were not called as witnesses by the 1st respondent to corroborate their statements. Moreover, the learned Judge disregarded the cross-examination of PW2 and PW3 on the procedure that they undertook to carry out their investigations, which resulted in the said reports. In conclusion, **Ms. Karua, SC** urged us to find that WKL was the only legitimate owner of the suit property, and overturn the holding of the trial court.

Next to submit was **Mr. Ochieng Oduol, SC** for Burugu and Runda Palms. Counsel made his submissions under six (6) heads namely that: the suit filed by the 1st respondent was time barred; there was no clear root of title by the 1st respondent; his claim was tainted with fraud and forgery; he did not discharge the burden of proof that is imposed on a litigant in civil proceedings; crucial evidence was ignored and glossed over by the trial court; and the trial was procedurally flawed and reflected apparent bias.

On the first head, Counsel asserted that since the 1st respondent allegedly purchased the suit property in the year 2000 but filed the suit

19 years later, the suit was time barred under **section 7** of the

Limitation of Actions Act. Citing this Court's decision in ***PUBLIC***

TRUSTEE Vs. WANDURU NDEGWA [1984] KECA 72 (KLR), he

submitted that time started running when payment of the purchase price was made. Counsel similarly argued that had the 1st respondent done due diligence, he would have become aware of the two pending suits between WKL, Burugu and Runda Palms Ltd, and filed his suit accordingly. **Mr. Oduol, SC** submitted that the 1st respondent was never in possession of the property up until the impugned judgment was issued when he forcefully took possession. Since the alleged purchase was in the year 2000, time begun to run and he failed to take the necessary action to assert his rights. He, therefore, could not approach the court for redress in the year 2019. To buttress this argument counsel cited ***JOSEPH GACHUMI KIRITU Vs. LAWRENCE Vs. LAWRENCE MUNYAMBU KABURA, Civil Appeal No. 20 of 1993 (unreported)*** where the Court was of the view that time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor.

As to whether the learned Judge erred in finding that the 1st respondent had proved the existence of a valid root title, it was urged that the learned Judge failed to consider glaring gaps in the

evidence of the 1st respondent towards proving the authenticity of his title. Those

gaps included the fact that there was no valid sale agreement produced before court in compliance with **section 3(3)** of the **Law of Contract Act, CAP 23.** There was also production of fake certificates of search and anomalies in the manner in which he bought the suit land for Ksh.20 million, in cash, when he was only 25 years old at the time. Relying on this Court's decision in ***LAWRENCE P. MUKIRI MUNGAI, ATTORNEY OF FRANCIS MUROKI MWAURA Vs. ATTORNEY GENERAL, JAMES NDIRANGU, JOSEPH NDIRITU MUGI, ANNAH WANGARI NDIRITU & LYDIA MUTHONI NDIRITU [2017] KECA 700 (KLR),*** it was submitted that **section 3(3)** of the **Law of Contract Act** is mandatory.

Senior Counsel referred us to pages 86, 87, 89, and 93 of volume 1 of the record where the signature of the vendor who allegedly sold the suit property to the 1st respondent is a written name of **Zena Bikaben**. He questioned why while cross-examining **Mr. John Franklin (DW1),** the son of the said **Zena,** the 1st respondent's counsel disputed that the name **Bikaben** was not hers. Counsel contended that the court should not have wished away **DW1**'s testimony that his mother died on 8th September 1999, in the United

Kingdom, one year before the alleged sale, as corroborated by a death certificate. It was argued that the said

vendor, who was deceased at the time, could not have instructed Mr. Rioba, Advocate, also deceased. Counsel urged that this was an indicator of fraud that the court ought to have looked at. Other indicators of fraud included, the issue of stamp duty not being paid, there being no beacons on the land when it was visited on 6th May 2022, and some of the documents that were produced appearing forged. Counsel submitted that the 1st respondent's case fell short of the required standard proof on a balance of probabilities.

The learned Judge was faulted for failing to consider the evidence tendered by the appellants, and that of the CLR and the Land Surveyor, which was "uncontroverted." It was submitted that the testimony of the CLR **(DW4)** was the official position, as it highlighted a series of title defects. Moreover, when the court went to the site on 6th May 2022, it was able to see that there was no subdivision on the ground. The learned Judge was castigated for ignoring the evidence of **DW1,** which disproved the existence of the vendor of the suit the property to the 1st respondent, at the time when it was sold. The decision in ***PETER NGIGI & ANOTHER (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOAN WAMBUI NGIGI) Vs.***

***THOMAS ONDIKI ODUOR & ANOTHER* [2019] eKLR** was cited for the argument that uncontroverted evidence bears a lot of weight.

Next, **Mr. Oduol, SC** submitted that the learned Judge's analysis of facts, evidence and findings was biased and an abdication of judicial authority. He contended that the court mis recorded and/or omitted the proceedings of the site visit. That it was clear during the visit that the 1st respondent had never been in possession or resided on the suit property as alleged. As a first appellate court, we were urged to re- examine and re-evaluate all the evidence tendered by the parties against the impugned judgment, and allow the appeal with costs.

Next to address us was **Mr. Mutiso** who associated himself with the submissions of **Ms. Karua, SC** and **Mr. Oduol, SC.** To add to those submissions, counsel questioned why the 1st respondent went to court seeking, amongst other orders, a declaration that his title is valid. To counsel, that prayer implied that the 1st respondent himself had doubts about his title. **Mr. Mutiso** invited us to re-evaluate the evidence in a chronological manner upon which, according to him, we will reach the conclusion that the 1st respondent's title is not genuine. To counsel, it could not be that the appellants intended to defraud

him as they are parties in HCCC No. 2459 of 1997 and HCCC No. 710 of

2009, which suits were instituted prior to his acquisition of the suit property.

Mr. Mutiso submitted that on 6th November 2019, the 1st respondent produced a search in support of his application for injunction, which was purportedly issued on 14th June 2000 under the Land Registration Act, an Act that was enacted in the year 2012. He argued that the anomaly should have exposed him as a fraudster. The learned Judge was faulted for concentrating on the issue of the root of the title only, on account of the Supreme Court decision in ***DINA MANAGEMENT LTD Vs. COUNTY GOVERNMENT OF MOMBASA & 5 OTHERS [2023] KESC 30 (KLR),*** without questioning the 'root, stem, branches and even the leaves' of the 1st respondent's title. It was contended that the issue before court was whether the 1st respondent had proven his case but not a mere comparison of the two titles and determining which between the two looked more legitimate. In conclusion we were urged to allow the appeal.

Next to submit was **Mr. Chacha Odera** who pointed out that the **Kenya Deposit Insurance Corporation,** as liquidator of Post Bank Credit Limited, was not party to the proceedings at the High Court

but upon application and with consent of parties, it was included in these

proceedings as the 6th respondent, but its participation was restricted to the record as it was with no leave to file further evidence. Counsel referred to various authorities that outline the duty of a first appellate court including, ***SELLE AND ANOTHER Vs. ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS [1968] EA 123; MUNYU MAINA Vs. HIRAM GATHIHA MAINA [2013] KECA 94 (KLR)*** and ***GITOBU IMANYARA & 2 OTHERS Vs. ATTORNEY GENERAL [2016] KECA 557 (KLR).***

He referred us to page 100 of the record in **Civil Appeal No. E705 of 2024** where there is a letter dated 15th August, 2001, on a letter head of 'Ministry of Lands and Housing' and relating to the suit property. The letter is purported to be signed by an officer calling themselves 'Commission of Lands', not 'Commissioner of Lands'. Counsel urged us to take judicial notice of Gazette Notice No. 5694 of 2001, pursuant to **section 85** of the **Evidence Act,** which demonstrates that there was no such ministry known as 'Ministry of Lands and Housing' as at 15th August 2001. That Ministry only came into existence in July 2004. **Mr. Chacha Odera** also cited about 12 gazette notices which were published by the Government Printer during the period when the letter was authored.

Counsel further referred us to page 622 of the same record where there is a letter dated 21st December 1970 and its response on the next page. The letter is addressed to the Commissioner of Lands and the box number is accompanied by an area code 00100. Counsel contended that there were no area codes in the year 1970. The codes came into existence pursuant to **regulation 4** of the **Kenya Information and Communications Act, No. 2 of 1998,** 28 years later. He asserted that the nature of reliefs that the 1st respondent sought at the trial court were in the nature of equitable reliefs and the courts have time and again stated that before one calls on equity for aid, one must also do equity. In this respect her cited various decisions including, ***NYERI CIVIL APPEAL NO. 175 OF 2010, JOHN NJUE NYAGA Vs. NICHOLAS NJIRU NYAGA & ANOTHER*** and ***PETITION NO. 23 OF 2018, SAMMY KEMBOI KIPKEU Vs. BOWEN DAVID KANGOGO.*** **Mr. Chacha Odera** contended that so many documents in these proceedings raised a red flag, which should have barred the court from giving the remedies which it gave. In the end he urged us to allow all the appeals.

We probed counsel how we were expected to treat the gazette

notices and if at all he was allowed to file anything when he was joined.

His response was that any gazette notice which contains either a notice or written law cannot be ignored and that we should rely on **section 85** of the **Evidence Act** in considering them.

Mr. Eredi, the learned Chief Litigation Counsel chose to rely on his written submissions. In the submissions, four (4) issues are delineated for consideration by this Court firstly, whether the learned Judge erred in law and fact in holding that the suit was not time barred and that amendment to section 3(3) of the Law of Contract Act had not taken effect so as to be a basis of invalidating the 1st respondent's interest on account of lack of an agreement for sale; second, whether the learned Judge erred in fact and law in analyzing the root title or interest of all the litigants claiming interest over the suit property and/or its subdivision in the absence of a counterclaim; third, whether the learned Judge erred in fact and law in analyzing and considering the issue of fraud and arriving at a wrong and/or biased conclusion and; fourth, whether the learned Judge erred in fact and law in concluding that the 1st respondent had proved his case on a balance of probabilities.

On the first issue, it was submitted that in the absence of uncontroverted evidence that the 1st respondent had knowledge of

the

appellants' claim over the suit property beyond 12 years as contemplated under **sections 7** and **26** of the **Limitation of Actions Act**, the learned Judge arrived at a correct and just conclusion that the suit was not time barred and assumed jurisdiction to adjudicate on the matter on merit, considering that the claim was not anchored on the transaction that took place in the year 2000 between the 1st Respondent and the alleged Zena, but on fraud and/or trespass on the part of the appellants. Concerning which party was in occupation of the suit property and since when, it was pointed out that the issue of occupation remains conflicting in these proceedings. The Supreme Court of India decision in ***KARNATAKA BOARD OF WA/CF Vs. GOVERNMENT OF INDIA & OTHERS (2004) 10 SCC 779*** as cited in ***MTANA LEWA Vs. KAHINDI NGALA MWAGANDI [2015] eKLR*** was

relied on for the argument that in the eye of the law, an owner would be deemed to be in possession of a property so long as there is not intrusion; non-use of the property by the owner even for a long-time would not affect his title. Counsel urged that in considering the appeal the Court would need to determine whether sufficient evidence was led to demonstrate that the 1st respondent never

occupied the suit property since the year 2000 to the time of filing the suit as purported,

considering the law and authorities cited supporting the learned Judge's finding that the amendment to **section 3(3)** of the **Law of Contract** requiring transactions over land to be mandatorily in writing, signed and attested by witnesses, took effect in 2003 and could thus not be invoked to operate retrospectively so as to invalidate his interest for failing to exhibit a sale agreement.

On the second issue, counsel referred to this Court's dictum in

SAMUEL KAMERE Vs. LANDS REGISTRAR, KAJIADO

[2015] KECA 644 (KLR) as affirmed by the Supreme Court in ***TORINO ENTERPRISES LIMITED Vs. ATTORNEY GENERAL [2023] KESC 79 (KLR)*** and ***DINA MANAGEMENT LTD*** (supra) where

the Court restated that the process leading to the acquisition of a title over any property is a key consideration and interest acquired illegally and/or unprocedurally cannot enjoy the protection of the law. It was submitted that the burden is on all litigants herein to demonstrate that the title documents they hold over a disputed parcel of land are valid and are anchored on a clean and unblemished root title. The Environment and Land Court decision in

KIPKULEI Vs. NDIBITHI FARMERS CO. LTD & 3 OTHERS [2023] KEELC 19001 (KLR), where

the court dismissed both the suit and counterclaim when both parties

claiming interest over a disputed parcel failed to satisfactorily demonstrate the validity of their root title, was cited.

On whether the learned Judge arrived at a wrong and/or biased conclusion in analyzing the issue of fraud, counsel relied on the decision in ***MBUTHIA MACHARIA Vs. ANNAH MUTUA NDWIGA & ANOTHER [2017] eKLR*** for the argument that once allegations of fraud and illegality are made and probative evidence is adduced to prove the same, there is a corresponding duty on the party accused to offer evidence or facts in rebuttal, failing which the court is at liberty to assess the probative value of the evidence tendered and make a determination whether the required standard of proof has been met. It was urged that while the 1st respondent made serious allegations challenging the root of the interest held and claimed by the appellants and adduced evidence in the form of expert testimonies, forensic report and DCI investigation report, the appellants failed to tender expert evidence in rebuttal, as noted by the learned Judge at paragraphs 335, 341 and 369 of the judgment. It was submitted that the 1st respondent principally relied on the DCI report, the evidence and testimony of PW5, PW6 and DW5, who

were surveyors in rebutting the accusation that the suit property is not subdivided to 44 sub-plots, as alleged.

PW5 gave evidence that original deed plans 154620, 154621, 154622 and 154623 are in the custody of the Director of Surveys as they were never used for registration having been surrendered for purposes of amalgamation. Further, both PW5 and DW5 confirmed that deed plans supporting the 44 sub-plots in the name of the 1st respondent were issued by the Director of Surveys. It was urged that the question as to whether records relating to the interest claimed by 1st respondent as well as the appellants that hold the root of the title claimed by the parties exists at the Lands Office, and whether the suit property is subdivided into 44 sub-plots issued in the name of the 1" respondent is no longer in disputation given the testimonies of PVV4, PW5, DW4 and DW5 who are all officers working within the Ministry of Lands.

On the 4th issue, it was submitted that that the 1st respondent as well as the appellants needed to convincingly demonstrate the validity of their root title. Counsel contended that DW4 and DW8 were unable to demonstrate how WKL acquired interest over the suit property vide Grant 35802 anchored on deed plan 106270; WKL had not adduced any transactional documents to confirm the acquisition from Basil George Mitton. Moreover, DW8 conceded that he was not

privy to the transaction that led to the acquisition of the interest. In conclusion, it

was urged that the legal test in this matter should be whether the trial court rightfully applied its mind to the facts and evidence adduced in concluding that the 1st respondent had, on a balance of probabilities, demonstrated the legality of the root of the interest he holds over the suit property and or the subdivisions thereof, and that the appellants had failed to demonstrate theirs' origin and validity.

We inquired from **Mr. Eredi** on what we were to make of a situation like the instant one, where two officers from the Lands Office gave totally contradictory evidence. Counsel's answer was that CLR brought the senior most officers from the Ministry of Lands to testify but other parties called other officers from the same office and so the Court has to re-evaluate the evidence and make a decision.

Addressing us on behalf of the 1st respondent, **Prof. Githu Muigai, SC,** raised six (6) issues for determination. First, whether or not the trial court erred in deciding that he was a valid bona fide purchaser of the suit property; second, whether the trial court erred in holding that he proved that he had a valid root title; third, whether the trial court erred in holding that the particulars of fraud against the appellants were approved to the required standard; fourth, whether the trial court relied on documents that had only been

marked for production. Fifth,

whether the appellants proved the allegations of irregularities and illegalities or fraud against the 1st respondent, and sixth, whether the trial court erred in holding that the interest held by the appellants was invalid and unlawful.

On the first issue, counsel drew our attention to paragraph 306 of the judgment, which he termed as a very clear finding by the trial Judge. The learned Judge found that the 1st respondent had demonstrated that he conducted due diligence before purchasing the suit property from Zena and that the vendors and her predecessors in title held a valid indenture over the suit property. We were referred to the decision in ***SAMUEL KAMERE*** (supra) where this Court settled the test that a party must satisfy to show that he is a bona fide purchaser for value. The Court was of the view that they must prove that they acquired a valid and legal title, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and, they paid a valuable consideration for the purchase of the suit property. Counsel urged us to uphold the finding of the trial court because, the 1st respondent had presented the indenture dated 5th September 2000, at pages 80 to 83 in volume 1 of the record, which shows that the subdivision

was conveyed from Zena at a consideration

of Ksh.20 Million. Further, an application for the consent of the Land Control Board is manifested at pages 84 to 85 of the same record. Counsel also drew our attention to the Commissioner of Land's consent dated 18th August 2000, found at pages 86 to 87 of the record in volume 1, that was obtained before the registration of the indenture between the vendor and the 1st respondent on the 5th of September 2000, and a land rates clearance certificate dated 23rd September 2000, as evidenced at pages 88 to 89 of the record.

Prof. Githu Muigai, SC referred us to another letter, dated 30th August 2000, at page 90 of volume 1 of the record, by which the Collector of Stamp Duty informed that the stamp duty payable was Ksh.400,000, which was paid. He submitted that PW4 confirmed that the indenture between Zena and the 1st respondent was not only in the custody of the CLR, but had been franked, which he said was evidence of the payment of stamp duty. Counsel continued that the 1st respondent led evidence to show that before the purchase, he conducted due diligence, which established that the vendor was the legitimate holder of the title, as evidenced by deed plan number 45300 found at page 306 of volume 1 of the record. Counsel submitted that through the indenture dated 17th July 1950,

registered on 27th July

1950, found at page 68 to 72 of volume 1 of the records, **Saint Benoist Plantation Ltd** conveyed an interest to **Basil George Mitton**, which was subsequently conveyed to **Zena**. Moreover, the 1st respondent produced evidence of payment receipts found at pages 77 to 79 of the record.

Senior Counsel submitted that the issue of absence of a sale agreement was addressed by the trial court which made a finding that **section 3(3)** of the **Law of Contract Act, Cap. 23** that imposed the requirement for written agreement for the disposition of land took effect on the 1st June 2003, and was therefore not applicable in 2000. To buttress this point, reference was made to ***PETER MBIRI MICHUKI Vs. SAMUEL MUGO MICHUKI*** (supra), a decision also cited by the appellants. On whether the 1st respondent had taken vacant possession of the suit property, it was urged that this was buttressed by the site visit by the court itself on 22nd May 2022 where particulars of the developments were evidenced.

Concerning whether the trial court erred in holding that the 1st respondent proved that he had a valid root title, it was urged that he was the only party that established, evidentially, a root title. Counsel argued that **section 107** of the **Evidence Act** imposes a legal and

evidential burden on every person who asserts a proposition. This Court's decision in ***MUNYU MAINA Vs. HIRAM GATHIHA*** ***[2013] eKLR*** was cited for the proposition that the appellants were bound to demonstrate that their acquisition of the suit property was legal, and free from any encumbrance. It was submitted that the obligation to look into the root title has been made more necessary by the ***DINA MANAGEMENT LIMITED*** decision (supra). Counsel defended the trial court's observation that where a court is faced with two or more titles over the suit property, it must look at the root ownership of the property.

On the allegations of fraud and illegality by the 1st respondent, it was submitted that PW2 produced an investigation report, which is at page 2004, which sets out statements from various witnesses and findings that indicate fraud and illegality relating to the appellants. Counsel drew our attention to what, according to him, were serious inconsistencies in the root of the appellants' title. He referred us to Williams & Kennedy Ltd' s bundle of documents dated 4th September 2020 which contains an alleged memorandum of registration of transfer between Basil George, and the appellant. The memorandum shows that it was signed by the Registrar of Titles on the 17th

September 1955, which day fell on a Saturday. Further, on page 1632 of Volume 4, DW8 stated that the company was registered as the owner of the suit property on 17th September 1955 which fell on a Saturday. At page 2118 of volume 4, paragraphs 13 to 15, the CLR (DW4) stated during cross examination that the Office of the Land Registrar or Registry has never registered documents on a Saturday or a Sunday, whether before or after Independence. Our attention was drawn to paragraph 2092, volume 5 of the record, where it is evident that evidence of the registration on a Saturday was never controverted.

As to whether the trial court erred in holding that the particulars of fraud against the appellants were proved to the required standard, **Mr. Rapando** also for 1st respondent, criticized **Mr. Chacha Odera's** argument that the use of postal codes was not in place in the 1970s. He contended that the issue did not arise before the trial court, and therefore, it does not fall for consideration before this Court. Further, that Mr. Chacha Odera never made reference to any specific provisions in the **Kenya Information and Communications Act No. 2 of 1998** that states the time when the use of postal codes commenced. As to the argument that the letter

dated 15th August 2001 was not authentic, because it was printed on a letterhead of the Ministry of Lands and

Housing which was not in existence until July 2004, we were referred to the letter dated 10th August, 1990 at pages 1395 of volume 2 of the supplementary record of appeal. The document there was filed to anchor of the interest held by WKL in 1990, and it, too, on the letterhead of the Ministry of Lands and Housing.

From the pleadings, the evidence, the judgment, the grounds of appeal, the rival submissions filed and made in these consolidated appeals, we think that the dispute herein will be fully determined by a consideration of and decision on the following issues;

(a) Whether the suit was statute time barred.

(b) Whether the suit should have failed for want of a written sale agreement

(c) Whether the 1st respondent established purchase and established his root to title and thus had a valid title to the suit property.

(d) Whether the 1st respondent (plaintiff) proved the allegation of fraud and illegality against the other parties

(e) Whether the parties who alleged fraud and illegality against the 1st respondent proved the same

(f) Whether the 1st respondent was entitled to the orders made.

Whether or not the suit was statute time barred is a question with jurisdictional consequence and must be decided as a threshold issue for, without it, a court is bereft of authority to make a further

step and

is obligated to down its tools. See the dictum of Nyarangi, JA in ***THE OWNERS OF THE MOTOR VESSEL LILLIAN 'S' Vs. CALTEX OIL [1989] KLR 1***. See, also ***GICHARI & ANOR Vs. MUCHIRI [2024] KEELC 1519 (KLR)*** (Ruling).

The argument made by the appellants is that, given the 1st respondent's contention that he bought the suit property in the year 2000, then his bringing the suit in 2019 meant that he was way out of the 12-year limit for bringing a claim for recovery of land under **section 7** of the **Limitation of Actions Act, Cap 22.** They also contend that he had actual or constructive notice of the claims of other parties given that they took possession in the 1980's and in the year 2007 and there were suits involving the property that were pending at the High Court. Relying on the Court's decision in ***PUBLIC TRUSTEE Vs. WANDURU NDEGWA [1984] KECA 72 (KLR)*** they contended that time began to run from the date of payment of the purchase price in full or the last installment of it. The 1st respondent should, therefore, have filed suit by the year 2012.

The 1st respondent's answer to the objection based on limitation is that upon purchase and registration of LR 5989/5, he took active occupation thereof which continued until Burugu and Runda Palms

invaded it and attempted to illegally evict and dispossess him. Only after that invasion did he learn of their holding documents of purported ownership of the suit property. He instituted proceedings against them and they raised a preliminary objection referring to the existence of **HCCC No. 710 of 2009** which then revealed the interest of WKL prompting him to amend the pleadings to join WKL and seek to nullify its interest on account of fraud. The full details of the fraudulent acts were not known to him until the DCI's investigation report was made public on 29th July 2020. He thus contends that the competing interests were concealed by fraud by reason of which he took umbrage under **section 26(1)** of the **Limitations of Actions Act**: the period limitation does not begin to run where the right of action is concealed by the fraud of the defendant or his agent until the plaintiff has discovered the fraud. He cited our decision in ***KENYA AIRPORTS AUTHORITY Vs. TIMBERLAND (K) LTD [2017]eKLR.***

Given the state of pleadings where fraud was alleged against a number of defendants and the evidence that was led, we have no difficulty arriving at the conclusion, which the learned judge did, that the plaintiff in the court below did not know of the competing claims

until the attempt at dispossession and the discovery of fraud between

30th November 2019 and 30th July 2020. Time for recovery of land under the statute of limitation had therefore not run out because it runs from the moment fraud is discovered as this Court held in ***NJENGA Vs. MUGO & 3 OTHERS [2023] KECA 18 (KLR).*** The learned

Judge was accordingly not in error to so find and hold.

The next issue for our consideration is the legal consequence of the 1st respondent's failure to place before court the sale agreement between Zena and himself. During his testimony he was questioned by Mr. Mutiso he stated that his advocate Mr. Rioba (deceased) did prepare a sale agreement but he did not have it. He answered Mr. Njuguna that he misplaced his copy of the agreement. However, he did produce the conveyance which he said had "same conditions as the agreement." The conveyance indeed does identify the parties to the transaction, the agreed price of Kshs.20,000,000 a description of the property in terms of its L.R. Number 5989/5 and its acreage of 24.7 acres and is signed by the vendor and purchaser.

The contention made by the appellants is that absent the sale agreement, the transaction was invalid and unenforceable for being contrary to section 3(3) of the Law of Contract Act which provides n

mandatory terms that:

"No suit shall be brought upon a contract for the disposition of an interest inland unless: -

(a) The contract upon which the suit is found; -

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

Among the authorities cited by the appellants in urging the invalidity of the 1st respondent's suit is the ruling of Mutungi, J. in ***SILVERBIRD KENYA LTD Vs. THE JUNCTION LIMITED & 3 OTHERS*** ***[2013] eKLR*** which struck out a suit in which the plaintiff did not have a contract that satisfied that mandatory provision. Indeed, all there was in that the case was a letter that offered the plaintiff an assignment of the lease previously held by a previous tenant.

None of the parties herein addressed us on the precise reason why the conveyance between the 1st respondent and Zena that we have refereed to, which was in writing, contained the essential elements of description of the subject matter, the acreage consideration and the date and was signed by the vendor and purchaser whose signatures were attested by the Advocate Rioba did

not satisfy the requirements of **section 3(3)** for the Law of Contract. They all seem to have proceeded

on the basis that in the absence of a document titled "sale agreement," the provision stood unsatisfied, notwithstanding that the 1st respondent in his triple amended plaint pleads that conveyance as the contract.

Be that as it may, when the issue of the suit's competence in light of section 3(3) of the Law of Contract Act was raised, the answer provided by the 1st respondent, and which the learned Judge ultimately accepted and upheld, was that the strictures contained in the provision came into force only on 1st June 2003 and could not operate retrospectively to implicate and invalidate the transaction between the 1st respondent and Zena that occurred in the year 2000. That position is patently correct as this Court has held in a number of decisions that the mandatory requirement for contract for sale of land be in writing became operative from the year 2003. See ***ANNE JEPKEMBOI NGENY Vs. JOSEPH TIREITO & ANOR [2021]eKLR*** and ***PETER MBIRI MICHUKI Vs. SAMUEL MUGO MICHUKI [2014]eKLR***, which latter case was relied on by the learned Judge but which reliance, according to the submissions by counsel for WKL, disregarded the law of contract in 2003.

Prior to the said amendment, subsection 3 read thus:

"No. suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be changed or by some person authorized by him to sign it …"

The difference between this provision and the subsequent amendment in that beyond the need for the agreement to be in writing, there was the option of a memorandum or note of the same, so long as such memorandum or note was "signed by the person to be charged" or by a person authorized by him to sign it. It did not have to be signed by that person himself, as an agent of his could sign it. An acknowledgement of the existence of an agreement could, therefore, suffice and both parties did not have to have signed it. More importantly, there was no requirement for attestation of each signature of the parties by a witness who was present. In short, the path to proof of the existence of and for enforcement of an agreement was much broader and easier to navigate.

But that was not all. The sub-section before amendment also had a proviso that flung the door of jural enforcement of such an agreement even wider:

"Provided that such a suit shall not be prevented by reason only of the absence of writing, where an

intending

purchaser or lessee who has performed or is willing to performed or is willing to perform his part of a contract –

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(2) Being already in possession; continues in possession in part performance of the contract and has done some other at in furtherance of the contact."

Our own assessment of the evidence on record persuades us that a proper application of this provision as it stood before the 2003 amendment would yield the inescapable conclusion that the conveyance relied on by the 1st respondent for the suit was sufficient foundation and the suit would not have been liable for striking out or be otherwise defeasible as sought by the defendants therein, now appellants. It satisfied the less restrictive or more liberal requirements as to writing. There would, therefore, have been no need to enquire, at least not for purposes of determining enforceability of the agreement alone, whether the plaintiff had taken possession of the land.

In so far, however, that the learned Judge had based his rejection of the objection to the suit on the fact that the operative law was section 3(3) of the Law of Contract Act pre-amendment, and the parties herein have proceeded on the assumption that there

was need to

establish under the proviso, thereto, the question whether the 1st

respondent as purchaser did take possession, we shall address it at this point.

In the triple amendment plaint, the 1st respondent averred at paragraphs 9 to 11 that;

> ***"9. Upon purchase and later registration of the suit property in his favour, the plaintiff took vacant possession thereof and has continued to enjoy vacant possession.***
>
> ***10. On or about 2nd November 2019 the 1st and 2nd defendants and their agents wrongfully and without any colour of rights entered the suit property, harassed and intimidated the plaintiff and his employees who were working on suit property.***
>
> ***11. The 1st and 2nd defendants inter alia destroyed a steel gate that had been construed by the plaintiff and carted away construction material and the plaintiff has suffered loss and damage."***

Given that section 3(3) of the Law of Contract was a jurisdictional bar to the bringing of a suit, unless certain conditions were met, and the proviso therefore made possession curative of the non-writing infirmity that would otherwise have barred the bringing of a suit based on a contract for disposition of land, it seems clear to us that once the plaint bringing such suit pleaded that the purchaser had taken or continues to be in possession in part-performance of the contract, the suit could not be defeated for the absence of a the

contract in writing.

Whether or not such possession was in fact proved by the 1st respondent is a matter we shall next address when dealing with whether he proved his case on purchase and root of title. It is enough for us to hold, as we do, that the learned Judge did not err in finding, at page 1937 of the record that the transaction founding the suit could not be invalided for want of an agreement for sale.

A central plank in the merit determination of this appeal is the vexed question of whether or not the 1st respondent was able to establish that he purchased the suit property and related to it, whether he was able to show a valid root of title. The beginning point in our engagement with this issue is the laying down of the law in proof and the discharge of the attendant burden.

There is no dispute that the learned Judge properly appreciated the law on this when he made reference to the Evidence Act and to a binding decision of this Court as follows:

> ***"295. It is trite law that whoever alleges must prove. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:***
>
> *'Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.'*
>
> ***296. On evidentiary burden of proof, Sections 109 and 112 of the Evidence Act provide as follows:***

'109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.'

'112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.'

297. The two provisions were dealt with in the case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

That approach was consistent with the Supreme Court's decision in ***GWER & 5 OTHERS Vs. KENYA MEDICAL RESEARCH INSTITUTE & 3 OTHERS [2020] KESC 66 KLR***. The complaint by WKL in this appeal is that the learned Judge merely restated the law on the burden of proof but failed to consider how the same is to be discharged. Counsel cited ***MBUTHIA MACHARIA Vs. ANNAH MUTUA NDWIGA &***

ANOR [2017] eKLR in which this Court stated that the legal burden is discharged by way of evidence with the opposing party having a

corresponding duty of adducing evidence in rebuttal; the evidentiary burden.

It was incumbent upon the 1st respondent, as the party who would fail if no evidence at all were given on either side, to prove on a balance probabilities that he was the true owner of LR 5989/5. The evidence he led, as emerges from his testimony and that of witnesses he called before the trial court, which was subjected to searching scrutiny in cross examination, as well as the documents tendered in order to meet or discharge the burden of proof needed to satisfy the test of a bona filed purchaser as enunciated by this Court in ***SAMUEL KAMERE Vs. LANDS REGISTRAR, KAJIADO [2015] eKLR***. This by proving

> ***"That [he] acquired a valid and legal title, secondly [he] carried out the necessary due diligence to determine the lawful owner from whom [he] acquired a legitimate title and thirdly that [he] paid a valuable consideration from the purchase of the suit property."***

The evidence presented was that he entered into an agreement with Zena for the sum of Kshs.20 million for LR No. 5989/5. The agreement was prepared by H. Rioba Advocate who acted for both he and the seller. He paid Kshs.20 million in three cash installments of Kshs.2million on 2nd February 2000; Kshs.9 million on 11th May 2000

and Kshs.9 million on 14th June 2000 for which Mr. Rioba issued him

with receipts which he produced. He produced a conveyance signed by himself and the seller, Zena, which was registered on 5th September 2000. Prior to the transfer so effected he obtained rates clearance certificate and paid stamp duty of Kshs.400,000. He also obtained land board consent and had done a search which showed that Zena was the owner of the land having bought it from Basil George Mitton who had himself acquired it from Saint Benoit Plantation Ltd in 1950. After the purchase the 1st respondent took possession of the land. He thereafter engaged Francis Maina Ndegwa and Steve Obado from Local Mapping who, with the approval of the Nairobi City Council, sub-divided the land into 44 parcels all of which were registered in his name. He surrendered the mother title for LR 5989/5 to create the 44 titles.

The 1st respondent when subjected to intense cross- examination by counsel for the defendants, now appellants herein, maintained that he operated at his father's timber business in Huruma called Gicheru and Wakurine Timber Yard in the year 2000 and stayed in a rental house paying Kshs.5000 per month. They kept the proceeds of the business, which he said "was doing well" in the house, and had cash transactions only. He met Zena at a Children's Home near

Redeemed Gospel Church with Bob Harris who introduced them. They thereafter

went to Mr. Rioba's law offices and he paid fees of Kshs.350,000. He denied the suggestion that he conveniently used the name of a deceased advocate to achieve his goals. He retorted that his parents, too were, deceased, when questioned about the coincidence for both the seller and the Advocate being dead.

He denied the suggestion that he had never been to the suit land and maintained that he took possession thereof and lived there together with his workers.

Besides his own testimony as to ownership of the suit property, the 1st respondent relied on the testimony of PW2 who referred to a rates payment record showing that the property was registered to the 1st respondent and also confirmed that the Ministry of Lands indicated that the documents in their possession regarding the land belonged to him. The witness stated that he did not find fault with the 1st respondent's documents and told the court in cross-examination that those documents should be preferred over the rival ones.

Wafula Edwin Munoko (PW4) a Land Registrar in the Ministry of Lands confirmed that the records kept thereat included an Indenture dated 19th July 1950 between Saint Benoit Plantation

Limited and Basil George Mitton and another dated 5th June 1991 to Zena. He

confirmed certificates of title relating to sub-divisions of LR 5989 which showed that the 1st respondent was the registered owner. He also confirmed that the title for 5989/5 was franked which was confirmation of stamp duty having been paid.

There was also the testimony of PW6 a licensed surveyor who told the court that he conducted the amalgamation and subdivision that led to the 44 titles belonging to the 1st respondent. He stated that the survey work he completed was originally done by **Mugenyu (DW2)** in 1991. He confirmed having gone to the ground and worked for 2 weeks with a team of surveyors. He had ascertained that the 1st respondent was the owner and he affixed beacons. He had done due diligence by confirming the authenticity of the deed plans. The original title was surrendered at titling stage to give way to the new titles.

Besides the witness's testimony and the documents relied on, the 1st respondent testified at the 'locus in quo" during the site visit. The record shows that a direction was given that since he was yet to close his case, he 1st respondent would lead the court entourage to specific site features, upon which counsel for the defendants would be at liberty to cross examine him. He indicated at the front gate that

it was there when he purchased the property and he has never replaced it. He

could not say where the beacons were exactly because the survey was done by the surveyor. At the main house he indicated it had a living room and 4 bedrooms. His workers used to stay in rooms that were next to the main house.

Upon analyzing that evidence, the learned Judge at paragraph 306, 309 and 316 arrived at the conclusion that the 1st respondent conducted due diligence, established that the vender and her predecessor in title had valid interest over the property and also paid valuable consideration in the sum of Kshs.20 million. He thus had demonstrated on a balance of probabilities that he was the legitimate and bona fide owner of the suit property and its subsequent subdivisions having satisfactorily explained the root of his title.

The appellants take issue with the learned Judge's analysis of facts and evidence and the findings he arrived at which they charge led to a judgment that was "slanted and amounted to abdication of juridical authority and/or abuse of judgment discretion" which ended up "giving a seal of approval to an intricate fraudulent scheme to disenfranchise the appellant and the [other] respondents." They therefore urge us to re-assess and re-analyze the evidence and arrive at different conclusions. Of course, it is our bounden duty to re-

evaluate with a

view to arriving at our own independent conclusion and we have done so painstakingly with those voluminous records. We have also carefully read the 165-page 377 paragraph judgment of the learned Judge. We have done so cognizant that though we are undertaking a re-trial, we are doing so confined to the cold-letter of the record and have not had the advantage the learned Judge had of hearing and observing the witnesses first-hand in live testimony, which gave him a decided advantage, especially in being able to observe their demeanour and form useful impressions as to their credibility. Moreover, in this case, he had the added advantage of vising the disputed property and getting a realistic view and feel of the ground – which we do not. It is these considerations that we bear in mind and obey the duty to make due allowance for our limitations on appeal. We pay due respect to his findings of fact, not too readily departing therefrom unless, as this Court stated in ***JABANE Vs. OGENJA [1986] KLR*** "they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did," in which case we would reverse him unreservedly.

One complaint raised is that the proceedings at the site visit as

they appear on the record are not the same as they occurred on the

ground. With respect, while this is a somewhat troubling charge, if true, as we are ourselves bound by the record, and in the absent of alternative certifiable account, we are in no position to make a determination on the point without venturing into the field of hypothesis and speculation. At any rate, we think there is enough on the record upon which the pivotal question of ownership is otherwise capable of being sufficiently established. This is especially so regard being had to the position in law that a civil case is established, not on the basis of proof beyond reasonable doubt as in criminal matters, but on the balance of probabilities.

What that means, as it must, is that a court trying a civil matter weighs all the evidence placed before it. If it is faced with no two or multiple competing narratives, it has to decide which narrative is more probable than the other. And in weighing probabilities and seeking preponderance, there is a tacit acknowledgement that in litigation as in life, there rarely are impeccable, unquestionable, unanimous truths or accounts of truth that are pasteurized of gaps and inconsistences. In criminal cases such gaps and inconsistencies if in the case mounted by the prosecution call for a finding that the case is not made beyond reasonable doubt. But in a civil case, with a

much lower standard of

proof, the verdict may still be in favour of the claiming party if the court is still able to say that despite them and because they are not so materials to disconnect the story is more probable than not.

The absence of a written agreement of sale has already been dealt with by the then prevailing legal regime. The defendants cast doubt as whether it was possible for the 1st respondent, then just out of his mid- 20's (at 27 years) to have been able to raise Kshs.20million which he carried in 3 instalments in a back pack to the office of Mr. Rioba Advocate between February and June 2000, a period of four and a half months. It may not be the commonest of occurrences but there was no bar to any person choosing to conduct their business on strictly cash basis. That happens the world over and a court of law can take judicial notice of that. There are citizens who, whether out of mistrust or just personal choice, elect to keep their wealth in their houses whether in or under mattresses or wherever else. There is also no legal or logical basis upon which a court can reject, absent valid reason, a litigant's contention that despite living in a rental house in Huruma, his savings from the timber business and those of his father plus the latter's resources from "rental houses in Pangani; Mlango Kubwa and Kambu" together with a Coffee Farm,

were enough to buy prime land in Runda.

To reject the narrative just because it is not common would be to engage in speculative profiling – which is not what courts do.

We think, upon our re-evaluation, that given the evidence that the 1st respondent tendered and also the documents that were placed before the trial court and testified to by the witnesses whose testimony we have adverted to, there was a sound enough basis upon which the learned Judge could reach the conclusion that the 1st respondent did indeed purchase LR No. 5989/5 from Zena for valuable consideration after conducting due diligence and establishing a valid root of title traceable back to Basil George Mitten before her who acquired it from Saint Benosit Plantation Limited in 1950. He thereafter commissioned the amalgamation and sub-division resulting in 44 titles in his name and he was the lawful proprietor thereof.

We next address the question whether the 1st respondent was able to prove the allegations of fraud he alleged and particularized as against the other parties specifically against the 4th defendant (WKL) and against the 1st and 2nd defendants (Burugu and Runda Palms) as well as Mary, who were laying claim over the land allegedly on the basis of transfer from the 4th defendant, which in the event, the later

denied. We note that notwithstanding the learned Judge’s finding that fraud

had been proved against them, the 1st and 2nd defendants in their memorandum of appeal make no or at best only a feeble challenge to that finding. They make no frontal attack and there is no direct mention of the fraud that had been alleged and found to have been proved. On its part WKL in ground 9 of its memorandum of appeal faults the learned Judge's finding that the 1st respondent had proved the particulars of fraud as against it and Burugu and Runda Palms "despite the evidence led to prove these faults, to wit the Director of Criminal Investigating Report, was wholly based on hearsay …"

It is not in dispute that the investigation report produced in evidence by **Patrick Maloba (PW2)** played a central role in unravelling the tangled web of accusations and counter accusations of fraud, illegality and forgery that loom large in this dispute. PW2 was a Chief Inspector of Police based at DCI Head Office who had training in Forensic Investigations, interview of suspects and had done advanced courses in investigations. His report was in response to two letters from the office of the Attorney General signed by State counsel **Allan Kamau** on behalf of the AG. He received documents from Burugu and Francis Nganga Gicheru (DW7) with regard to the suit property. He summoned witnesses and recorded statements

from them but David Nyandoro

(DW4) did not honour the summons. As far as he knew the contents of his report had not been impeached.

The other report that spoke to illegalities especially forgery was by **Alex Mwongera (PW3)** who was a forensic document examiner. He concluded that a number of documents relied on by the 4th defendant and by the 1st and 2nd defendants were forgeries. He arrived at that conclusion by comparing questioned signatures with known signatures of the alleged makers. He explained the process by which he arrived at those conclusions. He was an established expert in the field holding the rank of Assistant Superintendent of Police and a document examiner of over 15 years' experience trained at CID Headquarters, the National University in Khartoum Sudan, the Regional Forensic Laboratory in Khartoum and at the Forensic Laboratory in Marlboro, Australia. Even though these two experts were cross-examined, their expertise experience, methodology and conclusions were not impeached.

Among the conclusions arrived at were that George Kimathi Mugenyu (DW2) forged the signature of Fred Ngatia Advocate in the alleged survey fees acknowledgment note; the signature of the Commissioner of Lands Raymond Njenga on Grant No. 35802 which

was held by Jumchem and WKL allegedly lodged between 1984 and

1987 were so lodged by an unqualified person as secretary yet he was licenced years later in November 1990 and the entity in question, Emu Registrar, came to be registered in October 1991; Mr. Omwela Advocate of Hamilton Harrison & Mathews denied that the law firm ever acted for WKL in the alleged acquisition of the suit property. Moreover, WKL having been the subject of a members voluntary winding up, and the winding up having been commenced and gazetted in 1973 with the appointment of two liquidators, it had no capacity to transact over its shares or transfer them to DW7 as he alleged.

As is apparent from our summary of the evidence, there was ample, nay overwhelming, evidence in support of the 1st respondent's allegations of fraud as pleaded and particularized which is a mandatory requirement, pronounced upon by many decisions of this Court and other superior courts in our jurisdiction. The rationale behind such a requirement is that allegations of fraud are of a most serious kind carrying not merely moral blight but are in fact quasi criminal in nature. They are not allegations lightly to be made hence the need that their particulars be expressly pleaded. In further reflection of their gravity, the person making the allegations is

required to strictly prove the same and to do so to a standard higher than the usual civil

standard of preponderance of probabilities, although not so high as to reach the criminal law standard beyond reasonable doubt. In ***MAGUTU ELECTRICAL SERVICES LTD Vs. MIRIAM NYAWIRA NGURE & ANOR [2019]eKLR,*** a decision we rendered in Nyeri, we stated that the requisite proof must reach a level of assured and confident proof. See also ***ARTHI HIGHWAY DEVELOPERS LTD Vs. WEST END BUTCHERY LTD & 6 OTHERS [2015]eKLR.***

An intriguing aspect of this case is that in the face of multiple particulars of fraud backed by oral testimony and expert written reports marshalled by the 1st respondent, the defendants against whom those allegations of fraud were made appear to have been rather non- chalant in response thereto. On the expert opinion evidence of the forensic and document examiners, for instance, there seems to have been little effort to counter or impeach the same and focus was instead directed at questioning how the 1st respondent came to be in possession of the report immediately it was released. Indeed, even before this Court, some of the appellants have attempted to portray the said reports as constituting "illegally obtained evidence," which should have been rejected. With respect,

no attempt was made to lay a basis for such a bland characterization. The report was not indicated to be

classified or for restricted circulation and, even if it had been there would be nothing illegal about its being in the hands of a citizen especially in this era of freedom of information.

It has been held in numerous decisions of this Court that the proper way to counter or rebut expert reports is by obtaining a report from a different expert. See ***ALI MOHAMED SUKAR Vs. DIAMOND TRUST BANK LTD [2011] eKLR***, ***PARVIN SINGH Vs. REPUBLIC [1997] eKLR***. The evidence of experts who are properly qualified is to be given due respect but must be taken and weighed alongside the rest of the evidence tendered in the case. The ultimate decider of the case is the judge and while the opinion of an expert will no doubt be a useful guide, the decisional responsibility to do right reposes in the court.

Beyond the expert reports, which remained largely unchallenged with the result that the findings therein are essentially uncontroverted, the testimony evidence that emerged from the cross examination, especially of the Director of WKL Francis Nganga Gicheru (DW7) was nothing if not confirmatory of the allegations of fraud against the 4th defendant of which he was Managing Director, and generally destructive of its case as presented. After stating in

chief that he acquired the property “in 1983 through purchase of shares from

William and Kennedy Ltd" and that he had been in possession since February 1984 and sub-divided it in 1991 to get 4 separate titles 5986/66, 5986/67 and 5989/91 because he wanted to separate the house from the rest of the property, and used the remainder to borrow money from Post Bank which sold it because he defaulted and he sued the Bank, and that the was a stranger to attempts to transfer the property to Runda Gardens and that Juma Muchemi never honoured a sale agreement between them, and denying that WKL ceased to exist in 1973, the record captures his entire cross examination by the plaintiff's counsel at pages 167 to 171 of the typed proceedings which we quote verbatim as follows:

"CROSS EXAMINATION BY MR. EREDI

I bought the land in 1983. The land was about 24.7 acres. I bought the shares of the Company. The Company did not have any assets. I was informed that government had undertaken compulsory acquisition. Williams and Kennedy were the registered owners. After subdivision, there were 36 parties. 4 were partially released and title documents given to Williams and Kennedy. The balance remained. The mother title which composed of 31 plots were charged.

5989/66, 67, 68 and 91 were not charged. The big portion of land includes mother title. I have never worked for Post Bank. I failed to service the loan. The bank did realize the security. I did not challenge the right to the sale of property. I challenged the process. The bank had attempted to sale and were challenging interest. We had a consent

order in one of the case. The cases have taken long in Court. I don't know why it has taken long.

CROSS EXAMINATION BY MS. NDINDI ADVOCATE: Nil

CROSS EXAMINATION BY MR. RAPANDO ADVOCATE:

I am turning 70 years this September. I am a banker by profession. I have worked for Rural Urban Credit Limited. I was Managing Director at that Financial Institution. It was placed under liquidation when I was Managing Director. I went to Sweden. I never took off. I went to seek further opportunities. I do not have a written resolution from the Company. I never sold to Juma Muchemi. There was a Sale Agreement but the sale agreement never went through. The sale agreement is before court. Page 157 of my bundle has the agreement. The hectares is indicated as 11.96 hectares. Juma Muchemi alleged breach of contract and filed suit 2459 of 1997. The Plaint is at page 254 to 257. He sued me for breach of Contract. We responded vide filing a counter- claim dated 8th December, 2013. My counter claim denies the claim against Juma Muchemi. Paragraph 7(6) of my defence states that we deny that the land was acquired by Government among other issues. That was my response to the claim against Williams and Kennedy. The suit property was acquired in 1955 from George Milton. I have scanty information of how Williams and Kennedy acquired the property. The registration happened on 17th September, 1955. I would not be surprised to see that date fell on a weekend. I don't have a sale agreement between George Milton and Williams and Kennedy. I am here on behalf of Williams and Kennedy. I do not have resolutions from Willams and Kennedy authorizing the acquisition. I do not have a copy of the title showing transfer of interest. Page 31 of may bundle shows that it is Grant No. 35802. It was registered on 19th October, 1983. The surrender is not before the court. Page 69 is a letter addressed to me. It is dated 13th October, 1983. It was an offer to purchase the shares. I was buying the shares of the company which they owned the land. The grant was registered on 19th October, 1983. The directors Williams and

Kennedy did not show me a title. I did a search. It is not before court. I did obtain a CR 12 before purchase. It is not before this Court. The Land as per the letter of offer measured 14.9 acres. In my counter claim of HCCC No. 2459 of 1997, the total size is indicated as 9.575 Ha. The Consideration was Kshs. 2,500,000/=. The letter of offer dated 13th October, 1983 contains contradictory figures. Donald Vincent was a selling agent. The deposit was paid to Donald Vincent. I don't have any evidence to confirm that. The transfer of shares form is dated 1904. Williams and Kennedy was incorporated in 1953. The transfer of shares does not indicate the purchase price. I do not have proof of consideration that was paid.

I have filed a copy of annual returns of Williams and Kennedy Limited. It appears at page 81 to 104. I was a director at that time. We filed annual statements but it is not before court. The returns were filed by Emu Registrars. The document at page 69 of plaintiff's bundle shows that it was filed by Emu Registrars but that it is not my document. Page 354 of plaintiff's bundle shows that Emu Registrars was registered on 3rd October, 1991. That document is not certified. I am familiar on the process of obtaining a company search. I have not obtained any document to contradict this information.

I transacted with Mr. Owen Nyaga Koimbu on behalf of Emu Registrars. The letter dated 27th July, 2020 at page 356 of plaintiffs' bundle says Owen Njenga Koimbui was registered on 23rd November, 1990.

Page 682 shows that Williams and Kennedy appointed Emu Registrars on 13th August 1987. I have not filed anything to contradict that they were appointed in 1987.

Page 653 of the plaintiff's bundle is a declaration of solvency. The deponents are Mr. Kennedy and Mr. Williams. I am familiar with their signatures. The same is certified on 13th May, 2020 by Registrar of companies.

Page 654 of plaintiff's bundle is a special and ordinary Resolution of Williams and Kennedy. It is signed by Chenga Limited. It shows that there was a resolution to wind up the company as a members

voluntary winding up and joint liquidators were appointed. Mr. Silcock and Mr. Bell.

The second resolution was that the joint liquidators were authorized to liquidate the assets of the company. I was not a shareholder of the company at that time. I transacted with Mr. Donald Vincent. I have not placed any resolution to the company. I was not a shareholder of the company. Page 324 has the Kenya Gazette Notice Number 5396 dated 30th November, 1973. The Notice was issued by Mr. Silcock and Mr Bell. I have not placed any gazette notice to the contrary. I was not a director of the company then. I would not know if it has been revoked or challenged in Court. Gazette Notice Number 3897 also shows the appointment of the liquidators. I have not placed any information to contradict the same. I was not a shareholder by then. There is only one Williams and Kennedy. I accused Mr. Mutiso of fraud. We are waiting for investigations to be concluded. I also made reference to Mr. Ndegwa and Mr Nyokabi the matter is before DCI. We are waiting to investigations to be concluded. I have not presented any evidence showing current status of the case. I am not aware if the case was withdrawn. I am waiting to testify. I know fraud is a serious offence. Page 32 of my bundle condition No. 7 states that the grantee shall not subdivide he land and shall no sublet, transfer, charge or dispose of the land without prior consent of President or Commissioner of Lands. The consent was obtained but it is not before this Court.

Entry No. 16 and 17 at page 36 and 37 of my bundle relates to a charge and further charge. I do not have its consent. 5989/5 to my knowledge doesn't exit. What exists is 5989/5/R. I do not have its deed plan. The "R" was added when the subdivision occurred. I do not have the exact date when 5989/5 ceased to exist. It ceased to exist after the subdivision. The property was charged to Post Bank. Post Bank is under liquidation. The charge is dated 8th November, 1991.

Page 143 indicates 5989 as the property that was charged. Further charge is dated June 1992. Page 153 also shows that 5989/5 was subject to the further charge. The grant was signed by James

Raymond Njenga. The DCI never arrested me. I am not aware of the DCI report. I am not aware that the report said that I forged the signature of James

Raymond Njenga. I have not done anything to challenge the report. The DCI report is dated 29th July, 202. It was signed by P.M. Khaemba.

Page 554 has my name Francis Nganga Gicheru. It said that I committed forgery. I have never been made aware of this report.

CROSS EXAMINATION BY MR. ODUNGA ADVOCATE

I am here to testify on behalf of Williams and Kennedy. I have an interest in 5989/5/5. That is the land that I have an interest. I have occupied it since 1984 to date. A few years back, the property was transferred to another entity and that is what I am challenging. I have been in occupation from 2007. The user of the property is residential. I have not produced any evidence on farming activities on the land. I have not produced any evidence on goat rearing.

I have not placed any resolutions authorizing purchase by Williams and Kennedy of the land. I have not placed any resolution authorizing acquisition of shares. There has been a lot of interference on the directorship. The current directors are my wife and myself. I do not have a resolution appointing my wife as a director of the company. I do not have any CR 12 on the current status.

Paragraph 7(b) of my defence in 2489 of 1997 avers that Williams and Kennedy did not own the land as at December, 1970. My statement says that George Milton owned the land as at 1954. We do not have a sale agreement, transfer, a copy of title showing interest moving from George Milton to Williams and Kennedy. There is a letter by Milton denying that Willams and Kennedy owned the land. I have not placed the earlier title before Court. My title is from 1983. I don't have a surrender instrument of the earlier title. My deed plan was issued on 22nd March 1979. I have not seen the surrender deed plan. I do not have it before court.

Page 643 of plaintiff's bundle is a statement made to police by Pricilia Njeri Wangoi. She stated that deed plan 106270 dated 22nd March, 1979 doesn't appear in survey records. She states that genuine deed plan for 5989/5 is deed plan 45300 dated 22nd March 1980."

Upon a thorough analysis of all the evidence on this aspect of the case which is at the very heart of the dispute between the parties, we come to the inescapable conclusion that the following facts were established:

- WKL was incorporated on 18th March 1955.
- On 15th November 1973 its directors George Michael Kennedy and John Michael Williams made a declaration of insolvency.
- On 23rd November 1973 its shareholders and directors passed a special resolution that it be wound up as a members voluntary winding up.
- By Gazette Notice No. 3596 published in the Kenya Gazette of 30th November 1973, Mr. J.G. Silcock and Mr. J.G. Bell were appointed joint and several liquidators to distribute the assets among the shareholders and their addresses were notified.
- The winding up resolutions have never been rescinded or reversed.
- Notwithstanding the provisions of section 274 of the Companies Act, Cap 486 (since repealed in 2015) prohibiting carrying on of business after commencement of Liquidation, WKL purportedly obtained Deed Plan No. 106270 of LR 5989/5 on 22nd March 1979 and obtained registration on 19th October 1983 under Grant No. 35802 and effected subdivisions on 27th May 1991.

- Basil George Mitton was at the material time the registered owner of LR No. 5989/5.
- When WKL's shares were purportedly transferred to Francis Gicheru in 1983 and to his wife Eunice Wanjiku Gicheru and Amy Kagendo Gicharu in 1984, the liquidators were not involved as the purported purchasers dealt with one Donald Vincent Ltd, a separate entity, contrary to section 275 of the Companies Act and therefore void.
- Whereas a certificate of incorporation for WKL bore the dated 18th March 1953, the alleged share transfer forms between its shareholders and Francis Gicheru are all dated 24th January 1904, long before its incorporation.
- Francis Gicheru produced returns dated 14th January 1984 showing change of shareholding in WKL from George Michael Kennedy, John Michael Williams and Pamela Savage to himself as well as annual returns dated 14th January 1985 and 14th January 1987 all filed by Emu Registrars Limited.
- Emu Registrars Ltd was, however, not existent at the time having been incorporated later on 3rd October 1997 while its proprietor Koimburi was not registered by the Institute of Certified Public Secretaries until 23rd November 1990.
- The change of shareholding and directorships in WKL as contained in those returns was deceitful having been filed by an unqualified person and in the name of a non-existent entity.
- ASP Alex Mwongera (PW3) did a forensic examination and established that the entities and signature in Grant No.

35802 were not genuine and that the signature of James Raymond Njenga, the Commissioner of Lands was a forgery.

- PW3 also established that the postal searches presented by the 4th defendant (WKL) for LR No. 5989/67, 5989/68 and 5989/91 purportedly and the names of Joseph Wangombe Kamuyu, and Edwin Munoko Wafula, a Land Registrar dated 16th June 2020 and 26th June 2020 respectively were forgeries.

It is noteworthy that the forensic expert report that expressed firm opinions regarding the forgeries of the documents relied on by the 4th respondent, and which automatically impact the case of all the defendants who derived their claims to the suit property from it, were available to those parties from as early as 30th July 2020 or thereabouts when the plaintiff filled it thrice-amended plaint following leave granted by Bor, J. on 19th July 2020, with which the trial bundle containing them was filed and served. The import of this observation is that there was plenty of time available to those parties to familiarize themselves with, interrogate, reply to and seek expert opinion to counter the contents of those reports or otherwise avail opinion and witnesses with an alternative view. They did not do so, thereby leaving those opinions uncontroverted.

Given the state of the evidence and under those circumstances, and considering that all that WKL has done in submissions is attempt to diminish those expert reports as being “wholly based on hearsay evidence” and to contend that “cross examinations completely ousted the authenticity of the said reports” both of which assertions are not supported by the record, we have no difficulty finding and holding that the 1st respondent did establish the allegation of fraud pleaded and particularized against WKL and the learned Judge was correct in so finding.

The next issue is whether the parties who alleged fraud and illegally against the 1st respondent proved those allegations. We have already addressed the seriousness and gravity of allegations of fraud and illegality and the corresponding duty to not only expressly plead and particularize them but to also strictly prove the same to an appropriately higher standard. It was established and placed in evidence by four witnesses from the Ministry of Lands who ironically, testified on opposite sides of the legal contest as PW4, PW5, DW4 and DW5, that both records relating to the interest of the 1st respondent and the 5th respondent (which later were found to be forgeries) exist at the lands office and, further, that the suit

property was sub-divided

into 44 sub-plots the titles whereof were issued in the name of the 1st respondent.

In their undated amended defence, the 1st and 2nd defendants (Burugu and Jumchem alias Runda Palms) charged at paragraph 3A that the plaintiff's suit was purely predicated upon "blatant falsehoods and fraudulently processed documents" with the sole aim and objective of depriving the rightful owners of their property rights. They allege in their particulars, *inter alia* that he had tampered with the genuine official records at the lands office and created fake and falsified records; had uttered forged and/or fake sub-division schemes and documents in support of the false submissions and used "false, fake and forged documents" to substitute his blatant illegal claim to the property and "presented and uttered fake documents at the Lands Office and before the Court." They also pleaded that the 1st respondent purported to have purchased that property from "a non-existent person alleged to be called 'Zena Grace Linsley' who neither actually existed at the material time nor owned the property and was already deceased.

Those serious allegations of forgery, use of false or fake documents and uttering of the same required proof by solid evidence

beyond averments in pleadings. In law, they are of no probative value

and are not evidence or, as the great Madan, JA rendered it in; ***CMC AVIATION LTD Vs. KENYA AIRWAYS LTD (CRUISAIR LTD) [1978] eKLR:***

> ***"The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."***

We respectfully concur. Pleadings, no matter how passionately, picturesquely, persuasively or poignantly crafted are not evidence. They make for good and educative literature, they may be memorable and quotable and reflective of the drafter's learning and mastery of the catchy phrase, but before their content is converted to evidence under oath and evidence that meets the standard requisite to the case, what they signify is nothing, notwithstanding their sound and fury. Thus, the allegations of forgery and use of false and fake documents made against the 1st respondent remained just that in so far as the 1st and 2nd defendant did not call expert witness to authoritatively lend credence and probative value thereto.

The observation applies with equal force to the forgery allegations

made by the 4th and 5th defendants. The 4th defendant averred as we

alluded to earlier in summarizing the pleadings, that;

"The plaintiff in cahoots and/or collusion with the 3rd defendant and an coterie of unknown land fraudsters orchestrated the most obnoxious preposterous and daring modern day fraudulent scheme of manipulation and forgery of documents in the land office and purported to grant the plaintiff a non-existent title to the suit property from the air in a scheme reminiscent of a wild west soap opera which the plaintiff now seeks to sanitize using the judicial process."

It then proceeded to list "Particulars of Fraud and Forgery on the part of the Plaintiff and the 3rd Defendant" which we need not rehash. When it came to evidence, however, and we have already set out what Francis Nganga Gicheru stated both in summary and also the full record on his cross-examination, the 4th defendant never adduced any expert or other cogent and sufficient evidence to prove fraud against the 1st respondent.

The 5th defendant Mary Wanjiku Juma did no better. She made like allegations of fraud on paragraph 10 of her defence and averred that the 1st respondent had used fake and forged land documents to claim the suit property in addition to claiming to have purchased it from a non-existent person. Her testimony before court only dealt with how her late husband acquired portions of the suit property and the vexed question of occupation. She did not adduce any evidence nor call

any witness to substantiate the particulars of fraud against the 1st respondent.

Once a party pleads fraud against another, he immediately assumes and evidently duty to independently and satisfactorily prove the particulars thereof through cogent evidence that rises to the required standard that we have already adverted to herein. As was stated in ***VIJAY MORJARIA Vs. NANSINGH MADHUSINGH DARBAR & ANOTHER [2000] KECA 5 (KLR)***, **"**it is also well settled that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." See also ***NDOLO Vs. NDOLO [2008] 1 KLR (G & F) 742.*** Such is the onus that sits on the shoulders of he who alleges fraud, and as far as the allegations of falsification, faking and forgery of documents as against the 1st respondent are concerned, the inevitable conclusion we must reach given the absence of effort to furnish proof, is that the 1st and 2nd, the 4th and 5th defendants who are appellants herein, failed of proof.

One facet of the 1st respondent's alleged fraud that we need to separately address relates to the person from whom he claimed to

have bought the suit land, namely Zena Grace Linsley. According to those defendants, either Zena never did exist in person or, if she did, she

never owned the suit land and never entered into a sale agreement with the 1st respondent in the year 2000 as she had died on 22nd October 1999. The assertions then were to the effect that the documents presented by the 1st respondent purporting to have been signed by Zena in 2000 and the debenture dated 6th June 1991 were forgeries but, as we have already pointed out, they did not provide expert evidence and/or testimony in proof of the allegation.

The 2nd defendant called John Franklm Beakabare a resident of Diani who testified as DW1. Though stating that the conveyance was "fake and fraudulent," he had nothing to prove the statement. Tellingly, he was testifying on 12th July 2022 about a year and a half since he recorded the witness statement dated 5th February 2021 that he relied on as evidence in chief. In that period, he had not reported the alleged forgery to the as police he conceded in cross examination. Neither had he, nor the defendants who had called him, subjected the said signature, which he said resembles his mother's, to forensic examination to determine its genuineness or otherwise. As as far as we can tell from his evidence, he conceded that he had not filed anything containing his mother's genuine signature and that, not being a document examiner, he would not confirm

genuineness of signatures.

He had nothing to show that he was son to the said Zena. He had admitted that the death certificate he sought to produce had names different from the ones in the documents relied on by 1st respondent. He was not staying with his mother and would communicate with her only once a month or meet her once in two or five years. He was neither the administrator nor executor of the estate of Zena and had no authority to represent her. He admitted that her legal representatives were better placed to speak on her behalf and he was not one.

We think, with respect, that the evidence of DW1 did not do enough to disprove the cogent and consistent evidence of the 1st respondent that he did meet Zena through Bob Harris, a customer at the 1st respondent's timber yard, at his children's home in Huruma. It is Harris who told him about a friend who was disposing of land. That friend was Zena and they met several times with the next meeting being at lawyer Rioba's office and in time the transaction was agreed on and concluded. The documents involved were the subject of comment by various officers from the Ministry of Lands, none of whom seriously impeached or repudiated them. As we have already found, the defendants who alleged that the documents were fake,

fraudulent or

forgeries never availed expert forensic evidence of those allegations and neither could DW1.

The point of DW1's evidence that would have had a significant, if not decisive impact on the credibility of the 1st respondent's case, is the allegation that the vendor Zena was already deceased as at the time she was said to be transacting with the 1st respondent, entering into an agreement, receiving Kshs.20 million and signing the conveyance on 21st August 2000 which was later registered on 5th September 2000. DW1 needed to provide cogent and solid proof of Zena's death beyond his say-so, and he attempted to do so by way of a certificate of death but there was objection to its admissibility, not only because doubt were raised as to how it was procured given DW1 was not Zena's legal representative or administrator/executor of her estate, but also on whether the foreign public document which he claimed was mailed to him by his alleged older sister Elizabeth Elliot complied with the formal requirements for admissibility under the Evidence Act. He did not have the original of the certificate of death, which he alleged was lost in the UK in 2019, without providing evidence of such loss. This state of affairs was not such as to accord much credence to the question of Zena's alleged death prior to the

transaction. But as to the

admissibility hurdle in the face of the death certificate, which DW1 says was certified on 17th November 2020 showing there was time enough for him, who was in the UK in 2019, and/or the party who called him to do all that was required to render the document admissible, the learned judge expressed himself as follows;

> ***"359. In respect to the death certificate that was produced in Court, while the Defendants urged the court to consider the same, the Plaintiff in his submissions urged the Court to disregard it for the reasons that 1st and 2nd Defendants did not produce the original version of the said death certificate and further that the same was not admissible on account of violation of Section 82(g) of the Evidence Act.***
>
> ***360. Section 82(g) of the Evidence Act, Cap 80 provides: -***
>
> *"Without prejudice to any other mode of proof, prima facie evidence of the following public documents may be given in the manner hereinafter shown, that is to say –.. public documents of any other class in a foreign country, by the original, or by a copy thereof bearing a certificate under seal of a notary public or of a Kenya consular officer or diplomatic agent that the copy is duly certified by the officer having the lawful custody of the original thereof, and upon proof of the character of the document according to the law of the foreign country."*
>
> ***361. In view of the aforementioned provisions, it is evident that the said death certificate was a foreign public document which ought to have been certified by a notary public or Kenya consular officer or diplomatic agent with a view of confirming that that the copy is duly certified by the officer having its lawful custody to avert the***

difficulty of ascertaining its authenticity. In absence of a certificate by a notary public or Kenya consular officer or diplomatic agent in England and

Wales confirming that the purported copy of the death certificate has been fully certified, it is the finding of this court that the same is inadmissible in evidence for want of compliance with section 88(g) of the Evidence Act, Cap 80."

Our own consideration of that provision leads us to the conclusion that the learned Judge properly appreciated the law on this point and correctly directed himself in ruling the document inadmissible.

The inescapable conclusion, then, is that the 1st, 2nd, 4th and 5th defendants did not prove the allegations of fraud they levelled against the 1st respondent and the learned Judge was right to so hold.

We now come to the last issue we distilled, namely whether the 1st respondent was entitled to the orders the learned Judge issued, which is a logical progression from our treatment of the substantive points of contention in these consolidated appeals. Inevitably, the fate of the suit before the learned Judge had to crystalize into a determination of each of who among the parties, laid stake on the suit property, and each claiming to be lawful proprietors and raised competing and mutually exclusive narratives as to the basis of their specific interest, had demonstrated that they had a valid and lawful title thereto properly obtained and worthy of the protection of law.

For

the parties who held title documents, it was incumbent upon them to establish the legality and efficacy of the same in the face of competing claims. Only by showing that he had acquired his title lawfully for good consideration from a vendor who had a good title to pass, and which title was traceable to a valid root, could the 1st respondent succeed in his claim, and we have already addressed this issue.

Faced with other persons, specifically the 1st, 2nd, 4th and 5th defendants, who also claimed that they were the bona fide owners of the suit property or portions thereof, as the case may be, he had the onus of proving that their claimed rights or interests were not valid and effective to defeat his title, and he did so by pleading fraud and illegality on the part of those parties who were laying claim to the land, and questioning his title. They, in turn, sought to impeach his title by alleging that he manipulated, faked and forged documents in what was essentially a land-grab, and they used choice descriptive terms to the effect that he was a land fraudster.

As the plaintiff/1st respondent is the party who would have failed if no evidence at all was tendered, and he it is was that bore the legal burden to prove his case, his success in the suit, as correctly

submitted by the appellants herein citing ***CAROGET INVESTMENT***

a decision of this Court, would be "on the strength of his own case and not on the weakness of the opponent's case." That case was cited in criticism against the learned Judge for finding for the 1st respondent who, it is submitted, "never put weight to prove the validity of his title documents but rather focused on challenging the [defendant's] valid title documents. This same notion is repeated in the submissions for WKL citing the same case (and ***CHIEF LAND REGISTRAR & 4 OTHERS Vs. NATHAN TIROP KOECH & 4 OTHERS [2018] eKLR***) to assert, rather curiously given the record that speaks otherwise, that the 1st respondent "did not have any evidence as proof of how he allegedly acquired title to the tile property…" Indeed, it is submitted for WKL that it was erroneous for the learned Judge "to analyze the weaknesses of the appellant's title when the appellant had not filed a counterclaim." This acknowledgment of the weaknesses of WKL's title is unsurprising given the analysis we ourselves have conducted herein, as well as the wholly self-destructive testimony of DW8 that completely dissipated the case it presented.

We must point out that the appellants herein, in placing reliance

on both of these cases, do so in a selective and self-serving manner to

project as erroneous and unwarranted the learned Judge's recognition and appreciation of the weaknesses of their positions and the defects in their titles, as presented at trial.

Far from suggesting that a court should turn a blind eye on the weaknesses of the defense or opposing party case, this Court stated quite the opposite, and we think it is a dereliction of counsel's duty to be an honest guide to the court, to cite authorities in an obviously skewed and potentially misleading manner. Fortunately for the integrity of the judicial process, this Court does not accept at face value the interpretation given in the precise of cases cited, but endeavours to fully engage with the cases themselves for their true tenor and import.

Thus, to properly appreciate the Court's reasoning in ***CAROGET INVESTMENT***, we go beyond the phrase latched on by the appellants. The Court's view was thus:

> ***"Where two parties assert competing proprietary interest over one parcel of land, each must produce evidence in support of his claim.***
>
> ***This Court (Platt, Apaloo, Masime, JJ.A) recognized this in JAMES HENRY MUDIAR T/A KABARAK DEVELOPMENT SERVICES V. TRADEWHEEL KENYA LTD [1987] eKLR,***
> ***and said:***

‘But the plaintiff cannot attack the relative weakness of the defendant’s title just tertii, namely that the council owns the land. The plaintiff can only attack the position of the

defendant, on the strength of some title of its own. (See The Law of Real Property by Meggary and Wade, 4th Edn. Pp 1005 to 1009).

This dictum was applied in SAMUEL OTIENO Vs. MUNICIPAL COUNCIL OF MALINDI & ANOR [2015] eKLR.
Put differently, a claimant will succeed on the strength of his own case and not on weakness of the opponent' s case, save to add that the standard of proof in a case for declaration of title is on a preponderance of evidence."

(Our emphases)

It is a matter of some interest that in that case, this Court (Ouko, (P) (as he then was) Sichale & Kantai, JJ.A) upheld the judgment of Obaga, J., who had found in favour of the plaintiff who, like here, sued for various declarations after the defendants forcefully invaded the suit land while claiming title thereto. In what reads like an uncanny pre- enactment of the proceedings at the trial herein, two of the witnesses here also featured there:

"***Edwin Munoko Wafula, the Registrar of Titles in whose custody the title documents are entrusted, traced the history of the suit property to 1946 and affirmed to the court that from the perusal of his records, the 1st respondent was the registered owner of the suit property; that its application and approval for extension of the lease was on the register, endorsed by the Commissioner. He was also unequivocal that;***

'It is the plaintiff's title which is genuine. The deed plan which generated the 5th defendant's title was not

genuine. The 5th defendant came into the picture much later. The City Council of Nairobi was claiming that the property belonged to them. As at the time the letter was written, the property

was registered in the plaintiff's name ... It is the lands office which gave both titles. The deed plans originated from the survey office.'

From the survey office, Priscilla Njeri Wango confirmed that the only genuine deed plan was that held by the 1st respondent and that the deed plan held by the appellant did not emanate from the office of the Director of Survey."

We have quoted that excerpt from the judgment in that case to demonstrate that in the face of contested claims of title to landed property, it is the bounden duty of the courts to carefully and thoroughly interrogate the genuiness and validity of the rival narratives and documents, to determine where the truth lies on a preponderance of probabilities.

As to the ***NATHAN TIROP KOECH*** decision, the full meaning is achieved by reading more than the first sentence, and setting out the full paragraph 87 which is quite illuminating;

"87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. We are, however,
cognizant that where the defendant's case supports that of the plaintiff and contains evidence on which the plaintiff may rely, the plaintiff is entitled to rely on and make use of such evidence. In a claim for declaration of title, as the instant case, the onus is on the petitioners to satisfy the Court on the evidence produced by them that they are entitled to the

declaratory orders sought.”

(Our emphasis)

We have said enough to show that we think the learned Judge's approach was holistic and wholesome and the aspersions cast on him are unfounded and unwarranted. The appellants' fault him for enquiring into the root of their own titles when, according to them, he should only have focused on interrogating the root of the 1st respondent's title. They cannot be right. We think that the jurisprudence of the superior courts of this land have lately been quite consistent that in the face of rival competing claims to land, investigation into the root of the title must touch on all claimants. Then only can the true, valid and lawful owner be established and protected while, by necessary implication, any interest acquired unprocedurally, illegally or fraudulently cannot be accorded jural imprimatur.

In the all binding-decision of ***DINA MANAGEMENT LTD Vs. COUNTY GOVERNMENT OF MOMBASA & 5 OTHERS*** (supra) the Supreme Court laid down the law thus:

> ***"As was held by the Court of Appeal in MUNYU MAINA Vs. HIRAM GATHIHA MAINA [2013] eKLR where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is under challenge and therefore the registered proprietor***

must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free

from any encumbrance including interest which would not be noted in the register."

See also ***TORINO ENTERPRISES LTD Vs. ATTORNEY GENERAL [2023] KESC 79 (KLR).***

Bearing this jurisprudence in mind, and given the conclusions we have reached in all of the preceding issues, we are satisfied that the learned Judge was entitled, from the evidence, to issue the dispositive orders that he did in favour of the 1st respondent, who was able to establish his title as valid, lawful and efficacious with its root properly traced all the way back to Saint Benoist Plantation Limited through Basil George Mitton and the person from whom he bought, Grace Zena Linsely. The defendants in their pleadings cast aspersions on the title by making averments of alleged falsification, faking and forging of documents by the 1st respondent, but made no effort to discharge the burden that they bore of presenting evidence to back up those averments. They also failed to bring any evidence to counter the damning evidence of fraud and illegality on the part of WKL, and especially its sole witness DW7, the effect of which was to leave the expert forensic evidence of PW2 and PW3 unchallenged and uncontroverted. Moreover, DW7's testimony, and the totality of

the

testimony from all the witnesses from the Ministry of Lands and the Director of Survey who testified on opposing sides did not derogate from the documents that were presented before court, the authenticity or otherwise of which were subject of the forensic examination reports.

Before we conclude this judgment, we need to address two lines of submissions by WKL which we find curious. The first related to its corporate status. According to the submission made, it was improper for the learned Judge to have pronounced himself on whether it had effective existence capable of transacting business when, in paragraph 4A of the triple amendment plaint its corporate status had been pleaded by the plaintiff and was therefore not an issue. It submitted on the strength of our decision in ***INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOR Vs. STEPHEN MUTINDA MULE & 3 OTHERS***, that parties being bound by their pleadings, the 1st respondent could not challenge its corporate competencies.

To our mind, the answer to that issue lies in statute law itself. We have already found to be correct the learned Judge's holding that WKL could not continue in business or transfer its shares while under

the handicap of a winding up as resolved and gazetted way back in 1973, which is the reason the actions it purportedly took through Francis

Gicheru (DW7) to transfer shares otherwise than through the liquidators, purchase the suit land and engage in its business other than permitted under section 274 of the Companies Act, were null and void. Its corporate status is, however, saved in the proviso to the section and describing it as a liability company did not in any way amount to an admission that it could do the impugned acts.

Next is the contention in WKL's submissions dated 22nd October 2024 under the head of "II. Facts not in Dispute" that;

> ***"The (sic) was indeed compulsory acquisition of a portion of the suit property sometimes (sic) in the year 1970 and 1990. This was indeed confirmed by the 4th respondent who also confirmed that the owner of the property at the time of the said acquisition was the appellant herein. Further, the 4th respondent also confirm that compensation of the said compulsory acquisition was indeed paid to the appellant herein."***

We found this submission to be troubling and concerning because it was a total mischaracterization of the true state of things to call the issue "a fact not in dispute" when the opposite of it is the true position on the record, especially in the cross examination which we set out in full, is a study in spectacular collapse. As the claims of ownership by Burugu and Jumchem alias Runda Palms and by Mary Wanjiku Juma are ultimately traceable to and firmly anchored on

the

validity or otherwise of the title that WKL held, the inescapable finding

of the fraudulent and illegal character of that interest and title for the reason we have so fully addressed herein means, *ipso facto*, that their claims also fail as the learned Judge quite properly found on the evidence.

We think that in the face of the proven glaring illegalities and fraud attending the title of WKL which is essentially admitted in the testimony of its sole witness, the complaints about the learned Judge having relied on documents marked but not produced contrary to the holding of this Court in ***KENNETH NYAGA MWIGE Vs. AUSTIN KIGUTA & 2 OTHERS [2015] KECA 384 (KLR)*** do not amount to much. First, the documents so relied on are not identified. Further, and more important, in the instant case there was surfeit of evidence, both documentary and testimonial, that went to the proof of the 1st respondent's case. Nor do we think the record bears out the appellants' contention in their submissions, that the CLR's evidence, which they say the learned Judge did not properly or at all consider, in any wise weakened the 1st respondent's case as we have already set it out in the summary of the evidence that was tendered at trial. It does suggest a deliberate and untenable attempt to mislead the court at submissions stage instead of candidly and accurately

representing the evidence. The

record is quite clear that WKL was not the owner of the suit land in 1973 when the Gazette Notice dated 12th November 1970 indicated intention to compulsorily acquire the land. The notice indicated that WKL was the owner but following a protest letter from the registered Basil George Mitton, the Commissioner of Lands agreed that WKL was mentioned in error and the acquisition did not proceed. That much was testified to by the defense witnesses. **Paul Owino Odek DW5** who stated the land belonged to Bail George Mitton in 1970 and that no compensation award was ever made to him and that there was "no document of 1970 under the names of Willams & Kennedy." There was also no entry on the title showing 9.75 acres being hired off. This witness also referred to WKL's Amended Defence and Counterclaim to an earlier suit in which it expressly pleaded that it did not own the land in 1970. The witness was emphatic that the acquisition by Government was never completed.

The other witnesses was **Nabiswa Rose (DW6)** a valuer at the Ministry of Lands and Physical Planning who stated that Gazette Notice 3439 was just an intention to acquire which invited an inquiry "which contemplates that there could be other people interested or claiming ownership of the land." There was no evidence that the

awards were

ever made, and no evidence of acceptance or of settlement cheques. The inquiry was never concluded and there were no minutes and recommendations together with determinations thereon.

The 4th defendant's (WKL's) sole witness Francis Nganga Gicheru (DW7) stated that he acquired the suit property in 1983 and it was intact at 24.7 acres. He affirmed the averments in paragraph 7(b) of his defence filed in **HCCC 2489 of 1997** that Williams and Kennedy did not own the land as at December 1970.

Given those clear consistent testimonies by the witnesses, that that the Government never compulsorily acquired some 9.75 acres out of the suit property for purposes of a road, which as previously noted was in fact realigned and relocated elsewhere, the submissions by counsel that are diametrically opposed thereto, and which are based on no evidence whatsoever, are an affront to logic and unacceptable We find and hold therefore that the indisputable fact is that the Government did not compulsorily acquire any portion of the suit land which remained intact in acreage.

In view of our findings that the learned Judge's, analysis, and appreciation and application of the law was correct and his factual conclusions were not perverse but rationally derivable from the

evidence led, we are of the view that submissions made for and on behalf of the 6th respondent, which we have carefully considered, do not any was dilute or derogate from the correctness of his conclusions. We need only add that the attempt by the 6th respondent to introduce at submission stage on appeal documents to the effect that addresses used in the searches exhibited by the 1st respondent bore a format not available at their stated dates or that the nomenclature of the relevant Ministry of Lands was different at the time correspondence exhibited was allegedly made is not one that can be countenanced without doing violence to settled procedural and evidence law. Submissions are not a stage at or a mode by which a party may introduce new evidence. Such evidence can only be led by witnesses on oath who would then be subjected, to identification and, if necessary, rebuttal opportunity be extend to other parties. At any rate, given the extension and exhaustive analysis of the evidence properly on record, nothing in those submissions dilutes the unerring conclusion that the evidence commends.

We have said enough to show that we have not been persuaded to form a sound basis upon which we can interfere with the judgment

of the learned Judge or reverse his findings. The upshot is that we find no

merit in these consolidated appeals and they are each dismissed with costs.

Order accordingly.

Dated and delivered at Nairobi this 23rd day of January, 2026.

P. O. KIAGE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR