



**Theuri & another v Mweni & 4 others (Environment and Land Case 223 of 2020) [2026] KEELC 582 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 582 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE 223 OF 2020  
LL NAIKUNI, J  
FEBRUARY 6, 2026**

**BETWEEN**

**SIMON MUNYI THEURI ..... 1<sup>ST</sup> PLAINTIFF**

**DENNIS GATU WAITHAKA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FREDRICK TSOFA MWENI ..... 1<sup>ST</sup> DEFENDANT**

**FADHILI MICRO-ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**NICHOLAS MUNYI ..... 4<sup>TH</sup> DEFENDANT**

**SIWA LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to the civil claim instituted by Simon Munyi Theuri and Dennis Gatu Waithaka, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein. It was by way of an Amended Amended Plaint dated 26<sup>th</sup> March, 2021 against Fredrick Tsofa Mweni, Fadhili Micro – Enterprises Limited, Chief Land Registrar, Nicholas Munyi and Siwa Limited, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants herein. In a nutshell, the suit sought for declaratory reliefs, permanent injunctions, damages for trespass, and cancellation of alleged fraudulent titles held by the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
2. Upon filling and service of the Plaint the Defendants, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their joint Defence and Counter - Claim dated 12<sup>th</sup> February, 2021 and the 4<sup>th</sup> Defendant filed his Defence and Counter - Claim dated 11<sup>th</sup> February, 2021. The 3<sup>rd</sup> Defendant entered appearance on 14<sup>th</sup> November, 2024 and filed a Statement of Defence of even date.



## II. The description of the Parties

3. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were described as male adults of sound mind & understanding, residents of Mombasa, and the registered joint proprietors of the suit properties. The 1<sup>st</sup> and 4<sup>th</sup> Defendants were described as a male adults of sound mind & understanding residing and working for gain within the Republic of Kenya and the 2<sup>nd</sup> Defendant was described as a limited liability company engaged in micro-finance business.
4. The 3<sup>rd</sup> Defendant was described in the Plaint as the Chief Land Registrar, sued in his official capacity duly appointed as such by the Public Service Commission pursuant to the provision of Section 13 of the [Land Registration Act](#), No. 3 of 2012, 4<sup>th</sup> Defendant was described as a male adult of sound mind and understanding, whilst the 5<sup>th</sup> Defendant were described as a limited liability Company duly incorporated as such in the Republic of Kenya under the provisions of the [Companies Act](#), 2015.

## III. Court directions before the hearing

5. After confirming that the Plaintiffs and the Defendants had complied with the provision of Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 3<sup>rd</sup> March, 2022. The Plaintiffs called their 1<sup>st</sup> witness testified and called her witnesses on 3<sup>rd</sup> March, 2022 after which the Plaintiff closed their case. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants called their first witness DW - 1 on 20<sup>th</sup> April, 2023, and they closed their case.

## IV. The Plaintiffs' case

6. From the pleadings before court, the Plaintiffs averred that they had at all times material to this suit been the lawful and joint registered proprietors of the properties known as Land Reference numbers 22369/I/MN and 22370/I/MN - situated in Mombasa (Hereinafter referred to as "The Suit Properties"). The Plaintiffs stated that they have enjoyed peaceful and quiet possession of the suit properties since they jointly acquired the same and had the suit properties duly registered in their favour by the 3<sup>rd</sup> Defendant herein through Certificates of Title both registered on 18<sup>th</sup> December 2018.
7. The Plaintiffs averred that they had lately discovered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants either personally or through their agents had been trespassing onto the suit properties with potential buyers with the fraudulent intention of disposing of the suit properties without the Plaintiffs' knowledge and/or consent on the misrepresentation that they were the lawful owners of the suit properties.
8. The Plaintiffs further stated that in a bid to speedily execute this fraudulent scheme, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had been illegally erecting posters on the suit properties indicating that the suit properties was for sale in an effort to attract unsuspecting potential buyers in order to illegally dispose of the suit properties and dispossess the Plaintiffs who were the registered owners thereof.
9. The Plaintiffs further pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had been sending armed agents to the suit properties to prevent the Plaintiffs from peaceful enjoyment of the suit properties and in an effort to forcefully evict them from the suit properties to pave way for the intended fraudulent scheme to sale the suit properties to unsuspecting members of the public. The Plaintiffs averred that the Ministry of Lands and Physical Planning had numerously issued certificates of official postal searches confirming that the Plaintiffs were the lawful joint registered owners of the suit properties. The latest of the official searches were issued on 2<sup>nd</sup> October 2020 and 1<sup>st</sup> December 2020.
10. The Plaintiffs had established that the 4<sup>th</sup> Defendant was also laying claim over the suit properties on the strength of illegally acquired title documents in the name of the 5<sup>th</sup> Defendant herein on the basis



that he was a director and a shareholder in the 5<sup>th</sup> Defendant's company. The 4<sup>th</sup> Defendant had without justification been interfering with the Plaintiffs' peaceful occupation and use of the suit properties.

11. The Plaintiffs were apprehensive that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants if not restrained by the Honourable Court would succeed in executing their fraudulent scheme to dispossess the Plaintiffs of the suit properties in breach of their proprietary rights and interests. The Plaintiffs pleaded that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants had no identifiable legal interest over the suit properties which are currently lawfully registered in favour of the Plaintiffs and their conduct had and shall continue to occasion the Plaintiffs irreparable substantial loss and damage unless restrained by the Court. The Plaintiffs risk being violently dispossessed of the suit properties in breach of their constitutional right to acquire and own property of any description in any part of Kenya as envisaged under Article 40 of *the Constitution* unless the Honourable Court intervenes to safeguard the Plaintiffs' rights and interests.
12. The conduct of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants was illegal and unlawful and the Plaintiffs were rightfully apprehensive that unless the Honourable Court intervened their constitutional right to acquire and own the suit properties as guaranteed under the provision of Article 40 of *the Constitution* of Kenya, 2010 shall be infringed upon, they shall be prevented from putting the suit property to good use and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants should succeed in disposing of the suit properties to unsuspecting members of the public and or forcefully evicting them from the suit properties. The Plaintiffs having demonstrated that they were the lawful and registered owners of the suit properties were entitled to exclusive occupation and possession of the suit properties as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
13. According to the Plaintiffs they stood to suffer irreparable loss and damage unless the Court intervenes and restrains the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants from trespassing onto the suit properties, illegally disposing of the same or otherwise interfering with their right to peaceful and quiet enjoyment of the suit properties. There were no pending or previous proceedings between the parties herein relating to a claim over the suit properties in this or any other court having jurisdiction over the subject matter herein.
14. The suit property was located in Mombasa County and the cause of action arose within the jurisdiction of this Honourable Court.
15. The Plaintiffs prays for Judgement to be entered against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants jointly and severally for:-
  - a. A declaration be and is hereby issued that the Plaintiffs are the lawful owners and are entitled to exclusive possession and use of the suit properties known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa to the exclusion of the Defendants herein.
  - b. A permanent injunction be and is hereby issued restraining the Defendants either by themselves, their agents or servants or otherwise howsoever from trespassing onto, remaining onto, disposing of, transferring, leasing, interfering with and/ or in any manner whatsoever dealing with all the parcels of land known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa.
  - c. A permanent injunction against the Defendants prohibiting them whether by themselves, their agents or servants from entering upon, remaining upon, disposing of, transferring, occupying, leasing, charging, assigning or interfering with the Plaintiffs' ownership and quiet possession of the suit properties known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa.
  - d. An order for damages for trespass against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.



- e. Costs of the suit.
  - f. A declaration that the 4<sup>th</sup> and 5<sup>th</sup> Defendants does not hold valid and legal title documents over the suit properties known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa and is are not entitled to ownership and occupation thereof and the purported title documents stand revoke.
16. Subsequently, the Plaintiffs filed a response to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statement of Defence and Counter - Claim wherein the they contended that: -
- a. Save as herein admitted, the Plaintiffs joined issues with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statement of Defence and Counter - Claim and reiterated the contents of the Amended Amended Plaintiff filed herein.
  - b. The Plaintiffs denied the contents of Paragraph numbers 2 and 3 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statement of Defence in so far as it suggested that they were entitled to ownership and occupation of the suit properties put them to strict proof of the averments thereof.
  - c. The Plaintiffs denied the contents of Paragraph Number 5 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statement of Defence and put them to strict proof of the averments that the 2<sup>nd</sup> Defendant acquired valid interests on the suit property as a purchase. The Plaintiffs in further response reiterated the contents of Paragraphs numbers 5, 6, 10, 13, 15 and 16 of the Amended Amended Plaintiff.
  - d. The Plaintiffs in response to Paragraph Numbers 6 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Statement of Defence reiterated the contents of Paragraph Numbers 7 to 17 of the Amended Amended Plaintiff.
  - e. The Plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lack any proprietary interest in the suit properties as no valid interest had ever been transferred to them and should not interfere in any manner with their possessory rights and interests.
  - f. The Plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statement of Defence filed herein should be struck out and reliefs granted as sought in the Amended Amended Plaintiff.
  - g. The Plaintiffs reiterated the contents of set out at paragraph 1 to 19 of the Amended Amended Plaintiff.
  - h. On the defence to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter - Claim, the Plaintiffs stated that:-
    - i. Save as herein admitted, the Plaintiffs joined issues with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter - Claim and reiterated the contents of the Amended Amended Plaintiff as if the same were set out in verbatim and traversed seriatim.
    - ii. The Plaintiffs denied the contents of Paragraph numbers 2 and 3 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter - Claim and put them to strict proof of the averments thereof.
    - iii. The Plaintiffs in further response to paragraph numbers 2 and 3 of the Counter - Claim averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently and illegally attempted to encroach onto the suit property, evict the Plaintiffs and disposed of the same to unsuspecting third parties.
    - iv. The Plaintiffs further averred that the sale agreement the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purported to rely upon to perpetuate their illegal activities was explicit that vacant



possession was only to be granted upon full payment of the purchase price which never materialized on account of the aborted transaction.

- v. The Plaintiffs put the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to strict proof of the averments of fraud at Paragraph 4 of the Counter - Claim which averments were denied.
  - vi. The Plaintiffs in further response to Paragraph 4 of the Counter - Claim stated that they lawfully acquired the Property known as MN/I/1927 which was later lawfully subdivided to give rise to the suit properties. The validity of the interests they acquired had also been severally confirmed by the 3<sup>rd</sup> Defendant herein through official searches.
  - vii. The Plaintiffs denied the contents of Paragraph 5 of the Counter – Claim and stated that it was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who deliberately breached the terms of the aborted transaction and made illegal attempts to dispossess them of the suit properties and dispose of the same to unsuspecting 3<sup>rd</sup> parties without legal basis.
  - viii. The Plaintiffs averred that the Counter – Claim touching on the aborted transaction was bad in law for want of jurisdiction due to the arbitration clause, an abuse of the court process and should only suffer one fate of being struck out with costs.
  - ix. The Plaintiffs denied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were entitled to any reliefs sought in the Counter - Claim.
- a. The Plaintiffs prayed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Statement of Defence and Counter – Claim be struck out and Judgment be entered for the Plaintiffs as prayed for in the Amended Amended Plaintiff filed herein.
17. The Plaintiffs responded to the 4<sup>th</sup> Defendants’ Statement of Defence and counterclaim where the Plaintiffs stated that: -
- a. Save as herein admitted, the Plaintiffs joined issues with the 4<sup>th</sup> Defendant’s Statement of Defence and Counter - Claim and reiterate the contents of the Amended Amended Plaintiff filed herein.
  - b. The Plaintiffs denied Paragraph 2 of the 4<sup>th</sup> Defendant’s Statement of Defence and Counter - Claim in so far as it suggests that the title to the suit properties they hold were obtained fraudulently and put him to strict proof of the averments thereof
  - c. The Plaintiffs denied the contents of Paragraph Numbers 3 and 4 of the 4<sup>th</sup> Defendant’s Statement of Defence and Counter - Claim and reiterate the contents of Paragraph numbers 5, 6 and 10 of the Amended Amended Plaintiff.
  - d. The Plaintiffs in response to Paragraph numbers 5, 6 and 7 reiterated the contents of paragraphs 7, 8, 9,11, 12,13,14 and 15 of the Amended Amended Plaintiff.
  - e. The Plaintiffs put the 4<sup>th</sup> Defendant to strict proof of the averments in Paragraphs 8 and 9 of his Statement of Defence and Counter - Claim.
  - f. The Plaintiffs in further response to Paragraph 9 averred that they were the lawful owners of the suit properties which resulted from the procedural subdivision of the property known as LR No.MN/I/1927.
  - g. The Plaintiffs in response to Paragraph numbers 10 and 11 of the Defence and Counter - Claim reiterated the contents of Paragraphs 13, 15, 16 and 17 of the Amended Amended Plaintiff and put the 4<sup>th</sup> Defendant to strict proof of any contrary averments.



- h. The Plaintiffs in further response to Paragraph numbers 10 and 11 averred that the 4<sup>th</sup> Defendant had admitted that he had no legal interest in the suit properties as he was not the registered owner thereof and therefore lacked “locus standi’ or justification to sustain any claim against Plaintiff and should thus be restrained from interfering with Plaintiffs’ peaceful occupation and use of the suit properties.
- i. The Plaintiffs reiterated the contents of Paragraph numbers 5, 13, 15, 16 and 17 of the Amended Amended Plaintiff in response to Paragraph numbers 12 and 13 of the 4<sup>th</sup> Defendant’s Statement of Defence and Counter - Claim.
- j. The Plaintiffs in response to paragraph 14 averred that they were the lawful registered proprietors of the suit properties and had never been summoned to record any statement with the Directorate of Criminal Investigations concerning any investigations as purported and the legality of their interest had severally been confirmed through official search certificates issued by the 3<sup>rd</sup> Defendant herein.
- k. The Plaintiffs in response to Paragraph 15 averred that they jointly legally acquired the property known as MN/I/1927 from the previous lawful registered proprietor which was subsequently lawfully subdivided to give rise to the suit properties currently lawfully registered in their favour jointly.
- l. The Plaintiffs averred that the 4<sup>th</sup> Defendant admittedly lacked any proprietary interest in the suit properties and therefore lacks locus standi sustain any claim or to interfere in any manner with their possessory rights and interests and his defence filed herein should be struck out and reliefs granted as sought.
- m. The Plaintiffs reiterated the contents set out at paragraphs 1 to 19 of the Amended Amended Plaintiff.
- n. The Plaintiffs’ defence to the 4<sup>th</sup> Defendant’s Counter - Claim, was that: -
  - i. Save as herein admitted, the Plaintiffs joined issues with the 4<sup>th</sup> Defendant’s Counter - Claim and reiterated the contents of the Amended Amended Plaintiff as if the same were set out in a verbatim and transverse seriatim.
  - ii. The Plaintiffs denied the contents of Paragraph 17 of the Statement of Defence and Counter - Claim together with the particularized grounds of fraud thereof and puts the 4<sup>th</sup> Defendant to strict proof thereof.
  - iii. In further response to Paragraph 17, the Plaintiffs averred that they lawfully acquired the Property known as MN/I/1927 which was later lawfully subdivided to give rise to the suit properties. The validity of the interests they acquired and also relating to the suit properties has been severally confirmed by the 3<sup>rd</sup> Defendant herein through official searches.
  - iv. The Plaintiffs averred that the 4<sup>th</sup> Defendant had admitted lacking proprietary interest in the property (ies) in dispute and the instant Counter - Claim was vexatious, frivolous and an abuse of the court process.
  - v. The 4<sup>th</sup> Defendant equally lacked “the locus standi“ to institute or defend any legal proceedings in his own capacity on a property he has admitted was not registered in his name and for which he has no proprietary interest and the Counter - Claim filed



herein is fatally bad in law and incurably defective for lack of locus standi and or legal authority.

- vi. The Counter - Claim being incurably defective and bad in law was an abuse of the court process and should only suffer one fate of being struck out with costs.
- vii. The Ministry of Lands and Physical Planning through the 3<sup>rd</sup> Defendant herein had severally issued certificates of official searches confirming the validity of the Plaintiffs' interest on the suit properties.
- viii. The Plaintiffs denied that the 4<sup>th</sup> Defendant was entitled to any of the reliefs sought in the Counter - Claim.
  - a. The Plaintiffs prayed that the 4<sup>th</sup> Defendant's Statement of Defence and Counter - Claim be struck out and judgment be entered for the Plaintiffs as prayed for in the Amended Amended Plaintiff filed herein.

18. The Plaintiffs testified as PW - 1 on 3<sup>rd</sup> March, 2022 who testified as follows: -

**Examination in Chief of PW - 1 by Mr. Odunga Advocate.**

19. PW - 1 was sworn and in English language. He was identified as DENNIS GATU WAITHAKA, a citizen of Kenya and bearing all the particulars as indicated in the national identity card shown to Court during the hearing. He testified that he was a business man in real estate on 2<sup>nd</sup> December, 2020. He recorded a witness statement and filed a list of documents dated 10<sup>th</sup> November, 2021. He acquired the property from Mr. Francis A. Njiru. PW - 1 stated that the property was transferred on 23<sup>rd</sup> July, 2003 page 53. They did a search which was in page 35. The properties in dispute were two. After acquiring the property they were sub - divided into two sub - divisions. They appeared on pages 22 and 25. They did establish that the two titles were valid. They conducted official searches which were evidence under pages 28 and 29. They filed the case against the Defendants due to fraudulent acts, trespass and the efforts to transfer it.
  2. According to the witness, they added Mr. Nicholas Munyi as they discovered that he was one of the directors of the 5<sup>th</sup> Defendant. The witness told the court he was seeking for the prayers sought in the Plaintiff.

**B. Cross examination of PW - 1 by Mr. Kututa Advocate.**

21. PW - 1 confirmed that they bought the property from Mr. Francis Austin Njiru. The witness had found that Mr. Njiru was the registered owner to the suit property. PW - 1 was not aware that the land was under any investigation by the DCIO. They were in possession of the land. They had developed it. The 2<sup>nd</sup> Defendant was trying to sell the land. The witness did not know the 4<sup>th</sup> Defendant. He had sued Nicholas Munyi. He was the director of Siwa Limited. The witness had nothing to show that Nicholas was a director of Siwa Limited. They had documents showing interest but they did not have them in court.

**B. Cross examination of PW - 1 by Mr. Onduso Advocate.**

22. PW - 1 reiterated that they had never tried to sell their land to anybody from the time they took over possession of the same. Mr. Fredrick Tsofa Mweni came to them intending to buy the land; in 2019 the 2<sup>nd</sup> Defendant also went to them; they drew a sale agreement by Victor. It was for a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-). A 10% deposit of the purchase price being a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) was paid upon the execution of the agreement. Clause 1(b) of



the sale agreement stated that the Plaintiffs were to avail the original title deed and which they availed. He had delayed in paying them hence they deemed them as being trespassers as they surpassed the agreed period. They did the search which was done in the year 2020.

#### **B. Re – examination of PW - 1 by Mr. Odunga Advocate.**

23. PW - 1 averred that he had never been called to record any statement by the Police. He had never seen any statement. He was aware that the 4<sup>th</sup> Defendant was represented by an advocate. The witness was aware that the 4<sup>th</sup> Defendant filed his papers in Court being the Defence and Counter - Claim. He was the one who made certain revelations. He was in physical possession of the suit property but the documents were with Fadhili Micro – Enterprises Limited. The amount payable as deposit was to be a sum of Kenya Shillings Fourteen Million (Kshs. 14,000,000/-) but only a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) was paid. They were to have taken full possession upon the payment of the purchase price. They sued the Defendants as they had tried to sell the land to 3<sup>rd</sup> parties; they were trespassers and they had breached the contract.
24. The Plaintiffs marked their case closed on 3<sup>rd</sup> March, 2022 through their Legal Counsel Mr. Odunga Advocate.

#### **V. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's case**

25. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant responded to the Plaintiffs' claim through a Statement of Defence and Counter - Claim where it averred that:
  - a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied each and every allegation contained in the further amended plaint as if the same was herein set out seriatim and verbatim traversed save for what was herein expressly admitted to them.
  - b. The contents of Paragraph numbers 1 and 4 of the Plaint were admitted in so far as the same was merely descriptive of the parties.
  - c. The Defendants averred that the suit against them was malicious; as thus the Plaint and all its accompanying documents should be struck out on the face of it and no proceedings ought to be entertained thereof.
  - d. The contents of Paragraph numbers 5 to 6 of the Plaint were denied in toto and the Plaintiffs were put to strict proof thereof. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further stated that the 2<sup>nd</sup> Defendant purchased the suit property from the Plaintiffs at a consideration of a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-) whereby the 2<sup>nd</sup> Defendant paid a deposit of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) and the transaction was pending completion.
  - e. In response to the contents of Paragraphs 7 to 9 of the Plaint, the suit property did not belong to the Plaintiffs and the same was acquired by the 2<sup>nd</sup> Defendants as purchasers.
  - f. In response to Paragraphs Numbers 7 to 17 of the Plaint, the contents therein were not true and the Defendant puts the Plaintiff to strict proof thereof.
  - g. Save for what was expressly admitted, the Defendant denied each and every singular allegation contained in the Plaint as if the same were herein set out transversed in seriatim.
26. In the Counter - Claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that: -
  - a. The 2<sup>nd</sup> Defendant reiterated the contents of Paragraph 4 of the Defence.



- b. The 2<sup>nd</sup> Defendant averred that they purchased the suit property from the Plaintiffs and the whole transaction was subject to a mortgage finance which highly depended on the completion documents envisaged under Clause 7 of the Sale Agreement, which documents the Plaintiffs/Applicants had utterly sworn not to release in order to frustrate the transaction. That therefore, without the completion documents being released the bank was unable to approve the loan and release the funds, otherwise the balance purchase price of the parcels of land known as PLOT NO.22370/1/MN C.R.NO.72712 & 22369/1/MN.
  - c. The 2<sup>nd</sup> Defendant averred that despite having paid a deposit of the purchase price at a tune of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/-) the Plaintiffs had frustrated the transaction and had resorted to unlawful actions of evicting the Defendants from the suit property in a bid of defrauding them.
  - d. The 2<sup>nd</sup> Defendant stated that the Registrar, Mombasa Land Registry had called for the surrender of the title documents to the suit properties the Plaintiffs handed over to the Purchaser's Advocates on the grounds that the existence of the said title documents amount to duplicity of titles as no parcels' register exists thereof vis-à-vis the actual properties on the ground. This confirmed that the transaction is a fraudulent transaction where the Plaintiffs were in an expedition of defrauding the Defendants.
  - e. Despite the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' numerous reminders and notices seeking completion of the transaction the Plaintiffs had ignored and/ or declined to honour the same.
27. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants prayed that the Plaintiffs' suit be dismissed with costs and Judgment be entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for: -
- a. An order of specific performance compelling the Plaintiffs to hand over to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Advocates the original and true completions documents.  
Failure to;
  - b. The Plaintiffs to refund the deposit of the purchase price in full and interest at 14% per annum from the date of execution of the Sale agreement until payment in full.
  - c. Damages for breach of contract.
  - d. Costs of the Suit and interest.
28. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants called DW - 1 on 20<sup>th</sup> April, 2023 at 11.45 am who testified as follows:

**A. Examination in Chief of DW - 1 by Mr. Onduso Advocate.**

29. DW - 1 was sworn and he testified in English language. He was called FREDRICK TSOFA MWENI, a citizen of Kenya a holder of the national identity card bearing all the particulars as shown to Court during the hearing. He recorded a witness statement and produced the list of documents dated 3<sup>rd</sup> March, 2022 as 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Exhibit 1 to 5 which were produced and admitted accordingly. The witness was a doctor by profession and the Executive Director of the 2<sup>nd</sup> Defendant. The Plaintiffs approached them according to him seeking to sell the property. They wanted to purchase the suit land at a consideration of a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-). Prior to purchasing, they conducted due diligence on the suitland. They paid a deposit of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) in the following terms – Kenya Shillings Four Million (Kshs. 4,000,000/-) to an agent and a sum of Kenya Shillings Six Million (Kshs 6,000,000/-) to the Law firm of Messrs. Rapando and Rapando Advocates as per the terms of the sale agreement they were executing.



30. According to the witness the sale agreement was executed on 18<sup>th</sup> November, 2019. The outstanding balance of a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/-) was to be financed by Family Bank Limited. The Vendor was to furnish the completion documents as per Clause 7.0 of the Agreement which out of those, the vendor gave them: -
- a. Executed transfer form.
  - b. Copies of the identification cards.
  - c. Copies of the KRA Pins.
  - d. Photographs out of the 12 documents.
31. DW - 1 told the court that despite all these they were not able to secure the loan as the documents were not complete. They presented the documents for transfer at the Lands Office – Mombasa. The land Registrar introduced/ demanded for a lease certificate. They asked the vendor to supply them with the lease document but it was not forthcoming. The land registrar summoned them to physically appear in his office but they never turned up. Arising from the conduct, they decided to investigate on the matter and they got information that perhaps there were other title deed for the same land so they demanded for a refund.
32. DW - 1 stated that Rapando Advocates told them they would refund the a sum of Kenya shillings Six Hundred Thousand (Kshs. 600,000/-) only. They refused. Before they were dealing with Muriuki Advocates then Rapando Advocates. They had four advocates. They wanted to be refunded their money and their legal fees and interest. They felt the vendor had been very crafty. They had been charged by lawyers. They also discovered there were other titles for the land. They felt they had been conned and fraud affairs.

**B. Cross examination of DW - 1 by Mr. Kirui Advocate.**

33. DW - 1 reiterated that from the sale agreement they were buying two (2) parcels of land. They conducted a search and they were clear/ clean without any encumbrances. Referred to the bundle of documents - the title under Entry No. 2 indicating Swalehe Wachara and Simon Munyi Theuri as the registered owners to the suit property. He did not know who was on Entry No. 1. They got the document later on dated 14<sup>th</sup> June, 2005.

**C. Cross examination DW - 1 by Mr. Odunga Advocate.**

34. DW - 1 stated that he was the executive director of the 2<sup>nd</sup> Defendant. The sale agreement for the purchase of the suit property was duly executed by all parties. Further, they undertook due diligence through an official search which showed the registered owners were the Plaintiffs. From Clause 1 of the sale agreement, they agreed to pay a sum of Kenya Shillings Fourteen Million (Kshs. 14,000,000/-). The Plaintiffs paid a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-). They paid a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) broken down as a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) and a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) to the agents and the advocates. They were to had paid a sum of Kenya Shillings Fourteen Million (Kshs. 14,000,000/-) as per the terms and conditions stipulated on the sale agreement. They found the Vendor to be evasive after 4 months.
35. DW - 1 reiterated that they had evidence that they were corresponding with the Vendor as evidenced by a letter dated 4<sup>th</sup> December, 2020 and 26<sup>th</sup> November, 2020 authored by Rapando Advocate and the sale agreement was executed on 18<sup>th</sup> November, 2019 as per the letter dated 26<sup>th</sup> November, 2020



by the Advocate. The letters stated that they were not complied to. According to the witness it was a notice of termination of sale agreement dated 18<sup>th</sup> November, 2019. The response was done on 4<sup>th</sup> December, 2020. They filed the documents at the Lands registry. They booked the documents but they did not have them in court as their advocates had them.

36. With reference to the defence, at paragraph 7, the witness told the court that there was communication between the Land Registrar and themselves. However, as per the day of his testimony they were not in Court. The documents he had produced – 1<sup>st</sup> and 2<sup>nd</sup> Defendants Exhibit 1 – there was no letter forwarding it to him. The same did not bear an official stamp; 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Exhibit No. 5, the official search dated 29<sup>th</sup> June, 2017.
37. DW - 1 told the court that he executed the sale agreement on 18<sup>th</sup> November, 2019. There was no stamp. It was certified by the Land Registry. They did not proceed with the matter as there was no title deed. On being referred to the sale agreement on termination of the agreement, the witness told the court that Clauses 11 and 12; they received the notice of termination dated 26<sup>th</sup> November, 2020 but it was defective. The witness denied having occupied the property. Hence, it was wrongful to be suing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on allegation of any trespass. In any case, the Plaintiffs always had tight security at the gate hence it was impossible to pass them.
38. On being referred to the contents of the Replying Affidavit on taking possession, the witness told the court that Clause 8 on possession upon payment to take vacant possession upon payment of the full payment of the purchase price. They had not made the payment. Clause 16 of the sale agreement on Amendment. He may not know whether there was any variation. From the prayer in the Counter - Claim, the witness stated that he would want to be given the title deed to transfer it to themselves.

#### **D. Re – examination of DW - 1 by Mr. Onduso Advocate.**

39. DW - 1 confirmed that the letter of notice of termination dated 26<sup>th</sup> November, 2020 was defective. It never provided for the 21 days Notice. They responded to it vide a letter dated 4<sup>th</sup> December, 2020 but the Vendor never provided any responses to it. According to the witness they had paid a deposit of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) whereby a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) was to be paid upon approval of a loan facility which never happened. They never received a letter and/or notice showing that they had failed to deposit the sum of Kenya Shillings Fourteen Million (Kshs. 14,000,000/-). The Vendor never demanded anything. There was the letter of 26<sup>th</sup> November, 2020 but they never refunded the money advanced to them despite of them having a bank account. There was a fraudulent act that had occurred. The land never not existed. Now they only wanted the refund as the title deed did not exist.
40. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant marked their case closed on 20<sup>th</sup> April, 2023 through their Legal Counsel Mr. Onduso Advocate.

#### **VI. The 3<sup>rd</sup> Defendant's case**

41. The 3<sup>rd</sup> Defendant responded to the Plaintiffs' claim through filing of a Statement of Defence where they stated that: -
  - a. Save for what was expressly admitted the 3<sup>rd</sup> Defendants denied each and every allegation contained in the Plaint as if it was herein set out seriatim and verbatim transversed.
  - b. The 3<sup>rd</sup> Defendants admit the contents of Paragraph numbers 1, 2, 3, 4 and 4A of the Plaint but only to the extent that the same were descriptive of the parties herein.



- c. The 3<sup>rd</sup> Defendant admitted the contents of Paragraph numbers 5 and 6 of the Plaintiff and stated that according to its records the Plaintiffs were the duly joint registered owners of the suit properties being 22369 /1/MN and 22370/1/MN.
  - d. The 3<sup>rd</sup> Defendant's were strangers to the contents of Paragraph numbers 7, 8 and 9 of the Plaintiff and invited the Plaintiff to strict proof.
  - e. The 3<sup>rd</sup> Defendant admitted the contents of Paragraph 10 of the Plaintiff to the extent that it had issued several searches confirming ownership to the Plaintiffs.
  - f. In response to paragraph 11 of the documents at the land registry showed that the property had never been owned by the 4<sup>th</sup> not the 5<sup>th</sup> Defendants and their claim on the suit property was inaccurate.
  - g. The 3<sup>rd</sup> Defendant agreed with the contents of Paragraph numbers 12 and 13 of the Plaintiff and reiterated that ownership of the suit property was conferred to the plaintiffs and that position has not changed and their right to the suit properties ought to be protected.
  - h. In response to Paragraph numbers 14, 15, 16 and 17 they stated that the Plaintiffs right to ownership of the property had envisaged under Article 40 of *the Constitution* of Kenya 2010, could only be upheld by the Honourable Court since they were the registered owners of the suit property.
  - i. Paragraph 18 of the Plaintiff was admitted.
  - j. In response to Paragraph 19 of the Plaintiff, the jurisdiction of the Court was admitted.
  - k. For the foregoing reasons, the 3<sup>rd</sup> Defendants stated that the reliefs sought by the Plaintiff were merited.
42. The 3<sup>rd</sup> Defendant prayed that the Court makes the appropriate decision.
43. On 7<sup>th</sup> February, 2025 the 3<sup>rd</sup> Defendant called DW - 3 who testified as follows:-

**A. Examination in Chief of DW - 3 by M/s. Kiti Advocate.**

44. DW - 3 was sworn and testified under oath in English language. She was called M/s. SHEILA SOITA employed as Public Servant and holding an Employment card bearing the Personal Service numbers as shown to Court during the hearing. She was the Land Registrar – Mombasa. She filed a list of documents dated 14<sup>th</sup> November, 2024. She relied on the said documents in support of her evidence in Chief. According to her, the Parcel file for the property no. MN/I/1927 contained the following:-
- a. Copy of the Lease dated 13<sup>th</sup> December, 2018.
  - b. Postal search dated 31<sup>st</sup> October, 2019.
  - c. Deed Plan dated 29<sup>th</sup> November, 2018.
  - d. Application for registration dated 17<sup>th</sup> December, 2018.
  - e. Certificate of Official Search dated 27<sup>th</sup> December, 2018
  - f. Certificate of Official Search dated 4<sup>th</sup> November, 2019.
  - g. Certificate of Search dated 1<sup>st</sup> December, 2020.
  - h. Certificate of title for CR No. 15048 dated 4<sup>th</sup> February, 1977.



- i. Leased issued by the National Government to one Simon Munyi Theuri and Dennis Gatw Waithaka – the lease was registered at Mombasa on 18<sup>th</sup> December 2018.
45. The witness told the court that on CR 72713 - Plot No. 22369/ Plot MN was issued pursuant to a lease by the Government to Simon Munyi Theuri and Dennis Gatw Waithaka and registered in Mombasa on 18<sup>th</sup> December, 2018. She went further to state that she had in possession documents to the plots No. 8 of the 3<sup>rd</sup> Defendant's documents. The parcel was granted to Francis Austin Njiru on 4<sup>th</sup> February, 1977: -
- a. Certificate of title no. CR 72712 dated 18<sup>th</sup> December, 2018.
  - b. Certificate of title CR No. 72713 dated 18<sup>th</sup> December, 2018.
  - c. Letter of consent of transfer dated 2<sup>nd</sup> July, 2003.
  - d. Surrender dated 3<sup>rd</sup> September, 2018.
46. On the CR 15048 and the chronology of the property CR No. 72712 and 72713. All emanated from Plot No. MN/1/ BLOCK 1927. To begin with these Plot No. 72712 was Plot 22370; It was issued pursuant to a Grant/ lease from the transfer to Simon Munyi Theuri and Dennis Gatw Waithaka. It was surrendered to the Government of Kenya and then it was sub - divided. The surrender was registered on 6<sup>th</sup> September, 2018. From the records, CR No. 72712 and 72713 were registered in the names of the Plaintiffs as the absolute and legal owners.

**B. Cross examination of DW - 3 by Mr. Kirui Advocate.**

47. DW - 3 stated that he had referred to the grant No. 7 and 8 of the bundle. The witness also had the document by the Defendants. The witness confirmed that the first person to be allocated the land was Francis Austin Njiru. The property was registered to Njiru before being transferred to Simon Munyi Theuri.
48. With reference to a letter of consent of transfer dated 2<sup>nd</sup> July, 2003 the witness told the court that reference no. 15048/2; it was not the same one in the title. The title was 15048/1 meaning there was an issue there; The plot bore the part of term 99 years from 1<sup>st</sup> February, 1970. The 1<sup>st</sup> search dated 27<sup>th</sup> December, 2018 was in relation to Plot No. 22369 tenure was a lease hold for 99 years. The search dated 1<sup>st</sup> December, 2020 was Plot No. 22369, the tenure was freehold for 999 years. It was not normal and hence it was typographical error. It emanated from their office but it was erroneous; it lead to double allocation and she was in court to present documents as they were.
49. She told the court that she only produced what was in their Parcel file. She had not seen a transfer nor receipt for the payments of rates or any on the conveyancing of the property from Francis Austin Njiru to the Plaintiffs in July 2003. The invoice was issued in 2008 but the transfer was done in 2003 which was not possible. The payment was done on 31<sup>st</sup> January, 2018. They were not disputing the initial allottee Francis Austin Njiru.
50. The witness told the court that she saw the postal address on her documents in 42076. From the grant, the address was 43068. Its same as that of the Defendants. At page No. 7 the witness told the court that the same was issuing authority was Municipal Council of Mombasa. At page No. 8 of the 3<sup>rd</sup> Defendant's document there was a receipt No. 000036195; it was payment of land rates by Francis Austin Njiru. It was for a sum of Kenya Shillings Twenty Three Thousand One Twenty Three Hundred (Kshs. 23,123/-. It was a demand for the rate for a sum of Kenya Shillings Twenty Three Thousand Eight Fifty Five Hundred (Kshs. 23,855/-).



51. DW - 3 told the court that at page 10 that it was receipt for KRA the amount payable was a sum of Kenya Shillings Twenty Three Thousand Eight Fifty Five Hundred (Kshs. 23,855/-) at the National Bank, Nkrumah road. With reference to page 12, the witness told the court that it was payment by Francis Njiru for Plot No. 19588 – L.R. No. 1927 measuring 0.5782 HA. From her documents it measured 0.5782 HA. It was transferred to the 4<sup>th</sup> and 5<sup>th</sup> Defendants; where the Directors of the company would be Nicholas Munyi, the 4<sup>th</sup> Defendant. The transfer was properly executed on page 13. At page 15 there was a receipt. The stamp duty declaration and the stamp duty paid for a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) which was received by the National Bank of Kenya on 26<sup>th</sup> March, 2008.
52. DW - 3 stated that from her documents given details of the transactions but she noted that there were some documents which were missing. She only presented from the parcel and correspondence files from what was in her custody. According to her, what she presented may not be complete as she never presented the instruments which had been shown to court. According to the witness, since she never saw the instruments she could not say conclusively that the transfer of property from the Defendants to the Plaintiffs was complete/regular for the title no. 72712 and 72713, the sub - division numbers were omitted.

**B. Cross examination of DW - 3 by Mr. Onduso Advocate.**

53. DW - 3 stated that the searches may be erroneous and there was no way land could move from leasehold to freehold. The errors were on the case to case basis. For a conveyancing there had to be a process. The process had to be documented. In this particular case the instruments were missing from the record.

**B. Cross examination of DW - 3 by Mr. Odunga Advocate.**

54. DW - 3 confirmed that the records were filed and they came from the Ministry of Land. There had been no parallel documents. From the documents by the 5<sup>th</sup> Defendant the same were not certified. There was no evidence by the 5<sup>th</sup> Defendant on an application to obtain their documents. Their grant was no. CR. 19588. Its making reference to Grant No. 15048/2; the parcel No. 1927. The original was registered to Francis Austin Njiru on 4<sup>th</sup> February, 1977. The surrender of Grant to pave way to Grant No. 19588. She had not been shown of the surrender of Grant. The Grant was issued on 12<sup>th</sup> April, 1991. The Deed Plan that anchored the title was issued on 28<sup>th</sup> March, 1972.
55. DW - 3 told the court that she had not seen the CR. No. 15048. From their documents she had not seen any sale agreement. The documents CR 15048 related she had filed the parcel file for the title that was surrendered just because the documents were missing from the parcel file did not invalidate the ownership of the land. The plot No. 1/ 1927 had not been shown that the sub - division was invalid. For both were indicated as being leasehold. The error on the search did not invalidate the title. She confirmed that there were transfer documents.
56. DW - 3 told the court that she had not been furnished of any documents to indicate that the ones by the Plaintiffs were acquired fraudulently, She never saw any correspondence by the Land Registrar stating that the titles were obtained fraudulently. The Defendants claimed to have purchased the property in the year 2008.

**B. Re – examination of DW - 3 by M/s. Kiti Advocate.**

57. DW - 3 stated that in her record, she confirmed she never got the documents which the Defendants claimed to have been obtained fraudulently.



58. The 3<sup>rd</sup> Defendant marked its case closed on 7<sup>th</sup> February, 2025 through Counsel, Ms. Kiti Advocate.

## VII. The 4<sup>th</sup> Defendants' case

59. The 4<sup>th</sup> Defendant opposed the Plaintiff's claim by way of a Statement of Defence and Counter - Claim wherein he averred that:-

- a. The 4<sup>th</sup> Defendant admitted the descriptive Paragraph numbers 1, 2, 3, & 4 save to add that his address of service for purpose.
- b. The 4<sup>th</sup> Defendant denied Paragraph 5 of the Plaint and averred and maintained that if the Plaintiffs were holders of any such alleged Titles No. 22369/1/MN and 22370/1/MN, then the said titles were irregular, fraudulent and void ab initio and the 3<sup>rd</sup> Defendant should cancel these titles.
- c. The 4<sup>th</sup> Defendant denied Paragraph 6 of the Amended Plaint and specifically averred and maintained that the Plaintiffs had not been in possession of the suit premises and that they were not the rightful owners of the suit premises. The 4<sup>th</sup> Defendant was aware that the holder of the original genuine Title L.R. No. MN/1/1927 in respect of the suit premises was not the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs but the property was owned by Siwa Limited.
- d. The 4<sup>th</sup> Defendant averred and maintained that the title to the Suit parcel of land was legally registered in favour of Siwa Limited. The registration was effected way back in the year 1998 and the suit parcel of land was not available for registration in the year 2018 as alleged by the Plaintiff.
- e. The 4<sup>th</sup> Defendant was a stranger to the allegation by the Plaintiffs in Paragraph 7 of the Amended Plaint.
- f. In response to Paragraph 8, the 4<sup>th</sup> Defendant averred and maintained that he had since learned from the neighbors, if an attempt by certain persons to effect a fraudulent sale of land.
- g. The 4<sup>th</sup> Defendant was a stranger to Paragraph 9 of the Amended Plaint.
- h. The 4<sup>th</sup> Defendant denied Paragraph 10 of the Amended Plaint and averred and maintained that he had made several attempts to search this parcel of land but the records and the file in relation to this title had gone missing from the Lands Registry in Mombasa.
- i. In response to Paragraph 11 of the Amended Plaint, the 4<sup>th</sup> Defendant maintained that the land was legally owned by Siwa Limited and the 4<sup>th</sup> Defendant was a Director Shareholder of the aforesaid Registered Proprietor of this land. The Plaintiffs had irregularly or fraudulently obtained the titles allegedly known as LR NO. 22369/1/MN and LR NO. 22370/1/MN. The Defendant prayed for cancellation of these fraudulent titles.
- j. In response to Paragraphs 12 and 13 of the Amended Plaint, the 4<sup>th</sup> Defendant maintained that neither the Plaintiffs the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had any proprietary interest in the subject suit premises. Indeed, the 3<sup>rd</sup> Defendant should be ordered to cancel any such purported titles.
- k. The 4<sup>th</sup> Defendant denied Paragraph numbers 14 and 15 of the Amended Plaint and hereby stated that the suit property was within the control and possession of its registered proprietor Siwa Limited and the Plaintiffs were not entitled to any restraining orders; none of their constitutional rights had been breached and if any such orders were granted then this would form a classic example of blatant abuse of Court process.



- l. The 4<sup>th</sup> Defendant denied Paragraph numbers 16 and 17 of the Amended Plaintiff and stated that the Plaintiffs were guilty of obtaining titles fraudulently and the titles should be cancelled. The 4<sup>th</sup> Defendant was not a trespasser and denied this allegation vehemently.
  - m. In response to Paragraph 17, the 4<sup>th</sup> Defendant denied that the Plaintiffs had suffered or would suffer any loss as they did not legally own the suit property.
  - n. The 4<sup>th</sup> Defendant maintained that he had recorded a report with the Director of Criminal Investigations (DCIO) regarding the production of the fraudulent titles issued to the Plaintiffs or any other person sued in this matter. The matter was under investigation and the 4<sup>th</sup> Defendant maintained that the Plaintiffs together with their conspirators would soon be subjected to criminal investigation and prosecution for fraud in land ownership.
  - o. The Plaintiffs had tactfully failed to disclose to this Court how they acquired the titled for the suit premises. No history of the transaction had been pleaded in this matter.
60. On the Counter - Claim, the 4<sup>th</sup> Defendant contended that: -
- a. The 4<sup>th</sup> Defendant repeated the averment of the Defence and further states that the Suit Premises belong to Siwa Limited.
  - b. The 4<sup>th</sup> Defendant averred and maintained that both the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would be held liable in criminal investigation and prosecution for producing fake and fraudulent titles to the suit properties and purporting to dispose which did not belong to them.
  - c. The 4<sup>th</sup> Defendant relied on the following particulars of fraudulent actions: -
    - i. Purporting to own Suit premises while knowing that they had no legal title to this land.
    - ii. Causing production and holding Titles LR. No. LR NO. 22369/1/MN and LR NO.22370/1/MN.
    - iii. Abusing Court process by purporting to use fraudulent titles as evidence before a Court of Law within the Republic of Kenya.
    - iv. Witnessing a false document in the amended affidavits.
    - v. Conspiring and causing the misplacement of records in relation to Suit property and specifically attempting to extinguish the genuine records in relation to LR.NO. MN/1/1927.
    - vi. Purporting to present sub - divisions in relation to Suit premises hence generating 2 fraudulent and fake titles which are non-existent.
  - d. The 4<sup>th</sup> Defendant admitted Honourable Court's jurisdiction. Reasons wherefore 4<sup>th</sup> Defendant prayed for: -
    - a. The Injunctive orders issued by this Court be set aside forthwith.
    - b. The Plaintiff's suit be dismissed with costs to the 4<sup>th</sup> Defendant.
    - c. The 3<sup>rd</sup> Defendant be ordered to cancel the fraudulent and irregular titles LR NO.22369/1/MN and LR NO.MN/1/1927 in Mombasa.



- d. A declaration that the title LR. NO. MN/1/1927 registered in favour of Siwa Limited was the only genuine to the Suit properties.
- e. Any further relief that this Honourable Court deems fit.

61. The 4<sup>th</sup> Defendant called DW - 2 on 27<sup>th</sup> February, 2024 at 11.00 am who testified that: -

**A. Examination of the 4<sup>th</sup> Defendant DW - 1 by Mr. Kirui Advocate.**

62. DW - 1 testified under oath and in English Language. He identified himself as being NICHOLAS MUNYI, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing. He resided in Nyali near Kenya Road. He was a tea exporter. He retired after working for 33 years. He recorded a witness statement dated 27<sup>th</sup> April, 2023 which he adopted as his evidence in chief and filed a list of 9 documents which he produced as 4<sup>th</sup> Defendant's Exhibit Numbers 1 to 9. The witness told the court that he was the Director and shareholder of Siwa Limited. The company was the legal and absolute owner of the suit property. He bought the property in the year 2008 having followed all due process. In the year 2007 he had engaged a land agent – Mr. Kihiko Peter Gatimu who informed him that there was a property in new Nyali Sun Africa Hotel on Moyale road. He viewed the property and he bought it as he had intended to build apartments. He was issued with a title deed but he never developed the land.
63. The witness told the court that later on he was informed that there were some activities on the land. On checking he confirmed it and reported the matter to the police. Currently, the plot was still vacant. He was the one who had been taking care of it. He had incurred expenses – paying the land rates, clearing the bushes and he had put a guard to ensure the property was secured. There were two people Simon Munyo Theuri and Dennis Gatu Waithaka claiming to be the legal proprietors of the land. He had noted that the plot had been sub – divided into two (20). The said sub – division had prevented him from developing it.

**B. Cross examination of 4<sup>th</sup> Defendant - DW - 1 by Mr. Odunga Advocate.**

64. DW - 1 confirmed that he was the 4<sup>th</sup> Defendant. He was summoned by the Court but was sued by the Plaintiffs. Upon service, they filed documents. From the documents on the property, the witness confirmed that he did not have a Power of Attorney donated by the 5<sup>th</sup> Defendant. He was aware that the company operated on the dictum of the Company Act. He never got the resolution to act on behalf of the 5<sup>th</sup> Defendant. The property was registered in the name of 5<sup>th</sup> Defendant. He acquired the property in the year 2008 - on 23<sup>rd</sup> March, 2008, it was transferred to Siwa Limited – the 5<sup>th</sup> Defendant. The witness acquired the property as Nicholas Munyi. From the 9 documents he had produced there was no sale agreement; also there was no sale agreement between Austin Njiru and Siwa Limited.
65. DW - 1 stated that there was no document to show the transfer of shares to Siwa Limited. He had no official search to show he acquired property and it was owned by Francis Njiru. There was no official search to show that there was valid interest for Siwa Limited. With reference to the Grant CR. 15048 and another was CR. 15048/2. He confirmed that he had this grant was his name and it was surrendered but he did not have the record. He never bothered why the grant was surrendered. His advocate would deal with it. With reference to the Deed Plan No. 129488 dated 8<sup>th</sup> July, 1987; he never found when the property was ever registered.
66. DW - 1 stated that he took possession from the year 2008. He had a security guard manning it. However, he never had any proof to indicate that he had been paying him. He had no proof of physical occupation of the suit land. He saw some activities going on the land. He was aware that the Plaintiffs



had a dispute with 2<sup>nd</sup> Defendant. With reference to the Replying Affidavit of Fredrick Tsofa Mweni – dated 12<sup>th</sup> February, 2021. He had been making complaint on fraud and the illegality. He was not an expert on fraud. He had not received any report against the Plaintiff.

67. DW – 1 was referred to a search on the Plaintiff's documents page 28. It showed that the owners of Plot 22370/I/MN belonged to the Plaintiffs. The property had been illegally sub - divided into 2 No. 72172 and 72171. He had not provided any information to show that the government had disputed these parcels. With reference to the grant – condition no. 6 for any dealing; there was a requirement to get consent from the President and Commissioners of Land. He brought the property for commercial purposes.

#### **B. Re – examination of 4<sup>th</sup> Defendant - DW - 1 by Mr. Kirui Advocate.**

68. The witness informed the court that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were a director and shareholder of 5<sup>th</sup> Defendant. The witness had never filed the suit. He had only been sued. He was the Defendant in the matter and hence he needed not to have had a resolution to the company. The property was registered in the name of Siwa Ltd. The sale agreement was part of the documents that got misplaced but he had one.
69. DW - 1 stated that he had tried to get it from Sachdera Advocate but he had since retired and all the documents were in his house. He was his lawyer in the transaction. He had not been shown the sale agreement by the Plaintiff. With reference to the grant pages 32 to 34 – its CR. No. 15048 – compared to the grant in the Defendant documents. Asked to read the words: -

“ Know all men by there ..... my Grant is CR. No. 19508.”

70. DW -1 stated that he noticed the encroachment in the year 2020. With reference to grant special conduct No. 6. His grant the condition started as No. 2 but the one for the Plaintiffs started at No. 9. Paragraph 10 was his grant. Nobody had ever stopped him from accessing the property. There had never been any contempt proceedings against him; he was required to undertake the official searches – page 29. The CR Numbers were different from his Grant. There was no consent to transfer on the use of the property. It was residential to commercial; he was interested in charging; there was consent.
71. The witness told the court that page 35 was the search for the original land. CR NO. 15048 – pages 28 and 29 were CR No. 72712 and 72713; upon the sub division of the mother title.
72. The 4<sup>th</sup> Defendant marked their case closed on 28<sup>th</sup> February, 2024 by Mr. Kirui Advocate.

#### **VIII. Submissions**

73. On 7<sup>th</sup> February, 2025 after the Plaintiffs and Defendants marked the close of their cases, the Honourable Court directed that the parties file their written submissions within stringent timeframe thereof on. Unfortunately, by the time of penning down this Judgement, from the Judiciary CTS Portal and the ELC Registry, the Honourable Court only could access the submissions by the Plaintiffs.
74. Pursuant to that the Honourable court reserved a date to deliver its Judgement on notice. Eventually, taking that there was interlocutory application and the Court being on transfer the Judgement was delivered on 6<sup>th</sup> February, 2026.

#### **A. The Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs**

75. The 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs through the Law firm of Messrs. Rapando and Odunga Company Advocates, filed their written submissions dated 27<sup>th</sup> February, 2025. Mr. Odunga Advocate commenced the



- submissions by stating that it was one in support of the Plaintiffs' suit instituted vide a Plaint dated 2<sup>nd</sup> December, 2020 and amended on 1<sup>st</sup> February, 2021 and 26<sup>th</sup> March, 2021 respectively and filed herein (the Amended Plaint). The dispute herein relates to parcels known as 22369/1/MN and 22370/1/MN (previously known as MN/I/1927) (the suit property).
76. It was a case whereby both the Plaintiffs and the 5<sup>th</sup> Defendant separately claim to be the respective lawful registered owners of the suit property pursuant to purchase from the original registered owner Francis Austin Njiru. The Plaintiffs instituted the proceedings seeking the Court to declare them the lawful registered proprietors of the suit property and restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and their agents from trespassing, disposing of and or in any way interfering with their proprietary rights following the lawful termination of a sale agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on account of material breach of the terms thereof.
77. After the institution of the proceedings herein, the Plaintiffs discovered that the 4<sup>th</sup> and 5<sup>th</sup> Defendants who were evidently working in cahoots with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were also laying claim on the suit property premised on questionable ownership documents prompting them to amend the suit and include them as a parties to ensures effectual adjudication of the ownership dispute with finality. The 4<sup>th</sup> and 5<sup>th</sup> Defendants upon being joined in the proceedings were duly served as evidenced by the Affidavits of Service on record and are duly represented in the proceedings.
78. The Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their joint Defence and Counter - Claim dated 12<sup>th</sup> February, 2021 vide which they claimed the suit property did not belong to the Plaintiffs since they had acquired the suit land through purchase and sought an order of specific performance or a refund of the alleged deposit of a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000/) paid to the Plaintiffs together with damages for breach of contract.
79. Subsequently, the 4<sup>th</sup> Defendant filed his Defence and Counter - Claim dated 11<sup>th</sup> February, 2021 vide which it claimed that the Plaintiffs were not the lawful owners of the suit property and in occupation thereof but the land was owned by Siwa Limited, the 5<sup>th</sup> Defendant herein for which he was a director and shareholder. The 4<sup>th</sup> Defendant sought a declaration that the 5<sup>th</sup> Defendant was the lawful registered owner of the suit property and the 3<sup>rd</sup> Defendant be ordered to cancel the titles issued in favour of the Plaintiffs. The 5<sup>th</sup> Defendant relied on the documents filed by the 4<sup>th</sup> Defendant in this matter as well as the testimony of the 4<sup>th</sup> Defendant.
80. The 3<sup>rd</sup> Defendant entered appearance on 14<sup>th</sup> November, 2024 and filed a Statement of Defence of even date. The 3<sup>rd</sup> Defendant principally stated that as per their records, the suit property was owned by the Plaintiffs and the suit land had never been owned by the 4<sup>th</sup> and 5<sup>th</sup> Defendant and asserted that the reliefs sought by the Plaintiffs were merited.
81. On the summary of facts and evidence of the matter. The Plaintiffs relied on their double amended Plaint dated 26<sup>th</sup> March, 2021. The Plaintiffs also filed a list and bundle of documents dated 2<sup>nd</sup> December, 2020, a further list and bundle of documents dated 21<sup>st</sup> October, 2021 and a supplementary list and bundle of documents dated 8<sup>th</sup> November, 2021 in support of their claim. The Plaintiffs filed a reply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Defence and Counter - Claim dated 21<sup>st</sup> October, 2021. They equally filed a reply to the 4<sup>th</sup> Defendant's Statement of Defence and Counter - Claim dated 21<sup>st</sup> October, 2021.
82. The Plaintiffs' case was heard on 25<sup>th</sup> November, 2021. The 2<sup>nd</sup> Plaintiff, Dennis Gatu Waithaka testified on behalf of the Plaintiffs as the sole witness (PW - 1).PW - 1 adopted his witness statement dated 2<sup>nd</sup> December, 2020 as his evidence in chief. He also testified that they had filed a list and bundle



of documents dated 2<sup>nd</sup> December, 2020, 21<sup>st</sup> October, 2021 and 8<sup>th</sup> November, 2021 relating to their interest over the property all of which he informed the Court were contained in their trial bundle dated 10<sup>th</sup> November, 2021 (trial bundle). He stated that they would rely on the filed list and bundle of documents as contained in the trial bundle as their bundle of exhibits in the matter without any objection.

83. PW - 1 testified that they had filed replies to the Defence and Counter - Claims filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as well as the 4<sup>th</sup> Defendants which were contained in the said trial bundle. PW - I briefly informed the Court that they jointly acquired the suit property LR No. 1927/I/MN from Mr. Francis Austin Njiru vide a sale agreement dated 4<sup>th</sup> July, 2003 appearing at page 53 of their bundle of exhibits and subsequently transferred it to them vide the transfer instrument appearing at page 60 of the bundle of evidence and registered on 23<sup>rd</sup> July, 2003.
84. PW - 1 further testified that subsequent to the acquisition and registration of the suit property in their favour. They had conducted official searches including the one appearing at page 35 of the trial bundle which confirmed that they were the lawful registered owners of the suit property as at 21<sup>st</sup> June, 2018. PW - 1 also testified that after the acquisition of the property LR No. 1927/I/MN, they subsequently sub-divided the same upon obtaining all the requisite approvals thus giving rise to two parcels 22369/I/MN and 22370/I/MN and referred the Court to pages 22 to 25 of the bundle of exhibits in which the Certificates of Title for the sub - divisions was contained.
85. PW - 1 stated in evidence that following the registration and issuance of the titles for the sub – divisions. That they had conducted official searches including those at pages 28 and 29 of the bundle of exhibits which confirmed the validity of their interest. PW - 1 concluded his evidence in chief by testifying that they instituted the case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants due to fraudulent acts of trespass and attempts to transfer their parcels to 3<sup>rd</sup> parties without their knowledge by erecting sign post advertising purported sale and trying to forcibly dispossess them of the suit property. PW - 1 testified that they later added the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the proceedings when they discovered they were equally laying claim on the suit property.
86. PW - 1 urged the Court to grant the reliefs sought in the Amended Plaint in order to safeguard their rights and interests over the suit property.
87. PW - 1 was cross - examined by the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as well as for the 4<sup>th</sup> and 5<sup>th</sup> Defendants. On cross-examination by the Learned Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants, PW - I reiterated that they jointly acquired the suit property from Francis Austin Njiru after they conducted necessary due diligence. They confirmed that he was the lawful registered owner of the suit property. He further stated that he was not aware the land was under any investigation by the DCI as he has never been called to record any statement. PW - 1 affirmed that they were in physical occupation of the suit property but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had been trying to dispossess them and dispose of the same to 3<sup>rd</sup> parties thus prompting the filing of the suit.
88. PW - 1 confirmed that he had sued Nicholas Munyi and the 5<sup>th</sup> Defendant as they were also laying claim on the suit property but conceded he did not have any document to show that the 4<sup>th</sup> Defendant was a director of the 5<sup>th</sup> Defendant. While being cross-examined by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, PW - 1 confirmed that they had intended to sell the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who unfortunately breached the terms of the executed sale agreement by failing to pay the agreed purchase price within the stipulated period including the requisite deposit. PW - 1 stated that out of the agreed deposit a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000/=), the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only paid a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00/=) and did not pay any other



- amounts as envisaged in the sale agreement. PW- 1 stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having breached the agreement, their acts of trying to forcibly take possession and dispose of the suit property were acts of trespass. PW - 1 stated that they conducted searches in year 2020 which showed that they were the lawful registered owners of the sub - divisions of the suit property.
89. In re - examination, PW - 1 testified that he had not been called to record any statements by the DCI over the ownership of the suit property. He further stated in re-examination that it is the 4<sup>th</sup> Defendant vide his Defence and Counter - Claim filed in Court that disclosed that he was a director of the 5<sup>th</sup> Defendant which was allegedly the registered owner of the suit property. PW - 1 reiterated they were in physical possession of the suit property. He clarified that the deposit payable under the rescinded agreement was a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000.00/=) but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only paid a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00/=) through their advocates.
90. PW - 1 also clarified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as per the sale agreement were only supposed to take vacant possession upon payment of the full agreed purchase price. PW - 1 concluded the re - examination by testifying that they sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants because they were making attempts to dispossess them and dispose of the suit property to 3<sup>rd</sup> parties despite having breached the sale agreement and the same having been lawfully rescinded in writing.
91. On the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' the Learned Counsel summarized the facts and evidence as follows. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on their joint Defence and Counter - Claim dated 12<sup>th</sup> February, 2021. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also filed list and bundle of documents dated 2<sup>nd</sup> March, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case was heard on 20<sup>th</sup> April, 2023. The 1<sup>st</sup> Defendant testified on their behalf as DW - 1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on the list and bundle of documents dated 3<sup>rd</sup> March, 2022 containing five documents as their bundle of exhibits. DW - 1 testified that he was the Executive Director of the 2<sup>nd</sup> Defendant. He stated that they entered into a sale transaction with the Plaintiffs over the suit property and agreed at a purchase price of a sum of Kenya Shillings Sixty Million (Kshs.60, 000, 000.00/=). He informed the Court that after they conducted their due diligence and confirmed that the Plaintiffs were the registered owners of the property. They executed a sale agreement dated 18<sup>th</sup> November, 2019 and allegedly paid a deposit of a sum of Kenya Shillings Ten (Kshs. 10, 000, 000.00/=). He stated that a sum of Kenya Shillings Four Million (Kshs. 4, 000, 000.00/=) out of the sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000.00/) was paid to undisclosed agents through undisclosed means and a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00/=) to the Purchasers through the firm of Rapando & Odunga Advocates.
92. DW - 1 testified that the balance of the purchase price of a sum of Kenya Shillings Fifty Million (Kshs.50, 000, 000/=) was to be financed by Family Bank. It was his evidence that the Plaintiffs availed them with the completion documents but when they booked the transfer documents for registration of the transfer at the lands office they were allegedly not registered as the Land Registrar termed the documents as not being authentic. He further alleged that the Plaintiffs were summoned by the Land Registrar to physically appear in their office but they purportedly refused to honour the summons. DW - 1 stated that in view of the conduct of the Plaintiffs, they demanded for the refund of the funds they had paid as deposit. DW - 1 stated that they had discovered there were other titles for the property and that the Plaintiffs were fraudulent or cons.
93. DW - 1 was cross-examined by the Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants and the Plaintiffs respectively. On cross-examination by Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants, DW - 1 testified that they were buying the two sub - division parcels and that they conducted necessary due diligence before entering into a sale agreement which confirmed that the titles were valid without any encumbrance. DW - 1 was



- referred to a copy of parallel Title CR No. 15048 they had filed and he stated that they obtained it after the sale agreement was executed without explaining how and where.
94. While being cross-examined by the Counsel for the Plaintiffs, DW - 1 reiterated that they did necessary due diligence including vide official searches which showed that the Plaintiffs were the lawful registered owners of the suit property and the subdivisions thereof. DW - 1 conceded that pursuant to clause 1(a) of the sale agreement they had exhibited, the agreed deposit was a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000.00/=) which was payable to the Vendors' Advocates' bank account but they only paid a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00/=) to the Plaintiffs' though their Advocates.
  95. DW - 1 also conceded that while the sale agreement at Clause 4 provided that completion shall be 90 days. This was as at 26<sup>th</sup> November, 2020 when they formally received a letter from the Plaintiffs' advocates terminating or rescinding the agreement. By then, they had not complied with the remittance of agreed payments. While DW - 1 alleged that they booked the transfers for registration and they were rejected by the lands registry, he confirmed that there was no evidence of such booking and rejection of the documents at the lands office neither was there evidence that the Plaintiffs were summoned by any Land Registrar.
  96. When DW - 1 was referred to Paragraph 7 of his Replying Affidavit sworn on 12<sup>th</sup> February, 2021 and filed herein, he conceded that while he averred that the Land Registrar Mombasa had called for the surrender of the title documents to the parcels on account of duplicity of titles, he had not placed before Court any correspondence or evidence to demonstrate the said communication. DW - 1 further admitted that he could not demonstrate how they acquired the purported grant produced in their documents as exhibit 1 and it neither had an official stamp nor was it certified by any Land Registrar. He conceded the said anomalies applied to the purported search they had filed and which was allegedly issued in the year 2017 even before the execution of the agreement for sale in year 2019.
  97. DW - 1 when referred to Clauses 11 and 12 of the sale agreement conceded that it provided for termination on account of breach and confirmed that they were served with a formal notice or letter dated 26<sup>th</sup> November, 2020 terminating the sale agreement after several previous demands for compliance with the terms of the agreement. DW - 1 on cross-examination testified that it was wrong for the Plaintiffs to sue them for trespass when they had never occupied the suit property as the Plaintiffs had tight security manning the gate they had erected on the suit property. However, when referred to Paragraph 6 of his Replying Affidavit sworn on 12<sup>th</sup> February, 2021, he conceded that he had earlier on oath alleged that they were given vacant possession of the suit property upon payment of the alleged deposit of a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000/=) and that the Plaintiffs had illegally taken over possession on the strength of Court order issued in their favour on 7<sup>th</sup> December, 2020 and were carrying out development activities thereon.
  98. DW - 1 further admitted in evidence that according to Clause 8 of the sale agreement they were only entitled to take vacant possession of the suit parcels. This was to be upon full payment of the agreed purchase price which at the time of the termination of the sale agreement and subsequent filing of the suit for trespass they had not paid including the contemplated deposit of a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000.00/) in full. While the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had vide their pleadings and evidence termed the Plaintiffs' ownership documents as fraudulent, DW - 1 surprisingly testified that they wanted the land transferred to them as prayed for in their Counter - Claim.
  99. The 4<sup>th</sup> and 5<sup>th</sup> Defendants relied on the Defence and Counter - Claim dated 11<sup>th</sup> February, 2021 filed by the 4<sup>th</sup> Defendant. The 4<sup>th</sup> and 5<sup>th</sup> Defendants also filed a list and bundle of documents dated 26<sup>th</sup> April, 2023. The 4<sup>th</sup> and 5<sup>th</sup> Defendants equally filed a further list of documents dated 26<sup>th</sup> June, 2024



after they had closed their case on 27<sup>th</sup> February, 2024 but the 4<sup>th</sup> Defendant who testified as DW - 2 was never recalled to produce the same. The 4<sup>th</sup> and 5<sup>th</sup> Defendants' case was heard on 27<sup>th</sup> February, 2024 and Nicholas Munyi, the 4<sup>th</sup> Defendant herein testified on their behalf as DW - 2. DW - 2 testified that they would rely on their list and bundle of documents dated 26<sup>th</sup> April, 2023 as their evidence in the matter. DW - 2 principally testified that he was a director of Siwa Limited, the 5<sup>th</sup> Defendant herein and the suit property was lawfully owned by the 5<sup>th</sup> Defendant.

100. It was DW - 2's evidence that he personally acquired the suit property in the year 2008. This was after an alleged property agent informed him that there was property available for sale in Nyali. He stated that the property was still vacant and undeveloped but he was at one point informed that there were some activities on the land and he reported the matter to the police. He testified that he had been taking care of the suit property and had employed a guard to take care of the property. He stated that the Plaintiffs were claiming the property and he had noted that the same had been subdivided into two plots.
101. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counsel never had not any questions in cross-examination. DW - 2 on cross examination by the Counsel for the Plaintiffs started that he had filed documents in Court stating that the suit property was owned by the 5<sup>th</sup> Defendant. He admitted that despite being a director of the 5<sup>th</sup> Defendant he was aware it was a separate legal entity which operated through written resolutions. DW - 2 testified that he acquired the property in his own name as Nicholas Munyi but it was later transferred to the 5<sup>th</sup> Defendant on 23<sup>rd</sup> March, 2008. He conceded that he had neither filed a sale agreement between him and Austin Njiru nor between Austin Njiru and the 5<sup>th</sup> Defendant.
102. DW - 2 further conceded that he did not have any search conducted prior to the alleged purchase. This was one showing that Francis Austin Njiru was the registered owner of the suit property as at 2008 when he acquired the suit property. Similarly, he admitted that there was no official search since the year 2008 to show that valid interest was transferred and registered in favour of the 5<sup>th</sup> Defendant pursuant to the alleged transaction. DW - 2 admitted that the Grant CR 19588 held by the 5<sup>th</sup> Defendant showed that original Grant CR 15048 in the name of Francis Austin Njiru was allegedly surrendered to give rise to the said Grant CR 19588. However, he testified that Grant CR 15048 was in his name but was later surrendered.
103. When DW - 2 was shown the two (2) conflicting Deed Plans anchoring grants CR 15048 and CR 19588. He stated that he did not find out when the interest was first registered in favour of Francis Austin Njiru. While DW - 2 alleged that he took possession in year 2008 and had employed a guard to take care of the property, he admitted that he had not presented any evidence to prove the alleged physical occupation or contract with the alleged guard and proof of payment of wages or salary thereof. DW - 2 when showed the affidavit sworn by the 1<sup>st</sup> Defendant confirmed that DW - 1 had stated on oath that the property was occupied by the Plaintiffs as the time of their due diligence and purchase. While the 4<sup>th</sup> Defendant had made various allegations of fraud against the Plaintiffs, he conceded that he was neither a forensic expert nor had he filed any investigative report in which the Plaintiffs had been indicted or implicated of fraud.
104. DW - 2 confirmed in evidence that the evidence presented by the Plaintiffs showed that the Property had been sub - divided into two sub-plots. That they had not adduced any contrary evidence to demonstrate that the subdivision and the resultant titles had been disowned by any Government department. DW - 2 also admitted that while their Grant required a consent of the Commissioner of Lands to be obtained before any dealings including transfer of interest over the land, none was obtained prior to the transfer to the 5<sup>th</sup> Defendant. Whereas DW - 2 admitted that the suit property was initially residential, he confirmed that they had not presented any evidence on how the user of the same changed to hotel.



105. On the 3<sup>rd</sup> Defendant's case. The Learned Counsel summarized the facts and evidence. He stated that the 3<sup>rd</sup> Defendant relied on their filed Statement of Defence dated 14<sup>th</sup> November, 2024 and list and bundle of documents dated 14<sup>th</sup> November, 2024. The 3<sup>rd</sup> Defendant's case was heard on 7<sup>th</sup> February, 2025 and a Land Registrar Ms. Sheila Soita testified as DW - 3 on behalf of the 3<sup>rd</sup> Defendant. Principally, the DW - 3 reiterated that the contents of the 3<sup>rd</sup> Defendant's statement of defence and informed the Court that according to their official records Parcels L.R Nos 22369/I/MN and 22370/I/MN which were resultant sub - divisions of LR No. 1927/I/MN was lawfully registered in favour of the Plaintiffs.
106. DW - 3 adduced as evidence certified copies of Leases, Certificates of Title for the sub - division parcels and post registration searches as well as the consent that was obtained prior to the transfer of the suit property to the Plaintiffs. She testified that the suit property was originally owned by Francis Austin Njiri vide Grant CR 15048 registered on 4<sup>th</sup> February, 1977. According to their records, it was later transferred to the Plaintiffs on 23<sup>rd</sup> July, 2003 vide entry number 2 on the Grant. DW - 3 explained that there was evidence on record that Grant CR 15048 was subsequently surrendered to the lands office to facilitate the registration of the title documents for the sub - divisions. She adduced in evidence a surrender instrument dated 3<sup>rd</sup> September, 2018 that was registered on 6<sup>th</sup> September, 2018 as CR 15048/3 and noted as entry number 3 on the surrendered Grant CR 15048.
107. DW - 3 concluded her evidence in Chief by stating that the Plaintiffs were the lawful registered owners of the suit property. The suit property was currently sub - divided into two parcels with titles duly printed, registered and issued by the lands office. It had never been owned by the 4<sup>th</sup> and 5<sup>th</sup> Defendants as purported. DW - 3 was cross - examined by the Counsel for 4<sup>th</sup> and 5<sup>th</sup> Defendants who principally took her through the records filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants relating to their purported interest over the suit property. DW - 3 testified that in as much as the documents filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants suggested that they acquired the suit property from Francis Austin Njiru in the year 2008, the same were not in their records and the land according to the official records was transferred to the Plaintiffs way back in year 2003.
108. While DW - 3 conceded that transfer of interest was a process. She testified that she filed the records she could trace considering that the suit property was sub - divided and now had two new parcel files. She further testified that the mere failure to trace and file the entire records relating to a lawful registered owners interest was not proof of irregularity. DW - 3 further rejected the suggestion that the indication in one of the searches that the interest was freehold was evidence of illegality and stated that it was a normal error made by the registry while issuing the search and the title documents were reflective of the term as 99 years thus leasehold.
109. On cross - examination by the Counsel for the Plaintiffs, DW - 3 reiterated that the official records showed that the suit property was owned by the Plaintiffs. Currently, it was sub - divided and with respective parcel files CR 72712 and CR 72713 in favour of the Plaintiffs. She testified there was no parallel records in their custody for the suit property and or its sub - divisions neither had she been shown any parallel certified records from their registry by any Registrar to suggest the existence of the 5<sup>th</sup> Defendant's alleged ownership records. DW - 3 further testified that from their records the suit property was first registered in favour of Francis Austin Njiru vide Grant CR No. 15048 on 4<sup>th</sup> February, 1977. It was later transferred to the Plaintiffs on 23<sup>rd</sup> July, 2003. DW - 3 confirmed that Grant CR. 19588 filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants made reference to grant CR. 15048 and suggested that it was surrendered to give rise to Grant 19588. However, she testified that they neither had Grant CR. 19588 in their record nor had she been shown any evidence to demonstrate that the original Grant CR. 15048 was surrendered to give rise to Grant CR. 19588.



110. DW - 3 also conceded that while the original Grant CR. 15048 which was in their custody having been procedurally surrendered by the Plaintiffs was anchored on Deed Plan 90768 of 1972, Grant CR. 19588 exhibited by the Plaintiffs was anchored on Deed Plan No. 129488 of 1987. She informed the Court that there was no evidence both in their records and the Court that the suit property was resurveyed to give rise to the Deed Plan 129488 of 1987 that anchors the 5<sup>th</sup> Defendant's Grant and that the original Grant in their possession that was surrendered by the Plaintiffs was still anchored on Deed Plan no. 90768 of 1972.
111. DW - 3 testified that while the Plaintiffs had exhibited a sale agreement, consent to transfer and transfer instrument duly executed and registered, she had not seen a sale agreement between the 5<sup>th</sup> Defendant and Francis Austin Njiru. Neither had she been shown any consent that was obtained prior to the alleged transfer as envisaged in the Grant exhibited by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. She further admitted that the suit property having been transferred and registered in favour of the Plaintiffs in the year 2003. They were not available for transfer to the 5<sup>th</sup> Defendant as purported. DW - 3 also confirmed that the consent to transfer obtained prior to the transfer of the suit property to the Plaintiffs was issued in the year 2003 and related to parcel LR No.1927/I/MN, the suit property herein.
112. DW - 3 reiterated that the suit property L.R No. 1927/I/MN as per the official records was currently sub - divided into two parcels with individual titles issued and registered by the Ministry and anchored on valid Deed Plans which the 3<sup>rd</sup> Defendant had filed in Court. She confirmed that no evidence had been adduced to show that the sub - divisions and the Deed Plans anchoring them are illegal or irregular.
113. DW - 3 on further cross-examination confirmed that the Certificates of Titles for the sub - divisions filed in Court show that the term was leasehold for 99 years. Any error made by the registry while issuing the official searches or printing the Certificates of Title could not invalidate the interests of a lawful registered owner. She further conceded that the records filed relating to the Plaintiffs' interest was what she managed to retrieve at the point of filing it and failure to file the entire records could not invalidate the interest of the Plaintiffs who was the lawful owners of the suit property and or the sub - divisions.
114. DW - 3 conceded that while the 4<sup>th</sup> and 5<sup>th</sup> Defendants were laying claim on the suit property as the lawful owners, they had neither exhibited the searches they obtained from the lands office prior to the acquisition of the alleged interest nor post the acquisition of the interest. She stated that there was no evidence of the existence of the 5<sup>th</sup> Defendant's alleged records or attempts to reconstruct it.
115. DW - 3 testified that she had not been shown any evidence to demonstrate that the interest acquired and held by the Plaintiffs as confirmed by the official records was illegally or irregularly acquired. She further testified that there was no evidence of any correspondence between the lands office and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleging that the Plaintiffs' records were illegal and irregular and or a product of duplicity.
116. On cross examination by the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, DW - 3 reiterated that the suit property as per the official records was validly acquired by the Plaintiffs and was lawfully registered in their favour. She further stated that an error by the registry on an instrument or a search never invalidated the lawful registered owner's interests and failure to retrieve and file all records is not proof of irregularity. Notably, while parties were granted leave to file responses and documents in reply to any defence and documents filed by the 3<sup>rd</sup> Defendant in the matter, none of the parties herein filed any documents in reply or controverting the evidence adduced by the 3<sup>rd</sup> Defendant as presented through the testimony of DW - 3.



117. The Learned Counsel relied on the following seven ( 7 ) issues for determination to enable the Court adjudicate the dispute effectively and arrive at a decision. These were:-
118. Firstly, is on the issue of who between the Plaintiffs and the 5<sup>th</sup> Defendant had demonstrated the validity of the title they hold over the suit property. The Learned Counsel submitted that it was uncontested that this dispute related to disputed ownership of the suit property anchored on competing ownership records. The parties with the competing interests respectively needed to demonstrate the propriety of the root of the interest they claim to hold.
119. To support that point, while determining the issue of the root interest, the Counsel referred Court to the Court of Appeal to its celebrated decision in the case of: “Samuel Kamere – Versus - Land Registrar, Kajiado Civil Appeal No 28 of 2005[2015] eKLR” where it held that for a litigant to be considered a bona fide purchaser for value, 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 that they paid valuable consideration for the purchase of the suit property.
120. The above Court of Appeal’s dictum in the case of:- “Samuel Kamere – Versus - Land Registrar, Kajiado (supra)” was affirmed by the Supreme Court in the case of “Torino Enterprises Limited – Versus - Attorney General (Petition 5(E006) of 2022) [2023] KESC 79(KLR)” and “Petition No. 8(E010) of 2021;Dina Management Limited - Versus - County Government of Mombasa & 5 others”. The Supreme Court basically restated that the process leading to the acquisition of a title over any property was of key consideration and interest acquired illegally and or unprocedurally could not enjoy the protection of the law.
121. The Plaintiffs had in evidence stated that they conducted requisite due diligence which showed that the property known as MN/I/1927 was lawfully owned by one Francis Austin Njiru (Vendor) as at the year 2003, who was capable of transacting over it and passing a good title. According the Plaintiffs, the due diligence established that the suit property was registered in favour of the Vendor vide Grant CR 15048 registered on 4<sup>th</sup> February,1977.
122. It was pursuant to this due diligence that the Plaintiffs entered into an agreement for sale with the Vendor at a consideration of a sum of Kenya Shillings Twenty Million Five Hundred Thousand (Kshs. 20,500,000.00/=). Subsequently, the Plaintiffs executed a transfer instrument with the Vendor which was registered on 23<sup>rd</sup> July, 2003 as IR No.15048/2. The interest acquired by the Plaintiffs was also noted on Grant CR 15048 as entry number 2 effectively transferring the interest over the property to them with effect from 23<sup>rd</sup> July, 2003. The Plaintiffs adduced all these documents as evidence vide their trial bundle filed herein.
123. While it was undisputed that the suit property was lawfully owned by Francis Austin Njiru in the year 2003 vide Grant CR 15048 as confirmed by the records held and presented by the 3<sup>rd</sup> Defendant through the testimony of DW - 3, the 4<sup>th</sup> and 5<sup>th</sup> Defendants vide the Defence and Counter - Claim filed by the 4<sup>th</sup> Defendant alleged that the 4<sup>th</sup> Defendant acquired the suit property from Francis Austin Njiru in year 2008 and letter transferred it to the 5<sup>th</sup> Defendant.
124. However, the 4<sup>th</sup> and 5<sup>th</sup> Defendants conceded in evidence that they neither had any proof that they conducted any official search prior to the alleged transaction that demonstrated that the suit property was owned by Francis Austin Njiru in the year 2008. The 4<sup>th</sup> Defendant who testified as DW - 2 also admitted in evidence that they never bothered to find out the history of the registration of the interest and that they had neither adduced in evidence an agreement for sale between himself and the alleged Vendor nor the Vendor and the 5<sup>th</sup> Defendant.



125. DW - 2 further conceded in evidence that there was no proof that the mandatory consent of the Commissioner of Lands was obtained prior to the alleged transfer of interest to the 5<sup>th</sup> Defendant. Further, no official search was exhibited post the alleged transfer of interest to show that the 4<sup>th</sup> or 5<sup>th</sup> Defendants acquired valid interest over the suit property as purported.
126. While the existence of Grant CR 15048 in the name of Francis Austin Njiru was not in contention, the 5<sup>th</sup> Defendant's Grant CR 19588 having made reference to it as allegedly having been surrendered, and the 3<sup>rd</sup> Defendant having testified that the original Grant CR 15048 was in their custody having been surrendered, it was evident that the only certified copy of Grant CR 15048 adduced in Court by the 3<sup>rd</sup> Defendant as the custodian of land records showed that the interest over the suit property was first registered in favour of Francis Austin Njiru on 4<sup>th</sup> February, 1977 and later lawfully transferred to the Plaintiffs on 23<sup>rd</sup> July, 2003 vide entry number 2 on Grant 15048.
127. Suffice to note, while the Grant CR 19588 held by the 5<sup>th</sup> Defendant indicated that the original Grant CR 15048 was surrendered to give rise to the Grant they hold and which was anchored on Deed Plan No. 129488 issued on 8<sup>th</sup> July, 1987, there was no evidence to demonstrate when Grant CR 15048 was surrendered and by whom neither had they adduced any evidence to show that the suit property was resurveyed to give rise to the new Deed Plan.
128. The Learned Counsel humbly submitted that surrender was a process that entailed preparation and registration of a surrender instrument. This was as highlighted by DW - 3 when she testified that from their records, the Plaintiffs surrendered the original Grant CR 15048 vide a formal surrender instrument dated 3<sup>rd</sup> September, 2018 which was duly registered on 6<sup>th</sup> September, 2018 and it was noted on the original Grant CR 15048 as entry no.3.
129. In a persuasive but relevant decision in of ELC Nairobi, "Push Enterprises Limited – Versus - Kenya Airports Authority [2024] eKLR" , Oguttu Mboya J, was emphatic that a surrender was not valid unless there was proof of a duly executed and registered instrument of surrender and held thus:-
- “Secondly, it is also important to underscore that whenever there is a surrender, there must be an instrument of surrender duly executed by, inter alia, the owner of the land and which must thereafter be lodged for registration and be duly registered. For good measure, surrender only takes effect upon registration of the surrender instrument and not otherwise.”
130. The Learned Counsel thus relied on the persuasive decision in "Push Enterprises Limited – Versus - Kenya Airports Authority (supra)", the provision of Section 107 of the *Evidence Act*, Cap 80 and the dictum in "Samuel Kamere – Versus - Land Registrar, Kajiado (supra)" in urging that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were enjoined to provide evidence in the form of a surrender that is duly executed by the owner, that was lodged for registration and duly registered before issuance of Grant number CR 19588. They were further under a duty to adduce evidence that show the suit property was lawfully resurveyed to warrant the issuance of a new deed plan no. 129488 that anchored their purported grant.
131. DW - 2 conceded that there was no instrument of surrender that preceded issuance and registration of Grant number CR 19588 and a copy of the Grant that was allegedly surrendered to give rise to their purported grant was not adduced. He further admitted that they had neither adduced a sale agreement nor a consent that was obtained prior to the alleged transfer of interest to the 5<sup>th</sup> Defendant which in any case it was conceded in evidence neither authorized any acquisition of the property by way of written resolutions but equally did not execute any sale agreement with Francis Austin Njiru.



132. The Learned Counsel submitted that the absence of a duly executed sale agreement for a transaction that was purported to have happened in the year 2008 was incurably fatal. It was a clear testimony that the 4<sup>th</sup> and 5<sup>th</sup> Defendants never had valid interest over the suit property and or its sub - divisions. This Court while confronted with a similar issue in the case of “Muthami – Versus - Mutsongi & 2 others (Environment and Land Appeal 38 of 2019) [2023] KEELC 20807 (KLR)” LL. Naikuni J held thus:-

“In the instant case, I find that this Court cannot maintain a suit that runs afoul of a mandatory section that being section 3 (3) of the Law of Contract Act Cap 23 of the Laws of Kenya as they were the applicable regime then.” See also the Court of Appeal case of *Lamba – Versus - National Social Security Fund & another* (Civil Appeal E168 of 2021) [2023] KECA 124 (KLR).

133. The Learned Counsel submitted that they had demonstrated that they conducted necessary due diligence prior to the acquisition that showed Francis Austin Njiru as the owner of the suit property, they executed an agreement for sale and a transfer instrument which was duly registered by the lands office upon payment of the requisite stamp duty and franking of the same.

134. Unlike the 4<sup>th</sup> and 5<sup>th</sup> Defendants, the Plaintiffs had equally exhibited post registration searches issues by the lands office confirming the validity of their interest over the suit property and or its subdivisions. Thus, the Plaintiffs interest was traceable to the title lawfully held by the vendor Francis Austin Njiru vide grant CR 15048. The purported unexplained surrender and issuance of another Grant that never existed in the official records of Government could therefore not be a legal basis to disentitle them of the interest over the suit property.

135. Notably, the Plaintiffs' evidence speaking to the validity of the root of their interest was corroborated by the uncontroverted evidence adduced by the 3<sup>rd</sup> Defendant through the testimony of DW - 3. The 3<sup>rd</sup> Defendant who is the custodian of land records vide paragraphs 3, 5 and 7 of the defence dated 14<sup>th</sup> November, 2024 categorically stated that according to their official records, the suit parcels was lawfully owned by the Plaintiffs. They had issued several official searches confirming this position. Vide Paragraph 6 of the said defence, the 3<sup>rd</sup> Defendant affirmed that the suit property had never been owned by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 4<sup>th</sup> and 5<sup>th</sup> Defendants neither filed parallel certified records or official search nor called another Registrar to contradict this expert evidence as presented by DW - 3.

136. The Counsel urged the Court in considering this dispute to be guided by the Court of Appeal decision in the case of “Philemon L. Wambia – Versus - Gaitano Lusitsa Mukofu & 2 others [2019] eKLR” in which the Court of Appeal while upholding the finding of the trial Court that the records filed and relied upon by the Defendant were questionable, not in the official records and he never bothered to call a witness from the relevant office but instead accused the lands office of conspiracy held:

“39. In *Solomon Omwega Omache & another – Versus - Zackery O. Ayieko & 2 others* (2016) eKLR it was stated that the court has the duty to uphold the sanctity of the record at the Lands office. The official record at the lands office in relation to the suit property shows that the first allottee was Mr. Joseph Muturi Mutorania. The Third Party witness testified that the letter of allotment held by the appellant was not available at the lands office record file of the suit property. No evidence is on record to persuade us doubt the integrity and accuracy of the official records at the lands office.”

137. It was instructive to note that the Grant CR 15048 filed by the 3<sup>rd</sup> Defendant that anchored the root of the Plaintiffs' interest showed the user of the suit property as private dwelling. The 4<sup>th</sup> and 5<sup>th</sup>



Defendants' purported Grant CR 19588 showed the user of the suit property was for hotel purposes. While the 4<sup>th</sup> Defendant acknowledged in evidence during re - examination that the user of the property changed from residential to commercial and that he bought it for commercial purposes. No evidence was adduced by the 4<sup>th</sup> and 5<sup>th</sup> Defendants to demonstrate a procedural change of user from residential to commercial as purported. Similarly, the purported land rates invoices filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendant show that the user of the land was residential which tallied with the records adduced by the Plaintiffs and the 3<sup>rd</sup> Defendant. Thus, it was unclear how the land as claimed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants changed from being residential to hotel.

138. The Learned Counsel cited the Nairobi Environment and Land Court in the case of: "Charles Kinyua Kagio & 2 others – Versus - Attorney General on Behalf of the Ministry of State for Provincial and Internal Security and Ministry of State for Defence [2021] eKLR" where Justice Eboso observed thus: -

“20. Thirdly, under Special Condition No 5, the land and the buildings thereon were to be used for ‘one private dwelling house (excluding a guest house)’. Evidence by PW1 was that he erected a five storey block of apartments on the suit property with 3 ground floor shops, 5 two-bedroom flats, and 8 one-bedroom flats. No change of user was exhibited by the 1<sup>st</sup> plaintiff to demonstrate that there was a duly approved change of user or that the new structures were approved by the relevant authorities.”

139. DW - 3 testified and adduced uncontroverted evidence showing that suit property was acquired and transferred to the Plaintiffs in year 2003. Hence, the Vendor Francis Austin Njiru could not be having any interest capable of being transferred to the 5<sup>th</sup> Defendants in the year 2008. The 4<sup>th</sup> and 5<sup>th</sup> Defendants having failed to demonstrate that they conducted requisite due diligence to confirm the lawful ownership of the suit property before the alleged purchase in the year 2008 and only relied on a purported agent, it was clear they did not acquire any valid interest as purported. The fact that the 4<sup>th</sup> Defendant conceded that they had also not exhibited any official searches issued post the alleged transfer and registration of interest is a testament that they hold no valid interest over the suit.

140. They relied on the persuasive case by the Kwale Environment & Land Court in the case of:- "Mbugua – Versus - Kerre & 2 others (Environment and Land Appeal E004 of 2022)[2023] KEELC 18755 (KLR)" in which, A.E. Dena J held that: -

“A nullity is nullity and nothing valid can come out of it. I agree with the Court of Appeal dictum in Athi Highway Developers – Versus - West End Butchery & 6 Others (2015) while adopting the position taken by Lord Denning in Macfoy – Versus - United Africa Limited (1961) ALL FR 1169. The court of appeal held that the transfer of title by a vendor possessing a fake/fraudulent title cannot pass good title.”

141. Notably, both the Plaintiffs and the 3<sup>rd</sup> Defendant presented evidence to demonstrate that parcel 1927/I/MN was sub - divided into two parcels 22369/I/MN and 22370/I/MN duly registered in favour of the Plaintiffs. While the evidence tendered by DW - 3 showed that the property was currently sub - divided and titles anchored on valid Deed Plans issued by survey department exist in the official land records, the 4<sup>th</sup> and 5<sup>th</sup> Defendants who purport to hold a Grant for unitary parcel 1927/I/MN had not tendered any evidence to controvert this official position. In fact, DW - 2 during his evidence stated that they had learned that the suit property was sub - divided into two parcels.

142. The Learned Counsel submitted that unlike the Plaintiffs whose interest was traceable to the undisputable original Grant CR No. 15048, the 4<sup>th</sup> and 5<sup>th</sup> Defendants had not only conceded that the



5<sup>th</sup> Defendant never transacted with the alleged Vendor and never had any valid sale agreement. They had equally failed to demonstrate a nexus between their Grant CR 19588 and the original Grant CR 15048 that they alleged was surrendered to give rise to the Grant they hold but which DW3 stated is in their custody having been surrendered by the Plaintiffs.

143. The 4<sup>th</sup> and 5<sup>th</sup> Defendants' alleged interest was thus anchored on quicksand. It never met the test enunciated in the case of:- "Munyu Maina – Versus - Hiram Gathina Maina (2013) eKLR" in which the Court of Appeal outlined the principle in determining disputes relating to legality of title and observed thus: -

“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”

144. Secondly, on the issue of who had demonstrated actual occupation of the suit property. The Learned Counsel contended that the Plaintiffs had not only demonstrated the validity of their interest over the suit property but also that they had maintained actual occupation since they acquired the land. Indeed, the filing of the instant suit was prompted by the attempts by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to forcibly dispossess them of the suit property after they procedurally rescinded the agreement for sale between them on account of material breach envisaged in the agreement for sale.

145. The fact that the Plaintiffs were in actual physical occupation of the suit property was corroborated by the testimony of DW - 1. DW - 1 informed the Court they conducted necessary due diligence in the year 2019 that not only confirmed the Plaintiffs were the lawful registered owners of the suit property and/or its sub - divisions, but they were also in actual occupation thereof and were capable to grant vacant possession in accordance with the terms of the sale agreement. Indeed, DW - 1 while denying trespass on the suit property testified on oath that it was impossible for them to trespass as the Plaintiffs had erected a gate on the suit property which was manned by security guards.

146. The Court also on the application by the Plaintiffs issued interim orders protecting their occupation pending the determination of the matter and later directed status quo prevailing to be maintained to ensure expeditious conclusion of the dispute. This order gave the Plaintiffs a reprieve as the Defendants' agents immediately stopped their unjustified attempts at forcibly dispossessing the Plaintiffs. The 4<sup>th</sup> and 5<sup>th</sup> Defendants on their part also claimed to have been in actual occupation of the land. However, on cross - examination, DW - 2 conceded that he had not presented any evidence to demonstrate their alleged physical occupation of the suit property. DW - 2 further conceded that they had neither presented any evidence of a contract with the alleged security guard nor payment of any wages or salaries.

147. It was evident from the foregoing that the Plaintiffs had demonstrated occupation and which occupation was corroborated by the uncontroverted evidence by one of their adversaries in this matter, DW - 1 that asserted to have conducted necessary due diligence a year prior to the institution of the proceedings herein.

148. The Court of Appeal in the case of:- "Benja Properties Limited – Versus - Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR" while considering the significance of possession held:-

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin



is a root of title... .....The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei—Versus - Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”

149. Even if the Plaintiffs were currently not in occupation and had been illegally dispossessed by the Defendants, which was not the case in this matter. It could not have disintitiled the Plaintiffs of the parcels in the absence of evidence that the interest they held was illegal. The Learned Counsel placed reliance on the Court of Appeal Case of:- “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR” in which it quoted the Supreme Court of India decision in “Karnataka Board of WAKF -Versus - Government of India & Others (2004) 10 SCC 779” where it was observed that in the eye of the law, an owner would be deemed to be in possession of a property so long as there was no intrusion. Non-use of the property by the owner even for a long time won't affect his title.
150. The Learned Counsel urged the Honourable Court to be persuaded by the uncontroverted evidence on record and hold that the Plaintiffs had not only demonstrated possession of the suit property but the said possession had been lawful and regular as it was anchored on validly acquired and registered interest as verified by the 3<sup>rd</sup> Defendant through the documentary evidence and testimony of DW - 3.
151. The Learned Counsel further urged the Honourable Court to be persuaded by the uncontroverted evidence on record and hold that the Plaintiffs had not only demonstrated possession of the suit property but the said possession had been lawful.
152. Thirdly, on the issue of whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants had proved the allegations of fraud as against the Plaintiffs to the required standards. The Learned Counsel asserted that it was a settled law that any allegation of fraud must be pleaded and strictly proved with several courts pronouncing themselves on it. The Supreme Court in the case of:- “Fanikiwa Limited & 3 others – Versus - Sirikswa Squatters Group & 18 others [2023] eKLR” pronounced itself on the issue as follows: -

“ However, it is trite law that fraud, which, depending on the circumstances is recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters is not beyond reasonable doubt, it is higher than proof on a balance of probabilities as required in other civil claims.”
153. Similarly, the Court of Appeal in the case of “Moses Parantai & Peris Wanjiku Mukuru suing as the legal representative of the estate of Sospeter Mukuru Mbeere (deceased) – Versus - Stephen Njoroge Macharia [2020] eKLR” stated that fraud was a quasi-criminal charge which must not only be specifically pleaded but also be proved on a standard though below beyond reasonable doubt, but above balance of probabilities.
154. While the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had termed the Plaintiffs ownership records as fraudulently obtained but strangely sought an order for specific performance to have the said interest transferred in their favour. They had not adduced any evidence to demonstrate these allegations of fraud and illegality. DW - 1 conceded in evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not tendered any evidence to show that they booked the transfer documents at the lands office and they were rejected. DW - 1 also admitted that they had not filed any official correspondence from lands office indicating that the Plaintiffs' ownership records were termed as unauthentic.
155. Equally, DW - 3 testified that there was no correspondence in their records to show that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants either booked documents which were rejected or that they were informed that the Plaintiffs' documents which were in their official records were fraudulent or forgeries. Thus, the allegations by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not particularized. Further, there was no evidence



adduced to substantiate fraud. Hence, the allegations were baseless and should be disregarded by the Court.

156. The 4<sup>th</sup> Respondent equally vide his Defence and Counter - Claim dated 15<sup>th</sup> February, 2021 alleged that the Plaintiffs' ownership records were irregular and fraudulent and that the suit property was lawfully owned by the 5<sup>th</sup> Defendant. The 4<sup>th</sup> and 5<sup>th</sup> Defendants never adduced any evidence to prove the purported grounds of fraud as against the Plaintiffs. DW - 2 while testifying conceded that there was no evidence either from the police or any Government department to show that the Plaintiffs' ownership records was illegal or irregular.
157. DW - 3 while testifying affirmed that the Plaintiffs' ownership records were lawfully issued by the lands office and were in their custody and failure to retrieve and file the entire set of records is not proof of irregularity. In relation to the purported ownership records filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants, DW -3 stated that they were not in their records and despite the 4<sup>th</sup> and 5<sup>th</sup> Defendants alleging that their records could not be traced, there was neither evidence of communication to that effect to the lands office nor any attempt to reconstruct the purported records.
158. The Counsel cited the Court of Appeal in the case of:- "Chief Land Registrar & 4 others – Versus - Nathan Tirop Koech & 4 others [2018] eKLR" observed as follows relating to records in the custody of public offices and admittedly actioned upon by public officials.

“There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1<sup>st</sup> and 4<sup>th</sup> Respondents to prove otherwise. They had failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation.”

159. The Learned Counsel submitted that the 3<sup>rd</sup> Defendant having produced certified records confirming that the Plaintiffs were the lawful owners of the suit property and the resultant sub - divisions, which evidence corroborated the evidence and testimony of the Plaintiffs' root title, in the absence of any credible evidence showing that the interest held by the Plaintiffs was irregular and illegal they urged the Court to dismiss the allegations of fraud and illegality as it could not be inferred and merely imagined.
160. The Counsel urged the Court in arriving at this finding to be guided by the Court of Appeal decision in the case of "Marteve Guest House Limited – Versus - Njenga & 3 others (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR)(28 April 2022)" in which while considering allegations of fraud it held that fraudulent conduct had to be distinctly alleged and distinctly proved, and it was not allowable to leave fraud to be inferred from the facts.
161. Fourthly, on whether the Counter - Claim filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was merited. The Learned Counsel averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Counter - Claim dated 12<sup>th</sup> February, 2021. The Plaintiffs responded to the said Counter - Claim by their response dated 21<sup>st</sup> October, 2021 and urged the Court to dismiss the Counter - Claim in its entirety.
162. They argued that the Counter - Claim was principally an abuse of the Court process and a testament that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in cahoots with the 4<sup>th</sup> Defendant wanted to dispossess the Plaintiffs of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide their Counter - Claim asserted that the Plaintiffs had resorted to unlawful means to evict them from the suit property which they had taken vacant possession of after declining to release the completion documents as agreed. However, DW - 1 while giving evidence conceded that it was an unequivocal term of Clause 8 of the said agreement that vacant possession was only to be granted upon payment of the full purchase price.



163. DW - 1 further informed the Court that the claim of trespass as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was baseless as they had never taken physical occupation of the suit property and the Plaintiffs had stationed very strict guards in the premises which has a gate and thus they could not have trespassed as pleaded. The evidence of DW - 1 was not only in conflict with their pleadings but was reflective of a party that was utterly dishonest. This contradiction alone showed that the Counter - Claim was unmerited and the Plaintiffs was deserving of the orders sought in the Plaint.
164. Curiously, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had vide their pleadings asserted that the Plaintiffs' records were fraudulent and illegal, vide their Counter - Claim they sought a relief for specific performance directing the Plaintiffs to hand over their records to allow them transfer the interest to themselves.
165. Further, whereas, DW - 1 testified that they allegedly presented and booked records at the lands office for registration of transfer and the same were purportedly rejected, he never explained how he was able to book documents for registration if the Plaintiffs had not availed completion documents. This was a clear indication that the allegations of fraud were aimed at justifying their material breach of the sale agreement and attempts to forcibly take over the occupation of the suit property which prompted the filing of this suit.
166. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also sought an order of specific performance notwithstanding the admission by DW - 1 in evidence that they had not paid the agreed purchase price including the deposit as agreed. There was no lawful variation of the terms of the agreement and that the Plaintiffs formally rescinded the agreement pursuant to the provisions of Clause 11 of the sale agreement. The said clause also entitled the Plaintiffs to retain the 10% deposit as liquidated damages.
167. While the agreement filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stipulated that a deposit of a sum of Kenya Shillings Fourteen Million (Kshs.14, 000, 000.00/=) was to be paid upon execution, they pleaded that they had paid only a sum of Kenya Shillings Ten Million (Kshs.10, 000, 000.00/=) prior to the termination of the agreement by the Plaintiffs. This payment was not only in breach of the express terms of the agreement they were relying upon but was equally contested by the Plaintiffs who had maintained they only received a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00/=). The sale agreement equally provided that only a sum of Kenya Shillings Fourty Million (Kshs. 40, 000, 000.00/=) of the agreed sum of Kenya Shillings Sixty Million (Kshs. 60, 000, 000.00/=) was to be financed contrary to the evidence of DW - 1 that a sum of Kenya Shillings Fifty Million (Kshs. 50, 000, 000.00/=) was to be financed.
168. Despite of the agreement having stipulated that the amounts were to be paid through the advocates account and the Plaintiffs advocates only received a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00/) as conceded by PW - 1, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants never adduced any evidence to demonstrate that a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000.00/=) was paid to the Plaintiffs and the manner of the payment. It was incumbent upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to tender evidence of the alleged payments.
169. Their submissions that the Plaintiffs who were admittedly in breach of the agreement at the point of the formal termination of the same had a duty to demonstrate the alleged payments. They failed to discharge thus duty as fortified by the provision of Section 107 of the *Evidence Act*, Cap 80 which provides that anyone who desires that the Court gives judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



170. The Court of Appeal in the case of:- “Richard Kipkemei Limo – Versus - Hassan Kipkemboi Ngeny & 4 Others [2019] eKLR” in observing this section held that:-

“A party who wishes the Court to give judgment or to declare any right dependent on a particular fact or set of facts, give judgement or it has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.”

171. The Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had failed to demonstrate any cause of action as against the Plaintiffs. The reliefs sought were not only unjustified but were also not supported by the sale agreement which they had exhibited and which was lawfully terminated by the Plaintiffs on account of an evident material breach on their part. It was a cardinal principle that parties were bound by the terms of their contracts.

172. The Court of Appeal in the case of:- “Centurion Engineers & Builders Limited – Versus - Kenya Bureau of Standards (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR)” observed as follows: -

“As this Court has severally stated, and now a longstanding principle of law, that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts.”

173. Clearly, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in breach of the terms of the agreement by failing to pay the consideration as agreed. They even admitted having failed to pay the initial deposit as per the terms of the sale agreement. Hence, the Plaintiffs were empowered to rescind the sale agreement after giving the notices contemplated in the agreement which DW - 1 conceded were served upon them. Following the proper termination of the agreement on account of breach, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who through the evidence of DW - 1 admitted they had not taken over vacant possession had no right to attempt to forcibly and illegally take over possession. Indeed, the said agreement had stipulated proper dispute resolution mechanisms on any dispute arising from the agreement.

174. The Learned Counsel urged the Court to hold the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by their own admissions breached the sale agreement by among others failing to pay the agreed deposit of a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000.00/=). Further, they neglected numerous reminders and notices for compliance as envisaged in the sale agreement thus prompting the formal termination of the agreement as conceded in evidence by DW - 1.

175. This Court in dismissing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Counter - Claim should reiterate its dictum in its recent decision in “Bayusuf & another – Versus - Siraf Wings Limited (Environment and Land Case Civil Suit E006 of 2023) [2024] KEELC 6185 (KLR)” in which LL. Naikuni J held: -

“In the premises, there was a performance dispute arising from or relating to the Agreement between the parties. The dispute arose from a clear and conceded default by the Defendant on its obligation under the Agreement. The Plaintiffs issued the Defendant through its Advocate with a 21 days’ completion notice dated 16<sup>th</sup> December 2022. Further the Plaintiffs state that despite several demands, including the 21 Days’ Completion Notice dated 16<sup>th</sup> December, 2022, the Defendant has ignored, neglected and/or refused to settle the outstanding amount of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/-].

50. This suit is therefore necessary to protect the Plaintiffs’ interests. In Conclusion therefore, the Court finds the Defendant to have breached the



Agreement for Sale by failing to pay the deposit of Kenya Shillings Seven Million, Five Hundred (Kshs. 7,500,000/-) by the 16<sup>th</sup> December, 2022 as required.”

176. Fifthly, on whether the Counter - claim filed by the 4<sup>th</sup> Defendant was competent and merited. The Learned Counsel submitted that it could be deduced from the Court’s record and the pleading filed by the 4<sup>th</sup> Defendant that he was not the registered owner of the suit property. Indeed, he claimed that the suit property was lawfully owned and registered in favour of the 5<sup>th</sup> Defendant. Hence, the 4<sup>th</sup> Defendant was neither a beneficial owner nor a registered owner of the suit property. Therefore, he could not purport to institute proceedings claiming any interest unless vide a duly donated and registered power of attorney issued by a party claiming interest over the property. Eldoret ELC case of:- “Tara Singh Dogra Suing through Manmohan Singh Dogra – Versus - Elesh Chandrakant Gheewala (Kenyan) & 4 others [2018] KEELC 2502 (KLR)” while considering a similar matter where a director had sued on behalf of the company Odeny J noted thus: -

“The law is very clear about legal personality on who can sue and be sued. A company is a juristic person and is separate from its directors and shareholders. That is why in the beginning of this application an application to strike out the name of the 2<sup>nd</sup> Defendant from the suit was allowed by consent as he was sued together with the 3<sup>rd</sup> Defendant of which he was a director. Shareholders can sue if they lift the veil of the company which has not been done in this case. From the pleadings on record which are binding on the Plaintiff, the court is left with the Defendants minus the Plaintiff who has no capacity to sue the said Defendants. What happens in a case where there is no complainant? It goes without say that there is no case against the Defendants.”

177. It is settled law that parties are bound by their pleadings. The 4<sup>th</sup> Defendant having denied having any registered interest or claim over the suit property, it was legally untenable for him to purport to institute a counterclaim to challenge the propriety of the Plaintiffs interest either on his own behalf or on behalf of the 5<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant despite being a principal party in the matter and duly served with pleadings and represented opted not to file any pleadings in defence of the suit but relied on the pleadings filed by the 4<sup>th</sup> Defendant.

178. The Garissa High Court in the case of:- “Jimale & another – Versus - County Government of Wajir & 4 others [2023] KEHC 27369 (KLR)” while upholding a preliminary objection to the effect that directors did not have the locus standi to institute and maintain a suit on behalf of companies that are juristic persons and separate legal entities, JN Onyiego J held that: -

“It is trite that a company is a legal person. The law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In Salomon – Versus - Salomon Co (supra) Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words: ‘The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same bands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act’.”



179. Similarly, the Kitale ELC in the case of:- “Christopher Mutiambu Machimbo & 3 others – Versus - County Surveyor, Trans - Nzoia & 4 others [2022] eKLR” Dr.Iur Fred Nyagaka J observed thus: -

“The First Plaintiff stated that he was elected the Chairman of the Company and the other plaintiffs were members. They had no capacity to sue in their own individual capacities since the land in dispute was in the name of an incorporated company which has its own distinct legal standing separate from the members. Their role, if it would be proved that they were directors of the company or representatives duly authorized, was to swear affidavits and pleadings on behalf of the company upon authorization. Order 4 Rule 4 of the Civil Procedure Rules dictates so. It provides as follows:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

180. It was further instructive to note that the Counter - Claim was fatally defective and incompetent having been instituted by a party admittedly without proprietary interest or right on the suit property. Further, it was purportedly done on behalf of a juristic party with separate legal entity and a principal party in the proceedings. It was equally not accompanied by a verifying affidavit to demonstrate that the 5<sup>th</sup> Defendant authorized the filing of the alleged suit as required in law. Thus the Counter - Claim was defective and no substantive reliefs could be issued as there was no valid Counter - Claim on record.

181. To buttress this submission, the Learned Counsel relied on the case of: “Priska Onyango Ojuang’ & another – Versus - Henry Ojwang Nyabende [2018] eKLR” where the Environment and Land Court (S.M Kibunja J) dismissed an application to allow the filing of a verifying affidavit to a Counter - Claim at a stage where the parties had already closed their cases and the Plaintiff even filed their submissions held hereunder:-

“A Defendant filing a Counter - Claim is required to file a Verifying Affidavit at the time the Counter - Claim is filed, in the same way a Plaintiff is required to have his Complaint accompanied with a Verifying Affidavit at the stage of filing...

Where a claim is commenced through a plaint or counterclaim filed without an accompanying verifying affidavit in accordance with Order 4 Rule 1 (2) of Civil Procedure Rules, then such a claim is improperly before the court and is liable to be struck out on the court's own motion, or on being moved by a party to the proceedings.”

182. Even assuming the Counter - claim was competently on record, which was not the case, the Counsel opined that it would still be legally untenable and fit for dismissal or striking out. The 4<sup>th</sup> and 5<sup>th</sup> Defendants had not only failed to demonstrate the validity of their claim and records they rely upon but had also not demonstrated the nexus between their purported Grant and the original Grant CR 15048. No evidence was led to controvert the evidence by DW - 3 that their records had never existed at the lands office and the suit property was legally owned by the Plaintiffs.

183. They further relied on their preceding submissions herein and the 4<sup>th</sup> Defendant’s own admission that there was no evidence to show that either himself or the 5<sup>th</sup> Defendant executed a valid sale agreement with the purported vendor and whether they conducted any due diligence at the lands office to find out the status of ownership of the land as at year 2008. See this Court’s dictum in the case of “Muthami – Versus - Mutsongi & 2 others (Supra)”.



184. Similarly, in the Nyahururu ELC (Oundo J) case of “Anastasia Kingori & another – Versus - Stephen Muikamba [2019] eKLR” the Court while considering the import of Section 3(3) of the Law of Contract held that: -

“.....an existence of a duly executed Sale agreement by the parties is critical and expected and that there being no sale agreement between the 2<sup>nd</sup> Appellant and the Respondent and the sale of the suit land to the Respondent therefore became unattainable. See also the decision of Angote J in the case of Onyango – Versus - Opondo; Opondo (Plaintiff to the Counterclaim); Onyango & 2 others (Defendant to the Counterclaim) (Environment & Land Case 224 of 2018) [2024]KEELC 3617(KLR).”

185. The 4<sup>th</sup> Defendant also made adverse allegations of fraud against the Plaintiffs and termed their ownership records as illegal and forgeries. However, DW - 2 conceded in evidence that they had not tendered any evidence to demonstrate the alleged grounds of fraud. Further, despite the Court having granted parties leave to file any documents in reply to the defence and records filed by the 3<sup>rd</sup> Defendant, neither of the parties controverted the pleadings and evidence adduced by the 3<sup>rd</sup> Defendant which in essence corroborates the evidence tendered by the Plaintiffs and confirmed the validity of the interest held by the Plaintiffs.

186. In the absence of any evidence to the contrary, the Learned Counsel urged the Court to be guided and persuaded by the dicta in the cases of:- “Chief Land Registrar & 4 others – Versus - Nathan Tirop Koech & 4 others (Supra)” and “Moses Parantai & Peris Wanjiku Mukuru suing as the legal representative of the estate of Sospeter Mukuru Mbeere (deceased) – Versus - Stephen Njoroge Macharia (supra)” which it was respectively held that actions by public officials are deemed to have been regularly and legally performed unless contrary evidence was adduced and allegations of fraud are quasi criminal in nature and credible evidence must be adduced to prove the same. See the case of “Pankajkumar HemrajShah & another – Versus - Abbas Lali Ahmed & 5 others [2019] eKLR”.

187. The foregoing submissions show that the Counter - Claim as filed by the 4<sup>th</sup> Defendant was incompetent both in form and substance and should only suffer the inescapable fate of dismissal and or striking out with costs.

188. Sixthly, on what order should the Court issue to meet the ends of justice. The Learned Counsel submitted that the Plaintiffs had aptly submitted and made reference to specific evidence on record including those filed by the 3<sup>rd</sup> Defendant demonstrating that their interest over the suit property was pursuant to a lawful sale transaction that preceded the alleged purchase by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 3<sup>rd</sup> Defendant through the testimony of DW - 3 confirmed that the records supporting the Plaintiffs' ownership were in their custody unlike those filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whose origin was unclear and unexplained.

189. No tangible evidence had also been tendered or legal basis laid to cast any doubts on the legality of the records held and filed by the Chief Land Registrar relating to the contested ownership of the suit property and the lawful proprietors thereof. The Court of Appeal in the case of:- “Philemon L. Wambia – Versus - Gaitano Lusitsa Mukofu & 2 others (Supra)” observed:-

“...that the Court has a duty to uphold the sanctity of records held by the Chief Land Registrar unless tangible and uncontroverted evidence is tendered to cast doubt on the validity of such records.”



190. It was the submissions by the Counsel premised on the totality of the foregoing that the Plaintiffs had proved their case to the required standards as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. Thus, they are deserving of the Court's protection. The interest claimed by the 5<sup>th</sup> Defendant had equally been demonstrated to be invalid and anchored on quicksand without a clear root to the original Grant CR 15048. They prayed that the Court allowed the Plaintiffs' suit in terms of the amended Plaint and did proceed to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter - Claim as well as the 4<sup>th</sup> Defendant's Counter - Claim as they were unfounded and meritless.
191. Finally, on who should bear the cost of the suit and the Counter – Claim. The Learned Counsel submitted that in allowing the Plaintiffs' suit and dismissing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter - Claim as well as the 4<sup>th</sup> Defendant's Counter - Claim, the Plaintiffs urged this Court to be guided by the settled principle that costs must always follow events and award costs to the Plaintiffs. Were it not for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> and 5<sup>th</sup> Defendants' concerted illegal attempts to dispossess the Plaintiffs of the suit property, the filing of these proceedings would not had been necessary. No costs would therefore have been incurred in prosecuting the suit and defending the evidently baseless Counter - Claims.
192. The Learned Counsel urged the Court while considering the issue of costs to be guided by its recent ruling in the case of “Ocean Engineering Works Limited & another – Versus – SBM Bank of Kenya Limited (Civil Appeal 112 of 2021)[2024] KEELC 4724 (KLR)” in which LL. Naikuni J observed that:-

“It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 bolds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh - Versus - Tarcbalan Singh eKLR (2014)” and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).”

## **IX. Analysis and Determination**

193. I have carefully considered the parties' pleadings, testimonies, written submissions, plethora of cited authorities, and all documentary evidence, as well as the applicable provisions of *the Constitution* of Kenya, 2010, the statutory and case law. I shall address the issues sequentially as guided by their legal and factual complexity.
194. In order to reach an informed, fair, Equitable, reasonable and just decision in the subject matter, the Honourable Court has condensed the subject matter into the following seven (7) issues for its determination. These are: -
- a. Who between the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs and the 5<sup>th</sup> Defendant has demonstrated the validity of the title they hold over the suit property?
  - b. Who had demonstrated actual occupation of the suit property?
  - c. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants proved the allegations of fraud as against the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs to the required standards?
  - d. Whether the Counter - Claim filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is merited?
  - e. Whether the Counter - Claim filed by the 4<sup>th</sup> Defendants is competent and merited?
  - f. Whether the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs are entitled to the reliefs sought?



- g. Who should bear the costs of the suit and the Counter - Claims.

**Issue No. a). Who between the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs and the 5<sup>th</sup> Defendant has demonstrated the validity of the title they hold over the suit property;**

195. Under this sub-heading the Court is called upon to critically examine the central substratum of this case for determination being whether the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs or the 5<sup>th</sup> Defendant, Siwa Limited, hold valid title to the suit properties LR Nos. 22369/I/MN and 22370/I/MN.
196. First and foremost there is need to appreciate the legal jurisprudence and framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.
197. Fundamentally, it follows that the efficacy and effectiveness of registration of land, vesting indefeasible title, rights and interest on land by law, I am guided by the principles enshrined under the provisions of Article 40 (1) & ( 2 ) of *the Constitution* of Kenya, 2010, Sections 24, 25 and 26 of the *land registration Act*, No. 3 of 2012 thereof.
198. Article 40 ( 1 ) and ( 2 ) of *the Constitution* of Kenya, 2010 provides as follows:-
- 1). Subject to Article 65, every person has the right, either individually or in association with others , to acquire and own property:
    - a). of any description; and
    - b). in any part of Kenya.
  - 2). Parliament shall not enact a law that permits the State or any person:-
    - a). to arbitrary deprive a person of property of any description or of any interest in, or right over, any property or any description.
    - b). to limit, or in any way restrict the enjoyment of any right under the this Article on the basis of any of the grounds specified or contemplated in Article 27 ( 4 ).
199. Under the provision of Article 61 of *the Constitution* of Kenya, land in Kenya has been classified into three (3) categories. These are Public, Community or Private land. The Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods upon which there may be acquisition of land under the above categories.
- S. 7 Title to land may be acquired through:-
- i. Allocations;
  - ii. Land Adjudication process;
  - iii. Compulsory acquisition;
  - iv. Prescription;
  - v. Settlement programs;
  - vi. Transmissions;
  - vii. Transfers;
  - viii. Long term leases exceeding Twenty one years created out private land; or



- ix. Any other manner prescribed in the Act of Parliament.
200. Section 24 (a) of the [Land Registration Act](#), 2012 provides that:
- “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging thereto.”
201. Further, as provided by Section 25 of the said Act, his ownership cannot be defeated except as provided by the law. See the provision of Section 25(1) of [Land Registration Act](#):-
- “(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever,
202. Section 26(1) of the [Land Registration Act](#) 2012 provides that:-
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”
203. In the case of “Munyu Maina – Versus - Hiram Gathiha Maina (Supra)” the Court of Appeal held:-
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”
204. The Plaintiffs’ evidence satisfies the requirement in “Munyu Maina – Versus - Hiram Gathiha Maina [supra]”, where the Court of Appeal held that when the root of title is challenged, the registered proprietor must demonstrate the process of acquisition. The Plaintiffs did so by producing valid certificates and searches.
205. Now applying these legal principles to the instant case. From the record, it is evident that the Plaintiffs produced Certificates of Title registered in their names a process undertaken on 18<sup>th</sup> December 2018. They further tendered several Certificates of Official searches issued by the Chief Land Registrar on 2<sup>nd</sup> October 2020 and 1<sup>st</sup> December 2020 confirming their legal and absolute proprietorship. They traced their root of title to LR No. MN/I/1927, lawfully acquired from the previous registered proprietor and subsequently sub - divided to yield the suit properties.



206. On the other hand, the 5<sup>th</sup> Defendant, through the 4<sup>th</sup> Defendant, claimed ownership based on documents allegedly procured in its name. However, no valid registration in the 5<sup>th</sup> Defendant's favour was produced. The 4<sup>th</sup> Defendant admitted lacking proprietary interest. Fraud was alleged against the Plaintiffs but was not proved to the strict standard required in "Kinyanjui Kamau – Versus - George Kamau [2015] eKLR", the Court of Appeal observed that;

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo – Versus - Ndolo [2008] 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” (Emphasis mine)

207. The court in the case of “Patel & another – Versus - MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)” observed as follows;

“It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.”

The court went on further to say:

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

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

208. The Court of Appeal in the case of “Ardhi Highway Developers Limited – Versus - West End Butchery Limited & 6 others [2015] eKLR” as cited in “Hebron Orucho Gisebe & 2 others – Versus - Joseph Ombura Gisebe & another [2022] eKLR” in considering the issue of fraud observed as follows: -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427: “Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford – Versus - Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune – Versus - Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence – Versus - Lord Norreys [1880] 15 App. Case. 210 at 221). It is not allowable to



leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy – Versus - Garrett [1878] 7 ch. D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

209. Similarly, in the case of:- “Kuria Greens Limited – Versus - Registrar of Titles & Another [2011] eKLR”, the High Court affirmed that courts will cancel titles obtained through fraud or irregularity to protect genuine proprietors.
210. Applying these principles to the instant case, the Plaintiffs’ titles are supported by official searches and a clear chain of acquisition. The 5<sup>th</sup> Defendant’s alleged titles are tainted by duplicity, lack of registration, and failure to demonstrate lawful acquisition.
211. Consequently, the Honourable Court strongly finds and holds that that the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs have demonstrated bearing valid and indefeasible title, rights and interest over the suit land under the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. On the contrary, the purported titles held by the 5<sup>th</sup> Defendant are found to be invalid and voidable and ought to be subjected to cancellation and the rectification of the register under the provision of Sections 79 ( 1 ) and 80 of the Act. Accordingly, the Court declares that the Plaintiffs are the lawful proprietors of LR Nos. 22369/I/MN and 22370/I/MN, and any titles held by the 5<sup>th</sup> Defendant are hereby cancelled forthwith.

**Issue No. b). Who had demonstrated actual occupation of the suit property.**

212. Under this sub-heading the Court has considered the evidence tendered by both parties regarding possession and occupation of the suit properties LR Nos. 22369/I/MN and 22370/I/MN. The 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs adequately and consistently pleaded and testified by adducing empirical documentary and oral evidence that they legally and properly acquired the original parcel MN/I/1927, lawfully sub – divided it. Indeed, they have since taken and remained in physical possession of the resultant sub - divisions. These issues were never rebutted at all. PW - 1 confirmed that they had developed the land, conducted searches, and continued to enjoy quiet occupation until the Defendants’ interference.
213. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on a sale agreement dated 18<sup>th</sup> November 2019, under which they paid a deposit. However, as evidenced that there was outright breach of the agreement. For instance, from the contents of Clause 1(b) of the agreement expressly provided that vacant possession would only be granted upon full payment of the purchase price. The balance was never paid o an explanation that the financing was not secured. The completion documents were not furnished.
214. It follows that the Defendants never lawfully obtained possession. Therefore, their entry onto the suit land, advertising it for sale, and sending agents to prevent the Plaintiffs’ use amounted to sheer acts trespass. In the case of:- “Wambugu – Versus - Njuguna [1983] KLR 172”, the Court heldthat possession inconsistent with the rights of the registered owner constitutes trespass. The Plaintiffs’ testimony was consistent and corroborated by documentary evidence, including official searches confirming their registration. I discern that the Defendants’ claim of occupation was contractual and anticipatory, not factual.
215. Accordingly, the Court finds that the Plaintiffs have demonstrated actual occupation of the suit properties. The Defendants’ presence was unlawful, arising from an aborted transaction, and therefore amounted to trespass rather than legitimate possession.



**Issue No. c). Has the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants proved the allegations of fraud as against the Plaintiffs to the required standards:**

216. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants pleaded that the Plaintiffs procured their titles fraudulently and sought cancellation thereof. Legally speaking, the Court must therefore determine whether fraud was proved to the required legal standard. The provision of Section 26 (1) of the [Land Registration Act, No. 3 of 2012](#) provides that a certificate of title is prima facie evidence of ownership and can only be impeached on grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme.
217. The issue on fraud has been exhaustively deliberated by high Court. Thus, I need not re – invent the wheel. The jurisprudence is settled that fraud must be specifically pleaded and strictly proved. However, I will cite a few cases herein. For instance, in the case of:- “Kinyanjui Kamau – Versus - George Kamau [Supra]”, the Court of Appeal held that allegations of fraud are serious and must be proved to a standard higher than a balance of probabilities, though not as high as beyond reasonable doubt.
218. Similarly, in the case of:- “Arthi Highway Developers Ltd – Versus - West End Butchery Ltd & Others [Supra]”, the Court emphasized that fraudulent titles cannot confer ownership, but the burden of proof lies squarely on the party alleging fraud.
219. It was held by the Court of Appeal in the case of “Vijay Morjaria – Versus - Nansingh Madhusingh Darbar (Supra)” that:-
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* [1878] 7 Ch. D 473 at 489.”
220. In the case of:- “Kuria Kiarie and 2 others – Versus - Sammy Magera [2018] eKLR” the Court of Appeal held the claim on fraud was still born for lack of evidence and that mere allegations of fraud and illegality did not suffice.
221. A pleader for fraud and illegality requires sufficient evidence to justify his pleadings. It is not enough to allege and or suggest fraud or illegality.
222. In the case of:- “Boniface Onyango Okhango – Versus - Beatrice Anyango Ojiambo and another (2019) eKLR” the court held the burden to proof fraud never shifts and he who alleges must prove. Further the court held a party who says the land consent and the transfer were fraudulent must not want the court to wish away all this and assume that no such documents were taken to the lands office.
223. In the present case, while the Defendants alleged duplicity of titles and irregularities in registration, they failed to produce cogent and empirical evidence linking the Plaintiffs to any fraudulent conduct. The Plaintiffs, on the other hand, produced Certificates of Title and official searches issued by the Chief Land Registrar confirming their ownership. No documentary or testimonial evidence was adduced to demonstrate that the Plaintiffs procured their titles through fraud, misrepresentation, or illegality.
224. The 4<sup>th</sup> Defendant admitted that he was not the registered owner of the suit properties and lacked proprietary interest. The 5<sup>th</sup> Defendant’s claim was premised on documents allegedly procured in its



- name, but no valid registration was produced. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' reliance on the aborted sale agreement does not amount to proof of fraud in acquisition of title.
225. Guided by the case of "Kinyanjui Kamau (Supra)" and "Arthi Highway Developers (Supra)", the Court finds that the Defendants have not discharged the burden of proof required to impeach the Plaintiffs' titles. Mere suspicion or assertion without credible evidence cannot suffice.
226. They needed to avail evidence as per the provision of Sections 107, 108, 109 and 112 of the Evidence Act, Cap. 80. It was not the duty of the Plaintiffs to disapprove the allegations but the Defendants to substantiate them through evidence. In the absence of such evidence I am persuaded to find that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants failed on the aspect of fraud against the Plaintiffs.
227. Accordingly, the Court holds that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have not proved the allegations of fraud against the Plaintiffs to the required standard. The Plaintiffs' titles remain valid and indefeasible under the provision of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. Fundamentally, though fraud was alleged but not proved. The Plaintiffs' titles stand unimpeached, and the Defendants' claims outrightly collapse for want of evidence.

**Issue No. d). Whether the Counter - Claim filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is merited?**

228. Under this sub-heading the Court is called upon to examine merits of the Counter - Claim instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter - Claim was premised on an aborted sale agreement terms and conditions stipulated thereof dated 18<sup>th</sup> November 2019, under which they alleged to have paid a deposit of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-). Surprisingly, although they have pleaded fraud in the matter, but at the same time they sought specific performance compelling the Plaintiffs to release completion documents, or in the alternative, refund of the deposit with interest, together with damages for breach of contract.
229. Clause 1(b) of the sale agreement expressly provided that vacant possession would only be granted upon full payment of the purchase price. The Defendants admitted that the outstanding balance of the purchase price being a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/-) was never paid, as financing from Family Bank was not secured. They further admitted that the Plaintiffs had furnished some but not all completion documents, and that the Land Registrar raised concerns about duplicity of titles.
230. The Law of Contract Act, Cap. 23 and Land Law, No. 36 of 2012 clearly stipulates the requirements for valid instrument to convey an interest in land. Section 3(3) of the Law of Contract, stipulates that:  
No suit shall be brought upon a contract for the disposition of an interest in land unless –
- a. The contract upon which the suit is founded –
    - i. Is in writing;
    - ii. Is signed by all the parties thereto; and
  - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
231. While Section 38(1) of the Land Act, No. 6 of 2012 states:-
- “ Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land –
- a. The contract upon which the suit is founded –



- i. Is in writing;
    - ii. Is signed by all the parties thereto; and
  - b. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
232. Under the provision of Section 3(3) of the *Law of Contract Act*, Cap. 23, contracts for the disposition of land must be in writing, signed by the parties, and attested. While the agreement was validly executed, performance was conditional upon payment of the full purchase price and provision of completion documents.
233. In Harris JA in “Garvey – Versus – Richard (2011) JMCA 16” the court in considering the essential components of a contract reflected the following principals;
- “It is a well – settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, there basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”
234. The Defendants did not demonstrate compliance with their obligations under the agreement.
235. Specific performance is an equitable remedy granted only where the party seeking it has performed or is ready and willing to perform their part of the bargain. In the case of:- “Reliable Electrical Engineers Limited – Versus - Mantrac Kenya Ltd [2006] eKLR”, the Court held that a party in breach cannot obtain specific performance. The Defendants, having failed to pay the balance of the purchase price, cannot compel the Plaintiffs to transfer the property.
236. The Defendants also sought damages for breach of contract. However, the evidence shows that the transaction was frustrated by their inability to secure financing from a financial institution, not by any fraudulent conduct of the Plaintiffs. In the case of:- “National Bank of Kenya Ltd – Versus - Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR”, the Court emphasized that courts cannot rewrite contracts for parties. The Plaintiffs were under no obligation to transfer the property without full payment.
237. The Plaintiffs further raised the issue of jurisdiction, pointing to the arbitration clause in the sale agreement. This Court agrees that disputes arising from the aborted transaction ought to have been referred to arbitration in accordance with the parties’ agreement. Therefore, the Counter - Claim is not only unmerited but also procedurally defective.
238. Accordingly, the Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ counterclaim is not merited. They failed to prove entitlement to specific performance, refund, or damages. The counterclaim is dismissed with costs. In a nutshell, the Counter - Claim filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants collapses for want of merit, proof, and jurisdiction. Thus, it is dismissed in its entirety.

**Issue No. e). Whether the Counter - Claim filed by the 4<sup>th</sup> Defendant is competent and merited.**

239. Under this sub – heading, the Court shall examine the merits of the 4<sup>th</sup> Defendant’s Counter - Claim. The 4<sup>th</sup> Defendant filed a Counter - Claim alleging that the Plaintiffs procured fraudulent titles



- and sought cancellation thereof, asserting that the suit properties belonged to Siwa Limited (the 5<sup>th</sup> Defendant), of which he is a director and shareholder.
240. The Court must first consider whether the 4<sup>th</sup> Defendant has “locus standi” to institute the Counter - Claim. It is trite law that only a registered proprietor or a person with a recognizable proprietary interest may sustain a claim over land. In the case of:- “Alfred Njau & Others – Versus - City Council of Nairobi [1983] eKLR”, the Court of Appeal held that locus standi denotes the right to appear and be heard in court. The 4<sup>th</sup> Defendant admitted that he is not the registered owner of the suit properties. His claim is premised solely on his directorship in Siwa Limited, which itself is not the registered proprietor for the suit land.
241. The provision of Section 26(1) of the Land Registration Act, No. 3 of 2012 provides that a Certificate of Title is “a prima facie evidence” of ownership, impeachable only on grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. I reiterate on the principle of “the Burden of Proof” based on the provision of Sections 107, 108, 109 and 110 of the Evidence Act, Cap. 80 which lies squarely on the party alleging fraud.
242. In the case of:- “Kinyanjui Kamau – Versus - George Kamau [Supra]”, the Court of Appeal emphasized that fraud must be specifically pleaded and strictly proved to a standard higher than a balance of probabilities. The 4<sup>th</sup> Defendant pleaded fraud but failed to produce cogent evidence linking the Plaintiffs to any fraudulent conduct in the acquisition of their titles.
243. The Plaintiffs, on the other hand, produced Certificates of Title and official searches issued by the Chief Land Registrar confirming their ownership. Their case was solidly supported and corroborated by the comprehensive and authentic evidence by DW – 3, the land registrar who is the custodian of all records pertaining to the suit land. Juxtapose, the 4<sup>th</sup> Defendant did not demonstrate any procedural irregularity or illegality in the registration process. His allegations remained bare assertions without evidentiary support.
244. The Counter - Claim is further defective for want of locus standi. A director of a company cannot sue in his personal capacity to enforce rights allegedly belonging to the company. In “Salomon – Versus - Salomon & Co Ltd [1897] AC 22”, the House of Lords affirmed the principle of corporate personality: a company is distinct from its directors and shareholders.
245. In the case of “Law Society of Kenya – Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000”, as follows:-
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others – Versus - City Council of Nairobi [1982] KAR 229, the Court also held that:-
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
246. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the Court.
247. I will at this point pause to discuss what a Company is. In simple terms, a limited liability company is a legal person having separate existence from its shareholders. It can sue and be sued in its own name.



Once a company is incorporated it exist as a legal person from that date of incorporation; it can acquire its own property, and has rights and liabilities separate from those of its members. Simply put, it is a juristic person. This was enunciated in the seminal case of “Salomon – Versus - A Salomon & Co Ltd [1896] UKHL 1, [supra]”.

248. In the case of:- “Amin Akberali Manji & 2 others – Versus - Altaf Abdulrasul Dadani & another [2015] eKLR” the Court of Appeal discussed at length the issue of locus in relation to a limited liability company. It held thus:-

“..... The centuries-old case of Salomon – Versus - Salomon Company Limited [1895-99] All ER 33 laid that principle to rest. There is also no argument that the proper Plaintiff in any proceedings or action in respect of a wrong done to the company, is the company itself. Again, that was established over 160 years ago in Foss – Versus - Harbottle [1843] 67 ER 189 (the Foss case), popularly referred to in company law as “the rule in Foss v. Harbottle” (the rule). The rule was restated by Jenkins L. J. in the case of Edwards – Versus - Halliwell [1950] All ER 1064 as follows:-

“The rule in Foss – Versus - Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

In essence the rule established two principles. The first is the “proper Plaintiff principle” and the second is “the majority principle”. Through the former, a wrong done to the company may be vindicated by the company alone. On the second principle, if the alleged wrong can be confirmed or ratified by a simple majority then a shareholder is barred from bringing an action. The principal effect in the rule is to bar actions by minority shareholders.

This Court and others in this country have indeed cited and followed the Foss case and others which came after it, as good law. The cases of Rai and Others – Versus - Rai and Others [2002] 2 EA 537 and Grace Wanjiru Munyinyi & Another – Versus - Gedion Waweru Githunguri & 5 others [2011] eKLR were cited before us to confirm that the rule in Foss case still stands in Kenya. In a recent case, Arthi Highway Developers Ltd – Versus - Westend Butchery Ltd & 6 Others Civil appeal No. 246 of 2013 this Court followed the summing up of the rule by Lord Denning M.R in Moir – Versus - Wallerstainer [1975] 1 All ER 849 at pg 857, thus:-

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. (Emphasis mine by underlining). Such is the rule in Foss V. Harbottle [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”

249. From the cases cited above, it is without a doubt that a company has the perpetual succession body corporate and legal capacity to sue and be sued on its own name and capacity as an artificial, legal person. A company comprises of directors who are empowered to conduct the business of the company



on its behalf as authorized under the company's seal. In a situation where the company intends to institute a suit, a Board's resolution has to be made to that effect. One or more directors may be authorized to plead on behalf of the company. The authorization must be in writing. In the instant case, if Siwa Limited had any claim, it ought to have been instituted by the company itself, not by the 4<sup>th</sup> Defendant personally.

250. The present Counter - Claim has been instituted by the 4<sup>th</sup> Defendant who refers himself as the director of the 5<sup>th</sup> Defendant. He has no capacity to sue in his own capacity since the land in dispute was in name of an incorporated company which has its own distinct legal standing separate from the members. His role, if it would be proved that he was the director of the company or a representative duly authorized was to swear the affidavits and pleadings on behalf of the 5<sup>th</sup> Defendant upon authorization. The provision of Order 4 Rule 4 of the Civil Procedure Rules, 2010 dictates so. It provides as follows:-

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

251. I find that the 4<sup>th</sup> Defendant purported to institute the Counter - Claim on behalf of an entity which had the right to do so and in as much it was joined in this suit never bothered to file its own documents and chose to rely on those filed by the 4<sup>th</sup> Defendant which Counter - Claim was defective ab initio.

252. Thus, guided by these principles, the Court finds that the 4<sup>th</sup> Defendant's Counter - Claim is both incompetent and unmerited. It fails for lack of locus standi, want of proof of fraud, and absence of any proprietary interest in the suit properties. The 4<sup>th</sup> Defendant's Counter - Claim is incompetent and unmerited. He lacked locus standi, failed to prove fraud to the required standard, and did not establish any proprietary interest in the suit properties. Accordingly, the 4<sup>th</sup> Defendant's Counter - Claim is dismissed with costs.

#### **Issue No. f). Whether the Plaintiffs are entitled to the reliefs sought**

253. Under this sub-heading the Court is called upon to examine whether, in light of the findings the Plaintiffs are entitled to the reliefs sought. The Plaintiffs prayed for the following reliefs:-

- a. A declaration be and is hereby issued that the Plaintiffs are the lawful owners and are entitled to exclusive possession and use of the suit properties known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa to the exclusion of the Defendants herein.
- b. A permanent injunction be and is hereby issued restraining the Defendants either by themselves, their agents or servants or otherwise howsoever from trespassing onto, remaining onto, disposing of, transferring, leasing, interfering with and/ or in any manner whatsoever dealing with all the parcels of land known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa.
- c. A permanent injunction against the Defendants prohibiting them whether by themselves, their agents or servants from entering upon, remaining upon, disposing of, transferring, occupying, leasing, charging, assigning or interfering with the Plaintiffs' ownership and quiet possession of the suit properties known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa.
- d. An order for damages for trespass against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
- e. Costs of the suit.



- f. A declaration that the 4<sup>th</sup> and 5<sup>th</sup> Defendants does not hold valid and legal title documents over the suit properties known as Land Reference numbers 22369/I/MN and 22370/I/MN-situated in Mombasa and is are not entitled to ownership and occupation thereof and the purported title documents stand revoke.
254. The Plaintiffs seek declaratory reliefs affirming their ownership of the suit land (LR Nos. 22369/I/MN and 22370/I/MN), permanent injunctions restraining the Defendants from interference, damages for trespass, and cancellation of alleged fraudulent titles held by the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
255. The evidence before Court demonstrates that the Plaintiffs are the legally and absolute registered proprietors of the suit properties, with all the indefeasible rights, interest and title vested in them by law. This was them having acquired them lawfully from the previous owner and subsequently sub - divided them. Certificates of Title and official searches issued by the Chief Land Registrar confirm their proprietorship. Indeed, these facts are adequately corroborated by the evidence of DW – 3 the Land Registrar, Mombasa. Under the provision of Sections 24 and 25 of the [Land Registration Act, 2012](#), registration vests absolute ownership in the Plaintiffs together with all rights and privileges appurtenant thereto.
256. The Defendants challenged the Plaintiffs’ titles on grounds of fraud. However, as already determined, fraud was not proved to the required standard set out in “Kinyanjui Kamau – Versus - George Kamau [Supra]”. The Plaintiffs’ titles therefore remain valid and indefeasible under Section 26(1) [Land Registration Act, No. 3 of 2012](#).
257. The Plaintiffs also demonstrated actual occupation of the suit properties. The Defendants’ entry and advertisements amounted to trespass, actionable per se, as held in “Wambugu – Versus - Njuguna [Supra]”. The Plaintiffs are therefore entitled to damages for trespass.
258. The relief of cancellation of fraudulent titles is merited. Pursuant to the provision of Section 80 of the [Land Registration Act](#), which provides that: -
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
259. In the case of “Kenya Anti-Corruption Commission – Versus - Online Enterprise Limited Kisumu ELC number 708 of 2015” as cited in “Baishe – Versus - Bwana (Environment & Land Case 229 of 2021) [2023] KEELC 19129 (KLR) (27 July 2023) (Judgment)” the court stated that:-
- “The court is also empowered under section 80 (1) of the [Land Registration Act](#), to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the Defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand.” Emphasis mine.
260. From the above legal assertion, it is clear that in order for a party to succeed in a claim for rectification of a register of land, they must prove that the entries made therein were obtained, made or omitted



by fraud or mistake. As already stated the umpteenth times above, the provisions of Sections 107, 108 & 109 of the *Evidence Act*, Cap. 80 places the burden of proof on the person who wishes the court to believe a certain fact. The purported titles held by the 4<sup>th</sup> and 5<sup>th</sup> Defendants are invalid and must be cancelled.

261. The relief of permanent injunction sought is also justified. A permanent injunction is an equitable remedy issued by the Court to restrain a party from engaging in unlawful conduct and to protect proprietary rights on a continuing basis. Unlike interlocutory injunctions, which are temporary and granted pending trial, a permanent injunction is granted after full hearing and determination of the issues, and it conclusively settles the rights of the parties.
262. The Plaintiffs sought a permanent injunction to restrain the Defendants from trespassing upon, disposing of, transferring, leasing, charging, or otherwise interfering with their quiet possession of the suit properties. The evidence demonstrates that the Defendants unlawfully entered the land, advertised it for sale, and attempted to dispossess the Plaintiffs.
263. The principles governing injunctions were laid down in “Giella – Versus - Cassman Brown & Co. Ltd [1973] EA 358”:
  - a. The applicant must establish a prima facie case with a probability of success.
  - b. The applicant must demonstrate that they would suffer irreparable harm if the injunction is not granted.
  - c. If the Court is in doubt, it will decide the matter on a balance of convenience.
264. The Plaintiffs have shown that unless restrained, the Defendants will continue interfering with their proprietary rights. In the famous case of:- “Mrao Ltd – Versus - First American Bank of Kenya Ltd [2003] KLR 125”, the Court held that a prima facie case is established where proprietary rights are threatened. Similarly, in “Nguruman Ltd – Versus - Jan Bonde Nielsen & Others [2014] eKLR”, the Court emphasized that once a prima facie case and irreparable harm are established, the injunction must issue.
265. If the Court is in doubt, it will decide the matter on a balance of convenience. The Plaintiffs further demonstrated that unless restrained, the Defendants’ conduct would expose them to irreparable harm, including loss of property, violent dispossession, and interference with their constitutional right to property under Article 40 of *the Constitution*. Monetary compensation alone would not suffice to protect these rights.
266. The balance of convenience also tilts in favour of the Plaintiffs, who are the registered proprietors and in actual occupation. The Defendants, having failed to prove any valid proprietary interest, stand to suffer no prejudice if restrained from interfering with land they do not own.
267. Guided by these principles, in the instant case, the Court finds that the Plaintiffs being the legally and absolute registered proprietors of the suit land, have satisfied the requirements for grant of a permanent injunction. By all means possible, the Defendants must be restrained to prevent further trespass, fraudulent dealings, and interference with the Plaintiffs’ quiet possession. The permanent injunction is necessary to protect the Plaintiffs’ proprietary rights, prevent irreparable harm, and uphold the constitutional guarantee under the provision of Article 40 ( 1 ) & ( 2 ) of *the Constitution* of Kenya, 2010. It ensures that the Defendants, having failed to prove any lawful interest, are barred from interfering with the suit properties on a continuing basis.



268. Further, the Plaintiffs prayed to awarded damages for trespass. Trespass to land is a civil wrong consisting of any unjustifiable intrusion by one person upon land in the possession of another. It is actionable per se, meaning that the mere act of unlawful entry constitutes trespass, even if no actual damage is proved. The provision of Section 24 (a) of the [Land Registration Act](#) No. 3 of 2012 provides for the interests a person acquires upon registration of land and states;
- “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and”
269. Section 25 provides for the rights of such a proprietor and states that:-
- “The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
270. The provision of Section 152 A of the [Land Act](#) No. 6 of 2012 prohibits unlawful occupation of land and states that “A person shall not unlawfully occupy private, community or public land.”
271. The above rights, interests and privileges accorded to a registered proprietor of land apply to the Plaintiffs in this case having established that they are the proprietors of the suit properties.
272. Black’s Law Dictionary 10th Edition at pg. 1642 defines trespass as unlawful acts committed against the person or property of another especially wrongful entry of another’s land.
273. The provision of Section 3 (1) of the [Trespass Act](#), Cap. 294 provides that:
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
274. In the present case, the Plaintiffs testified that they were in actual possession of the suit properties, having lawfully acquired and subdivided them. They produced Certificates of Title and official searches confirming their ownership. Their evidence was consistent and corroborated by documentary proof and particularly the evidence by DW – 3, the Land Registrar, Mombasa.
275. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants admitted entering the suit properties and even advertising them for sale, relying on an aborted sale agreement. However, Clause 1(b) of that agreement expressly provided that vacant possession would only be granted upon full payment of the purchase price. The Defendants never paid the outstanding balance of the purchase price being a sum of Kenya Shillings Fifty Million (of Kshs. 50,000,000/-), nor did they secure financing. Their entry was therefore unauthorized.
276. The Plaintiffs further testified that the Defendants sent armed agents to the properties to prevent their peaceful enjoyment and attempted to sell the land to unsuspecting third parties. Such conduct amounts to aggravated trespass, as it not only infringed proprietary rights but also threatened violence and dispossession.
277. The law is clear that possession inconsistent with the rights of the registered owner constitutes trespass. In the case of:- “Wambugu – Versus - Njuguna [Supra]”, the Court held that any occupation without the consent of the owner is unlawful. Similarly, in “Philip Ayaya Aluchio – Versus - Crispinus Ngayo



- [2014] eKLR”, the Court emphasized that trespass is actionable without proof of damage, and damages are at large to vindicate the owner’s rights.
278. The 4<sup>th</sup> and 5<sup>th</sup> Defendants also laid claim to the suit properties based on alleged titles. However, as determined earlier, those titles were invalid and void. Their interference with the Plaintiffs’ occupation therefore equally amounted to trespass.
279. The Plaintiffs have demonstrated that the Defendants’ actions disrupted their quiet possession, interfered with potential development, and exposed them to risk of dispossession. The Defendants’ conduct was deliberate, unlawful, and aggravated.
280. Guided by the authorities, the Court finds that the Defendants’ entry and interference with the suit properties constituted trespass. The Plaintiffs are entitled to damages to vindicate their proprietary rights and deter similar conduct.
281. Having established that the Plaintiffs are the lawful registered proprietors of the suit properties, the Court must now address the consequences of the Defendants’ unlawful entry and interference. Trespass is a strict liability tort: once unlawful entry is proved, liability attaches regardless of whether damage is shown.
282. The Plaintiffs testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered the land, erected posters advertising it for sale, and sent armed agents to intimidate them. The 4<sup>th</sup> and 5<sup>th</sup> Defendants also laid claim to the properties on the strength of invalid titles. These actions disrupted the Plaintiffs’ quiet possession and amounted to aggravated trespass.
283. In “Wambugu – Versus - Njuguna [Supra]”, the Court held that possession inconsistent with the rights of the registered owner constitutes trespass. Similarly, in “Philip Ayaya Aluchio – Versus - Crispinus Ngayo [Supra]”, the Court emphasized that trespass is actionable per se, and damages are at large to vindicate proprietary rights. The Court of Appeal in the case of:- “Kenya Hotel Properties Limited – Versus - Willesden Investments Limited [2009] eKLR” further clarified that damages for trespass may include mesne profits where unlawful occupation deprives the owner of use. Mesne profits are defined under Section 2 of the [Civil Procedure Act](#) as profits accrued during wrongful possession.
284. In the present case, the Plaintiffs did not demonstrate that the Defendants derived rental income or commercial benefit from the land. However, they did prove interference with their peaceful occupation and potential development. The Defendants’ conduct was deliberate, aggravated, and calculated to dispossess the Plaintiffs.
285. Guided by the authorities, the Court finds that the Plaintiffs are entitled to:
- a. General damages for trespass: o vindicate their proprietary rights and deter similar conduct.
  - b. Mesne profits, only if evidence of actual loss of rental income or use value is established. In this case, no such evidence was tendered, and therefore mesne profits are not awarded.
286. Taking into account the size, location, and commercial value of the suit properties in Mombasa, and the aggravated nature of the trespass, the Court assesses general damages at Kenya Shillings Five Million (Kshs. 5,000,000/-). This figure reflects both compensation for infringement and deterrence against fraudulent dealings in land. The Defendants’ actions amounted to aggravated trespass. Thus, the Plaintiffs are entitled to general damages of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-), but not mesne profits due to lack of evidence of actual income loss. Permanent injunctions are necessary to restrain further interference.



287. The Plaintiffs are entitled to all the reliefs sought — declarations of ownership, permanent injunctions, cancellation of fraudulent titles, damages for trespass, and costs of the suit.

288. Accordingly, the Honourable Court finds that the Plaintiffs have proved their case on a balance of probabilities and are entitled to the reliefs sought in the Amended Amended Plaintiff.

ISSUE No. e). Who bears the costs of the suit and the Counterclaims

289. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

290. In “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held:-

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

291. In the present case, the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs have succeeded in establishing their ownership of the suit properties, proved trespass, and obtained the reliefs sought. Conversely, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have failed to prove fraud, their Counter - Claims have been dismissed, and their actions have been found unlawful.

292. The Plaintiffs were compelled to institute these proceedings to protect their proprietary rights under Article 40 of *the Constitution*. They have also had to defend against unmerited counterclaims. In “Supermarine Handling Services Ltd – Versus - Kenya Revenue Authority [2010] eKLR”, the Court of Appeal reiterated that costs are not a punishment but a means of indemnifying the successful party.

293. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants shall bear the costs of the suit and the Counter - Claim, payable to the Plaintiffs, together with interest at court rates. Accordingly, the Court finds that the Plaintiffs are entitled to the costs of the suit and of defending the Counter - Claims. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, having failed in their claims and Counter - Claims, shall bear the costs jointly and severally of both the Plaintiff and the two Counter - Claims.

## X. Conclusion and Disposition

294. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs



have established his case against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs, and against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, in respect to the Amended Amended Plaint dated 26<sup>th</sup> March 2021 and filed on the same day, the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs' claim having been proved on a balance of probabilities.
- b. That for avoidance of doubt, accordingly, having considered the pleadings, evidence, submissions, and applicable law, the Court makes the following orders:
  - i. the joint Defence and Counter - Claim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 12<sup>th</sup> February, 2021 be and is hereby found to lack merit and hence it is hereby dismissed with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs jointly and severally.
  - ii. the Defence and Counter - Claim by the 4<sup>th</sup> Defendant dated 11<sup>th</sup> February, 2021 be and is hereby found to lack merit and hence it is hereby dismissed with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs for the same being incompetent and for lack of locus standi.
- c. That a declaration be and is hereby issued that the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs are the absolute and lawfully registered proprietors of LR Nos. 22369/I/MN and 22370/I/MN situated in Mombasa with all the indefeasible rights, title and interest on it vested in law, and are entitled to exclusive possession and use thereof to the exclusion of the Defendants.
- d. That a permanent injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, whether by themselves, their agents, servants, or assigns, from trespassing upon, remaining on, disposing of, transferring, leasing, charging, occupying, or in any manner interfering with the Plaintiffs' quiet possession and enjoyment of the suit properties.
- e. That pursuant to Section 80 (1) & (2) of the *Land Registration Act*, No. 3 of 2012, any purported titles held by the 4<sup>th</sup> and 5<sup>th</sup> Defendants over the suit properties be and are hereby declared null and void and hence to be forthwith cancelled. The Chief Land Registrar shall rectify the register accordingly.
- f. That the Plaintiffs are awarded general damages for trespass against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally, assessed at Kenya Shillings Five Million (Kshs. 5,000,000/-).
- g. That the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs shall have the costs of the suit and of defending the counterclaims, together with interest at court rates, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants bearing the same jointly and severally.

It is so ordered accordingly

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 6<sup>TH</sup> DAY OF FEBRUARY 2026.**

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

Judgement delivered in the presence of: -

M/s. Firdaus Mbula – the Court Assistant.



M/s. Morara Advocate holding brief for Mr. Odunga Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs.

Mr. Kirui Advocate for the 4<sup>th</sup> & 5<sup>th</sup> Defendants.

No appearance for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.

