

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO. 1123 OF 2015

EUNICE WAIRIMU MUTURI 1ST
PLAINTIFF WASHINGTON MUCHIRI MUTURI
..... 2ND PLAINTIFF

VERSUS

G.M MUKUU 1ST
DEFENDANT DIRECTOR OF SURVEY
..... 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD
DEFENDANT
HON. ATTORNEY GENERAL 4TH
DEFENDANT
MWANGI THUO HOLDING LIMITED 5TH
DEFENDANT

JUDGMENT

Background

1. Vide an Amended Plaint dated 26th June, 2018, the Plaintiff seeks the following reliefs:

- a) ***A declaration that amalgamation of Land Reference Numbers 209/1832/1 and 209/2678 is null and void.***
- b) ***An order directing the 1st Defendant to return and/or surrender original deed plan, lease and certificate of title to the 2nd and 3rd Defendants for cancellation.***

- c) An order directing the 2nd and 3rd Defendants jointly and severally to disamalgamate Land Reference number 209/1832/1 from Land Reference number 209/8384 and further re-amalgamate Land Reference number 209/1832/1 to Land Reference number 209/1832 to retain the original land reference number 209/1832 measuring fourteen-point three square metres (14.3m²).**
- d) General and punitive damages for trespass and conversion.**
- e) A permanent injunction restraining the 1st Defendant, his servants, employees and/or agents from entering, trespassing, selling, charging, mortgaging, transferring, leasing and/or dealing in any manner whatsoever with all that parcel of land formerly known as Land Reference number 209/1832/1 now comprised in Land Reference Number 209/8384.**
- f) Costs and interest.**

2. It is the Plaintiffs' case that on or about 23rd September 2003, the late Gerald Muturi Maina entered into a transaction for the purchase of all that parcel of land known as Land Reference Number 209/1832 from the then registered proprietor, Mavji Ramji Patel.

3. A dispute subsequently arose between the parties, culminating in the institution of proceedings in the High

Court. In a judgment delivered on 22nd July 2013, in **HCCC No. 586 of 2005**, the court entered judgment against the vendor and issued an order of specific performance compelling him to transfer the entire property to the Estate of the late Gerald Muturi Maina.

4. Following the issuance of the decree, the Plaintiffs state that on or about 8th July 2014, they presented a transfer for registration, the same having been executed by the Deputy Registrar of the High Court on behalf of the vendor in compliance with the court order, and that all requisite statutory fees and charges were duly paid.
5. On the 31st July 2014, the 3rd Defendant rejected, declined and/or refused to effect the said transfer in favour of the Plaintiffs citing the following reasons; that the file is not clear as there are mortgages registered against the title; the term (tenure) has expired and has not been renewed (i.e 99 years from 1.9.1903) and the caveat registered against the title has not been withdrawn and that the court order has not been lifted.
6. As a consequence of the aforesaid decision, the Plaintiffs state that they instituted **JR Misc. Civil Application No. 307 of 2014** against the 3rd Defendant seeking orders of certiorari and mandamus. They aver that on 24th February 2015, the court referred the matter back to the 3rd Defendant's office for settlement in light of the decree issued in HCCC No. 586 of 2005.

- 7.** The Plaintiffs further contend that on or about the 13th July 2015, while executing the lease at the 3rd Defendant's office, they discovered that the original parcel L.R No. 209/1832 had allegedly been illegally, unlawfully and fraudulently subdivided into two parcels, namely L.R Nos. 209/1832/1 and 209/1832/2, by the 1st and 2nd Defendants without the knowledge, permission and/or consent of the late Gerald Muturi Maina.
- 8.** According to the Plaintiffs, the subdivision was fraudulent in that it was undertaken without first obtaining the consent of the late Gerald Muturi Maina; it was affected while a caveat was registered against the title; it proceeded despite a court order registered against the title; and it was carried out before the extended lease had been processed.
- 9.** They further assert that on the same date, 13th July 2015, they discovered that the 2nd and 5th Defendants jointly and severally colluded, with intent to defraud the late Gerald Muturi Maina and/or his estate, by illegally and unlawfully purporting to amalgamate L.R No. 209/1832/1 with L.R No. 209/2676 to create a new parcel, L.R No. 209/8384, in favour of the 1st Defendant.
- 10.** The Plaintiffs particularise the alleged fraud against the 2nd and 5th Defendants as including subdividing L.R No. 209/1832 without the knowledge and/or consent of the late Gerald Muturi Maina; amalgamating L.R No. 209/1832/1 with L.R No. 209/2676 without his knowledge, permission

or consent; and undertaking such amalgamation while a caveat remained registered against L.R No. 209/1832.

- 11.** The Plaintiffs further contend that the impugned amalgamation was undertaken notwithstanding that the original parcel had already been sold to the late Gerald Muturi Maina. They allege that a false and/or “dummy” amalgamation was orchestrated to create L.R No. 209/8384 measuring eleven square metres (11m²), asserting that no such measurement exists on the ground.
- 12.** It is also their case that L.R No. 209/1832/1 was effectively appropriated from the late Gerald Muturi Maina without any consideration, and that the amalgamation was processed irregularly while a court order remained registered against the parcel and before the process for extension of the new lease had been completed.
- 13.** The Plaintiffs additionally aver that on diverse dates between the years 2004 and 2007 and again in 2010, the 2nd and 3rd Defendants colluded with the 5th Defendant to draw survey maps and deed plans in respect of L.R No. 209/8384, thereby falsifying official records to suggest that L.R No. 209/2676 had been amalgamated to create L.R No. 209/8384 measuring eleven square metres (11m²), whereas no such measurements exist on the ground.
- 14.** They further allege that between 2004 and 2010, the 2nd and 3rd Defendants jointly and severally procured and doctored official land documents to facilitate the transfer and issuance of title documents in favour of the 1st

Defendant, despite knowing or ought to have known that such actions were illegal, unlawful, null and void.

- 15.** It is further pleaded that on 19th October 2007, the 5th Defendant purported to sell L.R No. 209/8384 to the 1st Defendant while knowing or while it ought to have known that the parcel had been illegally and unlawfully amalgamated and that no good title thereto could pass.
- 16.** The Plaintiffs assert that the amalgamation, sale and transfer from the 5th Defendant to the 1st Defendant are null and void. They further maintain that the original parcel L.R No. 209/1832 was not available for subdivision since it had been restricted by a caveat registered by the late Gerald Muturi Maina, and that any actions undertaken while the caution remained in force are null and void.
- 17.** The Plaintiffs contend that as a result of the said illegal and unlawful joint and several actions of the Defendants, the estate of Gerald Muturi Maina has been denied, deprived and/or dispossessed of L.R No. 209/1832/1 measuring 3.3 square metres comprised within the original purchased parcel known as L.R No. 209/1832.
- 18.** They urge that the actions of the Defendants jointly and severally constitute a violation of the beneficiaries' right to own property and earn legitimate income therefrom, and amount to misuse and abuse of public office in furtherance of the grabbing of private property without due compensation.

- 19.** The 1st Defendant filed a Defence on 16th December, 2015. He denied the assertions as set out in the Plaint stating that by a sale agreement dated 19th October 2007, he bought all that parcel of land known as L.R. No. 209/8384 from Mwangi Thuo Holdings Limited for valuable consideration.
- 20.** He averred that the suit property was subsequently transferred to him, the transfer being duly registered and a certificate of title issued in his favour. He contends that at the time of purchase, the property was free from any encumbrances and that no interests in favour of the Plaintiffs or any other persons were registered against the title.
- 21.** The 1st Defendant further averred that prior to 2007, he was not in possession of the property and that no claim, dispute, or proceedings were pending against the previous owner, Mwangi Thuo Holdings Limited. He maintained that no cause of action has been disclosed against him and, on that basis, prays that the suit against him be struck out.
- 22.** The 2nd, 3rd and 4th Defendants filed a Defence on 23rd September, 2016. They denied the assertions as set out in the Plaint stating that the 3rd Defendant perused correspondence file 26689 for property known as L.R. No. 209/1832 with a view of implementing the court order in **HCCC NO. 586 of 2005.**
- 23.** In doing so, the 3rd Defendant realized that it could not register the transfer for the reasons that the lease in

respect of the property had expired and extension of lease had been sought and granted for a further term of 50 years with effect from 1st October, 2000, in favour of the last registered owner Mavji Ramji Patel, who allegedly sold the property to the Plaintiff.

24. According to the 3rd Defendant, a new grant was prepared under the Registered Titles Act (Cap 281 repealed) and executed by the then Commissioner of Lands and the same forwarded to the Central Registry for registration. However, the grant could not be registered because there were encumbrances on the GLA title i.e. charge to Commercial Bank of Kenya Limited for Kshs. 3,400,000/= and the same was returned to the registrar conveyancing section.
25. The Chief Land Registrar upon receipt of the decree in **HCCC No 586 2005** and an advisory opinion from the office of the 4th Defendant to pursue an out of court settlement realized that the new grant and deed plan could not be traced and presumed it to be lost or misplaced, and that on this basis, the land administration division was advised to prepare a fresh lease in accordance with the **Land Registration Act No.3 of 2012**.
26. The Chief Land Registrar, it was contended, requested for a copy of the deed plan no. 235970 being the deed plan that had been used to prepare the grant that was lost or misplaced; that the Director of Surveys reverted indicating that the suit property had been subdivided to give rise to

two portions L.R. 209/1832/1 and L.R. 209/1832/2 sometimes in 1974 and that the deed plan requested by the Chief Land Registrar was in respect to L.R 209/1832/2.

- 27.** It was explained that the Chief Land Registrar upon confirming that L.R 209/1832/2 was not registered proceeded to furnish a copy of deed plan no. 235970 which was used to prepare a new grant registered in favour of the Plaintiff's herein and that the status of the suit property L.R. No. 209/1832 had been affected by the subdivision, whereby a 3.3. metre strip measuring 0.0064 ha, had been hived off to make L.R. 209/1832/1 amalgamated with L.R. No. 209/2678 to make L.R. 209/8384.
- 28.** It was averred that the perusal of correspondence file No. 30352 for L.R. 209/8384 indicated that the alleged amalgamation was done on extension of lease and a new grant issued by way of letter of allotment dated 14th March, 2007.
- 29.** The 5th Defendant filed its Defence on 12th October 2018, in which it denied the allegations contained in the Amended Plaintiff. It maintained that it lawfully sold L.R. No. 209/8384 to the 1st Defendant and that it had a good and indefeasible title capable of passing to the purchaser. According to the 5th Defendant, the transfer to the 1st Defendant was regular, valid and backed by full legal authority.

- 30.** The 5th Defendant further contended that if any subdivision of L.R. No. 209/1832 ever occurred, such subdivision predated any alleged restriction, caveat, inhibition or prohibition said to have been lodged by the late Gerald Muturi Maina. It asserted that any such restriction (if at all) was either placed against a non-existent title or registered long after the subdivision had already been effected, and therefore could not invalidate the resultant titles.
- 31.** The 5th Defendant attributed the subdivision and amalgamation to the correction of a historical error whereby part of L.R No. 209/2676 had been wrongly reflected within L.R No. 209/1832, and contended that when the process commenced, Mavji Ramji Patel, who allegedly sold the property to the Plaintiffs had not yet acquired the land, as the subdivision and surrender process had allegedly begun as early as the 1940s.
- 32.** Additionally, the 5th Defendant asserted that it has been wrongly joined in the present proceedings, stating that it had no privity of contract with the Plaintiffs and was not a party to the sale agreement between the Plaintiffs and Mavji Ramji Patel.
- 33.** It was urged that the Plaintiffs are seeking to benefit from transactions in which they have no legitimate interest and that any claim they may have lies against Mavji Ramji Patel, who surrendered L.R No. 209/1832/1 for consolidation with L.R No. 209/2676 upon discovering that

part of L.R No. 209/2676 had been erroneously included within L.R No. 209/1832 since the 1940s or thereabouts.

- 34.** Finally, the 5th Defendant stated that this court lacks jurisdiction to hear and determine the present matter in view of **HCCC No. 586 of 2005**, in which the issues relating to the suit property were fully heard and determined, and from which the Plaintiffs obtained judgment in respect of what the 5th Defendant describes as a non-existent title.

Hearing and Evidence

- 35.** The matter proceeded for hearing on 28th October 2021. PW1 was Washington Muchiri Muturi, the 2nd Plaintiff and one of the administrators of the Estate of Gerald Muturi Maina, the 1st Plaintiff being his mother. He adopted his witness statement filed on 5th November 2015, as his evidence in chief and relied on the documents filed on the same date, which were produced as PEXHB1, together with the supplementary list of documents dated 8th October 2019 as PEXHB2.
- 36.** It was PW1's evidence that he, together with the 1st Plaintiff, serve as the administrator and administratrix of the estate of the late Gerald Muturi Maina, who passed away on 10th January, 2011 having been appointed on 14th October 2011 and that they are also beneficiaries of the said estate.
- 37.** PW1 explained that on or about 23rd September 2003, his late father entered into a sale agreement with Mr. Pramji

Mavji Patel for the purchase of L. R No 209/1832 at a consideration of Kshs. 10,000,000. He stated that a deposit of Kshs. 3,000,000 was paid, leaving a balance of Kshs. 7,000,000 payable upon completion of the transfer. He further stated that on 16th December 2003, the purchaser lodged a caveat against the vendor's title at the 2nd Defendant's registry to safeguard his interest in the property.

- 38.** PW1 stated that on or about 17th May 2005, his late father instituted **HCCC No. 586 of 2005** seeking specific performance of the sale agreement and that a consent order issued on 4th July 2005 restrained the vendor from selling, transferring, charging, mortgaging or otherwise dealing with the property.
- 39.** PW1 explained that the Defendant's defence in that suit was later struck out on 20th April, 2010 and the matter proceeded for formal proof, culminating in a judgment delivered on 22nd July 2013 in favour of the Estate; that the court issued a decree compelling the vendor to transfer the entire parcel to the Estate upon deposit of the balance of the purchase price, which sum of Kshs. 7,000,000 was deposited in court on 8th August 2013 within the decreed period.
- 40.** According to PW1, the vendor refused to execute the transfer documents, prompting the Deputy Registrar of the High Court to execute the transfer on the vendor's behalf. He explained that on 8th July 2014, an application for

transfer was lodged after payment of stamp duty amounting to Kshs. 400,000, but that on 31st July 2014, the 2nd Defendant rejected the application on grounds that the file was not clear due to existing mortgages, that the tenure had expired and had not been renewed, that the caveat registered against the title had not been withdrawn, and that a court order was in force.

- 41.** Immediately thereafter, he and the co-plaintiff filed **HC Judicial Review Misc. Application No. 307 of 2014** challenging that decision of the Land Registrar.
- 42.** PW1 explained that following the Judicial Review proceedings, Hon. Justice Weldon Korir referred the matter back to the 2nd Defendant's office for determination based on the decree in **HCCC No. 586 of 2005** and that while processing registration in July 2015, they discovered that despite the caveat and court order, the 1st, 2nd and 3rd Defendants had allegedly colluded and purported to subdivide the original parcel into L.R Nos. 209/1832/1 and 209/1832/2.
- 43.** PW1 further stated that L.R No. 209/1832/1 was then purportedly amalgamated with L.R No. 209/2678 to create L.R No. 209/8384, which was registered in favour of the 1st Defendant. He stated that as a consequence of the said actions, the transfer of L.R No. 209/1832/2 was eventually affected in favour of the Estate on 22nd July 2015, save for an area measuring 3.3 square metres that had allegedly

been amalgamated with L.R No. 209/2678 to create L.R No. 209/8384.

- 44.** PW1 explained that his late father had purchased the entire parcel and that no portion ought to have been excised without his consent or permission, adding that the original vendor therefore had nothing to sell to the 1st Defendant and that any such sale was null and void. He stated that the subdivision and amalgamation were intended to defeat his late father's claim and frustrate execution of the decree issued in **HCCC No. 586 of 2005**.
- 45.** PW1 further stated that during the pendency of the earlier proceedings, the vendor had continued to assert ownership of the suit premises, that City Hall records showed rates were paid for the entire parcel, and that the Lands Office records remained intact as the lease, though renewed, had not been processed. He explained that the purported excision of 3.3 square metres and the alleged measurements forming L.R No. 209/2678 were fictitious and existed only on paper, asserting that no such measurements existed on the ground and that the adjoining L.R No. 209/1832 is a public road.
- 46.** He deponed that the Defendants acted in concert to excise and appropriate the said 3.3 square metres from the original parcel, allegedly as part of a scheme designed to conceal fraudulent intentions. According to him, this conduct occasioned loss and damage to the Estate of the late Gerald Muturi Maina.

- 47.** He further asserted that the Defendants' joint and several actions were calculated to benefit the 1st Defendant while unlawfully depriving the beneficiaries of their rightful property without compensation, and that the 2nd and 3rd Defendants abused their respective offices in facilitating the 1st Defendant's acquisition of the parcel. PW1 concluded by stating that he and his co-Plaintiff believe the court has the authority to correct the injustice committed against the Estate and that they seek judgment jointly and severally against the Defendants as prayed in the Plaint.
- 48.** On cross-examination, PW1 stated that he does not know the 1st Defendant personally and confirmed that they only discovered the alleged tampering with the suit property in 2015. He testified that he has never met Mr. Mavji in person and expressed the view that only the registered owner of land can initiate a subdivision.
- 49.** He further stated that he did not know how many titles the Defendant had presented and that, to his knowledge, the decree was not registered against the title. He conceded that as per the records, the subdivision process had been initiated in 1974 and, in his view, it must have been commenced by Mavji. He added that from the records, the 1st Defendant purchased the land in 2007.
- 50.** PW1 acknowledged that he never placed a caveat on the title and that he was unaware whether the parcel purchased by the 1st Defendant had any caveat registered against it. He further clarified that the court did not

specifically award them L.R No. 209/1832/2, but rather directed that they take what was available and pursue the remaining portions.

- 51.** PW1 conceded to being aware that the 5th Defendant occupied portion B at the time the property was purchased, and that the same portion is now occupied by the 1st Defendant. He explained that after judgment, they took possession of portion A and thereafter pursued the remaining part of the land. He further stated that one cannot validly purchase land under an expired lease and confirmed that although they lodged the decree and assignment for registration, the same was rejected for the reasons earlier indicated.
- 52.** It was his evidence on re-examination that the letter dated 6th November, 2011 states that the lease was extended for 50 years.
- 53.** DW1 was Godfrey Muchiri, adopted his witness statement dated 18th January, 2018 as his evidence in chief and produced the documents dated 23rd May, 2022 as DEXHB1.
- 54.** Briefly, it was DW1's oral evidence that he purchased the suit property from the 5th Defendant, and that the sale related to the amalgamation of L.R Nos. 209/1832/1 and 209/2678. He stated that the relevant correspondence demonstrated that the amalgamation had been approved by the Nairobi City Council.
- 55.** DW1 further testified that, as at 23rd September 2003 when the Plaintiff purchased the suit property, plot L.R No.

209/1832/1 was no longer available to the Plaintiff as it had already been amalgamated and a new title issued. He added that he had never seen any letter from the Director of Surveys cancelling the amalgamation.

56. It was DW2's evidence on cross-examination that the land was already fully developed when he took possession. He explained that he and his advocate conducted a search on the property, although he did not have the search in court. He further explained that at the time of purchase he transferred the purchase monies to his advocate and signed the transfer documents.

57. He stated that he was not aware of the letter dated 19th November 2003 contained in his bundle of documents, did not know the history of the land, had not seen the subdivision plan and could not tell whether the necessary approvals had been granted.

58. During re-examination, DW2 explained that it was his lawyer who prepared the sale agreement and the transfer, and that the 5th Defendant had not disputed the purchase price. He stated that at the time he purchased the land, he had not seen the various correspondences that have since been shown to him, and confirmed that he was not a party to any of the previous court proceedings. He added that he had seen the beacons on the ground before purchasing the land.

59. DW2 was Omolo O Patroba, a Deputy Director at the Ministry of Lands Housing and Urban Development. He

adopted his witness statement dated 14th March, 2025 as his evidence in chief and produced the documents.

- 60.** It was his evidence vide the statement that vide a memorandum of registration of transfer of lands dated 5th October, 1966, LR No. 209/1832 was transferred from Ewan Scott Grogan “the assignor”, James Frederick Home Hamilton “the vendors” and Kermally Jaffer “the purchaser” to Suleman Sumar. The transfer was registered as volume n.45 folio 268/1 at the central registry.
- 61.** By a memorandum of registration of transfer of lands dated 22nd February, 1972, LR No. 209/1832 was transferred through transmission from Suleman Sumar Khamisa - deceased to Cassam Suleman Sumar (*also known as Kassam Suleman Sumar*) and Haji Osman Dada Kumber. The transfer was registered as Volume N.45 Folio 268/3 at the central registry.
- 62.** It was DW2’s evidence that there is evidence that there was a proposed scheme of subdivision of LR No. 209/1832 and consolidation of plots 209/1831/1 and 1832/1. The plan was approved by the Town Clerk, Municipal Council of Nairobi on 6th May, 1941 and the Commissioner of Lands on 14th May, 1941. The plan was a proposal by Suleman Sumar, the proprietor, who also owned LR No. 209/2678
- 63.** By a further memorandum of registration of transfer of lands dated 28th August, 1973, LR No. 209/1832 was transferred from Cassam Suleman Sumar and Haji Osman Dada Kumber to Cassam Suleman Kumar as sole

proprietor. The transfer was registered as Volume N.45 Folio 268/4 at the central registry.

- 64.** He explained that from their records, it appears that the grantee of the parcel applied for permission to sub-divide LR No. 209/1832 into two portions A and B. The City Council of Nairobi recommended the approval of the subdivision with a condition that sub-plot B be consolidated with adjoining plot LR No. 209/2678.
- 65.** According to DW2, upon circulation of the proposed excision plan, the Director of Physical Planning noted in comments that this is not a case of pure subdivision but for a transfer or excision of a strip 10 feet by 35 feet from LR No. 209/1832 to LR No. 209/2678; that the Commissioner of Lands approved the proposal vide letter dated 22nd February, 1974 and endorsed his approval on the proposed excision plan and that upon its approval, the proposal was surveyed as per survey plan FR No. 130/107 which gave rise to LR No. 209/1832/2 and 209/8384 (amalgamated).
- 66.** Vide a further memorandum of registration of transfer of lands dated 23rd August, 1974, DW2 stated that LR No. 209/1832 was transferred from Cassam Suleman Sumar to Kioria Hinga; that the transfer was registered as volume N.18/32/9 at the central registry; that Kioria Hinga applied for permission of the City Council of Nairobi to change use of LR No. 209/1832 from residential to Commercial and that the council granted its approval to the proposal vide a letter dated 29th May, 1975.

- 67.** On the 26th January, 1977, through a further memorandum of registration of transfer of lands, LR No. 209/1832 was transferred from Kioria Hinga to Mavji Ramji Patel; that the transfer was registered as volume n.45 folio 268/8 at the central registry and that thereafter, Mavji Ramji Patel wrote a letter dated 21st April, 1977 to the Commissioner of Lands requesting to know the status of the subdivision of LR No. 209/1832 which was initiated before he purchased the property.
- 68.** In his response, the Commissioner of Lands vide a letter dated 3rd May, 1977 responded indicating that LR No. 209/1832 remains intact because no final approval was granted. It was averred by DW2 that regarding the 10 feet strip (road LR 209/1832/1), on 28th September, 1977, Mr. Cassam Suleman Sumar wrote to Mr. Mavji Ramji Patel informing him that he sold LR No. 209/1832 already subdivided of which he was aware.
- 69.** DW2 testified that on 7th March, 1978, the City Council of Nairobi communicated to Mavji Ramji Ladha Patel and others about approval of a building plan for shops and two flats to be built on LR No. 209/1832 and that there is evidence in a letter dated 26th June, 1990 and 11th December, 1991, that indeed the land was entirely developed with a new commercial building as per approved Nairobi City Council drawing number A.S 230 dated 6th March, 1978.

- 70.** He explained that through the letters of 19th October, 1989, 26th June, 1990 and 11th December, 1991, Pankaj Vyas, acting as financial controller of Rico Steel Fabricator Ltd applied for extension of lease for LR No. 209/1832 from the Commissioner of Lands.
- 71.** The Commissioner of Lands considered the application and granted his approval for an extended lease term of 50 years unexpired term with effect from 1st October, 2000 vide letter ref. 26689/72 dated 6th November, 2000 addressed to Ndungu Njoroge and Kwach Advocates and that the provisional approval was subject to five conditions which were accepted by Ndungu Njoroge and Kwach Advocates vide a letter dated 1st December, 2000.
- 72.** DW2 stated that in a note dated 20th March, 2003 from Senior Land Officer Nairobi to the Chief Valuation Officer, it was noted that a portion of LR No. 209/1832 namely LR No. 209/1832/1 measuring 0.0064 ha was excised and amalgamated with LR No. 209/2678 to form LR No. 209/8384 and that in light of this, LR No. 209/1832/2 was valued for enhanced land rent with the extended term and new user being commercial (shops, offices and flats) which was assessed at Kshs. 35,160.
- 73.** On 19th November, 2003, vide a letter ref. 26689/82, the Commissioner of Lands wrote to Mavji Ramji Patel referring to his letter dated 23rd September, 2003 noting that subdivision and excision of LR No. 209/1832 was into two portions; LR No. 209/1831/1-2 and further that LR No.

209/1832/1 was amalgamated to LR No. 209/2678 to create LR No. 209/8384.

74. DW2 stated that in the said letter, the Commissioner of Lands observed that the titles for L.R No. 209/1832 and L.R No. 209/2678 had already been surrendered and that the processing of the resultant leases was at an advanced stage.
75. DW2 stated that the records dated January, 2004 in their possession indicate that indeed the Registrar of Documents made a draft surrender with a note that the original assignment was received by the Commissioner of Lands and that consequent to the extension of lease and change of user, the Commissioner of Lands issued a fresh letter of allotment ref. 26689/87 dated 25th March, 2004 to Mavji Ramji Patel in respect of LR No. 209/1832/2. Upon survey, the Director of Surveys issued deed plan no. 255649 for LR No. 209/1832/2.
76. It was his evidence that on 24th May, 2007, the Commissioner of Lands executed the grant for LR No. 209/1832/2 in the name of Mavji Ramji Ladha Patel and forwarded the same to the central registry for registration. However, in a memo dated 11th May, 2015 from the Chief Land Registrar to the Head Legal Unit, it was noted that the grant was not registered because there were encumbrances on the GLA title.
77. In compliance with a court order issued in **Nairobi HCCC JR Misc. Application No. 307 of 2014**, DW2 stated that

the Chief Land Registrar prepared a lease for LR No. 209/1832/2 in the name of Eunice Wairimu Muturi and Washington Muchiri Muturi (as the administrator and administratrix of the estate of Gerald Muturi Maina (deceased)) and the same was registered as IR No. 163873).

- 78.** Speaking to L.R No 209/2678, he stated that by a memorandum of registration of transfer of lands dated 28th August, 1973, LR No. 209/2678 was transferred from Cassam Suleman Sumar and Haji Osman Dada Kumber to Ahmed Suleman Sumar and that on 7th December, 1976, Farouk Adam and Company Advocates on behalf of the proprietor applied for extension of lease for LR No. 209/2678 from the Commissioner of Lands.
- 79.** Upon consideration, the Commissioner of Lands approved the proposal on 12th May, 1977. On the 23rd August, 1977, LR No. 209/2678 was further transferred from Ahmed Suleman Sumar to Ndungu Kariuki; that Ndungu Kariuki prepared building plan for an additional first floor. The plan was approved by the City Council of Nairobi on 6th November, 1979.
- 80.** By a further memorandum of registration of transfer of lands dated 16th July, 1981, LR No. 209/2678 was further transferred from Ndungu Kariuki to Mwangi Thuo Holdings. The transfer was registered as IR No. 5410/9 at the central registry.

- 81.** DW2 stated that records in their possession reveal that Mwangi Thuo Holdings Ltd proposed to redevelop LR No. 209/2678 with a domestic building -shops and offices; that the building plan was approved by the City Council of Nairobi on 13th September, 1996 and that on 20th June, 1996, Francis M. Thuo applied for extension of lease for LR No. 209/2678 citing that they are in the process of doing a comprehensive development on the plot as per the approved building plan.
- 82.** Upon consideration by the Commissioner of Lands, DW2 stated that the lease was extended for a further term of 50 years unexpired with effect from 1st February, 2001.
- 83.** As per Mr Omolo's statement, it would appear that Mwangi Thuo Holdings Ltd applied to the Nairobi City Council through application registration No. 3537 submitted on 7th November, 2002 for permission to amalgamate LR No. 209/1832/1 and LR No. 209/2678.
- 84.** It was his evidence that on 12th April, 2003, Framon Enterprises forwarded an original title IR No. 5410 for LR No. 209/2678 in the name of Mwangi Thuo Holdings Ltd to the Commissioner of Lands and upon the extension of lease and amalgamation, the Commissioner of Lands issued a new letter of allotment Ref. no. 30352/163 dated 14th March, 2007 for LR No. 209/8384 measuring 0.0190 ha to Mwangi Thuo Holdings Ltd.
- 85.** Consequently, DW2 stated, and upon compliance with the conditions of the allocation, the Commissioner of Lands

prepared and executed a grant on 3rd May, 2007; that by a Memorandum of Registration of transfer of lands dated 3rd May, 2007, the grant for LR No. 209/8384 was registered as IR No. 105863/1 in the name of Mwangi Thuo Holdings Ltd.

- 86.** According to DW2, it is clear from the records that the application for sub-division of LR No. 209/1832 was commenced way back in 1941 by the original owner Cassam Suleman Sumar, and that it was approved by the City Council of Nairobi and also by the Commissioner of Lands vide letter dated 22nd February, 1974.
- 87.** It was his evidence that as at 26th January, 1977, when Mr. Mavji Ramji Patel was registered as owner of LR No. 209/1832, he was aware of the excision of 10 feet of LR No. 209/1832 and its consolidation with plot LR 209/2678, and that as at 23rd September, 2003 when Mr. Mavji Ramji Patel is alleged to have sold off LR No. 209/1832 to the deceased Gerald Muturi Maina, he knew that he had surrendered the original title for LR No. 209/1832 to allow the excision of LR No. 209/1832/1 (being 10 feet of LR No. 209/1832 and measuring 0.0064 ha) and that the excised plot was amalgamated with LR No. 209/2678 to form LR No. 209/8384.
- 88.** He stated that consequently, LR No. 209/1832/1 was thus available for sale and that is why through his advocates, he authorized the Commissioner of Lands vide a letter dated 20th November, 2003 to ignore the contents of his letter

dated 23rd September, 2003 and proceed and prepare a title for LR No. 209/1832/2 only.

- 89.** DW2 stated that it is also clear from their records that the amalgamation of LR No. 209/1832/1 and LR No. 209/2678 was done prior to 16th December, 2003 when the caveat by the Plaintiff was registered against the title and as such no consent was required from the deceased Gerald Muturi Maina. Finally, he urged, it is also clear from their records that the amalgamation of LR No. 209/1832/1 and LR No. 209/2678 was done before the court order in HCCC No. 586 of 2005 was registered.
- 90.** During cross-examination, he testified that he did not have on record any document evidencing final approval of the process. He clarified, however, that the conditions of approval had been accepted and that the excision had in fact been surveyed. He further stated that, based on the correspondence on record, the Commissioner of Lands had indicated that final approval had not yet been formally granted.
- 91.** He testified that Mr. Ramji had written a letter cancelling the subdivision process, but that those instructions were not acted upon. He further explained that on 20th November 2003, their office received a letter from Mohamed Madhani & Co. Advocates directing the Commissioner of Lands to ignore the earlier cancellation letter and to proceed with the subdivision process.

- 92.** DW3 was Mark Wandari Muigai, the Deputy Chief Lands Registrar. He adopted his statement dated 14th March, 2025 as his evidence in chief and produced the documents dated 11th March, 2024 as 3DEXHB1.
- 93.** It was his evidence that he has retrieved records for GLA File No. 14129 for L.R No. 209/2678 and grant I.R 105863 L.R No. 209/8384; that on 4th November, 1974, an assignment dated 23rd August, 1974 was registered to Kiama Hinga for 0.7461 acre in L.R No 209/1832; that on the same date, a mortgage was registered in favour of industrial and commercial development corporation; that on 27th January, 1977, a re-assignment of mortgage dated 20th January, 1977 was registered.
- 94.** DW3 explained that on 27th October, 1977, an assignment dated the 26th January, 1977 was registered in favour of Mavji Ramji Patel; on 16th May, 1994, a variation of mortgage and third further mortgage dated 28th April, 1994 were registered to Commercial Bank of Africa and that a court order dated 22nd December, 2005 from **NRB HCC No 586 of 2005** was registered against the title. Thereafter, an entry was later made by the registrar that the term of the lease had expired.
- 95.** With respect to Grant I.R No. 5410 for L.R No. 209/2678, it was his evidence that the records indicate that a grant was issued by the Governor and Commander-in-Chief of the Colony of Kenya to Sulema Sumar for a term of 62 years and 4 months commencing on 1st September 2002.

Subsequently, on 29th September, 1958, a charge was registered in favour of Standard Bank of South Africa Limited.

96. On 3rd October 1973, a transfer was registered in favour of Ahmed Suleman Sumar. Thereafter, on 17th July, 1981, a transfer was registered in favour of Mwangi Thuo Holdings Limited. On 26th February, 1990, a surrender to the Government of Kenya was registered in exchange for new grants being I.R. 49139, I.R. 49140 and I.R. 49141. Finally, on 1st December, 2000, a discharge of charge, registered as Entry No. 10 was duly recorded.

97. Moving to the records for grant I.R 105863 for L.R No. 209/8384, it was DW3's statement that it was a grant from the President of the Republic of Kenya to Mwangi Thuo Holdings for a term of 50 years from 1st December, 2000. It was his evidence that the grant was registered on 10th May, 2007. On 24th December, 2007 a transfer was registered in favour of Godfrey Muchuru Mukua. On 10th July, 2011 a charge was registered in favour of Barclays Bank of Kenya Limited.

98. Speaking to the records for grant I.R 163873 for L.R No. 209/1832/2, it was stated thus. It was the evidence of DW3 that a decree was issued in **HCC NO. 586 of 2005** directing the Chief Land Registrar to transfer, process and register the plaintiff's deed of assignment in respect of the parcel of land known as L.R No.209/1832 and that the

Plaintiff thereafter instituted **NRB HCCC JR Misc. Appl.No. 307 of 2014** to compel the Chief Land Registrar to comply with the decree issued in **HCC NO. 586 of 2005**.

99. It was explained that the lease in respect to the suit property had expired and extension of the same had been sought and granted for a further term of 50 years with effect from 1st October, 2000 in favour of the last registered owner Mavji Ramji Patel who allegedly sold L.R No. 209/1832/2 to the Plaintiff herein.

100. According to DW3, the Director of Survey vide letters dated 5th June, 2015 and 10th June, 2015 respectively, stated that the suit property had been subdivided into two portions, LR 209/1832/2 and LR 209/1832/1 sometime in 1974 and that a deed plan No. 255649 had been issued for LR 209/1832/2 in 2004 and that upon confirmation by the Chief Land Registrar that LR 209/1832/2 was not registered, the Director of Surveys proceeded to issue a copy of deed plan No. 235970 vide his letter dated 24th June, 2015. It is on the above premise that a new grant IR 16387 in respect to L.R 209/1832/2 was issued and registered in favour of the Plaintiffs herein on 22nd July, 2015.

101. DW3 reiterated that the decree could not initially be effected due to existing encumbrances, namely a caveat registered in 2003, a court order, and a mortgage in favour of Commercial Bank of Africa. Finally, he stated that the

deed plan indicates that L.R No. 209/8384 arose from an amalgamation of L.R No. 209/1832/1 and L.R No. 209/2678.

- 102.** DW4 was Raphael Gichohi, a businessman and a director of the 5th Defendant. He adopted his witness statement dated 9th November 2023 as his evidence in chief. It was his evidence that on or about 19th October, 2007, the 5th Defendant entered into an agreement for sale of land reference number 209/8384 with Godfrey Muchuru Mukua, the 1st Defendant herein.
- 103.** Following the transfer dated 5th December 2007, L.R No. 209/8384 was successfully transferred and registered in favour of the 1st Defendant on 24th December 2007 subject to the special conditions contained in the grant registered as I.R No. 105863.
- 104.** According to DW4, the grant for L.R No. 209/8384 measuring approximately 0.0190 hectares with deed plan number 255650 dated 30th September 2004 had earlier been duly registered as I.R No. 105863/1 on 10th May 2007 in favour of the 5th Defendant pursuant to approval of its application for extension of lease by the Government and that in the year 1996, the 5th Defendant had applied for extension of lease for L.R No. 209/2678 to the Commissioner of Lands, who by letter dated 12th November 1996 wrote to the Director of City Planning and Architecture and the Director of Physical Planning seeking their comments.

- 105.** It was averred that the 5th Defendant thereafter applied for development permission PPA1 on 22nd October 2002 proposing amalgamation of L.R Nos. 209/1832/1 and 209/2678 and paid the requisite inspection fee. The Director of City Planning Department confirmed by a letter dated 7th January, 2003 that the application submitted on 7th November 2002 had been duly approved by the Nairobi City Council subject to no conditions.
- 106.** Pursuant to the approval letter dated 7th January 2002, notification of approval on amalgamation of L.R Nos. 209/1832/1 and 209/2678 along Duruma Road was approved and certified by the Nairobi City Council Town Planning Committee at its meeting held on 28th November 2002, and the subdivision plan for L.R No. 209/1832/1 was signed by the Director of City Planning and Architecture on 21st January 2003.
- 107.** According to DW4, the subdivision of plot numbers 209/1832 and consolidation of plots 209/1831/1 and 1832/1 was duly approved by the Municipal Council of Nairobi as early as 6th May 1941, whereby L.R No. 209/1832 was subdivided into L.R Nos. 209/1832/1 measuring 0.0150 acres and 209/1832/2 measuring approximately 0.0480 acres being a total area of approximately 0.480 acres and 1832/2 measuring 0.0592 acres under minutes 3 of 6th May, 1941 as endorsed by the Town Clerk.

108.DW4 stated that the Commissioner of Lands by a letter dated 20th March 2003 requested the Director of Survey, Nairobi, to supply a deed plan for extension of lease on L.R No. 209/8384; that the 5th Defendant forwarded its original title certificate L.R No. 5410 (L.R No. 209/2678), and an allotment letter for extension of lease on L.R No. 209/8483 was issued by the Commissioner of Lands on 14th March 2007 paving the way for preparation of title.

109.In cross-examination, DW4 testified that he did not know how the strip in question was acquired. He stated that he purchased the land from Mr. Ndungu in 1981 for a consideration of Kshs. 310,000. He further explained that he could not tell why the parties waited until 2001 to take certain steps and acknowledged that there had been extensive correspondence relating to the strip.

110.DW4 stated that he could not say when they began owning the strip, did not know when the parcels were amalgamated, and could not recall the exact purchase price at which the land was later sold to the 1st Defendant, although the transfer indicated a consideration of Kshs. 8,000,000.

Submissions

111.The Plaintiffs' advocate filed his submissions on 17th November, 2025. Counsel contended that the 1st Defendant's title to L.R No. 209/8384 is liable to impeachment on the basis that it emanated from an unlawful amalgamation of L.R No. 209/2678 and L.R No.

209/1832/1. It was submitted that the process giving rise to the title falls within the exceptions contemplated under **Article 40(6)** of the **Constitution**, as well as **Sections 26(1)(a), 26(1)(b)** and **80(1)-(2)** of the **Land Registration Act**, thereby justifying cancellation and rectification of the register.

112. Counsel emphasized that jurisprudence has settled that title must be traceable to its root, due diligence goes beyond an official search, and even an innocent purchaser is unprotected where the title is tainted *ab initio*. Counsel relied on several authorities including *Munyu Maina vs Hiram Gathiha Maina, Civil Appeal No. 239 of 2009 (Nyeri), Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another [2013] eKLR* and *Joseph Kiprotich Bor vs Tabutany Chepkoech Chebusit [2021] eKLR*.

113. On legality of the excision and amalgamation, Counsel argued that the subdivision lacked final approval of both the Commissioner of Lands and the City Engineer, was undertaken without the vendor's consent despite a cancellation letter dated 23rd September 2003, and proceeded while a mortgage, court order and caveat were registered against the title.

114. It was submitted that the 2nd and 3rd Defendants ignored adverse records and facilitated disappearance of documents to enable the amalgamation, contending that

illegality once brought to the court's attention must be addressed.

115. Counsel stated that the 5th Defendant never explained how it acquired L.R No. 209/1832/1 and produced no evidence of purchase or payment of premiums. They argued that the immediate sale to the 1st Defendant after issuance of title on 10th May 2007 demonstrated an attempt to conceal irregularities.

116. On reliefs, Counsel maintained that the estate was deprived of the excised portion despite a decree in **HCCC No. 586 of 2005** confirming ownership, and sought general and punitive damages of Kshs. 15,000,000. Counsel relied on rental income allegedly earned by the 1st Defendant and ground rent differentials to demonstrate loss, urging the court to find that the subdivision and amalgamation were illegal; that the 5th Defendant acquired no valid title, and that the 1st Defendant was not an innocent purchaser for value without notice.

117. The 1st Defendant's counsel filed submissions on 6th February, 2026. Counsel submitted that the purchase and transfer of L.R No. 209/8384 was undisputed and that the historical record demonstrates a lawful chain and "common ancestry" of both parcels traced from Suleman Sumar Khanisa Sumar (Government grant), through transmissions and transfers up to Mwangi Thuo Holdings (5th Defendant) in 1981.

118. Counsel maintained that the evidence of the 2nd, 3rd and 4th Defendants showed the subdivision of L.R No. 209/1832 began as early as 1941 and was approved, with a condition that subplot “B” (a ten-foot strip) be excised and consolidated with L.R No. 209/2678 and that the 1st Defendant’s title is protected by **Section 26** of the **Land Registration Act**, and **Article 40** of the **Constitution**.

119. He cited *Lawrence P. Mukiri Mungai v Attorney General & Others, Civil Appeal No. 146 of 2014 (citing Katende vs Haridar & Company Limited [2008] 2 E.A. 173)* to submit that the 1st Defendant meets the criteria of a bona fide purchaser for value without notice, and urged dismissal of the suit with costs, contending any remedy (if misfeasance were proved) would lie in damages against Mavji’s Estate rather than nullification of his title.

120. Counsel for the 2nd-4th Defendants filed submissions on 6th January, 2026. Counsel maintained that the subdivision/excision was initiated by the then registered proprietor, Cassam Suleiman and approved by planning and lands offices in the 1973-1974 period, with F/R No. 130/107 of 16th May, 1974 showing the resultant plots.

121. Counsel submitted that the allegations on fraud are untenable when considered against the undisputed chronology of events. It was argued that Gerald Muturi’s purchase took place in 2003; that the caveat was registered on 16th December 2003; and that the court

order in **HCCC No. 586 of 2005** was registered on 13th March 2007.

122. By contrast, it was submitted, the impugned subdivision occurred in 1974. Counsel contended that the matters relied upon by the Plaintiffs arose decades after the subdivision and amalgamation processes and could not logically impeach acts undertaken long before their occurrence.

123. Counsel further invoked the doctrine of *nemo dat quod non habet*, submitting that Mavji Ramji Patel could not transfer a better title than that which he himself possessed, and that any claim founded upon such purported transfer is legally unsustainable.

124. The 5th Defendant's counsel filed submissions dated 7th February 2026. According to Counsel, the 5th Defendant's central argument is that the disputed 10-foot strip (L.R No. 209/1832/1, about 0.0064 ha) was always part of the excised portion from L.R No. 209/1832 dating back to 1941, and that the resultant amalgamated parcel, L.R No. 209/8384 (0.0190 ha), carried a 50-year extended lease from 1st February 2001.

125. On subdivision and excision, Counsel argued that the process was initiated and sanctioned by the original common proprietor, Suleman Sumar, and remained reflected "on the ground" through demarcated boundaries separating L.R No. 209/1832/2 from the strip that was

amalgamated with L.R No. 209/2678 to form L.R No. 209/8384.

126. In that regard, Counsel invoked the root-of-title principle as stated *in Dina Management Ltd vs County Government of Mombasa & 5 Others (Petition No. 8 (E010) of 2021) [2023] KESC 30 (KLR)*, which cited *Munyu Maina vs Hiram Gathiha Maina, Civil Appeal No. 239 of 2009 [2013] eKLR* for the proposition that once title is challenged, the proprietor must go beyond the instrument and demonstrate the legality of acquisition.

127. Counsel submitted that the evidence has ably demonstrated the root of title to L.R No. 209/8384. He explained that the historical narrative, supported by documentation shows that the amalgamation was lawfully undertaken and that the Plaintiff did not produce any official search, which would have disclosed that the 99-year lease from 1st September 1903 to 31st August 2003 had expired by the date of the alleged sale agreement being on 23rd September 2003.

128. Counsel faulted the Plaintiff for not enjoining the 2nd-5th Defendants in **HCC No. 586 of 2005** despite the defence allegedly disclosing subdivision/amalgamation, and instead moving to strike out the defence

Analysis and Determination

129. Having considered the pleadings, evidence and submissions, the issues that arise for determination are:

- i. Whether the 1st Defendant's title to L.R No. 209/8384 is lawful and indefeasible, or liable to be impeached?
- ii. What are the appropriate reliefs to issue?

130. Before turning to the substantive issues for determination, it is necessary to address the position taken by the 5th Defendant in its Defence that it would raise objections founded on the doctrines of *res judicata* and limitation. No formal preliminary objection was pursued and no arguments were advanced on that plea by the 5th Defendant. The court therefore finds that the objection was abandoned.

131. In any event, the objection would not have succeeded. **HCCC No. 586 of 2005** was a dispute between the deceased purchaser and Mavji Ramji Patel arising from a sale agreement, and seeking specific performance. The suit neither involved the present Defendants nor addressed the alleged fraudulent subdivision and amalgamation, which has been impugned. The present cause of action is therefore distinct.

132. As regards limitation, the Plaintiffs' case is that the alleged fraud was discovered in July 2015. By virtue of **Section 26** of the **Limitation of Actions Act**, time in cases of fraud runs from the date of discovery. The suit having been filed in 2018, the plea of limitation would equally have been untenable.

133. Vide the present suit, the Plaintiffs seek declaratory, injunctive and compensatory reliefs arising from the

alleged unlawful subdivision of L.R No. 209/1832 into L.R No. 209/1832/1 and L.R No. 209/1832/2 and the subsequent amalgamation of L.R No. 209/1832/1 with L.R No. 209/2678 to create L.R No. 209/8384, which title is now held by the 1st Defendant.

134. It is their case that the late Gerald Muturi Maina (deceased) purchased the entirety of L.R No. 209/1832 in 2003 and subsequently obtained a decree for specific performance in **HCCC No. 586 of 2005** compelling the transfer of the property to him.

135. However, difficulties arose in the implementation of the decree, including the fact that the lease had expired. While pursuing the implementation of the decree, and the extension of the lease, the Plaintiffs realized in 2015 that the parcel L.R 209/1832 had been sub-divided and a strip thereof, L.R 209/1832/1, amalgamated with parcel L.R 209/2678 creating L.R No. 209/8384, leaving them with L.R 209/1832/2.

136. They assert that the aforesaid sub-division and amalgamation to create L.R No. 209/8384 was unlawful and was undertaken in violation of their proprietary interests, and should be cancelled. It is the Plaintiffs' case that the deceased, whom they represent, purchased L.R No. 209/1832 and not 209/1832/2.

137. On his part, the 1st Defendant maintains that he lawfully purchased L.R No. 209/8384 from the 5th Defendant in 2007 for value, without notice of any defect and that the

amalgamation of L.R 209/1832/1 with parcel L.R 209/2678 to create L.R No. 209/8384 was lawful. This position is supported by the 5th Defendant.

138. The 2nd, 3rd and 4th Defendants support the legitimacy of the 1st Defendant's title, stating that the amalgamation of L.R No. 209/1832/1 with L.R No. 209/2678 to create L.R No. 209/8384 was lawful and was duly undertaken before the deceased acquired any interest in the property and the resultant title held by the 1st Defendant is un-impeachable.

139. From the foregoing narration, it is evident that the Plaintiffs seeks to impugn the 1st Defendant's title which he acquired from the 5th Defendant in 2007. The Plaintiffs are as such obligated to prove their claims in this regard. This requirement flows from the settled principle that he who alleges must prove, a maxim codified in **Section 107(1) and (2) of the Evidence Act.**

140. The aforesaid is reinforced by **Sections 109 and 112 of the Evidence Act.** **Section 109** places the burden of proof as to any particular fact upon the party who wishes the court to believe in its existence, unless the law provides otherwise, while **Section 112** recognises that where a fact is especially within the knowledge of a party, the burden of proving or disproving that fact rests upon that party.

141. As to the standard of proof, the applicable threshold in civil claims is proof on a balance of probabilities. The Court of Appeal in **Mumbi M'Nabea vs David M.**

Wachira [2016] KECA 773 (KLR) restated that the court must evaluate the oral, documentary and real evidence placed before it and determine which case is more probable than not.

142. On the discharge of the evidential burden, the Court of Appeal in **Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR)** endorsed the classical exposition by Denning J in **Miller vs Minister of Pensions [1947] 2 All ER 372**, that the balance of probabilities requires a reasonable degree of probability, not as high as in criminal cases, and that where probabilities are equal, the party bearing the burden fails.

143. The Plaintiffs have also alleged fraud. It is trite that fraud must not only be pleaded but specifically proved. This position was affirmed by the Court of Appeal in **Demutilla Nanyama Pururmu v Salim Mohamed Salim [2021] eKLR** relying on an earlier exposition in **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR** thus:

“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.”

144.As regards the standard of proof, the Court of Appeal in **Demutilla Nanyama Pururmu vs Salim Mohamed Salim (supra)** considered its earlier decision in **Kinyanjui Kamau vs George Kamau [2015] eKLR** wherein it held as follows:

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

145.The court will be so guided.

146. The 1st Defendant's title, which is the subject of these proceedings, was transferred into his name on 24th December 2007 pursuant to the provisions of the **Registration of Titles Act**, (now repealed). By dint of the provisions of **Section 107** of the **Land Registration Act, 2012**, the law applicable to the titles aforesaid is the retired **Registration of Titles Act** which provided as follows with respect to proprietorship:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

147. It is trite that where the validity of a registered proprietor's title is in question, it is insufficient for that person to simply produce the title deed as proof of ownership. The proprietor bears the duty to go further and show that the process through which the title was obtained was lawful, procedurally sound, and free from fraud or

irregularity. [See *Munyu Maina v Hiram Gathiha Maina [2013] KECA 94 (KLR)*].

148. Where the acquisition process leading to the issuance of a title is tainted by illegality or non-compliance with the law, such a title cannot be sustained. This position was affirmed by the Supreme Court in *Dina Management Limited vs County Government of Mombasa & 5 others [2023] KESC 30 (KLR)* where the Apex Court was categorical that:

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

- 149.** In the present matter, the 1st Defendant traces the root of his title to the 5th Defendant, from whom he purchased L.R No. 209/8384 on the 19th October, 2007. The same was transferred to him on 5th December, 2007, which transfer was duly registered on 24th December, 2007.
- 150.** The 5th Defendant, for its part, affirms that it lawfully held title to the suit property and validly sold and transferred it to the 1st Defendant for value. It explained that it applied for an extension of lease over L.R 209/2678 and the same was acceded to by the Town Planning Committee in its meeting of 17th January, 1997.
- 151.** According to the 5th Defendant, on 22nd October, 2002, it submitted its application for development permission and proposed amalgamation of L.R 209/2678 and L.R N0 209/1832/1 which was approved on 28th November, 2002 and that the sub-division of L.R 209/1832 to create L.R N0 209/1832/1 and L.R No. 209/1832/2 had been undertaken earlier on in 1974.
- 152.** The Plaintiffs' case is that, pursuant to a sale agreement dated 23rd September 2003, the deceased purchased L.R No. 209/1832 and not L.R No. 209/1832/2 from Mavji Ramji Patel. Disputes subsequently arose in the course of the transaction, prompting the deceased to lodge a caveat against the title on 16th December 2003 and later to institute proceedings in **HCCC No. 586 of 2005**.
- 153.** By a judgment delivered on 22nd July 2013, the court affirmed the deceased's entitlement to L.R No. 209/1832.

On that basis, the Plaintiffs contend that any dealings culminating in the creation of L.R No. 209/8384 were null and void.

154. That contention, however, must be weighed against the administrative chronology and the documentary record from the Lands Office as adduced by DW2 and DW3.

155. The documentary evidence shows that proposal in respect of the excision of a strip of land from L.R No. 209/1832 measuring 0.07461 and its consolidation with the adjoining parcel was initiated in the 1970s by the then proprietor, Cassam Suleman.

156. The record shows that on 6th December, 1973 the City Council of Nairobi recommended subdivision of L.R 209/1832 subject to conditions attached thereto being complied with. This conditional approval was communicated vide a letter dated 5th January, 1974.

157. The Director of Physical Planning, by a letter dated 11th February 1974, clarified that the proposal was not a conventional subdivision, but an excision of a strip measuring 10 feet by 35 feet from L.R No. 209/1832 to L.R No. 209/2678.

158. L.R No. 209/2678 and L.R No. 209/1832 were by then owned by one person, Cassam Suleman. The Commissioner of Lands approved the said proposal with conditions, on 22nd February 1974.

159. However, on 6th July, 1974, the City Council of Nairobi informed the proprietor of the two parcels of land that having declined to comply with condition number 2, the approval for sub division of LR No. 209/1832 had been declined.

160. It would appear that despite the proposed sub division of L.R No. 209/1832 vide a survey plan FR No. 130/107, which gave rise to LR Nos. 209/1832/1 and 209/1832/2, the said sub division never received absolute approval by the Commissioner of Lands and the then City Council of Nairobi. Indeed, with that stalemate, the statutory conveyancing and registration steps, including surrendering the mother title for purposes of issuing new titles for LR Nos. 209/1832/1 and 209/1832/2 was never effected by the then registered proprietor.

161. This state of affairs is confirmed by the memorandum of registration of transfer of lands dated 23rd August, 1974, which shows that LR No. 209/1832 measuring 0.07461 was transferred from Cassam Suleman Sumar to Kioria Hinga for a consideration of Kshs. 113,000. Mr. Kioria Hinga then made an application for the permission of the City Council of Nairobi to change the user of LR No. 209/1832 from residential to commercial, which approval was granted vide a letter dated 29th May, 1975.

162. The lands record shows that on 26th January, 1977, through a further memorandum of registration of transfer of lands, LR No. 209/1832 still measuring 0.07461 acres was

transferred from Kioria Hinga to Mavji Ramji Patel for Kshs 160,000. Mavji Ramji Patel wrote a letter dated 21st April, 1977 to the Commissioner of Lands requesting to know the status of the subdivision of LR No. 209/1832.

163.In the said letter, Mr. Mavji stated that although he was made to understand that the plot was sub divided, his title did not show that. He sought for a confirmation that the sub division was never implemented, and sought for a plan showing the extent of the boundaries of LR No. 209/1832.

164.In his response, the Commissioner of Lands vide a letter dated 3rd May, 1977, which was copied to the Director of Surveys and City Engineer, stated that LR No. 209/1832 remains intact because no final approval was granted, and that since the plot had been transferred, the plot remains intact. The ultimate paragraph of the letter by the Commissioner of Lands to Mr. Mavji stated as follows:

...By a copy of this letter the Director of Surveys is requested to note that the sub division scheme partially approved vide my letter ref. 26689/31 dated 22nd February, 1974 has never been accorded my final approval.

165.The record shows that on 7th March, 1978, the City Council of Nairobi communicated to Mavji Mamji Ladha Patel and others about approval of a building plan for shops and two flats to be built on LR No. 209/1832. The letter dated 26th June, 1990 and 11th December, 1991, show that indeed the land was entirely developed with a new commercial

building as approved by Nairobi City Council drawing number A.S 230 dated 6th March, 1978.

166. Indeed, Mr. Mavji, through Rico Structural Engineers applied to the Commissioner of Lands for the extension of Lease of LR No. 209/1832 vide letters dated 19th October, 1989 and 26th June, 1990. In the letter dated 11th December, 1991, he informed the Commissioner of Lands as follows:

“...The main purpose of extension is that we have developed the entire plot with complete new commercial building as per approved drawings N.C.C. Drawings No. AS 230 dated 6/3/1978.”

167. Mr. Mavji's advocates thereafter did several letters to the Commissioner of Lands requesting for the extension of lease of LR No. 1832 culminating with the memo by the Land Officer dated 28th September, 2000, whose recommendations were approved by the Deputy Commissioner of Lands.

168. In the said Memo, it was recommended that the lease for LR No. 209/1832 should be renewed for another 50 years in total of unexpired term. Indeed, in his letter dated 6th November, 2000 to Mr. Mavji's advocates, the Commissioner of Lands asked Mr. Mavji to surrender the existing title for exchange for a new one reflecting a new term and rent.

- 169.**The Commissioner of Lands calculated the payable new ground for LR No. 209/1832, and the surrender and conveyancing fees, which he informed Mr. Mavji's advocates vide a letter dated 21st June, 2001. Vide the letter dated 6th July, 2001, Mavji's advocate forwarded to the Commissioner of Lands the Assignment dated 26th January, 1977 in the name of Mavji (the title); a new Deed Plan 235970 for LR No. 209/1832 dated 12th June, 2001 and a cheque for Kshs 5,000 being approval fees.
- 170.**Up to this point, there was no mention by the Commissioner of Lands or Mr. Mavji of the sub division of LR No. 209/1832, or surrendering the title for the purpose of issuing new titles for the sub divided portions.
- 171.**However, while Mr. Mavji and the chargee, Commercial Bank of Africa, were awaiting the issuance of a new grant for LR No. 209/1832, on 20th March, 2003, a senior land officer authored a handwritten memo in which he stated that according to the records, LR No. 209/1832/1 had been excised and amalgamated with LR No. 209/2678 to form LR No. 209/8384.
- 172.**The said officer advised that a revised valuation for LR No. 209/1832/2 measuring 0.0238 ha as per F/R 394/68 for the extended term of 50 years with effect from 1.10.2000 be done. It is on that basis that the Commissioner for Lands did a letter to Mr. Mavji dated 19th November, 2003 advising him about the two sub divisions, and the payable rent. In the letter, the Commissioner of Lands stated that

the letter dated 23rd September, 2003 by Mr. Mavji “cancelling the above sub division and amalgamation of this stage of amalgamation is disturbing.”

173. On 20th November, 2003, the Commissioner of Lands forwarded to Mr. Mavji revised rates for portion number 209/1832/2 which were paid by Mr. Mavji through his advocate, Mohammed Madhani & Co. Advocates on 20th November, 2003. A letter of allotment was subsequently issued to Mr. Mavji for L.R No. 209/1832/2 on 25th March, 2004.

174. It is instructive to note that by the time the letter of allotment was issued to Mr. Mavji for L.R No. 209/1832/2 on 25th March, 2004, Mr. Mavji had sold L.R No. 209/1832, as one whole portion, to Gerald Muturi, deceased, on 23rd September, 2003.

175. This sale was with the concurrence of the chargee which was holding the Assignment (the title) for L.R No. 209/1832, and which had released the title to the Commissioner of Lands, through the firm Ndungu Njoroge & Kwach Advocates on 6th July, 2001, for purposes of extension of lease for 50 years.

176. In fact, other than the Plaintiffs who have objected to the turn of events after the purchase of the suit property by the deceased, the chargee, which had consented to the sale of the property, through the firm of HHM, complained about the sub division of LR No. 209/1832 which had been charged to Commercial Bank of Africa by Mavji in 1978,

1980, 1983, 1988 and 1994 and the issuance of a new grant for L.R No. 209/1832/2 vide a letter dated 6th April, 2004 as follows:

“It has however come to our attention that unknown to it (the chargee) and without its consent, the proprietor of the land proceeded to carry out a sub division and excision of a portion of the property...the assignment which was surrendered for the purposes of extension of lease is now being used for purposes of concluding the excision and the extension of lease seems to have been put on hold...”

177.The correspondence exchanged between 1974 and 1977 between the Commissioner of Lands, Nairobi City Council and Mr. Mavji underscores that, although a sub division scheme had been contemplated, the process never crystallised into a finalised subdivision in the manner required by law. By a letter dated 21st April 1977, Mavji Ramji Patel sought clarification on the status, implementation, and boundaries of the subdivision said to have been initiated before he purchased the land.

178.In response, the Commissioner of Lands by a letter dated 3rd May 1977 stated that L.R No. 209/1832 remained intact and that the subdivision had not been finalised because the plots had been transferred to different persons. That contemporaneous response is significant, because it demonstrates that the scheme never matured into a

completed subdivision at that time, and the title was never surrendered by the original owner, or at all for purposes of the sub division.

179. Therefore, the contents of the letter dated 29th September, 1977 from the original owner, Mr. Cassim Suleiman to Mr. Mavji Patel, in which Mr. Suleiman asserted that Mr. Mavji Patel had been aware that a 10-foot strip of L.R No. 209/1832 had been subdivided and consolidated into L.R No. 209/2678 is not factual.

180. It is notable in that letter that Mr. Suleiman urged Mr. Mavji Patel to “have new deed plan” prepared to avoid future complications, which language is itself consistent with an incomplete process requiring formalisation. Further, the charging of L.R No. 209/1832 by Mr. Mavji between 1977 to 1994 shows that the process of sub division of L.R No. 209/1832 never materialized into a registrable document.

181. The City Planning Department’s letter dated 7th January 2003 confirming that amalgamation of L.R No. 209/1832/1 and L.R No. 209/2678 was approved at a meeting held on 28th November 2002 evidences that planning approval was obtained many years after the 5th Defendant had purchased L.R No. 209/2678 (in 1981). This confirmation of amalgamation by the Nairobi City Council was contrary to its refusal to approve the sub division via the letter dated 6th July, 1974.

- 182.** Indeed, planning approval is only one step in the chain and does not, by itself, complete a subdivision or amalgamation or extinguish proprietary rights absent survey approval, surrender, registration, and issuance of independent titles.
- 183.** From the above chronology of events, Mavji's advocates' letter dated 20th November, 2003, in which Mohamed Madhani & Co. Advocates instructed the Commissioner of Lands to disregard the earlier cancellation request of 23rd September 2003, accepted the offer, and directed that title be prepared for L.R No. 209/1832/2 only, was done in bad faith, and was fraudulent in nature considering that the surrender of the title by the chargee and Mr. Mavji was in respect of the extension of lease for L.R No. 209/1832, and not for sub division and amalgamation.
- 184.** Further, the instructions by the firm of Mohammed Madhani & Co Advocates, on behalf of Mr. Mavji Patel, to the Commissioner of Lands vide a letter dated 20th November, 2003 were post-contractual, coming after the Plaintiffs' purchase of the land from Mr. Mavji, who had earlier on charged the property. Those instructions could not lawfully re-define the subject matter already sold to the deceased or defeat the purchaser's interest which had already attached to L.R No. 209/1832.
- 185.** I say so because it is settled that subdivision of a registered parcel of land with a title is only complete upon surrender of the mother title and registration of separate titles. In the present case, although proposals for excision

of a strip from L.R No. 209/1832 were initiated as early as 1974, there is no proof that the mother title was surrendered and a separate title for L.R No. 209/1832/2 issued before the deceased's purchase on 23rd September, 2003, or before the property was charged by Mr. Mavji.

186. Indeed, DW2 conceded that he had no document evidencing final approval of the process, and the Commissioner of Lands' letter of 3rd May 1977 expressly stated that the subdivision had not been finalised and that L.R No. 209/1832 remained intact. On those facts, the court is unable to accept that a legally completed subdivision existed capable of defeating the deceased's purchase on 23rd September, 2003, which purchase was confirmed by the court in **HCCC No. 586 of 2005**.

187. Crucially, the first registration of the amalgamated parcel L.R No. 209/8384 occurred much later, and after the deceased had purchased **LR No. 209/1832**. The evidence from DW3 shows that Grant I.R No. 105863 for L.R No. 209/8384 was registered on 10th May 2007 in the name of Mwangi Thuo Holdings Limited, and that the 1st Defendant only acquired the property thereafter by a transfer registered on 24th December 2007.

188. By the time the purported amalgamation of LR No. 209/1832/1 and LR No. 209/2678 crystallised into a registered title, LR No. 209/8384 in 2007, the deceased had already purchased L.R No. 209/1832 in September, 2003 and had lodged a caveat on 16th December 2003. The

later amalgamation and registration therefore occurred against the backdrop of a subsisting purchaser's interest which had already attached to the original parcel.

189. The lodging of a caveat by the deceased against the title for L.R No. 209/1832 on 16th December, 2003 stopped all transactions on the said parcel of land. Indeed, after the entry, the amalgamation of 209/1832/1 and LR No. 209/2678 could not have proceeded considering that a surrender instrument for LR No. 209/1832 ought to have been registered against the title for LR No. 209/1832 first before the amalgamation of LR No. 209/1832/1 and LR No. 209/2678 in 2007 and issuing of a title for 209/1832/2 in 2015.

190. This court has not come across any surrender instrument which was duly registered signifying the closure of LR No.209/1832. Instead, this court has been shown an internal memo from the Head of Legal Unit to the Chief Land Registrar dated 11th May, 2015, in which he confirms that an extension of Lease for LR No. 209/1832 was granted for 50 years with effect from 1-10-2000.

191. The Head of Legal Unit further informed the Chief Land Registrar that although the new grant for LR No. 209/1832 was prepared under the RTA, the same was not registered because there were encumbrances on the GLA title. He further stated that the new title was misplaced and efforts to trace it had been futile. He concluded by stating that a

fresh Lease should be prepared for registration and subsequent execution of the court order.

192. It is instructive to note that even as late as the year 2015, the Head Legal Unit in the Ministry of Lands still, and rightfully so, held the view that the only Lease that could be extended and issued was for LR No. 209/1832 in the name of the deceased with a view of satisfying the court order. The memo or the court order did not refer to LR No. 209/1832/2. How that opinion changed for a Lease to be prepared and issued in respect of LR No. 209/1832/2 can only amount to fraud.

193. In fact, the document produced by the officials from the Ministry of Lands shows that the 5th Defendant did purchase an identifiable portion of land known as LR No. 209/2678 for Kshs 310,000 from Ndung'u Kariuki on 16th July, 1981 measuring 0.0310 acres. The said Ndung'u Kariuki had purchased the land from Ahmed Suleiman on 23rd August, 1977 for Kshs 170,000.

194. The record further shows that the 5th Defendant applied for extension of Lease for LR No. 209/2678 on 20th June, 1996. In the said application for extension of lease, the 5th Defendant did not make any reference to the issue of amalgamation, or the existence of LR No. 209/1832/1.

195. Indeed, the Commissioner of Lands accepted the said application for extension of Lease for LR No. 209/2678 vide a letter dated 19th February, 2001 and asked the 5th Defendant to make payments for the same, and surrender

the old title. The issue of amalgamation of LR No. 209/1832/1 and 209/2678 arose for the first time vide the letter dated 7th January, 2003 by the Director of City Planning.

196. The 5th Defendant's claim over LR No. 209/1832/1, which was amalgamated with 209/2678 to create LR No. No. 209/8384 in 2007 is therefore fraudulent, having purchased LR No. 209/2678 in 1981, and used it until 1996 when he applied for extension of the Lease without any reference to LR No. 209/1832/1. All long, the 5th Defendant never claimed to own LR No. 209/1832/1, which in any event was still part of LR No. 209/1832 owned by Mr. Mavji, who sold the entire portion to the deceased on 23rd September, 2003.

197. The 5th Defendant's contention that the subdivision and amalgamation was completed in 1974 before the deceased purchased LR No. 209/1832 is therefore not borne out by the registration record. The grant for L.R No. 209/8384 emanated from a fresh letter of allotment dated 14th March 2007 and was only registered in May 2007.

198. That chronology contradicts the proposition by the Defendants that the excised strip - LR No. 209/1832/1 had been independently registered decades earlier. In law, until the resultant titles were registered, L.R No. 209/1832 remained the operative parcel in the register, and the vendor remained capable of transferring it, which Mr.

Suleiman, Mr. Hinga and Mr. Mavji did in 1974, 1977 and 2003 respectively.

- 199.** Consequently, it is the finding of this court that once the deceased entered into a binding sale agreement on 23rd September 2003 for the purchase of L.R No. 209/1832, and later obtained a judgment for specific performance compelling Mr. Mavji to transfer the entire property to him, Mr. Mavji could not lawfully defeat that interest by subsequent surrender, subdivision, or authorisation of a re-grant excluding part of the land sold.
- 200.** The vendor could not give what he no longer had to give, and those claiming through later administrative processes could not enlarge their interests beyond what was lawfully available. The 5th Defendant, in particular, could not through a later of amalgamation acquire or convey an interest that derogated from the Plaintiffs' prior contractual and equitable rights.
- 201.** Further, the 5th Defendant did not provide any evidence to show that when he purchased LR No. 209/2678 in 1981, it was on condition that the same will be amalgamated with another portion being LR No. 209/1832/1.
- 202.** Consequently, he cannot be heard to say, in the year 2001 or thereabouts, that he is entitled to a bigger portion, which he never purchased in the first place. The only land that the 5th Defendant could lawfully pass to the 1st Defendant in 2007 was LR 209/2678 and not LR No. LR

No. 8384 which was unlawfully created in 2007 after the impugned amalgamation.

203. In the premises, this court finds that the subdivision and amalgamation only culminated into a registrable and registered title in 2007, well after the Plaintiffs' (deceased) 2003 purchase and after the lodging of a caveat by the deceased.

204. The creation of L.R No. 209/8384 and its subsequent transfer to the 1st Defendant on 24th December 2007 therefore occurred in disregard of a subsisting purchaser's interest and in a manner inconsistent with the Plaintiffs' court-sanctioned entitlement to the entire parcel.

205. Accordingly, the excision of L.R No. 209/1832/1 and its amalgamation with L.R No. 209/2678 to create L.R No. 209/8384 was fraudulent and cannot be allowed to stand; the resultant title is impeachable, and the subdivision and amalgamation are null and void to the extent that they derogate from the Plaintiffs' prior rights.

206. For emphasis, the only person who could lawfully amalgamate L.R No. 209/1832/1 with L.R No. 209/2678 was Mr. Suleman, the initial owner of the two suit properties. In fact, one of the requirements for a lawful amalgamation to occur is that the properties to be amalgamated must be one owned by one person. That ceased to be the position when LR No. 209/1832 and L.R No. 209/2678 were sold to two different people in the 1970's, and when Mr. Mavji subsequently charged LR No.

209/1832 to Commercial Bank of Africa and sold it to the deceased.

What are the appropriate reliefs to issue?

207.The Plaintiffs seeks, *inter alia*, a declaration that the subdivision of L.R No. 209/1832 and the amalgamation of L.R No. 209/1832/1 with L.R No. 209/2678 to create L.R No. 209/8384 were null and void; an order directing rectification of the register by cancellation of the resultant title L.R No. 209/8384; restoration of the excised portion to L.R No. 209/1832; and consequential reliefs including damages.

208.Having found that the subdivision and amalgamation process which culminated in registration of L.R No. 209/8384 in 2007, long after the Plaintiffs' purchase on 23rd September 2003 and the lodging of a caveat on 16th December 2003 was unlawful, and further having found that the excision was effected in disregard of a subsisting contractual and equitable interest, later fortified by a decree of specific performance in HCCC No. 586 of 2005, this court is satisfied that the resultant title L.R No. 209/8384 is impeachable and is for cancelling.

209.On the question of damages, the Plaintiffs sought an award of Kshs. 15,000,000 as general and punitive damages for trespass and conversion. Their claim is premised on the evidence that after acquiring L.R No. 209/8384 in December 2007, the 1st Defendant took possession and let

out the premises to multiple tenants at a monthly rent of Kshs. 12,500 per unit.

210.The 1st Defendant's own evidence confirms that upon registration of L.R No. 209/8384 in December 2007, he took possession and let out the premises to approximately ten (10) tenants at a monthly rent of Kshs. 12,500 per unit. This would translate to an estimated Kshs. 125,000 per month, or about Kshs. 1,500,000 per annum.

211.For over a period eighteen years, the cumulative rental income derived from the amalgamated parcel would exceed Kshs. 25,000,000, demonstrating that substantial commercial benefit was enjoyed by the 1st Defendant during the period the Plaintiffs were deprived of the excised portion.

212.Nevertheless, the court notes that no valuation report or expert evidence was tendered to establish the precise market value of the impugned strip, nor was there specific proof isolating what proportion of the rental income is directly attributable to that excised portion. The exact pecuniary worth of the strip, standing alone, therefore remains unclear on the evidence placed before the court.

213.Further, punitive or exemplary damages are only awardable in exceptional circumstances, such as where conduct is oppressive, arbitrary, unconstitutional, or deliberately calculated to yield profit in excess of any likely compensation. While the subdivision and amalgamation have been found unlawful and in derogation of the

Plaintiffs' prior rights, the evidence does not rise to the high threshold required for an award of punitive damages.

214. That said, the Plaintiffs have established trespass and prolonged deprivation of a portion of their property for nearly two decades, during which time the 1st Defendant derived commercial benefit from the amalgamated parcel. Considering the duration of dispossession, the rental income disclosed, and the need to vindicate proprietary rights, the court is satisfied that an award of Kshs. 10,000,000 as damages for trespass is fair and warranted in the circumstances.

215. In the end, the Plaintiffs have established their case on a balance of probabilities and the court finds as follows:

a. A declaration does hereby issue that amalgamation of Land Reference Numbers 209/1832/1 and 209/2678 to create LR No. 209/8384 is null and void.

b. An order does hereby issue directing the 2nd and 3rd Defendants to jointly and severally disamalgamate Land Reference number 209/1832/1 from Land Reference number 209/2678 and further re-amalgamate Land Reference number 209/1832/1 to Land Reference number 209/1832/2 to retain the original Land Reference number 209/1832.

- c. The 2nd and 3rd Defendants to jointly and severally cancel the survey plan that created LR No. 209/1832/1 and LR No. 209/1832/2.**
- d. The 2nd and 3rd Defendants to cancel the title for LR No. 209/1832/2 that had been issued to the Plaintiffs and simultaneously, and unconditionally, issue to the Plaintiffs a title for LR No. 209/1832 under the same terms and conditions issued to the Plaintiffs while issuing the title for LR No. 209/1832/2 in 2015.**
- e. The 2nd and 3rd Defendants to jointly and severally cancel the Deed Plan and title for LR No. 209/8384 issued to the 1st Defendant and simultaneously issue to the 1st Defendant a title for LR No. 209/2678 under the same terms and conditions issued to the 1st and 5th Defendants while issuing the title for LR No. 209/8384 in 2007.**
- f. A permanent injunction does hereby issue restraining the 1st Defendant, his servants, employees and/or agents from entering, trespassing, selling, charging, mortgaging, transferring, leasing and/or dealing in any manner whatsoever with all that parcel of land formerly known as Land Reference**

number 209/1832/1 now comprised in Land Reference Number 209/8384.

- g. The Plaintiff is awarded damages for trespass to the tune of Ksh 10,000,000 to be borne by the 1st Defendant.**
- h. The 1st and 5th Defendants shall bear the costs of the suit jointly and severally.**

Dated, signed and delivered in Nairobi virtually this 5th day of March, 2026.

**O. A. Angote
Judge**

In the presence of:

Mr. Oyugi for the Plaintiffs

Mr. Karuga for the 1st Defendant

Court Assistant: Tracy