

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE

ELC CASE No. 128 OF 2021

FORMERLY MOMBASA ELC CASE No. 105 OF 2015

**KWALE INTERNATIONAL SUGAR CO. LTD
PLAINTIFF**

VERSUS

**RUWA MWARUWA KURERA 1ST
DEFENDANT**

AMOS WAMUYU 2ND DEFENDANT

KISIMA PROPERTIES LIMITED 3RD DEFENDANT

FOUNTAIN ENTERPRISE PROGRAME LIMITED 4TH DEFENDANT

THE REGISTRAR OF TITLES 5TH DEFENDANT

THE HON. ATTORNEY GENERAL 6TH DEFENDANT

AND

KISIMA REAL ESTATE LIMITED INTERESTED PARTY

JUDGEMENT

1. This suit was commenced by way of a Plaint dated 15th May, 2015 filed in the Environment and Land Court at Mombasa as ELC Case No. 105 of 2015, and was later transferred to this court for hearing and determination.
2. In the said Plaint, the Plaintiff seeks the following reliefs against the Defendants: -
 - (a) A declaration that the Plaintiff is the legal owner of KWALE/KIWEGU JEGO/47.
 - (b) A declaration that the purported sub-division by the 2nd Defendant of the suit land into KWALE/KIWEGU JEGO/778,

KWALE/KIWEGU JEGO/779 and KWALE/KIWEGU JEGO/780 is null and void.

(c) A declaration that the purported transfer of the suit land by the 2nd Defendant to the 3rd Defendant is null and void.

(d) The 5th Defendant be ordered to correct the Land Register to reflect the Plaintiff as the only legal owner of the suit land to the exclusion of all.

(e) An order restraining the 2nd, 3rd and 4th Defendants by themselves, agents and/or servants from interfering with the Plaintiff peaceful enjoyment of the suit land.

(f) Costs of this suit.

(g) Any other relief this Honourable Court deems fit.

3. The facts pleaded are that the Plaintiff purchased the land known as KWALE/KIWEGU JEGO/47 measuring 162.0Ha (the suit property herein) from the 1st Defendant on 20th March, 2012 and a transfer registered in its favour on 8th June, 2010. That the Plaintiff received a complaint from the Kwale Land Registry on 20th March, 2012 stating that the 2nd Defendant herein, who was the original owner, had not sold the land to the 1st Defendant thus the sale by the 1st Defendant was illegal and the Plaintiff was asked to surrender the original title documents to the said Registry for investigations.

4. The Plaintiff avers that it instructed a surveyor to conduct investigations at the Registry and discovered that the 2nd Defendant had sub-divided the suit land into KWALE/KIWEGU JEGO/778, 779 and 790 and the survey map amended to reflect the three plots. That the three subdivisions were transferred to

the 3rd Defendant although the green card to the original parcel was still intact. It avers that the sub-division was done by the 2nd Defendant illegally without its knowledge and consent.

5. The Plaintiff also claims that the sale to the 3rd Defendant was without its consent, is fraudulent and without legal or equitable interest. The Plaintiff claims that it conducted a search at the Kwale Land Registry on 31st March, 2015 which showed that the land is still registered in its name. The Plaintiff however discovered that the suit property is occupied by the 4th Defendant and who had made arrangements to re-settle the squatters residing on the land. The Plaintiff averred that it is the legal owner and any dealings on the land by any of the Defendants is illegal, fraudulent, null and void ab initio.
6. In response, the 2nd Defendant filed a Statement of Defence dated 5th October, 2015 and denied all the averments in the Plaintiff's Complaint save for the description of the parties. The 2nd Defendant pleaded that he became the first registered proprietor of the suit land on 25th October, 1988 having followed all due process of law. That in or about 2006 squatters invaded the land, compelling him to file HCC No. 392 of 2009 for vacant possession against them and the court in its judgment of 26th May, 2010 found in his favour.
7. The 2nd Defendant averred that the issue of ownership of the suit land was thus settled and any other question on the same is res judicata. He explained that a new register for the suit property was opened in his favour vide Gazette Notice No.

10407 dated 3rd September, 2010. He averred that he obtained consent to subdivide the suit property into Kwale/Kiwegu Jego/778, 779 and 780, upon which the suit property ceased to exist, and he has since disposed of all his interests in the three subdivisions. He averred that the suit against him lacks merit and asked that it be dismissed with costs.

8. The 5th and 6th Defendant were both represented by the Office of the Attorney General and filed a joint Statement of Defence dated 13th January, 2022 in which they denied the averments in the Plaint and stated that the suit is bad in law and a nullity. They averred that there was another suit, namely HCC No. 392 of 2009 before a court of competent jurisdiction where the 2nd Defendant was the Plaintiff and the court found he was the owner of the suit land. That this court cannot thus litigate over the ownership of the suit property again. Further, that the 1st Defendant had no valid title to pass, and that any fraudulent title can neither be protected under Section 26 of the Land Registration Act or Article 40 of the Constitution.
9. The 5th and 6th Defendants also averred that the suit herein is time barred by virtue of Section 3 of the Public Authorities Limitation Act, CAP 39 thus this court lacks jurisdiction and the prayers sought in the Plaint must fail. They further averred that the 5th Defendant acted in good faith pursuant to its legal mandate under the Land Registration Act, hence is not liable for any loss suffered from the Plaintiff's negligence. They concluded that the Plaintiff failed in its duty of care to verify the

legitimacy of the property and is thus estopped from claiming proprietary rights over the land.

10. The Interested Party also filed a Defence dated 12th August, 2016 and also denied the averments set out in the Plaint. The Interested Party clarified that it is not the 3rd Defendant and denied any knowledge of the 1st, 3rd and 4th Defendants herein or any dealings with them. The Interested Party averred that it is the legal registered proprietor of the properties known as Kwale/Kiwegu Jego/778, 779 and 780 having purchased them from the 2nd Defendant in a transaction completed on 16th July, 2012 and titles issued on the same date by the Kwale Land Registry.
11. The Interested Party denied the prayers sought in the Plaint and prayed that the Plaintiff's suit be dismissed in its entirety with costs. The Interested Party further filed a Co-Defendant's Notice of Claim dated 8th December, 2017 against the Defendants in this suit. According to the said Notice, the Interested Party expressed intention to claim against the Defendants jointly and/or severally if the Court is to find or order against it.

HEARING AND EVIDENCE

The Plaintiff's Case

12. Hearing of the case commenced on 6th March, 2023 with Amos Suge, the Plaintiff's Legal Officer, testifying as PW1. PW1 produced stamped transfer deed dated 3/6/2010 between the Plaintiff and the 1st Defendant and registered on 8/6/2010 as PEXb1 and testified that the title was for plot 47. PW1 produced

a bundle of cheques totalling to KShs. 7,200,000/- being the purchase price of the suit property paid to the 1st Defendant as PEXb2. The title deed to the suit property in favour of the Plaintiff was produced as PEXb3, and it showed that there is an encumbrance to CFC Stanbic. The Plaintiff also produced a Certificate of Official Search dated 31/3/2015 as PEXb4. PEXb5 is a letter dated 20/3/2012 on the investigations on the title and requesting a return of the same. He testified that on receipt of the letter, the Plaintiff made inquiries and explained how it obtained ownership of the land and cleared the issues with Registrar.

13. PW1 also produced the green card to the suit property certified on 12/1/2022 as PEXb6. He testified that per the green card, it was opened on 29/08/1988 with the 2nd Defendant at entry no. 1 and he was issued with title on 25/10/1988 and the third entry is the 1st Defendant's name. PW1 confirmed that per the green card there are 8 charges registered after the letter of 20/3/2012 and the register was not closed. PW1 also produced the green cards for the three subdivisions as PEXb7 which show that they from Plot No. 47. He testified that the Plaintiff is the one in possession and not the Interested Party. PW1 was referred to the Gazette Notice dated 3/9/2010 in the 2nd Defendant's list on opening of a new register following loss of the original, and noted that title to the Plaintiff predates the Gazette Notice. PW1 conceded that after the Gazette Notice, a new green card was generated with only two entries.

14. PW1 conceded that there were two green cards and testified that the Plaintiff was not consulted on the generation of the 2nd Green card, thus he claimed that this action was fraudulent. Further, that transactions were still being registered. PW1 was aware of the judgment delivered in HCC No. 392 of 2009 but testified that per ruling delivered herein on 12/2/2012, the Plaintiff and Interested Party were not parties to that suit. PW1 was referred to the Interested Parties Investigation Report dated 18/08/2015 and testified that the same did not originate from the official investigative authority. He asked the court to grant the prayers sought in the Plaint.
15. PW1 was cross-examined by Mr. Mwaure and Ms. Kariuki for the Interested Part. He testified that everything was done in accordance with the law. That the 1st Defendant had been served but did not file any pleadings, and claimed that the Plaintiff did not have any obligation to look for him since he no longer has any interest in the suit land. He confirmed that the Plaintiffs title was issued on 20/3/2010 but they did not have an agreement for sale or LCB Consent in the Plaintiff's bundle.
16. PW1 admitted that he had no evidence that the issue with the registrar was sorted out or that the Plaintiff set the record straight. He further conceded that he had no evidence to dispute the Interested Party's report. PW1 admitted that the 2nd Defendant was the original owner, and that he could not establish any relationship between him and the 1st Defendant. PW1 testified that at the time of the Gazette Notice, the Plaintiff had already acquired the land. PW1 stated that he was aware of

the squatters but did not know there were discussions between them and the Interested Party.

17. On further cross-examination by Mrs. Waswa for the 5th and 6th Defendants PW1 testified that they conducted a search before purchase but he had no search showing Ruwa as the owner of the property. He told this court that they were told to surrender the title, but they had no official communication to show that the issue had been sorted out. He conceded that they had made no official protest on the second green card. PW1 asserted that the Plaintiff is the owner because they have the original title.
18. On re-examination, PW1 was referred to PEXb1 and testified that the transfer was duly signed by Ruwa, that it was witnessed and the purchase price acknowledged. PW1 testified that the issue of lack of LCB Consent was not pleaded thus they did not need to respond to it. He claimed that they only became aware of the second green card immediately before filing the instant suit. Further, that a pre-purchase search would not add any value, but they did another search which is before the court showing their transfer went through. He further stated that if the issues on the title had not been resolved, the registrar would have refused to register the subsequent charges.
19. The Plaintiff called Otieno Oganga Maurice who testified as PW2. He introduced himself as a surveyor employed by the Plaintiff. PW2 testified that he visited the land in December, 2022 when it had been prepared for sugarcane planting, and the presence of squatters on the land did not hinder their

operations. PW2 testified that the Boundary Survey for Plot 47 had been amended to show the subdivisions that were carried out and he produced it as PEXb8. He testified that the subdivision is a fraud because plot no. 47 is still intact and its green card claimed to be lost is still in the registry.

20. PW2 raised suspicions on the subdivisions because they were done immediately after the Gazette Notice. PW2 acknowledged that the Interested Party entered a Sale Agreement on 17/04/2012 but that he could not see proof of payment of the KShs. 60,000,000/-. He however claimed that the transaction was to erase the original documents from the registry and to defraud the Plaintiff's property. He prayed that the court grant the prayers in the Plaint.
21. PW2 was cross-examined by Mr. Mwaure and he testified that he was not aware of any LCB Consent brought to court. PW2 testified that a party who has no interest in land has no basis to stop anything. He admitted that the original map cannot exist after subdivision and that he did not advise the Plaintiff to report fraud at the DCI.
22. Cross-examined by Mrs. Waswa the witness testified that the subdivision only changed the map but it did not change the status of the land. He confirmed that the Defendants did the subdivisions. PW2 testified that the Plaintiff had commenced preparations for the last 10 years having moved in in 2015. With regards to the gazette notice, PW2 testified that he is not aware whether the Plaintiff raised any objection to the same. He

conceded that if the Land Registrar did not receive any objections, then he is not in the wrong to issue the green card.

23. On re-examination, PW2 was referred to HCC No. 392 of 2009 and testified that the ruling by Omollo J. had nothing to do with legal ownership. On the gazette notice, PW2 faulted the registrar for creating a new green card when the old one was in place, and the fact that there was no objection is not an issue. He confirmed that they were seeking a nullification of the subdivisions, which prayer the court has power to issue.
24. With the above the Plaintiff closed its case.

The Interested Party's Case

25. DW1 was Joseph Karanja Kanyi, who introduced himself as an advocate of this court and Conveyancing practitioner. He adopted his witness statement dated 30/11/2022 as his evidence in chief. He testified that the 2nd Defendant was his long term client. That the 2nd Defendant instructed him to file a suit over plot no. 47 to assert ownership and have the squatters removed. That after judgment was delivered in his favour, the 2nd Defendant subdivided the land into parcel nos. 778, 779 and 780 and instructed DW1 to oversee the sale of the three portions to the Interested Party. DW1 testified that the purchase price was KShs. 60 million which was paid in full by the Interested Party who was represented by Mbatia Advocate. That thereafter, the land was transferred to the Interested Party and they handed over possession.

26. DW1 testified that prior to the suit in 2009, he had through due diligence discovered that the 2nd Defendant acquired the suit property through adjudication process and had a proper title. DW1 explained that the 2nd Defendant discovered that the original green card was missing at the Land Registry in Kwale and he caused it to be replaced. DW1 testified that there was no objection to the application, thus the register was reconstructed. According to DW1, the 2nd Defendant never sold the property to anyone else other than the Interested Party.
27. On cross-examination by Mr. Njuru counsel on record for the Plaintiff, DW1 was referred to the green card produced as PEXb6 and he confirmed that it was certified and stamped by the registry. DW1 denied the purported transfer to the 1st Defendant, although he admitted that the 2nd Defendant in his Defence and witness statement did not deny knowing the 1st Defendant. DW1 testified that he could state with certainty that the 2nd Defendant did not sell the property. DW1 explained that the 2nd Defendant personally undertook the process of replacing the green card without the assistance of an advocate. DW1 testified that per PEXb6, the 2nd Defendant ceased to own the property after transfer and Mwaruwa's name was on the green card. DW1 testified that he did a search and the 2nd Defendant was still the owner. As to proof of payment of the purchase price by the Interested Party, DW1 testified that he did not provide evidence of the money trail because there was no dispute between the parties, but the transfer indicates that the money was paid.

28. Upon cross examination by Mrs. Waswa and DW1 testified that the 1st Defendant was not a party to the 2009 case. He clarified that before the Interested Party purchased, they did a search and confirmed that the 2nd Defendant still owned the land but it was not part of their documents. He testified that when they conducted the search, they did not get any revelation on the second green card. DW1 speculated that the 2nd Defendant realised the loss of the green card when registering the mutation.
29. On re-examination, DW1 testified that the Plaintiff's green card was fake because the registrar wrote to the Plaintiff that the title was fake. With regards to the earlier judgment, DW1 testified that the 2nd Defendant had sued as an owner and they were able to prove ownership and obtained orders for vacant possession. DW1 reiterated that the purchase price was paid in full.
30. The Interested Party then called Lucy Nyambura Mbatia who testified as DW2. She adopted her witness statement dated 18th November, 2022. DW2 told this court that the Interested Party used to be her client at LN Mbatia & Co. Advocates. She testified that she drew the agreement for sale at item 8 of the Interested Party's list dated 17th April, 2012 and produced it as DEXb1.
31. DW2 was cross-examined by Mr. Kulecho and she testified that she handed over all the documents to the Vendor's advocate. According to DW2, the balance of the purchase price was paid.

DW2 testified that she did due diligence and was convinced that the documents were genuine based on the records at the Land Registry. She testified that had she known about the 2nd green card, she would not have touched it as it would have allowed her client to be conned. She stated that she had not come across any transfer from the 2nd Defendant to the 1st Defendant, otherwise she would not have advised the Interested Party to proceed. DW2 testified that to her knowledge, the 2nd Defendant gave vacant possession.

32. DW2 was the cross-examined by Mrs. Waswa and she testified that she did a search before the purchase although she had not produced it in court. DW2 testified that she forwarded all the documents to the registry, but was not aware there was a second green card.
33. On re-examination, DW2 reiterated that she remitted the purchase price to Advocate Kanyi, and that there has been no allegation that she did not pay. She further testified that she did due diligence and confirmed that the land was transferred to the Interested Party.
34. The Interested Party called Tiberius Onyango Otsieno to testify as DW3. He introduced himself as a Private Investigator. He testified that in August, 2015 he was hired by the Interested Party to investigate a plot of land in Kwale. DW3 produced his witness statement dated 12.11.2021 and a report dated 18.08.2015 as DEXb2. DW3 testified that he found there were two green cards relating to plot no. 47. He testified that on the

second green card, there was handwritten marks indicating that a fraud had been reported by the original owner, who on both green cards is Amos Wamuyu. DW3 testified that he also made searches of criminal records at the court and DCI stated his observations and conclusions at page 6 of his investigation report.

35. On cross-examination by Mr. Kulecho, DW3 testified that he was instructed by FEP Holdings, which was the Interested Party's Mother Company and prepared a report to be filed in court. DW3 was referred to PEXb6 and testified that there were writings of fraud on the green card, and further claimed that the green card did not capture the entire document. On the recommendations at page 6 of his report, DW3 testified that he had not attached any correspondence from the EACC or Land Registry. DW3 claimed he was not aware of the green card opened pursuant to a gazette notice.
36. DW3 was also cross-examined by Mrs. Waswa and he testified that he visited the lands office and made official requests for the lands office documents as well as applied for a search, and he had enclosed these documents in his report. DW3 stated that there were no criminal charges brought against the Land Registrar, and further, that he did not advise his client to institute criminal proceedings against any of the parties. DW3 claimed that he did not ask the staff which of the titles was authentic, but that he made his conclusions based on the documentation. DW3 testified that he found no evidence of

corruption at the registry and neither did he investigate that aspect since it was not part of his mandate.

37. On re-examination, DW3 testified that there is no law barring him from producing his report in court. DW3 testified that the presence of two green cards points to fraud. He added that the Land Registrar is the one to be blamed for the existence of two green cards. He said that he gave everything he collected and without concealing anything.
38. DW4 was Onesmus Muia Muasa and introduced himself as the Interested Party's Finance Manager. He adopted his witness statement dated 17th September, 2024 as his evidence-in-chief. He also produced the documents in the Interested Party's List of Documents filed on 12th August, 2016 as DW4 DEXb1 - 41, and those in the Interested Party's Supplementary List of Documents dated 30th November, 2022 as DW4 EXb42 - 48.
39. DW4 testified that the Interested Party purchased the property from the 2nd Defendant for KShs. 60 million. That the payment was done through Lucy Mbatia Advocate who was acting for them. DW4 explained that he had caused searches to be done as late as 2022 and had the green card for the properties, all of which showed that the land belonged to the Interested Party. DW4 referred to the Plaintiff's bank statements and he testified that they were not conclusive evidence of payment as they were not accompanied by a sale agreement. He testified that while they had obtained LCB Consent for the sale, the Plaintiff

had no LCB Consent. He asked that the Plaintiff's suit be dismissed.

40. DW4 was cross-examined by Mr. Njuru and he testified that he was not there when the property was acquired thus, he doesn't have first-hand knowledge. He however clarified that he had interacted with the documents and was familiar with them. DW4 testified that they paid the money but he had no evidence that their advocate transmitted the money to the Vendors. He however stated that they obtained vacant possession per the agreement for sale and currently have a caretaker on the land. That they have also built a two-roomed mabati site house at the border of plot nos. 780 and another of their properties known as Plot no. 672, he however clarified that it was more on the side of plot no. 672.
41. DW4 asserted that there is no sugarcane on the land and that they did not find any squatters thereon. He also admitted that they had hired three other caretakers before 2012. DW4 testified that they obtained the LCB Consent on 11/4/2012 before the agreement for sale since they started the process early and had already agreed as at that date that the LCB Consent would be obtained on or before the completion date. DW4 was referred to the transfers for parcel nos. 778, 779 and 780. He testified that the applications for registration were booked on 23.10.2012 yet their titles were issued on 16.07.2012 and added that this was not evidence of fraud as it could be an error.

42. DW4 added that he was aware there were two green cards and claimed that they lodged a complaint with the police at Lungalunga about the fake green card but had no OB. He also indicated that there was correspondence between them and the Land Registrar that the titles are fraudulent. DW4 testified that they also got Speed Chase to look into the matter and the investigator had produced his report dated 18.08.2015. He confirmed that the Investigator had their authority but denied any allegation that the investigator removed some documents from the Land Registry.
43. DW4 was also cross-examined by Mr. Kulecho for the Plaintiff and admitted that at some point, the Plaintiff cleared the land. He also acknowledged that there has been a dispute on the land since 2015 before the instant case was filed. DW4 testified that they had reported the matter to the chief.
44. On cross-examination by Ms. Waswa, DW4 testified that he had leave of the Interested Party to appear in court. He further admitted that he did not know the documents required for LCB Consent.
45. On re-examination, DW4 was referred to the two green cards at page 2 thereof and testified that green card 2 had the words "fraud reported by owner". That although PEXb6 had the same entries as green card 2, it does not bear the above words. Further, that while he did not know whether the 2nd Defendant complained about not receiving the purchase price, his lawyer testified and did not make any such complaint.

46. With the above the Interested Party closed its case.

The 5th and 6th Defendants' Case

47. On their part of the 5th and 6th Defendant called Susan Mueni Land Registrar in Kwale who testified as DW5. She testified that she had the parcel file for the suit property, which was allocated to Amos Wamunyu, 2nd Defendant, on adjudication on 25.08.1988. She also had the adjudication record dated 12.02.1982. DW5 testified that Amos was issued with a title on 25.10.1988, and she had the cancelled title in court. The witness stated that the land was transferred to Ruwa Mwaruwa Kurera on 15.02.1999 and a title deed issued to him on the same date. DW5 had the original title issued to the 1st Defendant, but indicated she did not have the transfer from Amos to the 1st Defendant in the parcel file, which she later and admitted was not normal.

48. DW5 testified that from her records, the 1st Defendant then transferred the land to the Plaintiff on 8.06.2010 and there was a transfer to that effect, with the title issued in the Plaintiff's name on the same date. DW5 testified that there are several charges registered against the Plaintiff's title. That the last two charges are in favour of KCB Bank and Stanbic Bank for different amounts and were both registered on 24.01.2017, however she did not have the relevant charge documents in the parcel file.

49. DW5 testified that there is also another green card opened in the name of Amos Wamunyu vide Gazette Notice No. 407 of 3.09.2010 because the original one could not be traced. To her

understanding, this meant that the first edition with the aforementioned entries was lost. DW5 testified that on 13.02.2012 the 2nd Edition register was closed upon subdivision into parcel nos. 778, 779 and 780. DW5 told the court she had the parcel files, whose registers were all opened on 13.02.2012 in the name of Amos Wamunyu and titles issued on the same date, and all transferred to Kisima Real Estate Limited on 16.07.2012.

50. DW5 testified that while the Land Registrar has discretion on whether a green card will be reported as lost, there must be an indication from the owner, who must present the original title. She testified that the Gazette Notice indicates that the 1st Edition green card was lost, but it must have been misplaced. DW5 clarified that when a lost green card is found, one edition ought to be dispensed with, but in the present case, they could not because the land had already been transferred. DW5 conceded that it would be difficult to conduct a search on the property today because there are two conflicting registers. DW5 admitted that there is need to establish the legitimate owner after which the bad register can be expunged. She however claimed that for her, both green cards are valid.
51. DW5 was cross-examined by Mr. Kulecho and she testified that the green card bears the words “fraud reported by Reg. Owner”. DW5 explained that it is not clear which registered owner reported and neither is the note dated or signed, thus she could not authenticate whether it was by the Land Registrar. DW5 testified that there were seven charges but

reiterated that not all charge documents were in the parcel file. DW5 testified that there is no record to show that the banks conducted due diligence. DW5 testified that if a title had issues and a charge was presented for registration, she would not register it.

52. DW5 outlined the process of replacement of a lost green card, and explained that a new green card is only issued if there are no objections. With regards to the subdivisions, DW5 testified that she only had the LCB Consent and not the RIM or mutations for the three new parcels. DW5 noted that there is a mismatch on the dates of presentation for registration with regards to plot no. 780 as well as plot nos. 778 and 789. DW5 testified that the title was surrendered during the subdivision, but was not surrendered during the transfer in the 1st Edition green card. DW5 testified that the lost green card resurfaced in 2010 with the transfer already having been done to the Plaintiff, and further that entries 1-4 on the said green card were done prior to 2010.
53. DW5 pointed out that by the time the new green card was opened, the transfer to the Plaintiff had already been done and the Plaintiff was already a proprietor but it did not object to the Gazette Notice. She testified that if the green card had resurfaced before September, the new one would not have been opened. She concluded that the Plaintiff presented all the relevant documents.

54. On cross-examination by Mr. Mwaure, DW5 testified that the Plaintiff had a duty to satisfy themselves that they were buying a good title. DW5 admitted that the 2nd Defendant was properly given the land at adjudication. DW5 listed the documents required during a transfer and testified that she did not have the requisite documents required to effect the transfer from the 2nd Defendant to the 1st Defendant. She stated that it was unusual to have only the title for the 1st Defendant and not have the necessary supporting documents.
55. DW5 testified that they do not re-issue green cards casually and that they have an in-depth process under which they had to confirm that no other document existed. DW5 testified that the title obtained by the 1st Defendant was a fraudulent title, and that the entries 3 & 4 on the 1st Edition green card do not support a genuine title. With regards to the letter dated 20.03.2012, DW5 testified that the issue was reported by the 2nd Defendant, and the Plaintiff was asked to return its title but to date, it has not been returned. DW5 reiterated that the parcel file did not have supporting documents for the six charges out of a total seven charges registered by the Plaintiff.
56. DW5 further explained that where a further charge is in favour of a different institution, then the first institution must give its consent, however, she had no such consent in the parcel file for the subsequent charges despite the charges being in favour of different institutions. According to her, the subsequent charges should not have found their way into the green card. DW5 also testified that it was impossible to register two charges in favour

of different institutions on the same date. DW5 testified that the subdivision of plot 47 was legal. DW5 testified that where documents are rejected for any reason the first time, they can be presented again and re-booked thus there will be a new booking date, but when re-booking is done, they use the old date. DW5 testified that there is nothing wrong with the dates and that the process was followed to the latter.

57. DW5 was not re-examined, and the 5th and 6th Defendant's case was closed,

SUBMISSIONS

58. The court directed the parties to file their final written submissions. The parties complied, with the Plaintiff filing its final written submissions dated 25th November, 2024. The 5th and 6th Defendants' submissions are dated 29th January, 2025. On its part, the Interested Party filed written submissions dated 28th January, 2025 as well as supplementary submissions dated 31st January, 2025.

ANALYSIS AND DETERMINATION

59. The court has considered the pleadings filed by the respective parties in this case, the witness testimonies adduced alongside the documents produced in support of their cases, and the submissions filed by Counsel on behalf of the parties herein and the authorities cited. Based on the prayers sought the main issue for determination would be whether the Plaintiff should be declared the rightful owner of the suit property.

60. It is my view to arrive at the answer to the above the following questions must be addressed; -

- 1) Who was the rightful owner of the suit property Kwale Kiwegu/47 before the subdivisions herein.
- 2) Whether the 2nd Defendant indeed transferred the suit property to the 1st Defendant
- 3) Whether the 1st Defendant held any legal title to the suit property capable of being transferred to the Plaintiff
- 4) Whether the Plaintiff is a bonafide purchaser for value without notice
- 5) Whether the titles arising from the subdivisions should be impeached
- 6) Whether the prayers sought by the Plaintiff are merited.
- 7) Who shall bear the costs of this suit?

Preliminary Issues

61. Before I get into the analysis a number of preliminary issues have been raised by the Plaintiff and the Interested party in their submissions which I must resolve at this juncture as follows; -
62. Counsel for the Interested party has invited this court to consider the judgement rendered in the Mombasa HCCC No.392 of 2009, Amos Wamunyu vs Nyae Kadungo & 16 others as judgement in rem and should declare the 2nd defendant held a valid title and thus transferred to the Interested party a clean and valid title. I think this issue was dealt with when the issue of whether this suit is res judicata was ventilated before this court. All the parties were heard and this court in its ruling delivered on 12/02/2016 held that res judicata was not applicable to the

present case. Further that in the present suit there are rival titles over the suit property which was not in issue in the former suit because the question as to who between the plaintiff on the one hand and the 2nd Defendant, the 3rd Defendant and the Interested Party on the other hand, is the rightful owner was not determined in HCCC No. 392 of 2009. This indeed is the crux of the matter and not whether the decisions are binding or not to this court. The present plaintiff was neither a party in the former suit nor could it have litigated or made claims through the squatters who were the defendants in that former suit. Moreover, if the Interested Party was aggrieved by the decision of this court not to render this suit res judicata nothing stopped them from appealing the same. They did not do so.

63. I find that the Interested Party's invitation is misplaced. For me the issue of ownership is still alive and must be decided on its merits.
64. On whether the Plaintiffs suit is generally in law time barred as against all defendants it is submitted by the Interested Party that 26 years and 8 months had elapsed from the time the title was issued on 25.10.1988 to the 2nd defendant (now deceased) to the date when this case was filed.
65. It is trite that where a suit is based on fraud then limitation does not run. It starts running from the time the fraud is discovered. The Plaintiff pleads at paragraph 8 of the plaint that they received a letter from the Kwale Land Registry dated 12/03/2012 informing them that a complaint had been lodged that the original land owner had not sold the land. The instant suit was filed in the year 2015 which is three years later. See

the persuasive decision of S. Okongo J (as he then was) in **Justus Tureti Obara Vs. Koipeitai (2014) eKLR**.

66. It is therefore the finding of this court that the Plaintiff suit is properly before this court and is not time barred whatsoever.
67. As regards to whether the Plaintiff exhausted all available alternatives to have the 1st Defendant appear in Court and whether the Plaintiff has a claim or any claims against any other defendants/parties in view of the withdrawal of the Plaintiff's case against the 3rd and 4th defendants, and the death of the 2nd defendant and the failure by the Plaintiff to apply for inclusion of the Estate of Amos Wamunyu as required by the law, it is my considered view that these are not preliminary issues and are subsumed in the courts determination as to whether the Plaintiff has proved its claim to the required standard. Moreover, the Interested Party is the holder of the very subdivisions that the Plaintiff craves to nullify.
68. The extent to which the Interested Party should participate in these proceedings has been raised by counsel for the Plaintiff that they are not a primary party and they should not be permitted to alter the nature of this suit and or issues as framed by the primary parties. The record bears a Defence dated 12th August, 2016 filed by the Interested Party. No objections were filed by the Plaintiff to the filing of the defence during the entire proceedings. The plaintiff is estopped from raising the issue at this stage. All along the suit has progressed on the basis of this defence and by dint of which the Interested party became a key party in the proceedings. I respectfully agree with the Interested Party submissions on this issue.

69. Having resolved the preliminary issues I will now proceed to analyse the substantive issues identified.

Who was the rightful owner of the suit property Kwale/ Kiwegu/Jego /47 before the subdivisions

70. Vide the present suit, the Plaintiff seeks inter-alia, a declaration that it is the legal owner of the suit property, an order for the cancellation of the titles issued upon subdivision and orders restraining the Defendants from interfering with the suit property. On the other hand the Interested party lays a stake on the suit property by dint of the subdivisions registered in its name. It is not in dispute that the subdivisions were derived from the parcel Kwale /Kiwegu/ Jego /47.

71. It is important to note that even before the subdivision there were other parties. Firstly the 1st Defendant who it is alleged by the Plaintiff sold the land Kwale /Kiwegu/ Jego /47 to the Plaintiff. There is also the 2nd Defendant who it is alleged is the first registered owner of parcel Kwale /Kiwegu/ Jego /47 and who transferred his rights in the suit property to the 1st defendant who then sold to the Plaintiff. There also the subdivisions undertaken by the 2nd Defendant and transferred to the Interested Party.

72. The court is therefore faced with two parties each asserting ownership over the same parcel of land abnatio.

73. The Evidence Act lays out the legal framework on the burden of proof in Civil cases in sections 107, 109 and 112

Sections 107 provides as follows:

‘(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the

existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

74. And Sections 109 and 112 of the same Act state as follows:

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

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

75. In the case of **Palace Investments Limited vs Geoffrey Kariuki Mwenda & Another [2015] eKLR**, discussing the question of burden of proof, the learned Judges of Appeal had this to say; -

“Denning J, in *Miller -vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

76. The burden of proof was on the Plaintiff to prove its lawful interest in the property and to further defend its root in view of the competing interests. There cannot be two titles to the same property.
77. Ordinarily, a Title deed would prima facie demonstrate a legitimate ownership of property. However, where parties claim to have titles over one parcel of land, the court is mandated to conduct an investigation into the root of the titles to establish the real ownership. This position was confirmed by the Court of Appeal in **Megvel Cartons Limited vs Diesel Care Limited & 2 Others (Civil Appeal 70 of 2018) [2023] KECA 184 (KLR) (17 February 2023) (Judgment)** placing reliance on the decision of the court in **Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR**, which noted thus:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth

the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

78. PW1 took the position that that the plaintiff is the owner because they hold an original title. But as we have seen it is not enough to dangle a title. Its root must be investigated.
79. The Plaintiff's title is anchored upon the title issued to Ruwa Mwaruwa Kurera the person alleged to have sold property to the Plaintiff. The Plaintiffs case is that it purchased the parcel Kwale/Kiwegu Jego/47 from the 1st Defendant. In this regard PW1 produced a Title Deed for Kwale/Kiwegu Jego/47 showing Kwale International sugar Company Limited as the registered absolute proprietor issued on 8/06/2010 (PEX 3); Transfer of Land dated 3rd June 2010 from Ruwa Mwaruwa Kurera (the 1st Defendant) to the Plaintiff registered on 8/06/2010 for a consideration of Kshs. 7,200,000/-; A bundle of cheques (the court counted 10 cheques) drawn in favor of the said Ruwa

Mwaruwa Kurera each in the sum of Kshs. 720,000/-. They also produced a Copy of Certificate of Official search dated 31st March 2015 with entry No. 5 of 8/6/2010 showing Kwale International Sugar Company Limited as proprietor and entry 6 of the same date indicating title deed as having been issued.

80. Based on the evidence produced in court the 1st Registered proprietor of the suit property appears to be the 2nd Defendant Amos Wamunyu having been registered on adjudication in the year 1988. This was corroborated by the evidence of DW5 who produced from the parcel file a green card (see page 1 -4 of the AGs new bundle). This green card shows the said Amos Wamunyu was registered proprietor on 29/8/88. It also shows this was the 1st edition to be opened on the same date. From the evidence adduced by DW5 this is said to be the green card that had been lost but later resurfaced. Even the 2nd green card has the entry for Amos Wamunyu. This therefore clears the doubt as to whether Amos Wamunyu was the 1st registered proprietor. The Land Registrar DW5 produced the adjudication record in court confirming that indeed the 2nd Defendant was the first allottee of the suit land.

81. That being the case the question that arises then is how did Ruwa Mwaruwa Kurera become a registered owner of the suit property still bearing in mind the Plaintiffs title is anchored on his title.

82. Entry No. 3 of the above green card shows that Ruwa Mwaruwa Kurera was entered as registered proprietor on 15/02/99. My observations with regard to this entry, it bears no comments on the column for 'CONSIDERATION AND REMARKS' whether it was by sale or what mode as there are many ways of owning land.

This is in view of the entry dated 29/8/88. To emphasise on this a look at entry 5 of this same green card in favor of Kwale International Sugar Company Limited the column is populated with remarks 'sale 7200,000/-.'

83. From the above it is not clear how therefore Ruwa became the owner of the suit property before the subdivisions herein. The Plaintiff however claims that the 2nd Defendant sold the land to Ruwa Mwaruwa Kurera, who despite being sued as the 1st Defendant herein, never filed a defence or appeared to testify. The court has noted the submissions by the Interested Party that there is no proof of service upon the 1st defendant insinuating that this was designed to ensure that the 1st defendant does not give evidence in this court. But I must also state that there were subsequent affidavits of service filed but counsel never sought to have the process server summoned for cross examination on the depositions, which in my view would have been the right forum to test the veracity of the contents.
84. Although the 2nd Defendant died before giving evidence in this case and his suit has since abated, he filed a Statement of Defence denouncing any sale to the 1st Defendant. It goes without saying that the burden of proof still lay on the Plaintiff who desired this court to believe that the 2nd Defendant sold the land to the 1st Defendant. Did the Plaintiff discharge this burden of proof?
85. The Plaintiff has not produced any evidence of the purported sale between the 2nd Defendant and the 1st Defendant. DW1 who was the 2nd Defendants advocate testified that the 2nd Defendant never sold the land to Ruwa Mwaruwa Kurera. DW5 had the title issued to the 1st Defendant, but indicated she did

not have the transfer from Amos to the 1st Defendant in the parcel file, which she later admitted on cross examination was not normal. PW1 indicated the Plaintiffs title was issued in 2010 and confirmed they did not have an agreement for sale between the 2nd defendant and Ruwa Mwaruwa Kurera before court.

86. I note from the evidence produced before this court that there is no direct link between the 1st and 2nd Defendant with respect to the suit property other than the fact that the 1st Defendant's name is indicated in the green card and the cancelled title produced by DW5 with his name on it. Nothing was adduced to show the 2nd Defendant ever sold the land to the 1st Defendant. This court has not seen a sale agreement to indicate that the purported sale ever took place or even a transfer between the 1st and 2nd Defendants, which is a very critical document which conveys the interest from the owner to the buyer. DW2 also testified she did not across any transfer from the 2nd Defendant to the 1st Defendant, otherwise she would not have advised the Interested Party to proceed.
87. According to the Plaintiff the transaction between the Plaintiff and Ruwa Mwaruwa Kurera was carried out by a prominent law firm Rachier and Omollo Advocates. It is not clear why the Plaintiffs could not obtain some of the documents supporting the transaction from the said law firm who ordinarily are expected to have retained copies in their records. None of the lawyers in the said law firm was called to corroborate the Plaintiffs averments.

88. Moreover, the original title deed must ordinarily be surrendered for cancellation to facilitate issuance of title to the transferee. DW5 testified that the 2nd Defendants title was not surrendered during the alleged transfer to Ruwa Kurera the 1st Defendant who is the Plaintiff's predecessor in title. This title was only surrendered during the subdivisions herein.

89. Clearly the Plaintiff did not discharge the burden of proof that the 2nd Defendant sold the land to the 1st Defendant Ruwa Kurera and therefore Ruwa Kurera cannot have been a true owner of the suit property before the subdivisions herein but the 2nd defendant herein.

Whether the 1st Defendant had any legal title to the suit property capable of being transferred to the Plaintiff

90. What follows next is whether there can have been a procedural transfer from the 2nd Defendant to the 1st Defendant in the circumstances. This question is aptly answered in the case of **Rebecca Nadupoi Supeyo & Isaac Tipariko Supeyo (suing as the Administrators of the Estate of Keziah Gathoni Supeyo) vs Millennium Dream Homes Limited & 3 Others (2025) eKLR**, where the court had this to say: -

“From the foregoing, this Court is not satisfied that the suit property was procedurally and regularly transferred to the 1st Defendant. As I have already outlined, there are glaring evidential gaps that have failed to satisfy the validity of the transaction, such as lack of evidence of the transfer and inconsistencies in the payments of the purchase price.”

91. Consequently, there was no procedural and legal transfer to the 1st Defendant by the 2nd Defendant. It follows therefore the 1st Defendant did not acquire any legal title to the suit property capable of being transferred to the Plaintiff. He had nothing capable of being transferred. In this regard, I am guided and persuaded by the holding in the case of **St Thomas Academy Limited vs Githumu Kangema Limited and Others (Environment & Land Case 281 of 2013) [2024] KEELC 7025 (KLR)**, where the court held that: -

“62. With regard to the first issue, the main challenge is that of the principle of nemo dat quod non habet which comes into play...

63. The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”

92. The 5th and 6th Defendants cited the case of **Arthi Highway Developers vs West End Butchery Limited and 6 Others (2015) KECA 816 (KLR)** and rightly so where the Court of Appeal similarly held that: -

“69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the

trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.” Emphasis is mine.

93. Arising from the above judicial precedent, an unauthorised transfer by any person other than the registered owner of the land has no legal effect.

It can also be surmised that once the original acquisition is found to lack legality, the title to subsequent owners, even if innocent, cannot be protected. Having found that the 1st Defendant did not have any legal and/or valid interest in the suit land and therefore he had no title capable of being transmitted to the Plaintiff.

94. But having pointed all the foregoing is the defence of innocent purchaser for value without notice of defects in the title available to the Plaintiff.

Whether the Plaintiff is a bonafide purchaser for value without notice

95. The Plaintiff argued in its submissions that it is a bona fide purchaser for value. To buttress this proposition the court was led to the case of **Katende vs Haridar & Company Limited [2008]2 E.A.173**, where the Court of Appeal in Uganda set out the conditions that would qualify a party to be deemed an innocent/bona fide purchaser: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

96. One of the requirements is that the vendor must have apparent good title. This element can only be established where the purchaser undertook sufficient due diligence prior to purchasing the property, to satisfy themselves that indeed the vendor holds an apparent good title to the land. It is also through such due diligence that a party may be able to determine whether there is any fraud or illegalities related to the acquisition of the title to the land to raise a red flag.

97. The court was not led to any evidence to show that the Plaintiff conducted due diligence to confirm the ownership of the suit property before it purchased from the 1st Defendant. I note that during cross-examination PW1 testified that they conducted a search before purchase but he had no certificate of search showing Ruwa as the owner of the property. PW1 went further to state during re-examination that a pre-purchase search would not have added any value and chose to rely only on the

search conducted after the transaction indicating that their transfer had in fact been registered. This in fact proves to me that the Plaintiff made no effort in confirming that it was purchasing a genuine title.

98. I note from the Plaintiff that the Plaintiff claims it purchased the suit property from the 1st Defendant on 20th March, 2012, yet the transfer in its favour is dated 3rd June, 2010 and it was registered on 8th June, 2010 with title issued on the same date. It is not clear how the Plaintiff could have purchased the land on 20th March, 2012 and be issued with a title deed on 8th June, 2010 which is almost 2 years before it actually allegedly bought the land. PW1 claimed that this was an error. Indeed, they had 7 years while the matter was in court to amend the Plaintiff and put in the correct dates, but never did so. The court sees no bonafides on the part of the Plaintiff.
99. The above notwithstanding, I have also seen the letter from the land registrar dated 20th March, 2012 informing the Plaintiff that the first registered owner had lodged a complaint that he had not transferred the land to the person who sold the land to the Plaintiff. The Plaintiff received a complaint on 20th March, 2012 being the date it purports in its Plaintiff to have purchased the suit property, yet it still opted to proceed with the transaction. The Plaintiff was therefore sufficiently informed of a potential defect but chose to ignore and/or overlook it.
100. Whereas a certificate of title is prima facie proof of ownership as provided by Section 26 of the Land Registration Act, the said title ought to have been procedurally procured and the process

of acquisition should be seamless and without any shadow of doubt on its credibility. The finding that the initial acquisition of the land by the 1st Defendant was of no legal effect and conferred no legal interest or title on him casts doubt and credibility on the Plaintiff's title. The Plaintiff did not acquire good title and therefore cannot be afforded the plea of innocent purchaser for value without notice.

101. I'm further emboldened by the decision of the Supreme Court of Kenya in **Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** where the learned judges stated thus; -

“To establish whether the appellant is a bonafide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...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.”

102. Taking into consideration the totality of the above factors, the Plaintiff herein can hardly be referred to as an innocent purchaser for value and without notice of defects. Its title cannot be protected under Article 40 of the Constitution either.

103. The Plaintiff casts a doubt on the opening of the green card that facilitated the subdivision of the mother title into the three properties 778, 779 and 780 having been undertaken fraudulently in the year 2012. I reiterate it was incumbent upon the 1st Defendant and anyone claiming under him, the Plaintiff included, to demonstrate to this court that the 2nd Defendant was in fact the one who sold the land to the 1st Defendant. Further, that in fact all the requisite documents were presented for registration of the transfer from the 2nd Defendant to the 1st Defendant. That the green card was not lost, and that this fact was well within the 2nd Defendant's knowledge that the green card was available when he undertook to have it reconstructed, and that he did so fraudulently. PW1 admitted that he had no evidence that the complaint raised in the letter dated 20/3/2012 was resolved. He admitted he did not raise any formal complaint about the issue of the 2nd green card.

104. I have seen the Plaintiffs submissions in this regard and which have placed emphasis on the failure by the Land Registrar to call the specific land registrars to give evidence noting that DW5 was not working at the Kwale Land Registry then. I must observe that nothing stopped the Plaintiff from applying for summons to be issued to the specific registrar they required to give evidence and for purposes of cross examination.

105. The court has already investigated the root of the Plaintiffs title having been anchored on Ruwa Kureras title and found it wanting. I have also made a finding that the same cannot be

protected under Article 40 of the Constitution. The Plaintiff having failed to defend its title therefore has no business impugning the 2nd Defendant's title which was the title issued on 1st registration and which is also the root of the subdivisions in the names of the Interested Party.

106. The Interested Party herein claims that it is the one that purchased the three subdivisions from the 2nd Defendant. It is not in doubt that the 2nd Defendant as the legal and registered owner of the land, had every right to deal with it as he pleased. Such dealings include but are not limited to sub-dividing the land as he did in this case and disposing the same.

107. The Interested party through DW4 has produced transfers to the said parcels, bank statements from Cooperative Bank for various postings made in the year 2012. On 6/07/2012 is an entry relating to L.N.Mbatia & Co. Advocates for Kshs.37,000,000/-. Lucy Mbatia testified that she was sure this money was paid. Other documents produced were Agreement for Sale for the three plots dated 17/4/2012, Land Control Board Consents authorising the sale of all three subdivisions to the Interested Party. The Interested Party was then registered as owner of the three subdivisions, and issued with title thereto. Equally, the 2nd Defendant surrendered his title for cancellation to pave way for the subdivision. A copy of the cancelled title in the name of the 2nd Defendant has been produced as part of the parcel file by DW5. It indicates clearly, that it was closed for subdivision.

108. The two advocates who represented the 2nd Defendant and the Interested Party in the sale testified in this court and corroborated that the transaction actually happened. There has been no complaint from the deceased 2nd Defendant or any personal representative of his estate with regards to the sale to the Interested Party.

109. The Plaintiff raised issue with the fact that the LCB Consent presented by the Interested Party was acquired before the date of the Agreement for Sale. I see nothing wrong with obtaining the LCB Consent earlier than the date of the agreement for sale. DW4 confirmed the negotiations between the Interested Party and 2nd Defendant had been ongoing for a while before the date of the agreement.

110. I will emphasise that as long as the court has found that the Plaintiff did not have a good title, the plaintiff has no locus to impeach the other titles. In my view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. See the Court of Appeal decision in the case of **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR)**.

111. I find no basis upon which to impeach the titles issued upon subdivision herein.

112. I have noted the Plaintiff claim over the suit property on the basis of possession/seisin but having investigated the root of the Plaintiff title and the findings herein and having noted it was

not an innocent purchaser for value without notice I do not see how possession can sanctify the title. I still take the view that nothing comes out of an illegality.

113. Even the charges that were allegedly registered it is my view that the validity of the charge documents should be considered from the basis of the title (security) upon which they were grounded. The charges cannot survive amidst the finding invalidating the Plaintiffs title. See the judgement of the Court of Appeal Nairobi Civil Appeal 465 of 2019 **Edward Ndungu Wambui v Francis Kinyanjui Mwangi & 3 Others** [2021] KECA 144 (KLR). It is therefore this court's finding that the plaintiff did not acquire a valid interest and the alleged charges are not valid to warrant consideration by the court as to their existence and as submitted in paragraph 5 of the plaintiffs submissions.

Whether the prayers sought by the Plaintiff are merited.

114. The totality of all the foregoing is that the Plaintiff is not entitled to the prayers sought in the plaint dated 15th May, 2015.

Who shall bear the costs of this suit?

115. On the issue of costs, the guiding law is Section 27 of the Civil Procedure Act (Cap. 21). Section 27(1) specifically provides that: -

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to

determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

116. Arising from the above provisions, the applicable principles are that costs follow the event. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

117. The outcome is that the Plaintiff has failed to prove its claim as contained in the Plaint dated 15th May, 2015 to the required standard and the same is dismissed with costs to the Interested Party.

Orders accordingly.

Judgement dated signed and delivered this **10th day of March 2026**

HON. LADY JUSTICE A.E DENA

JUDGE

10.03.2026

Mr. Kulecho for the Plaintiffs

Mr Mwaure for Interested Party

No appearance for the 5th and 6th Defendant

Daniel Disii - Court Assistant

ORIGINAL