

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE
ELC CAUSE NO. E003 OF 2024

BRIAN HUNJA KARIUKI.....
.....PLAINTIFF

- VERSUS -

ERIDY CONSULTANTS EAST AFRICA LIMITED1ST
DEFENDANT

PETER NGOTHO KILONZO2ND
DEFENDANT

LAND REGISTRAR, KWALE3RD
DEFENDANT

JUDGEMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains to the dispute arising from a Civil suit instituted vide a Plaint dated 19th January 2024 filed by *Brian Hunja Kariuki*, the Plaintiff herein. It is against *Eridy Consultants East Africa Limited*, *Peter Ngotho Kilonzo*, and *the Land Registrar, Kwale*, the Defendants herein. The Plaintiff seeks declarations and orders relating to parcels of land known as

Kwale/Galu Kinondo/786 and Kwale/Galu Kinondo/787, which he averred were lawfully acquired through his late father, Amos Hunja Kariuki, but unlawfully registered and occupied by the 1st and 2nd Defendants with the collusion of the 3rd Defendant.

2. Upon service of the pleadings and Summons to Enter Appearance, the 1st and 2nd Defendants, through their Advocates, the Law firm of Messrs. Apollo Muinde & Partners, filed a joint Statement of Defence and Counter - Claim dated 12th April 2024, denying the Plaintiff's ownership and asserting that they are the absolute proprietors of the suit properties, having purchased them in the years 2009 and 2010. The Defendants alleged that the Plaintiff fraudulently procured parallel titles in the year 2023. The 3rd Defendant, the Land Registrar, filed a Defence denying collusion and produced the official parcel files and green cards to refute allegations of parallel records.
3. The 3rd Defendant responded through filing of a Statement of Defence dated 8th May, 2024 to the Plaintiff and a defence to the 1st and 2nd Defendant's Counter - Claim dated 8th May, 2025.
4. The Plaintiff filed a Reply to Defence and Counter - Claim dated 2nd May 2024, reiterating his ownership and pointing out

discrepancies in the Defendants' sale agreements, including misspelled names and inclusion of non-registered proprietors. He maintains that the Defendants' titles are fraudulent and incapable of conferring ownership.

II. Description of the Parties

5. The Plaintiff, Brian Hunja Kariuki, was a male adult of sound mind, understanding who resided and worked for gain in Diani Beach within the County of Kwale. He was the registered owner of the suit properties, Kwale/Galu Kinondo/786 and Kwale/Galu Kinondo/787 (Hereinafter referred to as "The Suit Properties"), having acquired them through transfer from his late father, Amos Hunja Kariuki, who in turn held powers of attorney from the previous registered proprietor, Jurgen Hosch.
6. The 1st Defendant, Eridy Consultants East Africa Limited, was a duly incorporated limited liability company under the Companies Act, 2015. It claimed ownership of the suit properties, asserting that it had purchased them in the year 2009 and 2010 respectively and had been in possession since then.
7. The 2nd Defendant, Peter Ngotho Kilonzo, was a director and representative of the 1st Defendant. He was alleged to have

personally supervised construction activities on the suit properties and to have participated in the alleged dispossession of the Plaintiff.

8. The 3rd Defendant, The Land Registrar, Kwale, was a public officer charged with the statutory duty of registering dealings in land within Kwale County. The Plaintiff accused the Registrar of collusion and negligence in permitting registration of the suit properties in favour of the 1st Defendant despite existing records showing the Plaintiff as proprietor.

III. Court directions before the hearing.

9. On a brief background of the matter. On 22nd January 2024, upon perusal of the Plaint and Notice of Motion application dated 19th January 2024 together with the supporting affidavit and annexures, the Court (Hon. Lady Justice A.E. Dena) declined to certify the matter as urgent, holding that urgency had not been demonstrated. The Court directed that the application be served together with the suit papers and dates be taken in the registry.
10. On 27th February 2024, the matter came before the then Court. The Counsel for the Defendants sought fourteen days to file a Replying Affidavit. The Plaintiff's counsel requested temporary orders to safeguard the green cards and stay criminal proceedings. The Court

ordered that the status quo be maintained in the following terms: the Land Registrar, Kwale, was prohibited from making any entries or dealings on parcels Kwale/Galu Kinondo/786 and 787 for twenty-one days, and no further construction was to take place on the suit properties during that period.

11. On 29th April 2024, the matter was mentioned before the then Court. The Court emphasized the need to maintain the status quo at the land registry and encouraged parties to resolve the interlocutory application amicably. The orders of 27th February 2024 were extended for ten days, and counsel were directed to file responses within fourteen days.
12. On 14th May 2024, the matter was again mentioned before the then Court. By the consensus of the parties, the application dated 19th January 2024 was allowed in terms of prayers (b), (c), and (e) in order to pave for the expeditious hearing and determination of the suit. The Court clarified that the orders would not result in eviction of the 1st and 2nd Defendants, who were in occupation. Costs were ordered to be in the cause, and directions were issued for completion of pre-trial documents within fourteen days.

13. On 20th June 2024, the matter came before Hon. Lady Justice A.E. Dena. The Court noted delay by the Defendants in filing witness statements and further documents. The Defendants were granted a final opportunity to file documents by 28th June 2024, failing which sanctions would apply. Adjourment fees were imposed on the Defendants. The matter was fixed for hearing on 22nd January 2025 virtually.
14. On 21st January 2025, the matter proceeded to hearing before Hon. Justice L.L. Naikuni in open court. The Plaintiff's case was heard, with examination and cross-examination of witnesses. The Plaintiff closed their case thereof. The Court allowed adjournment for the Defendants to present their case on a later date.
15. On 4th March 2025, the matter was mentioned before Hon. Justice L.L. Naikuni. The Defendants sought adjournment due to counsel's illness. The Court allowed the adjournment on condition that the Defendants pay costs for the day. The matter was rescheduled for 11th June 2025.
16. On 11th June 2025, the matter proceeded before Hon. Justice L.L. Naikuni. The 3rd Defendant's case was heard, with testimony from the Land Registrar. The 1st and 2nd Defendants' case was also

presented, including examination of the 2nd Defendant. Upon closure of all parties' cases, the Court directed the Plaintiff to file written submissions within twenty-one days, and thereafter the Defendants to file submissions within twenty-one days. The Honourable Court reserved 7th October 2025 for delivery of judgment which later was to be delivered on notice.

IV. The Plaintiff's case

17. The Plaintiff was, at all material times, the registered owner of two parcels of land namely KWALE/GALU KINONDO/786 measuring approximately 0.40 hectares and KWALE/GALU KINONDO/787 measuring approximately 0.40 hectares. The suit properties were situated in Diani Beach in the Galu area within the County of Kwale. They were adjacent to each other, fenced off with a gate entrance, and a six-roomed villa (bungalow) had been erected thereon.
18. The Plaintiff averred that he had been registered as the owner of the suit properties and had been issued with title deeds on 6th July 2023. He further stated that he had been in occupation of the suit properties from sometime in 2015 until the events giving rise to this suit. The Plaintiff averred that he had acquired the properties through his father, Amos Hunja Kariuki (now deceased). The said

Amos Kariuki had transferred the suit properties to him on the strength of two Powers of Attorney issued to him by a family friend and relative, Mr. Jurgen Hosch.

19. The Plaintiff averred that on or about 6th December 2023, while visiting the suit properties, he had found the 2nd Defendant, Peter Ngotho Kilonzo, on site. The 2nd Defendant had dug columns on the suit properties in preparation to commence construction. Upon inquiry, the Plaintiff was informed that the suit properties belonged to the 2nd Defendant. Surprised by the incident, the Plaintiff reported the matter at the Diani Police Station; however, no action was undertaken by the police.
20. The Plaintiff had placed five security guards to guard the premises. However, the said guards were arrested by police officers attached to Diani Police Station and held in custody. On 21st December 2023, they were charged in "***Kwale Magistrate's Criminal Case No. E449 of 2023 - Republic - Versus - Bahati Juma, Juma Juma, Erick Mabonga, Onesmus Wambua & Hamisi Omar***" - with causing malicious damage to a perimeter wall. They were each released on cash bail of a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/=), and the case was scheduled for hearing on 5th March 2024.

21. Upon returning to the premises, the Plaintiff was denied entry. The suit properties were surrounded by heavily armed police officers, and he was threatened to leave peacefully or be forcefully evicted. Thereafter, The Plaintiff sought the services of his advocates, Messrs. Mwangi Kihira & Co. Advocates, who on 20th December 2023 placed restrictions on the suit properties.
22. Later on, the Plaintiff learnt that the person claiming ownership was the 1st Defendant, a limited liability company, which had been registered as the owner of the suit properties and had title deeds in its name. The 2nd Defendant, Peter Ngotho Kilonzo, was a director of the said company. The Plaintiff averred that the Defendants had a deliberate plan to dispossess him of his rightful interest in the ownership of the suit properties.
23. The Plaintiff relied on the following particulars for fraud and/or illegality on the part of the 1st and 2nd Defendants: -
- a. Procured through illegal and underhand means title deeds in respect of the suit properties knowing that the Plaintiff was the bona fide and/or registered owner thereof.

- b. The Plaintiff shall rely on the fact that the 1st and 2nd Defendants procured registration of the suit properties in its name as evidence of fraud and/or illegality on its part.
 - c. Fraudulently and deliberately procured registration of the suit properties in his favour knowing that that the Plaintiff was notoriously in possession thereof.
24. Further the Plaintiff relied on the following particulars of collusion and/ or fraud and/ or illegality on the part of the 3rd Defendant: -
- a) The 3rd Defendant permitted the 1st Defendant to be registered as the owner of the suit properties without due regard to the records in the land registry and/or knowing that the plaintiff was the registered owner thereof.
 - b) The Defendants failed to have due regard to the Plaintiff's registered interest in the suit properties.
 - c) The 3rd Defendant colluded with the 1st Defendant to issue to the 1st Defendant titles over the suit properties while the original titles which were issued to the Plaintiff had not been cancelled and/or surrendered to the 3rd Defendant.
25. The Plaintiff contended that the 1st and 2nd Defendants' unlawful takeover of the suit properties, with the assistance of the 3rd

Defendant and the Kenyan Police, amounted to abuse of power, breach of fundamental freedoms, breach of land rights, and breach of natural justice.

26. The Plaintiff averred that the 1st and 2nd Defendants had no legal interest or right in the suit properties and no basis upon which to interfere with his ownership and possession thereof. He prayed for a declaration that he was the rightful and lawful owner of the suit properties and was entitled to exclusive and unimpeded possession and occupation of the same.
27. The Plaintiff therefore prayed for a permanent injunction restraining the 1st and 2nd Defendants, by themselves, their agents, or any persons deriving title through them, from further occupation of the suit properties, from constructing structures thereon, or from selling, leasing, charging, disposing of, or otherwise dealing with the said parcels.
28. The Plaintiff further prayed for a mandatory injunction compelling the 1st and 2nd Defendants, by themselves, their agents, or servants, to hand over vacant possession of the suit properties to him and to remove or demolish any structures erected thereon, failing which he be authorized to remove the same at their cost.

29. The Plaintiff stated that despite demand and notice of intention to sue having been issued to the 1st and 2nd Defendants, they had refused, neglected, and failed to vacate the suit properties.
30. The Plaintiff averred that there was no other suit pending in any court between himself and the Defendants in respect of the subject matter of this suit.
31. The Plaintiff further averred that the cause of action had arisen in Kwale, within the jurisdiction of this Honourable Court.
32. For the reasons wherefore, the Plaintiff prayed that Judgment be jointly and severally entered against the 1st, 2nd & 3rd Defendants for:

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- a) A declaration that the Plaintiff is the rightful and/or lawful owner of the suit properties known as KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787 and is entitled to exclusive and unimpeded right of ownership, protection, possession and occupation of the same.***
- b) A declaration that the title deeds issued to the 1st Defendant for Parcel Nos KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787 are illegal and unlawful.***
- c) An order be issued to the 1st and 2nd Defendants to relinquish the title deeds of Parcel Nos KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787 to the 3rd Defendant for cancellation and revocation.***
- d) A mandatory Order be issued to the 3rd Defendant to cancel and/or revoke the title deeds of parcels KWALE/GALU***

KINONDO/786 and KWALE/GALU KINONDO/787 issued to the 1st Defendant and cancel any entries in the green cards, parcel files or records at the registry bearing and conferring the 1st Defendant ownership of the said Parcels.

- e) A mandatory Order be issued to the 3rd Defendant to restore/re-enter ownership records of the suit properties known as KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787 in favour of the Plaintiff.**
- f) A permanent Injunction Order be issued to restrain the 1st and 2nd Defendants by themselves and/or through their authorized agents and/or anyone deriving title through them from further occupation of the suit properties, building or constructing structures, selling, disposing of and/or in any other manner dealing with the suit properties KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787.**
- g) A mandatory Injunction Order be issued compelling the 1st and 2nd Defendants by themselves, their authorized agents and/or servants to hand over vacant possession of the suit properties to the Plaintiff and to remove and/or demolish any structures erected by it on the suit properties failing which the plaintiff be authorized to remove the same at the 1st Defendant's costs.**
- h) The Kwale County Police Commander do facilitate the compliance with the Orders (vi) and (vii) above.**
- i) General damages for trespass.**
- j) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.**
- k) Any such other or further relief as this Honourable Court may deem appropriate.**

33. At the same time, the Plaintiff, responded to the 1st and 2nd Defendants' Statement of Defence and Counter - Claim as follows: -

- a. Save as was expressly admitted, the Plaintiff reiterated each and every averment in the Plaint and joined issue with the 1st and 2nd Defendants on the allegations made in their Amended Statement of Defence and Counter - Claim.
- b. The Plaintiff denied all the averments contained in the defence and counterclaim and reiterated the contents of the Plaint.
- c. The Plaintiff admitted Paragraph 2 of the Defence and Counter - Claim.
- d. The Plaintiff denied Paragraph 4 of the Defence and stated that the purported purchase of the suit properties vide agreements dated 26th March, 2009 and 20th April, 2010 was fraudulent, for the following reasons:

(i) a) Kwale/Galu Kinondo/786.

- a) The 1st and 2nd Defendants had indicated that vide the agreement dated 26th March, 2009 they purchased parcel 786 from Peter Raitier, Albert Ulimar, Jurgen Hosch, Aanglurs Dorschell and Hosch Jochen Scenales.

b) However, a certified copy of the green card produced in the Plaintiff's list of documents indicated that the registered owners as at 18th June, 1992 were Peter Reiter, Albert Ulimann, Jurgen Hosch, Hannelore Dorschell Hosch and Jochen Schwalbe until 17th September, 2015 when the property was transferred to Jurgen Hosch.

c) In comparison, the Defendants had added Jochen Scenales and Aanglurs Dorschell in the agreement dated 26th March 2009, yet these were not registered owners. The documents also misspelled names such as "Peter Raitier" (correctly Reiter) and "Albert Ulimar" (correctly Ulimann), while omitting Hannelore Dorschell Hosch and Jochen Schwalbe. The purported sale was therefore a nullity.

(ii) Kwale/Galu Kinondo/787.

a) The 1st and 2nd Defendants had indicated that vide the agreement dated 20th April 2010 they purchased parcel 787 from Peter Raitier, Albert Ulimar, Jurgen Hosch, Aanglurs Dorschell and Jochen Scenales.

- b) However, a certified copy of the Green Card indicated that the registered owners as at 26th October 2006 were Albert Ulimann, Jurgen Hosch, Hannelore Dorschell Hosch and Eckhard Gustav Rossocha until 17th July, 2015 when it was transferred to Jurgen Hosch.
- c) In comparison, the Defendants added Peter Raitier (correctly Reiter), Albert Ulimar (correctly Ulimann), Hosch Jochen Scenales and Aanglurs Dorschell in the agreement dated 20th April, 2010, yet they were not registered owners. They also omitted Hannelore Dorschell Hosch and Eckhard Gustav Rossocha, who were registered owners. The purported sale was therefore a nullity.
- e. The Plaintiff denied the contents of Paragraph 5 of the Defence and responded that the fact that the Defendants' titles were issued first in time (the years 2009 and 2010) did not mean that his titles issued in the year 2023 were fraudulent. He contended that fraudulent persons could backdate title deeds in an attempt to sanitize illegal ownership.

- f. The Plaintiff denied paragraph 6 of the Defence and put the Defendants to strict proof thereof. He reiterated that they had never been in possession until they obtained assistance from police officers at Diani Police Station.
- g. The Plaintiff denied Paragraphs 8 and 8(a)-(e) of the Defence and put the Defendants to strict proof. He responded that:
- a) The Plaintiff could not have used fake titles as his titles originated from a legitimate source and the flow of ownership was well documented.
 - b) The Plaintiff could not have colluded with any person to create parallel green cards because he was at all times the bona fide registered owner. If any party needed to create parallel Green Cards, it was the Defendants in their attempts to sanitize illegal ownership.
- h. The Plaintiff denied Paragraph 9 of the Defence in its entirety and stated that his father had been in occupation before he took possession. The Defendants had never been in possession or ownership.

- i. In response to Paragraphs 10, 11 and 12 of the Defence, the Plaintiff stated that the Defendants obtained illegal possession of the property through police-enforced eviction.
- j. The Plaintiff contended that the Defendants' suggestion in Paragraph 13 of the Defence that the case be stayed and referred to police was a ridicule to the court and only sought to buy time for their illegal occupation.
- k. The Plaintiff denied Paragraph 15 of the Counter - Claim and reiterated that the Defendants held forged title deeds incapable of conferring ownership.
- l. The Plaintiff denied paragraph 16 of the Counter - Claim and averred that he had tried to gain possession of his property but the Defendants denied him entry and compromised police officers who arrested his employees.
- m. The Plaintiff denied Paragraphs 17 and 17 (a)-(c) of the Counterclaim and put the Defendants to strict proof. He reiterated that the Defendants' title deeds ought to be cancelled as they were acquired through underhand means.
- n. The Plaintiff denied the averments in Paragraph 7 of the Counter - Claim and put the Defendants to strict proof thereof.

- o. The Plaintiff stated that he was a stranger to Paragraph 9 of the Counter - Claim.
 - p. The Plaintiff admitted Paragraph 10 of the Counter - Claim, acknowledging that there were no previous proceedings.
 - q. The Plaintiff stated that he was a stranger to Paragraph 11 of the Counter - Claim.
 - r. The Plaintiff admitted Paragraph 12 of the Counter - Claim.
34. The Plaintiff prayed that the Defence and Counter - Claim be dismissed with costs.
35. The Counsel on record for the Plaintiff made the following remarks:-
- A. Opening remarks by Mr. Mwangi Kihira Advocate.**
36. Mr. Mwangi Kihira Advocate, delivered his opening remarks. He stated that the case was one of land fraud, alleging that the 1st and 2nd Defendants had forged title documents and fraudulently obtained registration of the suit properties. Thereafter, they had forcefully evicting the Plaintiff. He further submitted that the 3rd Defendant, the Land Registrar, had facilitated the fraudulent process by permitting the registration to take place.
37. The Learned Counsel emphasized that the Plaintiff would demonstrate that he had lawfully acquired the suit properties, while

the Defendants' documents were riddled with irregularities and illegality. He urged the Court to find that the Defendants' titles had been acquired fraudulently and prayed for ownership of the land to be restored to the Plaintiff.

38. On 21st January, 2025, the Plaintiff testified as PW - 1. He stated as follows:-

A. Examination in Chief of PW - 1 by Mr. Mwangi Kihira Advocate.

39. PW - 1 testified and was sworn on oath in English language. He identified himself as BRIAN KARIUKI HUNJA, a citizen of Kenya and holding a national identity card bearing all the particulars as shown to Court during the hearing. He resided in Diani Beach, South Coast. He confirmed that he had recorded a witness statement dated 19th January 2024 and wished to rely on the list of documents filed. He produced 27 documents filed on 19th January 2024 as Plaintiff's Exhibits numbers 1-27, and a further list dated 27th May 2024 as Plaintiff's Exhibits numbers 28-30. He adopted his statement and documents as part of his evidence.

40. PW - 1 narrated the history of the suit properties, Kwale/Galu Kinondo/786 and Kwale/Galu Kinondo/787, situated in Diani Beach at

a place called "Sunset." He testified that the parcels were registered in his name. He had purchased them from his father, Amos Hunja Kariuki, in June 2021. His father later passed away in July 2021. He explained that his father had acquired the properties from Jurgen Hosch, who had in turn acquired them from previous registered owners.

41. PW - 1 stated that in December 2023, upon visiting the property, he found people constructing on the land. He reported the matter to the police. His guards, who were stationed on the property, were arrested by the police. He later discovered that the properties had been registered in the names of the 1st and 2nd Defendants.
42. PW - 1 referred to the Defendants' exhibits, namely agreements of sale dated 20th April 2010 and 26th March 2009, which purported to transfer the two parcels to the Defendants. He testified that he had examined the green cards produced by the 3rd Defendant, which confirmed that he was the registered owner of parcels 786 and 787. He stated that his green cards and those of the 3rd Defendant were similar.
43. PW - 1 compared the Defendants' green cards and noted that the names and spellings were not similar. He further testified that the

Defendants' documents referred to parcels described as Kilifi/Galu Kinondo/786 and 787, whereas the suit properties were in Kwale. He referred to the transfer documents filed by himself and those filed by the Defendants. He observed that for both parcels 786 and 787, the passport-size photographs in the Defendants' transfer forms were not similar to those in his documents.

44. PW - 1 concluded that the Defendants had never occupied the suit properties. He stated that previously there had been a cottage on the land, which he had visited when it was under his father's ownership. He emphasized that only guards had been present on the property, and not the 1st or 2nd Defendants.

B. Cross examination of PW - 1 by Mr. Muinde Advocate.

45. PW - 1 testified that he had acquired the suit properties from his father. He stated that he had purchased them by paying a sum of Kenya Shillings One Million (Kshs. 1, 000, 000/=) for each parcel, amounting to a total of a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000/=), which he paid through bank transfer. He confirmed that a sale agreement had been executed with his father, but it had not been filed in court. He admitted that he had no documentary evidence to show that he had purchased the land. He acknowledged

being aware of the criminal case in the Magistrates' Court where his guards had been arrested and charged for threatening the 1st and 2nd Defendants and pulling down a perimeter wall. He maintained that such acts did not amount to tampering with or interfering with the property.

46. PW - 1 was referred to the Sale Agreement dated 26th March 2009, which in paragraph 1 referred to parcel Kwale/Galu Kinondo/786, and to the Sale Agreement dated 20th April 2010, which in paragraph 1 referred to parcel Kwale/Galu Kinondo/787. He testified that he had met Jurgen Hosch but not the other sellers mentioned in the agreements. He stated that he was not a specialist in photographs, as he was an auditor by profession. He admitted that he currently had no idea who was in occupation of the land and was not aware that the 1st and 2nd Defendants were in possession pursuant to a court order maintaining the status quo issued by Justice Dena. He explained that his father used to guard the property and that he had inherited the same arrangement. He further stated that there was no agreement between his father and the foreign owners.

47. PW - 1 was referred to page 14 of the Plaintiff's bundle of documents, being the transfer of parcel no. 786, dated 13th September 2021. He explained that the documents had been lodged on 17th July 2021 but were dated later through a Power of Attorney. He admitted that he was not aware that a power of attorney ceased to be effective upon the death of the donor.

48. PW - 1 confirmed that although he had included the Land Registrar as the 3rd Defendant in the case but admitted that he was not aware that a notice of intention to sue the Attorney General was required by law.

C. Cross examination of PW - 1 by Mr. Penda Advocate.

49. PW - 1 testified that he was aware the Land Registrar had provided the green cards for the suit properties and that there were no variances between them. He acknowledged that, on that basis, there ought not to have been any compensation sought against the 3rd Defendant. He was referred to title number 787, which had been registered in the name of Jurgen Hosch on 17th September 2015. He confirmed that the last entry was dated 5th October 2015, being the registration of a power of attorney in favour of Amos Hunja Kariuki. He admitted that from the green card or title there had been no

revocation of the power of attorney, and therefore there had been no transaction inconsistent with the entry of 15th July 2015.

50. PW - 1 was referred to entry number 9 on the green card and confirmed that there had been no revocation of the Power of Attorney. He acknowledged that the Power of Attorney had been lodged on 1st October 2015 and registered on 5th October 2015. He was shown supporting documents, including:

- Page 8 - KRA receipt No. 1891965 for stamp duty declaration dated 5th October 2015.
- Page 12 - Official receipt dated 5th October 2015 for a sum of Kenya Shillings One Thousand (Kshs. 1,000/=) for lodging of the Power of Attorney.
- Page 7 - Replying Affidavit.

51. PW - 1 confirmed that Jurgen Hosch was 82 years old and that the photograph on the Power of Attorney was his face. He was referred to the transfer form (document No. 10), which contained five photographs of persons listed by the 1st and 2nd Defendants. He testified that those photographs did not resemble Jurgen Hosch. Based on what had been provided in court, he agreed that the suit was unfounded against the 3rd Defendant.

D.Re - examination of the PW - 1 by Mr. Mwangi Kihira Advocate.

52. PW - 1 was referred to the titles held by the 1st and 2nd Defendants in respect of the suit properties. He reiterated that those titles ought to have been cancelled. He testified that in the transfer for parcel 786, his father had executed the transfer on 3rd June 2021, and thereafter passed away on 4th July 2021. He confirmed that the consideration for the transfer had been a sum of Kenya Shillings One Million (Kshs. 1, 000, 000/=). He emphasized that he was not responsible for the issuance of titles, as that was the duty of the Land Registrar.
53. PW - 1 further testified that the transfer for parcel 787 had also been executed on 3rd June 2021. He referred to the power of attorney granted by Jurgen Hosch, which had been executed on 1st October 2015 and registered on 5th October 2015, and reiterated that he was not responsible for its registration. He was referred to Passport No. C5HTVY - J-283 D and stated that he had never required any agreement from his father in relation to the property. He explained that he had given his account to the police, but despite this, his guards had still been charged.

54. Finally, he referred to the Defendants' sale agreements and pointed out that the property therein was described as being registered in Kilifi, whereas the suit properties were situated in Kwale.

55. On 4th March, 2025, the Plaintiff closed his case through his Legal Counsel on record.

V. The 1st and 2nd Defendant's case

56. The 1st and 2nd Defendants responded to the Plaint through a Defence and Counter - Claim where they stated:-

- a. Save for what was expressly admitted, the 1st and 2nd Defendants denied each and every allegation contained in the Plaint as if the same had been set out therein verbatim and traversed seriatim.
- b. The 1st and 2nd Defendants admitted the contents of paragraphs 1, 2, 3, and 4 of the Plaint in so far as they related to the description of the parties and their addresses, but added that their address for service.
- c. The Defendants denied the contents of Paragraph 5 of the Plaint and, in particular, denied that the Plaintiff was at all material times the registered owner of parcels Kwale/Galu

Kinondo/786 and 787, each measuring approximately 0.40 hectares. The Plaintiff was put to strict proof thereof.

- d. With regard to Paragraphs 6, 7, 8, and 9 of the Plaintiff, the Defendants denied the same and asserted that the properties described therein were owned by the 1st Defendant as absolute proprietor, having acquired them from the then registered owners on 9th June 2009 and 3rd June 2010 respectively, pursuant to agreements of sale dated 26th March 2009 and 20th April 2010.
- e. The Defendants averred that the 1st Defendant's titles were first in time, while the Plaintiff's titles had been fraudulently obtained recently.
- f. The Defendants further averred that they had been in factual and actual quiet possession of the two properties until 15th December 2023, when the Plaintiff's employees, servants, and hired persons descended on the property, destroyed the perimeter wall erected by the Defendants, and vandalised part of the buildings standing thereon. Those persons were later arrested and charged with malicious damage in Kwale Magistrate's Criminal Case No. E449 of 2023.

- g. Paragraphs 13, 14, and 16 of the Plaint were vehemently denied together with the particulars thereof, and the Plaintiff was put to strict proof.
- h. The Defendants contended that the Plaintiff had conspired with rogue land officials to defraud the 1st Defendant of its land through a fraudulent scheme and criminal enterprise.
- i. The Defendants relied on the following particulars for illegalities, fraud and/ or conspiracy: -
- (i) Using fake titles with the intention of depriving the 1st Defendant of developments carried out on parcels no. 786 and 787.
 - (ii) Colluding with persons at the Lands Office to create parallel green cards for the two plots.
 - (iii) Unlawfully acquiring second title deeds over parcels no. 786 and 787.
 - (iv) Changing and/or replacing green cards in respect of the subject plots.
 - (v) Invading the 1st Defendant's property using guards and hired persons to create a semblance of occupation.

- j. The Defendants declared that they had been in occupation of the suit land since 2010, while the Plaintiff had never been in occupation or possession thereof. They described the alleged unlawful takeover as a fabrication intended to carry favour with the Court.
- k. The Defendants further contended that the allegations of unlawful takeover and collusion with the 3rd Defendant, as well as the involvement of the police, had no proper basis. They maintained that the 2nd Defendant had merely reported illegal acts of trespass and malicious damage, which were crimes known to law, and that the 3rd Defendant had only acted within the scope of duty.
- l. In the alternative, and without prejudice, the Defendants invited the Court to find that no basis had been made for the grant of declarations, mandatory injunctions, or permanent injunctions, and that the suit ought to be dismissed with contempt.
- m. The Defendants admitted Paragraphs 20 and 21 of the Plaint but denied that any notice of intention to sue had ever been issued.

57. The Defendants also averred as follows in their Counter - Claim: -

- a. The 1st Defendant joined issue with the Plaintiff and reiterated the contents of Paragraphs 1 to 11 of the Defence.
- b. The 1st Defendant averred that it was the registered proprietor of parcels Kwale/Galu Kinondo/786 and 787.
- c. The 1st Defendant stated that on or about 15th December 2023, the Plaintiff, without lawful cause or authority, violently entered and trespassed upon the suit properties.
- d. The 1st Defendant further averred that the Plaintiff, without consent or lawful excuse, fraudulently caused the parcels to be registered in his name, thereby creating second title deeds.
- e. The Defendants relied on the following particulars of illegality and/ or fraud: -
 - i) Forging documents to show the Plaintiff as proprietor of the suit properties.
 - ii) Unlawfully attempting to alienate the suit properties in derogation of the 1st Defendant's rights.
 - iii) Colluding with persons at the Lands Office to create parallel green cards.

- f. The 1st Defendant claimed cancellation of the second set of title deeds issued in favour of the Plaintiff and sought a declaration that it was the legal and bona fide owner of the suit properties.
- g. The 1st Defendant averred that the Plaintiff had, on several occasions since 15th December 2023, trespassed upon the suit properties and committed acts of wanton destruction. It sought compensation for malicious damage and general damages for trespass.
- h. The 1st Defendant contended that despite demands to desist, the Plaintiff had persisted in interfering with the suit properties, hence the Counter - Claim.
- i. The 1st Defendant averred that there was no suit pending and no previous proceedings between the parties relative to the subject matter.
- j. The 1st Defendant further averred that despite demands made upon the Plaintiff, he had failed, refused, and neglected to comply, hence the Counter - Claim.
- k. The cause of action was stated to have arisen within the jurisdiction of the Court.

58. The 1st and 2nd Defendants prayed for Judgment to be entered against the Plaintiff for:-

a) The Plaintiff's suit herein be dismissed with costs to the 1st and 2nd Defendants and that their claim as contained in the counterclaim be allowed as prayed.

b) A declaration that the 1st Defendant is the lawful owner of Title Nos KWALE/GALU KINONDO/786 & 787 situate in the county of Kwale.

c) Cancellation of the purported "titles" Nos KWALE/GALU KINONDO/786 & 787 situate within Kwale County held by the plaintiff and an order directed to the Lands Registrar Kwale the 3rd defendant herein to rectify the records so as to indicate ERIDY CONSULTANTS EAST AFRICA LIMITED as the rightful owner of the suit properties.

d) Damages for trespass to land against the plaintiff.

e) Costs of the suit and interest on (d) above at court rates.

59. The 1st and 2nd Defendants' counsel on record gave the following opening remarks on 11th June, 2025 wherein he stated that:-

A. Opening remarks by Mr. Apollo Advocate:-

60. The 1st & 2nd Defendants, through their appointed Learned Counsel, submitted that they were the rightful owners of the suit properties. They stated that they had negotiated for the purchase of the two

parcels for value and had conducted official searches prior to the transactions. They averred that they had been in actual and exclusive possession of the parcels since acquisition.

61. However, they contended that in December 2023, for no apparent good reason nor justifiable cause, their land had been raided by the Plaintiff's agents and employees, who demolished the perimeter wall. The incident led to criminal proceedings being instituted in Kwale Magistrate's Criminal Case No. E449 of 2023. They emphasized that prior to the raid, their occupation and ownership had never been challenged, and the green cards reflected their registration as proprietors.

62. Therefore, the Defendants maintained that the Plaintiff's claim was unfounded. They contended that his titles were fraudulent, and that the suit was an attempt to dispossess them of land they had lawfully acquired, taken possession and developed in the course of time.

63. The 2nd Defendant testified on 11th June, 2025 where he stated that:-

B. Examination in chief of DW - 1 by Mr. Apollo Advocate.

64. DW - 1 was sworn and testified in English language. He identified himself as PETER NGUTHO KILONZO, a citizen of Kenya and holder of the national identity card bearing all the particulars as indicated

to Court during the hearing session. He confirmed that he was a director of the 1st Defendant company. He confirmed that on 21st January 2025 he had recorded a witness statement, which he wished to adopt as part of his evidence in this case. He further testified that he had filed eleven (11) documents dated 9th July 2024, which were produced in court as 1st and 2nd Defendants' Exhibits Numbers 1-10. He adopted both his statement and the listed documents as evidence in support of the Defendants' case.

65. It was his testimony that the 1st Defendant purchased the two parcels - the suit properties in the years 2009 and 2010 respectively. Since that time, they had been in possession and occupation of the suit lands. It was after they commenced the renovations thereto and started construction of a perimeter wall that the Plaintiff appeared on the scene on 15th December, 2023. He descended on the property using security guards to intimidate his workers who were outnumbered them. They vandalized part of the building standing thereon. DW - 1 reported the matter to the Diani Police Station where they were arrested and later on charged with malicious damage vide ***"Kwale Magistrate's Criminal Case No. E449 of 2023"***. The case was still pending before the said Court.

C. Cross examination of DW - 1 by Mr. Mwangi Kihira Advocate.

66. DW - 1 testified that he did not have the official search he had conducted before purchasing the land herein in Court. He stated that he had been present when the sale agreement dated 26th March 2009 was executed. He confirmed that he had been given a copy of the title deed but did not have it in court. He testified that the transfer had been done on 16th May 2010 as per the transfer document. He admitted that the transfer document did not contain his name, signature, or any of his particulars. Instead it was in the name of the company. He stated that the Certificate of Title had been issued and registered on 3rd June 2010. He further admitted that he had obtained the letter of consent on 24th June 2010, which was after the title had already been issued and registered.

67. DW - 1 confirmed that although he had paid for the purchase of parcels 786 and 787, he had not produced any receipts in court to prove the payments.

D. Cross examination of DW - 1 by Mr. Penda Advocate.

68. DW - 1 confirmed that it was true he had conducted an official search only after purchasing the land. He admitted that he had not undertaken any search prior to the transaction.

E. Re - examination of DW - 1 by Mr. Apollo Advocate.

69. DW - 1 testified that the transaction had been conducted by Mr. Kabiaru, Advocate, who had handled all aspects of the sale, prepared the sale agreement, and delivered the title deed. He stated that it was evident the titles were issued in the name of the company. He further testified that after the transaction, searches were undertaken for the two parcels, and the results confirmed that all was in order.

70. The 1st Defendant marked his case closed on 11th June, 2025 through his counsel Mr. Apollo.

VI. The 3rd Defendant's case

71. The 3rd Defendants contested the contents of the Plaintiff and stated that:

- a. Save for what had been expressly admitted, the 3rd Defendant denied each and every allegation contained in the Plaintiff as if the same had been set out verbatim and traversed seriatim.

- b. The 3rd Defendant admitted the contents of Paragraphs 1, 2, 3 and 4 of the Plaint in so far as they were descriptive of the parties herein, save that the 3rd Defendant's address of service for the purpose of the suit had been care of the Hon. Attorney General.
- c. That in accordance with the documentation forming part of the parcel file, Paragraphs 5, 6, 7 and 8 of the Plaint had been an accurate representation of ownership of the suit properties being KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787.
- d. The 3rd Defendant had been a stranger to Paragraphs 9, 10, 11 and 12 of the Plaint, save to state that the Plaint had indeed been filed by the Law firm of Messrs. Mwangi Kihira & Co. Advocates.
- e. In further response to Paragraph 10 of the Plaint, the Land Registrar had neither been a party nor a witness to any criminal proceedings in relation to the said parcels and liability could not attach therefrom.
- f. That in further response to Paragraph 12, the list of documents by the 3rd Defendant attested to the recording of a restriction

dated 20th December 2023 on both parcels of land being KWALE/GALU KINONDO/786 and KWALE/GALU KINONDO/787.

- g. In response to Paragraph 14 of the Plaint, the Land Registrar had not been aware of any purported scheme as alleged and had put the Plaintiff to absolute strict proof thereof.
- h. Allegations of illegality and fraud had been unfounded, based on actions of third parties not in concert or collaboration with the Land Registrar. The 3rd Defendant, based on the records, denied any involvement.
- i. Allegations of fraud, illegality, collusion or conspiracy had to be particularly laid out to enable rebuttal. The allegations in Paragraph 14 had been vague, ambiguous and outrightly unsupported misapprehensions against the 3rd Defendant.
- j. In response to Paragraphs 16, 17 and 18 of the plaint, the 3rd defendant stated that the position of ownership of the parcels of land had been clear and the 3rd Defendant would abide by the orders and directions of the Honourable Court.
- k. The 3rd Defendant had been unaware of any demand notice or letters without prejudice between the Plaintiff and the 1st and 2nd

Defendants and had therefore been a stranger to the averments therein.

l. The jurisdiction of the Honourable Court had not been disputed by the 3rd Defendant.

m. The 3rd Defendant had not been in receipt of any notice of intention to institute proceedings against the government under the provision Section 13A of the Government Proceedings Act and hence the Plaintiff had been precluded from an award for costs against the 3rd Defendant.

72. The 3rd Defendant prayed that the suit against the Land Registrar be dismissed for want of sufficient evidence in support.

73. The 3rd Defendant also responded to the Counter - Claim by the 1st and 2nd Defendant and averred as follows: -

a) Save for what had been expressly admitted, the 3rd Defendant denied each and every allegation contained in the Counter - Claim as if the same had been set out verbatim and traversed seriatim.

b) That paragraph 15 of the counterclaim had been denied in totality as it had not been supported by records at the Land Registry.

c) The 3rd Defendant had been a stranger to Paragraph 16 of the Counter - Claim.

d) In response to Paragraph 17 of the Counter - Claim, the 3rd Defendant stated that any allegations of a parallel file had been unfounded, false, and an attempt to mislead the Honourable Court.

74. The 3rd Defendant prayed that the Counter - Claim be dismissed with orders as to costs against the 1st and 2nd Defendants.

75. The 3rd Defendant called their first witness DW - 2 on 11th June, 2025 at wherein the witness testified but before that their Counsel on record gave the following opening remarks: -

A. Opening remarks by Mr. Penda Advocate.

76. Mr. Penda Advocate for the 3rd Defendant made his opening remarks to Court. He stated that the Land Registrar had been joined in the matter to the effect that they explicit to defraud the Plaintiff and the 1st Defendant. The crucks of the allegation was the purported two parallel Green Card/Parcel files. They had brought the Land registrar as a witness to refute this fact no. 786 and 787.

77. As to who was the owner of these parcels its for the court to decide. They were in Court to assist the court and they would be acquitted of these allegations.

B. Examination in Chief of DW - 2 by Mr. Penda Advocate.

78. DW - 2 was sworn and testified in English language. She identified herself as being M/s. SUSAN MWENI. She stated that she was the Land Registrar at Kwale, holding Personnel No. 2015 000 474. She confirmed that the parcels of land involved in the dispute were Land Reference Numbers Kwale/Galu Kinondo/786 and 787. She testified that her office had filed a list of documents dated 2nd April 2024, which had been filed in court on 8th April 2024. These documents comprised the official green cards for the two parcels. She produced the two (2) original Green cards and the Parcel files pertaining to the two parcels of the land in court.

79. DW - 2 emphasized that there were no two parallel green cards for the parcels in question. She produced the documents as 3rd Defendant's Exhibits Numbers 1 and 2.

C. Cross examination of DW - 2 by Mr. Apollo Advocate.

80. DW - 2 testified that she had a green card for each of the parcels in dispute. She stated that she had served at the Land Registry, Kwale

for three years and had undertaken entries and translations over the parcels, which had originally been handled by Mr. Mokaya, the then Land Registrar. She confirmed that parcel number 786 had been registered on 5th October 2015 using a Power of Attorney granted by Jurgen Hosch to Amos Hunja Kariuki. She admitted that she was not certain whether a deceased person could effect a Power of Attorney.

81. DW - 2 was referred to parcel number 787, specifically entry number 3 from the list of documents filed by the 1st and 2nd Defendants, which was a copy of the green card. She testified that her office did not have that entry in its official records.

D. Cross examination of DW - 2 by Mr. Mwangi Kihira Advocate.

82. DW - 2 was referred to the list of documents filed by the 1st and 2nd Defendants dated 9th July 2024, specifically item number 8, being the green card for parcel number Land Reference Numbers Kwale/Galu Kinondo/787. She confirmed that entry number 3 was dated 18th June, 1992 therein contained the following names:

- i) Peter Raitler.
- ii) Albert Ulimar.
- iii) Jurgen Hosch.

iv) Aanglurs Dorschell Hosch.

v) Jochem Scenales.

83. DW - 2 stated from the Parcel file indicated that the two parcel files indicated that they were registered in the names of the 1st Defendant - Eridy Consultants (E.A) Limited as at 3rd June, 2010 and Certificate of Titles issued accordingly. However, DW - 2 testified that clearly two names were omitted from the green card in the possession of her office. She was further referred to the Plaintiff's documents and confirmed that the Plaintiff had obtained the property through Power of Attorney No. 3063, with the transfer executed on 3rd June 2021 by Amos Hunja Kariuki. She acknowledged that Amos Hunja Kariuki had died on 4th July 2021, as evidenced by the Certificate of Death, and therefore he had been capable of transacting prior to his demise. This applied to parcel number 787.

84. DW - 2 testified that when transacting, the signatures of directors were required whether acting as transferor or transferee. She was referred to the transfer form for parcel number 787 and confirmed that it only contained the details of the transferors and not the transferee. She further noted that the form did not attach the

photographs of the transferees nor the signatures of the directors, making it impossible to ascertain who had undertaken the transaction.

85. The 3rd Defendants closed their case through their counsel on record Mr. Penda Advocate on 11th June, 2025.

VII. Submissions

86. On 11th June, 2025, immediately after the closure of the Plaintiff's case, the Honorable Court directed the Plaint and the Counterclaim be canvassed through written submissions. Pursuant to which the Honorable Court reserved a date for delivery of Judgement on notice accordingly on 13th April, 2026 accordingly.

VIII. Analysis and Determination

87. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the Defendants and the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

88. The provisions of Sections 107 (1), 108 & 109 of the Evidence Act, Cap. 80 provides that: -

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

89. Section 108 provides:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

90. And section 109 provides:

“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 for by law that the proof of that fact shall lie on any particular person.”

91. For the Honourable Court to arrive at a reasonable, fair and Equitable decision, it has crafted five (5) key issues for its determination. These are:-

- a) Whether the Plaintiff lawfully acquired parcels Kwale/Galu Kinondo/786 and 787 through transfers executed on 3rd June 2021 under a valid Power of Attorney.***
- b) Whether the 1st Defendant’s titles, allegedly obtained pursuant to sale agreements dated 26th March 2009 and 20th April 2010, are first in time and therefore indefeasible under the provisions of Sections 24, 25 & 26 of the Land Registration Act, No. 3 of 2012.***
- c) Whether the Plaintiff’s titles were fraudulently procured in collusion with rogue land officials, and whether there exist parallel green cards or irregular entries in respect of the suit parcels.***

d) Whether the parties are entitled to the reliefs sought in the Plaintiff and Counter - Claim, including cancellation of titles, declarations of ownership, and damages for trespass and malicious damage.

e) Who should bear the costs of the suit and the Counter - Claim.

ISSUE No. a). Whether the Plaintiff lawfully acquired parcels Kwale/Galu Kinondo/786 and 787 through transfers executed on 3rd June 2021 under a valid Power of Attorney.

92. Under this sub-title, the Honourable Court decipheres that the main substratum of the matter is on the question of the ownership of the suit properties as claimed by both the Plaintiff and the 1st & 2nd Defendants herein. The Honourable Court will specifically address the legal aspect in relation to each of the parties herein. To begin with, in the case by the Plaintiff - Mr. Brian Hunja Kariuki, it rests upon the transfer of the suit properties effected on 3rd June 2021, allegedly pursuant to a legal instrument - the Power of Attorney No. 3063 granted by his late father, Mr. Amos Hunja Kariuki. The Plaintiff produced the transfer instruments and Certificates of Title showing registration in his name. He further relied on the Certificate of Death of his father - Amos Hunja Kariuki, which confirmed that the donor of the Power of Attorney as fate would have it passed away on 4th July 2021, subsequent to the transfer.

93. Legally speaking, a Power of Attorney (POA) is a legal instrument by which one person (the donor or principal) authorizes another (the donee or attorney) to act on their behalf in specified matters. It is a delegation of authority, often used in property transactions, litigation, or commercial dealings. The Court is guided by the provision of Section 3 of the Power of Attorney Act, Cap. 16, Laws of Kenya, which provides that a Power of Attorney may be registered at the Lands Registry and, once registered, may be relied upon in dealings relating to land. The Act further recognizes that acts done by the attorney within the scope of authority bind the donor, provided the donor is alive at the time of execution.
94. The Court also draws guidance from the provision of Section 26 (1) of the Land Registration Act, No. 3 of 2012, which provides that a certificate of title is prima facie evidence of ownership but may be impeached if obtained through fraud, misrepresentation, or illegality. Where a transfer is executed under a Power of Attorney, the validity of the attorney's authority is central to the integrity of the transaction.
95. Critically, the Defendants vigorously challenged the validity of the Plaintiff's acquisition of the parcels of land. They argued that the

transfer instruments were defective, lacking photographs and signatures of the transferees, and that the Power of Attorney could not have been validly exercised if the donor was deceased at the time of execution. They further alleged collusion with rogue land officials to create parallel green cards. The Honourable Court is guided by the provision of Sections 107, 108 and 109 of the Evidence Act, Cap. 80, Laws of Kenya, which place the burden of proof upon the party asserting a fact. In this case, the Plaintiff bore the burden of proving that the transfer of 3rd June 2021 was lawfully executed under a valid Power of Attorney.

96. Further, the Court draws guidance from the provision of Section 25 (1) of the Land Registration Act, No. 3 of 2012, which provides that registration confers absolute ownership together with rights and privileges appurtenant thereto, and the provision of Section 26 (1), which states that a Certificate of Title is “**prima facie**” evidence of ownership but may be challenged if obtained through fraud, misrepresentation, or illegality. Further, the provision of Section 80 of the Act empowers the Court to order rectification and/or cancellation of the register where fraud or mistake is proved.

97. The jurisprudence of the superior courts has consistently laid - down firm legal principles on the subject matter. The Courts have emphasized that registration alone does not cure defects arising from fraud or procedural impropriety. Hence, there will be no need to re - invent the wheel. For instance, in the case of:- **“Isack M’Inanga Kiebia - Versus - Isaaya Theuri M’Lintari & Another [2018] eKLR”**, the Supreme Court held that the root of title must be interrogated, and that fraudulent acquisition cannot be shielded by registration. More recently, in the case of:- **“Harcharan Singh Sehmi & Another - Versus - Tarabana Company Limited & 5 Others, Petition No. E033 of 2023 (Supreme Court, April 2025)”**, the Court reaffirmed that the doctrine of indefeasibility of title does not protect fraudulent acquisitions. Similarly, in the case of:- **“Freedom Limited - Versus - Omar Awadh Mbarak [2024] KESC 76”**, the Supreme Court emphasized that contested land ownership requires scrutiny of the root of title and compliance with statutory requirements.

98. The East African jurisprudence is aligned with this position. In the case of:- **“Kampala District Land Board - Versus - National Housing & Construction Corporation [2022] UGSC”**, the Ugandan Supreme Court held that indefeasibility of title is not absolute and can be

impeached where fraud or misrepresentation is proved. Likewise, in the case of:- **“Registered Trustees of Holy Spirit Sisters - Versus - Mbene Village Council [2023] TZCA”**, the Court of Appeal of Tanzania reiterated that land titles obtained through irregular processes are voidable, even if registered.

99. Applying these fundamental legal principles to the instant case, the Court finds that while the Plaintiff produced evidence of registration, the Defendants raised credible questions regarding the authenticity of the transfer instruments and the existence of parallel green cards. The absence of the transferee particulars and signatures in the transfer form, coupled with allegations of irregular entries, cast doubt on the validity of the Plaintiff’s acquisition.

100. Accordingly, the Court holds that the issue of whether the Plaintiff lawfully acquired parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787 through transfers executed on 3rd June 2021 under a valid Power of Attorney cannot be conclusively established on the Plaintiff’s evidence alone. Therefore, it must be weighed against the competing claims of the Defendants under Issue (b), which interrogates whether the 1st Defendant’s titles are first in time and hence be vested with indefeasible rights, interest and title.

Based on the records - filed pleadings and the empirical evidence adduced, the answer to this query is in the affirmative that the 1st Defendant was the first to get registered to the suit property.

ISSUE No. b). Whether the 1st Defendant's titles, allegedly obtained pursuant to sale agreements dated 26th March 2009 and 20th April 2010, are first in time and therefore indefeasible under Section 26 of the Land Registration Act, No. 3 of 2012.

101. Under this sub-title, the Honourable Court deciphers the competing claim of the 1st Defendant. The 1st Defendant's case rests upon sale agreements dated 26th March 2009 and 20th April 2010 respectively, pursuant to which transfers were effected on 16th May 2010, and Certificates of Title issued and registered on 3rd June 2010. DW - 2, the Land Registrar, Kwale testified and produced the parcel files for the two (2) parcels. From the Certificate of Search conducted on 30th June, 2010 clearly indicated that the two (2) parcels of land were registered in the names of the 1st Defendant as from 3rd June, 2020 and the Certificate of Titles issued accordingly. The Defendants produced copies of the sale agreements, transfer instruments, the Certificate of Searches, and certificates of title to demonstrate that their acquisition preceded that of the Plaintiff.

102. Be that as it may, the Plaintiff vigorously challenged the validity of these titles by the 1st Defendant, arguing that the transfer documents did not bear the names, signatures, or particulars of the transferee, and that the Letter of Consent was obtained on 24th June 2010, from the Land Control Board, after the title had already been issued. He contended that this sequence of events rendered the Defendants' titles irregular and void ab initio.

103. Despite of this, I emphasis that the Honourable Court is once more guided by the provision of Sections 24 & 25 (1) of the Land Registration Act, No. 3 of 2012, which provides that registration confers absolute ownership together with the indefeasible rights, titles and privileges appurtenant thereto. However, the provision of Section 26 (1) of the Act qualifies this principle by stating that a Certificate of Title is a '**prima facie**' evidence of ownership but may be impeached if obtained through fraud, misrepresentation, or illegality. As already indicated above, these are allegations the Plaintiff was not able to demonstrate nor prove to the required legal standards. Further, I reiterate that the provision of Section 80 of the Act empowers the Court to order rectification and/or cancellation of the register where fraud or mistake is proved.

104. Towards this end, I seek solace from several well established precedents on the subject matter, These are from the case of:-
“Daudi Kiptugen - Versus - Commissioner of Lands & 4 Others (2015) eKLR” the court stated: -

‘In order to determine the question whether the lease held by the Plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result; the process of acquisition is material.’

Further to this, in the case of **“Hubert L Martin & 2 Others - Versus - Margaret J Kamar & 5 Others [2016] eKLR”**:- the court stated 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."

Additionally, in the cases of: ***"Wreck Motors Enterprises - Versus - the Commissioner of Lands and others Civil Appeal no. 71 of 1997"*** the court held that:-

"where there are two competing titles the one registered earlier is the one that takes priority"

105. This position was also buttressed in the case of:- ***"Gitwany Investments Limited - Versus - Tajmal & 3 others (2006) eKLR"*** where the Court held that:

"the first in time prevail, so that in the even such as this one whereby a mistake that is admitted, the Commissioner of Land

issued two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save the mistake then the first in time prevail.”

As already indicated above, applying the legal principles to the instant case, the Court reiterates that while the 1st Defendant's titles were registered earlier in time, the Plaintiff has raised legitimate questions regarding the procedural regularity of the transfers, particularly the absence of transferee particulars and the issuance of the Letter of Consent from the Land Control Board after registration. However, it has been noted that there exists parallel copies of Green Cards - one produced by the Land Registrar and the other by the Plaintiff. These anomalies cast doubt on the integrity of the Defendants' titles.

106. Accordingly, the Court holds that the 1st Defendant's titles, though first in time, cannot automatically be deemed indefeasible under Section 26 of the Land Registration Act without a full interrogation of the alleged irregularities and the possibility of fraud. Be that as it may, and in the given circumstances, therefore, the determination of ownership must be resolved by weighing both parties' claims against the statutory framework and the evidence adduced.

ISSUE No. c). Whether the Plaintiff's titles were fraudulently procured in collusion with rogue land officials, and whether there exist parallel green cards or irregular entries in respect of the suit parcels

107. Under this sub - title, the Honourable Court deciphers the allegations of fraud and irregularity surrounding the two competing titles. While on the one hand, the Defendants contended that the Plaintiff's titles were unlawfully procured in collusion with rogue land officials, pointing to discrepancies in the transfer instruments, the absence of transferee particulars, and the existence of alleged parallel green cards.

108. On the other hand, the Plaintiff maintained that his titles were lawfully acquired pursuant to Power of Attorney No. 3063 and that the transfers were executed on 3rd June 2021, prior to the death of the donor, Amos Hunja Kariuki, on 4th July 2021. He argued that the Defendants' documents were defective, referencing parcels described as "Kilifi/Galu Kinondo" rather than "Kwale/Galu Kinondo," and transfer forms lacking photographs and signatures of transferees.

109. As already stated above, the Honourable Court is guided by the provision of Sections 107, 108 and 109 of the Evidence Act, Cap.

80, Laws of Kenya, which places the burden of proof upon the party asserting a fact. Fraud is a serious allegation and must be strictly proved to a standard higher than a balance of probabilities, though not as high as beyond reasonable doubt. The Court also draws guidance from the provision of Section 26 (1) of the Land Registration Act, 2012, which provides that a certificate of title is prima facie evidence of ownership but may be impeached if obtained through fraud, misrepresentation, or illegality. Further, the provision of Section 80 of the Act empowers the Court to order rectification of the register where fraud or mistake is proved.

110. Similarly, applying the legal principles to the instant case, the Court finds that the Plaintiff's titles, though supported by certificates of registration, are tainted by procedural anomalies. The absence of transferee particulars and signatures in the transfer forms, coupled with the contested existence of parallel green cards, raises serious doubts as to the integrity of the Plaintiff's acquisition. The Defendants have discharged their evidentiary burden by pointing to specific irregularities, thereby shifting the burden back to the Plaintiff to demonstrate lawful acquisition.

111. Accordingly, the Court holds that the Plaintiff's titles cannot be deemed free from fraud or irregularity without further scrutiny. The allegations of collusion with rogue land officials, though not conclusively proved to the criminal standard, have been sufficiently demonstrated to undermine the presumption of indefeasibility under Section 26 of the Land Registration Act. Thus, the titles deeds held by the Plaintiff must fail the test of indefeasibility of the rights, title and interest of the titles.

ISSUE No. d). Whether the parties are entitled to the reliefs sought in the Plaint and Counter - Claim, including cancellation of titles, declarations of ownership, and damages for trespass and malicious damage

112. Under this sub-title, the Honourable Court deciphers the competing prayers sought by the Plaintiff and the Defendants. The Plaintiff seeks cancellation of the Defendants' titles, confirmation of his ownership of parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787, and ancillary reliefs. The 1st and 2nd Defendants, through their Counter - Claim, seek cancellation of the Plaintiff's titles, declaration of their ownership, damages for

trespass and malicious damage, and costs. The 3rd Defendant, the Land Registrar, prays for dismissal of the suit against it for lack of evidence of fraud or conspiracy.

113. The Court is guided by the provision of Section 26 (1) of the Land Registration Act, No. 3 of 2012, which provides that a certificate of title is prima facie evidence of ownership but may be impeached if obtained through fraud, misrepresentation, or illegality. Further, the provision of Section 80(1) of the Act empowers the Court to order rectification of the register where fraud or mistake is proved.

114. The Plaintiff has not discharged the burden of proving fraud on the part of the Defendants to the required standard under sections 107-109 of the Evidence Act. Conversely, the Defendants have demonstrated that the Plaintiff's titles are tainted by procedural irregularities, thereby undermining their validity.

115. As regards the claim for damages for trespass and malicious damage, the Court notes that the Defendants adduced evidence of invasion of the suit properties on 15th December 2023, destruction of the perimeter wall, and vandalism of buildings thereon. The Plaintiff did not rebut this evidence satisfactorily. Guided by the principles in ***Kenya Power & Lighting Company Limited - Versus -***

Nathan Karanja Gachoka & Another [2016] eKLR”, the Court finds that the Defendants are entitled to damages for trespass.

116. With respect to the 3rd Defendant, the Land Registrar, the Court finds no cogent evidence of fraud or conspiracy. The Registrar produced official green cards and parcel files, which were consistent and authentic. The allegations of parallel green cards were not substantiated to the required evidentiary standard. Accordingly, the suit against the 3rd Defendant must fail.

117. In the premises, the Court holds that the Plaintiff is not entitled to the reliefs sought in the Plaint. The 1st and 2nd Defendants have partially succeeded in their counterclaim, and are entitled to cancellation of the Plaintiff’s titles, declaration of their ownership of parcels Kwale/Galu Kinondo/786 and 787, and damages for trespass. The suit against the 3rd Defendant is dismissed.

ISSUE No. e). Who should bear the costs of the suit and the Counter claim

118. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a party is granted at the conclusion of any legal process or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

119. The provision of Section 27 of the Civil Procedure Act, Cap, 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows;-

“(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.”

120. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book ***Judicial Hints on Civil Procedure, 2nd Edition, 2005*** at 95 notes

that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

121. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of: ***"Morgan Air Cargo Limited - Versus - Everest Enterprises Limited [2014] eKLR"*** the court noted that;

"The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Cost follow the event" was driven by the fact that there could be no "one-size-fit-all" situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

122. Applying these principles to the instant case, the Court finds that the Plaintiff has failed to prove his claim to the required standard under sections 107-109 of the Evidence Act. The Plaintiff prays

for costs of the suit, while the 1st and 2nd Defendants seek costs of both the suit and the Counter - Claim.

123. The 3rd Defendant, the Land Registrar, prays that the suit against it be dismissed with costs. His suit is therefore dismissed. The 1st and 2nd Defendants have succeeded in their Counter - Claim to the extent of cancellation of the Plaintiff's titles, declaration of their ownership of parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787, and damages for trespass. They are therefore entitled to costs of both the suit and the Counter - Claim.

124. As regards the 3rd Defendant, the Land Registrar, the Court finds that the allegations of fraud and conspiracy were not substantiated. The suit against the 3rd Defendant is dismissed. In the circumstances, the 3rd Defendant is entitled to costs of the suit as against the Plaintiff.

125. Accordingly, the Court orders that the Plaintiff shall bear the costs of the suit and the Counter - Claim, payable to the 1st and 2nd Defendants, and further that the Plaintiff shall bear the costs of the suit as against the 3rd Defendant.

IX. Conclusion and Disposition

126. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court, on the preponderance of probabilities, finds that the Plaintiff has failed to establish lawful ownership of parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787 under the transfer of 3rd June 2021. Conversely, the 1st and 2nd Defendants have demonstrated that their titles, though first in time, were procedurally regular and supported by evidence of possession. The allegations of fraud against the 3rd Defendant, the Land Registrar, were not proved to the required standard. Accordingly, and for avoidance of any doubts, the Honourable Court makes the following orders for disposal thereof:-

- a) THAT the Plaintiff's suit as per the Plaint dated 19th January 2024 be and is hereby dismissed.**
- b) THAT the 1st and 2nd Defendants' Counter- Claim dated 12th April 2024 be and is hereby partially allowed.**
- c) THAT a declaration be and is hereby made that parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787 are lawfully owned by the 1st and 2nd Defendants.**
- d) THAT an order be and is hereby issued directing the Land Registrar, Kwale, to cancel the Certificates of Title issued in favour of the Plaintiff in respect of parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787,**

and to rectify the register accordingly to reflect the ownership of the 1st and 2nd Defendants.

- e) **THAT** an order be and is hereby issued directing the Plaintiff, his servants, agents, or anyone acting under his instructions, to deliver vacant possession of parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787 to the 1st and 2nd Defendants within thirty (30) days of service of this judgment. In default, the Defendants shall be at liberty to apply for a writ of possession, and the Court shall authorize enforcement by the Court bailiff and the Officer Commanding Station (OCS) of the relevant police station.
- f) **THAT** damages for trespass and malicious damage are awarded to the 1st and 2nd Defendants against the Plaintiff, the quantum thereof to be assessed upon application supported by evidence.
- g) **THAT** a permanent injunction be and is hereby issued restraining the Plaintiff, his servants, agents, transferees, and anyone acting under his instructions from further alienating, transferring, charging, encumbering, entering upon, occupying, developing, or otherwise interfering with parcels Land Reference Numbers Kwale/Galu Kinondo/786 and 787.
- h) **THAT** the suit against the 3rd Defendant, the Land Registrar, Kwale be and is hereby dismissed with costs, there being no evidence of fraud or conspiracy proved against it.

i) **THAT** the costs of the main suit and the Counter - Claim be and hereby awarded to the 1st and 2nd Defendants against the Plaintiff. Further, the 3rd Defendant be and is hereby awarded costs of the suit as against the Plaintiff.

IT IS SO ORDERED ACCORDINGLY.

**JUDGMENT DELIVERED THROUGH MICRO - SOFT TEAMS
VIRTUAL MEANS SIGNED AND DATED AT KWALE THIS.....
13THDAY OFAPRIL.....2026.**

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

Judgement delivered in the presence of:

- a) M/s. Asmaa Maftah, the Court Assistant.
- b) Mr. Mwangi Kihira Advocate for the Plaintiff.
- c) Mr. Apollo Mwinde Advocate for the 1st Defendant.
- d) No appearance for the 2nd & 3rd Defendants.