



REPUBLIC OF KENYA



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Mutisya & another v Mugambi & another (Environment and Land Case E010 of 2023) [2025] KEELC 5847 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE E010 OF 2023**

AE DENA, J

JULY 25, 2025

BETWEEN

MARIA MUMBUA MUTISYA 1ST PLAINTIFF

JOSEPH MUTHEE NYARUAI 2ND PLAINTIFF

AND

LAWRENCE MAINA MUGAMBI 1ST DEFENDANT

LAND REGISTRAR KWALE 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit through the firm of Mulandi & Mulandi and Company Advocates vide a plaint dated 21/02/2023 seeking the following reliefs; -
 - a. An order directing the Land Registrar Kwale the 2nd Defendant herein to forthwith remove the restriction/Caution lodged by the 1st Defendant herein against land Parcel Number Kwale/Mafisini/1267 unless the 1st Defendant sooner withdraws it.
 - b. General Damages for wrongful restriction/caution
 - c. Costs of this suit plus interest
 - d. Any other or further relief the honorable court may deem fit and just to grant.
2. It is pleaded that the 2nd Plaintiff is the registered proprietor of Parcel Number Kwale/Mafisini/1267 (suit property) after acquiring it from the 1st Defendant and one Simon Mugambi who is deceased. It is pleaded that the 2nd Plaintiff has since procedurally transferred the same to the 1st Plaintiff. That she is a bonafide purchaser. Further that the issuance of the title deed to the 1st Plaintiff was later hindered as the 1st Defendant placed a restriction/caution against the parcel register alleging suspected fraud and ill dealings.



3. The 1st Defendant responded to the suit by a Statement of Defense dated 11/5/2023 through the firm of Mungai & Company Advocates. The 1st Defendant denies that he sold the suit property to the 2nd Plaintiff. The 1st Defendant avers that the 2nd Plaintiff stole the original title deed and illegally/ fraudulently transferred the suit property to himself and later sold it to the 1st Plaintiff. That this prompted the 1st Defendant to register the restriction to prevent any dealings from taking place.
4. The 1st Defendant sought orders that the suit be dismissed with costs. A declaration that the purported title deed for Kwale/Mafisini/1267 dated 2/10/2023 Serial No. 0499356 in the name of the 1st Plaintiff is illegal null and void ab initio and an order directing its cancellation and entries related thereto.
5. The 2nd Defendant filed a statement of defence dated 27/06/2023 through J.K. Kemei State Counsel. The averments in the plaint are denied except the description of the 2nd Defendant. It is denied any demand was made to remove the restriction. That the restriction could not be removed suo motto without an application from an interested party. That the pleadings have failed to reveal any reasonable cause of action against the 2nd Defendant and the suit should be dismissed for lacking in merit.

Evidence of the Parties

Plaintiffs Case

6. PW1 was Maria Mumbua Mutisya the 1st Plaintiff. She told the court she is the owner of the property herein which she acquired from Joseph Muthee though she has not been issued with a title. That before purchase she did due diligence by obtaining green card, official search and attended the Land Control Board at Msambweni together with the 2nd Plaintiff who was the owner of the land. She adopted her witness statement dated 21/2/23 as her evidence in chief. According to her witness statement she has been unable to affect her plans to develop the said land as the 1st Defendant and his kin have continued to trespass thereon. The witness produced as her evidence the documents in the Plaintiffs list dated 21/2/23 (PEx 1-6) and further list dated 19/4/23 (Pex 6-23) and Supplementary list dated 11/10/23 (PEx 24-41).
7. It was her evidence that she has not been issued with a title because of a restriction placed at the tail end of the sale transaction. She could not register the transfer. That Ali Mbwiza is the lawyer who assisted her with the transaction and is the same lawyer who registered the restriction. PW1 urged the court to compel the registrar to lift the restriction and register her as proprietor.
8. Cross examined by Mr. Mungai for the 1st Defendant PW1 stated though she obtained a green card to know the history of the property she was only interested in the current owner and not previous ownership. She did not find prudent to inquire about the previous ownership of the property. That she inquired from the chief who confirmed the plaintiff was the owner. That she could not remember the chiefs name. She did not make inquiries with the neighbors. That the only information she had was that the 1st Defendant was the owner of a neighboring plot. The witness conceded that had she taken possession or inquired with this specific neighbor she would have known about the ownership of the suit property.
9. Cross examined on the search (LMM-05) in the defendants bundle she noted that as at November 2022 the 1st Defendant was still registered as joint owner. That she lodged her transfer in February 2023. That though the matter was in court to confirm the 1st Defendants interest he had the right to protect his property. She conceded there can never be two green cards on one property and only one must be genuine. It was her testimony that she did not lodge a complaint with the DCI on discovery of the restriction and was not aware of any criminal investigations on the property. That should the



- court find the 1st Defendant to be the lawful owner of the property she would have no objection if her transfer is not to be registered.
10. Cross examined by Mr. Kemei state counsel PW1 confirmed she did not conduct due diligence on the previous owner before Joseph Muthee. On being referred to prayer a) of the plaint she testified that she did not file any request to the Land registrar to remove the restriction. She conceded the land registrar did not commit any wrong to place the restriction since it was the 1st defendant who did it.
 11. PW1 clarified in re -examination that the purpose for the search was to confirm if Joseph Muthee was the legal owner and which she confirmed. That there was no joint owner. That she was issued with the green card by the Kwale land office. She did not discover any other documents other than those of Joseph Muthee.
 12. PW2 was Joseph Muthee Nyaruai the 2nd Plaintiff. He adopted his witness statement dated 21/2/23 as his evidence in chief. He adopted all the documents produced by PW1 as his evidence in addition to annexures in his Further Affidavit sworn on 19/4/23. He told the court he had come to clear his name since he was informed about the restriction yet he had sold the suit property which he knew was his land to the 1st Plaintiff. That there was no other owner of the suit property except himself. He became aware of the restriction through the 1st Plaintiff and the lawyer Rashid Mbwiza who was registering the transfer.
 13. The witness stated the 1st Defendant is his father's brother. That he had no personal differences with the 1st Defendant. The 1st Defendant introduced him to his father. That the 1st Defendant and PW2 father both transferred the property to him at a consideration of Kshs. 300,000/=. That he was aware of the allegations of forgery however he had followed due process to transfer the land into his name. That he never forged any signature neither did he coerce them to transfer the property to him.
 14. PW2 stated he was summoned by the DC1 Kwale where he attended and presented all his documents. No charges were preferred against him and he has never been arrested. He testified that he acquired the property in 2013, transferred it to 1st Plaintiff on 9/2/23 and the restriction was placed on 14/2/23. He denied stealing the title from the 1st Defendant. That he believed the 1st Plaintiff did her due diligence and confirmed PW2 name was in the green card which indicated him as the absolute owners. That he was aware the Plaintiff has never developed the property because of the restriction. That he slightly blames the land registrar because he ought the have check the 1st Defendants documents before registering the restriction. That he was never informed of the restriction before it was registered. He also blamed the 1st Defendant for the restriction. The witness reiterated he got his title from the land registrar who is mandated to issue them.
 15. Upon cross examination by Mr. Mungai PW2 asserted he had a consent agreement that authorized all transactions (see item 10 on further list dated 19/4/23). The sale agreement for his purchase of the property was oral. He conceded the consent agreement is not dated but insisted it was accepted by the land registry. That the consent agreement was not a power of attorney. He did not require a written contract for sale especially where it is a family matter. On being shown the Power of Attorney dated 30/11/2012 (see item 16 in Plaintiffs list of 19/4/23) donated to him by Simon Muchiri Mugambi whom he confirmed as his biological father he conceded it did not refer directly to the suit property.
 16. On being referred to paragraph 4 of the 1st Defendants defence the witness confirmed the transfer was executed by the same lawyer J.O. Mandi in Kwale town. He reiterated he obtained the original title for 1267 from the 1st Defendant and PW2 father. That the 1st Defendant confessed to the DCI that the signature on the transfer was his signature. That the responsibility to obtain consents was on the 1st Defendant and both the joint owners and himself attended the LCB. Referring to the search issued



carried out on 24/11/23 (LMM-5) he conceded that a search cannot be issued in the absence of a green card. That there cannot be two green cards.

17. Cross examined by Mr. Kemei the witness confirmed he had not produced a sale agreement. That at the lands office he presented the consent agreement. He did not pay any money for the sale agreement. He did not have any acknowledgement for money for the sale. He had no Power of Attorney registered against the property. He had not written to the registrar about removal of the restriction.
18. The witness indicated in re -examination that the consideration for the transfer was the expenses he incurred in the process in the transaction, boundary identification, subdivisions among other expenses including lodging at Mombasa.
19. With the above the Plaintiffs case was marked as closed.

1st Defendants Case

20. Lawrence Maina Mugambi the 1st Defendant testified as DW1 and adopted his witness statement dated 26/6/2023. The witness also produced the documents in the list of documents dated 23/6/2023 (DW1 Ex 1-8). The witness testified that he inherited the suit property from his father and they were joint owners of the same with his brother. That he knew the 2nd Plaintiff though he never transferred the property to him. That the signature purported to be his on the transfer adduced (item 6 of Plaintiffs list) is not his signature. He did not know the lawyer who witnessed the said signature and never appeared before him on 30/12/2013. On being shown the attendant LCB consent he noted it did not bear his and the brother's signature. That it also lacked the identity of the Board and was undated.
21. DW1 testified the original title of the suit property was with the 2nd Plaintiff though he did not know how he got it as it had always been kept by his brother. According to the witness the transfer was not in accordance with the law. The witness urged the court to consider his documents and find in his favor.
22. DW1 asserted in cross examination by Mr. Mulandi that plot 1267 was a subdivision of his father's land and bore DW1 name and that of his brother. He confirmed the photo in the transfer, ID Number and PIN to be his except the signature. He confirmed the application letter for LCB consent had a stamp of Msambweni LCB. He stated he did not implement the contents of paragraph 5 of his replying affidavit dated 2/3/2023. On paragraph 7 thereof he confirmed it referred to the consent he gave his brother and affirmed the signature as his (DW1). DW1 confirmed he knew the witnesses in the consent (Joseph Muthee Nyaruai and George Maina Nderitu. He confirmed the said witnesses signature appeared in the transfer and application for LCB consent though they were not similar. That he first saw the 2nd Plaintiff in the year 2013 and knew him for about 1 year. He denied the 2nd Plaintiff was his relative.
23. Regarding the Commissionable contract DW1 denied knowledge of his brother having appointed the 2nd Plaintiff. He confirmed Jane Wambu appearing at page 21 was his brother's child though he could not confirm the 2nd Plaintiff was his brother's son as he came as an adult in 2013. That the subdivision of his father's land into 1268 and 1267 was undertaken by one Simon Mugambi whom he authorized to do mutation into 2 plots. He conceded the consent did not mention the mutation. On paragraph 7 (b) of his defence DW1 stated he could not remember whether the consent therein is before court. He reiterated the 2nd Plaintiff stole the title since his brother died in 2018 and the transfer was done in 2013. That he discovered the transfer in February 2013. Asked to compare Plaintiffs official search dated 12/01/2023 in the name of the 2nd Plaintiff with DW1 he conceded the later lacked the registrar's initials while the former had.
24. On the Plaintiffs green card (page 3&4 of Plaintiff bundle) the witness confirmed Joseph Muthee was issued with a title deed, there was consideration of Kshs. 300,000/= and the entries coincided. On the



restriction placed by the witness on 14/2/2023 he stated it was preceded by a search undertaken on 24/11/22. That he was not asked for any documents during the lodging of the restriction but used the said search and copy of title for 1267 which had his name and Lawrence Mugambi. The witness confirmed he has never reported to the police that his title was lost or stolen by Muthee. On being referred to paragraphs 6 of his defence the witness testified that Joseph Muthee was summoned to the police, recorded statement but has never been arrested or charged in court. He affirmed the DCI had not presented any report to the court.

25. Cross examined by Mr. Kemei DW1 reiterated he got the land from his father. That he did succession. On being shown the transfer (JMN-3) the witness confirmed the dates at the bottom were blank. On the transfer (Plaintiffs Supplementary list page 13 & 14) the witness confirmed it was dated 2/10/2013 and stated his surprise that one is dated while the other is not which means some wrongs took place. That he had not been summoned by the land registrar with regard to the removal of the restriction. That he did not sign a power of attorney for the brother to transfer the land into their two names but the consent. No power of attorney was registered.
26. DW1 clarified in reexamination that he gave his brother authority via the consent (DWEx4) to subdivide plot 369 into two. The authority was to Simon alone and not Joseph. That the authority at page 20 of the Plaintiff's bundle was for a different plot in Nairobi and not the suit property. That the notice of land agreement at page 21 of the same bundle makes no reference to plot 369. That he would not know whether the 2nd Plaintiff has been charged. He did not have any complaint over the consent.

The 2nd Defendants Case

27. DW2 was Steve Mokaya the County land registrar Kwale. He confirmed land Parcel Number Kwale/Mafisini/1267 was a subdivision of land Parcel Number Kwale/Mafisini/369. That the former was first registered on 27/09/2013 to Simon Muchiri Mugambi and Lawrence Maina Mugambi and title deed issued the same day S/No. 0499182. On 2/08/2013 (sic) plot 1267 was transferred to Joseph Muthee Nyaruai for Kshs. 300,000/- and title issued. On 14/2/2023 a restriction was registered by Lawrence Maina Mugambi indicating the property was never transferred.
28. DW2 added that plot 369 was registered on 26/2/1979 under Mugambi Mururia who was issued with land certificate on 2/5/1994. The property was transferred to Simon Muchiri Mugambi and Lawrence Maina Mugambi as administrators and beneficiaries and which was closed on 27/9/2013 to open parcel 1267 and 1268. He noted that there was no Power of Attorney registered under any of the registers. He produced the documents as listed in the list dated 27/06/2023(DW2Ex 1-8).
29. Cross examined by Mr. Mulandi DW2 testified that Lawrence Mugambi was able to register the restriction because he was one of the registered owners. He noted that Joseph Muthee was owner of the property for approximately 12 years and that Limitations of Actions Act would apply for uninterrupted ownership of the period. That the grounds of the restriction was 'suspected fraud, dealings by unknown people'. He confirmed a title deed was surrendered which links Lawrence to the property. There was no advocate involved on the registration of the restriction.
30. DW2 admitted there cannot be two titles on the same property and only can be correct. He asserted that the register is the one that is genuine. That the search dated 24/11/22 was not signed and he could not confirm its genuineness. He confirmed the search dated 12/01/2023 was genuine having been signed by the land registrar.
31. On whether Joseph was notified of the restriction DW2 testified he has not come across the statutory written notice which must be issued in case of restriction or caution. That Joseph cannot benefit from the property unless the restriction is lifted. He asserted the restriction was duly registered since the



- owner states he did not transfer the property. That before transfer the owner must consent absence of which would render the transfer illegal ab initio. That while the transfer instruments from Joseph to Maria were booked they could not be registered because of the restriction.
32. Cross examined by Ms. Mukabane for the 1st Defendant DW2 asserted that where an entry in the green card (25/1/2023) is not signed by the land registrar it cannot be relied upon since it does not amount to a transaction. That entry no. 3 and 4 of the green card dated 20/2/2023 is also not valid. That consequently the title dated 2/10/2013 (item 1 of DW2 bundle) is issued unprocedurally. He confirmed that entries 1 – 4 of the green card for Simon and Lawrence was done in less than a week which would ordinarily take three weeks to 1 month.
 33. DW2 reiterated he could not confirm who issued the search dated 24/11/22. He affirmed that the LCB letter of consent dated 18/9/2013 issued to Lawrence and Simon to transfer to Joseph though as that date subdivision had not occurred and therefore the two didn't have title.
 34. He affirmed the transfer dated 9/2/2023 (DW2 bundle) is not signed by the Land Registrar and cannot make as an exhibit from the lands office. He added that the 1st Plaintiff cannot obtain title from an unsigned transfer. That submitting the documents to the registry is not enough until they are registered. According to him the 1st Plaintiff did not follow procedure. He reiterated the reasons why he deemed the restriction as duly placed.
 35. DW2 clarified in re-examination that the restriction is still valid since there has been no formal application to lift it. He could not state where the Kshs. 300,000/- came from as the registry does not ordinarily require the sale agreement.
 36. With the above the 2nd Defendants case was marked as closed.

Submissions

37. Parties filed and exchanged closing written submissions pursuant to the court's directions.

Plaintiffs Submissions

38. The Plaintiffs submissions dated 14/11/2024 were filed through the firm of Mulandi & Mulandi Company advocates and Five issues were identified for determination and are summarized here below.

Whether the 2nd Plaintiff is the owner land Parcel Number Kwale/Mafisini/1267

39. It is submitted that the land registrar through his oral testimony and documentary evidence confirmed the 2nd Plaintiff as the owner of the suit property above. The 1st Defendant had no proof of his claim to the suit property and only produced a fake unsigned certificate of official search (LMM-5). He could not explain how he obtained the same. He confirmed the 2nd Plaintiff was the son of his late brother. That the consent agreement between the 1st Defendant and his said late brother features the 2nd Plaintiff as a witness.
40. It is asserted that the 2nd Defendant erred in law in failing to recognize the sanctity of title as contemplated under the provisions of section 24, 25 and 26 of the [Land Registration Act](#). That there was an error of law by the 2nd Defendant in failing to recognize the existence of a valid transfer between the 1st and 2nd Plaintiffs.
41. Referring to the holding in Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others (2015) eKLR it is submitted the allegations of fraud against the 2nd Plaintiff were not proved to the required standard.



Whether the 1st Plaintiff was bonafide purchaser for value

42. It is submitted both Plaintiffs initiated the transfer based on willing buyer willing seller basis the 1st Plaintiff being the bonafide purchaser using one advocate in the transaction. The 1st Plaintiff conducted due diligence by obtaining official search and green cards which confirmed the suit property belonged to the 2nd Plaintiff. The position was confirmed by DW2 including the area chief. Reliance is placed on the case of in Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others (2015) eKLR where the Court of Appeal cited the case of Katende Vs. Hariridar on who comprises a bonafide purchaser.
43. Additionally the court is referred to the provisions of section 80 of the [Land Registration Act](#) for the court to rectify the register and issue title of plot 1267 to the 1st Plaintiff.

Whether the Restriction lodged by the 1st Defendant was legal

44. It is submitted that the restriction was illegal and null and void for the reasons that the 1st Defendant never produced any document declaring his interest over the property. Further that the 2nd Defendant contravened the provisions of sections 14, 77 and 79 of the [Land Registration Act](#). That the same should be lifted.

Whether the 1st Plaintiff is entitled to be issued with the title deed of Kwale/Mafisini/1267

45. Rehashing the submission on the 1st Plaintiff being a bonafide purchaser for value and having paid entire purchase price completing all the necessary steps to the point of being issued with a booking form the title was never issued due an illegal restriction. It is submitted that the 1st Plaintiff therefore acquired a clean title to the suit property. Further reference is made to the provisions of section 53(1) of the [Land Registration Act](#) to buttress this position.
46. The Plaintiff urges that to the extent that the 1st Defendant lodged an illegal restriction and the same was effected unprocedurally and unlawfully by the 2nd Defendant by dint of section 10 of the [Evidence Act](#) there is reasonable ground to impute that the two defendants colluded and conspired against the Plaintiffs to deprive them of their right to own property contrary to article 40 of [the Constitution](#). It is consequently submitted that the plaintiffs are entitled to the prayers sought in the plaint.

1st Defendants Submissions

47. The 1st Defendant through submissions filed by the firm of Mungai Kamau & Co. Advocates submitted on four issues as follows.

Who is the registered owner of parcel no. Kwale/Mafisini/1267

48. Recapping the background of the case tracing the ownership of the suit property to the father of the 1st Defendant and his brother Simon which they inherited by transmission it is submitted that while the plaintiff purports to have purchased the parcel for a consideration of 300,000/-, there was no evidence of an agreement for sale of land. That pursuant to the requirement of section 3(3) of the [law of Contract Act](#) it would be challenging to prove the existence of the sale. That failure to comply with the said provisions deprives the court of jurisdiction to entertain the suit. Reliance is also placed in Silverbird Kenya Limited Vs. Junction Ltd & 3 Others (2013) eKLR.



Whether the parcel no. Kwale/Mafisini/1267 was fraudulently and illegally transferred to the 2nd Plaintiff

49. It is submitted that the transfer of the suit property to the 2nd Plaintiff is shrouded in mystery and fraud. A history of the property as given by DW2 from the parcel confirmed that as at 27/09/2013 the land was registered in the names of the 1st Defendant and his deceased brother Simon Mugambi. That DW2 confirmed there were no supporting documents in the parcel file to show how ownership changed into the 2nd Plaintiff. Green cards produced in the 2nd Plaintiff's supplementary list dated 11/10/2023 and the entries in favor of Joseph Muthee Nyaruai was not signed by the land registrar as confirmed by DW2. This meant the documents were likely rejected. That entries not endorsed by the land registrar are invalid and cannot be considered as giving proprietary rights to the recipient. Consequently, the 1st Plaintiff's title was a nullity. Reliance is placed on the case of *Visch & Visch (suing as the legal representative of the Estate of Fernando Visch) & Another Vs. Mulewa & 6 Others (2023) KEELC 21956(KLR)* and *Japhet Nyawade Chessah Vs. Daria Nekesa (2016) eKLR*.

Whether the restriction/caution was rightfully placed by the 1st Defendant

50. Rehashing the provisions of section 76 of the *Land Registration Act* donating power to the registrar to register a restriction and the purpose thereof, it is submitted that the 1st Defendant had all the right to register a restriction against his property since some unknown dealings were going on. He followed due process for registering a restriction as evidenced by Application for restriction dated 14/2/23 duly witnessed. That the restriction can only be removed after the dispute that led to its filing is resolved since on its own it does not the solution. The court is referred to the case of *David Macharia Kinyur Vs District Land Registrar, Naivasha & Another Nakuru ELC Misc. Appl No. 331 of 2016*.
51. It is further contended that the Plaintiffs cannot pray for damages on a properly placed restriction as confirmed by the Land Registrar.

Whether the entries should be cancelled.

52. The court is urged to invoke section 80 of the *Land Registration Act* and restore the 1st defendants right to property under article 40 of *the Constitution* by ordering a cancellation of the entries in the Plaintiffs names.
53. On costs it is urged the since grant of costs is discretionary, the plaintiffs having approached the court with guilty dirty hands and should not benefit from the courts discretion.

The 2nd Defendants Submissions

54. Submissions on behalf of the 2nd Defendant are dated 25/11/2024 and identified three issues for determination namely 1) Whether the Restriction was lawful. 2) Whether there was a formal application in the relevant prescribed statutory forms to lift the restriction and 3) Whether the Applicant is entitled to the orders sought.
55. It is submitted that the 2nd Defendant has been vested with discretionary powers to register restriction under Section 76 of the *Land Registration Act*. It is the 1st Defendant's evidence that upon conducting a search on the suit property, he discovered that the same might have fraudulently been registered in the names of the 2nd Plaintiff, allegations which he presented to the 2nd Defendant in order to register a restriction and protect their interests. That this warrants the 2nd Defendant to register a restriction against the suit property and which was within their legal mandate to place a restriction upon the suit properties.



56. It is urged that Section 78(1) of the [Land Registration Act](#), contemplates remedial measures where any party aggrieved by action of the registrar to make an application to remove the restriction. That it is not in dispute that the Plaintiffs have not made any formal application in the prescribed statutory forms under Section 81 (4) of The Land Registration (General) Regulations, 2017 to the 2nd Defendant to remove the restriction. Reliance is placed on the holding in Republic v Land Registrar, Nakuru Land Registry; Kimari & 2 others (Environment and Land Judicial Review Case E3 of 2021) [2023] KEELC 17298 (KLR) where the court stated an Applicant is not only duty bound to establish that they indeed applied to the Land Registrar.
57. Consequential it is submitted that the Plaintiffs cannot use this Honourable Court to remove a lawful restriction where there is a statutory procedure which they have failed to adhere to in addressing their concerns. The court is referred to Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling)
58. It is urged that the Applicant was not denied a right to be heard where they have not made any formal application and duly submitted themselves to the statutory process as required. Further that having failed to exhaust available statutory procedure the Plaintiff is not entitled to the orders sought.
59. The Plaintiff filed submissions 9/12/2024 on points of law. These latter was to be on new issues of law raised by the Respondents. I have considered the various points of law in rejoinder.

Issues for Determination

60. Upon considering the pleadings, the evidence led, the rival submissions of the parties and the law and authorities cited the issues that arise for consideration are; -
 1. Who is the rightful owner of the suit property Kwale/Mafisini/1267.
 2. Whether the 1st Plaintiff is a bonafide purchaser for value without notice.
 3. Whether the restriction lodged by the 1st Defendant was legal.
 4. Whether the reliefs sought should issue.
 5. What reliefs should issue in the circumstances.

Analysis and Determination

61. Briefly my understanding of the Plaintiffs claim is that the 1st Plaintiff should be recognized as the owner of the suit property Kwale/Mafisini/1267 having after conducting due diligence and obtaining green card and search confirmation from the 2nd Defendant that it belonged to the 2nd Plaintiff purchased it thereof for a consideration of Kshs. 300,000/=. The first Plaintiff then followed up due process, obtained LCB consent, presented the relevant documents including a transfer but the same was not registered by the 2nd Defendant on the basis of an illegal restriction registered against the title through the collusion of the 1st and 2nd Defendant.
62. On the other hand the 1st Defendant claims he is the rightful owner of the suit property which he jointly acquired with the late Simon Muchiri Mugambi through succession from their deceased father. That they were to be joint owners and upon Simons demise the remaining shares would vest to him automatically. The 1st Defendant terms the root history of the title in the names of the Plaintiffs as tainted with illegalities, misrepresentation and fraud. The 1st Defendant denies ever signing transfer in favor of the 2nd Plaintiff. It is upon this alleged fraud that he proceeded to lodge a restriction to protect his property.



Who is the rightful owner of the suit property Kwale/Mafisini/1267

63. Arising from the foregoing the Plaintiffs had to demonstrate that their title was legal to be able to defeat the alleged 1st Defendant's title and or claim. The court must also interrogate whether the suit property was fraudulently and illegally transferred to the 2nd Plaintiff.
64. Section 107 of the Evidence Act Cap 80 of the laws of Kenya requires that
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.”
65. The root of the 1st Plaintiff's claim to the suit property 1267 arises from the 2nd Plaintiff's title, which according to her evidence was purchased from the 2nd Plaintiff. This is where the interrogation must begin. The 2nd Plaintiff testified as PW2 and in support of the 1st Plaintiff's claim. But of utmost importance is the documents he produced to prove his title as vendor. PW2 adopted the documents produced by PW1 in addition to annexures in his Further Affidavit sworn on 19/4/23.
66. JMN6 was a green card opened on 27/9/2013 for parcel 1267 revealing it was a subdivision of plot 369. The green card was first opened in favor of Simon Muchiri Mugambi and Lawrence Maina Mugambi. Entries No. 3 and 4 dated 2/10/2013 is registered to Joseph Muthee Nyaruai the 2nd Plaintiff through a sale of Kshs. 300,000/= and title was issued on the same day. The title was produced as JMN5 for Kwale/Mafisini/1267 in the name of Joseph Muthee Nyaruai dated 2/10/2013. A copy of this Certificate of title was also availed by DW2 (DW2 Ex 1).
67. DW2 who gave evidence on behalf of the 2nd Defendant testified in cross examination that there were no documents in the parcel file that support the transfer to the 2nd Plaintiff. The documents produced by the DW2 are as listed in the 2nd Defendant's list of documents dated 27/06/2023. These documents comprised of Copy of Certificate of title dated 2/10/2013, Copy of transfer dated 9/2/2023, LCB consent dated 8/2/2023, Copy of receipt of LCB consent payment dated 6/2/2023, Copy of application for LCB consent, Copy of Certificate of title dated 2/10/2013, Copy of Bank deposit slip dated 13/2/2023 and KRA stamp Duty Declaration and pay in slip dated 10/2/2023.
68. All the above documents support the transaction between the 1st Plaintiff and 2nd Plaintiff. But as stated hereinbefore it is the 2nd Plaintiff's title we must first interrogate. It was therefore expected a set of such documents would be in the parcel file in respect of the transfer to the 2nd Plaintiff. On cross examination by Mr. Mungai for the 1st Defendant DW2 confirmed that he had brought along the parcel file and affirmed the registrar is the custodian of all title documents. His testimony was that the parcel file held no documents to support the transfer and or registration of the 2nd Plaintiff as proprietor. I have noted the Plaintiffs submissions that DW2 admitted that the 2nd Plaintiff was the beneficial and legal owner but is important to note that the court is interrogating this title for any irregularities as pleaded by the 1st Defendant.
69. The court then went back to the documents produced by the 2nd Plaintiff which as noted PW2 adopted from PW1 list and annexures in his Further Affidavit sworn on 19/4/23. PW1 supplementary list comprised PW1 Exh 24-41 and PW1 Exh 1-23. From the lists the court identified documents that would support the history of the 2nd Plaintiff's registration as proprietor.
70. From the Plaintiffs Supplementary list dated 11/10/23 the court has identified copies of title deed in the name of the 2nd Plaintiff, letter of consent dated 18/9/2013, approved LCB application executed by 1st Defendant and Simon Muchiri Mugambi in favor of 2nd Plaintiff dated 2/10/2013 and approved



by the 2nd Defendant, Valuation of stamp duty form dated 30/9/2013, KRA stamp duty declaration assessment and pay in slip dated 30/9/2013, Bank slip in relation to stamp duty by 2nd Plaintiff dated 1/10/2013, Comissional sale contract by Simon Muchiri in favor of the 2nd plaintiff terming him as coordinator and his son, A copy of joint written letter to District Officer by some family members of the 2nd Defendant's brother which include the 2nd Plaintiff as part of the family dated 19/5/2011.

71. The court has noted that during cross examination a number of issues arose with some of the above documents and which I will consider vis vis my own independent review. I will revisit this later in this judgement.
72. I think it is not in dispute that Simon and Lawrence were siblings and inherited the suit property from their father previously parcel 369 the mother title which thereafter was subdivided into 2 parcels one being the suit property 1267. A confirmation of grant was also adduced in this regard. However, I must address the issue of joint ownership which is pleaded but none of the counsels found it necessary to address. For me this has a bearing to the root of the 2nd Plaintiff's title since Simons clearly states his brother share devolved to him automatically upon his death.
73. What is joint ownership and the legal implications thereof. The Registered Land Act (now repealed) under which the mother title was registered has the following relevant provisions; -

Section 101) (1) An instrument made in favor of two or more persons, and the registration giving effect to it, shall show

- a. Whether those persons are joint proprietors or proprietors in common and
- b. Where they are proprietors in common, the share of each proprietor.

Section 103 (1) Where any land, lease or charge is owned in common each proprietor shall be entitled to an undivided share in the whole, and on death of a proprietor his share shall be administered as part of his estate. (2) No proprietor in common shall deal with his undivided share in favor of any person other than another proprietor in common of the same land except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

74. Was the proprietorship joint in respect of the suit property? Arising from the above legal provisions the answer can only lie in the instruments of registration. The green card opened on 27/9/2013 for parcel 1267 shows Simon and Lawrence registered as proprietors. The register is silent whether they are joint or not. I then looked for the title that was issued on the same date which was produced by the 1st Defendant I noted that it was silent.
75. In view of the silence above then the proprietorship becomes in law a tenancy in common and not joint ownership. It is trite that in tenancy in common there is no right to survivorship. This means that upon the death of a tenant in common, their share of the property does not transfer to the surviving owners. Instead, it becomes part of the deceased's estate and is distributed according to their will or the laws of intestate succession – see NNK Vs JNK: ELC 781 of 2017 (2020) eKLR
76. The import of the above analysis is to displace the 1st Defendant's claim that his deceased brother share in the suit property devolved to him. No it did not but rather it devolved to his brother's estate. Moreover, I also note that the confirmation of grant in succession cause 484 of 2004 gives the mother title 369 in equal shares to the two brothers 1st Defendant and Simon.
77. The foregoing notwithstanding I will now revisit the documents adopted and produced by PW2. So how was the transfer effected to the 2nd Plaintiff? PW2 reiterated throughout his evidence that he got



the suit property from his father (Simon) but there seems to be doubts about his being Simons sons. The 1st Defendant in cross examination does not seem to affirm them when he stated he came as an adult. I will not be drawn into this discourse it is not within my jurisdiction. PW2 insisted in his examination in chief and in cross examination that the 1st Defendant and PW2 father both transferred the property to him at a consideration of Kshs. 300,000/=. He asserted in cross examination by Mr. Mungai that he had a consent agreement that authorized all transactions.

78. A copy of Transfer of Land dated 2/10/2013 was produced by the plaintiffs (see item 6 of Plaintiffs supplementary list). The transfer is by Simon and Lawrence as transferees to 2nd Plaintiff for a consideration of Kshs. 300,000/=. It appears as executed by the transferees who appeared in person before Andrew J.C Mandi Advocate. DW1 admitted in evidence that the photo affixed thereto, the PIN and ID numbers were his. But denies the signature as his. Infact he states he came to Mombasa or Kwale for that matter for the first time in 2018 meaning he cannot have appeared before Mandi Advocate in September 2013. It is also noteworthy that the dates when the two appeared before Mandi Advocate are not inserted/completed in the transfer document. The Plaintiffs never called Advocate Mandi as a witness to corroborate that the said 1st Defendant appeared before him in person and executed the transfer.
79. The court further noted that PW2 contended during cross examination that the 1st Defendant had confessed before the DCI that the signatures featuring in the documents were his signatures. The court was never led to any evidence from the DCI to confirm this fact.
80. But a pertinent observation has emerged that the green card in favor of the 2nd Plaintiff has not been signed by the Land Registrar. This was confirmed by DW2 in cross examination. My review of this green card opened on 27/9/2013 shows that entries 3 and 4 thereof are not signed but only bear 'sgd J.K.Koskei' without his signature. According to DW2 this means the documents were likely rejected.
81. But assuming the green card was signed would the Commisinal Contract by Simon Muchiri in favor of the 2nd Plaintiff terming him as coordinator and his son suffice for proof that Simon gave the suit property to the 2nd Plaintiff? I looked at the agreement it refers to land known as 204(old 305) Pumwani and not Kwale Mafisini 1267. Indeed, PW2 conceded in cross examination by Mr. Mungai that this document did not refer directly to the suit property. The witness agreed there was no evidence of an agreement for sale of land as the same was oral.
82. For me the absence of sale agreement was of little assistance to the 2nd Plaintiff in view of the provisions of section 3(3) of the *Law of Contract Act*. These provisions makes it mandatory for an agreement for the disposition of land to be in writing. This court agrees with the finding in *Silverbird Kenya Limited Vs. Junction Ltd & 3 Others* (supra). Even assuming there was an oral agreement no witness was called by the Plaintiffs to corroborate this fact.
83. What about exceptions to the above. The Court of Appeal in *Anne Jepkemboi Ngeny v Joseph Tireito & another* [2021] eKLR had this to say:-

27. In Civil Appeal Number 22 of 2013, *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR, this Court held;

Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came



into effect on 1st June, 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” (Emphasis added)

84. In the present case there was no evidence of possession by the 2nd Plaintiff nor the 1st Plaintiff and therefore the Plaintiffs cannot be assisted in this regard.

85. I have also reviewed the Power of Attorney dated 30/11/2012 donated to the 2nd Plaintiff by Simon Muchiri Mugambi and noted it did not refer directly to the suit property as conceded by the witness in cross examination. I noted it was specific to plot 204 Pumwani Estate Nairobi. It also trite a power of attorney must be specific. While at the bottom the form appears to have been approved by the land registrar this is not registration and it can only have any binding effect to the specific title. DW2 confirmed there was no power of attorney registered against the suit property 1267. DW1 categorically stated in cross examination by Mr. Kemei that he did not sign a power of attorney for the brother to transfer the land into their two names but the consent. No power of attorney was registered.

86. The Plaintiffs also adduced in evidence LCB letter of consent dated 18/9/2013 issued to Lawrence and Simon to transfer to Joseph. I agree as at that date the subdivision of the mother title into 1267 and 1268 had not occurred and therefore the two didn't have title the subject of the said consent. This is indeed irregular.

87. The 1st Defendant has pleaded particulars of fraud, forgery and misrepresentation of the 2nd Plaintiff at paragraph 7 of the statement of defence dated 11th May 2023. I think my foregoing discussion above largely speaks to the misrepresentations made by the plaintiff in obtaining the title to the suit property.

88. Black's Law Dictionary 9th Edition also defines 'fraud' as: -

A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

89. While the 2nd Plaintiff states in his witness statement that he followed the legal laid down procedure for sale and purchase of land in Kenya the gaps identified in the foregoing analysis shows otherwise.

90. In view of the foregoing I must make a finding that the 2nd Plaintiff fell short of proving that he acquired the title to the suit property 1267 procedurally as the basics to prove the root of the title were missing including the irregularities noted in the analysis. The 2nd Plaintiff can therefore not be the owner of the suit property and cannot have passed good title to the 1st Plaintiff.



91. But would the defence of bonafide purchaser for value without notice of defect or claim against the title be available for the 1st plaintiff?

Whether the 1st Plaintiff is a bonafide purchaser for value without notice

92. The 1st Plaintiff's case is that she is a bonafide purchaser. PW1 evidence was that before purchase she did due diligence by obtaining green card, official search and attended the Land Control Board at Msambweni together with the 2nd Plaintiff who was the owner of the land.
93. What does the plea of innocent purchaser entail? The Court of Appeal in the case of Samuel Kamere Vs Land Registrar (Kajiado Civil Appeal No. 28 of 2005 (2015) eKLR held that in order to be considered a bonafide purchaser for value, one must prove they acquired a valid legal title and carried out the necessary due diligence.
94. In SC Petition 8 (E010) of 2021 Dina Management Limited Vs County Government of Mombasa & 5 Others ___ the Supreme Court of Kenya pronounced thus; -
- (111) Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.
95. In Suleiman Rahemtulla Omar & another v Musa Hersi Fahiyeh & 5 others (2014) eKLR the Court of Appeal defined the duties bestowed upon a person claiming bona fide purchaser's interest. It held that:
- It is our view that counsel for both parties failed to carry out sufficient due diligence before committing their clients to the transaction. It is true that practically speaking counsel for the purchaser carries the heavier burden when it comes to carrying out due diligence. This is so because it is his client who stands to lose if he commits his funds to purchase a property that later turns out to be problematic. This does not however, absolve the vendor's counsel from the responsibility of confirming that his client has a good title to the property he seeks to dispose of and also that the property has a clear Title.”
96. The documents produced by the 1st Plaintiff in respect to the sale between her and the 2nd Plaintiff have already been enumerated elsewhere in this judgement. Prima facie they seemed to have met all the legal requirements for a valid conveyancing of land. But she was never issued with a title as indicated by DW2 because of the restriction.
97. Nevertheless, I must interrogate whether she meets the attributes of an innocent purchaser for value. Starting with the Supreme Court dictum above my hands would be tied in view of the finding foregoing that the 2nd Plaintiff failed to prove he obtained a lawful title. It therefore follows that the 2nd plaintiff never passed good title or interest in the title. Consequently, the defence of bonafide purchaser would not be available to protect her title.
98. Further a bonafide purchase is one who conducted thorough due diligence going beyond the root of title. PW1 evidence in cross examination clearly indicated though she obtained a green card to know the history of the property she was only interested in the current owner and not previous ownership. PW1 also confirmed on cross examination by Mr Kemei for the 2nd Defendant she did not conduct due diligence on the previous owner before Joseph Muthee. She seemed to have been satisfied with



the chief's confirmation that the 2nd Plaintiff was the owner. That she could not remember the chief's name. She did not make inquiries with the neighbors. She even conceded she had information that the 1st defendant was a neighbor and that had she taken possession or inquired with this specific neighbor she would have known about the ownership of the suit property. Therefore, on the criteria for due diligence PW1 fails as a bonafide purchaser.

99. It is therefore the finding of this court the 1st plaintiff is not an innocent purchaser for value.
100. The Plaintiff blames her woes for the non-registration of her transfer on the restriction lodged by the 1st Defendant. But having made the foregoing observations my view is that this has been rendered otiose. I must however deal with this issue as it is the Plaintiffs basis for the entire suit.

Whether the restriction lodged by the 1st Defendant was legal

101. It is important to understand the legal basis and rationale for a restriction. Section 76 is instructive I will not reinvent the wheel as all the parties submitted on the legality or otherwise of the restriction dated 14/02/2023 registered at the instance of the 1st Defendant.

PARA 102.

Section 76 of the [Land Registration Act](#), Act No. 3 of 2012, does give power to Land Registrars to place restrictions. The said section is drawn as follows :-

Restrictions.

76. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
- (a) for a particular period;
 - (b) until the occurrence of a particular event; or
 - (c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

103. In the case of *David Macharia Kinyuru v District Land Registrar, Naivasha & another* [2017] eKLR Justice Sila Munyao had this to say on the purpose of a restriction

4. It will be noted from the above, that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute.



104. The 1st Defendant's case is that upon discovering that the suit property was registered in the name of the 2nd Plaintiff to whom he never participated in the same, he placed the said restriction. Arising from the legal provision all that a person desiring to lodge a restriction is required, is to demonstrate an interest in the land and to make an application. The power to register a restriction is also discretionary.
105. The 1st Defendant adduced in evidence vide the list of documents dated 26/06/2023 Application for restriction for title No. Kwale/Mafisini/1267. The same shows it was received at the registry on 14/2/2023. The grounds for the same are given as 'Suspected Fraud, ill dealing' on the said parcel. The applicant claims owners Interest. The application was duly executed before Rashid Mbwiza Advocate. I note there was an attempt to impugn the signing of this document by Mr. Mbwiza who is the lawyer who acted in the conveyancing transaction between the 1st and the 2nd Plaintiff. But I think to me this is neither here nor there and I agree with DW2 testimony that he could not prevent an advocate from representing a client. Based on the parcel history the register still bore entries showing the 1st Defendant applicant was owner of the property together with Simon which demonstrates an interest in the land on the part of the 1st Defendant.
106. Having met the two requirements above I would not fault the land registrar for making the restriction and which was within his power. The 1st Defendant equally had a right to defend his alleged interest in the property. In view of this finding I do not see the need to delve into the issue of damages payable and the right to indemnity as raised by Counsel for the Plaintiffs.
107. The upshot of the foregoing is that the plaintiffs have failed to prove their case against the defendants to the required standard. It therefore follows they are not entitled to the prayers sought in the plaint dated 21/02/2023.
108. The 1st Defendant has moved the court for a declaration that the purported title for Kwale/Mafisini/1267 dated 2/10/2013 in the of the 1st Plaintiff (sic this title is in the name of the 2nd Plaintiff) is illegal, null and void ab initio and orders cancelling all entries in the land register relating to the same.
109. In view of the finding that the plaintiffs and specifically the 2nd Plaintiff title has been obtained irregularly through misrepresentations it follows without say it must be cancelled. This is in tandem with the provisions of section 26 of the *Land Registration Act* which provides a title may be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
110. Additionally this court is bolstered by the provisions of Article 40 of *the Constitution* whose import on illegally acquired titles has already been pronounced by the Supreme Court in *Dina Management Limited Vs County Government of Mombasa & 5 Others*.

What orders should issue in the circumstances?

111. Clearly the 2nd Plaintiff's title cannot be sustained and remain in the parcel register and all entries attendant to it must be rectified by cancellation. Indeed, section 80 of the *Land Registration Act* has clothed the court with power to cancel any titles acquired through fraud.

Section 80 of the Act provides that: -

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”



112. Moreover, the Section 13 (5) of the *Environment and Land Court Act* empowers me to make any order and grant any relief as the court deems fit and just. The title to the suit property will revert to the position upon subdivision of the mother title 369 in two plots and specifically plot 1267 herein in favor of the 1st Defendant and Simon Muchiri Mugambi as entered in the parcel register as at 27th September 2013. I have already discussed the import of a title document being silent on the ownership of the two registered proprietors elsewhere in this judgement (see paragraphs 72- 76.)
113. The upshot of the foregoing is that this court finds that the Plaintiffs have failed to prove their claim against the Defendants to the required standard. The suit is hereby dismissed with costs to the 1st and 2nd Defendant.
114. An order be and hereby issues for the Land Registrar Kwale to rectify the register for parcel No. Kwale Mafisini/ 1267 by cancelling the entries dated 2nd October 2013 in the name of Joseph Muthee Nyaruai within 45 days of the date of this judgement.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 25TH OF JULY 2025.

HON. LADY JUSTICE A.E DENA

JUDGE

25.7.2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Mulandi for the Plaintiffs

Mr. Mungai for the 1st Defendant

No appearance for the 2nd Defendant

Asmaa Muftah Court Assistant

HON. LADY JUSTICE A.E. DENA

