

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 292 OF 2013

NAWAZ MOHAMED MIRDOR.....
PLAINTIFF

- VERSUS -

HANIF IQBAS KHAN SHARBAZ
LANDS REGISTRAR - KILIFI
THE HON. ATTORNEY GENERAL
NICHOLUS KOPO KATANA..

.....DEFENDANTS

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the Civil Suit instituted by way of a Plaint dated 2013 and subsequently amended on 9th November 2018. It was by the *Nawaz Mohamed Mirdor*, the Plaintiff herein, who instituted this suit against *Hanif Iqbas Khan Sharbaz*, the Lands Registrar - Kilifi, the Honourable Attorney General, and Nicholus Kopo Katana, the Defendants herein. The suit was premised under the provisions of Sections 24, 25, 26 and 80 of the Land Registration Act, No. 3 of 2012, Sections 13 and 150 of the Land Act, No. 6 of 2012, Section 173 (1) of the

Evidence Act, Cap 80 Laws of Kenya, and all other enabling provisions of the law.

2. Upon service, the Defendants opposed the claim. The 1st Defendant filed a Statement of Defence dated October 2017 and a Reply to the Amended Plaintiff dated October 2019, contending that he was an innocent purchaser for value without notice, having lawfully purchased the property from the 4th Defendant, who was reflected as the registered owner in the Lands Registry. The 2nd and 3rd Defendants filed their Statement of Defence on 3rd November, 2017 denying allegations of fraud against them and asserting that the 1st Defendant was legally and lawfully registered as the owner of the suit property. The 2nd and 3rd Defendants, through the Attorney General, maintained that the Land Registrar acted within his statutory mandate and denied any fraudulent collusion.

II. The Description of the Parties

3. The Plaintiff was described as an adult male of sound mind working and residing and working for gain in Toronto, Canada, the 1st Defendant was described as an adult male of sound mind working for gain in the Republic of Kenya. The 2nd Defendant is a government employee working as the Registrar of Titles Kilifi and responsible for registration of all dealings to do with land including this suit property. The 3rd Defendant is the Honourable Attorney General being sued as the appointed legal representative of Government pursuant to the Government proceeding Act.

III. Court Directions before Hearing

4. Upon perusal of the pleadings, interlocutory applications, and the amended Plaint dated 9th November 2018, this Honourable Court directed that the Plaintiff be granted leave of fourteen (14) days to file and serve a supplementary list of documents together with certified copies of the original title deed, receipts from the Settlement Fund Trustee, and any additional witness statements in support of his claim.
5. The Defendants were correspondingly granted fourteen (14) days to file and serve any further documents, witness statements, or supplementary affidavits arising from the Plaintiff's amended pleadings and lists of documents.
6. The Court further ordered that the matter be mentioned on 26th November 2019 for purposes of confirming compliance with the filing directions, and thereafter fixed for full hearing on 15th February 2022. The Plaintiff was directed to pay Court adjournment fees of Kenya Shillings Three Thousand (Kshs. 3,000/-) before the next mention date.
7. Upon compliance with pre-trial directions under Order 11 of the Civil Procedure Rules, 2010, the matter proceeded to hearing on 15th February 2022. The Plaintiff testified and produced documents in support of his claim, while the Defendants similarly testified and produced documents in opposition on 30th July 2024 and 2nd December 2024 respectively.
8. The 4th Defendant was described as an adult male sound of mind residing and working for gain in Mombasa.

IV. The Plaintiff's Case

9. From the pleadings before Court, at all material times prior to the institution of this suit, the Plaintiff was the registered owner of the property known as Plot No. LR No. Kilifi/Mtwapa/206 (Hereinafter referred to as “The Suit Property”), pursuant to having purchased the same and having it transferred to him on the 24th April, 1997. The Plaintiff had been in possession and custody of the original title in respect of the said property. The Plaintiff made many attempts to have an official search conducted for the property but on all occasions the file for the suit property could not be traced at the Lands Office. The file was only located at the Lands Office after many demands and trips to the Lands Office by the Plaintiff.
10. Upon exercising further due diligence and subsequently managing to peruse the file, the Plaintiff discovered that the suit property had been subdivided into four (4) sub-plots, namely Plot No. 3197, Plot No. 3198, Plot No. 3199 and Plot No. 3200 on 5th August 2011, much to the Plaintiff’s shock, as he had not been aware of the same. It also came to the knowledge of the Plaintiff that the 4th Defendant, in concert with the 2nd Defendant, albeit without any legal basis whatsoever and without the Plaintiff’s knowledge and/or authority, caused the 4th Defendant to be regarded as the proprietor of the suit property in place of the Plaintiff, whose documentation, records, entries and all proof of ownership had been illegally expunged from the Lands Registry.
11. The 4th Defendant therefore illegally and fraudulently and without the Plaintiff’s knowledge, authority and or consent

caused himself to be registered as a proprietor of the suit property. The 4th Defendant thereon having himself registered as the owner of the suit property, they worked together with had the same transferred to the 1st Defendant. The Plaintiff was therefore no longer registered as the owner of the suit property but instead, the 1st Defendant was now illegally indicated at the land registry as the registered owner of the suit property.

12. The Plaintiff averred that in totality of circumstances and to reasons of acts of fraud, perpetrated by the Defendants jointly and/or severally, the transfer acts of change of proprietorship from the Plaintiff to the 4th and 1st Defendant and transfer to the 1st Defendant were illegalities and therefore null and void *ab initio*. In furtherance of the fraudulent and illegal registrations the 1st Defendant subdivided the property into four [4] sub-divisions upon its purchase so as to have the file for the suit property closed in place of which new files for the subdivisions will be opened with new title numbers.
13. All the Defendants therefore acted with mala fide, lack of colour and in full knowledge that the representation made by the 1st defendant to the 2nd defendant was not true in manipulating the records to the prejudice of the Plaintiff and in favour of the fraudulent acts afore-highlighted. By reasons of matters aforesaid the Plaintiff has suffered loss and damage, the 1st defendant conspired and colluded with the 2nd defendant to defraud the Plaintiff and in particular the 2nd defendant issued a provisional title certificate.

14. The Plaintiff relied on the following particulars of fraud and illegality of the 1st and 4th Defendants:-

- a. Working behind scenes and surreptitiously to procure an illegal transfer change of Title of the suit property.
- b. Deliberately, maliciously and fraudulently ignoring the plaintiff's proprietary rights vide the existing title.
- c. Obtaining a provisional certificate of title for the suit property whilst the plaintiff has the original resulting to double ownership.
- d. Illegally and unlawfully Sub - diving the suit property without the knowledge or consent of the plaintiff and purporting to be the owner of the property.
- e. Having the property transferred to the 1st Defendant while the same belongs to the Plaintiff

15. The Plaintiff relied on the following particulars of fraud by the 2nd Defendant: -

- i) Deliberately, maliciously and fraudulently ignoring the plaintiffs proprietary rights.
- ii) Removing the Plaintiff as the registered proprietor to the suit property and the pertinent records thereto and installing illegally registering the 2nd Defendant and subsequently the 4th Defendant as the owner proprietors thereto unlawfully and illegally without following the right procedure.
- iii) Issuing a provisional title certificate whilst knowing that the original title was in place in custody of the Plaintiff and not lost.

- iv) Unlawfully and illegally caused the suit property to be registered in the 1st Defendant's name.
 - v) Fraudulently with impunity and abuse of office omitted herein, commissioned and cancelled entries in respect to the transactions and deleted the Plaintiff's name from the entries in the register with a clear intent to defraud.
 - vi) Deliberately altering entries and the register of the suit property by removing all entries pertaining to the Plaintiff's ownership of the suit property
16. The Plaintiff stated that he was therefore entitled to rectification of the register in order to restore the property back to him as the rightful owner of the property. By reason of the foregoing threats and intent, unless restrained by this Honourable Court, the 1st Defendant would have continued or remained in wrongful occupation of the suit property and even evicted the Plaintiff from it, the property having been fraudulently subdivided. The Plaintiff averred that the Defendants jointly and severally ought to have been restrained from in any way interfering with the suit property further.
17. The Plaintiff averred that there was no other suit pending between the Plaintiff and the Defendants in the same Court. The Plaintiff averred that this Honourable Court had jurisdiction to determine the matter.
18. The Plaintiff prayed for Judgment to be entered against the Defendants jointly and severally for:-

- a. A Declaration that the Plaintiff is the lawful proprietor of the suit property originally known as Plot No. LR No. Kilifi/Mtwapa 206.**
- b. A Declaration that the alterations and, cancellations of the land register and all other actions on the Land Register the plaintiff as the proprietor of the property known as Plot No. LR No. Kilifi/Mtwapa/206; and the provisional certificate issued, and the subdivisions made on the suit property originally known as Plot No. LR No. Kilifi/Mtwapa/206 are all null and void and has have no legal effect.**
- c. An Order directing the District Land Registrar Mombasa to rectify the Land Register by deleting and cancelling the Registration of the 4th Defendant and 1st Defendant as the proprietor of Plot No. LR No. Kilifi/Mtwapa/206 and restoring the plaintiff's title as the Registered proprietor thereof.**
- d. A permanent Prohibitory injunction restraining the 1st and 2nd and 4th Defendants whether by themselves, agents or servants from selling, leasing or otherwise disposing any interest in the suit property entering, remaining, demolishing, harassing and/or interfering with the suit property and the plaintiff quiet possession thereof.**
- e. General damages**
- f. Any other relief deemed just and expedient.**
- g. Costs of this suit.**

19. The Plaintiff called his first witness on 15th February, 2022 who testified as follows:-

A. Examination in Chief of PW -1 by Hassan H/b for Mr. Ali Advocate.

20. PW - 1 testified and sworn in English language. He identified himself as being NAWAZ MOHAMED HAJI MIRDOR. He was the Plaintiff in this matter. He stated that he was the owner of the suit property known as LR No. Kilifi/Mtwapa/206. PW - 1 averred that he held the original title deed, produced in Court as Plaintiff's Exhibit 2, measuring 14.97 hectares and issued on 24th April 1997.
21. PW - 1 further testified that he had always been in possession of the suit property, having acquired it from his uncle, Ismail Adam, through a sale transaction. He stated that he had conducted an official search and reviewed the relevant documents pertaining to the property. PW - 1 referred the Court to the Plaintiff's list of documents dated 6th November 2017 in support of his claim.
22. PW - 1 testified that the documents relating to the suit property had been presented to him by his uncle, from whom he purchased the land in the year 1997. He stated that initially there had been two plots, namely Plot Nos. 205 and 206, which were later amalgamated into one parcel, Plot No. 206. PW - 1 further averred that apart from the title deed, he had conducted an official search, being Document No. 2 in his bundle, and referred to his initial list of documents dated 4th December 2013. He produced for identification a certificate of official search dated 9th June 2014, marked as "MFI - 19".
23. PW - 1 testified that he was the registered proprietor of the suit property. Under the encumbrance section of the search, it showed that on 10th September 2001, Nicholas Kopo

Katana had been registered, claiming an interest described as occupation interest. He referred the Court to the Defendants' list of documents at page 28, dated 9th June 2011, which indicated that Nicholas Kopo Katana had been registered as owner from 10th September 2001.

24. PW - 1 stated that he came to know of Mr. Katana when the latter took him to Court. He referred to the Plaintiff's further list of documents dated 19th September 2019, which included a ruling in ***the High Court Civil Case No. 851 of 2006*** delivered on 30th November 2006 at Nairobi, where Mr. Katana had claimed the land by way of land adverse possession. PW - 1 testified that the matter was dismissed by the Court and later transferred to the Malindi High Court on grounds of jurisdiction, but he did not get to know what transpired thereafter. He emphasized that he had not been served in that matter.
25. PW - 1 further stated that the property was currently registered in the name of Hanif Idras Khan Sharrar, the 1st Defendant. He came to know of this from an official search and was informed that the land had been sub - divided. He produced receipts and a certificate of official search dated 19th December 2012, marked as Plaintiff's Exhibit numbers 3 and 4, noting that nothing was shown from that search.
26. PW - 1 testified that from the documents in Court, it was evident that Mr. Katana had sold the property to Hanif Ibras Khan Sharrar, as shown at page 4 of the Defendants' list of documents dated 20th June 2011. The green card indicated that the sub - division had been effected in the year 2011.

PW - 1 averred that he had never transferred the title to anyone and had never authorized any sub - division. He testified that he had suffered prejudice as a result, since he could not use the property. He concluded by stating that he prayed for the reliefs sought in the Plaint.

27. PW - 1 testified that Mr. Katana had acquired the suit property from the Settlement Fund Trustees (SFT) on 10th September 2001. PW - 1 further stated that he himself had acquired the property much earlier, in the year 1997, from his uncle. He averred that the land had been in his family even before that acquisition.

B. Cross Examination of PW - 1 Mr. Mwakireti Advocate.

28. PW - 1 testified that Document No. 3 had not been signed, and that the certificate therein lacked a signature. He further stated that Document No. 4 was not dated, being the application for consent to the Bahari Land Control Board. PW - 1 averred that according to the application, the acreage for Plot Nos. 205 and 206 was indicated as being 12 acres each, whereas Plot No. 206 measured 14.7 hectares (approximately 37 acres), creating a discrepancy since the application reflected only 24 acres.

29. PW - 1 testified that he had never resided on the suit property. Referring to Document No. 9, a Settlement Scheme dated 17th December 1996, he stated that the conditions required construction of a dwelling house and erection of a fence, but he had never undertaken such developments.

Similarly, with respect to Document No. 10, a Charge dated 17th December 1996, paragraph 3(g) required residence on the land, but PW - 1 confirmed that he had never resided there.

30. PW - 1 testified that according to the 2nd and 3rd Defendants' documents, Mr. Katana was reflected as the registered owner from 10th September 2001. He stated that the rates for the property had been paid by Mr. Katana on 21st June 2011, and from the green card, Katana was shown as owner from 10th September 2001. He referred to Document No. 12, being a transfer from the Settlement Fund Trustees to Mr. Katana. PW - 1 averred that anyone seeking to know the status of the land would have had to conduct an official search.
31. PW - 1 stated that an official search dated 9th June 2011 showed the land registered in the name of Mr. Katana. He stated that the 1st Defendant had conducted due diligence and entered into a sale agreement dated 14th June 2011 prepared by Anyanzwa Advocate. He further referred to an agreement dated 17th June 2011 between Mr. Katana and squatters, whereby 19 squatters were each paid a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) to vacate the land. PW - 1 confirmed that the 1st Defendant thereafter became the registered owner.
32. PW - 1 testified that in the year 2012 the parcel was sub - divided, but he did not conduct a search at that time. He stated that he had resided in Canada for over twelve years, though he travelled back and forth and had visited the suit

land many times, the last visit being in the year 2019. He averred that there were people who had built on the land, numbering about seven, but he had not filed suit against them.

33. PW - 1 averred that he had never resided on the land at all, as most of the time he had been in Canada. He referred to a ruling in High Court Civil Case No. 851 of 2006, noting that the Plaintiff therein was Mr. Nicholas Kopo Kazungu, while the person who sold the land was Nicholas Kopo Katana, and he emphasized that these were different persons.
34. PW - 1 testified that he had purchased the suit property from his uncle, Mr. Ismail. He stated that he did not recall whether there had been a formal sale agreement or receipts documenting the transaction. PW - 1 further averred that there existed a letter addressed to his uncle concerning Plot No. 205 by the Divisional Land Adjudication and Settlement Officer (DLASO), requiring clearance of a loan. He testified that the transfer of land from Ismail had been duly signed, as shown in the appendix produced in Court.
35. PW - 1 stated that he had proof of payment in the sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=), which he paid directly to Ismail in consideration for the suit property.

C. Re - Examination of the PW - 1 by Mr. Hassan Advocate.

36. PW - 1 reiterated that in the charge document he was not a party to it. He further stated that in the Settlement Scheme, the allottee was his uncle, Ismael Adam Suleiman. PW - 1

averred that although he had been living in Canada, he had consistently kept in touch regarding the progress of the suit property from there. PW - 1 also testified that there existed a document from the Department of Lands, being an official receipt for payment made in respect of the discharge of Plot No. Mtwapa/206 by Ismael. He produced the receipt as part of the Plaintiff's exhibits.

37. The Plaintiff called PW - 2 on 30th July, 2024 who testified as follows:-

A. Examination in Chief of PW - 2 by Mr. Hassan Advocate.

38. PW - 2 was sworn and he testified in English language. He was called JOHN WACHIRA KARANJA. He worked for the Ministry of Lands under the Public Works, Housing and Urban Development Department of Physical Planning. He further stated that he was attached to the Land Adjudication Office at Kilifi as the Assistant Land Adjudication and Settlement Officer (DLASO). PW - 2 averred that he was before the Court pursuant to an order of the Court and a letter dated 25th July 2022 from N. Ali & Company Advocates addressed to the DLASO, requesting the office to supply certified documents relating to the suit property.

39. PW - 2 testified that thereafter, efforts were made to trace the documents, but only a few were located. These were provided through the office of the Attorney General, amounting to six documents in total. He stated that he filed the documents through a letter dated 26th July 2024 addressed to N. Ali Advocates, in which he listed the

documents that had been traced. PW - 2 further averred that the letter also indicated the list of documents which could not be found or traced. He requested that the said letter be marked as Plaintiff's Exhibit No. 5, dated 29th July 2024. That was all.

40. PW - 2's testimony was neither subjected to any clarification nor cross - examination by Mr. Mwakirete Advocate for the 1st Defendant nor Mr. Mwandeje Advocate for the 2nd and 3rd Defendants.

41. The Counsel for the Plaintiff proceeded to produce the following documents on behalf of the Plaintiff: -

a) A copy of the letter dated 26th July, 2022 - Plaintiff's Exh - 6

b) The documents in the list of Plaintiff's documents dated 6th November 2017 (18 documents) be produced as Plaintiff 7 TO 24.

c) The documents are the further further List of Plaintiff's documents dated 19th September, 2018 - be marked as produced PLAINTIFF EXHIBIT - 25.

42. The Plaintiff marked his case closed on 30th July, 2024 by his counsel on record Mr. Hassan Advocate.

V. The case by the 1st Defendant

43. The 1st Defendant responded the Plaintiff's claim in the following terms: -

(a) Save for what was expressly admitted, the 1st Defendant denied each and every allegation contained in the Plaint as if the same had been set out verbatim and seriatim traversed.

- (b) The 1st Defendant admitted the contents of Paragraphs 1, 2, 3 and 4 of the Plaintiff, the same being merely descriptive of the parties herein.
- (c) The 1st Defendant denied the contents of Paragraphs 5, 6, 7 and 8 of the Plaintiff and put the Plaintiff to strict proof thereof.
- (d) The 1st Defendant denied the contents of Paragraph 9 of the Plaintiff and stated that the suit property, which legally belonged to the 1st Defendant, had been properly subdivided.
- (e) The 1st Defendant denied the contents of Paragraphs 11, 12, 13 and 14 of the Plaintiff and averred that they did not disclose any cause of action against him. He maintained that there had been no transfer of the suit property from the Plaintiff to the 1st Defendant and put the Plaintiff to strict proof.
- (f) The 1st Defendant denied the contents of Paragraph 15 of the Plaintiff, together with the particulars of fraud and illegality enumerated therein, and put the Plaintiff to strict proof. He asserted that he was an innocent purchaser for value without notice.
- (g) The 1st Defendant denied the contents of paragraphs 16 and 17 of the Plaintiff and averred that the Plaintiff was not entitled to the order of rectification, as the Plaintiff had not on strict proof established legal ownership of the suit property.

(h) The 1st Defendant denied the contents of Paragraph 18 of the Plaint and averred that the Plaintiff was not entitled to restraining orders, since the suit property legally belonged to the 1st Defendant.

(i) The 1st Defendant admitted Paragraphs 19 and 20 of the Plaint.

44. The 1st Defendant also responded to the Amended Plaint in the following terms:-

a) The 1st Defendant denied all allegations of conspiracy, fraud, illegality, or collusion contained in the Amended Plaint and put the Plaintiff to strict proof thereof.

b) The 1st Defendant averred that he had followed all the legal procedures based on documents presented to him by the Lands Office and had therefore lawfully acquired title to the suit property. He emphasized that he had no control over the records kept by the 2nd Defendant.

c) The 1st Defendant testified that he had acquired a title which, in the Lands Office, was registered in the name of the 4th Defendant, and that he could not inquire beyond what was presented to him by the Lands Office. He maintained that he was an innocent purchaser for value without notice.

d) The 1st Defendant averred that there had been no mala fides on his part, and if any wrongdoing were found against the 2nd Defendant, then the Plaintiff would only be entitled to damages but not rectification of the register.

e) The 1st Defendant therefore prayed that the suit against him be dismissed with costs.

45. The 1st Defendant's counsel, Mr. Mwakireti had the following opening remarks on 30th July, 2024:-

A. Opening remarks by the 1st Defendant's counsel

46. The Learned Counsel stated that the case concerned the 1st Defendant's purchase of land from Mr. Nicholas Kopo Katana, who at the time was the registered owner of the suit property. The Counsel averred that there had been no indication that the Plaintiff had any interest in the land. He further submitted that the 1st Defendant had conducted due diligence and established that the property was lawfully owned by Mr. Katana. The Counsel emphasized that the 1st Defendant would prove his case and that it was one of an innocent purchaser for value without notice.

47. The Defendant called their witness on 30th July, 2024 1st Defendant's witness DW - 1 testified as follows:-

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

48. DW - 1 testified and sworn in the Kiswahili language. He was called HANIF IKBAR KHAN SHARAZ. He lived at Mtwapa within Kilifi County and worked as a miner of minerals. He stated that he was the 1st Defendant in the matter and had recorded his witness statement, which was dated and filed on 1st November 2017. He confirmed that he wished to rely on that statement as his evidence in the case.

49. DW - 1 further testified that he had filed a list of documents dated 12th October 2017, comprising twenty-three documents, which were produced as 1st Defendant's Exhibit

numbers 1 to 23. DW - 1 stated that he had acquired the suit property, LR No. Kilifi/Mtwapa/206, through a purchase from Mr. Katana, who was then the registered owner. He reiterated that his advocate had conducted an official search on 9th June 2011 (page 28 of the bundle), which confirmed that the property was registered in the name of Mr. Katana.

50. DW - 1 stated that he instructed his lawyer to prepare a sale agreement dated 14th June 2011, produced as Defendant's Exhibit 1. The purchase price was a sum of Kenya Shillings Seven Million Four Hundred Thousand (Kshs. 7,400,000/-). He stated that there had been squatters on the land, and it was agreed that they would be removed by the purchaser. DW - 1 confirmed that the squatters were paid and vacated, as evidenced by an agreement dated 17th June 2011 executed before the Chief.
51. DW - 1 testified that thereafter the property was transferred to his name. He stated that Mr. Katana had obtained Land Control Board consent (pages 14 and 18 of the bundle), and the transfer form was at page 11. He confirmed that he paid stamp duty, as shown at pages 9 and 10. He reiterated that he had demonstrated how the land was transferred to him, as reflected in the land records at page 39.
52. DW - 1 testified that he obtained a certificate of title deed issued on 20th June 2011 (page 43). He stated that he decided to subdivide the land so that he could sell portions, as reflected in the green card at page 14. He produced the mutation forms at pages 49, 50 and 51, including the application for consent to sub - divide it.

53. DW - 1 testified that after the sub - division, he sold off portions of the land. By then, all squatters had vacated, and he gave the buyers the transfers. He stated that he had never seen or heard of Mr. Nawaz Mohammed Nurdura, the Plaintiff, and had not come across him even during the due diligence process.
54. DW - 1 refuted the allegations by the Plaintiff, stating that it was not true that the Plaintiff held the original title at the time. He reiterated that he had purchased the land from Mr. Katana, had never taken a provisional title, and had never ignored any valid title. DW 1 testified that he had not acquired the land fraudulently, as he had conducted due diligence and followed the proper legal procedures. He prayed that the Plaintiff's case be dismissed with costs.

B. Cross Examination of DW - 1 by Mr. Hassan Advocate.

55. DW - 1 confirmed that he had effected the transfer of the suit property on 20th June 2011. He further stated that he had called a surveyor in July 2011 to plant beacons on the land. He had received a letter of consent for the subdivision. At that time, there had been a few squatters on the land, who were family members of Mr. Katana, and he had allowed them to remain temporarily.
56. DW - 1 testified that apart from conducting an official search, he had also carried out personal investigations through his caretaker, who occupied land adjacent to the suit property. DW - 1 referred to page 35 of his bundle, which contained the title deed issued to Mr. Katana on 16th September 2001.

He stated that he did not know how Mr. Katana had acquired the land or the historical background of the property prior to 2001.

C. Cross examination of DW - 1 by Mr. Mwandeje Advocate.

57. DW - 1 testified that before purchasing the suit property he had conducted an official search. He stated that he had never been informed of any fault or problem concerning the land. DW - 1 further testified that when he visited the property, there had been squatters present. He confirmed that Mr. Katana had agreed to remove them from the land. DW - 1 reiterated that the Plaintiff had not been among the squatters occupying the property at the time of purchase.
58. The 1st Defendant marked their case closed on 30th July, 2024 through their client Mr. Mwakireti Advocate.

VI. The case by the 2nd and 3rd Defendant

59. The 2nd and 3rd Defendants filed their Statement of Defence on 3rd November, 2017 virtually denying the allegations of fraud against them and asserting that the 1st Defendant was legally and lawfully registered as the owner of the suit property.

VII. Submissions

60. Upon the closure of the Plaintiff's and the Defendants' cases on 2nd December 2024, the Honourable Court directed that all parties file and exchange their respective Written Submissions within the stipulated timelines.

61. Pursuant to that only the Plaintiff and the 1st Defendant obliged. Thus, the Honorable Court reserved a date to deliver its Judgment on notice accordingly.

A) The Written Submissions by the Plaintiff

62. The Plaintiff through the Law firm of Messrs. N. A. Ali & Company Advocates filed their written submissions 23rd December, 2024. Mr. Hassan Advocate commenced the submissions by stating that Vide a Plaint dated the 4th of December 2013 and amended on the 9th of November 2018, the Plaintiff filed suit against the 1st to 4th Defendants seeking inter alia for orders that the Plaintiff be declared as the lawful owner of the suit property to wit Plot No L.R No. Kilifi/Mtwapa/206. It sought for further orders that alterations, cancellations and all action on the land register which deprive or ignore the Plaintiff as being the proprietor of the suit property and subdivisions made on the suit property be declared to be null and void and of no legal effect. It also seeks for an order directing the 2nd Defendant to rectify the Land register by deleting and cancelling the registration of the 4th Defendant and 1st Defendant as proprietors of the suit property and restoring the Plaintiff's title as the registered proprietor thereof. The Plaintiff also sought for permanent prohibitory injunction to restrain the 1st, 2nd and 4th Defendants from leasing, selling or otherwise disposing any interest in the suit property or interfering with the Plaintiff's possession thereof. The Plaintiff finally seeks for general damages.

63. Basically, the Plaintiff's case was that he was the registered owner of the suit property having acquired the same and having it transferred into his name on the 24th of April 1997. He then came to find out that the property is now registered in the name of the 1st Defendant, who proceeded to cause the same to be sub-divided into four parcels, to wit, Plot No. 3197, Plot No. 3198, Plot No. 3199 and Plot No. 3200. He also came to find out that the suit property had been transferred to the 1st Defendant by the 4th Defendant who is allegedly indicated as being the first proprietor of the suit property. The Plaintiff's cause of action is therefore that records indicating him as being the owner were fraudulently expunged/removed from the land register and in the 4th Defendant further fraudulently caused to be registered as the owner thereof, who then has the land subsequently transferred to the 1st Defendant who proceeded to have the same sub divided.
64. The 4th Defendant failed to enter appearance and failed to file a defence. The rest of the Defendants participated in the proceedings.
65. The Learned Counsel on the Plaintiff's case submitted that the Plaintiff adopted the contents of his witness statement dated the 4th of December 2013. It was his evidence that he is the registered proprietor of the suit property. He produced the original Title deed for the property which was marked as PEXH1 showing him as the owner thereof. He also produced a Certificate of official search dated the 5th of March 2009 as Plaintiff Exhibit No. 2. He pointed out that in

the said search, the encumbrance section showed that the 4th Defendant had registered a caution on the property claiming occupier's interest.

66. He continued that he lodged an application for search on the land on 19th of December 2012. He produced the Application for search marked as Plaintiff Exhibit Number 3 and a receipt for the search marked as Plaintiff Exhibit Number 4. He stated that there were results of the search as he was informed that the suit property had been sub-divided into four sub-plots hence the register for the suit property was closed. When he investigated further, he found out that the sub-division of the suit property was effected by the 1st Plaintiff who is indicated as the proprietor of the suit property prior to the sub-division. He also came to learn that the 4th Defendant was the one who transferred the suit property to the 1st Defendant. When asked how he knows of the 4th Defendant, he said that other than him registering the caution against the land, the 4th Defendant has filed a case, NAIROBI HCC Case No. 851 of 2006 claiming adverse possession on the suit property, which suit was struck out. He produced the ruling dated the 30th of November 2006 as Plaintiff Exhibit Numbers 5.
67. He then narrated how he acquired the suit property. He stated that he acquired it from his uncle namely Ismail Adam who was the erstwhile proprietor thereof. The said Ismail Adam had acquired the same from one Nguya Jambo. The Land was initially Plot Number 205 and 206 Mtwapa settlement scheme which were consolidated into Plot No L.R

No. Kilifi/Mtwapa/206. He produced the documents contained in the Further list of documents dated the 6th of November 2017 which detailed the history of the property since the time it belonged to Ismail Adam up until the time it was transferred to the Plaintiff. The documents basically emanated from the Land Adjudication and settlement office Kilifi. The Plaintiff stated that he did not have original copies of some of those documents since they were old documents and wished to produce secondary documents i.e. photocopies pursuant to Section 68 (1) (c). Hence the best evidence available were some originals and some photocopies. The Court on the 15th or made an order that secondary evidence be produced but on condition that they be certified by the office that they emerged from or that office confirmed that the documents could not be found.

68. The Land Adjudication and settlement officer vide a letter dated the 26th of July 2024 confirmed that the documents which were in its file and it proceeded to have them certified were:

- a) Copy of Application for consent of the Land Consent board (Document Number 4 of the List of documents dated the 6th November, 2017.) This was produced as Plaintiff Exhibit - 6.
- b) Letter dated the 2nd of February 1996 (Document 7)- Plaintiff Exhibit - 7
- c) Letter dated the 19th of December 1996 (Document 10)- Plaintiff Exhibit - 8.

d) Transfer dated the 14th January 1997 (Document 14)-
Plaintiff Exhibit - 9.

e) Letter dated the 15th of January 1997 from ministry of
lands and settlement (Document 16) - Plaintiff Exhibit
- 10.

f) Application for Consent of the Land Consent Board
(Document 18) - Plaintiff Exhibit - 11.

69. The rest of the documents in the list of documents dated the
6th of November 2017 were produced as follows:

a) Letter dated the 8th of August 1978 - Plaintiff Exhibit -
12

b) Land control regulations letter of consent dated 24th
June 1980 - Plaintiff Exhibit - 13.

c) A copy of Transfer dated 18th September 1982 - Plaintiff
Exhibit - 14.

d) Letter of consent dated 29th September 1982 - Plaintiff
Exhibit - 15.

e) Land control regulations letter of consent dated 29th
September 1982 - Plaintiff Exhibit - 16.

f) Letter dated 20th November 1996 - Plaintiff Exhibit - 17.

g) Letter dated 17th December 1996 - Plaintiff Exhibit - 18.

h) Letter dated 10th January 1997 - Plaintiff Exhibit - 19.

i) Receipt number 039305 dated 15th January 1997 -
Plaintiff Exhibit - 20.

j) Letter dated the 15th January 1997 - Plaintiff Exhibit -
21.

k) Transfer dated 14th January 1997 - Plaintiff Exhibit - 22.

l) Receipt number 667133 dated 28th April 1997 - Plaintiff Exhibit - 23.

m) Receipt number 667132 dated 28th April 1997 - Plaintiff Exhibit - 24;

70. The Learned Counsel submitted that during cross-examination, PW - 1 was asked about a Charge documents and also asked about terms and conditions contained in the documents for the subject property as prescribed by the Settlement fund of Trustees. He clarified during re - examination that the charge on the land was duly discharged by the Settlement fund of Trustees upon payment of the charges proscribed, hence the reason why he had a Title deed thereof. Further he also clarified that the charge of the land had been discharged as per the receipt dated the 28th of April 1997 - (Plaintiff Exhibit - 23) which is a receipt issued by the Kilifi land registry showing payment of a sum of Kenya Shillings One Thousand One Hundred and Seventy-Five Hundred (Kshs. 1,175/=) towards discharge for the subject parcel of land and shows that it consists of the certificate of title, registration, opening new register, attestation, inspection and copying.

71. On the 1st Defendant's case, the Learned Counsel submitted that the 1st Defendant basically adopted the contents of his witness statement dated the 1st of November 2017. It was basically his evidence that he purchased the suit property from the 4th Defendant upon confirmation of position from the land registry that it belonged to the 4th Defendant. He thereafter proceeded to sub-divide the land into

four portions. He stated that there were squatters on the land which he helped the 4th Defendant to remove when he was purchasing the property.

72. During cross examination, the 1st Defendant confirmed that he has never occupied the suit property. He stated that during sub-division, some squatters together with the 4th Defendant were allowed to occupy the suit property. The 1st Defendant also admitted that beyond conducting a search, that he did not conduct any further due diligence to ensure whether the 4th Defendant was the genuine owner to the suit property. He also confirmed that despite the records and title indicating that the 4th Defendant allegedly has the title issued on the 10th of September 2001, the 1st Defendant did not know nor did he find out how the said property was acquired. He further confirmed that he does not know the history of the land prior to the year 2001. He finally confirmed that he does not know whom the land belonged to prior to the 4th Defendant and did not find out about it.
73. On the 2nd and 3rd Defendant's case, the Learned Counsel submitted that the 2nd and 3rd Defendants who are represented by the Attorney General did not give evidence. The parties however by consent admitted the witness statement of one Anthony Tunje Karani, the former Land Registrar Kilifi, dated the 18th of April 2016 which statement basically restates the status quo of the records for the suit property reflecting the 1st Defendant as the registered proprietor having acquired the same from the 4th Defendant.

74. On the 4th Defendant's case, the Learned Counsel submitted that he never filed an appearance, despite having being served by way of substituted service as ordered by the Honorable Court. He also neither filed and defense nor participated in the proceedings.
75. On the analysis, the Learned Counsel averred that as can be gathered from the pleadings and evidence on record, the Plaintiff's case is that the Plaintiff is the genuine owner of the suit property having acquired the same and had the same registered in his name and accordingly issued with a title deed on the 24th April 1997. Fast forward, upon conducting a search on the land in the 2009, he came to realize that the suit property was in the name of the 1st Defendant whom had proceeded to sub-divide it.
76. The position reflected at the land registry Kilifi is that the land belonged to the 4th Defendant whom the sold the same to the Plaintiff. There are no records showing that the Plaintiff is the proprietor of the land. It is therefore the Plaintiff's position that the corrects records, which shows that he is the owner of the land have irregularly and/or fraudulently been expunged from the land's register.
77. The 1st Defendant on the other hand contends that prior to purchasing, he did conduct a search on the suit property which reflected the 4th Defendant to be the registered owner thereof. On that sole basis, the 1st Defendant pressed on with the purchase of the land. It is therefore the 1st Defendant's case that he was a purchaser for notice without value. The 2nd and 3rd Defendants, who are government

agencies, merely restated the position at the land register and did not shed any light or provide any further useful information. The 4th Defendant on the other hand did not provide any useful information. **The first issue for determination is therefore who is the genuine proprietor to the land and who has a better title in law?**

78. The rule of law whereby there exists two different titles on the same parcel of land is quite established in jurisprudence. In the case of ***“Hubert L. Martin & 2 Others - Versus - Margaret J. Kamar & 5 Others [2016] eKLR”***.

79. The Learned Counsel submitted that it therefore followed from the foregoing that the Plaintiff and the 1st Defendant, who had competing titles, ought to demonstrate the root of their respective titles is regular. That therefore requires them to go beyond a mere search and beyond the position of the title itself. They need to go to the background of the land register and show how their individual titles came about. The Court of Appeal stated in the case of ***“Munyu Maina - Versus - Hiram Gathiha Maina [2013] eKLR”*** that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required

of him and no evidence was led to rebut the appellant's testimony."

80. On the part of the Plaintiff, he did produce a Title deed issued on the 24th of April 1997 and a search dated the 5th of March 2009 which confirmed the contents of the said title deed. Beyond that, the Plaintiff produced other documents showing that the suit property was initially allotted to one Ngoyo Jambo who transferred the same to Ismail Adam Suleiman (See Plaintiff Exhibit - 14 (Transfer dated the 18th of September 1982), application for consent of the Land consent board - Plaintiff Exhibit Number 6, a Letter of Consent dated the 29th of September 1982 - Plaintiff Exhibit Number 15 and a Land control regulations letter of consent dated 29th September 1982 - Plaintiff Exhibit Number 16. The Plaintiff further produced as Plaintiff Exhibit - 22 a transfer dated the 14th of January 1997 where Ismail Adam was transferring to him the suit property. The Plaintiff also produced the receipts for the discharge of charge issued by the Government (department of lands) - Plaintiff Exhibit - 23 which then allowed the Plaintiff to be issued with a title. The receipt indicates that the payment made was on account of certificate of title, registration, opening new register, attestation, inspection and copying. The Plaintiff has also along with other pertinent documents, also produced a letter dated the 15th of January 1997 sent by the Kilifi land adjudication and settlement office to the Director of Land adjudication and settlement Nairobi attaching the transfer documents, forms and land control board consents PEX21. The Plaintiff finally produced a receipt showing

payment of the transfer of the property to the Plaintiff - Plaintiff Exhibit - 24 which receipts similarly indicated that the amounts paid covers certificate of title, registration, opening new register, attestation, inspection and copying. The Plaintiff also produced as Plaintiff Exhibit Number 11 the application for a consent at the Land Consent Board.

81. The Land Adjudication and settlement officer also confirmed that some of the documents produced showing the Plaintiff as the allottee to the suit property were contained in its records and proceeded to produce certified copies thereof. There is therefore sufficient proof produced by the Plaintiff showing the history and root of title as to how he came to acquire the property. The Plaintiff has through those documents, elaborated at length various engagements with the land before the Title being ultimately issued to the Plaintiff.
82. On the other hand, the 1st Defendant merely stated that he conducted an official search on the suit property and that was sufficient for him to confirm ownership of the land. He confirmed and admitted that other than an official search, he had no idea and never conducted any investigations as to how the 4th Defendant came to acquire the suit property. He therefore did not go beyond a simple search or the land register in acquiring the property. The 1st Defendant in his list of documents has adopted and produced the 2nd and 3rd Defendant's list of documents which are documents contained at the land register for the suit property. Amongst the documents are a transfer showing the land was

transferred from the settlement fund of trustees to the 4th Defendant on the 10th of September 2001 and a discharge of charge. All those documents as can be seen, have been signed by the Land registrar. The same signature that is contained in the Title deed showing the 4th Defendant's name (See page 35 of the Defendant's list of documents) are the same signatures in the transfer by the S.F.T and the same signature in the Discharge of charge. They furthermore contain the same date as the date of the Title. They were therefore prepared the same day, signed and registered on the same day and by the same person. The Learned Counsel averred that even the title of the 4th Defendant did not bear the seal containing the specific Land Registrar's name.

83. These are basically documents showing how the land came into the 4th Defendant's name. It has not been shown whether the 4th Defendant was the allottee of the land, correctly allotted the same by the Settlement fund of Trustees or any documentations pertaining to how the 4th Defendant became entitled to the land which then gave the 4th Defendant the right to be issued with a Title. All that was shown was that a discharge of charge was registered. Not even the payment made to the Settlement fund of trustees has been shown which then led to the discharge of charge. Thereafter what was shown is a transfer to the 4th Defendant and then the transfer to the 1st Defendant. In short, nothing has been shown by the 1st Defendant or any other

Defendants beyond the current impugned records at the land's registry.

84. The fact that the 1st Defendant did not conduct any further investigations other than an official search is undisputed as it has not been denied by him. He did not bother to find out how the 4th Defendant became the owner. Therefore contrary to the directive by the Court of Appeal in the said case of **MUNYU MAINA (sic)**, the 1st Defendant had not gone beyond his instrument of title to prove that the process of acquisition of his title was regular. This point of insufficiency of a search and the ex facie position of the Land register was discussed at length in the case of **“National Land Commission - Versus - Afrison Export Import Limited & 10 Others [2019] eKLR”** as follows:

***“A search on any title at the land registry is very important before one can act on it. The search indicates the owner(s) of a particular property and any encumbrances or other relevant entries registered against that land. Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration. However, a search may not always be a true reflection of the position as will be demonstrated below where two searches carried out in the same year showed different results... The two contradictory searches show that a search and the records held at the lands registry can be manipulated to achieve certain objectives which in most cases are intended to deceive those relying on the search to transact on the land in question.*”**

Based on the inherent danger of the search system which is based on the Torrens System of registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Applicant had bothered to delve into the history of the title, it would have discovered that the title had two mortgages besides other entries in the register and the other transactions... which were not noted on the register.

...

Section 28 of the Land Registration Act lists overriding interests that subsist and affect land but which need not be noted on the register. ... In undertaking due diligence, one must go further and ascertain if there are any overriding interests affecting the land they wish to transact on. In light of the foregoing, our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search."

85. Therefore, if one fails to conduct a historical search on land, then it was not enough that they conducted an official search. Proper due diligence demanded that one investigates the history of the land beyond the records at the land register in order to understand the full historical context and any potential encumbrances on the property. A mere official search in isolation cannot establish the legitimacy of land ownership. In the foregoing, it can be deduced from the evidence on record, that the Plaintiff sufficiently supported his root of title, while on the other hand, the 1st Defendant did not go beyond the records at the land registry to support the root of his title. Furthermore, no

evidence was tendered by the 1st Defendant to counter or challenge the Plaintiff's root of title.

86. On the next issue for determination according to the Learned Counsel, which could be deduced from the pleadings and evidence was **whether the defence by the 1st Defendant that he was a Purchaser for value without notice holds**. The 1st Defendant has through his defence asserted that he was a purchaser for value without notice and is therefore protected due to not having any knowledge of the Plaintiff being the genuine owner of the suit property. The law on the principle of bona fide Purchaser for value without notice vis-à-vis the lack of conducting proper due diligence was well set out in the case of ***"Said - Versus - Shume & 2 Others (CIVIL APPEAL E050 OF 2023) [2024] KECA 866 (KLR) (26 JULY 2024) (Judgment)"*** as follows:

"...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase." And as in the Supreme Court decision in Dina Management Limited vs County Government of Mombasa (supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser.

87. Similar to the instant case, the root of title is under challenge. The 1st Defendant can therefore not rely on the said defence in order to sustain his title. He has to establish its root. The Court went ahead to hold as follows:

"So, did the Appellant acquire a valid and legal title to the suit property? The Appellant's case was that he purchased

the suit property from the 2nd Respondent who was the registered title holder; that he conducted a search at the Kilifi Lands Registry and confirmed that the land was owned by the 2nd respondent. However, of significance is that the appellant made no effort to conduct further inquiry into the 2nd respondent's title. In other words, he did not establish the root of the 2nd Respondent's title, which essentially required that he ascertain how it had come into existence, and how the 2nd Respondent came to be the registered owner.

....

As to whether he was a bona fide purchaser for value without notice, we form the view that, had the Appellant conducted sufficient enquiry into the 2nd Respondent's title, he would have discovered the anomalies aforesaid. At the very least, he ought to have enquired into the history behind the 2nd Respondent's title.

This is because a title to land is not contrived out of oblivion, and nor is it created from a vacuum. In Kenya, land is classified as either public land, community land or private land. Article 64 of the Constitution defines private land as any land that has been designated private by an Act of Parliament, as well as land that is registered and held by anyone under a freehold or leasehold tenure. A title to land denotes a registered ownership of land, and every title has a root in one or another of the classifications. A good root of title means that a title to land is traceable back to its origins.

88. In the instant case, it can clearly be seen from the evidence on record that the land register indicated that the 4th Defendant had allegedly acquired the subject parcel of the Settlement fund of Trustees. That was clear indication that

the 1st Defendant ought to have further enquired as to how the 4th Defendant came to be the allottee of the land. Did the 4th Defendant correctly acquire the land from the Settlement fund of Trustees? Did he pay for the amount due to the Settlement fund of Trustees which led to the discharge of charge? If so, where is the receipt? Further, given that the Land adjudication and settlement office confirmed that some of the documents bearing the Plaintiff's name to the land are contained in its file, should the 1st Defendant have enquired from that office when investigation on the history of the land and root of title, he would have found out about the correct position of the land or the information regarding the Plaintiff, which would have led him to ask the 4th Defendant the appropriate questions. In those circumstances, the 1st Defendant never conducted sufficient enquiry on the 4th Defendant's title, and therefore cannot be considered as an innocent purchaser for value without notice.

89. The final issue for determination as can be seen from the pleadings and evidence is **what is the position of the 4th Defendant vis-à-vis the title? Was he a genuine title holder of the land?** The Learned Counsel submitted that the 4th Defendant never entered appearance and defended the suit, hence he did not come to Court to clarify how he became the title holder to the suit property. As can be seen from the evidence on record, there is no documentation to show that he was correctly allotted the suit property. Of further significance was that in Plaintiff Exhibit - 2, the

Certificate of Official search dated the 5th of March 2009, the 4th Defendant is indicated in the encumbrances section showing that he registered a Caution against the land, claiming occupant interest. Furthermore, the Plaintiff produced a ruling made in NAIROBI HCC Case No. 851 of 2006 - Plaintiff Exhibit - 5 in a case filed by the 4th Defendant against the Plaintiff claiming adverse possession on the suit property, which suit was struck out due to it being filed in Nairobi while the suit property was in Malindi.

90. It can therefore be gathered from the above facts that the Plaintiff was indeed the registered owner of the suit property. If he wasn't, the 4th Defendant would not have placed an encumbrance on the title and would not have filed a suit for adverse possession. It is therefore puzzling as to how the 4th Defendant now became the registered owner of the said property instead of the Plaintiff.
91. They therefore submitted that the above issues not having been addressed entirely in the suit, the evidence shows the Plaintiff to be the genuine owner of the suit property. In the foregoing, they urged the Honourable Court to proceed to allow the suit as prayed with costs to the Plaintiff.

B. The Written Submissions by the 1st Defendant

92. The 1st Defendant through the Law firm of Messrs. Mwakireti & Asige Advocates filed his written submissions dated 7th February, 2025. Mr. Mwakireti Advocate submitted that vide the Amended Plaint dated 9th November, 2018, the Plaintiff seeks for relief against the Defendants that, inter alia, the Plaintiff is the lawful proprietor of the suit property originally

known as Plot No LR Kilifi/Mtwapa/206 alleging that the 1st Defendant is now illegally indicated at the land registry as the registered owner of the suit property and that the same was done fraudulently.

93. The 1st Defendant filed his defense dated 12th October, 2017 denying the Plaintiff's allegations and categorically stating that he was legally registered as owner of the suit property and he was an innocent purchaser for value without notice. The particulars of fraud against the 1st Defendant were denied in *toto* and the 1st Defendant seeks for dismissal of the suit against him. The 1st Defendant also filed a reply to the Plaintiff's amended Plaint on 11th October, 2019 denying the allegations of conspiracy, fraud, illegality or collusion and that the 1st Defendant followed all the legal procedures based on the documents presented to him by the lands office and therefore legally acquired title to the suit property. He further stated that he had no custody over records kept by the 2nd Defendant and that he acquired the suit property having purchased it from the 4th Defendant who was the registered owner then and that the 1st Defendant was an innocent purchaser for value without notice and that of there was no *mala fides* on his part and if any is found against the 2nd Defendant, the Plaintiff would only be entitled to damages from the 2nd Defendant.

94. The 2nd and 3rd Defendants filed their statement of defence on 3rd November, 2017 denying allegations of fraud against them and asserting that the 1st Defendant was legally and lawfully registered as the owner of the suit property. The

Plaintiff adopted his witness statement as evidence in chief and produced the documents listed in his bundle of documents as exhibits and reiterated the matters stated in the Plaint. In Cross examination, the Plaintiff confirmed that:

-

- a) Plot number Kilifi/Mtwapa/206 no longer exists the same having been subdivided.
- b) He did not identify the subdivided plots and determine in whose names they were registered.
- c) He did not know the status of the property on the ground and who was in possession.
- d) He has never been in possession of the property because he lives in Canada.

95. On the evidence of the 1st Defendant, the Learned Counsel submitted that the 1st Defendant adopted his witness statement filed on 1st November, 2017 as appearing at page 57 and 58 of his list of documents filed on even date. He produced the document enumerated in the list of documents as exhibits. The 1st Defendant, testified that he purchased the property from one Nicholous Kopo Katana and produced the agreement sale [1st Defendant Exhibit Number 1]. Prior to the purchase, he did due diligence by applying for an official search and obtained the certificate of official search dated 9th June, 2011 which showed the 4th Defendant as the owner[see page 33 of the list of documents].

96. On the evidence of 2nd and 3rd Defendants, the Learned Counsel submitted that the witness statement of the 2nd

Defendant dated 18th April, 2016 was adopted as evidence by consent of the parties. The 2nd Defendant confirmed that the land was registered in the name of the 4th Defendant who transfer it to the 1st Defendant and all legal requirements were followed before the 1st Defendant became the legal owner. The 2nd and 3rd Defendant filed their list of documents on 3rd November, 2017 in support of the case.

97. The Learned Counsel relied on the following issues for the determination for the court:-

- a) Whether the court can make orders in respecting L.R. No. Kilifi/ Mtwapa/206 which does not exist;
- b) Whether a determination can be made in respect of the subdivisions when the owners thereof have not been made parties to this case;
- c) Whether the Plaintiff has proved fraud to the required standard;
- d) Whether the 1st Defendant acquired the property lawfully; and
- e) Whether the Plaintiff is entitled to the remedies sought.

98. On whether the Court can make order in respect of a non - existent property. The Learned Counsel submitted that evidence by both parties revealed that L.R. No Kilifi/Mtwapa/206 does not exist. The Plaintiff stated that he could not make a search thereof because the same had been closed upon subdivision. The Plaintiff did not go further to ascertain the ownership status of the sub - division. The 1st

Defendant also confirmed that he had sub - divided the L.R Kili/Mtwapa 206 into 4 plots. (see 1st Defendant's list of documents page 48-54 for mutation form, Land Control Board consent to sub - divide, application for Land Control Board consent to subdivide, the certificate of compliance and receipt for RIM amendment and printing fees).

99. It was beyond doubt that the said L.R No. Kilifi/Mtwapa/206 does not exist. The Plaintiff had sought for relief in respect a property that does not exist. He did not make any efforts to identify and include in the Plaint the sub - divided plots for purposes of obtaining relief in respect thereof. They humbly submitted that this Honourable Court cannot make orders in respect of the property that does not exist as it will be acting in vain. The Plaintiff's claim is therefore stillborn and is for dismissal.
100. On whether a determination can be made in respect of the sub - divisions when the owners thereof have not been made parties to this case. The Learned Counsel submitted that the pleadings and evidence of the parties also revealed that the subdivided plots were sold to other persons. A simple search by the Plaintiff would have revealed the owners of the sub - divided plots. None was applied for. The said persons who own the sub - divided plots have not been made parties to this suit. They humbly submitted that the Plaintiff could not obtain reliefs against persons not made parties to this case. The Plaintiffs suit should fail on this ground as well.

101. On whether the Plaintiff had proved his case of fraud to the required standard. The Learned Counsel submitted that the plaintiff pleaded particulars of fraud against the 1st Defendant. He was required to prove the fraud allegations to the required standard which is higher than that required in ordinary civil cases. The Learned Counsel relied on the case of **“Kinyanju Kamau - Versus - George Kamau [2015] eKLR”** the Court of Appeal held thus:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved the standard of proof required of him was obviously higher than that required in ordinary cases.....in cases where fraud is alleged it is not enough to simply infer fraud from the facts....”

102. In the present case, no evidence was given by the Plaintiff to prove the particulars of fraud pleaded. He did not prove which acts by the 1st Defendant were fraudulent. On the contrary, the 1st Defendant proved that he obtained title to the property legally having purchased it from the 1st Defendant for valuable consideration and the 2nd and 3rd Defendants confirm that all the legal procedures were followed before the 1st Defendant became the registered owner. They humbly submitted that the plaintiff has failed to discharge his burden of proof and suit ought to be dismissed.

103. In his submission, the Plaintiff has relied on the case of **“National Lands Commission - Versus - African Exports/Imports Limited & 10 others (Supra)”** for the preposition that one must go beyond the search to ascertain ownership before

purchasing land and submitted that the 1st Defendant did not do so.

104. They humbly submitted that the Plaintiff's submission on this point was in error as the evidence by the 1st Defendant shows otherwise. The 1st Defendant produced the register [green card] which showed the history of the transaction relating to the land [see the register at page 14]. The 1st Defendant also testified that he went to the land which was full of squatters, 19 in total. Those squatters were compensated by the 4th Defendant.

105. It was therefore clear according to Learned Counsel that the 1st Defendant indeed went beyond relying on the search and confirmed ownership of the 4th Defendant by checking the register and the position on the ground. What else could the 1st Defendant do more than what he did? They submitted that he could do nothing further than that. The Plaintiff had not led any evidence to prove that fraud was committed in the acquisition of the property and that the 1st Defendant was a party to the alleged fraud.

106. If the Plaintiff had any claim at all, it would be against the 2nd and 3rd Defendants and it would be for damages only. This is because the 2nd Defendant is the custodian of the land records, and he confirmed that the 4th Defendant was the legal owner of the suit property and a search certificate based on the contents of the land register was issued to the 4th Defendant which he relied upon in confirming ownership apart for going to the land.

107. They urged this Honourable Court to find that the Plaintiff had not proved his case against the 1st Defendant to the required standard and his claim should fail.
108. On whether the 1st Defendant acquired the property lawfully, the Learned Counsel submitted that the 1st Defendant was lawfully registered as owner of the property having purchased the same from the 4th Defendant for value without notice of any defect in title, if any. The 1st Defendant conducted a search which confirmed the 4th Defendant's ownership. He confirmed the status on the ground and ensured that the 4th Defendant dealt with all the squatters by paying them. The Plaintiff was not in possession of the property at the time of the 1st Defendants purchase or thereafter. In fact the Plaintiff confirmed in cross-examination that he did not know the status on the ground and did not know there were squatters thereon.
109. The Plaintiff did not challenge the evidence of the 1st Defendant on how he acquired ownership but only asserted that he had his own title for the land whose status on the ground he did not know being a resident of Canada. They submitted that the 1st Defendant had demonstrated that he acquired ownership of the property lawfully and followed all the legal procedures.
110. The Plaintiff's claim does not lie against the 1st Defendant at all in view of the foregoing and they urged the Court to so find.
111. On whether the Plaintiff was entitled to the remedies sought. The Learned Counsel submitted that having

demonstrated that the 1st Defendant acquired ownership of the property lawfully for value without notice, the reliefs sought by the Plaintiff against the 1st Defendant cannot issue. The Plaintiff only remedy, if any, is a claim for damages against the 2nd and 3rd Defendant. They had demonstrated that the property was sub - divided and sold and the parties to whom they were sold have not been made parties to this case and no reliefs can be granted against them without a hearing.

112. They urged this Honourable Court to dismiss the suit as against the 1st Defendant with costs.

VIII. Analysis & Determination

113. I have keenly considered all the filed pleadings, the oral testimony adduced by the Plaintiff and the Defendants' witnesses, the documentary evidence produced, the Written Submissions filed by the respective parties, and the authorities cited. I have also taken into account the relevant provisions of the Constitution of Kenya, 2010, the Land Registration Act, the Land Act, and other applicable statutes.

114. For this Honorable Court to reach an informed, just, equitable and reasonable decision on the subject matter, it has considered all the issues into the following six (6) sub-headings. These are: -

a) Whether the Plaintiff has proved ownership of the suit property LR No. Kilifi/Mtwapa/206 and established a valid root of title.

- b) Whether the Defendants, particularly the 1st Defendant, acquired any valid interest in the suit property as bona fide purchasers for value without notice.**
- c) Whether the transfer and sub - division of the suit property into Plots Nos. 3197, 3198, 3199, and 3200 were lawful, regular, and procedurally compliant.**
- d) Whether fraud, illegality, or irregularity has been proved against any of the Defendants in relation to the suit property.**
- e) Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff, including rectification of the register, cancellation of the Defendants' titles, permanent injunction, and damages.**
- f) Who should bear the costs of the suit.**

ISSUE NO. (a) Whether the Plaintiff has proved ownership of the suit property LR No. Kilifi/Mtwapa/206 and established a valid root of title?

115. Under this sub-heading the Court examined whether the Plaintiff had established legal ownership of the suit property and proved a valid, unbroken root of title. The enquiry required the Court to determine whether the Plaintiff's documentary and oral evidence traced the chain of title to a lawful source and whether the Defendants had rebutted that proof by showing a superior, lawful root for their competing title.

116. From the very onset, Judicial notice will be taken to the fact that land in Kenya is extremely sensitive and emotive. Land is a source of livelihood and a lot of importance is bestowed on it. There has been plenty of disputes over the

occupation, title and rights of land. According to the Constitution of Kenya, 2010 land is categorized into three – Private; Public and Community land. With promulgation of the Constitution of Kenya, 2010, all the legal regime of land legislation were condensed into a few legal framework, Significant, after the repealing of several legislation, two of them were sustained being **“The Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2016”**.

117. It is instructive to note that the suit land was registered under the Registration of Title Act, Cap. 281 (now Repealed). As already correctly pointed out by the Learned Counsel for the Defendants, based on the provisions of Section 107 of the Land Registration Act No. 3 of 2012 provided that any right, interest, title, power, or obligation acquired, accrued, or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act. This Legal position finds grounding in the provisions **Section 23 (3) (c) of the Interpretation and General Provisions Act, Cap. 2** which provides:-

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

118. The legal starting point is that registration under the Torrens system confers strong protection. Ideally, I wish to point out that the Land Registration Act makes provision on

the effect and efficacy of registration of title and its indefeasibility. The provision of Section 24 (a) of the Land Registration Act, Numbers 3 of 2012 provides as follows:-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

119. The provision of Section 25(1) protects a proprietor's rights from defeat except as provided by the Act. While the provision of Section 26 (1) makes a certificate of title prima facie evidence of indefeasible ownership but permits impeachment of title on limited grounds, notably fraud, mistake, omission or where the certificate was procured illegally, unprocedurally or through a corrupt scheme.

120. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of **“Hubert L. Martin & 2 Others (Supra)”**, where the Court held that:-

‘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.'

121. Further to this, the Honourable Court is guided by the Court of appeal in the case of: ***“Munyu Maina - Versus - Hiram Gathiha Maina (Supra)”*** The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as *‘the prima facie’* conclusive evidence that the person named as proprietor of the land is the absolute and legal owner with indefeasible title, rights and interest on the land and the proprietor shall not be subject to challenge except - On the ground of fraud, mistake, omission 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.

122. This court in considering this matter referred to the case of:- ***“Elijah Makeri Nyangw’ra - Versus - Stephen Mungai Njuguna & Another (2013) eKLR”*** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of provision of Section 26(1) (a) and (b) of the Land Registration Act holds as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

123. The golden question and the elephant in the room here is simple and straightforward: - ***“Who between the Plaintiff and Defendants have certainly shown the root of their title?”*** To respond to this deep query, the Honourable Court would require more than the Solomonic wisdom anchored and founded from the Scriptures of 1 Kings 3 Verses 16 to 28 on the decision by King Solomon over the dispute of the parentage of the child being claimed by the two Harlots and the law. From the said scripture it upon King Solomon making the decision, it was stated that: ***“and all Israel heard of the Judgement which the King had rendered; and they stood in awe of the King, because they perceived that wisdom of God was in him, to render Justice...”***. That should be the case in this matter herein.

124. Now turning to the issues from the instant case, the Plaintiff produced an original certificate of title dated 24th April 1997 (Plaintiff Exhibit - 1) together with a certificate of official search (Plaintiff Exhibit - 2) and a bundle of documents certified by the Land Adjudication and Settlement Office. The certified documents included transfers, Land Control Board consents, and receipts evidencing discharge of charge and payment for registration (notably Plaintiff Exhibit - 6, Plaintiff Exhibit - 9, Plaintiff Exhibit - 11, Plaintiff

Exhibit - 20 & Plaintiff Exhibit - 24). The Land Adjudication and Settlement Officer confirmed that several of the historical documents showing the Plaintiff as allottee were contained in the office records and were certified for the Court.

125. Therefore, the Plaintiff's evidence did not rest on the title alone. It included contemporaneous administrative records and receipts which, when read together, traced the chain from the Settlement Fund Trustees through Ismail Adam to the Plaintiff and showed payment and registration steps that culminated in the year 1997 title. That documentary matrix addressed the very matters the authorities require when a root of title is in issue.

126. The 1st Defendant's evidence was materially different. He admitted that his acquisition was founded on an official search conducted in year 2011 which showed the 4th Defendant as registered proprietor. He produced registry instruments and transfers but did not produce antecedent documents or receipts showing how the 4th Defendant was allotted the land by the Settlement Fund Trustees, or that any payment or lawful process preceded the transfer to the 4th Defendant. The 1st Defendant conceded that he did not investigate the history of the title beyond the search.

127. I note that the Plaintiff's production of the title deed together with certified records from the Land Adjudication and Settlement Office satisfied the requirement to show the root of title. Those documents provided a coherent narrative of allocation, transfer and registration culminating

in the Plaintiff's 1997 title. In the light of Section 26(1) of the Land Registration Act and the authorities cited, the Plaintiff established prima facie, traceable root of title which was properly open to the Court's acceptance unless convincingly rebutted.

128. The Defendants were required to go beyond the registry entries and show that their competing title had a lawful root. The 1st Defendant's reliance on a later registry search without antecedent documentation or proof of lawful allotment to the 4th Defendant fell short of the standard set in "**Munyu Maina (Supra)**" and "**Hubert Martin (Supra)**". The absence of receipts, Land Adjudication records or other evidence showing that the Settlement Fund Trustees lawfully allotted the land to the 4th Defendant meant that the 1st Defendant did not establish a continuous, lawful chain displacing the Plaintiff's earlier root.

129. For the reasons stated, and applying the statutory provisions and the authorities relied upon by the parties, the Court finds that the Plaintiff had proved ownership of LR No. Kilifi/Mtwapa/206 and has established a valid root of title. The Plaintiff's documentary evidence, corroborated by certified records from the Land Adjudication and Settlement Office, traces the chain of title satisfactorily. The 1st Defendant failed to demonstrate a lawful, antecedent root for his competing title and did not discharge the onus of rebutting the Plaintiff's established root.

130. Accordingly, on issue one, the Court upholds the Plaintiff's claim to ownership and root of title in respect of L.R. No.

Kilifi/ Mtwapa/ 206 with all the indefeasible rights, interest and title vested in him by law.

ISSUE NO. (b) Whether the Defendants, particularly the 1st Defendant, acquired any valid interest in the suit property as bona fide purchasers for value without notice.

131. Under this heading, the Court considers and at this juncture, the Honourable Court needs to determine whether the Defendants, particularly the 1st Defendant is a bona fide purchaser for value without notice.

132. That takes us to the other issue for determination: whether the first defendant is a bona fide purchaser for value without notice. The term “**bona fide purchaser**” is defined in **Black’s law Dictionary 10th Edition** as follows:

‘One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.’

133. The Court must determine (a) the legal test for that doctrine, (b) the scope and limits of protection where the root of title is challenged, and (c) whether the 1st Defendant’s conduct and evidence met the required standard. On challenging validity of title, the provision of Sections 26 (1) (b) of the Land Registration Act states that:

‘The Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and

indefeasible owner and the title of that proprietor shall not be subject to challenge, except -

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'**

134. In the case of ***“Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others (2015) eKLR”***, the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of ***“Katende - Versus - Haridar & Company Ltd (2008) 2 EA 173”***, the Court defined what amounts to a bona fide purchaser for value thus:

‘A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a Certificate of Title***
- b. He purchased the Property in good faith;***
- c. He has no knowledge of the fraud;***
- d. The vendors had apparent valid title;***
- e. He purchased without notice of any fraud;***
- f. He was not party to any fraud.***

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.’

135. While in the case of ***“Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura - Versus - Attorney General & 4 others***

(2017) eKLR”, the Court of Appeal held that a party cannot claim a bona fide purchaser for value where the vendor did not have a valid title.

136. Yet in the case of **“Munyu Maina - Versus - Hiram Gathiha Maina (Supra)”**, the Court of Appeal held that:-

‘We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.’

137. Just for purposes of setting the record straight, the Court of Appeal in the case of **“Mwangi James Njehia - Versus - Janetta Wanjiku Mwangi & ano (2021) eKLR”**, reviewed the above cited case of Katende at condition (d) and did away with the word ‘Apparent’ to read ***‘The vendor had valid title’***. Katende case is still a good authority but without the word apparent at clause (d).

138. On the valuable consideration, the Court notes that the 1st Defendant produced evidence of a sale agreement and payment (purchase price), and therefore prima facie satisfied the requirement of giving value.

139. On good faith and notice, the 1st Defendant relied on an official search conducted in 2011 showing the 4th Defendant as registered proprietor. He admitted he did not investigate

the antecedent history of the 4th Defendant's title or obtain documents showing lawful allotment or payment to the Settlement Fund Trustees.

140. The Plaintiff produced a 1997 title and certified historical records from the Land Adjudication and Settlement Office tracing the chain from the Settlement Fund Trustees through Ismail Adam to the Plaintiff. Those records were available in official files and, on the evidence, could have been discovered by reasonable enquiry. The authorities require that where the root of title is susceptible to challenge, a purchaser relying on a registry search must take further steps to verify the vendor's root. The 1st Defendant's failure to do so exposed him to constructive risk of notice of competing interests.

141. On the constructive notice and reasonableness of enquiries, the Court notes that in "***National Land Commission - Versus - Afrison Export Import Limited & 10 others (Environment and Land Case Reference 1 of 2018) [2019] KEELC 2851 (KLR) (28 June 2019) (Judgment)***", made it clear that a registry search may not be conclusive and that anomalies or historical entries may require further inquiry. The presence of prior allotment records and discharge receipts in the Land Adjudication Office meant that a reasonable purchaser should have probed the history.

142. The 1st Defendant's admitted conduct — stopping at a search and not obtaining antecedent documents or receipts — fell short of the standard of reasonable due diligence in the circumstances.

143. The effect of a challenged root is that once the Plaintiff produced a coherent chain of title predating the 1st Defendant's acquisition, the onus shifted to the 1st Defendant to show that his title had a lawful root. He did not produce evidence of lawful allotment to the 4th Defendant or of payment to the Settlement Fund Trustees that would validate the 4th Defendant's title. Where the root of the 4th Defendant's title was not satisfactorily established, the 1st Defendant could not rely on the protection of a bona fide purchaser for value without notice to displace the Plaintiff's earlier, documented root.

144. Under this leg of the Judgment, the Court finds that the 1st Defendant did not establish that he was a bona fide purchaser for value without notice entitled to protection. Although he paid value and acted in apparent good faith, his reliance solely on an official search without further inquiry into the vendor's root of title was insufficient in the face of the Plaintiff's documentary chain.

145. I discern that the doctrine of bona fide purchaser for value without notice does not operate to defeat the Plaintiff's established root of title in these circumstances. The 1st Defendant therefore failed to prove a valid interest that displaces the Plaintiff's title.

ISSUE No. (c) Whether the transfer and sub - division of the suit property into Plots Nos. 3197, 3198, 3199, and 3200 were lawful, regular, and procedurally compliant.

146. Under this issue the Court examined whether the steps that culminated in the transfer and the subsequent subdivision

of LR No. Kilifi/Mtwapa/206 were taken in accordance with the applicable statutory regime, administrative practice and settled authorities. The enquiry required the Court to determine:-

- a) what statutory and procedural steps the law requires for a valid transfer and subdivision,**
- b) whether those steps were followed in the present case, and**
- c) whether any irregularity or illegality vitiated the transfers and sub - division.**

147. On the registration and transfer - registration under the Torrens system vests proprietary rights in the registered proprietor; transfers must be effected by the prescribed transfer instruments, supported by Land Control Board consent where required, payment of stamp duty and registration by the Registrar. (See Sections 24, 25 and 26 of the Land Registration Act (No. 3 of 2012) (principles on registration, indefeasibility and impeachment of title).

148. I note that on subdivision and survey - subdivision requires compliance with the statutory survey and planning regime: preparation of a Deed Plan by a licensed surveyor, approval/authentication by the Director of Surveys, compliance with any planning or local authority conditions, and issuance of a sub - division Certificate or Deed Plan before separate titles can be issued. Administrative approvals and authenticated Survey Plans are essential to give effect to a lawful sub - division.

149. Due diligence and searches is highly advised during land transaction - an official search is important but not conclusive; where the history of title or the register shows potential anomalies, a purchaser or transferee and the authorities must take further steps to verify antecedent documents and ensure that the chain of title and any conditions (including surrender or allotment conditions) were complied with. The Environment & Land Court has emphasised that searches may be manipulated and that further enquiry into the history of title is often necessary.
150. Where competing titles or later transfers are impugned the Court must investigate the root of title and the chain of transactions that produced the competing instruments; a title that cannot be traced to a lawful root or that was procured by unprocedural steps may be impeached.
151. Sub - division and survey approvals must be procedurally regular: Survey Plans must be prepared by licensed surveyors, approved and authenticated by the Director of Surveys, and any local authority or planning conditions must be satisfied before separate titles are issued. Administrative irregularities in survey or sub - division approvals may render subsequent titles or Deed Plans vulnerable to challenge. The Environment & Land Court has set out the practical consequences of irregular survey/sub - division processes and the need for documentary proof of lawful procedure.
152. On whether there was evidence of the required antecedent approvals and authenticated Survey Plans? The Defendants

relied principally on registry entries and Deed Plans showing the later registration and subdivision. The Court examined whether the record contained the antecedent survey plans, authenticated approvals, and any local authority or Director of Surveys' confirmations that would ordinarily precede lawful subdivision. The authorities require that Deed Plans and survey approvals be traceable and authenticated; where the administrative record shows multiple surveys, approvals or re - surveys, the provenance and authority for each survey must be explained and supported by documentary proof. The Environment & Land Court has repeatedly scrutinised such documentary chains and required proof of proper authority for each Survey and Deed Plan.

153. On whether the survey and sub - division steps were consistent and continuous or were there material breaks/irregularities? The Court notes that the evidence in the contemporaneous administrative record (as in the authorities) showed instances where survey plans were prepared at different times, re-surveyed and in some instances superseded by later plans; where that occurred the Court must be satisfied that each step was taken by the proper authority and in accordance with the statutory process. If a Deed Plan was prepared on the basis of an authority that did not properly empower the surveyor, or if a Sub - division certificate was issued without satisfying planning or rate-clearance conditions, the subdivision may be irregular. The Environment and Land Court has held that

such procedural defects can render the sub - division and consequent titles vulnerable.

154. On whether there was evidence of compliance with the Land Control Board and stamp duty requirements, valid transfers arising from private sale ordinarily require Land Control Board consent (where applicable), proper transfer instruments, payment of stamp duty and registration. The Plaintiff produced Land Control Board consents and receipts in support of his root of title; the Defendants produced registry transfers but did not produce antecedent documents showing lawful allotment or payment that would validate the 4th Defendant's root. Where the record lacks proof of required consents or payments, the transfer's regularity is open to challenge. The Court must therefore treat registry entries alone with caution where antecedent compliance is not demonstrated.

155. The Court considers in such a matter also whether there were signs that surveys, approvals or registrations were prepared or back-dated, or that approvals were used for purposes other than those for which they were granted. The Environment & Land Court has warned that searches and registry entries can be manipulated and that further enquiry is required where anomalies appear. In the present case the absence of antecedent allotment documents, receipts or authenticated survey provenance for the 4th Defendant's title raised a reasonable doubt about the procedural regularity of the later transfers and sub - division.

156. The Court has further examined whether any statutory preconditions (for example, surrender of land for public amenities under an earlier subdivision scheme, or outstanding rates) were complied with before subdivision. Where conditions precedent to subdivision or surrender were not satisfied, the subsequent subdivision may be void or voidable. The administrative record in comparable cases has shown that failure to satisfy such conditions (or to obtain final approval) undermines the lawfulness of later deed plans and titles.
157. On the evidence before the Court the Plaintiff produced a coherent chain of antecedent documents (Land Adjudication records, transfers, Land Control Board consents and receipts) tracing his 1997 title. The Defendants relied largely on later registry entries, transfers and deed plans showing subdivision and new parcel numbers.
158. Given the legal standards (that sub - division requires authenticated survey plans, proper approvals and compliance with planning and administrative conditions, and that a registry search alone is not conclusive), the Court found that the Defendants did not satisfactorily demonstrate that every procedural step required for a lawful subdivision and transfer had been complied with in full. In particular, the absence of antecedent allotment documentation, authenticated survey provenance for the 4th Defendant's root, and clear evidence of compliance with any outstanding administrative conditions left material gaps

in the chain of lawful procedure. The Environment & Land Court has emphasised that such gaps are fatal to a claim that later transfers and subdivisions were regular.

159. On a balance of the evidence and applying the statutory and judicial standards, the Court concludes that the transfer and sub - division into Plots Nos. 3197, 3198, 3199 and 3200 were not shown to be fully lawful, regular and procedurally compliant. The Defendants failed to establish the antecedent administrative and survey steps necessary to validate the later Deed Plans and titles; accordingly the Court treated those later instruments with caution and did not allow them to displace the Plaintiff's earlier, documented root of title.

ISSUE No. (d) Whether fraud, illegality, or irregularity has been proved against any of the Defendants and or the Plaintiff in relation to the suit property.

160. Under this sub title, the Honourable Court shall examine whether fraud, illegality, or irregularity has been proved against any of the Defendants and or the Plaintiff in relation to the suit property. In the case of ***“Alice Chemutai Too - Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”*** Justice Sila Munyao held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to

the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara -Versus - Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum."

161. I am in agreement with Munyao J. that the provision of Section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown. It is trite that he who alleges must prove, as provided by Section 107 of the Evidence Act. The Defendants have alleged fraud on the part of the Plaintiffs, and they had a duty to prove the existence of such fraud.

162. **Black's Law Dictionary, 9th Edition** defines "**fraud**" as:-

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another".

163. In the case of "**Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others [Supra]**", the Court held that;

"It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

164. Where a person's title is under attack, he must of necessity give an account on how he acquired the same; the Accuser

must also show the court that the property as truly obtained in a fraudulent transaction. In the case of **“Munyu Maina - Versus - Hiram Gathiha Maina (Supra)”**, where the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

165. It is trite that fraud must be specifically proved. See the case of **“Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR”**, where the Court held:-

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

166. See also the case of **“Koinange & 13 others - Versus - Charles Karuga Koinange 1986 KLR”** at page 23, where the court held that:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

167. The Defendants alleged fraud on the part of the Plaintiff but did not produce documentary evidence or credible testimony to substantiate the claim. The Defendants bore the burden under the provision of Sections 107, 108 and 109 of the Evidence Act, Cap. 80 to prove fraud or illegality against the Plaintiff. They failed to discharge this burden. The Plaintiff, on the other hand, produced his 1997 title deed and certified records from the Land Adjudication and Settlement Office tracing the lawful chain of ownership. The Court finds that on the part of the fraud, the same was not specifically proved against the Plaintiff.

168. On the illegality and irregularity in the Defendants' title, the 1st Defendant admitted that he relied solely on an official search in 2011 and did not investigate how the 4th Defendant acquired the property. No evidence was produced showing lawful allotment of the land to the 4th Defendant by the Settlement Fund Trustees, nor receipts proving payment. The subdivision into Plots Nos. 3197-3200 was not supported by antecedent documents showing compliance with survey approvals, Land Control Board consents, or discharge of charge. These gaps amount to procedural irregularities and possible illegality under the provision of Section 26(1)(b) of the Land Registration Act, No. 3 of 2012.

169. Conversely, the Plaintiff demonstrated a lawful root of title, while the Defendants failed to establish the legality of their competing title.

170. The Court finds that fraud was not proved against the Plaintiff. However, illegality and irregularity were evident in the Defendants' acquisition and subdivision of the suit property, as they failed to demonstrate a lawful root of title or compliance with statutory procedures. Accordingly, the Defendants' titles are impeachable under the provision of Section 26 (1)(b) of the Land Registration Act, 2012, and cannot displace the Plaintiff's established ownership of LR No. Kilifi/Mtwapa/206.

ISSUE No. (e) Whether the Plaintiff is entitled to the reliefs sought in the Plaint, including rectification of the register, cancellation of the Defendants' titles, permanent injunction, and damages.

171. Under this sub-heading, the Plaintiff has sought for various reliefs as contained at the foot of the Plaint, namely:

- a. A Declaration that the Plaintiff is the lawful proprietor of the suit property originally known as Plot No. LR No. Kilifi/Mtwapa 206.***
- b. A Declaration that the alterations and, cancellations of the land register and all other actions on the Land Register the plaintiff as the proprietor of the property known as Plot No. LR No. Kilifi/Mtwapa/206; and the provisional certificate issued, and the subdivisions made on the suit property originally known as Plot No. LR No. Kilifi/Mtwapa/206 are all null and void and has have no legal effect.***
- c. An Order directing the District Land Registrar Mombasa to rectify the Land Register by deleting and cancelling the Registration of the 4th Defendant and 1st Defendant as the proprietor of Plot No. LR No. Kilifi/Mtwapa/206 and restoring the plaintiff's title as the Registered proprietor thereof.***

d. A permanent Prohibitory injunction restraining the 1st and 2nd and 4th Defendants whether by themselves, agents or servants from selling, leasing or otherwise disposing any interest in the suit property entering, remaining, demolishing, harassing and/or interfering with the suit property and the plaintiff quiet possession thereof.

e. General damages

f. Any other relief deemed just and expedient.

g. Costs of this suit.

172. As already stated herein, the Plaintiff produced cogent documentary evidence tracing the root of his title to the Settlement Fund Trustees through Ismail Adam and ultimately to himself in 1997. The Defendants failed to establish a lawful antecedent root for the 4th Defendant's title or to demonstrate procedural compliance in the subdivision into Plots Nos. 3197-3200. The Court is guided by the maxim "***nullus commodum capere potest de injuria sua propria***" — no man shall take advantage of his own wrong. This principle, recognised in equity and law, prevents a party from benefiting from irregular or unlawful dealings with land.

173. Having concluded that the Plaintiff has a legitimate claim to the suit property, prayers (a) and (b) are hereby allowed. The register shall be rectified under the provision of Section 80(1) of the Land Registration Act, 2012, cancelling the Defendants' titles and restoring the Plaintiff's title to LR No. Kilifi/Mtwapa/206. On whether a permanent injunction can issue, being that the Plaintiff is the beneficial and legal owner of the suit property with indefeasible rights under the provision of Sections 24, 25 and 26 of the Land Registration Act, 2012, the same is granted. The

Defendants are permanently restrained from interfering with the Plaintiff's quiet possession and enjoyment of the suit property.

174. On general damages, in the case of: ***“Nakuru Industries Limited - Versus - S S Mehta & Sons [2016]eKLR”*** court observed:-

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”

175. Halsbury 4th ed, Vol 45 at para 26, 1503 provides as follows on computation of damages in an action of trespass:-

(a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

(b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

(c) Where the Defendant has made use of the Plaintiffs land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

(d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or

where the Defendant cynically disregards the rights or the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

176. In the case of:- ***“Nakuru Industries Limited (supra)”*** the court cited the case of ***“Duncan Ndegwa - Versus - Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)”*** where the court held:-

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the claimant in the position he was prior to the infliction of the harm.”

177. In the instant case, the Defendants unlawfully interfered with the Plaintiff's proprietary rights by purporting to transfer and subdivide LR No. Kilifi/Mtwapa/206 into Plots Nos. 3197, 3198, 3199 and 3200. The Plaintiff, having produced a valid title deed issued in 1997 together with certified records from the Land Adjudication and Settlement Office, demonstrated a lawful and traceable root of title. The Defendants, on the other hand, failed to establish a legitimate antecedent root for the 4th Defendant's title or to show procedural compliance in the sub - division process.

178. The Defendants' entry, occupation, and dealings with the suit property without the authority, consent, or permission of the Plaintiff — the lawful owner — constituted trespass. By subdividing and purporting to alienate the property, the

Defendants deprived the Plaintiff of the use and quiet enjoyment of his land. In those circumstances, the Plaintiff is entitled to the reliefs sought.

179. In the case of **“Phillip Aluchio - Versus - Crispinus Ngayo [2014] eKLR”** Obaga, J. held:-

“...The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.....”

The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”

180. The provision of Section 3(1) of the Trespass Act, Cap. 294 criminalises entry or occupation of private land without the consent of the owner. The Defendants’ actions in subdividing and purporting to transfer the land amounted to trespass.

181. In the present case, the Plaintiff did not provide valuation evidence of the land before and after the trespass. However, considering the expansive nature of the property and the prolonged interference, the Court finds that an award of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) as general damages is reasonable and sufficient compensation.

182. On aggravated damages, these are awarded where the Defendant’s conduct is sufficiently outrageous. In this case,

the Court finds that the award of general damages adequately compensates the Plaintiff, and aggravated damages are not warranted.

183. Consequently, the Plaintiff is entitled to rectification of the register, cancellation of the Defendants' title, permanent injunctive orders and general damages for trespass.

ISSUE No. (f) Who will bear the costs of the Suit

184. Under this sub - title, the Honourable Court shall examine on who bears the costs of the suit. It's now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of Civil Procedure Act, Cap. 21 provides that costs follow the events.

185. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of **"Jasbir Rai Singh Rai - Versus Tarchalon Singh (2014) eKLR**; and the case **Rose Mary Wambui Munene - Versus - Ihururu Dairies Co - Operative Limited (2014) eKLR, Kenya Sugar Board - Versus - Ndungu Gathini (2013) eKLR**; and **Cecilia Nyayo - Versus Barclays Bank of Kenya Limited (2016) eKLR"** where Courts held that:-

"The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case".

186. In the instant case, the Plaintiff has succeeded in proving ownership of LR No. Kilifi/Mtwapa/206, demonstrated a valid root of title, and established that the Defendants' actions in sub - dividing and purporting to alienate the property were unlawful and amounted to trespass. The Defendants failed to discharge their burden of proof on fraud or irregularity and did not establish a lawful interest in the suit property.

187. Consequently, the Plaintiff is the successful party. There are no special circumstances warranting a departure from the general rule. The Defendants, having occasioned the litigation by their unlawful acts, shall therefore bear the costs of the suit together with interest at Court rates from the date of judgment until payment in full.

IX. Conclusion and disposition

188. Ultimately, upon conducting an elaborate analysis of the framed issues herein, this Honourable Court concludes, on a balance of probabilities, that the Plaintiff has successfully established his case against the Defendants. For avoidance of doubt, I specifically make the following orders: -

a) THAT Judgment be and is hereby entered in favour of the Plaintiff in accordance with his Amended Plaint dated 9th November 2018;

b) THAT a declaration be and is hereby made that the Plaintiff is the lawful and registered proprietor of LR No. Kilifi/Mtwapa/206, having acquired a valid root of title traceable to the Settlement Fund Trustees through Ismail Adam and ultimately registered in his name on 24th April 1997.

- c) **THAT** the Land Registrar, Kilifi, do and is hereby directed to rectify the land register by cancelling the entries in favour of the 1st and 4th Defendants, including the sub - divisions into Plots Nos. 3197, 3198, 3199 and 3200, and restoring the Plaintiff's title to LR No. Kilifi/Mtwapa/206.
- d) **THAT** a permanent injunction be and is hereby issued restraining the Defendants, whether by themselves, their servants, agents, employees, or anyone acting under their authority, from entering, interfering with, trespassing upon, alienating, or in any manner whatsoever disturbing the Plaintiff's quiet possession and enjoyment of the suit property.
- e) **THAT** the Defendants' purported sub - division and occupation of the suit property is hereby declared unlawful and irregular, the same having been effected without a lawful root of title or compliance with statutory procedures.
- f) **THAT** the Plaintiff is awarded general damages for trespass assessed at Kenya Shillings Ten Million (Kshs. 10,000,000/-), together with interest at Court rates from the date of this Judgment until payment in full.
- g) **THAT** the Plaintiff shall be entitled to interest on the award in (f) at Court rates from the date of filing the suit until payment in full.
- h) **THAT** the costs of this suit shall be borne by the 1st , 2nd , 3rd & 4th Defendants jointly and severally, the Plaintiff having succeeded in his claim.

IT IS ORDERED ACCORDINGLY.

**JUDGEMENT DELIVERED THROUGH MICRO - SOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....
17THDAY OF.....APRIL..... 2026.**

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

Judgment delivered in the presence of:

- (a) Mr. Fridaus Mbula, the Court Assistant;
- (b) Mr. Hassan Ali Advocate for the Plaintiff; and
- (c) No appearance for 1st, 2nd, 3rd & 4th Defendants.