

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E013 OF 2024

PETER **KIRWA**
SANG-----
PLAINTIFF

VERSUS

ROSE JEPKOECH LAGAT-----
1ST DEFENDANT
BENJAMIN L. LAGAT-----**2ND**
DEFENDANT
JOAN JEBET BARTAI-----
3RD DEFENDANT

JUDGMENT

1. The plaintiff approached this court through a plaint dated **2/4/2024**, the primary suit, suing the 1st, 2nd, and 3rd defendants. He sought:
 - (a) **Declaration that the transfer of Land Parcel No. Trans Nzoia/Maridadi/629, hereinafter the suit land, to the 3rd defendant, was fraudulent and should be cancelled by this court.**
 - (b) **Declaration that he is the rightful owner of 15 acres contained in the suit land.**
 - (c) **Declaration that the plaintiff has acquired by way of adverse possession ownership of the residual 5.3 acres or thereabouts contained in the suit land.**

(d) An order of restoration of the title to the suit land to the estate of the late Gabriel Rotich Bartai for transmission to himself.

(e) Permanent injunction.

- 2.** The plaintiff contends that he purchased **15 acres** of land, which he took possession of with effect from **1985**, out of Land Title No. **Trans Nzoia/Maridadi/317**, from the late Gabriel Rotich Bartai, whose estate is now represented by the 1st and 2nd defendants, by offsetting a loan owed by the allottee to the Settlement Fund Trustees, by way of a mutual agreement.
- 3.** The plaintiff avers that the 1st and 2nd defendants, while obtaining letters of administration for the estate of the deceased, deliberately failed to disclose to the probate court that he was a beneficiary to the estate as a purchaser or a creditor.
- 4.** The plaintiff avers that after confronting the 1st and 2nd defendants about his interest in the estate, the 1st and 2nd defendants affirmed the same vide a sale agreement dated **9/2/2020**, who were then proprietors of parcel No. **Trans Nzoia/Maridadi/317**, measuring **47** acres or

thereabouts, having acquired it through transmission.

5. The plaintiff avers that recently he discovered that the 1st and 2nd defendants, despite the said agreement, have since transferred the **15 acres** rightfully belonging to him, known as Title No. **Trans Nzoia/Maridadi/629** measuring **15 acres** to the 3rd defendant, based on a certificate of confirmation of grant dated **10/11/2009**, despite the 1st defendant having signed a transfer form in his favour, and initiated the process of seeking a Land Control Board Consent.
6. Further, the plaintiff avers that the acts of the 1st and 2nd defendants are shocking since he has been in occupation of the suit property since **1985**, both as an agent and caretaker of the deceased for the whole of **47 acres**, structures on the suit land, made development therein with eucalyptus trees, for over **15 years**. The plaintiff avers that the defendants have instructed surveyors to demarcate and place beacons on the suit property without his consent, which will make him lose the said property.
7. The 1st - 3rd defendants oppose the suit through an amended defence and counterclaim dated

1/10/2024 (the 1st counterclaim); they deny that there being no agreement for the sale of the suit property entered into between the plaintiff and the deceased; it was unnecessary to involve the plaintiff in succession proceedings, which he had no interest or connection with.

- 8.** The 1st - 3rd defendants aver that any sale agreement that may have been entered into upon the death of the registered owner is not enforceable in law, hence cannot anchor any claim.
- 9.** Again, the 1st - 3rd defendants aver that the alleged sale agreement post-death of the registered owner was not sanctioned by the estate, hence was illegal, null, and void. The 1st and 2nd defendants aver that they do not require the plaintiff's consent to demarcate their own property or deal with it in any manner; otherwise, the plaintiff cannot claim to lose that which he does not have.
- 10.** By way of a counterclaim, the defendants, as the plaintiffs, sued the primary plaintiff as the 1st defendant and a third party, who was not in the initial suit, as the 2nd defendant in the counterclaim. It is averred that the 3rd defendant is the registered owner of the suit land measuring **8.22 Ha** or

thereabouts, which the defendants in the counterclaim, without any notice or colour of right, have trespassed onto claiming ownership.

11. The plaintiffs in the counterclaim aver that, vide a sale agreement dated **14/8/2013**, the 1st defendant in the counterclaim purported to sell a portion of the suit land to the 2nd defendant, who thereafter proceeded to erect a temporary structure on the suit land as a residential home contrary to the proprietary interest of the 3rd defendant in the main suit.

12. The 3rd defendant in the main suit averred that there has never been any transaction regarding her parcel of land between her or the estate of her late father, with the defendants or any other parties. The 3rd defendant in the primary suit terms the acts of the 1st and 2nd defendants in the secondary suit as causing her irreparable loss, damage, and further terms the alleged claim of ownership by the said defendant as illegal, fraudulent, null, and void, and actuated by malice for:

(a) *Converting the structure on the suit land into a residential home without his consent or authority.*

- (b) *Making the developments without an approved plan.*
- (c) *Selling the land without his authority.*

13. The plaintiffs in the counterclaim, therefore, pray for:

- (a) **Declaration that the 3rd defendant in the main suit is the legitimate owner of the title to the suit land.**
- (b) **Eviction of the defendants in the counterclaim from the suit land.**
- (c) **Permanent injunction.**

14. The 2nd defendant in the counterclaim opposed the counterclaim through a statement of defence dated **13/5/2025**. It is averred that on **13/8/2013**, the 2nd defendant bought part of the suit land then known as **Trans Nzoia/Maridadi/317** measuring 4 acres from the legal beneficiary of the estate, the 1st defendant in the counterclaim, by virtue of purchase for **Kshs.60,000/=**, and thereby took immediate possession and has been in uninterrupted use and possession for **11 years** before this suit was filed.

15. The 2nd defendant insists that he is a *bona fide* purchaser of the portion from a legal beneficiary of the estate of the late Gabriel Bartai, without any fraud or illegality on his part. The 2nd defendant

terms the counterclaim as invalid, unlawful, and untenable.

- 16.** By way of a counterclaim lacking titular heading (the 2nd counterclaim dated **13/5/2025**) the 2nd defendant in the primary defendants counterclaim reiterates that he lawfully purchased **4 acres** out of the suit land from the plaintiff in the main suit after confirming the legality of his purchaser rights through a sale agreement dated **9/2/2010**, after which he paid full purchase price, took vacant possession, developed the land and has been uninterrupted use, possession and occupation therein since **2013** to date, until **2014** when he was sued in this case.
- 17.** The 2nd defendant counterclaims without specifying the defendants for:
- (a) Declaration that 4 acres out of the suit land, which is a subdivision of Trans Nzoia/Maridadi/317, belong to him.**
 - (b) Permanent injunction.**
- 18.** By a reply to defence and defence to the counterclaim dated **7/2/2025**, the primary plaintiff denies the contents of the counterclaim dated **1/10/2024** generally and in particular as regards fraud and or illegality. The plaintiff avers that he

has been in possession of the suit land for a period exceeding **25 years**, after buying it from the late Mr Bartai, before it was fraudulently transferred to the defendants.

- 19.** Before the hearing, the parties filed an agreed list of issues dated **19/3/2025**. At the hearing, Peter Kirwa Sang testified as PW1. He relied on a witness statement dated **2/4/2024** as his evidence in chief. His testimony was that he bought **15 acres** of Land Title No. **Trans Nzoia/Maridadi/317** from the late Gabriel Rotich Bartai in **2004**, by offsetting the Settlement Fund Trustees' loan through a mutual agreement, which was of interest during the succession proceedings over the estate, was deliberately overlooked and ignored by the 1st and 2nd defendants, as the legal administrator of the estate, as either a beneficiary or creditor.
- 20.** PW1 said that by an agreement dated **9/2/2010**, the 1st defendant affirmed his interest in **15 acres** in the land, which he had acquired by virtue of transmission.
- 21.** PW1 said that the 1st defendant went on to sign the transfer form in his favour and also initiated the process of seeking a Land Control Board Consent.

- 22.** PW1 said that he used to have a very cordial relationship with the 1st defendant and her deceased husband, having both been their agent or caretaker for **25 years** over the whole **47 acres** of the larger farm. PW1 said that after buying the **15 acres**, he started developing by planting eucalyptus trees, which are more than **15 years** old.
- 23.** PW1 relied on a bundle of letters and receipts as **P. Exhibit Nos. (1)** and **(2)**, a copy of a sale agreement dated **9/2/2010** as **P. Exhibit No. (3)**, a copy of the certificate of confirmation of grant issued on **10/11/2001** in respect of the estate of the deceased as **P. Exhibit No. (4)**, a copy of the title deed for parcel No. **Trans Nzoia/Maridadi/317** issued on **22/1/2014** as **P. Exhibit No (5)**, copy of an official search certificate dated **13/3/2024** as **P. Exhibit No. (6)**, certified copy of a green card dated **20/3/2024** as **P. Exhibit No. (7)**, a copy of the signed transfer form dated **9/2/2020** as **P. Exhibit No. (8)**, copies of the Land Control Board Application Form for consent as **P. Exhibit No. (9)**, bundle of photographs as **P. Exhibit No. (10)**, copy of a letter dated **16/2/2023** from County Survey as **P. Exhibit No.(11)**.

- 24.** PW1 told the court that he used to be a neighbour of the deceased, then working in Mombasa, who told him to take over his land as caretaker. PW1 said that by then, the deceased had an outstanding loan with the Settlement Fund Trustees for the allocated land. PW1 said that in **October 2003**, the Settlement Fund Trustees gave notices to repossess the land to the loan defaulters, and since the deceased had no capacity at the time to clear the arrears of **KShs. 172,266/=**, he paid the same on his behalf, leaving out a balance of **Kshs.12,266/=** which her had allegedly paid **Kshs.30,000/=** at the DC's office in Mombasa. PW1 said that since the balance was not cleared, there was an accrued interest which the 1st and 2nd defendants cleared in **2012**.
- 25.** PW1 said that he accompanied the 1st and 2nd defendants to the Land Registry in Nairobi, where they requested a statement of the deceased's account, which lacked the alleged payment of **Kshs. 30,000/=** by the deceased. PW1 said that at the Settlement Fund Trustees headquarters, they were able to confirm that they had paid **Kshs.158,000/=**. PW1 said that the 1st and 2nd

defendants, after the Nairobi visit and the signing of the transfer form, became evasive and instead continued disposing of the land to third parties, yet he has been in occupation for over **25 years**.

26. PW1 said that he was shocked to receive **P. Exhibit No. (11)**, which did not include his name as one of the beneficiaries in early **2014**. PW1 said that his trees on the land have been there for over **15 years** alongside a permanent structure. PW1 said that the defendants have never evicted him from the land. PW1 confirmed that he has in **2013** sold **4 acres** out of the **15 acres** to the 2nd defendant in the counterclaim, who has erected a permanent house on the portion.

27. PW1 said that out of the **17 acres, 13.5 acres** are under eucalyptus trees. PW1 said that he moved into the **17.5 acres** in **2010**; otherwise, before then, he was the caretaker of the **47 acres** comprised of the mother title. PW1 said that after the deceased passed on, the elders and the widow of the deceased came to him and insisted that he take up only **15 acres**, culminating in the sale agreement dated **February 2010**, with the 1st defendant producing the transfer form and the Land

Control Board application forms as **P. Exhibit No. (3)**.

- 28.** PW1 admitted that, as per **P. Exhibit No. (8)**, the Settlement Fund Trustees were the initial owners of the sui land with effect from **11/11/1994** to **22/1/2014**, when they transferred the same to the 1st and 2nd defendants. PW1 said that between **2014** and **2024**, he was still on the land, though **P. Exhibit No. (3)** had not been signed by the 2nd defendant as required in paragraph **3** thereof. Equally,
- 29.** PW1 admitted that the application for Land Control Board Consent and the transfer forms were not executed by the 2nd defendant or represented before the Land Control Board.
- 30.** PW1 said that he was the bona fide caretaker of the deceased since **1985**, undertaking all the cultivation on the land on his behalf, though he had no formal lease agreement as per **P. Exhibit No. (5)**. PW1 said that before **2014**, he had no written notice terminating his agency relationship with the deceased or his estate. PW1 said that there was an intention to formally reduce their sale agreement with the deceased into writing as per the

correspondence before the court, which never materialised.

- 31.** PW1 denied that the correspondence was overtaken by events. PW1 said that he cleared the outstanding loan with the Settlement Fund Trustees as part of the consideration to acquire the **15 acres** out of mutual trust following a request to do so by the deceased. PW1 said that it is out of mutual understanding and discussion with the deceased that he paid the loan arrears as per the original receipts before the court by **2004**, following a demand for the arrears in **November 2003**.
- 32.** As per **P. Exhibit No. (11)**, PW1 said that his name is not indicated therein, which he suspects was deliberate. PW1 admitted that after **10/11/2009**, dealing with the suit land required the involvement of the 1st and 2nd defendants. PW1 said that the portion he is occupying is now under the name of the 3rd defendant with effect from **24/11/2022**.
- 33.** PW1 admitted that he sold the **4 acres** to the 2nd defendant in the counterclaim in **2013** based on his earlier agreement, though the land belonged to the Settlement Fund Trustees. PW1 said that he is the

one who cleared about **95%** of the loan when the notice came out in **2003**. PW1 said that he and the 1st defendant voluntarily signed **P. Exhibit No. (8)** and **(9)**.

- 34. Ernest Langat** testified as **PW2**. He told the court that her was a Land Adjudication & Settlement Officer with the County Government of Trans Nzoia. PW2 produced a loan statement regarding parcel No. **317** measuring **50 acres**, showing that the initial allottee was the late Gabriel Bartai, whose principal account was **Kshs. 49,884/=** a two-year capital attacking an interest of **Kshs.6,484/=**, totalling in **Kshs.56,364/=**, payable in **28 years**, with a biannual interest of **Kshs.2,199/=**, daily interest, and penalties in case of a default.
- 35.** PW2 told the court that, after the offer was accepted, the allottee executed a charge on **28/8/1987**, paid a **10%** deposit, and a conveyance fee of **Kshs. 5,547/=** on **3/8/1984**. PW2 said that after default, a demand notice was issued in **1989**, leading to a payment of **Kshs.25,000/=** on **22/8/1990**, at the District Officers, Mombasa.
- 36.** PW2 said that the loan statement shows other payments of **Kshs. 53,000/=**, **Kshs. 30,000/=**,

Kshs. 40,000/=, Kshs. 15,000/=, Kshs.20,000/=, Kshs. 35,000/=, paid on 27/1/2004, 15/3/2004, 23/3/2004, 25/3/2004, and 22/3/1990.

- 37.** PW1 said that after all these payments, there was still a balance of **Kshs. 20,000/=** plus interest and penalties. PW2 said that a final payment of **Kshs. 84,282/=** was made on **4/5/2012**. PW1 said that the loan was cleared within **28 years**. He produced the final receipts, schedules of payments, and the statement as **P. Exhibit No. (12)**. PW2 confirmed that the charge was created and executed in **1982** and **1987**, respectively. PW2 said that it would amount to a breach of the charge to transfer or dispose of the land without the discharge of the charge being executed or the loan being cleared on **4/5/2012**.
- 38.** PW2 said that all demand notices were sent to the allottee, and so were the payments. PW2 admitted that all the payments made by **2004** were not enough to clear the loan, given the penalties and interests on the balance. PW2 said that his records do not reflect any other payee apart from the allottee. PW2 clarified that the payee would have

original receipts for the loan repayments. PW2 said that the loan period was to expire on **13/6/2010**.

- 39. Gabriel Naibei** testified as **PW3**. He relied on a witness statement dated **7/3/2025** as his evidence-in-chief. As a village elder and in Maridadi village, PW3 told the court that the plaintiff has been his neighbour since **1985** and was also a caretaker of Parcel No. **Trans Nzoia/Mariadai/317**, part of which was bought from the allottee by assisting him in clearing the loan with the Settlement Fund Trustees.
- 40. PW3** confirmed that the plaintiff was the one who planted eucalyptus trees on the disputed land, now in the maturity stage, and had also erected a house therein. PW3 similarly told the court that he was aware of Ben Wafula's developments on the part of the suit land.
- 41. Benjamin K. Langat** testified as **DW1**. He relied on an undated witness statement, whose date of filing is not clear. DW1 told the court that after the late Gabriel Rotich Bartai, a brother-in-law, passed on, he was appointed alongside the 1st defendant as the legal administrator to his estate through a grant confirmed on **26/10/2009** in **Eldoret High Court**

Succession Cause No. 165 of 2008, while the 3rd defendant was still a minor.

- 42.** DW1 said that after the grant was confirmed, they embarked on the process of obtaining titles in respect of the estate property. DW1 said that as of the date of the deceased's death, parcel No. **Trans Nzoia/Mareidadi/317**, measuring **19.5 acres**, was registered in favour of the Settlement Fund Trustees, who effected the transfer on **3/9/2012**, leading to the issuance of a title deed under their name on **22/1/2014**.
- 43.** DW1 said that thereafter, they caused the parcel to be equally subdivided into portions in **2022**, to the three beneficiaries, and transferred. Title No. **Trans Nzoia/Maridadi/629** to the 3rd defendant on **24/11/2022**, being her entitlement. DW1 said that he was not aware of any sale in favour of the plaintiff, either by the 1st defendant, or the deceased, otherwise, to the best of his knowledge, the estate had not sanctioned such a transaction.
- 44.** DW1 said that the plaintiff is misleading the court by relying on a letter as a basis for the alleged sale. DW1 said that a subsequent letter by the plaintiff to the deceased indicates that he was struggling

financially, with no ability to purchase the land. DW1 said that the alleged agreement and transfer dated **9/2/2018** is illegal, for it was not executed by and after the involvement of all the parties to the estate, since he was not involved. DW1 said that he had no obligation in law or equity to abide by the terms and conditions of the said documents.

45. DW1 relied on a copy of a grant issued on **2/2/2009**, a certificate of confirmation of grant issued on **10/11/2009**, letter from the District Land Adjudication & Settlement Officer dated **11/11/2008**, transfer and discharge of charge dated **3/9/2012**, death certificate issued on **26/3/2008**, copies of receipts payment to Settlement Fund Trustees dated 3/8/1984 and **22/3/1990**, letters dated **31/3/1992**, **26/5/1993**, **27/3/1993**, **17/3/1993**, as **D. Exhibit No. (1), (2), (3), 4(a) and (b), (5), 6(a) and (b), (7), (8), (9), (10), and (11)** respectively.

46. Further, DW1 said that he came across correspondence between the plaintiff and the deceased showing that the plaintiff, who was a neighbour, was acting as an agent or caretaker for the deceased with respect to the suit property and

no more. For instance, DW1 said that **P. Exhibit No. 1(b)** dated **21/1/1991**, the deceased was insisting that he clear the loan arrears first before they could exchange the land with the plaintiff portion in Lessos, which arrangement did not materialise by the time the deceased passed on, by way of a sale agreement. DW1 said that the letter of offer for **28 years** was expiring in **2010**.

47. DW1 said that after obtaining the certificate of grant, they visited both the suit property and the land office in Kitale, where they were informed of the outstanding loan amount and paid **KShs. 84,295/=** to the Settlement Fund Trustees' offices, Nairobi, giving rise to the discharge of the charge dated **3/9/2012** and a transfer form. DW1 said that the three parcels of land have since been subdivided into nine portions as per a copy of the green card, produced as **P. Exhibit No. (7)**.

48. DW1 said that the suit land was still in the name of the Settlement Fund Trustees when **P. Exhibit No. (3)** was signed on **9/2/2010**. DW1 said that **Kshs.158,000/=**, captured in Clause No. **(1)** of **P. Exhibit No. (3)** contradicts the deceased's own letter dated **7/4/1993** (Produced as **D. Exhibit No.**

(11), showing that the plaintiff was a mere agent, being sent to the Settlement Fund Trustees to make payments on behalf of the deceased.

- 49.** DW1 said that the plaintiff's justification for demanding **15 acres** of land from the suit land is not supported by any documentary evidence; otherwise, it is the deceased who solely cleared the loan as per **D. Exhibit No. 6(a) and (b)**. DW1 said that he had no original receipts reflecting the said payments, especially in view of the demand letter dated **4/9/2003**, produced as **P. Exhibit No. (1) and (11)**.
- 50.** DW1 confirmed that he found a structure and grown-up trees on the land when he visited the suit land after the issuance of the grant. DW1 admitted that the deceased and his family were largely living in Mombasa and Iten, and not on the suit land. DW1 said that after obtaining the letters of grant, they did not object to or write to the trespassers to cease any acts of development or yield vacant possession to them between **2009** and **2016**.
- 51.** DW1 confirmed that several portions of the estate have been disposed of to third parties to cater for the school fees of the beneficiaries, even before the

trespassers were removed. DW1 said that he could not tell how the trespassers gained entry and erected permanent structures or developments on the land. DW1 could not explain how the co-administrator signed the sale agreement and transfer on **9/2/2010** with the plaintiff without his input, before an advocate called Stephen Lel, a former speaker, Uasin Gichu County Assembly.

52. DW1 confirmed that from **P. Exhibit No. (3)**, the plaintiff was both a caretaker and occupant of the land, to ward off intruders. DW1 confirmed that his first visit to the land was on **20/3/2014**, when he found it vacant. DW1 confirmed that **P.Exhibit No. (13)** from the deceased referred to the tree plantation.

53. Rose Jepkoech Langat testified as **DW2**. She relied on a witness statement dated **3/5/2024** as her evidence in chief. She associated herself with the evidence of DW1. DW2 said that her late husband did not allude to any sale of the suit property to the plaintiff during his lifetime. She, however, said that she had come across some correspondence from the deceased to the plaintiff, showing that although the latter had some interest

in acquiring the land, he did not manage to raise the funds required for an agreement to be then executed.

- 54.** DW2 said that an agreement to transfer a portion of the property by herself to the plaintiff was a mere proposal, which was subject to the consent of the 2nd defendant, which unfortunately was not obtained. DW2 said that she has been unable to confirm if the plaintiff made any payment as he alleges; otherwise, it is she and the co-administrator who cleared the loan.
- 55.** DW2 said that the subdivision and transfer of the suit land to the beneficiaries were lawful and procedurally done. DW2 said that her late husband had the financial capacity to clear the loan since, after retiring from the armed forces, he was employed as a chief security officer at Kenya Pipeline Mombasa. DW2 confirmed that she first visited the land in **1998** and that by **2014**, the plaintiff was still the caretaker, as he was also their neighbour.
- 56.** DW2 said that she was not privy to any sale agreement, its terms and conditions, between the plaintiff and her deceased husband, including the

offsetting of the loan as part of the consideration. DW2 said that she was not at liberty to engage the plaintiff in the processing of documentation for the estate after her husband passed on in **2008**. DW2 confirmed that she has since disposed of her share of **16.7 acres**, out of the initial land, leaving behind the share for the 3rd defendant, now occupied by trespassers.

- 57.** DW2 inserted that the alleged developments on the suit land, as per the photographs, occurred after **2018**, save for the trees, which are over **8 years** old. DW2 admitted that ordinarily, receipts for loan payments would be issued to the payee, and in this case, the payee is indicated in all the receipts as her late husband. DW2 admitted that she willingly signed **P. Exhibit No. (3) and (8)** before Stephen Lel on **9/2/2010**, acknowledging payment of **Kshs.158,000/=** part of the loan by the plaintiff, to which she committed to surrender 15 acres to the plaintiff.
- 58.** DW2 also admitted that she surrendered her original documents after signing **P. Exhibit No. (3) and (8)** to the plaintiff. She said that it was not done under duress or undue influence. Similarly, DW2 said that

in **P. Exhibit No. (3) and (8)**, she admitted that the plaintiff had been in continuous occupation of the suit land as a caretaker, which documents, unfortunately, were not executed by either the co-administrator or any member of her family.

- 59. Joan Chebet Bartai** testified as **DW3**, though she had not filed any witness statement. She confirmed that her counterclaim is dated **1/10/2024**. DW3 confirmed that she is the registered owner of title No. **Trans Nzoia/Maridadi/629**, with effect from **24/11/2022**, which initially was part of her father's estate.
- 60.** DW3 denied that her land overlaps that claimed by the plaintiff. DW3 confirmed that the illegal developments on her land were in existence before she became the registered owner.
- 61.** DW3 admitted that from the correspondence exchange between her late father and the plaintiff, it appears the latter had been on the land for a while. DW3 said that she did not convene any meeting with the plaintiff to establish on what basis he has been on the land, other than being a caretaker of the estate.

- 62. Ben Wafula Matere** testified as **DW4**. He relied on a witness statement dated **13/5/2025** as his evidence in chief. DW4 confirmed that he bought **4 acres** of the suit land from the plaintiff in **2013**, took vacant possession, and has developed a permanent house on the land without objection by the defendants. DW4 relied on a sale agreement dated **9/3/2010** and **14/8/2013** as **D. Exhibit No. 12(a)** and **(b)** and photographs as **D. Exhibit No. 13(a) - (f)**. He asked the court to allow his counterclaim. DW4 confirmed that surveyors visited the land claiming it belonged to DW3, yet nobody had complained about his occupation since taking vacant possession in **2013**.
- 63.** DW4 said that, apart from the sale agreement dated **9/2/2010**, shown to him by the plaintiff, he conducted no other due diligence to establish the owner of the land. DW4 confirmed that he never visited the land office or the Land Control Board with the plaintiff to effect the transfer in his favour, though he knew that the registered owner had passed on.
- 64.** DW4 said that he did not engage the co-administrators of the estate in the sale. He denied

that he bought the land from someone who had no capacity to dispose of it. Equally, DW4 admitted that he had no approved building plans for his house.

- 65.** The plaintiff relies on written submissions dated **14/2/2026**. It is submitted that from the receipts produced before the court, the plaintiff paid a total of **Kshs.158,000/=** as of **2004**, which translates into **92%** of the loan arrears, as substantiated by PW2, to be entitled to the **15 acres** claimed in the plaint dated **2/4/2024**. The plaintiff submits that all these payments were made in furtherance of the mutual agreement for the purchaser of **15 acres** as per the correspondence exchanged between the plaintiff and the deceased.
- 66.** The plaintiff submits that, on top of paying the amount, he took possession of the land and has remained therein to date with the knowledge of the defendants herein, which the 1st defendant acknowledged in the sale agreement dated **9/2/2010**, produced as **P. Exhibit No. (3)**.
- 67.** The plaintiff submits that the said transaction satisfies the requirements of the Law of Contract Act. Reliance is placed on **Willy Kimutai Kitili -vs- Michael Kibet [2018] eKLR** and **Botwa Farm Co.**

Ltd -vs- Settlement Fund Trustees Civil Appeal No. 239 of 2009, on the doctrine of constructive trust, proprietary estoppel, and that payment of the purchase price and taking of vacant possession as an equitable interest enforceable in law.

- 68.** The plaintiff submits that the deceased held the suit land in trust for him to the extent that he purchased the portion. Relying on **Chief Land & Others -vs- Nathan Tirop Koech & Others [2018] eKLR**, and **Zinj Ltd -vs- Attorney General & Others [2019] eKLR**, the plaintiff submits that **Articles 40(1) and (3), 60(1)(b)** of the Constitution, having legally, lawfully, and continuously offset a substantial amount of the principal amount, with a clear understanding with the deceased in which his receipts and other documents have not been challenged, coupled with taking possession, such rights or interest, should have been disclosed to the probate court by the 1st and 2nd defendants, otherwise, the grant was issued and confirmed without disclosure of material facts under **Section 76** of the Law of Succession Act, making them flawed, and fundamentally defective, to be capable

of conveying any valid title to the 3rd defendant over his portion.

- 69.** Reliance is placed on **Munya -vs- Kithinji & Others [2014] eKLR**. The plaintiff submits that, having pleaded and particularised fraud, the transmission of the title for the portion to the 3rd defendant by the 1st and 2nd defendants was therefore obtained through fraud, or misrepresentation, and through the use of an already tainted succession process. Reliance is placed on **Arthi Highway Developers Ltd -vs- West End Butchery Ltd & Others [2015] eKLR**.
- 70.** Further, the plaintiff submits that he has been in open, continuous, exclusive, and uninterrupted occupation of **5.3 acres** of land, title No. **Trans Nzoia/Maridadi/629** since **1985**, which he has developed, and planted eucalyptus trees now over **15 years** old, which extinguish the title held by the 3rd defendant in respect of the **5.3 acres**.
- 71.** The plaintiff submits that the defendants' conduct demonstrates deliberate concealment, misrepresentation, and total disregard of his proprietary interests on the land, which, if allowed, would amount to unjust enrichment and miscarriage

of justice. Reliance is placed on **Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kagiri [2014] eKLR.**

- 72.** The defendants in the main suit and the 3rd defendant, as the plaintiffs in the counterclaim, rely on written submissions dated **16/2/2026**, isolating five issues for the court's determination arising from the plaintiff's list of issues dated **20/6/2025** and the agreed one dated **21/6/2025**.
- 73.** The defendants submit that parties are bound by their pleadings and issues for the court's determination arise therefrom, as held in **Beatrice Okoth -vs- Francis Pius Omweri Nyaberi & Another, Nairobi Civil Appeal No. 348 of 2018, Galaxy Plaints Co. Ltd -vs- Falcon Guards Ltd [2000] eKLR,** and therefore the court can only pronounce judgment on issues arising from the pleading or such as have been framed by the parties.
- 74.** On whether the plaintiffs acquired any interest in the suit by dint of adverse possession, the defendants submit that **P. Exhibit No. (1) and (2)** are letters indicating the idea of the sale of property and later an exchange of plots as per **D. Exhibit**

No. (7), which were never concluded. The defendants submit that for adverse possession to be established, the plaintiff had to first show that the land was registered in the name of the alleged owner as per **Sections 7 and 38** of the Limitation of Actions Act, followed by the ingredients set out in **Mtana Lewa -vs- Kahindi Ngala Mwagandi [2015] KECA 544, Mate Gitabi -vs- Jane Kaburu Muga alias Jane Kaburu Muga & Others [2017] eKLR, Kasuve -vs- Mwaani Investments Ltd & Others [2004] eKLR** and **Haro Yonda Juaje vs Sadaka Dzenzo Mbauro & Another [2014] eKLR**.

- 75.** The defendants submit that there is ample evidence that the plaintiff was an agent of the deceased on land which belonged to the Settlement Fund Trustees with effect from **11/11/1994** till **21/1/2014** in favour of the 1st and 2nd defendants. Therefore, the defendants submit that **Section 37**, as read together with **Section 41** of **Cap 22**, precludes an adverse possession claim over land belonging to the government or public land as held in **Boniface Oredo -vs- Wabomba Mukile CA No. 170 of 1989**.

- 76.** The defendants submit that the time for adverse possession could only start to run in favour of the plaintiff with effect from **22/1/2014**, when the 1st and 2nd defendants became the registered owners, and which unfortunately stopped when they asserted ownership and made an effective entry thereon. Reliance is placed on **Joseph Gachumi Kiritu -vs- Lawrence Munyambu Kabura [1996] eKLR.**
- 77.** The defendants submit that even assuming that time began to run in **1994**, the Settlement Fund Trustees have not been joined in the suit, hence a party who is not in a suit should not be condemned unheard as held in **IMK -vs- MWM & Another [2015] eKLR, Onyango -vs- Attorney General [1986-1989] EA 456** and **Mwaki & Others -vs- Macharia & Another [2005] 2 EA 206,**
- 78.** On whether the plaintiff was a *bona fide* purchaser for value, the defendants submit that there was no evidence that the deceased was under pressure from the Settlement Fund Trustees to approach him to clear the loan; otherwise, the land could be repossessed. The defendants submit that the newspaper advertisement had no relation to the

Settlement Fund Trustees, hence the plaintiff's oral agreement is founded on a lie and, hence, discloses no cause of action.

- 79.** Further, the defendants submit that he who comes to equity must come with clean hands; no agreement of sale was made between the deceased and the plaintiff; particulars of the terms and conditions are lacking, and the total consideration and timelines to show a clear meeting of the mind are missing. The defendants submit that mere custody of the original receipts of payments to the Settlement Fund Trustees, which do not bear the names of the plaintiff, already admitted to be an agent, does not turn on anything. To entitle the plaintiff to the reliefs sought on a non-existent sale agreement in compliance with **Section 3(3)** of the Law of Contract Act.
- 80.** Reliance is placed on **Tsavo Academy Co. Ltd & Another -vs- Voi Development Co. Ltd Civil Appeal No. E034 of 2023 [2025] KECA 2231 [KLR]**, and in **Jacob Wekesa Bokoko Balongo -vs- Kincho Olokio Adeya & Another [2020] KECA 928 [KLR]**.

- 81.** The defendants submit that the sale agreement dated **9/2/2010** was only signed by the 1st defendant and not by both joint administrators of the estate of the deceased, making the same null and void. Reliance is placed on **Re Estate Rahab Nyawira Thuu (Deceased) [2023] KEHC 20958 [KLR](26th July 2023) (Ruling)**.
- 82.** As to the interest of the plaintiff and the 3rd defendant over the suit land, the defendants submit that the 3rd defendant as the registered owner unlike the plaintiff is entitled to vacant possession by dint of **Section 24 (1)** of the Land Registration Act, since the plaintiff and the 2nd defendant in the counterclaim has no legal or justifiable reason why they should interfere with the right as an absolute owner of the land. The defendants submit that the plaintiff and the 2nd defendant in the counterclaim have not managed to impeach the title held by the 3rd defendant, who lawfully, procedurally, and regularly obtained title out of transmission and is entitled to protection of her rights of ownership under **Article 40** of the Constitution.
- 83.** Regarding the 2nd defendant's counterclaim, the defendants in the main suit submit that the sale

between the plaintiff in the main suit and the 2nd defendant in the counterclaim fails because there was no Land Control Board consent, under **Section 6(1)** of the Land Control Board Act, Cap **302**. Reliance is placed on ***Kariuki -vs- Kariuki [1983] KLR 225***.

- 84.** The defendants submit that since the plaintiff had no valid passable interest to the 2nd defendant in the counterclaim, the sale agreement dated **14/8/2013**, based on the doctrine of *nemo dat quod non habet*, was of no legal effect. Reliance is placed on ***Chemutai Too -vs- Nickson Kipkurui Korir & Others [2015] eKLR***.
- 85.** Regarding fraud in the succession proceedings, the defendant submitted that the plaintiff had not met the standard of proof because he was neither a beneficiary nor a creditor to the estate. Reliance is placed on ***Kinyanjui Kamau -vs- George Kamau [2015] eKLR***. The defendants submit that since the 3rd defendant is a registered owner of the suit land, the title under **Section 26** of the Land Registration Act is prima facie proof of ownership in the absence of a challenge of grounds of fraud or misrepresentation to which she was a party, based

on credible evidence, her title, ownership, use, and possession right should be protected by way of the reliefs sought in the counterclaim for the plaintiff and the 2nd defendants are trespassers on the land. Reliance is placed on **Dr. Joseph N.K. Ng'ok -vs- Justice Moiyo Ol Keiwua & Others [1997]eKLR,** and **Park Towers Ltd -vs- John Mithamo & Another [2014] eKLR.**

- 86.** The 2nd defendant in the counterclaim relies on written submissions dated **14/2/2026**, isolating three issues for determination. It is submitted that the 2nd defendant has discharged the burden under **Sections 107** and **108** of the Evidence Act, that he purchased four acres of land from the plaintiff over the suit property, who was then a beneficial owner, free from any encumbrances as per the sale agreement dated **14/8/2013**, to which he took vacant possession, has developed the land with no adverse claims or objection from the co-defendants.
- 87.** The 2nd defendant submits that his rights are equitably protectable as held in **Willy Kimutai Kitilit -vs- Michael Kibet** (*supra*). The 2nd defendant submits that the court is being called upon to confirm whether a trust was created

between the plaintiff and the 1st defendant, and which he could pass to the 2nd defendant under **Section 28** of the Land Registration Act.

88. Again, the 2nd defendant submits that the occupation of the land by the plaintiff in the main suit for over **25 years** amounted to overriding interests protectable in law and in equity. The defendant submits that equity always protects the rights of the oppressed. In this case, it is submitted that the deceased and the plaintiff had an interest in transferring **15 acres** of the suit land, which the 1st defendant knew of, and hence the 1st and 2nd defendants, for over **12 years**, did not drive out the plaintiff from the land. The court is therefore asked to prevent the injustice as a court of equity and grant the reliefs sought.

89. The court has carefully gone through the pleadings, evidence tendered, written submissions, and the law. The issues calling for my determination are:

(1) If the 1st and 2nd defendants in the primary suit obtained letters of grant and their confirmation by concealing material facts and without disclosing the interests of the primary plaintiff in the suit land.

(2) If the plaintiff in the main suit has established that the 1st and 2nd defendants

obtained a grant of letters of administration in the estate of the late Gabriel Rotich Bartai, by concealing material facts from the Probate Court, generally and in particular that the plaintiff had acquired an interest or was a purchaser of 15 acres, out of Land Title No. Trans Nzoia/Maridadi/317 from the deceased, since 2004, by offsetting the Settlement Fund Trustees' loan through a mutual agreement.

- (3) If the 1st defendant knew of and affirmed the plaintiff's interest in the agreement and transfer form dated 9/2/2010.**
- (4) If the plaintiff has proved that, following the mutual agreement with the deceased, he took vacant possession of and has developed the portion measuring 15 acres.**
- (5) If the 1st and 2nd defendants deliberately failed to disclose the interests of the plaintiff on the suit land to the 3rd defendant while effecting the transfer of Title No. Trans Nzoia/Maridadi/629.**
- (6) If the 1st and 2nd defendants had a duty to involve the plaintiff in the succession proceedings or disclose his interest over the alleged mutual agreement as both a caretaker, agent, and neighbour of the deceased.**
- (7) If the sale agreement or arrangement between the plaintiff and the deceased or between the plaintiff and the 1st defendant**

had any legal effect or should have been sanctioned by the estate of the deceased.

- (8) If the 3rd defendant, the plaintiff in the 1st counterclaim, was bona fide and an absolute registered owner of Land Title No. Trans Nzoia/Maridadi/629, without notice of the interests of both the plaintiff and the 2nd defendant in the counterclaim.**
- (9) If the 3rd defendant in the defence and the plaintiff in the 1st counterclaim has pleaded and proved that the defendants in the counterclaim were trespassers to her land or fictitious and or illegal occupants and claimants to her legitimate ownership right.**
- (10) If the 2nd defendant in the 2nd counterclaim has proved that he is a bona fide purchaser and occupant of the four acres out of Title No. Trans Nzoia/Maridadi/629, a resultant subdivision of Trans Nzoia/Maridadi/317 from the primary plaintiff.**
- (11) If the primary plaintiff is entitled to prayers no. (a), (b), (c), (d), and (e) of the plaint dated 2/4/2024.**
- (12) If the 3rd defendant, the plaintiff in the counterclaim, is entitled to the reliefs sought against the defendants in the counterclaim.**

(13) If the 2nd defendant, the plaintiff in the 2nd counterclaim, is entitled to the reliefs sought in the 2nd counterclaim against the primary plaintiff.

(14) What is the order as to costs?

- 90.** The plaintiff's case is that his interests in **15 acres** of the suit land were acquired by mutual agreement with the deceased, in which he offset the outstanding loan of **Kshs. 158,000/=**, at the request of the deceased, followed by vacant possession and developments thereon of over **15** years, which allegedly were overlooked and or not disclosed to the probate court by the 1st and 2nd defendants, who went ahead to transfer Land Title No. **Trans Nzoia/Maridadi/629** to the 3rd defendant, despite the 1st defendant having affirmed his interests vide a sale agreement dated **9/2/2010** and Land Control Board application and transfer forms thereof.
- 91.** The 1st and 2nd defendants deny that the primary plaintiff had any enforceable interests or rights on the land capable of disclosure. Further, the 1st and 2nd defendants aver that they owed the plaintiff no obligation since the land, until 2012, belonged to the Settlement Fund Trustees.

- 92.** It is trite law that parties are bound by their pleadings and issues for determination arises from the pleadings. In **Beatrice Okoth -vs- Francis Pius Omweri Nyaberi & Another, Nairobi Civil Appeal No. 248 of 2018,** and in **Galaxy Paints Co. Ltd -vs- Falcon Guards Ltd** (*supra*), the courts said that court are bound by the parties pleadings and only adjudicate upon the specific matters in dispute, raised in both the plaint and the defence, or issues raised therefrom or framed by the parties.
- 93.** There is no dispute that Plot No. **317 Maridadi** was, until **22/1/2014**, registered in the name of the Settlement Fund Trustees, when a charge and discharge were registered as entry No. **(1)** and **(2)** a copy of the register opened on **11/11/1994**. There is no evidence that the late Gabriel Rotich Bartai, before he passed on on **12/1/2008**, had become the registered owner of the title No. **Trans Nzoia/Maridadi/317**.
- 94.** **Section 3** of the Law of Succession Act, **Cap 160**, provides that only free property of a deceased forms part of their estate, and is available for distribution. Ownership of Plot No. **317** by the deceased is

lacking. The role of a probate court ends with the confirmation of a grant. In the **Estate of Daniel Khasievera Anusu (Deceased) [2022] eKLR**, the court said that the remit of the probate court is limited to the distribution of the assets of the estate, and that it is not the role or function of the probate court or mandate to superadded over how the land is to be thereafter distributed. The court said that transmission of property as per the certificate of confirmation of grant is a concept in land or property law, and does not fall under the regulation of succession law.

95. Section 35(1) of the Law of Succession Act provides that a certificate of confirmation of grant takes the form of a schedule of all properties of the estate under the name of the deceased as extracted under **Section 71** thereof. A confirmation of a grant empowers the petitioners under **Section 35(2) thereof** to apportion any part of the estate to the beneficiaries.

96. In Torino Enterprises Ltd -vs- The Attorney General [2023] KESC 79[KLR], the court said that it is the act of registration that confers a transferable interest and not the possession of an

allotment letter. From the court records, the suit land up to the date of confirmation of the grant on **10/11/2009** was owned by the Settlement Fund Trustees.

- 97.** In **Eliud Nyongesa Lusenaka & Another -vs- Nathan Wekesa Omocha [1994] eKLR**, the court held that land owned by Settlement Fund Trustees, which was a body corporate under the repealed **Section 167(1)** of the Agriculture Act, was a mere chargee and not land owned by the government.
- 98.** In **Boniface Orebo -vs- Wabomba Mukile Civil Appeal No. 170 of 1989**, the Court of Appeal said that the interest of Settlement Fund Trustees is really that of a chargee, which is to lend money for development to persons to whom it has allocated land, and the repayment of such money is secured by a charge upon the property.
- 99.** From **D.Exhibit No. (3)**, as of the death of the allottee on **12/1/2008**, he had a pending loan of **Kshs. 75,000/=**. The transfer and discharge of charge in favour of the 1st and 2nd defendants as per **D. Exhibit No. 4(a)** and **(b)** took place after the grant was confirmed. **D. Exhibit No. (3)** indicate payment made on **15/3/2004, 22/3/2004**, and

25/3/2004. It does not reflect **Kshs.158,000/=** paid by the plaintiff. The defendants could not tell who exactly paid those monies.

100. D. Exhibit No. (12) is for **Kshs. 84,285/=** paid on **4/5/2012.** It does not indicate if the payee was the 1st and 2nd defendants since the allottee had passed on on **12/1/2008.** **D. Exhibit No. (2)** does not include the particulars of Title No. **Trans Nzoia/Maridadi/317** or its resultant subdivisions.

101. In **Botwa Farm Co. Ltd -vs- Settlement Fund Trustees** (*supra*), the court cited **John Kamunya & Another -vs- John Nginyo Muchiri & Others [2015] eKLR**, that no contractual relationship concerning the suit land could be legally be created as between the purchaser and the seller before the seller had discharged his indebtedness to the Settlement Fund Trustees and had the title to the suit land transferred to his name as the owner.

102. In **Samuel Ndungu Gitu -vs- Danson Ndungu & Others [2001] eKLR**, the issue was whether land belonging to Settlement Fund Trustees could be held through adverse possession. The court cited **Boniface Oredo -vs- Wabomba Mukile** (*supra*), that the interest of Settlement Fund Trustees in the

suit was not extinguished under **Cap 22** by dint of **Section 37** thereof and **Section 175** of the Agriculture Act (repealed). The court made a finding that the decision of **Eliud Nyongesa Lusenaka & Another -vs- Nathan Wekesa Omocha Civil Appeal No.134 of 1993** was wrong for overlooking **Section 37** of the **Limitation of Actions Act** and **Section 175** of the Agriculture Act (repealed).

103. In **Boit -vs- Ali & Another Civil Appeal No. 5 of 2015 [2021] KECA 270[KLR] (3rd December 2021) (Judgment)**, the court affirmed the inapplicability of adverse possession as the land was registered under the Settlement Fund Trustees until **2003**, by dint of **Section 41(a) (1)** of the Law of Limitation of Actions Act and **Section 175** of the Agriculture Act (repealed) and as held in **Gitu -vs- Ndungu [2001] 2 EA 379**.

104. In **David Muturi Migwi -vs- Sally Jemeli Korir & Another [2018] eKLR**, the court said that adverse possession claims require registration under the Limitation of Actions Act and that **Section 41 thereof** explicitly bars acquiring government land through adverse possession, and that Settlement Fund Trustees, being such a government entity, the

land through allocated by the Settlement Fund Trustees retained control due to the unpaid loan. The court said that even though the deceased had a contingent interest, adverse possession cannot extinguish government-held titles.

105. The court said that the appellant's claim was legally untenable, and the respondent's (deceased heirs) inherited a non-registrable interest. The court said that since the deceased had not completed the title acquisition process with the Settlement Fund Trustees, and was never registered as the proprietor, there was no claim based on adverse possession for unregistered land was premature.

106. What the court is faced with is the 1st and 2nd defendants, who proceeded to obtain letters of administration over plot No. **317**, which the deceased had not perfected its charge. The plaintiff pleaded that the defendants concealed material facts and or failed to disclose that he had substantially offset the loan with the Settlement Fund Trustees, taken vacant possession of **15 acres**, and developed the same for over **25** years. The plaintiff pleads that the resultant title issued to the 3rd defendant by the 1st and 2nd defendants out

of the said process was fraudulent or irregular. He denied that he was a trespasser on the land.

- 107.** In **Mwangi & Another -vs- Mwangi [1986] KLR 328**, the court held that the right of a person in possession or occupation is an equitable right binding on the land. In **Francis Munyolo Mulinge & Others -vs- Gladys Mponda & Others Civil Appeal No. 167 of 2018**, the court said that given the 1st respondent's family having been in possession of the suit property since **1977**, their rights were binding on the suit property, and the 2nd respondent had no mandate to dispossess them of their rights that were overriding to a subsequent allottee.
- 108.** In **Dr. Sarah Jelangat Siele vs Attorney General & Others Civil Appeal No. 67 of 2016**, the court cited **Dr. Ng'ok -vs- Ole Keiwua Nairobi** (*supra*), that it is the law and law takes precedence over all other alleged equitable rights of title which can only be impeached on grounds of fraud or misrepresentation to which the owner is proved to be a party.
- 109.** Fraud consists of some deceitful practice or willful device, resorted to with the intention to deprive

another of his right or in some manner do him injury. In *Black's Law Dictionary, 10th Edition*, fraud is defined as consisting of a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. See **Kuria Kiarie Kiromo -vs- Settlement Fund Trustees & Others [2021] KEELC 1015 [KLR]**.

110. In **Republic & Others -vs- Kipruto & Another Civil Appeal Appl. No. 128 of 2018 [2025] (3rd October 2025) (Ruling)**, the court cited *Black's Law Dictionary, 10th Edition*, that misrepresentation is the act or instance of making a false or misleading assertion about something with the intent to deceive, which is also known to be incorrect, unfair, or false. A mistake was defined as an error, misconception, or misrepresentation.

111. Fraud, as held in **Fanikiwa Ltd & Others -vs- Siriwa Squatters Group Petition No. 32, 35, and 36 of 2022**, must be specifically pleaded and proved. Further, in **Odhiambo -vs- Wanyanga & Another Civil Appeal No. E073 of 2020 [225] KECA 1621 [KLR] (3rd October 2025)**

(Judgment), the court held that the burden is on he who asserts to prove the existence of certain facts.

112. The court cited **Eldoret Express Ltd -vs- Tawai Ltd & Another [2019] eKLR**, that fraud is a serious thing to allege and should be discharged as held in **Patel -vs- Lalji Makanji [1957] eKLR**, on a higher burden to show the wickedness of the mind. See also **Kinyanjui Kamau -vs- George Kamau [2015] eKLR**.

113. In **Machuka & another -vs- Nyangute & another (Civil Appeal 166 of 2019) [2025] KECA 538 (KLR) (21 March 2025) (Judgment)**, the issue was whether the grant had been issued by failing to disclose or leaving out beneficiaries and purchasers interested in the estate. The court found that there was concealment of material information justifying the court to revoke the grant.

114. In this suit, the 1st and 2nd defendants falsely included plot No. **317** in the application for letters of administration and in the schedule for confirmation of grant when they knew the charge had not been perfected, and the deceased was not registered as the owner of the land. Even after perfecting the charge, there is no evidence that the 1st and 2nd

defendants went back to the probate court to rectify the grant before they sought to be registered as joint owners of the mother title to the suit property before it was subdivided into three portions.

- 115.** There is also no evidence that the 1st and 2nd defendants ascertained from the Settlement Fund Trustees, who had cleared the initial loan, leaving a balance of **Kshs.84,285/=**. DW2 admitted the interest of the plaintiff in **P. Exhibit No. (3) and (8)**. The receipt dated **12/1/2004** is the payment of **Kshs.23,900/=**, by the plaintiff for the loan of Plot No. **326**. He also paid on the same day, **Kshs.53,000/=** for Plot No. **317**.
- 116.** DW2 admitted that she signed the transfer form and application for the Land Control Board consent and a sale agreement on **9/2/2010** willingly, voluntarily, and consciously, regarding **15 acres** of land forming part of Plot No. **317**. The sale agreement acknowledges the **Kshs. 158,000/=** paid directly to the Settlement Fund Trustees by the plaintiff, his occupation and developments on the land, and his role in safeguarding the entire parcel of land comprised of **47 acres** intact for over **25 years**.

- 117.** By the time the sale agreement, transfer form, and an application for the Land Control Board were being signed, the charge had not been perfected. The land, as held above, could not be subject to or be termed as free property of the deceased. So the argument by the 2nd and 3rd defendants that the estate of the deceased did not sanction the transactions is neither here nor there.
- 118.** In **Gichuki & Another -vs- Njenga & Others Civil Appeal No. 413 of 2019 [2026] KECA 374 [KLR] (27th February 2026) (Judgment)**, the court said free property means property which a person was legally competent to dispose of during his lifetime and was separate from one held in trust which a trustee cannot treat as his personal property and distribute at will to strangers, to defeat the trust and the interest of the trust beneficiaries.
- 119.** The evidence tendered by the plaintiff and confirmed by the 2nd defendant through **P. Exhibit No. (1), D. Exhibit Nos. (7), (8), (9), (10), (11)** all point to a mutual relationship between the plaintiff and the late Gabriel Bartai.
- 120.** The correspondences cover a period of over **15 years**. In his letter dated **7/4/1993**, the deceased

confirmed that since the allocation of the plot by the Settlement Fund Trustees in **1985**, he had not permanently moved to the farm, save for placing some of his cattle under the care of the plaintiff, who was his neighbour. The deceased specifically refers to the plaintiff both as his agent and caretaker, whom he had entrusted with duties of liaising with the Land Adjudication and Settlement Officers in relation to the then alleged encroachers on his land and the settling of boundary disputes.

- 121.** The deceased confirmed in the said letter that he had ceded some authority over the land to the plaintiff, including the erection of a fence and the overall security of his land. The letter is copied to several government officers and to the plaintiff. In a letter dated **3/12/1991**, the District Settlement Officer confirms that there was a boundary dispute regarding plots Nos. **317, 324, and 326**, requiring a surveyor to visit the land. In the letter dated **1/2/2014**, the 2nd defendant has signed the copy, agreeing to a re-surveying of each of the individual plots and for a re-adjustment, as the case might be.
- 122.** In a letter dated **21/1/1991**, the deceased informed the plaintiff about the payment of **Kshs.35,000/=**

loan arrears and urged that as soon as he clears the outstanding balance of **Kshs. 10,880/=**, they would sit down to discuss the issue of the exchange of land in Lessos belonging to the plaintiff and the suit land. In the letter dated **22/10/1986**, the plaintiff had been assured by the deceased to be patient; otherwise, nobody was going to take the land, for he had already paid the 10% deposit to the Settlement Fund Trustees. In a letter dated **22/9/1990**, the deceased confirmed payment of **Kshs.35,000/=** in response to a demand letter dated **22/12/1989** from the Settlement Fund Trustees. The letter is also copied to the plaintiff.

123. In the letter dated **17/3/1993**, the deceased and the plaintiff assured each other that they would eventually reach a deal. The plaintiff, in the meantime, requested to plant trees on five acres, drain the flooded area, and continue grazing his cattle on the land.

124. In the amended defence and counterclaim dated **1/10/2024**, the 1st and 2nd defendants at paragraph 5 plead that there being no agreement for sale of the suit property entered into between the plaintiff and the deceased, they had no reason to involve the

plaintiff in the succession proceedings in connection with and further any sale agreement entered upon the death of the registered owner is not enforceable in law, hence cannot anchor a claim.

125. The defendants term the alleged sale agreement as null and void and unenforceable. Further, the defendants aver that the plaintiff cannot claim to lose that which he did not have.

126. Coming to the counterclaim, the 3rd defendant, as the plaintiff in the counterclaim, she blames the plaintiff and the 2nd defendant in the counterclaim for entry into the land without notice or colour of right, the erection of developments and structures therein without her knowledge, consent, or authority. The 3rd defendant also denies that her late father had entered into any transaction over the suit land with the primary plaintiff to justify the purported trespass and fictitious claim of ownership.

127. The 3rd defendant terms the acts of the primary plaintiff and the 2nd defendant in the counterclaim as fraudulent, illegal, and unjustified; hence prays for a declaration that she is the legitimate owner, entitled to eviction and permanent injunction orders, against

the primary plaintiff and the 2nd defendant in her counterclaim.

- 128.** One of the agreed issues for determination by the parties is whether the primary plaintiff has or did acquire any proprietary interest over the suit property, a resultant subdivision of the mother title capable of passing part of it to the 2nd defendant, who is entitled to its possession, occupation, and use.
- 129.** In their defence and testimony, the 1st and 2nd defendants relied on undated witness statements. DW1 and DW2 admit that the deceased passed on on **12/1/2008**, after which they embarked on seeking letters of grant and their confirmation. Both in their witness statements admit that until **3/9/2012**, Plot No. **317** was still registered in the name of the Settlement Fund Trustees and only came to their names on **22/1/2014**.
- 130.** The 1st - 3rd defendants deny the contents, implication, and purport of the letters written by the deceased as amounting to any sale in favour of the plaintiff. As a matter of fact, DW2 in her witness statement at paragraph **7** confirms coming across correspondence between her late husband and the

plaintiff. In her witness statement, she says that although the plaintiff had expressed interest in acquiring the land from her late husband, he did not raise the funds required for an agreement to be executed.

131. The 1st defendant terms the sale agreement, application for Land Control Board consents, and transfer form dated **9/2/2010**, which she executed before Stephen Lel, advocate, as a mere proposal, which was subject to a consent from the 2nd defendant. The 1st defendant in her witness statement says that she is unable to confirm if the plaintiff made any payment to the Settlement Fund Trustees of **Kshs.158,000/=**, otherwise, it is she and the 2nd defendant who made the payments to the Settlement Fund Trustees to secure the discharge of the charge and the transfer.

132. The 1st - 3rd defendants in the amended defence and counterclaim did not specifically plead that the original payment receipts of **Kshs. 158,000/=** held by the plaintiff and produced before this court, confirming payment of **Kshs. 158,000/=** to the Settlement Fund Trustees was forged or unlawfully obtained from the custody of the estate of the

deceased. Equally, the defendants did not cause the letters written to the plaintiff by the deceased to be subjected to any forensic examination for being forgeries.

- 133.** Similarly, in their pleadings and witness statements, the primary defendants are silent on the claim by the plaintiff that they withheld, concealed, and or failed to disclose to the probate court material facts or information regarding his beneficial interest in the suit land, by virtue of purchase, offsetting of the loan with the Settlement Fund Trustees through mutual agreement between himself and the deceased.
- 134.** Admission of the said interest by the 1st defendant on **9/2/2010** and the cordial relationship as a caretaker, neighbour, and agent in existence between the plaintiff, the 1st defendant, and the deceased with effect from **1985**, till his demise in **2008**, as the person in charge of the whole parcel of land measuring **47** acres.
- 135.** What the primary plaintiff has pleaded in paragraph **7** of the plaint is a beneficial interest or being a beneficiary of the estate. *Black's Law Dictionary 11th Edition, at page 191* defines beneficial interest

or beneficial ownership, as consisting in a right that derives from something other than legal title, or someone who is designated to receive the advantages from an action or change, one designated to benefit from an opportunity, or to receive something as a result of a legal arrangement or instrument, a person whom another is in a fiduciary relation, whether the relation is one of agency, guardianship, or trust, someone who is initially entitled to enforce promise, whether that person is the promisee or a third party.

136. In paragraph **15** of the plaint, the plaintiff specifically pleaded that having been in occupation of the suit parcel since **1985**, and had a cordial relationship with the 1st defendant and her late husband, as their agent and caretaker, for **25 years** over the whole **47 acres** comprised in title No. **Trans Nzoia/Maridadi/317**, which he had developed with eucalyptus trees older than **15 years**, which history and developments the 1st defendant acknowledged on **9/2/2010**, the acts to send surveyors, transfer and register the land in favour of the 3rd defendant came as a shock, as without his consent and or amount to him losing his

interest which he obtained for value, and was a creditor to the estate, as pleaded in paragraph **10** of the plaint.

137. A creditor and a beneficiary under *Black's Law Dictionary, 11th Edition, page 192*, is defined as a third-party beneficiary of a contract, who is owed a debt that is to be satisfied by another party's performance under the contract. A creditor refers to one who is owed a debt or an obligation. See *Black's Laws Dictionary, 11th Edition, page 464*.

138. An agent or caretaker, on the other hand, in page **76** of the *Black's Law Dictionary 11th Edition*, is defined as a relationship that arises when one person manifests assent to another that the agent will act on the principal's behalf, subject to the principal's control, and the agent manifests assent or otherwise consents to do so. The basic theory of agency is defined as enabling a person, through the services of another, to broaden the scope of his activities and to receive the product of another's efforts, paying such other for what he does, but retaining for himself any net benefit resulting from the work performed.

- 139.** An agency coupled with an interest is defined as a relationship in which one party holds an irrevocable power to take action on behalf of another to protect legal or equitable title or to secure performance of a duty apart from any duty owed to the holder by the grantor of the power.
- 140.** In **Ali Abid Mohammed -vs- Kenya Shell & Co. Ltd [2017]**, the court said a contract can exist when no words are used but can be inferred from the conduct of the parties that a contract has been concluded.
- 141.** In **Industrial & Commercial Development Corporation -vs- Patheon Ltd [2015] eKLR**, the court cited **Garnac Grain Co. Inc. -vs- H.M. Faure & Fair Dough Ltd & Another [1967] 2 ALLER 353**, that the relationship of the principal and agent can be established by the consent of the two if they have agreed, on the said oral contract, or already being in possession of the land, he continued in possession in part performance of the oral contract.
- 142.** The court said that **Section 3(7)** of the Law of Contract Act makes execution of oral contracts for the sale of land, followed by part performance, which were concluded before **Section 3(3)** of the

Law of Contract Act came into force. The cases of **Tsavo Academy Co. Ltd & Another -vs- Voi Development Co. Ltd [2025] KECA 2231** (*supra*), and **Jacob Wekesa Bokoko -vs- Olokio Adeya & Another [2020] KECA 928 KLR**, though good law, are not applicable in the circumstances of this suit, where the events relate to pre **1/6/2003**, for what amounts in law to such a relationship, even if they do not recognise it themselves.

- 143.** From the foregoing case law, I do not doubt in my mind that there existed an agency relationship which subsisted even beyond the death of the deceased in **2008** till the 1st defendant confirmed the same by an agreement dated **9/2/2010**.
- 144.** The next issue is whether there was an agreement of sale between the deceased and the plaintiff before he died in 2008. In **Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another [2014] eKLR**, the court stated it is trite that there are three essential elements for a valid contract: an offer, acceptance, and consideration. From the pleadings by the primary plaintiff, he says he took vacant possession of the **15 acres** initially as a caretaker, or agent, in **1985**, and later, after

paying the **Kshs. 158,000/=** as a purchaser to date. The defendants, in their amended statement of defence and counterclaim, generally deny the existence of any sale agreement or intention to do so.

- 145.** In **Boit -vs- Ali & Another Civil Appeal No. 50 of 2015 [2020] KECA 270 [KLR] (3rd December 2021) (Judgment)**, the suit land, just like in this suit, initially belonged to the Settlement Fund Trustees. The appellant, as the purchaser, had paid the purchase price in **1972**, after which they took possession, paid the loan to the Settlement Fund Trustees, and developed the suit property. They were shocked when the respondents came into the suit land after secretly registering the same in their names.
- 146.** There was nothing in the Settlement Fund Trustees' records to show the sale agreement. Through a visit by the Settlement Fund Trustees to the land in **1998**, the appellant's family was found on the land. Evidence was there that between **1979** and **2003**, the Settlement Fund Trustees were the registered owner of the land.

- 147.** On appeal, the court held that it was true that **Section 3(3)** of the Law of the Contract Act came into force on **1/6/2003**, and therefore, did not apply to the oral contract for sale. The court said that even if the Section was not applicable, still, at the trial court, they had not produced the agreement of sale as an exhibit; what was produced from the Settlement Fund Trustees was a document with major discrepancies and therefore was unreliable.
- 148.** In this suit, the plaintiff relies on correspondence made between him and the deceased between **1986** and **2003**. Similarly, he relies on the agreement dated **9/2/2010** confirming the earlier payment of **Kshs.158,000/=** to the Settlement Fund Trustees.
- 149.** In *Peter Mbiri Michuki -vs- Samuel Mugo Michuki [2014] KECA 342 [KLR]*, an alleged agreement of sale of land was said to have taken place in **1964**, coupled with vacant possession. It was attacked for non-compliance with the Law of Contract Act.
- 150.** The court found the sale agreement outside the purview of the Land Control Act **1967**, and **Section 3(3)** of the Law of Contract Act. The court held that

before **1/6/2003**, the law only required satisfaction, by the claimant, of either taking possession of the suit property in part performance of the agreement.

151. In this suit, the plaintiff has pleaded to having offset the Settlement Fund Trustees' loan by way of a mutual agreement with the deceased. Evidence of intention to create a legal relation followed by part performance has not been disputed by the defendants. The agency with interest spreading from **1985** to the death of the deceased has been disputed.

152. Accrual of beneficial interest to the land by the plaintiff has not been refuted by the defendants, save to term his alleged claim for ownership as both fraudulent and illegal. Fraud or illegality must be specifically pleaded and specifically proved on a balance higher than in ordinary civil suits but below that in criminal proceedings. See **Vijay Morjaria - vs- Nansingh Madhusingh Darbar [2000] KECA 34 (KLR).**

153. The plaintiff has brought a multifaceted claim. On the cited law in this judgment, the claim based on adverse possession does not apply by dint of **Section 41** of the Limitation of Actions Act and

Section 175 of the repealed Agriculture Act. The court finds no basis to address the same.

- 154.** Furthermore, claims based on adverse possession cannot arise where the claimant is also alleging superior rights or questioning the proprietorship of the registered owner. See **Songoi -vs- Songoi [2020] eKLR, Mtana Lewa -vs- Kahindi Ngala Mwangandi (supra), Wambugu -vs- Njuguna [1983] eKLR, and Samuel Kihamba -vs- Mary Mbaisa [2015] eKLR.**
- 155.** In **M'Riria & Others -vs- Muthomi Civil Appeal No. 253 of 2019 [2025] KECA,** the court held that where the claimant is a purchaser under a contract of sale, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase. The court said that the possession can only become adverse once the contract is repudiated.
- 156.** The court held that where a claimant pleads the right to land under an agreement and in the alternative seeks an order of adverse possession, the rule is that the claimant's possession is deemed to become adverse to that of the owner after the

payment of the last instalment of the purchase price.

- 157.** Coming to whether the plaintiff is a trespasser on the land or laying an unjustified, illegal, and fraudulent claim to the suit land, the plaintiff relies on a plethora of correspondences to show that he was permitted to occupy the land by the deceased, initially as a caretaker/agent for the entire **47 acres** and later as a beneficial owner of the **15 acres**.
- 158.** The undisputed letters before this court, authored or written to various government offices by the deceased, are in black and white that the plaintiff was his recognised agent, caretaker, neighbour, and an authorised occupier of the land until he passed on.
- 159.** Courts do not rewrite contracts but give effect to them. In **Jovet (K) Ltd -vs- Bavaria N.O. Petition No. E039 of 2024**, the court cited **Heineken East African Import Co. Ltd & Another -vs- Maxam Ltd [2024] KECA 526 [KLR]**, that court, while applying or interpreting contract law, is bound by the imperatives set out in **Article 10** of the Constitution.

- 160.** In ***Kenya Railways & Others -vs- Okiya Omtatah Okoit & Others Petition No. 13 of 2020, as consolidated with Petition No. 18 (E019) of 2020***, the court in establishing the intent of parties cited ***RTS Flexible Systems Ltd -vs- Molkerei Alois Muller GmbH [2010] UKSC 1438***, that “whether there is a binding contract between the parties and, if so, upon what terms depend upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that lends objectively to a conclusion that they intended to create a legal relation and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.
- 161.** Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend an agreement of such terms to be a precondition to a concluded and legally binding agreement.”
- 162.** In ***Arvind Shah & Others -vs- Mombasa Bricks & Tiles Ltd, Petition No. 18 (E020) of 2022***, the

court said that the doctrines of equity under **Section 3(1)** of the Judicature Act and **Article 10** of the Constitution are applicable in Kenya. The court cited with approval **Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kagiri** (*supra*), and in **Willy Kimutai** (*supra*), that in matters involving the sale of land, equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case. The court said that under **Section 25** of the Land Registration Act, the rights of a proprietor are subject to such liabilities, rights or interests declared by **Section 28** not to require notices on the register unless, contrary to this, is expressed in the register, including under **Section 25(2)**, an obligation to which the person is subject as a trustee. The court said that overriding interests, which a title is subject to under **Section 28** of the Land Registration Act, include trusts.

163. The court said that a constructive trust is imposed to address a situation where it would be unjust for one party to retain legal ownership of property under unequitable circumstances, or to a victim of the wrong. The court said that a constructive trust can

be imported into a land sale agreement to defeat a registered title to avoid unjust enrichment.

164. In **Githae -vs Mwai & Others Civil Appeal No. 230 of 2018 [2025] KECA 1563, [KLR] (3rd October 2025) (Judgment)**, the court cited *Black's Law Dictionary 9th Edition*, that trust is a right enforceable solely in equity, to the beneficial enjoyment of property, to which another holds legal title, a property interest held by one person at the request of another for the benefit of a third party.

165. In **Diaproperty Ltd & Others -vs- Githae & Others Civil Appeal No. E155 and E157 of 2023 (consolidated) [2024] KECA 318 [KLR]**, the deceased administrator and the beneficiaries had concealed the prior sale during succession proceedings in **2006**, leading to the property being registered under their names, only for the purchasers to discover a caveat and find someone else in possession. The trial court established a constructive trust in favour of the occupant of **200 acres** due to his long possession and the deceased's conduct.

166. The trial court on appeal said that, despite procedural technicalities, the transaction was

enforceable in law, based on the deceased's sale to the respondent, his possession with effect from **1986** to **2023**, and the appellant's knowledge of that arrangement, which, in the court's view, amounted to an overriding interest intended by the Land Registration Act.

167. The Court of Appeal affirmed the decision and ruled that, unlike the Environment and Land Court, the probate court couldn't issue the ownership due to a lack of jurisdiction. Just like in this court, the evidence of the 3rd and 6th appellant was that they did not know that the deceased had sold part of the suit property to the respondent, as well as the balance, until they came across some documents that the deceased had left. The appellant had also denied possession of the land by the respondent during the lifetime of the deceased without interference.

168. As to attempts to transfer the land, the court held that, forged or not forged, a constructive trust over the portion was created in favour of the respondent and became an overriding interest when the deceased failed to obtain the necessary Land Control Board consent on time. The court said that

failure did not render the transaction void and unenforceable. On the interplay between the Environment and Land Court and the probate court, the court said that the 3rd appellant, in applying for letters of grant and its confirmation, had indicated the suit properties as one of the free properties of the deceased that was available for distribution among the beneficiaries.

- 169.** The court said that a succession court is limited to ascertaining what assets are available to the estate, while an Environment and Land Court under **Section 13** of the Environment and Land Court Act and **Article 162 2(b)** covers, *inter alia*, land ownership, its use, tenure, and boundaries. The court said that under **Rule 43(1)**, Probate and Administration Rules, a claim by a party as a beneficial holder to a parcel of land registered in the name of a deceased goes to the Environment and Land Court.
- 170.** In this suit, the court has already made a finding that the defendants concealed material facts, for the suit property never formed part of the deceased's free property as defined under **Section 3** of the Law of Succession Act. **Article 40(6)** of the Constitution

does not extend the rights to property unlawfully acquired. The 1st and 2nd defendants lacked the capacity to purport to use a grant for land which did not belong to the deceased at the time of his death. As held in **Mac Foy -vs- United Africa Co. Ltd [1961] 3 ALL ER 1169**, if an act is void, then it is, in law, a nullity.

- 171.** In **Kemboi -vs- Macharia & Others [2025] KECA 1665 [KLR]**, the court cited **Dina Management Limited -vs- County Government of Mombasa [2023] KESC 30[KLR]**, that when a root title is under challenge, the party must go beyond the instrument of ownership to prove that the acquisition was legal, formal, and free of any encumbrances, including interests which will not be noted in the register.
- 172.** The court said that a certificate of title cannot cure an unlawful allocation process, and if it is a product of a process tainted with procedural irregularities, then the resultant title is void, with no right that can flow from nothing. The court said that a nullity remains a nullity, no matter how many hands it passes through.

173. In **General & Another -vs- Hussein & Others [2025] KECA 1022 [KLR]**, the court cited with approval **Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School [2023] KLR**, that the elements of a good title include:

(a) *It must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question.*

(b) *It must contain a recognisable description of the property.*

(c) *It must not contain anything that casts any doubt on the title.*

174. In this suit, the 3rd defendant pleads that she is a *bona fide*, lawful, and absolute owner of Title No. **Trans Nzoia/Maridadi/629**, which she obtained from the 1st and 2nd defendants free of any encumbrances, including those alleged by the plaintiff and the defendants in her counterclaim.

175. The 3rd defendant in her counterclaim seeks eviction of the defendants from the land, terming them as trespassers. Trespass is covered by **Section 3(1)** of the Trespass Act. In **Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) -vs- Mwatsami (Civil Appeal E015 of 2020) [2024] KECA 579 (KLR) (24 May 2024)**

(Judgment), trespass was said to occur when a person enters upon land of another without permission, remains there without justification or authority.

176. In ***Muthiora -vs- Marion Muthama [2022] KECA 28 [KLR]***, trespass was defined as unauthorised entry, whether present or continuous. To prove trespass, the court in ***M’Kiara M’Mukunya & Another -vs- M’Mbijiwe [1984] eKLR***, said that one has to establish immediate exclusive possession whose rights have been violated by the intruder.

177. In ***Margaret Luyayi -vs- Moses Opondo Mundaka [2019] eKLR***, the court held that there was no wrongful entry or violation of the plaintiff’s rights of possession since the defendant had been invited there as a manfriend.

178. In ***Torino Enterprises Ltd -vs- Attorney General (supra)***, the court said that the fact that the land was occupied must have sounded a warning to the buyer to be aware of what it was purchasing. Due diligence includes visiting the land in addition to conducting an official search.

179. There is evidence that the plaintiff and the 2nd defendant in the 3rd defendant’s counterclaim were

on the land before the discharge of the charge, registration in favour of the 1st and 2nd defendants, and the subdivision of Title No. **Trans Nzoia/Maridadi/317** to the three, transfer and registration in favour of the 3rd defendant on **24/11/2022**. The 3rd defendant's counterclaim was not accompanied by any witness statement or list of documents, nor was it accompanied by the attached paper trial she used to obtain what she calls an absolute and indefeasible title.

180. Strangely, the list of documents dated **3/5/2024**, which the defendants relied upon, does not include any transfer forms between the 1st and 2nd defendants in respect to Title No. **Trans Nzoia/Maridadi/629**, a copy of her ID card, a copy of her title deed, Land Control Board consent for transfer, and an application for Land Control Board consent leading to the issuance of title in **November 2022**.

181. In reply to the defence and defence to the counterclaim dated **7/2/2025**, the plaintiff specifically denied the alleged fraud and illegality by the 3rd defendant. He specifically pleaded paragraph 6 thereof that he had been in possession

of the suit land for a period exceeding **25 years** after buying it from the 3rd defendant's deceased father.

- 182.** The plaintiff admits that he is the one who sued following trespass to his land and a fraudulent transfer of the land to the 3rd defendant.
- 183.** Despite such pleadings, the 3rd defendant did not find it necessary to write a witness statement or tender evidence in support of her counterclaim that the defendants to the counterclaim were relying on fraudulent documents or fictitious documents or laying stake to the suit land without justification. There is no evidence that the 3rd defendant gave notice to the defendants in the counterclaim to vacate the land after **2022**, when she acquired a title deed.
- 184.** There is evidence through the agreement for transfer dated **9/2/2010**, that the 1st defendant admitted that the primary plaintiff was in occupation of **15 acres** of plot No. **317**, which the 1st defendant desired to transfer to him as a recognition of **25 years** of service as a caretaker of the **47 acres** of land. The 3rd defendant did not object to the production of **D. Exhibits No. 12(a)** and **(b)**,

13(a), (b), (c), (d), (e), and (f), showing the developments by the defendants to the counterclaim in the suit land.

185. The mother title to the suit land came to the names of the 1st and 2nd defendants on **22/1/2014**. On **8/10/2019**, the title register was closed for subdivision as per the green card produced before the court.

186. In the letter dated **16/2/2023**, the County Surveyor was requesting boundary confirmation of parcels No. **629, 628, and 316**. It is this letter that triggered the filing of this suit by the primary plaintiff. The 3rd defendant in her testimony before the court was unable to tell the status of the suit land, which she claims to own, the date it was transferred to her, or the documented evidence before this court that the occupation, use, and developments on the suit land belonging to the defendants in her counterclaim predates **2013**, which was **10 years** before she acquired the title.

187. Eviction is governed by **Section 152A-I** of the Land Act. An eviction notice is a condition precedent in law. The right to housing is a constitutional right under **Article 43(1)** of the Constitution. In ***Moi***

Education Centre Co. Ltd -vs- William Musembi & Others Civil Appeal No. 363 of 2014, the court said that the legal framework in the Land Act **2016**, provide for the manner and procedure of eviction of a person in unlawful occupation of private, public, and community land, must be followed. An eviction order has far-reaching implications as it entails the forced removal of a party from the land.

188. In **Njeru -vs- Olendo ELC 1154 of 2015 [2025] KEELC 1403 [KLR]**, the court said that **Section 15E** of the Land Act requires a three-month notice of eviction to be issued to the person unlawfully occupying private land. **Section 152E** thereof envisages that there is no dispute on ownership, and the occupation is unlawful.

189. In **William Musembi -vs- Moi Educational Centre Co. Ltd (supra)**, the court held that the right to accessible and adequate housing could be applied inter se between private parties. What the defendants to the counterclaim are saying is that they had overriding interests subsisting before the 3rd defendant became the registered owner of the suit land, hence cannot be termed as trespassers to the alleged land.

- 190.** Other than alleging that she became a registered owner of the land in **November 2022**, the 3rd defendant does not know when or the circumstances under which the plaintiff in the main suit, and the defendants to her counterclaim, moved into the suit land.
- 191.** In *The Catholic Diocese of Mombasa Registered Trustees -vs- Pereira & 2 others (Suing as the Registered Trustees of Goan Community, Mombasa) & another (Civil Appeal E070 of 2023) [2026] KECA 295 (KLR) (20 February 2026) (Judgment)*, the court held that extrinsic evidence may only be admitted to aid interpretation where the contractual language is ambiguous, and not to contradict a document whose meaning is plain and unambiguous.
- 192.** The correspondences between the plaintiff and the 3rd defendant's late father were confirmed in the sale agreement entered into between the plaintiff and the 3rd defendant's own mother. Courts do not rewrite contracts. Voluntarily entering into the agreement in **2010** and operating under it before the 3rd defendant came into ownership means that the defendants affirmed its terms and assumed the

attendant obligations. The defendants are estopped in law from asserting, through oral evidence, that the 2nd defendant never intended or undertook the responsibility of approving the entry, occupation, and use of the suit land by the primary plaintiff.

193. Estoppel is an equitable doctrine that bars or prevents one from asserting a claim or right that contradicts what one had said or done before. See **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & Others [2014] eKLR**, quoting **Serah Njeri Mwobi -vs- John Kimani Njoroge CA No. 314 of 2009**. The sale agreement entered into between the 1st defendant and the plaintiff on **9/2/2010** has not been impeached on account of coercion, fraud, undue influence, or illegality as regards the permissive entry, use, and occupation of the suitland by the plaintiff for over **25 years**. See **National Bank of Kenya -vs- Pipe Plastic Samkokit (K)Ltd & Another [2001] eKLR**.

194. Guided by **Macharia Mwangi Maina** (*supra*), the court finds that the defendants in the 1st counterclaim are not trespassers on the land, but had subsisting overriding interests on the land,

which the title deed held by the 3rd defendant is subject to. Further, as held in **Mwangi & Another -vs- Mwangi [1986] KLR 328**, I find that the defendants in the 1st counterclaim had rights of possession or occupation of land, which are equitable rights binding on the land and which the title deed held by the 3rd defendant is subject to. See **Kanyi -vs- Muthiora [1984] KLR 712**, **William Kipsoi Sigei -vs- Kipkoech Arusei & Another [2019] eKLR**. In **Kiplagat Kotut -vs- Rose Jebor Kipngok [2019] eKLR**, the court held that the Land Control Act was never meant to exempt a mala fide vendor from his contractual obligation, or to aid unconscionable conduct between parties. The court held that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment, or to prevent unconscionable conduct by ensuring one party does not benefit at the expense of another.

195. The court, in the circumstances, finds that the 3rd defendant's counterclaim against the primary plaintiff and the 2nd defendant remains unsubstantiated.

- 196.** As to the reliefs sought by the plaintiff and the 2nd defendant in the counterclaim, the *ex turpi causa non oritur actio* principle is that a court should not enforce an illegal contract or allow itself to be made the instrument of enforcing an obligation alleged to arise out of a contract or transaction which is illegal and if the person invoking the aid of the court is himself implicated in the illegality. See **Kenya Airways Ltd -vs- Satwant Singh Flora [2013] eKLR.**
- 197.** In **Mwaura -vs- Maina & Another Civil Appeal No. 550 of 2019 [2026] KECA 298 (KLR) (20th February 2026) (Judgment)**, at issue was whether the agreement pleaded was an invalid, unenforceable oral contract for the sale and purchase of immovable property, and if it was supported by any consideration. The court cited *Chitty on Contract Vol. 1 General Principles 25th Edition page 3-151*, that executory consideration refers to the performance of an act of forbearance in return for a promise, and consists of mutual promises. The holding by the trial court that the agreement was valid was upheld.

- 198.** In this suit, what the plaintiff and the deceased agreed upon was not challenged on account of illegality, fraud, coercion, or undue influence. The court, as held in **Funzi Development Ltd & Others -vs- County Council of Kwale [2019] eKLR**, cannot, based on indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.
- 199. Article 40(6)** of the Constitution limits rights as not extending them to any property that has been found to have been unlawfully acquired. The title deed held by the 3rd defendant, having been successfully challenged by the plaintiff and the 2nd defendant in the 3rd defendant's counterclaim, the 3rd defendant cannot benefit from the indefeasibility of title.
- 200.** In **Lydia Wanjiru Muriithi -vs- The Hon. Attorney General Civil Appeal No. 435 of 2019**, the court cited **Dina Management Limited -vs- County Government of Mombasa**, that a title is an end process, and if the process of its issuance did not comply with the law, then such a title cannot be held as indefeasible.
- 201.** The onus was on the 3rd defendant to show that she did everything required by the law to satisfy herself

that the root of the title to the suit land was beyond reproach. The burden was on her to demonstrate that the title she holds does not suffer from any incapacities, illegalities, or encumbrances, including overriding rights.

202. The 1st, 2nd, and 3rd defendants have not pleaded and proved that the plaintiff was party to any illegality. It is the deceased and the 1st defendant who granted the plaintiff agency or caretaker powers, duties, and obligations for over **25 years** in relation to the **47 acres** of land. In the course of undertaking his duties, the plaintiff was granted overriding interests on **15 acres** of land.

203. There is evidence of payment of **Kshs.158,000/=** to the Settlement Fund Trustees to safeguard the allotted land from repossession. After the death of the principal, the 1st defendant affirmed the agency relationship and made a promise to the plaintiff. The sale agreement dated **9/2/2010** was never rescinded.

204. The court finds the plaintiff in the main suit entitled to orders in the following terms.

- a) **A declaration be, and is hereby issued that the transfer of Land Parcel No. Trans Nzoia/Maridadi/629, to the 3rd defendant, was fraudulent and is hereby cancelled.**
- b) **A declaration be, and is hereby issued that the plaintiff in the main suit is the rightful owner of 15 acres contained in the Land Parcel No. Trans Nzoia/Maridadi/629.**
- c) **An order be, and is hereby issued for the restoration of Land Parcel No. Trans Nzoia/Maridadi/629 to the plaintiff in the main suit.**
- d) **An order of permanent injunction is granted restraining the defendants, by themselves, their agents, servants, or employees, from interfering with Land Parcel No. Trans Nzoia/Maridadi/629.**
- e) **Costs of the suit and of the counterclaims to the plaintiff in the main suit.**

205. Orders accordingly.

Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 22nd day of April 2026.

In the presence of:

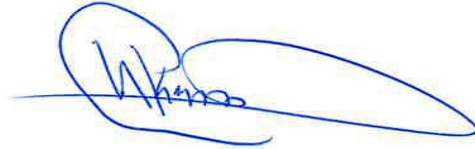
Court Assistant - Dennis

Plaintiff present

Tororei for the 1st, 2nd, and 3rd defendants present

Mukamo for Ambutsi for plaintiff present

Majanga for 2nd defendant in the counterclaim

A handwritten signature in blue ink, appearing to read 'C.K. Nzili', is written over a large, light grey watermark that says 'ORIGINAL COPY' diagonally across the page.

**HON. C.K. NZILI
JUDGE, ELC KITALE.**