



**Omar & another v Kulei & 2 others (Land Case E033 of 2023)  
[2025] KEELC 5916 (KLR) (5 August 2025) (Judgment)**

Neutral citation: [2025] KEELC 5916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
LAND CASE E033 OF 2023  
A OMBWAYO, J  
AUGUST 5, 2025**

**BETWEEN**

**OMAR MOHAMED OMAR ..... 1<sup>ST</sup> PLAINTIFF**

**PATRICK MAINA WAKANDA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSHUA KULEI ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR & ANOTHER & ANOTHER ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Parties Pleadings**

**Plaintiffs**

1. This suit revolves on a suit parcel of land known as Land Reference Number 13287/99 that was previously owned by the Agricultural Development Corporation. (ADC). The same was scheduled for judgment on the 12th of March 2025, four months ago but the same could not be delivered due to preliminary applications which have now been determined. Omar Mohammed Omar and Patrick Maina Wakanda (hereinafter referred to as the plaintiffs) have come to this court against Joshua Kulei, Chief Land Registrar, and the Hon. Attorney General (Hereinafter Referred to as the Defendants) by way of plaint stating that they have at all times material to this suit been the lawful and registered proprietors of property known as Land Reference Number 13287/99 (hereinafter referred to as the suit property) situated in at Ngata in Nakuru County within the Republic of Kenya. The plaintiffs aver that the suit property was allocated to them by the Agricultural Development Corporation for the purposes of purchase following application and upon complying with the conditions contained in the letter of offer. They attained registration thereof on or about 14th February 1996 and were issued with a duly registered Grant. The Plaintiffs plead that they took vacant possession of the suit property



- on or about 1996 immediately upon transfer and have enjoyed peaceful and uninterrupted occupation thereof.
2. On 21st October 2023 at about 4.00 am, agents of the 1st and 2nd Defendants in cahoots with other persons not known to the Plaintiffs and their agents unlawfully and without permission trespassed onto the suit property and started placing beacons and erecting a temporary fence around small portions the suit land that they had presumably sub-divided and excised from the suit property. The plaintiff upon being informed of the 1st and 4th Defendants acts of trespass have reported to the Directorate of Criminal Investigations and the police and the same is pending investigations.
  3. The plaintiffs lament that the 1st and 4th Defendants and their agents caused wanton destruction to the suit property with abandon during the violent trespass and attempted dispossession of the
  4. Plaintiffs and have interfered with the latters' right to peaceful occupation and enjoyment of the suit property. The conduct of the 1st and 4th Defendants and their agents has threatened the Plaintiffs with loss of occupation and user of the suit property. The Plaintiffs now harbor extreme and founded fear and anxiety that they risk being violently dispossessed of the suit property unless the Court intervenes.
  5. The impugned Conduct of the 1st Defendants is illegal and unlawful has infringed on the plaintiffs' right over the suit property. The Plaintiffs are apprehensive that unless the Honorable Court intervenes their constitutional right to acquire and own the suit property as envisaged in Article 40 of *the Constitution* has and shall continue to be infringed by the 1st and 4th Defendants. The plaintiffs aver that they are entitled to exclusive occupation and possession of the suit properties having demonstrated that they lawfully acquired the same and legally attained its registration in their favour on or about 14th February, 1996.
  6. The plaintiffs lament that they stand to suffer irreparable loss and damage unless the Court intervenes and stops the Defendants and their agents from trespassing onto the suit property or otherwise their' right to peaceful and quiet enjoyment of the suit property shall be infringed. Their demands to desist from the acts of violent trespass have been ignored by the 4th Defendant,
  7. The plaintiffs seek a declaration that they are lawfully registered as the proprietors of the property known as Land Reference Number 13287/99 situated in Ngata, within Nakuru County in the Republic of Kenya. Moreover, the plaintiffs seek a permanent injunction restraining the Defendants either by themselves, their servants or otherwise howsoever from interfering with the Plaintiffs quiet and peaceful possession and occupation of the suit property known as Land Reference ber13287/99 situated at Ngata, Rongai Sub-County within the Republic of Kenya,
  8. Furthermore, the plaintiffs seek a permanent injunction issued against the Defendants prohibiting them whether by themselves, their agents or servants from entering upon, transferring, occupying, leasing, charging, alienating, assigning or interfering with the Plaintiffs quiet possession of the suit property known as Land Reference Number 13287/99 situated at Ngata in Nakuru County in the Republic of Kenya, eviction order do issue and the Officer Commanding Station, Menengai Police other nearest police station do ensure compliance.
  9. The plaintiffs also seek a declaration that the 1st and 4th defendants have no legal right or recognizable interest over the property known as Land Reference Number 13287/99 Ngata in Nakuru County within the Republic of Kenya and any title document they hold is a nullity, null and void and stands revoked. The plaintiffs seek orders that the Chief Land Registrar to revoke any purported title document held by the 4th Defendant in relation to the parcel of land namely Land Reference Number 13287/99 within seven (7) days of the judgment. Finally that a mandatory injunction be issued directing the Chief Land Registrar, the 2nd Defendant herein to revoke, annul and cancel grant



no. I.R 52014 for Land Reference 13287/99 held by the 4th Defendant and any other title document that purports ownership of this land to the said 4th Defendant within seven (7) days of the judgment herein plus General damages for trespass and Costs of the suit.

### **The 1st And 4th Defendants Defence**

10. The 1st and 4th defendants filed defence to amended plaint and counter claim stating that vide Grant No. 40236, the President granted a Trustee Company all that parcel of land situate North East of Njoro Town, Nakuru District, containing by measurement Two Thousand, One Hundred and Twenty-Three, naught five Hectares (2,123.05 Ha) or thereabouts, being LR No. 13287 (Original No 3969/1, 3071/1, 5836/1, 9213/1, 9734/1) subject to caveats and special conditions as imposed by the government. Subsequently, through a Transfer registered on 3rd May 1985, the said Trustee Company transferred all that parcel of land to the Agricultural Development Corporation, which proceeded to subdivide the same into various parcels, including LR. No. 13287/99 situate North of Njoro Town in the Nakuru District comprising 20.24 Ha delineated on Land Survey Deed Plan Number 143859.
11. In a Transfer dated 21st January 1991, and registered on 22nd January 1991, the Agricultural Development Corporation then transferred the suit property to the late Joseph Kasaine Nkaissery for a consideration of Kshs. 60,015.63. Consequently, the late Joseph Kasaine Nkaissery was issued with a Certificate of Title dated 22nd February 1991 and that it is from the said Joseph Kasaine Nkaissery that the 4th Defendant purchased the suit property, was issued with a Certificate of Title to the same and subsequently registered as the proprietor of the suit property.
12. The Defendants further aver that in March 1998, the 4th Defendant entered into an agreement for sale of the suit property with the late Joseph Kasaine Nkaissery, for a consideration of Kshs. 5,500,000.00, which consideration the 4th Defendant paid in two instalments, being Kshs. 2,500,000.00 through Cheque No. 000152 and Kshs. 3,000,000.00 through Cheque Nos. 000188 and 000206 on 23rd March 1998 and 23rd July 1998 respectively.
13. The Defendants further aver that having finalized payment of the purchase price, the parties executed a Transfer dated 20th August 1999, effectively vesting proprietary rights over the suit property on the 4th Defendant. However, before registration of the Transfer, it came to the attention of the 4th Defendant's advocate, G.J Kipyator, that the late Joseph Kasaine Nkaissery had, sometime before 1996, charged the suit property in favor of obtaining a Kshs.500,000.00 loan from Postbank Credit Limited.
14. The Defendants aver that their advocate on record for the transaction obtained a letter dated 11th March 1996 from Postbank Credit Ltd, confirming that indeed the late Joseph Kasaine Nkaissery had cleared his liabilities and forwarded the Certificate of Title, the Transfer, Charge and a Discharge of Charge. Furthermore, the Defendants aver that while the charge over the suit property had in fact been discharged, the late Joseph Kasaine Nkaissery and Postbank Credit Limited had failed to register the said discharge, hence records at the Land Registry indicated that the charge was still in place. Thus, the said G.J Kipyator prepared a new Discharge of Charge dated 20th August 1999 and forwarded the same to the Liquidator, Postbank Credit Ltd for execution, to further facilitate the sale transaction. The Defendants aver that upon confirmation that all the documents were in order, the parties forwarded a Transfer dated 20th August 1999 and the Discharge of Charge to the Land Registry for registration.
15. On 8th September 1999 the transfer of the suit property was registered in favor of the 4th Defendant, and a Certificate of Title issued to it, thus passing on all proprietary rights to the 4th defendant to the exclusion of all others. The Defendants aver that out of the 186 entries, only Entry No. 85 relates to the suit property, recorded as a transfer to Joseph Kasaine Nkaissery, 20.24 Ha, LR No.13287/99, freehold. The Plaintiffs do not appear in any entry. The Defendants state that the 4th Defendant took



vacant possession of the suit property more than Twenty Years ago and enjoyed quiet occupation of the same. The Plaintiffs were never on the suit property prior to commencing their cause of action.

16. The Defendants state that the Plaintiffs' actions are unlawful and only intended to dispossess a registered proprietor of its property; the 4th Defendant's rights to own property under article 40 of *the Constitution* are in jeopardy and ought to be protected by this Honorable Court and that it is the Plaintiffs' actions and claim over the suit property that are in fact fraudulent, and have proceeded to obtain forgeries and fraudulent documents to support their alleged ownership. Particularly the Plaintiffs have procured a forged grant for L.R 13287/99 and are:-
  - a. Uttering false documents alleging title over L.R No. 13287/99.
  - b. Uttering false correspondences from the Agricultural Development Corporation in relation to L.R No. 13287/99.
  - c. Presenting a forged and falsified Letter of Consent form the Land Control Board.
  - d. Alleging ownership of the suit property on the basis of a fraudulent and forged Title, transfer documents and consents
  
17. The Defendants pray that this Honorable Court dismiss the Plaint for lack of merit with costs to the Defendants. By way of counter claim the Defendants now the Plaintiffs aver that on 11th and 18th of January 2024 the 1st and 2nd Defendants illegally, without cause and or justification trespassed onto the suit property, being L.R No. 13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha. In defence of their proprietary rights, the Plaintiffs evicted the 1st and 2nd Defendants and further reported their actions to the Directorate of Criminal Investigations vide a letter dated 19th January 2024, which summoned investigations against the 1st and 2nd Defendants. The Plaintiffs aver that the 1st and 2nd Defendant alleged claim over the suit property is anchored on documents that are not only forgeries but also obtained through a criminal enterprise solely designed to irregularly, illegally and fraudulently disposes the 2nd Plaintiff of the property. The particulars of fraud are:-
  - a. Creating alleged correspondences from the 5th Defendant in an attempt to demonstrate non-existent sale of the suit property.
  - b. Creating a parallel grant for the suit property.
  - c. Uttering a false grant, transfer instrument and title with respect to the suit property.
  - d. Creating and or obtaining an illegitimate title to the suit property.
  - e. Presenting a forged and fraudulent Title and Grant as evidence of ownership of the suit property.
  - f. Presenting a falsified entry no. 85 of the grant.
  - g. Presenting falsified receipts and banker's cheque as alleged proof of payment for the suit property.
  - h. Illegally occupying the suit property on the strength of forged and fraudulent title documents. The Plaintiffs aver that the 2nd Plaintiff is the registered proprietor of the suit property having purchased the same from the late Joseph Kasaine Nkaisery and issued with a Certificate of Title. The Plaintiffs further aver that the original Grant No. 40236 from which all transactions relating to LR 13287 emanate from, has a total of One Hundred and Eighty-Six (186) entries,



indicating the first transfer to the 5th Defendant in 1985 to the latest transfer to one Charles Kipkoech Rop in 2023.

18. The 5th Defendant herein prepared a list of all allottees of LR 13287 detailing a total of 167 entries, all which correspond to the entries in the grant. The allotment to the late Joseph Kasaine Nkaissery appears at entry No 85 of the list, whilst no allotment is indicated as having been done in favor of the alleged Ishmael Chelang'a or the 1st and 2nd Defendants, with respect to the suit property. The Defendants Plaintiffs aver therefore that no allocation was made to the 1st and 2nd Defendants as alleged. Instead, the 5th Defendant transferred the suit property to the late Joseph Kasaine Nkaissery, who in turn transferred the same to the 2nd Plaintiff. The Plaintiffs aver that the 1st and 2nd Defendants have presented an alleged original grant no. 40236 bearing a falsified Entry No. 85 indicating that the Agricultural Development Corporation 5th Defendant transferred the suit property to one Ishmael Chelang'a, which transfer was later cancelled.
19. The Plaintiffs further aver that the 5th Defendant, having already allocated the suit property to the late Joseph Kasaine Nkaissery, could not have offered the same to the 1st and 2nd Defendants.
20. Therefore, in the event that the 5th Defendant did in fact offer the suit property to the 1st and 2nd Defendants, the same is nothing but an illegality that must be rectified by this Honorable Court. The Plaintiffs however aver that the correspondences between the 1st and 2nd Defendants and the 5th Defendant are forgeries that the 5th Defendant shall attest to. The Defendants (Plaintiffs in counter claim) pray that this Honorable Court issues a declaration that the 4th Defendant 2nd Plaintiff is the legally registered proprietor of all that parcel of land known as L.R. No.13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha.
21. Moreover, a declaration be issued that any title held by the Plaintiffs 1st and 2nd Defendants with respect to all that parcel of land known as L.R. No. 13287/99 situated in North Njoro was acquired fraudulently and illegally.
22. The plaintiffs pray for a mandatory injunction directing the 1st and 2nd Defendants to forthwith vacate all that parcel of land known as LR. No.13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha.
23. The plaintiffs further pray for a mandatory injunction be issued directing the 3rd Defendant to cancel any and all titles issued to the 1st and 2nd Defendants with respect to all that parcel of land known as L.R. No. 13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha and a further mandatory injunction directing the 5th Defendant to cancel all titles and or allocations issued to and held by the 1st and 2nd Defendants with respect to all that parcel of land known as L.R. No. 13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha.
24. Ultimately, the plaintiffs pray for a permanent injunction prohibiting the 1st and 2nd Defendants, their agents, servants or anyone acting on their instructions from further trespassing on or otherwise interfering with the Plaintiffs' quiet possession of all that parcel of land known as L.R. No.13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha. Lastly they pray for General Damages and Costs of the suit.

### **The 2nd and ,3rd Defendants' statement of Defence**

25. The 2nd and 3rd defendants filed their statement of defence through the honorable Attorney General whose gist is that the suit property of Land, LR 13287/99 was registered by the Registrar of titles in the names of Omar Mohamed Omar and Patrick Maina Wakanda on the 14th February 1996.



## 5th Defendant's Defence to Counterclaim

26. The 5th Defendant to the counterclaim states that he is a stranger to the averment by the plaintiffs that the suit property was ever transferred from the Agricultural Development Corporation to the late Joseph Kasaine Nkaisery and on the contrary avers as follows:
- I. The suit property known as L.R No. 13287/99 belonged to the Agricultural Development Corporation.
  - II. Interest over the suit property L.R No. 13287/99 was not transferred from the Agricultural Development Corporation to the late Joseph Kasaine Nkaisery.
  - III. The late Joseph Kasaine Nkaisery never paid the requisite consideration for the suit property by reason of which interest thereon neither crystallized nor vested.
  - IV. Interest over the suit property L.R No. 13287/99 having not vested on the late Joseph Kasaine Nkaisery the same could not be validly transferred from him to any person including the Plaintiffs in the counterclaim.
27. The 5th Defendant to the counterclaim further contends that neither the late Joseph Kasaine Nkaisery nor the Plaintiffs in the counterclaim are Bonafide purchasers of the suit property for want of payment and valid completion and therefore incapable of having titles registered in their names.
28. She further avers that entry number 85 on grant number 40236 in respect to which any transaction relating to L.R No. 13287 emanate from that depicts the late Joseph Kasaine Nkaisery as the owner of the suit property L.R No.13287/99 is fraudulent, illegal and irregular as no good title passed from the 5th Defendant to the said late Joseph Kasaine Nkaisery for want of payment and execution of a valid instrument of transfer. The particulars of fraud, illegality and malice on the part of the plaintiffs in the amended counterclaim are:-
- a. Misrepresenting the fact that the Agricultural Development Corporation transferred L.R No. 13287/99 to the late Joseph Kasaine Nkaisery and title issued or collected.
  - b. Misrepresenting the fact that the suit property known as L.R No. 13287/99 was registered in the name of the late Joseph Kasaine Nkaisery.
  - c. Forging documents in respect of the suit property L.R No. 13287/99 and presenting the same to deliberately mislead this Honorable Court.
  - d. Forging instrument of land transfer dated 21st January 1991 purportedly between the 5th Defendant and the late Joseph Kasaine Nkaisery.
  - e. Misrepresenting the fact that the late Joseph Kasaine Nkaisery allegedly sold the suit property to the 2nd Plaintiff when the same is untrue.
29. She contends that the claimed registration to the late Joseph Kasaine Nkaisery that purportedly appears at entry no. 85 of the grant in question is fraudulent, illegal, null and void as interest over the suit property never vested on the said late Joseph Kasaine Nkaisery nor a valid transfer executed and registered in his favor as alleged to give rise to such an entry. She denies that she transferred interest over the suit land to the late Joseph Kasaine Nkaisery as alleged in paragraph 37 of the counterclaim. The purported transfer instrument dated 21st January, 1991 which the 1st and 2nd Plaintiffs in the counterclaim have exhibited is a forgery. Further, that the entry contained in the mother title, in the name of the 2nd Plaintiff's predecessor in title, the late Joseph Kasaine Nkaisery, in respect to the suit



land is irregular and fraudulent as the said late Joseph Kasaine Nkaissery did not have any valid interest that had vested or crystallized to be registered against his name over the suit land.

30. The 5th Defendant to the counterclaim furthers avers that no valid interest was vested on the late Joseph Kasaine Nkaissery for want of consideration and primary completion documents such as a validly executed instrument of transfer by reason of which the said suit property, L.R No. 13287/99 could and was validly allocated to the 1st and 2nd Defendants in the counterclaim. That any title acquired through irregular means and without allocation from the Agricultural Development Corporation and payment of the requisite consideration has no valid root and such a title or process leading to issuance of such titles and purported subsequent transfer as claimed by the Plaintiffs in the counterclaim should be declared null and void ab initio for all intents and purposes and as such conferred no interest or right to the 2nd Plaintiff in the counterclaim. The 5th Defendant to the counterclaim avers that it never transferred any valid interest over the suit property to the alleged 1st and 2nd Plaintiff's in the counterclaim's predecessor in title as purported. The 5th defendant prays that the suit be dismissed with costs.
31. The 1st and 4th defendants responded to the defence filed by the Attorney General and stated that the Agricultural finance Corporation was better placed to identify the owner of the parcel of land and that the Attorney General was relying on falsehood and forgeries.

## **The Evidence**

### **(Plaintiffs Evidence)**

32. Omar Mohamed Omar testified on his behalf and on behalf of Patrick Maina Wakanda. The witness statement of PW1 was adopted as evidence in chief. He further stated under oath that he and Patrick Maina Wakanda are the lawful and registered proprietors of the property known as Land Reference Number 13287/99 that is situated at Ngata within Nakuru County. They obtained registration of the suit property on 14th February, 1996 when they took vacant possession thereof. Since 1996, they have been farming on this parcel of land. They have in this respect obtained a letter dated 4th September, 2023 from the office of the Area Chief, Ngata Location that shows that they have been in possession of the suit land since mid-1990s. The Area Chief's letter dated 4th September, 2023 further shows that they have been cultivating the suit property from mid-1990s to date and have the title. They made an application for allocation of the suit property to the Agricultural Development Corporation ("ADC") vide a letter dated 14th March, 1995. By a letter dated 18th May, 1995 ADC informed them that they had accepted the request contained in their application and allocated them the suit property for purchase on condition that the same would be used for agricultural purposes. By a letter dated 18th May, 1995 the ADC further informed them that it would communicate the purchase price, conveyance and other disbursements toward the acquisition of the suit land. That by a letter dated 8th October 1995 ADC asked that them to make payment of Kshs 56,826.85 to cater for the purchase price for the suit property, survey and conveyance fees, disbursements and stamp duty among others. Vide the letter dated 31st October, 1995 the plaintiffs forwarded a banker's cheque No.344068 of Kshs. 56,825.85 to ADC in settlement of the consideration set tin the allocation letter dated 8th October, 1995. The forwarding letter dated 31st 'October, 1995 is at page 8 of the bundle of documents. ADC acknowledged receipt of payment of Kshs.561826.85 vide their letter dated 29th November 1995 which also forward to the plaintiffs payment receipt no. 24507. That by an application dated 6th December, 1995 ADC applied to the Nakuru Land Control for consent for the sale and transfer of the suit property to the Plaintiffs.
33. The Nakuru Land Control Board issued a consent letter dated 7th December, 1995 approving the sale and transfer of the suit land from ADC to the plaintiffs. By an instrument of transfer dated 6th



- February, 1996 interest over the suit property conveyed from ADC to the plaintiffs. The Chief Land Registrar registered the instrument of transfer between ADC and the plaintiffs on the 14th February, 1996 upon its assessment, payment of stamp duty franking.
34. The Agricultural Development Corporation upon registration of the instrument of transfer dated 6th February 1996 on 14th February, 1996 released the original grant for the suit property to wit grant number I-R 52014 to the plaintiffs. The suit property is a sub-division of the parcel of land number IR 402236, Land Reference 813287 whose excision and ownership is reflected vide entries numbers 85 and 149 mother title. The plaintiffs are validly registered as owners of Land Reference Number 13287/99 Situated at Ngata in Nakuru County. The Ministry of Lands and Physical Planning has issued a number of certificates of official searches confirming that the Plaintiffs are the lawful and registered proprietors of suit property to the exclusion of the and Defendants.
35. On 21st October, 2023 agents of the 1st and 4th Defendants and persons that are not known to the Plaintiffs unlawfully and without any colour of right trespassed onto the property and started placing beacons and erecting a temporary fence around a small portion they had presumably sub-divided and excised from the suit property. The goons that invaded the suit property on 21st October 2023 stated that they were acting on instruction of the 1st Defendant, a director of the 4th Defendant, who purportedly owned the suit land. Upon being informed of the 1st and 4th Defendants' acts of trespass, the Plaintiffs reported the unfortunate incident to the Directorate of Criminal Investigations and is under investigations. The 1st and 4th Defendants and their agents caused extensive damage and destruction on the property during the invasion and or violent trespass with a view of dispossessing the plaintiffs of the suit property.
36. The plaintiff called Charles Kipkurui Koech, an Assistant Chief within Ngata location living at Ngata and employed by the government of Kenya on 28th April 2010. He was born in 1974 and has lived in Ngata since 1982. The witness testified that the suit property was being utilized by the plaintiff. He wrote the letter dated 4th September 2023 on the letterhead of the chief and with the chief's permission on behalf of the chief Augustine Rotich. The suit property was in his jurisdiction and that the plaintiffs were in possession and had constructed a temporary structure made of iron sheets where the plaintiff's employees lived. On cross examination, he confirmed that he had not carried his national identify card. He stated that the 1st plaintiff called and sought to meet him. They met in his office of the Assistant chief. He did not have the official stamp when testifying. He exercises his authority as an Assistant chief as appointed by the state. He has permission to act as the chief when the chief is on leave. He signed the letter under contention as the chief in the chief name and signature. The letter head is for the chief. He used the signature of the chief.

### **1st and 4th Defendants' Evidence**

37. The 1st and 4th defendants called Collins Oluoch Odumba who testified and produced a court file ELC No E015 of 2021.
38. Joshua Kulei adopted his statement as evidence in chief and testified under oath that he has been the director of Sian Enterprises Limited, the 4th Defendant herein since its inception and has knowledge of all the transaction pertaining to the suit before court. That through Grant No. 40236, the President granted a Trustee Company all that parcel of land situate North East of Njoro Town, Nakuru District, containing by measurement Two Thousand, One Hundred and Twenty-Three, naught five Hectares (2,123.05 Ha) or thereabout, being LR No. 13287 (Original No. 3969/1,3071/1,5836/1,9213/1,9734/1) subject to caveats and special conditions as imposed by the government. Subsequently, through a Transfer registered on 3rd May 1985, the said Trustee Company transferred all that parcel of land to the Agricultural Development Corporation, which proceeded to



subdivide the same into various parcels, including the suit property situate North of Njoro Town in the Nakuru District comprising 20.24 Ha delineated on Land Survey Deed Plan Number 143859. In a Transfer dated 21st January 1991, and registered on 22nd January 1991, the Agricultural Development Corporation then transferred the suit property to the late Joseph Kasaine Nkaisery for a consideration of Kshs. 60,015.63. Consequently, the late Joseph Kasaine Nkaisery was issued with a Certificate of Title dated 22nd February 1991.

39. It is from the said Joseph Kasaine Nkaisery that the 4th Defendant purchased the suit property and was issued with a Certificate of Title to the same and subsequently registered as the proprietor of the suit property.
40. That in March 1998, the 4th Defendant entered into an agreement for sale of the suit property with the late Joseph Kasaine Nkaisery, for a consideration of Kshs.5,500,000.00, which consideration the 4th Defendants paid in two instalments. Being Kshs. 2,500,000.00 through Cheque No. 000152 and Kshs. 3,000,000.00 through Cheque Nos. 000188 and 000206 on 23rd March 1998 and 23rd July 1998 respectively. Therefore, having finalized payment of the purchase price, the parties executed a Transfer dated 20th August 1999, effectively vesting proprietary rights over the suit property on the 4th Respondent.
41. That the 4th Defendant is the registered proprietor of the suit property having purchased the same and issued with a Certificate of Title dated. That the original Grant No. 40236 from which all transactions relating to LR 13287 emanate from, has a total of One Hundred and Eighty-Six (186) entries, indicating the first transfer to the Agricultural Development Corporation in 1985 to the latest transfer to one Charles Kipkoech Rop in 2023.
42. The DW2 states that out of the 186 entries, only Entry No. 85 relates to the suit property, recorded as a transfer to Joseph Kasaine Nkaisery, 20.24 Ha, LR No. 13287/99, freehold. The Plaintiffs do not appear in any entry. The Plaintiffs have presented the same Grant with a different Entry No.85 indicating that the Agricultural Development Corporation allegedly transferred the suit property to one Ishmael Chelang'a, which transfer was later cancelled. The Plaintiff's blatant alteration of the grant is not only fraudulent but also a clear forgery.
43. The witness states that immediately after purchasing the suit property, the 4th Defendant took vacant possession of the suit property more than Twenty Years ago and has enjoyed quiet occupation of the same. The Plaintiffs were never on the suit property prior to commencing their cause of action. That through a letter dated 19th January 2024, they equally filed a complaint with the Regional Criminal Investigation Officer, Rift Valley Region, against the Plaintiffs, whose investigations shall confirm that the 4th Defendant is the true owner of the suit property. The Plaintiffs cannot lay claim over private property, invade said property arbitrarily and illegally, and then purport to cry foul when the registered proprietor takes steps to protect its interests. It is evident that the Plaintiff's actions are unlawful and only intended to dispossess a registered proprietor of its property; the 4th Defendant's right to own property under article 40 of *the Constitution* are in jeopardy and ought to be protected by this Honorable Court.
44. The 4th Defendant is the registered proprietor of the suit property, the Plaintiffs have arbitrarily trespassed on part of the same by erecting make-shift structure and illegally interfered with the Defendants' quiet enjoyment and use of the suit property. He prays that this Honorable Court dismiss the Plaint for lack of merit with costs to the Defendants and allow the Defendants' Counterclaim.
45. Trophimus Kiplimo, asked the court to adopt his witness statement as evidence in chief which the court did. He took oath and stated that he has been the Legal Manager of the 4th Defendant since 2016. He has interacted with all the legal documents pertaining to the present suit hence competent presenting



- evidence on behalf of the 4th Defendant. He states that through Grant No. 40236, the President granted a Trustee Company all that parcel of land situate North East of Njoro Town, Nakuru District, containing by measurement Two Thousand, One Hundred and Twenty-Three, naught five Hectares (2,123.05 Ha) or thereabout, being LR No. 13287 (Original No. 3969/1,3071/1,5836/1,9213/1, 9734/1) subject to caveats and special conditions as imposed by the government.
46. Subsequently, through a Transfer registered on 3rd May 1985, the said Trustee Company transferred all that parcel of land to the Agricultural Development Corporation, which proceeded to subdivide the same into various parcels, including LR. No. 13287/99 (hereinafter the suit property), situate North of Njoro Town in the Nakuru District comprising 20.24 Ha delineated on Land Survey Deed Plan Number 143859.
  47. In a Transfer dated 21st January 1991, and registered on 22nd January 1991, the Agricultural Development Corporation then transferred the suit property to the late Joseph Kasaine Nkaisery for a consideration of Kshs. 60,015.63. Consequently, the late Joseph Kasaine Nkaisery was issued with a Certificate of Title dated 22nd February 1991.
  48. It is from the said Joseph Kasaine Nkaisery that the 4th Defendant purchased the suit property and was issued with a Certificate of Title to the same and subsequently registered as the proprietor of the suit property. That in March 1998, the 4th Defendant entered into an agreement for sale of the suit property with the late Joseph Kasaine Nkaisery, for a consideration of Kshs. 5,500,000.00, which consideration the 4th Defendants paid in two instalments, being Kshs. 2,500,000.00 through Cheque No. 000152 and Kshs. 3,000,000.00 through Cheque Nos. 000188 and 000206 on 23rd March 1998 and 23rd July 1998 respectively.
  49. Therefore, having finalized payment of the purchase price, the parties executed a Transfer dated 20th August 1999, effectively vesting proprietary rights over the suit property on the 4th Respondent.
  50. However, before registration of the Transfer, it came to the attention of the advocate, G.J Kipyator that the late Joseph Kasaine Nkaisery had, sometimes before 1996, charged the suit property in favor of obtaining a Kshs. 500,000.00 loan from Postbank Credit Limited.
  51. In conducting due diligence, the said G.J Kipyator obtained a letter dated 11th March 1996 from Postbank Credit Ltd, confirming that indeed the late Joseph Kasaine Nkaisery had cleared his liabilities and forwarded the Certificate of Title, the Transfer, Charge and a Discharge of Charge. That the charge over the suit property had in fact been discharged, the late Joseph Kasaine Nkaisery and Postbank Credit Limited had failed to register the said discharge, hence records at the Land Registry indicated that the charge was still in place.
  52. Thus, the said G.J Kipyator prepared a new Discharge of Charge dated 20th August 1999 and forwarded the same to the Liquidator, Postbank Credit Ltd for execution, to further facilitate the sale transaction. Upon confirmation that all the documents were in order, we forwarded a Transfer dated 20th August 1999 and the Discharge of Charge to the Land Registry for registration. On 8th September 1999 the transfer of the suit property was registered in favor of the 4th Defendant, and a Certificate of Title issued to it, thus passing on all proprietary rights to the 4th defendant to the exclusion of all others. The 4th Defendant is the registered proprietor of the suit property having purchased the same and issued with a Certificate of Title.
  53. The original Grant No. 40236 from which all transactions relating to LR 13287 emanate from, has a total of One Hundred and Eighty-Six (186) entries, indicating the first transfer to the Agricultural Development Corporation in 1985 to the latest transfer to one Charles Kipkoech Rop in 2023. Out of



the 186 entries, only Entry No.85 relates to the suit property, recorded as a transfer to Joseph Kasaine Nkaisery, 20.24 Ha, LR No.13287/99, freehold. The Plaintiffs do not appear in any entry.

54. That immediately after purchasing the suit property, the 4th Defendant took vacant possession of the suit property more than Twenty Years ago and has enjoyed quiet occupation of the same. The Plaintiffs were never on the suit property prior to commencing their cause of action. Sometime in December 2023, they commissioned the services of a Land Surveyor, one Sammy Mwangi Matara, who in a Report dated 13th December 2023 concluded that the Plaintiffs' claim that they erected permanent structures on the suit property is utterly false and that the 4th Defendant has been cultivating canola for the over twenty years.
55. Further, according to the surveyor's report, an official search conducted on 1st November 2023, revealed that the initial owner of the suit property was the late Joseph Kasaine Nkaisery, who then transferred the same to the 4th Defendant on 8th September 1999.
56. The 4th Defendant, through a letter dated 19th January 2024 equally filed a complaint with the Regional Criminal Investigation Officer, Rift Valley Region, against the Plaintiffs, whose investigations shall confirm that the 4th Defendant is the true owner of the suit property. The Plaintiffs cannot lay claim over private property, invade said property arbitrarily and illegally, and then purport to cry foul when the registered proprietor takes steps to protect its interests.
57. The 4th Defendant is the registered proprietor of the suit property, the Plaintiffs have arbitrarily trespassed on part of the same by erecting make-shift structure and illegally interfered with the Defendants' quiet enjoyment and use of the suit property. He prays that this Honorable Court dismiss the Plaint for lack of merit with costs to the Defendants and allow the Defendants' Counterclaim.
58. The 4th defendant called Augustine Rotich, the current chief of Ngata Location since 3rd March 2016. He wholly relied on his statement dated 21st May 2024 which statement was adopted by the court as his evidence in chief.
59. He has known Joshua Kulei for over 10 years as they are neighbors and knows the history of the land No.13287/99. The original owner was Joseph Kasaine Nkaisery. He did not authorize PW2 to sign the letter dated 4th September on his behalf.
60. Daniel Singoei Kandie was called to testify and also asked the court to adopt his statement as evidence in chief which was done. He gave evidence under oath that he was an adult male aged 70 years and a retired Chief of Ngata Location having been a chief from 1981 to July 2014. During his time as the area chief it came to his attention that there were a number of land disputes involving certain parcels of land allocated to people by the 5th Defendant herein. Among them was the suit property. Due to these disputes, he sought information from the 5th Defendant about the said parcels and decided to proceed to ADC offices in Nairobi where he was given the list /register of one hundred and sixty-six people who had been allocated parcel of land by ADC and from the said list he confirmed that parcel of land reference number 13287/99, the suit property herein, was allocated to the late Joseph Kasaine Nkaisery. Sometimes in the year 1991 the late Joseph Kasaine Nkaisery went to his office and complained that someone had tampered with his fence. It is to this effect that he accompanied him so that he could show him his parcel of land. He confirmed that it was indeed true that someone had tampered with his fence as three wires had been destroyed. He then asked him why he did not have a caretaker, but he said he had gotten into agreement with officials of the 5th Defendant to plant wheat and afterwards they were to deduct their expenses and take the balance with him. From this incidence they became good friends, and he knew the said parcel of land to be belonging to late Joseph Kasaine Nkaisery and that after a few years the late Joseph Kasaine Nkaisery told him that he had sold the said parcel of land to Sian Enterprises Limited a company that belongs to one Joshua Kulei. He then asked



him why he had sold the said parcel of land to which he replied that he had some projects at Kajiado that he wanted to concentrate on. He is aware that the said Sian Enterprises Limited took over the suit property and started growing crops such as maize, canola and sunflower and that the 4th Defendant has been in possession of the suit property since purchasing it from the late Joseph Kasaine Nkaisery.

61. Carolyne Mwangela Mutungi stated that she was the liquidator at Post Bank Creditors Ltd. She stated that she was in Court to confirm that the late Nkaisery obtained a loan from the bank of Kshs. 500,000 and furnished the bank with a title deed L.R No. 13297/99 as a security for a loan. DW4 further stated that the late Nkaisery paid the loan and the bank released the title and discharge of the charge. On cross-examination, DW4 stated that she was a manager of the bank but conceded to have not filed any document evidencing her employment in Court.
62. She conceded that despite alleging that the bank released the charge to the late Nkaisery, she had not filed in Court documents supporting this proposition including evidence of repayment, the bank statement or the statement of account that would show disbursement of the physical sum and that the release letter at page 185 of the 1st and 4th Defendants' trial bundle was not certified. She further conceded that when the late Nkaisery obtained the loan from the bank in 1992, she was not working at the bank and could therefore not speak on the transaction.
63. Sammy Mwangi Matara testified that he is a private surveyor and that on 11th December 2023, he conducted survey on a parcel of land known as LR.No. 13287/99. His findings were that the property was located in Ngata with survey plans of F/R Nos. 207/61,207/62 and 317/13 showing the boundaries and details of the property. His findings further showed that property is under fixed survey with definite coordinates. That when he arrived on the property, he did a beacon search and identified all beacons and exhibited the photographs of the property. He also stated that on the ground area corresponded with the title area. The survey report was produced as an exhibit while the Annual Practising, Certificate of survey Licence, Diploma Certificate, Degree from the University of Nairobi, photographs, survey plans and satellite images were marked for identification.
64. The search of the suit property was conducted on 1st November, 2023 and the said search showed the 4th Defendant as the owner. On cross examination, he conceded that the survey report he exhibited was not signed on any of the pages, neither was it stamped nor was it dated. Additionally, pages 3, 4 and 8 of the report were missing. He did not have the original search for the suit property, neither did he have the application for the search or a receipt for payment of the search fees despite acknowledging that fees have to be paid for a search.
65. Nyandoro David Nyambaso testified that he works at the Ministry of Lands, Public Works and Housing and Urban Development as the Chief Land Registrar. He testified that he had with him the mother title to the suit property and that entry 85 on the mother title to the suit property indicated a transfer to the late Nkaisery which property was transferred by ADC and does not bear the name of the Plaintiffs. He further stated that the property measuring 20.24 Ha belonged to the 4th defendant. The title document filed by the Plaintiffs had the same Land Registration Number to the one filed by the 1st and 4th Defendants. He further stated that the Certificate of title held by the Plaintiffs was certified as a true copy by one of his Registrars by the name Elly Ogolla who was deployed on 30th August, 2019 and that at the time of signing the document, he was not posted to the Central Land Registry but was at the Homa Bay Land Registry. On cross-examination, he testified that the mother title produced was kept by the Chief Land Registrar and that the said title showed no alteration at Entry No. 85 which entry conformed to the title in respect of the late Nkaisery.
66. That the Certificate of Title to the suit property held by the Plaintiffs and signed by Lubulella who is deceased is not authentic for the reason that the said title came from entry number 85 of the mother



- title and which entry showed a transfer to the late Nkaissery and was signed by Mutunga. That he did not authorize Mr. Elly Ogolla to swear any affidavit in these proceedings and that the different bar codes showed that the two documents were not the same and that there was no way a photocopy could produce a different bar code. The Chief Land Registrar usually does not ask parties whether there was payment made before registration and only look at the primary and completion documents being transfer, consent to transfer, stamp duty and an application for registration. He stated that the parcel file to the suit property could not be traced which parcel file could have contained the certificate of title or even a charge
67. He could not authenticate the title document held by the Plaintiffs despite it being signed by an officer who worked at the lands office and being traceable to the Ministry of Lands. He stated that entries on the mother title as usually done sequentially and as such entry no. 86 could only be made upon entry no. 85 being made.
  68. Entry no. 185 on the mother title was made on 30th May, 2019 and though cancelled with no record of the cancellation and it being unsigned, it was made prior to entry no.186. He stated that Mr. Elly Ogolla was a land registrar, and no adverse action had been taken against him in regard to his witness statement filed in Court. He further conceded that the grant filed by the office of the Attorney General on behalf of the 2nd and 3rd Defendants shows that entry no. 85 was cancelled and refers to entry no.149 which is a transfer to the Plaintiffs.
  69. He authored the letter dated 24th May, 2024. He also stated that there was a dispute in court regarding his appointment as a chief land registrar whereby judgment was delivered on 24th May,2024 holding that he was not validly appointed but that the said judgment was stayed and further that counsel for the 1st and 4th Defendants was also his counsel in the said employment matter.
  70. He testified that it was not the practice for a witness statement to be filed by advocates other than the Attorney General. He conceded that he wrote the letter to professor Ojienda but did not know how the documents were filed by the said professor Ojienda. On re-examination, he testified that entries no. 185 does not invalidate the mother title as the said entries were in respect of present title and showed the application for issuance of titles. He further stated that the documents filed by Mr. Ogolla did not reflect the records.
  71. Mark Mungai testified that he does not have any ownership documents and only has the mother title to the suit property that was produced by the Chief Land Registrar as the parcel file was missing. He stated that according to the said mother title, there was a transfer registered in favour of the late Nkaissery dated 22nd February, 1991.
  72. On cross-examination by counsel for the 1st and 4th Defendants, he reiterated that he could only produce the mother title whose entry no. 85 shows a transfer to the late Nkaissery. He further stated that he is a Principal Land Registrar who reports to the Chief Land Registrar and that the Chief Land Registrar is the custodian of the land records.
  73. On cross-examination by counsel for the Plaintiffs, he stated that Mr. Ogolla knew his position by the time he was certifying documents and that he was not working at the Central registry at the time.
  74. He further stated that registration could not be concluded unless the primary documents being the transfer, LCB consent, application for registration and payment of stamp duty, are made available.
  75. He conceded that entries no. 186 and 185 are inconsistent and unusual as entry no. 186 was booked on 27th June, 2017 which was before entry no. 185 which was booked on 14th July,2017 and further that there was another entry no.85 on the same page that is cancelled and dated 30th May,2019.



76. That a parcel file is important in determining a land ownership dispute without which it would be difficult to determine the true owner of a property in a dispute and that in his 16 years of being a Land Registrar, he had come across cases of double registration which would normally be as a result of double allocation. In such case, the office of the land registrar would normally investigate by asking the parties with the two titles to the same property to submit their documents but that no investigations had been conducted with regard to the suit property. On re-examination, he stated that inconsistencies in the mother title does not invalidate the mother title.
77. Elly Ogolla testified that he is a Land Registrar and that he had filed a witness statement dated 14th May, 2024. He further stated that he had a letter dated 28th May, 2024 which substituted his statement. He further stated that he did not want to comment on the documents filed.
78. On cross-examination by counsel for the 1st and 4th Defendants, he conceded that the signature on the witness statement was his, that he certified the documents although he was not at the central land registry. He also stated that he did not wish to comment on any issues and also stated that he had withdrawn his whole witness statement. On cross-examination by counsel for the Plaintiff, he stated that when he prepared the documents in the AG's bundle, he was working at the Registration Section. He further testified that he receives requests for instructions from the Office of the Attorney General and processes instructions to the Attorney General., He also stated that an advocate could not receive instructions from their office.
79. Nicholas Ayugi Odoyo testified that he is the land administrator at ADC. He further stated that Lands Ltd, a subsidiary of ADC allocated land to allottees. He stated that once the allocation is approved, the applicant/allottee is informed and is required to pay the purchase price for the allocation. The allottee pays the purchase price, a transfer is prepared, a consent to transfer is obtained and the transfer is registered once accompanied by the primary documents.
80. The grant IR 40236 was allocated from the 1980s to 1986 and L.R No. 13287/99 was allocated to the late Nkaiserry but that the late Nkaiserry did not pay the full purchase price and that the late Nkaiserry was in occupation of the suit property. He denied that ADC had any transaction with the Plaintiffs as the Plaintiffs do not exist in ADC's records neither do the plaintiffs' documents.
81. On cross examination by counsel for the 1st and 4th Defendants', he testified that ADC had issued a demand letter to the late Nkaiserry requesting him to complete paying the purchase price of the suit property. He further stated that his work as a lands administrator was to keep records such as receipts for Lands Ltd and produce them for reference.
82. He denied interacting with the 1st and 4th Defendants and stated that he had not produced any title to the suit property as the issues pertaining to title are best within the knowledge of the Ministry of Lands. Further, that the suit property was allocated to the late Nkaiserry and denied having any records of the Plaintiffs.
83. On further cross examination by counsel for the 2nd and 3rd Defendants, he testified that he had produced a letter of allotment whose conditions included payment of the purchase price. DW10 further stated that if the purchase price is not paid, transfer cannot be effected. However, he did not have any evidence of the transfer to the late Nkaiserry given that if transfer had been effected, he would have had a copy of the transfer deeds in his records, which he did not have.
84. On further cross examination by counsel for the Plaintiffs, he stated that whilst the suit property was allocated to the late Nkaiserry, the produced letter of allotment dated 7th June, 1988 did not indicate the L.R No. of the property being allocated. Additionally, the original letter of allotment was not produced in court.



85. He agreed that the memo he had produced dated 30th November 1989 showing the names of Ngata farmers did not show the LR numbers of the properties or the L.R no. of the property held by the late Nkaissey. It was his testimony that the letter dated 10th July, 1999 called for payment of the purchase price for the allocation with the breakdown. He conceded that it was mandatory for the purchase price to be paid before transfer could be effected and yet ADC's records did not show whether the late Nkaissey had paid the full purchase price and that despite the need for a party to apply for allocation to ADC, there was no evidence on record to show that the late Nkaissey had made an application for allocation of the suit property.
86. He stated that the Defence filed by ADC dated 24th May, 2024 reflected the current position in regards to the suit property being that interest over the suit property did not vest on the late Nkaissey for failure to pay the purchase price and therefore no valid interest could be transferred to any other party including the 1st and 4th Defendants. The Plaintiffs had applied for allocation of the suit property as is required and as exhibited by PEX2 while PEX3 was a letter on ADC's letter head confirming that ADC had allocated the suit property to the Plaintiffs. The said ADC's letter was signed by DR. W.K Kilele and concluded by stating that it was normal for files to be misplaced at ADC's registry and that he had perused the records held at ADC and could not find the Plaintiffs' records. He also stated that he did not come across any consent from LCB to transfer the suit property to the late Nkaissey.
87. On re-examination, he stated that applications for allotment could be oral or written and if a person does not comply then they are issued with demand letters. He stated that there was no demand letter against the late Nkaissey. He further stated that documents are kept at ADC's registry to which any ADC staff could access the documents.

## **Rival Submissions**

### **Plaintiffs Submissions**

88. The gravamen of the Plaintiffs' submissions is that they are the legal and beneficial owners of the suit property and have exhibited a certificate of title registered on 14th February 1996 in their names as proof of their claim. The 1st and 4th Defendants have also claimed that they are the legal and beneficial owners of the suit property having purchased the same from the late Nkaissey and exhibited a certificate of title in the name of the late Nkaissey with entry 4 of the title showing a transfer to the 4th Defendant. According to the plaintiffs, this this court is confronted with two conflicting titles: the title held by the plaintiffs and that in the name of the late Nkaissey but transferred to the 1st and 4th defendants. The critical issue that this court is to determine is which of the two parallel titles should be upheld. In other words, which of the two titles was acquired lawfully and procedurally. The courts have settled this issue. It is now trite law that when courts are confronted with competing interests, it is not enough for parties to dangle their titles but are required to demonstrate how the interests they claim was acquired. The plaintiff refers to the Court of Appeal in the case of *Munyu Maina v Hiram Gathina Maina* [2013] eKLR outlined the principles to guide in determining disputes relating to competing titles and observed thus:

“When a registered proprietor's title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”



89. Additionally, the Supreme Court was faced with similar predicament in Petition No.8 (E010) of 2021; Dina Management Limited v County Government of Mombasa & 5 others and it affirmed that the process leading to the acquisition of a title over any property is so important that where the process is not proved the logical conclusion would be that the interest was acquired illegally and un-procedurally and that the title would not enjoy the protection of the law.
90. Justice Sila Munyao in Daudi Kiptugen vs Commissioner of Lands & 4 others [2015] eKLR had this to say:

“It is not enough that one issues a lease or a certificate. Where there is contention that a lease or certificate of lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the lease or certificate of lease that he holds was properly acquired. The acquisition of the title cannot be constricted only in the end result, the process of acquisition is material, it follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is manufacture a lease or certificate of title (some) backyards or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.” The Plaintiffs submit that they have not just dangled their instrument of title but have gone further to establish the root of their title. It is the plaintiffs’ submissions that they have been able to demonstrate the process they followed to acquire their title. To the plaintiffs, the root of their title arises from an allocation of the suit property by ADC. The plaintiffs’ evidence is that they applied for and were allocated the suit property by the ADC. Upon allocation, the plaintiffs claimed that they paid for the requisite charges and fees and thereafter, the suit property was transferred by ADC to the plaintiffs. The plaintiffs rely on the Court of Appeal dealing with the issue of allocation of land in Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR held as follows:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

91. The Plaintiffs submit that they have demonstrated that they were issued with a letter of allotment for the suit property, met the conditions stated therein and were issued with title to the suit property as a result. The plaintiffs submit that on the other hand, the 1st and 4th Defendant have not proved that they acquired a valid and legal title. That the 1st and 4th Defendants trace their root of title to the 4th Defendant’s purchase of the suit property from the late Nkaisery vide their exhibited sale agreement and transfer instrument. Being bona fide purchasers for value, the 1st and 4th Defendants have a duty to establish that they acquired valid and legal title and that the late Nkaisery had good title to pass to them through sale.
92. The 1st and 4th Defendants averred that the late Nkaisery had a good title to pass to the 4th Defendant on account of his allocation by ADC, the 5th Defendant herein and subsequent transfer from ADC to the late Nkaisery. When the PW 1 and DW 10 were testifying, they agreed on the process of allocation of land by ADC. They both agreed that the allocation starts with a letter of allocation, payment, letter of consent and transfer. It was therefore incumbent upon the 1st and 4th defendants to demonstrate with documents that the late Nkaisery complied with these processes. The 5th Defendant also exhibited a letter dated 10th July, 1991 in which ADC was demanding for payment of Kshs. 16, 142.00 from the late Nkaisery that had already been used on his behalf and further stated



that the purchase price shall be communicated to him in due course. That was the end of any evidence exhibited by the 5th Defendant regarding the purported allocation to the late Nkaisery by ADC.

93. The Plaintiffs submit that as held in the case of *Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo Ole Keivua & 4 others C.A.60/1997*, a letter of allotment is nothing but an offer and it does not constitute a contract between the offeror and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.
94. The Plaintiffs further submit that as such, the 1st and 4th defendant need to have demonstrated that they complied with the conditions of the letter of allotment as was held in *Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) KESC 79 (KLR) (22 September 2023)*. The 1st, 4th and 5th defendants did not even attempt to lead evidence to show that the offer was accepted or paid for. The Supreme Court in the *Torino Case (supra)* held that a letter of offer does not confer any proprietary interest. Title to landed property arising from allocation process only crystallizes upon acceptance of the offer, payment of the requisite charges and registration and issuance of the title.
95. The plaintiffs rely on the verdict in the case of *Satan Investments Ltd-versus-J.K Mbugua Civil Appeal No.164 of 2004* the court observed as follows:

A letter of allotment cannot override a duly registered title under the Act and where there is a registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which is yet to crystallize.

96. The plaintiffs submit that the implication of failing to meet the set conditions in a letter of allotment is that the offer contained therein is to be considered to have lapsed by operation of the law. There is already rich jurisprudence on the ramifications of non-compliance with the set conditions for allocation of land. The Supreme Court in its recent and binding decision of *Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) KESC 79 (KLR)(22 September 2023) (Judgement)* reaffirmed the jurisprudence and stated thus;

“While the allotment letter is dated December 19,1999, Renton Company limited made the specified payments on April 24, 2001, one hundred and twenty-seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant.”

97. The plaintiff submits that the 1st and 4th Defendants did not carry out necessary due diligence to determine the lawful owner from whom they acquired a legitimate title. The plaintiffs argue that a party who wishes the court to give judgment on the existence of a particular fact has the legal obligation to provide evidence that will best assist in the proof of the existence of those facts. In the circumstances of this case, the burden of establishing that due diligence was conducted before purchase and registration of the suit property in the name of the 4th Defendant rested with the 4th Defendant. According to the plaintiffs, the 1st and 4th Defendant are not bona fide purchasers for value as they did not conduct proper due diligence to establish whether their predecessor in title had valid title that they could acquire. That the 1st and 4th Defendants did not conduct proper due diligence to establish that they were acquiring good title to the suit property and according to the plaintiffs, had the 1st and 4th Defendants conducted proper due diligence, they would have established that the late Nkaisery had not paid the purchase price for the suit property and therefore any purported registration of transfer to the late Nkaisery would have raised questions as the same would have alluded to a fraudulent registration even in the eyes of a reasonable man.



98. The Plaintiffs further submit that had the 1st and 4th Defendants conducted proper due diligence, they would have established that there was no consent by the Nakuru Land Control Board to transfer the suit property from ADC to the late Nkaissey, given that suit property was agricultural land that required LCB's consent before it could be transferred. The Plaintiffs thus submit that the lack of evidence demonstrating that the LCB consented to the transfer of the suit property from ADC to the late Nkaissey is fatal given the requirement to obtain the said consent, as the suit property is an agricultural land. The Plaintiffs further submit that the failure of the 1st and 4th Defendants to conduct proper due diligence was a gross oversight on their part as they would have established that the late Nkaissey did not have a good title to the suit property to transfer to them.
99. They contend that it is trite under section 112 of the *Evidence Act*, Cap 80 that whether or not due diligence was conducted before the purchase of the suit property by the 4th Defendant was a fact that was within its special knowledge. It was therefore incumbent upon the 4th Defendant to dislodge the notion that it did not conduct due diligence and explain why it proceeded with the transaction despite the late Nkaissey not having good title. The 4th Defendant has not discharged this burden by reason of which they ask the Court to find that it is not a Bonafide purchaser for value. The Plaintiffs thus submit that as demonstrated above, the 1st and 4th Defendants have not proved the validity of their root of title as was held by the Court of Appeal in *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny and 4 others* [2019] eKLR, that:
- “Article 40(6) of *the Constitution* stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. In this regard, the appellant had the burden to prove the root of his title and to demonstrate that he procedurally and lawfully acquired title to the suit property.”
100. The Plaintiffs have through uncontroverted evidence demonstrated that the root of their title is valid and lawful. In the circumstances therefore, the Plaintiffs urge the Court to find that the 1st and 4th Defendants have not only failed to establish that the 4th Defendant was an innocent purchaser for value but have also failed to prove the existence of a valid root title as their own evidence on record impeaches the purported claim over the suit property. Therefore, as to who was able to demonstrate the root of their title, we return a sound verdict that the plaintiffs were able to not only prove the history and root of their title but also that they followed all due processes to acquire their title.
101. On the issue as to who between the Plaintiffs and the 1st and 4th Defendants have demonstrated fraud in the acquisition of the suit property in order to impeach the title to the suit property, the plaintiff submits that the 4th Defendant did not acquire valid title to the suit property as its predecessor in title did not have good title to pass. It did not matter whether the 1st and 4th Defendant did not know that the late Nkaissey did not have good title to pass as the title he held was acquired fraudulently.
102. This was the position as held in the case of *Mukesh Baishe v Ali Bwana* [2023] eKLR where the Court held:
- “Where the title in favour of the vendor is proved to have been obtained and or acquired unprocedurally, illegally or by corrupt practice, the second and subsequent purchaser of the suit property do not acquire any valid title, irrespective of whether same knew of the illegality or otherwise.”
103. The Plaintiffs further submits that given that their predecessor in title did not have good title to pass, the purported registration of the suit property in their name could only therefore be fraudulent and



occasioned through a corrupt scheme to which the 1st and 4th Defendants were parties to and the said title was thus acquired, illegally and unprocedurally.

104. On whether the Plaintiffs are entitled to the reliefs sought, the plaintiffs submit that they have aptly illustrated that they lawfully and legally acquired the suit property, had it registered in their names and have been in possession since acquiring them. Further that the acquisition of the suit property was done through a legal and lawful process free from any fraud or forgery warranting their declaration as the legal and beneficial owners of the suit property.

105. The Plaintiffs urges the Court to be guided by the High Court decision in *Mike Maina Kamau-v-Attorney General* [2017]eKLR in which the Court expressed itself as follows;

“...given that the history and root of this title can be traced, the court finds and holds that the Plaintiff herein holds a good title to the suit property which title has not been cancelled and/or revoked.”

106. The 1st and 4th Defendants have on the other hand failed to prove that they acquired good title to the suit property as it has been evidenced that their predecessor in title did not have good title to pass to them. Additionally, the Plaintiffs have further demonstrated to the Court that the purported title to the suit property was acquired fraudulently and through forgery in which the 1st and 4th Defendants were parties to. This therefore warrants the cancellation and revocation of their title to the suit property.

107. On the issue of damages, the Plaintiffs submit that they have demonstrated that they are in possession of the suit property save for a small portion which is encroached upon by the 1st and 4th defendant. The plaintiff even obtained injunction order as against the Defendants from interfering with their possession and occupation, after the 1st and 4th Defendants trespassed onto the said portion of the suit property that in fact warranted the filing of this suit. The 1st and 4th Defendants also admitted to not being in possession of the suit property and did not tender any admissible evidence as to their possession given that the alleged photographs of the suit properties by a surveyor were not accompanied by a Certificate of Electronic Evidence hence were unverifiable and inadmissible. In awarding damages for trespass, Courts have time and again held that a party only has to prove that there was trespass occasioned on his property to be awarded damages and that the award would ordinarily depend on the facts and circumstances of the case as there is no scientific or mathematical formula as was held in the case of *Park Towers Lt V John Mithamo Njika and 7 others* [2014] eKLR;

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages.” See also the case of *Willesden Investment Limited v Kenya Hotel Properties Limited* HCC No. 367 Of 2000.”

108. It is the Plaintiffs submission therefore that premised on the totality of the foregoing, the Plaintiffs have proven their case to the required standard of proof as against the 1st and 4th Defendants and are therefore deserving of the Court's protection and grant of the orders sought. The interest claimed by the 1st and 4th Defendants have equally been demonstrated to be invalid. The Plaintiffs therefore pray that the Court allows their suit in terms of the Plaint amended on 29th April, 2024 and do proceed to dismiss the 1st and 4th Defendants' Counterclaim dated 21st May, 2024 as the same is unfounded and without merit. The plaintiffs pray for costs.



## Attorney Generals Submissions

109. The 2nd and 3rd Defendants submit that premised on the pleadings, documents and rivaling evidence of the parties in this matter, the issues that fall for determination are who between the Plaintiffs and the 4th Defendants has demonstrated a valid root title, whether fraud has been proved and who should bear costs. According to the honorable Attorney General, the Plaintiffs hold a certificate of title which they claim entitle them to the reliefs sought in the amended plaint against the 1st and 4th Defendants. The 4th Defendant on the other hand also claim that it holds a certificate of title which it claims alongside the 1st Defendant entitles it to exclusive ownership. Both the Plaintiffs and 4th Defendant claims ownership of the disputed on the basis that they are bonafide purchasers for value. In the context of the Plaintiffs, they claim that they purchased the disputed parcel from ADC while the 4th Defendant claims that it purchased the disputed parcel from one Joseph Kasaine Nkaisery who it further claims purchased the same from ADC. The Courts have been emphatic that before one is considered a bonafide purchaser for value as the Plaintiffs and the 4th Defendant would like to, they must prove that they acquired a valid and legal title in addition to demonstrating the validity of their root title. The Honorable Attorney general relies on the case of Samuel Kamere vs. Lands Registrar, Kariadi [2015] eKLR where the Court of Appeal stated thus: -

“...in order to be considered a bona fide purchaser for value they must prove that they acquired valid and legal title second/ the carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit land.

110. The Attorney General cites the judgment in Munyu Maina vs Hiram Gathima Maina [2073] eKLR where the Court of Appeal held as follows; -

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, forma/ and free from any encumbrances including any and al/ interests which need not be noted on the register. ”

111. The Attorney General also relies on Dina Management Limited vs. County Government of Mombasa 5 others [2023] eKLR where the Supreme Court of Kenya cited with approval the decision of the Court of Appeal in Munyu Maina vs Hiram Gathima Maina (supra) as follows: -

“As held by the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009/120131 eKLR, where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, forma/ and free from any encumbrance including interests which would not be noted in the register. ”

112. The Attorney General submits that in order to establish whether the Plaintiffs are a bona fide purchasers for value, the Court should interrogate the root of their title right from the alleged allocation for purposes of purchase by ADC, payment of consideration, procurement of completion documents and proof of registration of the transfer as this is the bone of contention in this matter. Likewise, in order to establish whether the 4th Defendant is a bona fide owner of the of disputed parcel, the



Court should interrogate the root of its title from the alleged allocation to Joseph Kasaine Nkaisery by ADC for purposes of purchase, payment of consideration, procurement of primary completion documents before alleged registration of the transfer between ADC and Joseph Kasaine Nkaisery and proof registration of the transfer to both Joseph Kasaine Nkaisery and the 4th Defendant. Under sections 102 to 112 of the *Evidence Act*, the burden to prove or demonstrate how the late Joseph Nkaisery acquired his title was upon the 1st and 4th defendants. Sadly, the 1st and 4th defendants miserably failed to discharge this burden. Firstly, the 1st and 4th defendants ought to have joined the estate of the late Joseph Nkaisery to the suit either as a defendant or third party or at least summon the personal representatives of the estate to shed light on the alleged transaction between the late Nkaisery and ADC. This was important noting that ADC had in its defence and evidence denounced that it transferred the suit property to the late Nkaisery. In the absence of any cogent evidence from the 1st and 4th defendants or the estate of the late Nkaisery to rebut consistent and clear evidence from ADC denouncing any transfer to the late Nkaisery, it is quite clear and on balance of probabilities that the 1st and 4th defendants failed to prove the interest in the suit land by the late Nkaisery. The honorable Attorney General relies on *Richard Kipkemboi Limo v Hassan Ngeny & others* [2019] eKLR where in similar circumstances the Court of Appeal held that to prove the root title, evidence of the original owner ought to be considered.

113. The Attorney General further contends that entries Number 85 and 149 on competing and conflicting grants no 40236 relating to the suit land which the parties have presented constitute the end product of a registration process and would not without a demonstration of due process and procurement of primary completion documents before their registration constitute evidence of a valid root title and interest. This should particularly be the case given the undisputed fact that both of these conflicting grants contain unexplained and inconsistent entries as confirmed by David Nyambaso Nyandoro and Mark Wanderi Muigai that testified as the 2nd and 3rd Defendants' DW1 and DW2 respectively.
114. The suit land previously belonged to ADC. This being the case and relying on the decided cases of *Dr. Joseph Arap N ok vs. Justice Moiwo Ole Keiwua & 5 others* [1997] eKLR and *Wreck Motors Enterprises v Commissioner of Lands & 2 others* CA No. 71 of 1997 (unreported), the 2nd and 3rd Defendants submit that the Plaintiffs are enjoined to demonstrate that ADC issued them with a letter of allotment offering the suit land for sale, they complied with the conditions in the letter of offer by payment and that a valid title was thereafter issued after execution of a transfer, assessment and payment of stamp duty and procurement of the land control board consent.
115. The Plaintiffs have produced documentary evidence that shows that vide a letter dated 14th March, 1995 they applied for allocation of the suit land for purposes of purchase; the ADC through a letter dated 18th May, 1995 informed the Plaintiffs they had been allocated the disputed land and the purchase price would be communicated to them; the ADC vide a letter of offer dated 8th October, 1995 informed the Plaintiffs to remit payment of Kshs. 56,856.85 to cater for the purchase price and other disbursements; the Plaintiffs through a letter dated 31st October, 1995 forwarded a banker's cheque for Kshs. 56,826.85 to ADC and that the ADC through a letter dated 29th November, 1995 forwarded payment receipt number 24507 dated 28th November, 1998 to the Plaintiffs for Kshs. 56,826.85 being payment of the suit land. The evidence tendered by the Plaintiffs also pointed out that ADC and the Plaintiffs as vendor and purchasers respectively applied to the Nakuru Land Control Board for consent to transfer the suit land vide an application dated 6th December, 1995 and that on 7th December, 1995 a letter of consent to transfer was issued by the Nakuru Land Control Board. The Plaintiffs produced both the application and letter of consent as well as the above stated correspondence in evidence. ADC through its witness, Nicholas Ayugi Odoyo (DWIO) however claimed during examination in chief and re-examination that it had no records to show that it allocated the suit properties to the Plaintiffs. ADC further testified that the allocation records that the Plaintiff



has filed are not authentic. It is however imperative to note that ADC in response to the and 4th Defendants' defence and counterclaim filed a statement of defence to the counter-claim dated 24th May, 2024 vide which it pleaded that Joseph Kasaine Nkaissery having been allocated the suit land and having failed to remit the consideration no interest vested upon the said Joseph Kasaine Nkaissery and the suit land was allocated to the Plaintiffs who were named as the 1st and 2nd Defendants in the counterclaim. ADC vide this paragraph 11 of their statement of defence to the counter claim pleaded that the 5th Defendant to the counterclaim further avers that no valid interest was vested on the late Joseph Kasaine Nkaissery for want of consideration and primary completion documents such as a validly executed instrument of transfer by reason of which the said suit property, L.R No. 13287/99 could and was validly allocated to the 1st and 2nd defendants in the counterclaim.

116. According to the Attorney General, it is a settled law that parties are bound by their pleadings. The Court of Appeal in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002 where it was held thus:

“it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties witness which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

117. The Court of Appeal in the above stated decision in Independent Electoral and Boundaries Commission another v Stephen Mutinda Mule 3 others [2014] eKLR also cited with approval that part of the decision of the Supreme Court of Nigeria in Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002 where the Judges held:

“The fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opinion is given to the other party to meet the new situation.”

118. In the same vein, the Court of Appeal in Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR restated the position that a litigant is not entitled to give evidence that runs contrary to their pleading in defence as follows: -

“Learned counsel for the appellant is with due respect to him, wrong in his submission that the appellant was entitled to proceed on a case that ran contrary to the pleading in its defence. The appellant was bound by pleading in the defence which was not amended to allow the learned judge to consider issues that the appellants witness was introducing through evidence in court. ”

119. The 2nd and 3rd Defendants submit that if this Court is to follow the reasoning of the Court of Appeal in the above cited cases in Independent Electoral and Boundaries Commission another v Stephen Mutinda Mule & 3 others (supra) and Dakianga Distributors (K) Ltd (supra), the inescapable conclusion should be that ADC is bound by the pleading at paragraph 11 of their statement of defence that Joseph Kasaine Nkaissery having not remitted the purchase price no interest in the suit land vested in him and the suit property was validly allocated to the Plaintiffs. The evidence of ADCs witness that the allocation records held by the Plaintiffs did not originate from them is at variance with its pleadings, goes to no issue and must be disregarded. Unlike the 1st and 4th defendants, the plaintiffs led evidence and produced documentary evidence that demonstrate on a balance of probabilities that the Plaintiffs applied to ADC or allocation of the suit land for purposes of purchase, ADC allocated



them the disputed parcel subsequent to which they remitted payment of the consideration to ADC before completion documents that include a transfer and the land control board were procured. The averments at paragraph 11 of the statement of defence filed by ADC corroborate the position that the suit land was allocated to the Plaintiffs. In view of the foregoing and in the absence of evidence that the allocation records filed by the Plaintiffs are forgeries, we submit that the Plaintiffs have on a balance of probabilities demonstrated that they were allocated the disputed parcel by ADC and that they paid the required consideration and that interest crystallized in their favour.

120. Thirdly, the 4th Defendant relied on entry number 85 on grant number 40236 for L.R No. 13287 to demonstrate that on 22nd February, 1991 ADC conveyed interest over the suit land to its predecessor in title, Joseph Kasaine Nkaissery. The 4th Defendant further produced an instrument of transfer dated 21 st January, 1991 vide which interest over the suit land was conveyed from ADC to Joseph Kasaine Nkaissery. This instrument shows that it was registered on 22nd February, 1991 and certificate of title grant number I.R 52014 issued on even date. Needless to mention that this certificate of title shows that interest over the suit land would first be charged to Postbank Credit Limited (IL) and discharged vide entries numbers 2 and 3 respectively before this parcel was transferred to the 4th Defendant on 8th September, 1999. The 2nd and 3rd Defendants' DW1 and DW2 confirmed to the Court that there exists grant number I.R No. 40236 in the lands registry which they stated is evidence that interest over the suit land was registered in favour of Joseph Kasaine N Kaissery thereby corroborating the 4th Defendant's narrative. The Plaintiffs on the other hand produced in evidence an instrument of transfer dated 6TH February, 1996 and registered on 14th February 1996 as proof of the contention that ADC conveyed interest over the suit land to them. The Plaintiffs also filed certificate of title grant number 52014 for the suit land that was registered in their favour and issued by the land registry on 14th February, 1996 to support the contention that they are validly registered as the owners of the disputed land. It is also on record that the Plaintiffs equally relied on grant number 40236 for L.R No. 13287 which contains Cancelled entry number 85 vide which transfer of interest over the suit land from ADC to one Ishmael Chalanga on 22nd February, 1991 is revoked and reference made to entry number 149 on the same grant.
121. Entry number 149 vide which interest over the disputed parcel is transferred from ADC to the Plaintiffs herein on 14th February, 1996.
122. The court record shows that the 2nd and 3rd Defendants filed a list and bundle of documents LU dated 15 th May, 2024 containing a certified and registered instrument of transfer dated 6 th February, 1996; a certified land control board consent dated 7th February, 1995; a certified certificate of title I.R No. 52014 for L.R No. 13287/99 that is registered in the name of the Plaintiffs and the above stated certified copy of grant number IR No. 40236 which shows that interest was conveyed from ADC to the Plaintiffs. A Land Registrar, namely, Elly Ogolla while testifying as the 2 nd and 3 rd Defendants DW3 confirmed that the documents filed in Court on 17th May, 2024 were obtained from the land registry but declined to produce them claiming that the Chief Land Registrar had written a letter substituting them.
123. The record shows that ADC has disowned the transfer of interest over the disputed parcel of the 4th Defendant's predecessor in title, Joseph Kasaine Nkaissery vide its statement of defence dated 24th May, 2024 as well as vide the testimony of DWIO. The sad reality however is that both the Plaintiffs and the 4th Defendants hold competing mother titles and certificates of title over the same parcel of land that are in themselves end products of a registration process and therefore inconclusive proof of ownership. Under Article 40(6) of *the Constitution* and section 26 of *Land Registration Act*, this court is enjoined to uphold title to land only if there is evidence to prove that the title was acquired lawfully and procedurally. This legal position has been amplified in a number of court decisions.



124. The Attorney General refers to *Funzi Island Development Limited & 2 others — versus- County Council of Kwale & 2 others* [2014] eKLR. Hon. Maraga JA (as he was then) held that in the case of allocated land, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegally or irregularly obtained title. In *Republic —versus- Land Registrar Kilifi & Another ex- arte Daniel Ricci* [2013] eKLR, the court held that a title deed is an end product of a process. For a title to be protected by Article 40(1) of *the Constitution*, the holder of the title deed has to establish that he followed the laid down procedures in ac uirin it.
125. In deciding whether the registration of the 4th Defendant as the owner of the suit property is valid and takes precedence over the Plaintiffs' claim over the suit land the Court should consider whether it has been demonstrated that laid down procedures were complied with before registration of Joseph Kasaine Nkaissery as the owner of the suit land vide entry number 85 on grant number 40236 and certificate of title I.R No. 52014 as alleged. The title held by the 4th Defendant would be a nullity if the Court arrives at the conclusion that the laid down procedure was not followed before the transfer of interest from ADC to the Joseph Kasaine Nkaissery. For this position, the 2 nd and 3 rd Defendants rely on the decision in *McFo v United African Com an Limited* [1961] 3 All ER 1169 where it was held thus:
- “If an act is void, then it is in law a nullity. It is not bad but incurably bad. There is no need for an order of the court to set it aside It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put anything on nothing and expect it to stay there. ” The Court of Appeal in *Jenipher Kositan vs. Chania Logistics Limited & 3 others* [2024] eKLR in almost similar circumstances was considering whether interest in agricultural land purportedly acquired from ADC without proof of an allocation letter for purposes of purchase, proof of payment of consideration and procurement of a land control board consent despite its registration on the mother title or issuance of a grant was invalid. It was held inter alia as follows: -
- “The appellant confirmed that she did not have an allotment letter from ADC, proof of payment of the purchase price or a consent of the Land Control Board, that she had title to the suit land. No evidence was led before the trial Court on how the appellant was allocated the suit land by ADC or how she obtained a certificate of title
126. The 1st and 4th Defendants who were enjoined to prove that the allocation and transfer of the disputed parcel of land from ADC to Joseph Kasaine Nkaissery was procedural conceded through DW2 that they did not have evidence of an allotment letter that was issued to Joseph Kasaine Nkaissery by ADC communicating the purchase price or allocation of the disputed land. The Vt and 4th Defendants through their DW2 further conceded during cross examination that they did not have evidence of payment to ADC by Joseph Kasaine Nkaissery yet they had a duty to establish that he paid the requisite consideration before obtaining title under section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. According to the Attorney General, the defendants hold competing certificates of title over the same land or that officials of the 2 nd Defendant through the 2 nd and 3 rd Defendants through their DW1, DW2 and DW3 have stated that records indicate they are registered as the owners of thereof and availed titles to the Court is not enough to warrant the reliefs they are seeking. This is because this Court has held that it is not enough to wave a certificate of title or assert ownership by mere possession of a grant and that a party must go beyond the title and prove that a valid root title exists and that the acquisition was legal, formal procedural and free from any encumbrance. The 2nd and 3 rd Defendants urge the



Court to decide the ownership dispute hereon not on the basis of the certificates of titles waved by the Plaintiffs but rather on the basis of the question as to whether the Plaintiffs have established that they were allocated the suit property by ADC, they paid the purchase price and procured primary documents before their alleged registration. The Attorney General urges me to find that unlike the 1<sup>st</sup> and 4<sup>th</sup> defendants' interest, the plaintiffs' title is properly grounded.

127. The Court should equally decide the ownership dispute not on the basis of the certificate of title or grant waved by the 1<sup>st</sup> and 4<sup>th</sup> Defendants but rather on the question as to whether the 1<sup>st</sup> and 4<sup>th</sup> Defendants have established that their alleged predecessor in title was allocated the disputed land by ADC for purposes of purchase, he paid the required purchase price and relevant primary / completion documents procured before registration.
128. On whether any of the parties before the Court has proved the allegations of fraud, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants rely on the following authorities: - The decision of the Court of Appeal in *Central Kenya Ltd vs. Trust Bank Limited & 4 others* [1996] eKLR where it was held that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.
129. The AG further refers to the decision of the Supreme Court in *Fanikiwa Limited & 3 others vs. Sirikwa Squarters Limited & others* [2023] eKLR where it was upheld that even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. The Plaintiffs vide their amended plaint and pleadings made allegations of fraud against the Defendants but failed to adduce any evidence beyond a balance of probabilities to substantiate their allegations. The 1<sup>st</sup> and 4<sup>th</sup> Defendants equally alleged fraud against the Defendants in their counterclaim but also failed to adduce evidence to prove allegations of fraud. It was for instance not proved that the Plaintiffs forged the signature of the Chief in the letter dated 4<sup>th</sup> September, 2023 as the Assistant Chief attended Court and confirmed that he authored the same while serving in acting capacity as the chief. Allegations of fraud by both the Plaintiffs, the and 4<sup>th</sup> Defendants in the counterclaim as well as the 5<sup>th</sup> Defendant as against the 4<sup>th</sup> Defendant were not supported by any documentary evidence such as forensic examination report(s) or police investigation report to substantiate them.
130. Given the above quoted decisions of the Court of Appeal and Supreme Court, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submit that allegations of fraud and conspiracy to defraud were not proved to the required standards.
131. In conclusion, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants urge the Court to determine the dispute herein not on the basis of the purported title documents or grants as waved by the Plaintiffs and the 4<sup>th</sup> Defendant but on the basis of root title by interrogating based on facts and evidence adduced on who between them has proved valid acquisition from ADC and whether there is evidence that primary completion documents were procured.
132. In the upshot, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submits that no action has been disclosed against them and pray that the suit and counter-claim as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be dismissed. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall nonetheless comply with any order of the court in respect of cleaning of records over the suit property.

#### **1st and 4TH Defendants Submissions**

133. The 1<sup>st</sup> and 4<sup>th</sup> defendants submit that the allegation by the Plaintiffs that they are the lawful registered owners of the suit property on the basis of a Certificate of Title dated 14<sup>th</sup> February 1996 allegedly obtained upon the allocation of the suit property to them from the 5<sup>h</sup> Defendant is not proved. They submit that the courts have established that while Section 26 of the *Land Registration Act* provides



that a Certificate of Title serves as conclusive proof of ownership, such ownership, if challenged, must be proven by the alleged registered owner to have been acquired through a legal process, and it is not sufficient to simply wave the Certificate in the face of the court. The Court of Appeal in *Munyua Maina v Hiram Gathiha Maina*, Civil Appeal No.239 of 2009 held that, if we have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and registered proprietor must go beyond the instrument to prove the, legality o of how he acquired the title to show that the acquisition was legal formal and free from ant/ encumbrances including any and all interests which would not be noted in the register."

134. This was reiterated by the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 others* Nairobi SC Pet No. 8 (EOIO) 2021 (Mwilu DCT&VP Waniala, Njoki, Lenaola & Ouko, SCII ( unreported) where it stated thus the title or lease is an end products of a process. If the process followed prior to the issuance of the title did not comply/ with the law, then such a title cannot be held as indefeasible."

135. The Defendants further rely on the case *Kantar & 5 Others* (2016)<sup>1</sup> where the court held that;

"A court when faced with a case of two or titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have title deed or Certificate of Lease, then they have a right over the Property. The other party also has similar document and there is therefore no advantage in litigating one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.

136. It therefore follows that for the Plaintiffs to convince this Honorable Court that their Title is indefeasible and therefore superior to that of the Defendants, they must demonstrate that the process leading up to issuance of the impugned Certificate of Title was lawful and incontrovertible. The Defendants submit that the Plaintiff's evidence falls short of the test of indefeasibility of title. On the alleged allocation of the suit property to the Plaintiffs by the 5th Defendant, the 1st and 4th defendants submit that the Plaintiffs' witness, Mr.Omar Mohamed Omar during his testimony in chief, produced several correspondences between themselves and the 5th Defendant as proof of allocation of the suit property. He produced a letter dated 18th May 1995 addressed to the Plaintiffs from the 5th Defendants, communicating the allocation of the suit property. However, during cross- examination by Mr. Karumpu for the 5th Defendant, he was put to task to explain how it came about that a letter was written and addressed to the Plaintiffs on a date that fell on a Sunday in the year 1995, which explanation he was unable to provide, other than in stating that the Plaintiffs were issued with the letter in Nairobi.

137. His failure to explain how it was possible that a government office operated on a Sunday being a non-working day, decided to allocate the suit properties to the Plaintiffs and dispatched the letter for issuance to them reveals only two possibilities; first/ that: the Plaintiffs conspired with the 5th Defendants' official to prepare this letter on a day that the official would be under minimal supervision and scrutiny to avoid interference with the fraudulent scheme of allotting a suit property that was



not available for allocation. The second possibility, which the Defendants herein humbly consider to be the correct position, is that the Plaintiffs, upon being served with the Defendants' Defence and accompanying documents, rushed to forge correspondences bearing the 5th Defendant's letterhead to allege allocation of the property to them, in which rush the Plaintiffs overlooked the fact that 18th May 1995 was a Sunday and not a government working day. Further to the letter dated 18th May 1995, the same is shown to have been executed on a Sunday by one Dr. Kilele, the 5th defendant's Managing Director. The said Dr. Kilele equally makes an appearance on the Plaintiffs' Application for Land Control Board Consent as having signed the Application on behalf of the 5th Defendant. A cursory look at Dr. Kilele's signature in the letter dated 18th May 1995 and in the Application for LCB Consent, reveals patent discrepancies that are clear to the naked eye. The able Court shall note that in the Ruling dated 5th May 2024, the Court declined the Defendants' Application to have a forensic document examiner investigate the authenticity of Dr. Kilele's signatures and in turn the letter allegedly allocating the suit property to the Plaintiffs was produced. The Ruling notwithstanding, it is the Defendants' humble submission that it does not require a forensic examiner to interpret what a reasonable person can see with their naked eye. The inconsistencies in Dr. Kilele's signature point to only one fact, either the dated 16th May 1995 or the Application for LCB Consent was forged, which is fatal in either case for the Plaintiff. The Defendants submit that they are both nothing but forgeries.

138. The Defendants herein humbly submit that the Plaintiffs have not presented to this Honorable Court a valid application for consent or a valid. PW1 produced the Application for LCB Consent (PEXB 10), allegedly signed by Dr. Kilele on behalf of the 5th Defendant, which execution, the Defendants reiterate forgery as the same is manifestly different to all other signatures being passed off as those of Dr. Kilele. Having addressed this issue earlier, the Defendant wishes to focus on the Consent alleged to have been the result of the impugned application. That this Consent is nothing but a forgery, fraudulently procured to mislead this Honorable Court as to the transactions leading up to the Plaintiffs' alleged acquisition of the suit property.
139. On the root of the title, the 5th defendant submits that the Grant presented by the Plaintiffs is procured to misrepresent the true facts of the matter since entry No. 85 is a cancellation of a transfer of the suit property to one Ishmel Chelanga.
140. Two issues arise from this entry. First, the cancellation has not been countersigned by the officer that effected it. Common sense dictates, as Justice Kimaru in *William Kaboqo Gitau V George Thuo & 2 others* [2010] eKLR held "that where there is a cancellation or alteration of a statutory form, the same should be countersigned by the concerned official. That Entry No. 85 is clearly a forgery which has been used to alter the original entry, evidenced by the clear difference in the handwriting in the preceding and subsequent entries. If at all truly the entry was recorded within the same time frame that entry 84 and 86 were recorded, the same person would have done the recording, and there would be consistency in the appearance by the handwriting. In this instance however, the person that entered entry 85 is patently different from that who entered entry 1 to 84 and 86 to 148. That Entry 149 is equally a clear forgery done by the same person that altered entry 85; A cursory look at all the entries in the grant reveals various handwritings that maintain consistency in three to four entries. However, a look at entry 149 and 85 reveals that not only were they done by the same individual but also that the said individual does not appear to have effected any other entry in the entire Grant. This cannot be a mere coincidence. It is therefore upon this Honorable Court, to determine whether there is a reasonable of title. The Defendants presented several documents in proof of the authenticity of Nkaisery's ownership. The first was the Transfer dated 21st January 1991 (DMFI-3) effecting the passing ownership of the suit property from the 5th Defendant to Nkaisery. The legitimacy of the transfer of ownership by the 5th Defendant was corroborated by its own witness, Nicholas Ayugi who testified that "L.R No. 13287/99 was allocated to Lt. Col Joseph Nkaiserv. Second, the 1st Defendant produced the Grant No. IR



40236 (the Mother Title) and testified that Entry 85 of the same showed that a transfer to Joseph Kassaine Nkaiserry of the suit property was effected on 22nd February 1999. This evidence was equally corroborated by the 5th Defendant's witness, Nicholas Ayugi who testified that all the records held at its office, including their copy of the Mother Title identified Nkaiserry as the very first allottee and beneficiary of the suit property. The authenticity of the contents of Entry No. 85 was also corroborated by the Chief Land Registrar, David Nyambaso Nyandoro, who testified that according to the original Mother Title produced in court as DEX 1, Entry 85 related to a transfer of the suit property to the late Joseph Kassaine Nkaiserry.

141. Third, the 1st Defendant produced a search of a Certificate of Title issued on 25th November 2020 (DEX 19) showing that the initial owner of the said title was the late Joseph Kassaine Nkaiserry.
142. Applying a similar test to that outlined by the Chief Land Registrar in determining the genuineness of the title reveals key issues such as the Title I.R Number is indicated as IR. 40236/85. By the Chief Land Registrar's testimony, this Title is shown as registered against the initial grant number, that is 40236 and in reference to an Entry No. 85 on the said grant, it would therefore follow that to know whether the Title was truly issued to Nkaiserry, one would have to confirm that the Entry 85 referred to contains his name as the person to whom the property was transferred to. In this case, Entry No 85 on the Certificate of Title corresponds with the Entry 85 in Grant IR. 40236. The long and short of it is the search produced by the 1st Defendant is conclusive proof that the late Joseph Kassaine Nkaiserry was the only allottee of the suit property.
143. On the issue of occupation of the suit property by Nkaiserry, the 1st and 4th defendants submit that the 1st Defendant testified that he found the late Joseph Nkaiserry in possession and later approached him and expressed an intention to sell the suit property. In determining the root of title, this Honorable Court must satisfy itself that the person allotted the suit property did in fact take occupation of the same. The Defendants assert that evidence that Nkaiserry's took occupation tramples that of the Plaintiffs' and is more believable. They submit that the 5th Defendant's witness testimony, coupled with that of the area chief at the time as well as the fact that Post Bank had placed a charge over the Suit property at the same time that the Plaintiffs claim to have acquired it on point to one conclusion, that it was Nkaiserry and not the Plaintiffs, that was in occupation of the property between 1992 and 1999. It is trite law that for a purchaser to prove that they acquired title, they must demonstrate the existence of a sale agreement, payment of consideration, obtaining of necessary consents and clearance certificates, transfer of the property and finally registration of the transfer and issuance of a Certificate of Title. The Defendant produced several correspondences between Nkaiserry and Grace Kipyator currently an ELC Judge at Thika Law Courts which correspondences were made during the negotiation period leading up to the sale of the suit property.

### **Submissions by the 5th Defendant**

144. The 5th defendant submits that under Kenyan law, the burden of proof lies on the party asserting a fact. Section 107(1) of the *Evidence Act*, Cap 80 provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
145. The Plaintiffs have failed to demonstrate, through credible and verifiable evidence, that they acquired any valid interest in the Suit Property from the 5th Defendant. The documents relied upon by the Plaintiffs, including the letters dated 14th March 1995, 18th May 1995 and 8th October 1995, as well as the purported Transfer dated 6th February 1996 are unsupported by any records from ADC. The 5th defendant relies on *Wreck Motor Enterprises v Commissioner of Lands & Others* [1997] eKLR,



the Court emphasized that claimants of land must provide VALID and LEGALLY VERIFIABLE documentation. ADC categorically denies any allocation or sale of the Suit Property to the Plaintiffs as the plaintiff did not produce any formal application for allocation and approval by ADC's authorized officers including documentation of the transaction, plus payment records and minutes of meetings authorizing the allocation. The Plaintiffs allege that they applied for the Suit Property through a letter dated 14th March 1995 that was subsequently approved through a letter dated 18th May 1995. However, no such documents exist within ADC's official records.

146. Furthermore, the Plaintiffs allege payment of Kshs. 56,826.85 via Banker's Cheque No. 344068 on 31st October 1995. ADC has no record of receiving such payment. The absence of payment records raises serious doubt as to the authenticity of this claim.
147. The 5th defendant relies on *Dina Management Limited v County Government of Mombasa* (Supreme Court Pet. No. 8 (E010) of 2021), the Court held that proper records and documentation are critical in establishing land transactions. The lack of records from ADC invalidates the Plaintiffs' assertions. The Plaintiffs' claim is founded on documents that are highly suspect. The Letter dated 14th March 1995 has not been authenticated, and ADC has no record of receiving such communication. The Letter dated 18th May 1995: The Plaintiffs claim this letter approved their application. Again, ADC has no record of issuing such a letter, and its authenticity is unproven.
148. The Banker's Cheque No. 344068 was not received by ADC. If indeed this assertion were true, the Plaintiffs would have made an effort to get a statement from the Bank where they supposedly made the payment to. A statement verifying that they indeed paid money to ADC through the supposed Bank. The Transfer dated 6th February 1996 is not in the possession of the 5th defendant. The 5th defendant relies on the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held:

“When a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how the title was acquired.”
149. This means parties must go above and beyond to prove the authenticity of the documentation they rely on. It should not be assumed that the Court by its own motion will go ahead and prove the authenticity of the documentation relied on by the parties. The onus lies with the producer of the said documents. The Plaintiffs' reliance on dubious documents fails to establish a valid root of title. In *Gitwany Investment Ltd v Tajmal Ltd & 3 Others* [2006] eKLR, the Court emphasized that land allocation must follow due process and be supported by documentation. Without evidence of allocation by the party allocating the land, the Plaintiffs' claim is unsustainable.
150. The 5th Defendant's records indicate that the Suit Property was allocated to the Late Joseph Kasaine Nkaissery by a letter dated 7th June 1988. However, going by the 5th Defendant's records, there is insufficient evidence to confirm whether the Late Nkaissery completed payment for the land. In the absence of such evidence, it cannot be conclusively determined that the Late Nkaissery acquired legal ownership of the Suit Property. This position is supported by the decision in *Dina Management Limited v County Government of Nairobi* [2017] eKLR, where the Court emphasized the importance of clear documentation in land transactions. The failure to prove payment renders the allocation incomplete and invalid.
151. In the above-mentioned case, the Supreme Court addressed the principles surrounding land allocation and the consequences of failing to meet legal requirements. The Court held that, for a transfer to be



valid, there must be compliance with the substantive and procedural requirements outlined in law. It was further noted that:

“A mere allocation letter or possession of land does not constitute ownership unless there is evidence of full compliance with the conditions of the allocation, including payment of the requisite fees and formal registration of title.”

152. This case is directly applicable as there is insufficient records indicating whether or not the Late Nkaiserry completed payment for the suit property. It is a well-established principle of law that one cannot transfer what they do not possess, often expressed in the Latin maxim *nemo dat quod non habet*. This principle is firmly embedded in Kenyan Land Law and is codified under Section 24 of the *Land Registration Act*, 2012. For a person to transfer a valid interest in land, they must themselves hold a good and lawful title to the said property. In this case, the Late Joseph Kasaine Nkaiserry could not have transferred a legitimate interest in the Suit Property to the 4th Defendant because there is no evidence that he had valid title to the property in the first place.
153. The transfer of land requires compliance with several legal conditions, including the payment of consideration. Section 3(3) of the *Law of Contract Act*, Cap 23, requires that any agreement for the disposition of an interest in land must be in writing, signed by all parties, and supported by consideration. In the present case, there is insufficient evidence to show that the Late Nkaiserry completed payment for the Suit Property after the alleged allocation by the 5th Defendant.
154. Without evidence of full payment, the conditions precedent for the legal transfer of the property to Nkaiserry were never fulfilled. The principle that states that an invalid title cannot be perfected by subsequent transfers was once again emphasized in *Dina Management Limited v County Government of Mombasa* (Supreme Court Petition No. 8 (E010) of 2021). The Supreme Court ruled that if the initial transaction creating the title is flawed, subsequent transactions based on that title are also void. This is particularly relevant in cases involving public land or where conditions of allocation, such as payment of consideration, were not met.
155. The principle of reversion of land to its original owner was affirmed in *Yako Supermarket Limited v National Land Commission* (Kakamega ELC Petition Case Number 3 of 2017). The Court in this case stated:

“Public land that has been allocated irregularly or without compliance with statutory requirements reverts back to the original allocating authority or the public body entrusted with the management of such land.”
156. The Court further highlighted that a claimant's failure to produce valid documents of ownership, including proof of compliance with allocation conditions, warrants the reversion of the land. In the present matter, there is insufficient evidence that the Late Nkaiserry fulfilled the terms of allocation thereby necessitating that the Suit Property should revert to the 5th Defendant.
157. Additionally, in *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR, the Court reiterated that failure to comply with the terms of an allocation renders the allocation void, and the land reverts to the original owner. Section 26 of the *Land Registration Act*, 2012 provides that a title is indefeasible except where it is acquired through fraud, misrepresentation, or unlawful means. In the absence of credible and verifiable evidence from the Plaintiffs, the Suit Property should revert to the 5th Defendant.



158. It is critical to protect public land and ensure that allocation processes are valid and verifiable, and that they comply with statutory requirements. On this basis, the 5th Defendant prays that this Honourable Court finds as follows:

- a. The 5th Defendant did not allocate or offer the Suit Property to the Plaintiffs.
- b. The Plaintiffs have failed to establish any legal or equitable claim to the Suit Property.
- c. There is insufficient evidence to confirm that the Late Joseph Kasaine Nkaissery completed payment for the Suit Property.
- d. The Suit Property should revert to the Agricultural Development Corporation as its original owner.

The 5th Defendant respectfully prays that the Plaintiffs' suit and the Counterclaim by the 1st and 4th Defendants be dismissed with costs.

### **Analysis And Determination**

159. In *Wareham t/a A.F. Wareham & 2 Others – v- Kenya Post Office Savings Bank* [2004] 2 KLR 91, this Court stated:

“.....in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

160. This court has considered the pleadings and evidence on record and does find that the crystal clear facts of this case are that the President granted a Trustee Company (settlement fund trustees) all that parcel of land situate North East of Njoro Town, Nakuru District, containing by measurement Two Thousand, One Hundred and Twenty-Three, naught five Hectares (2,123.05 Ha) or thereabout, being LR No. 13287 (Original No. 3969/1,3071/1,5836/1,9213/1,9734/1) subject to caveats and special conditions as imposed by the government. Subsequently, through a Transfer registered on 3rd May 1985, the said Trustee Company transferred all that parcel of land to the Agricultural Development Corporation, which proceeded to subdivide the same into various parcels, including the suit property situate North of Njoro Town in the Nakuru District comprising 20.24 Ha delineated on Land Survey Deed Plan Number 143859.

161. It is clear from the register produced by the Chief Lands Registrar DW8 that In a Transfer dated 21st January 1991, and registered on 22nd January 1991, the Agricultural Development Corporation then transferred the suit property to the Late Joseph Kasaine Nkaissery for a consideration of Kshs. 60,015.63. Consequently, the late Joseph Kasaine Nkaissery was issued with a Certificate of Title dated 22nd February 1991.

162. It is also clear that the 4th defendant purchased from the said Joseph Kasaine Nkaissery that the 4th Defendant purchased the suit property and was issued with a Certificate of Title to the same and subsequently registered as the proprietor of the suit property.



163. It is also evident on record that in March 1998, the 4th Defendant entered into an agreement for sale of the suit property with the late Joseph Kasaine Nkaisery, for a consideration of Kshs.5,500,000.00, which consideration the 4th Defendants paid in two instalments. Being Kshs. 2,500,000.00 through Cheque No. 000152 and Kshs. 3,000,000.00 through Cheque Nos. 000188 and 000206 on 23rd March 1998 and 23rd July 1998 respectively. Therefore, having finalized payment of the purchase price, the parties executed a Transfer dated 20th August 1999, effectively vesting proprietary rights over the suit property on the 4th Respondent.
164. It therefore a fact the 4th Defendant registration as a proprietor of the suit property arises from purchasing the same from the late Joseph Kasaine Nkaiseri and was issued with a Certificate of Title. It is also a fact that the original Grant No. 40236 from which all transactions relating to LR 13287 emanate from, has a total of One Hundred and Eighty-Six (186) entries, indicating the first transfer to the Agricultural Development Corporation in 1985 to the latest transfer to one Charles Kipkoech Rop in 2023.
165. The evidence of Joshua Kulei which I find to be true is that out of the 186 entries, only Entry No. 85 relates to the suit property, recorded as a transfer to Joseph Kasaine Nkaisery, 20.24 Ha, LR No. 13287/99, freehold. It is also true that the Plaintiffs do not appear in any entry. It is a fact that the Plaintiffs have presented the same Grant with a different Entry No.85 indicating that the Agricultural Development Corporation allegedly transferred the suit property to one Ishmael Chelang'a, which transfer was later cancelled. The grant relied upon by the plaintiff was different from the one produced by the Chief land registrar and therefore the court will choose to rely on the grant produced by the Chief Land Registrar as the proper document because entry no 85 on the document produced by the plaintiff was tampered with and the name of Joseph Kasine Nkaiseri removed and the one of Ismael Chelanga inserted and then deleted.
166. Though the 2nd plaintiffs witness stated that the plaintiff was in possession of the land the Deputy Registrar observed on site visit that the iron structure on the land was new. Moreover, the plaintiff's second witness Charles Kipkurui Koech cannot be trusted as he signed as the chief in the name of the chief a letter dated 4th September 2023 he produced as an exhibit that supported the plaintiff's statement that the plaintiff was in possession of the land. The act of signing a letter on the letter head of the chief in the name and signature of the chief was an illegality. Though he was the acting Chief, he did not have the authority to sign the letter. The evidence of the Chief Ngata Location Augustine Rotich, where the suit land is situate and former chief Dniel Sing'oei Kandie was truthful that the 4th defendant had been in possession of the land since 1998 when he purchased it. This court finds that the plaintiffs were never legally in possession of the suit property prior to commencing their cause of action.
167. On the issue of ownership of the land, the chief land registrar who is the custodian of the land register testified that he had the mother title to the suit property which he produced as an exhibit. The Chief Land Registrar gave evidence that entry no 85 on the mother title to the suit property indicated that the property was transferred to the Late Joseph Kasaine Nkaisery by ADC. He stated that the names of the plaintiffs were nowhere on the record. This court finds that the title document produced by the plaintiffs as the mother title was tampered with in respect of entry no 85 to read an entry in the name of Ismael Chelanga and that there is no way a photocopy could produce a document different from the original. Mr Nyandoro, the chief Land registrar disowned the documents filed by Mr Elly Ogolla.
168. Mr Mark Mungai , The Principal Land Registrar testified that based on the documents in their custody entry no 85 shows that the land was transferred to Joseph Kassine Nkaisery on 22nd February 1991. His evidence was supported by the documents produced by the chief registrar and the 1st and 4th



defendants. Mr Elly Ogolla a land Registrar who testified as DW9 did not want to comment on the documents filed and appeared not willing to divulge information because did not want to contradict his superiors.

169. The evidence of Nicholas Ayugi Odoyo and the documents produced were very clear that the suit property that LR NO 13287/99 was allocated to the late Nkaissery but he did not pay the full purchase price. He stated that the late Nkaissery was in occupation of the property and the plaintiffs were never allocated the land. I do find this to be the true fact of the case. This court finds that the evidence of the Chief Land Registrar, the Principal Land Registrar and the land administrator Agricultural Development Corporation was crystal Clear that the suit property belonged to the 4th plaintiff after having purchased it from the late Joseph Kasaine Nkaisseri. The only various by the 5th defendant was that the late Nkaissery never paid the full purchase price. This court finds that there are no competing titles in this case as the plaintiffs title is not supported by the mother tittle whereas the 4th defendant's title is supported by the mother title. I do find that the Chief Lands Registrar was very clear that the register produced by the plaintiffs was tampered with at entry no 85 to remove the name of Nkaissery and to insert the name of Ishmael Chelanga and therefore the title produced by the plaintiff was obtained illegally and unprocedurally as it is not supported by the mother title.
170. The evidence of Carolyne Mwangela Mutungi, the liquidator of Postbank Credit Ltd was very clear and supported by documents that the late Nkaisseri took a loan of Ksh 500,000 from the bank using the title to the suit land as security in the year 1992 and had repaid the same by the year 1999 when the 4th defendant bought the land. It was legally impossible for the plaintiffs to acquire interest in the property when there was a subsisting charge in 1996.
171. Courts have expressed themselves many times without number that property that is illegally acquired cannot be protected by law. The protection of private property as guaranteed under Section 75(2) of the retired Constitution is sustained under the provisions of Article 40 of the 2010 Constitution. In relevant excerpts, Article 40 (2), (3), (4) and (6) provide as follows:

- “ 40 Parliament shall not enact a law that permits the State or any person:-
- (2) (a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description ...
3. The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation:
- a. results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-
- i. requires prompt payment in full of just compensation to the person, and
- ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.



- (5) ....
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

172. The Court of Appeal in the case of *Munyu Maina v Hiram Gathina Maina* [2013] eKLR came out clearly on the principles to guide in determining disputes relating to competing titles and observed thus:

“When a registered proprietor's title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”

173. The instruments of title of both the plaintiffs and the defendants are under challenge and scrutiny to determine which instrument originates from the mother title and the court finds that the plaintiffs' title cannot be traced from the mother title. The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR) stated as follows, guided by the dicta in *Mwinyi Hamisi Appeal vs. Attorney General*, Civil Appeal No. 125 of 1997,

“it is our considered view that the entry in the Register that Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government ipso jure extinguished all rights and interest of the then registered proprietors over the suit property. We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.

87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. We are however cognizant that where the defendant's case supports that of the plaintiff and contains evidence on which the plaintiff may rely, the plaintiff is entitled to rely on and make use of such evidence. In a claim for declaration of title, as the instant case, the onus is on the Petitioners to satisfy the Court on the evidence produced by them that they are entitled to the declaratory orders sought.

88. We are fortified in our view by provisions of Section 97(1) of the *Evidence Act* which inter alia stipulates that when the terms of a grant or any other disposition of property has been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such grant or other disposition except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible.”



174. The import of the above is that there is a presumption that Joseph Kasaine Nkaisery having been registered as the proprietor of the suit parcel of land, he had paid the prerequisite fees and that the due process was followed. It was the onus of the plaintiffs and the 5th defendant to prove otherwise.
175. The Supreme Court of Kenya on such issue in *Petition No.8 (E010) of 2021; Dina Management Limited v County Government of Mombasa & 5 others* held that the process leading to the acquisition of a title over any property is so important that where the process is not proved the logical conclusion would be that the interest was acquired illegally and un-procedurally and that the title would not enjoy the protection of the law. Justice Sila Munyao in *Daudi Kiptugen vs Commissioner of Lands & 4 others [2015] eKLR* had this to say:
- “It is not enough that one issues a lease or a certificate. Where there is contention that a lease or certificate of lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the lease or certificate of lease that he holds was properly acquired. The acquisition of the title cannot be constricted only in the end result, the process of acquisition is material, it follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is manufacture a lease or certificate of title (some) backyards or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.” Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
176. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.
177. Section 26 of the *Land Registration Act*, 2012 provides;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme
178. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In this case the 1st and 4th defendants were able to demonstrate that the title held by the plaintiffs had no root in the register and that the title held by the 4th defendant had root in the register. Among the rights to be enjoyed by a registered owner of any land is the right for



peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land.

179. The plaintiff has argued that there is no evidence that the Land Control board issued a consent letter to the Agricultural Finance Corporation to transfer the land to the late Nkaiisery and therefore the said Nkaiserri did not have a good title. This court finds that the late Nkaiisery is not a party to this suit and therefore this court cannot fault him without hearing from him or his legal representative. It is only the family of the late Nkaiisery that can respond to the allegations but the plaintiffs did not make him a party.
180. The upshot of the above is that this court finds that the plaintiffs have not proved their case on a balance of probabilities and therefore the suit is dismissed with costs.
181. On the other hand, I do find that the defendants have proved their counterclaim on a balance of probabilities and do allow it in terms that the court issues a declaration that the 4th Defendant 2nd Plaintiff is the legally registered proprietor of all that parcel of land known as L.R. No.13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha.
182. Moreover, a declaration is issued that any title held by the Plaintiffs 1st and 2nd Defendants with respect to all that parcel of land known as L.R. No. 13287/99 situated in North Njoro was acquired illegally.
183. The court further grants a mandatory injunction directing the 1st and 2nd Defendants in the counterclaim to forthwith vacate all that parcel of land known as LR. No.13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha.
184. The court further issues a mandatory injunction directing the 3rd Defendant to cancel any and all titles issued to the 1st and 2nd Defendants with respect to all that parcel of land known as L.R. No. 13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha and a further mandatory injunction directing the 5th Defendant to cancel all titles and or allocations issued to and held by the 1st and 2nd Defendants with respect to all that parcel of land known as L.R. No. 13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha.
185. Ultimately, the court issues a permanent injunction prohibiting the 1st and 2nd Defendants, their agents, servants or anyone acting on their instructions from further trespassing on or otherwise interfering with the Plaintiffs' quiet possession of all that parcel of land known as L.R. No.13287/99 situated in North Njoro Town within Nakuru County measuring approximately 20.24 Ha. Lastly the defendants to pay the costs of the counter- claim.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT  
ENVIRONMENT AND LAND COURT**

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