



Mbae (Suing as the Legal Representative Administrator of the Estate of Silas Judah Mbae - Deceased) & another v Mwamba & 5 others; M'arimi & another (Interested Parties) (Environment and Land Case 42 of 2018) [2024] KEELC 215 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE 42 OF 2018
CK NZILI, J
JANUARY 24, 2024**

BETWEEN

KENNON MWITI MBAE (SUING AS THE LEGAL REPRESENTATIVE ADMINISTRATOR OF THE ESTATE OF SILAS JUDAH MBAE - DECEASED) 1ST PLAINTIFF

KENYA FINANCE BANK LTD (IN LIQUIDATION) 2ND PLAINTIFF

AND

ZAVERIO KIAMBI MWAMBA 1ST DEFENDANT

THE LAND REGISTRAR, IMENTI NORTH DISTRICT 2ND DEFENDANT

THE LAND SURVEYOR, IMENTI NORTH DISTRICT 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

CONSOLATA KANUNGO MWAMBA 5TH DEFENDANT

GREGORY KIMATHI MWAMBA 6TH DEFENDANT

AND

Z. NYAMU M'ARIMI INTERESTED PARTY

FESTUS RIUNGU RIMBERE INTERESTED PARTY

JUDGMENT

1. The 1st and 2nd plaintiffs moved this court through an amended and a further amended plaint dated 1.4.2019 and 11.8.2020, respectively. The 1st plaintiff brought the suit as the legal representative of the estate of Silas Judah Mbae, the sole registered owner of LR No. Kiirua/Naari /54 (hereinafter the suit



- land) when he passed on 7.11.1996. His claim against the 1st to 4th defendants was that on 27.3.2018, they secretly, fraudulently, and illegally subdivided the LR No. Kiirua/Naari/54 into LR No's Kiirua/Naari/5257, 2858, 5259, 5260, 5261, 5262 and 5263 and registered the subdivisions in the names of the 1st defendant.
2. As a result of the aforesaid illegal and unprocedural subdivisions, transfers, and registrations, the 1st plaintiff averred that the deceased's estate had suffered loss and damage. He sought a declaration that the suit parcels of land belonged to the estate, that the subdivisions and transfer were unlawful, cancellation of the title deeds issued, reversion of the land to the estate of the deceased, permanent injunction and eviction of the defendants, the interested parties or any other agents, servants or employees of the 1st defendant claiming the suit parcels of land.
 3. Following leave granted out of an application dated 1.10.2019, the 2nd plaintiff bank in liquidation filed a claim through its liquidation agent, David Riungu. It averred that on 28.1.1987, the late Silas Judah Mbae took out a loan facility of Kshs.90,000/=, which he did not repay and has since accumulated to Kshs.5,408,274;55/= as of 15.7.2020 and which was secured by a charge registered against LR No. Kiirua/Naari/54.
 4. The 2nd plaintiff averred that demands for repayments were made to the deceased, all in vain, and the process of statutory power of sale was put in motion only to learn in 2016 that the deceased had passed on. The 2nd plaintiff averred that on 7.3.2018, the defendants conspired and fraudulently unlawfully, illegally, and secretly caused transfers of the land given as collateral to the names of the 1st defendant without its consent or knowledge, which, as per official searches made on 22.7.2016 was still charged in its favor, but surprisingly, illegally, irregularly the charge was removed as per the 2nd search conducted on 28.5.2018.
 5. The 2nd plaintiff averred the defendants schemed to deprive the 1st plaintiff's family or estate and itself the legal interest in the suit land. The 2nd plaintiff, therefore, prayed for a declaration that the land belonging to the 1st plaintiff had been fraudulently and illegally subdivided and transferred; cancellation of the title deeds to revert to its original status; permanent injunction; eviction of the defendants and interested parties declaration that the suit land was encumbered and lawfully charged to it and reinstated of the charged entries.
 6. Although the 1st defendant entered an appearance dated 8.11.2018 through the firm of Mwenda Mwarania, Akwalu, and Co. Advocates, he never filed any statement of defense to the claims. The 2nd to 4th defendants filed a notice of appointment dated 5.2.2019. Other than a list of witness statements and documents dated 11.3.2022, the court has not come across any statement of defense by the 2nd – 4th defendants.
 7. By an application dated 29.11.2022, Consolata Kanungo Mwamba and Gregory Kimathi Mwamba, as the legal representatives of the estate of Stephen Mwamba M'Ngare (deceased), were joined as 5th and 6th defendants following the ruling delivered on 19.10.2022. The 5th and 6th defendants were directed to file a defense and counterclaim by 3.11.2022. Instead, they filed one dated 14.11.2022, which elicited a preliminary objection from the 2nd plaintiff.
 8. In a ruling dated 22.2.2023, the court struck out the defense and counterclaim to the extent that it had been brought against the 2nd plaintiff, named the 2nd plaintiff as the 2nd defendant without leave as required under section 56 of the [Kenya Deposit Insurance Act](#).
 9. The 1st plaintiff filed a reply to the 2nd – 4th defendant's defense. He averred that as custodians of records for LR No. Kiirua/Naari/54 colluded with the 1st defendant to commit fraud. It was averred that the



- 2nd - 4th defendants owed a statutory duty of care to the 1st plaintiff, which they abused to defraud the estate and the land. Despite an existing charge against the title, the 1st plaintiff averred the 2nd - 4th defendants altered the record of the register, hence occasioning the estate loss and damage.
10. Following the ruling, parties were directed to comply with Order 11 of the [Civil Procedure Rules](#). Further to the above ruling, there is no evidence that the 5th and 6th defendants ever sought leave to regularize their defense and counterclaim before the suit was set down for hearing on 6.11.2023. In [Stanley Kangethe Kinyanjui v Tony Keter & others](#) (2015) eKLR, the court observed that while it has a duty to justice, litigation was a game with clear rules of engagement, and a party may not be allowed to circumvent them. Filing, pleadings, and serving them ensures the other party knows what case to expect and what response to give or offer. In [Raila Odinga & another v IEBC and others](#) (2017) eKLR, the Supreme Court of Kenya held that evidence, if any, produced by a party cannot be considered in the absence of pleadings.
 11. Leave was mandatory to sue the 2nd defendant in the counterclaim since the plaintiff is still under liquidation. See [David Nderitu Gathungu & another v Chase Bank \(K\) Ltd \(in receivership\) & others](#) (2018) eKLR, [Charity Wangui Ngumo v Actions Bank Ltd & Antique Action Agencies](#) (2018) eKLR, [Bougainvillea Estate Ltd v Kenya Deposit Insurance Corporation & others Malindi](#) ELC 212 of 2016.
 12. The court's sanction was not sought after the defense and counterclaim were struck out as per Section 56 (2) of the [Kenya Deposit Insurance Act](#). The absence of a defense and counterclaim filed with leave against the Bank in receivership means that the 5th and 6th defendants did not specifically plead to any issues against the 1st and 2nd plaintiffs amended and further amended complaints alluded to above. In [Stephen Onyango Achola and another v Edward Hongo Sule and another](#) (2004) eKLR, the Court of Appeal said cases must be decided on the issues pleaded.
 13. In [Bisai & another v Kenya Commercial Bank](#) (2002) 2 EA 346, the court said non-obtaining the leave from the court was a fundamental issue and not a pre-caudal one going to the jurisdiction of the court. See [Mwethaga v Thabiti Finance Co. Ltd & others](#) CA No. 120 of 1998. Further, in [Deposit Protection Fund Board v Sunbean Super Match Ltd & others](#) HCC No. 3099 of 1996, the court said a counterclaim as a cross-suit filed without leave was a proper candidate for striking out. Additionally, in [Trade Bank Ltd & another v Elysium Ltd & others](#) HCC No. 1845 & 1997, the court said a counterclaim filed against Sections 228 & 241 of the [Companies Act](#) for a company under liquidation was unsustainable.
 14. After the defense and counterclaim were struck out on 22.2.2023, the 5th and 6th defendants filed a notice of preliminary objection dated 22.5.2023 based on paragraph 5 of the said defense and counterclaim dated 2.11.2022 on account of Sections 4 (4), 7, 16 & 19 of the [Limitation of Actions Act](#). The court proceeded to dismiss the preliminary objection through a ruling dated 20.9.2023.
 15. As regards the pleadings by the interested parties, the court in [Francis Karioko Muruate & Another v Republic & 5 others](#) (2016) eKLR cited with approval [Black's Law Dictionary](#) that an interested party is a person who is not a party to a suit but has a stake or interest and may be affected by the decision either way it is made. The court also cited with approval [Judicial Service Commission v Speaker of the National Assembly](#) (2014) eKLR and said the overriding interest or stake in any matter remains that of the primary parties, and third parties may only be remotely or directly affected by the outcome. Further, the court said an interested party may not frame its fresh issues or introduce new issues for determination other than those by the principal parties.
 16. As to the nature of pleadings by an interested party in [Luka Kiplelei Kotut v Joseph Chebii and another](#) (2013) eKLR, the court said under Order 6 Rule (1) and 7 of the [Civil Procedure Rules](#), an appearance may only be made by a defendant and not any other busy body. The court said a joinder under Order



- 1 Rule 10 of the Rules is possible, but an interested party can file a separate suit to agitate the stake if he has a legitimate claim.
17. By an application dated 20.11.2018, Nyamu M'Arimi sought to join the suit as an interested party. Given that he disclosed a purchaser's right to one of the resultant subdivisions of LR No. 54, the court, despite objection from the 1st plaintiff, allowed the request on 4.3.2019 and directed that the interested party file any pleadings within seven days. By another application dated 27.6.2019, Festus Riungu Rimberia sought to be joined as a 2nd interested party. The court granted the request on 27.11.2019.
 18. Given the new developments, the 1st plaintiff amended his plaint on 1.4.2019 to include the 1st interested party, after which the 1st interested party filed and served a defense dated 15.3.2019, alleging that he was an innocent purchaser for value without notice of LR No. Kiirua/Naari/5257 from the 1st defendant.
 19. The 1st plaintiff filed a reply to the 1st interested party's defense dated 13.10.2020, terming him as a stranger to the suit, for there was no privity of contract over the suit and land. Similarly, 1st plaintiff described the 1st interested party as the mastermind behind the fraudulent dealing over the suit land while aware of the charge.
 20. The 2nd interested party filed a defense and counterclaim dated 5.12.2019. In the said defense and counterclaim, the 2nd interested party averred that he bought 4 ½ acres of the suit land from the original owner on 24.11.1993 and 10.5.1990, took vacant possession since then, and has developed it extensively. He indicated he had obtained title through a long occupation of over 12 years and urged the court to declare him as the owner based on adverse possession and constructive trust. The counterclaim had no verifying affidavit or titular heading as required under Orders 4 and 7 of the Civil Procedure Rules.
 21. In a reply and defense to the counterclaim by the 2nd interested party, the 1st plaintiff denied any privity of contract between them. He termed the claim misplaced, an abuse of the court process, and brought it before a court lacking jurisdiction to determine it.
 22. Following directions, the parties complied with Order 11 of the Civil Procedure Rules. The 1st and 2nd plaintiffs relied on their paginated bundles of documents dated 26.10.2020, 1.3.2022, and 11.1.2023. On the other hand, the 2nd – 4th defendants relied on a paginated bundle of documents dated 11.3.2022. The 5th and 6th defendants and the 1st and 2nd interested parties did not file a paginated bundle of documents for records; however, the 5th and 6th defendants' defense and counterclaim dated 1.11.2022 was accompanied by witness statement dated 2.11.2022. To avoid doubt, the 1st and 2nd interested parties filed a list of witness statements and documents dated 15.3.2019 and 5.12.2019 accompanying their defenses.
 23. The trial commenced on 6.11.2023 with the evidence of Kennon Mwiti Mbae as PW 1. He adopted his witness statements dated 23.10.2018 and 13.10.2020 as his evidence in chief. Briefly, he told the court his late father, Silas Judah Mbae, died in 1996, leaving behind LR No. Kiirua/Naari/54, among other properties, following which he sought and obtained letters of administration in Nairobi HC *Succession Cause No.825 of 2010*. While trying to implement the grant in August 2018, PW1 discovered that LR No. 54 had been registered under the 1st defendant's name on 7.3.2018 and subdivided, yet no grant had been issued to the 1st defendant.
 24. PW 1 said investigations were lodged after the 2nd and 3rd defendants refused to disclose or give any explanation, which established new subdivisions No's 5257, 5258, 5259, 5260, 5261, 5262, and 5263



- had been created, which the 1st defendant was actively disposing to third parties even though no boundaries of the same had been fixed on the ground.
25. Further, PW 1 told the court that the Criminal Investigation Department (CID) established that the defendants colluded with the 1st interested party to secure the removal of the existing charge against the title, colluded and subdivided the land, and filed Meru CMCC ELC *No. 153 of 2018* by entering an agreement on 19.1.2018 as a consent to steal the land. He termed the sale agreement produced by the 1st interested party as a forgery, together with a non-existent grant in Meru HC *Succession Cause No. 192 of 2016*, which appears on the copy of the register.
 26. PW 1 said that the 1st defendant and the 1st interested party were charged in Meru CMC *CR No. 624 of 2019* as a result of the investigations for fraud. As to the 2nd interested party, PW 1 told the court he was another imposter who alleges to have bought the land in 1990 or 1993, which claim is time-barred.
 27. Additionally, PW 1 produced a copy of the register for LR No. 54, a land certificate, official search certificates, a copy of the grant, a certificate of confirmation of grant, bank statements, demand letters dated 17.8.2018 and 20.8.2018, a DCIO letter dated 20.8.2018, title deed for 1st defendant mutation form, a letter confirming non-existence of the HC *Succession Cause No. 192/1996*, charge sheets in Meru CMC court as P. Exh No. 1-14, respectively and further denied selling any land to the 1st and 2nd defendants. He denied that the 5th and 6th defendants had any interest in this land, more so after Meru ELC OS *No. 21 of 2019* was dismissed.
 28. In cross-examination, PW 1 told the court the suit land had been charged in favor of the 2nd plaintiff and that legal administrators in 2016 had agreed with the 2nd defendant to settle the outstanding debt. Regarding the CID report and pending criminal cases, PW 1 wrote P. Exh No. 8 to the Land Registrar Meru. He said his father passed on 7.11.1996.
 29. Cross-examined by Mr. Mwarania, advocate for the 5th and 6th defendants. PW 1 said the grant was issued in 2016 and that the land was under his late father's occupation until he passed on, after which he has been leasing it to third parties for cultivation to one Stephen Mwamba.
 30. On the pending debt, PW 1 said the 2nd defendant's witness statement by Nduku Nzioki, who had referred to Meru Criminal *Case No.647 of 1989*, where his late father had been charged out of a complaint by the late Stephen Mwamba. He said he had personally authorized some third parties and not the 5th and 6th defendants to use the land. He denied the land was being used exclusively as of right by the 5th and 6th defendants since they were mere licensees with effect from 1996. PW 1 said there was a need for eviction orders after he gave the 5th and 6th defendants a notice of six months to vacate his land in December 2017 in the presence of the area chief, but they declined to comply.
 31. In cross-examination by Mr. Kimathi, advocate for the 1st and 2nd interested party, PW 1 said he was unaware if the 1st interested party followed the law and obtained all the requisite documents to obtain a title deed. He said his father bought the land in 1986 and denied any sale agreement or occupation of 4 acres of the suit land by the 2nd interested party. PW 1 said his late father used to graze and cultivate the land and had built a house before passing on.
 32. In re-examination, PW 1 said his late father's use of the suit land also included taking a loan and offering the land as collateral since 1986. He termed the removal of the charge transfers and subdivisions by the defendants as illegal and fraudulent since, as a legal administrator of the estate, he was not involved in 2019, going by the entries in P. Exh No. 13 & 14 the criminal charges against the 1st defendant and the 1st interested party, for obtaining registration by pretenses. PW 2 said the 1st, 5th and 6th defendants had



- been his good neighbors who had agreed to vacate the land following a meeting in December 2017, only to result in fraud. He denied permitting the 1st defendant to effect the transfers to the suit land.
33. Dorcas Wanjala testified on behalf of the 2nd plaintiff as PW 2. As an assistant director in the liquidation agent of the 2nd plaintiff, she adopted her witness statements dated 11.8.2020 and 11.1.2023 as her evidence in chief. She told the court on 28.1.1987 that Silas Judah Mbae took out a loan of Kshs.90,000/= upon the perfection of the security instrument over LR No. Kiirua/Naari/54, whose property has never been discharged to date, and his account remained with an outstanding loan of Kshs.5,408,274/= as of 15.7.2020, accruing interest at 15% per annum.
 34. PW 2 said the 2nd plaintiff had been scouting for buyers for years until sometime in 2016 when it learned the debtor had passed on. She said PW 1 approached the 2nd plaintiff for a negotiated settlement. However, while clearing the debt, it was discovered that the title had been fraudulently transferred. PW 2 said two official searches were conducted over the title on 22.7.2016 and 28.5.2018; the former showed the charge while the latter had been removed, prompting the 2nd plaintiff to report the irregularity to the directorate of criminal investigations.
 35. Further, PW 2 told the court that on 28.5.2019, the 2nd plaintiff received an email from PW 1 over the court orders in this suit. PW 2 said that from the records in their custody and the surrounding turns of events, it was irregular to transfer and subdivide the suit land without a discharge of charge or consent from the 2nd plaintiff to effect any changes to the title.
 36. Moreover, PW 2 said the late Stephen M'Ngure had filed *CC No. 168 of 1992* to stop the plaintiff herein from dealing with the suit land or sale of the same, which orders were granted. She said there was also a criminal case against Silas Mbae over forgery of the title, which was dismissed by judgment delivered on 22.1.1992. PW 2 said that in 1994, the 2nd plaintiff filed *suit No.275 of 1994* for Kshs.1,579,781.90/= against the deceased whose judgment was entered against the deceased but died before the execution could be issued. Further, PW 2 said attempts to initiate the sale of the security were frustrated by the pendency of *HCC Civil Suit No. 168 of 1992*.
 37. PW 2 said the 2nd plaintiff had in June 2000 made a demand to the 1st plaintiff for Kshs.2160, 489.05/= by a letter dated 7.9.2000, after whose default it instructed auctioneers to realize the security by letters dated 16.1.2002, and valuation was done showing the land was worthy Kshs.1,000,000/= with forced sale value of Kshs.1,500,000/= as per valuation report dated 24.5.2001. PW 2 said that Dr. Joseph had offered Kshs.1,200,000/= by a letter dated 24.9.2008 but withdrew the offer letter dated 13.1.2009.
 38. PW 2 said that following the engagement above, the late Stephen M'Ngare, the 1st and the 6th defendants jointly wrote to the 2nd plaintiff requesting to buy the suit land at Kshs.500,000/= as per the letter dated 16.8.2016. Therefore, PW 2 said that for close to a decade, the 2nd plaintiff had persistently sought to realize the security, but potential buyers were unable to meet the reserve price as shown by various letters dated 16.6.2007, 21.7.2008, 20.8.2013, 18.8.2016, 21.6.2007, 8.8.2017, 11.10.2021 and 25.9.2012.
 39. PW 2 said that due to the effluxion of time, the value of the suit land appreciated, and as per the valuation letter dated 26.7.2016, it was standing at Kshs.35,000,000. PW 2 referred to the DCIO letter dated 5.9.2018 and her witness statement at the DCIO dated 30.11.2018. She produced her list of documents dated 11.8.2020 and 11.1.2023. The exhibits were the bank statements as P. Exh No. (15), two official search certificates as P. Exh No's. (16) & (17), DCIO letter dated 20.8.2019 as P. Exh No. (18), EA newspaper advertisement as P. Exh No. (19), copy of charge dated 7.2.2020, copy of charge dated 7.2.2020 as P. Exh No. (20), letter dated 7.9.2020 as P. Exh No. (21), auctioneers letter dated 16.1.2002 as an advertisement for sale and for auctioneers letter and notification for sale as P. Exh No.



- (21) (a), (b) & (c), valuation report dated 24.5.2001 as P. Exh No. (22) and withdrawal letter, letter of offer by Dr. Maitima as P. Exh No. (23) and (24) respectively, letter dated 1.8.2009 by the 1st defendant, as P. Exh No. (25), a bundle of auctioneers' letters and responses as P. Exh No. (26) valuation reports dated 16.11.2007 and 12.4.2012 as P. Exh No. (27) & (28), valuation report by Acumen valuers P. Exh No. (29), DCIO letter dated 5.9.2018 as P. Exh No. (30) and the official statement to DCIO dated 30.11.2018 as P. Exh No. (31). PW 2 said the 2nd plaintiff was placed on liquidation on 29.10.1996. She said that the 1st plaintiff had offered to settle the matter at Kshs.3,000,000/= and has continued paying the debt.
40. In cross-examination by the 1st plaintiff, PW 2 said the letter by the 1st defendant related to the issue on behalf of the 5th and 6th defendants, but the title deed was not released to them due to the outstanding loan. In cross-examination by the 2nd to 4th defendants' counsel, PW 2 said the loan was payable within 24 months with effect from 1987. She said she could not confirm whether the loan was insured or any precautionary measures were taken against death. PW2 said the discharge of charge could only occur after the loan was repaid with the consent of the 2nd plaintiff.
41. Cross-examined by Mr. Mwarania, advocate for the 1st, 5th and 6th defendants, PW 2 said HCC *No. 275/1994* was determined in favor of the 2nd plaintiff in March 1995, but the decree was not executed till the debtor passed on in November 1996. Further, PW 2 said efforts to trace the debtors' family and recover the debt through auction sale continued until proposals were received. She said the auction sale would not occur since the potential buyers offered less than the reserve price. Even though a decree becomes stale after 12 years, PW 2 said the suit property remained security for the debt. As to the *Duplum Rule*, PW 2 said the law came into force after the loan had accumulated, but after 2006, no interest has accrued.
42. PW 2 said some fraud was committed in transferring the suit land, though the 5th and 6th defendants were not charged. In re-examination, PW 2 said P. Exh No. 30 shows the 2nd plaintiff had consistently sought to recover the loan.
43. DW 1 told the court he had not filed any defense or witness statement. He denied any fraud leveled against him. However, he admitted the suit land came into his name in 2018 with no letters of administration to represent the deceased owner's estate. Similarly, he said he had no consent to do so from the family of the deceased. DW 1 said that after acquiring the title, he subdivided the suit land without the family's consent. Further, he said he was arrested and charged in Meru CM *Cr. Case No. 35B of 2019* was still pending for alleged land fraud.
44. DW 1 said the 2nd defendant was among the witnesses against him. He denied transferring any land to third parties. He said he had filed a suit in 1983 claiming the land. DW 1 said he had authorized the 5th and 6th defendants to sue for his late father's estate. He admitted writing a letter dated 16.8.2009 to the 2nd plaintiff offering to buy the land at Kshs.500,000/= after his family had agreed to that effect.
45. Cross-examined by Mr. Mwarania, advocate for the 5th & 6th defendants, DW 1 said no family member had authorized him to transfer or subdivide the suit land. He admitted that his late father had sued him with the 1st plaintiff in Meru ELC (OS) *No. 21 of 2019*, now before the Court of Appeal.
46. Cross-examined by Mr. Kiara Kimathi, an advocate for the interested parties, DW 1 denied selling any land to the 1st interested parties or being aware of any land sale by his late father to the 2nd interested party. He admitted that the 2nd interested party used to till the land. The 2nd - 4th defendants called no witnesses supporting their defense and opted to close their case.



47. Consolata Kanungo Mwamba and Gregory Kimathi Mwamba, the 5th and 6th defendants, testified as DW 2 & 3. DW 2 adopted his witness statement dated 2.12.2022 as his evidence in chief. He told the court he was a son and co-administrator of the estate of Stephen Mwamba M'Ngare, the 1st registered owner of LR No. Kiirua/Naari/54 now subdivided.
48. DW 3 said his family has lived on the suit land from 1965 to the present. He also said that in 1986, the late Silas Judah Mbae unlawfully registered himself as the owner of the land without the consent, knowledge, or approval of his father. He denied that the 1st plaintiff had ever taken possession of the land. DW 3 said his late father had filed Meru ELC No. 21 of 2019, claiming the land under adverse possession.
49. Further, DW 3 said the late Silas Judah Mbae took out a loan with the 2nd plaintiff and refused to repay it, and by 1988, the 2nd plaintiff unsuccessfully attempted to sell the land to recover the loan. He said the claim by the 2nd plaintiff was statute-barred. Further, DW 3 said the 2nd plaintiff in 1994 sued the late Silas Judah Mbae in Meru ELC No. 275 of 1994 for the loan, and the judgment was entered in March 1995, which decree was not executed till the judgment decree debtor passed on 7.11.1996, which is now stale.
50. DW 3 said the 2nd plaintiff has no legally protected right under the charge or the late borrower's covenant to recover the loan. He also produced a copy of the limited grant as D. Exh No. (1) green card for LR No. Kiirua/Naari/54 as D. Exh No. (2) statement by Cecilia Nduku Nzioka, the assistant liquidation agent to DCIO as D. Exh No. (3), letter of offer dated 6.2.1987 as D. Exh No. (4), a letter by the late Silas Judah Mbae to the 2nd plaintiff received on 14.10.1994 as D. Exh No. (5) and the 2nd plaintiff's letter dated 8.11.1994 as D. Exh No. (6). He denied the occupation of the land with the permission of the 1st plaintiff.
51. In cross-examination, DW 3 said he had no documents to prove that the land initially belonged to his late father. Further, he said Meru ELC No. 21 of 2019 (OS) was dismissed, as well as the one his late father filed in 1992. He also said the 1st defendant had been authorized to pursue the land while his late father was alive. He admitted being party to the letter to the 2nd plaintiff authored by the 1st defendant and his late father. DW 3 denied knowledge of the sale and transfer of the land to the 1st interested party by the 1st defendant, nor the one to the 2nd interested party by his late father.
52. Zed Nyamu M'Arimi, the 1st interested party, testified as DW 4. He told the court the 1st defendant in 2018 offered to sell to him LR No. Kiirua/Naari/5257. DW 4 said that after undertaking an official search and obtaining consent from the land control board, the land was transferred to him. He produced the consent form, transfer form, and green card as D. Exh No's. (7), (8) & (9) respectively.
53. In cross-examination, DW 4 said he never went to collect the title deed, though he could not explain an entry to the records, which indicated a cancellation. Further, DW. 4 admitted he had no sale agreement for the land before the court. Similarly, DW 4 said he had lodged Meru CMCC No. 153 of 2018 for the land from the 1st defendant. Additionally, DW 4 said he entered a consent judgment in the aforesaid suit. Further, DW 4 said he was an accused in Meru CMC CR Case No. 35 of 2019 with the 1st defendant. He denied any collusion or fraud to sell and subdivide the land. DW 4 said he was an innocent purchaser for value who followed all the processes to acquire the title. DW 4 said he paid for the transfer and registration before becoming the registered owner on 3.8.2018. He said he was unaware of any pending loan, nor did he ascertain the origin of his land parcel number.
54. Festus Riungu Rimbere testified as DW 5. He adopted the witness statement dated 5.12.2021 as his evidence in chief. He said he bought the suit land from the late Stephen Mwamba as per the sale



agreement dated 10.5.1990 and 24.11.1993, which he produced as D. Exh No. (10) and (11) and took vacant possession, though the sons of the seller objected to the same. Additionally, DW 5 said the area chief wrote a letter to go to the Njuri Ncheke elders. He said he paid for the land as acknowledged by the late Stephen Mwamba as per D. Exh No. (12). Additionally, DW. 5 said the sons of the deceased refused to appear before the area chief as per a letter dated 5.7.2006 produced as D. Exh No. 13 (a) & (b) and D. Exh No. (14). DW 5 also said he has been on the land for many years, which he had fenced off but was currently under use by the 1st plaintiff.

55. In cross-examination, DW 5 said he was aware of the loan and paid the sum to secure the suit land from being auctioned. He said he was unaware that the land was registered in the name of the 1st plaintiff's deceased father. He went on to state that he visited the 2nd plaintiff's offices in Meru and established there was a pending loan taken by someone else other than his neighbor, Stephen Mwamba. He also said that the late Stephen Mwamba had acquired the land from the late Angaine Jackson and erected a homestead therein. He denied that the late Silas Judah Mbae had ever utilized the land. DW 5 said he bought 4 ½ acres of the suit land. He admitted that he had not sued the 1st – 6th defendants, though DW 1 was a signatory to the sale agreement.
56. DW 5 said he was unaware the land belonged to Silas Judah Mbae, though the seller had alleged someone had defrauded him of his land. He said that though he did not attend any land control board meeting, the seller had assured him he would transfer the land only for his sons to object to it. DW5 said his claims were directed at the 1st, 5th, and 6th defendants since the deceased was the one who sold the 4 ½ acres to him, which was on the verge of being auctioned. In addition, DW 5 said the deceased had alleged that someone had stolen his title deed and taken a loan. He insisted he had been on the land since 1995 till he filed the suit.
57. With the close of the defense by the 1st and 2nd, interested parties were directed to file written submissions by 19.12.2023. The 1st and 2nd plaintiffs relied on written submissions dated 28.11.2023 and 17.12.2023, respectively. The 1st plaintiff submitted this suit was filed after he established illegal, fraudulent, and unprocedural transfer of the initial land to the name of the 1st defendant after the charge was mysteriously removed without the plaintiff's knowledge, consent, or approval. Though the 1st defendant did not file a defense, the 1st plaintiff submitted at the defense hearing that he admitted his participation in the transfers without knowledge by the 1st plaintiff and his arraignment over fraud before the Meru Chief Magistrates Court together with the 1st defendant. The 1st plaintiff submitted the 2nd and 4th defendants as the custodians of the land records; they could not explain how the changes to the title deed were authorized without rebuttal evidence of any discharge of charge documents produced by the 1st defendant.
58. Regarding the interested parties, the 1st plaintiff submitted the 1st interested filed no counterclaim against the 1st defendant, nor did he produce any sale agreement or proof of payment of any consideration for the suit land. Further, the 1st plaintiff submitted the consent judgment entered between the 1st interested party and the 1st defendant in Meru ELC CC *No. 153 of 2018*, which was enough testimony of collusion to defraud coupled with the pending criminal charges against the two.
59. Regarding the 2nd interested party, the 1st plaintiff submitted that it was impossible to buy land in the deceased's name and that his claim for adverse possession was not directed against any party, lacked merit, and was misplaced.
60. As concerns the 5th and 6th defendants, the 1st plaintiff submitted following the dismissal of Meru ELC *No. 21 of 2019*, the subsisting charge previous cases brought by the late Stephen Mwamba, which were also dismissed, the pending decree, the defense or claim by the 5th and 6th defendants remained



- ambiguous, unclear, lacking standing and was legally unsustainable. Reliance was placed on [*Edema & others v Edema and others*](#) (Misc Succession Cause No. E001 of 2022 (2022) KEHC 9960 (KLR) (July 6th, 2022) (Ruling), [*John Marete & another v Gladys Karimi M'Muthamia & 3 others*](#) (2013) eKLR, on the proposition that the letters of administration in possession of the 5th & 6th defendants were limited to the institution of Meru ELC No. 21 of (2019) (OS), which has since been dismissed per the attached judgment hence the claim if any is res judicata. Further reliance was placed on [*Henderson v Henderson*](#) 1943 – 60) ALL ER 313 [*Nancy Mwangi T/A Worthlin Marketers v Airtel Networks \(K\) Ltd*](#) (2014) eKLR, where the court cited with approval [*E.T v Attorney General & another*](#) (2012) eKLR.
61. The 1st plaintiff submitted the advocates on record for the 1st, 5th and 6th defendants, who seem to have advised the three to circumvent or short-circuit this suit by filing for adverse possession after the previous suit was dismissed. The 1st plaintiff termed the same as depicting malice, disclosing no cause of action lacking merits, an abuse of court process, to mislead the court to consolidate this suit with an already dismissed suit and made in bad faith. Reliance was placed on [*Caliph Properties Ltd v Barbel Sharma & another*](#) (2015) eKLR, [*Mbui v Maranya*](#) (1993) eKLR, [*Yalwala and others v Kadenge & others*](#) (2022) KEELC 2510 (KLR) July 21st, 2022) (Judgment).
 62. The 2nd plaintiff submitted that the gist of this suit revolves around the fraudulent and illegal removal of the charge entries on its land property under unexplained circumstances on 7.3.2018 and the subsequent registration in the name of the 1st defendant, who immediately subdivided it and transferred some portions to third parties.
 63. Following the ruling delivered on 20.9.2023, the 2nd plaintiff submitted that the court noted the defendants and interested parties had not denied the illegality, fraud, or conspiracy, which was also not disputed during the hearing.
 64. As to fraud and illegality, the 2nd plaintiff relied on [*Mutuaruchiu & another v Kiriamburi*](#) (2023) KEELC 1926, where the court cited with approval [*Mary Njeri Nyaga & another v Erastus Njue Gitonga & others*](#) (2020) eKLR and [*Virjay Morjaria v Nasingh Madhusingh Darbar & another*](#) (2000) eKLR.
 65. Given that the 1st defendant did not file any defense or adduce any evidence to discolor the averments made against him, the 2nd plaintiff submitted the concession by the 1st defendant and the 1st interested party that they were facing a criminal case on land fraud, cumulatively shows the plaintiffs have comprehensively pleaded and proved fraud, illegality, and collusion among the defendants.
 66. As to the issue of non-execution of the previous decree, the 2nd plaintiff submitted judicial notice should be taken that it was placed on liquidation on 26.10.1996; industry was employed as per P. Exh No. 31 by it before and after 26.10.1996 to attempt to recover the loan, which facts remain uncontested by the parties till a proposal was made by the deceased and the 1st, 5th and 6th defendants, going by the correspondence produced herein for the period 2001 and 2016. Reliance was placed on [*Koinange Investment and Development Co. Ltd v Ian Kahi Ngethe & others*](#) (2015) eKLR.
 67. Further, the 2nd plaintiff submitted for the 1st, 5th and 6th defendants to assert that execution of the decree should have been done by 2007 is not only misleading but inaccurate since they made a letter or consent on 16.8.2019 proposing to redeem the property at Kshs.500,000/=, otherwise, they would not have endorsed the letter if the claim was stale. Guided by [*Koinange Investment caselaw*](#) (*supra*), the 2nd plaintiff urged the court to find it faced numerous roadblocks, among them previous suits filed by the father of the 1st defendant, now represented by the 5th and 6th defendants. Therefore, having contributed to the delay, the 1st, 5th and 6th defendants could not now turn the tables to claim prejudicial conduct on the part of the 2nd plaintiff.



68. The 2nd plaintiff submitted under Section 5 of the [Kenya Deposit Insurance Act](#) that its object and purpose are to provide a deposit insurance scheme for customers of the member institution to receive, liquidate, and wind up any institution in respect of which the corporation is appointed a receiver or liquidator and as stated by Miss Nzioka before the DCI, endeavor to maximize value from the realization of assets and securities of such institution for the maximum benefit of depositors and creditors whose hard-earned savings are locked up in a failed institution.
69. Therefore, the 2nd plaintiff could have accepted one of the many offers forwarded to it, including those of some defendants in 2009. However, on account of public interest, the 2nd plaintiff retained the duty to extract the best possible price as regulated by the prevailing valuation reports subject to the principles of equity and natural justice. To this end, the 2nd plaintiff submitted the cause of action changed when the estate of the 1st plaintiff wrote seeking further information regarding the suit land, leading to an agreement.
70. Relying on *Shire v Thabiti Finance* (2000) LLR 1455 (CAK) cited in the ruling of this court on 20.9.2023, the 2nd plaintiff submitted the effect of an acknowledgment of the debt gave rise to a fresh accrual of a right to action and extension of the limitations period by reviving an otherwise statute-barred claim. The 2nd plaintiff urged the court to find that even if, for an argument's sake, the assertions of delay were accepted the acknowledgment by the defendants or the 1st plaintiff did not show it acted in bad faith or malice by seeking reinstatement of the charge.
71. The 2nd plaintiff submitted that going by letters dated September 2016 by the 1st plaintiff and the letter dated 18.8.2016, as a public body motivated only by public interest, it had a duty to engage the 1st plaintiff as an administrator of the defaulter's estate, which conduct shows no malice or bad faith. The 2nd plaintiff submitted, notwithstanding the above, following the ruling on 22.2.2023, that the defense and counterclaim dated 14.11.2022 was struck out with costs.
72. As to whether the interested parties were innocent purchasers for value without notice, the 2nd plaintiff relied on the ingredients set in *Katende v Haridar Co. Ltd* (2008) 2 EA 173 cited in [Weston Gitonga and others v Peter Rungu Gikanga and another](#) (2017) eKLR. He urged the court to find them not qualifying since the 2nd interested party knew Stephen M'Ngare was not the owner of the land, and after visiting the 2nd plaintiff knew it was charged, no report of theft of land was reported to the police, no due diligence as expected was conducted for him to say that the deceased was not the registered owner and the sale agreement dated 24.11.1993, indicated a pendency of a *Civil Suit No. 168 of 1991*. Therefore, according to the circumstances, the 2nd interested party was knowledgeable and party to the fraud to steal a portion of the suit land.
73. The 5th and 6th defendants, per written submissions dated 15.12.2023, took the view that in the amended plaint dated 11.8.2020, the prayers by the 1st plaintiff were against the 1st defendant, who did not defend the suit. As to prayers (c) and (d) of the 2nd plaintiff's further amended plaint, the 5th and 6th defendants, based on their amended defense and counterclaim, submitted such a claim as time-barred.
74. Relying on paragraphs 8 and 9 of the defense and counterclaim, the 5th and 6th defendants submitted the suit land was registered under the deceased's name by tricks and charged to the 2nd plaintiff barely six months with no attempt to clear the debt while it was under the possession and user of the family of the 5th and 6th defendants.
75. The 5th and 6th defendants submitted no reply or defense to the amended defense by the 1st plaintiff; hence, the defense and counterclaim stand unopposed.



76. Similarly, the 5th and 6th defendants submitted that pleadings bind parties who cannot depart from them under Order 2 Rule 6 [Civil Procedure Rules](#) and that as per Order 2 Rule 11 (3) thereof, any denial of a statement of facts made in a counterclaim, if not admitted must be specifically traversed in a defense to the counterclaim by a party upon whom it is served. To this end, the amended defense and counterclaim were served on 15.11.2022, and a preliminary objection indicated no defense. Therefore, as against him, the counterclaim stood admitted by operation of law.
77. Going by the fact that the 1st plaintiff's father was charged in *Cr. Case No. 647 of 1989*, the 5th and 6th defendants submitted it was unlikely the deceased would be on such good terms with the complaint as to permit him to use the suitland, which issue, in any event, was never pleaded by the 1st plaintiff by way of a defense to the counterclaim.
78. On *res-judicata*, the 5th and 6th defendants submitted paragraphs 4, 10, and 17 of their defense, and the counterclaim pleaded the existence of the previous Originating Summons *No. 21 of 2019*. In any event, the previous suit was dismissed on a technicality where the court did not finally determine the merits of adverse possession.
79. As to Meru HCC *No. 168 of 1992*, the 5th and 6th defendants submitted that no order or decree was produced to show a claim of adverse possession was determined to finality. On *locus standi*, the 5th and 6th defendants submitted the counterclaim based on adverse possession, which, if determined, the court would determine the legality of the charge, giving them locus standi.
80. On consent to the 1st defendant to pursue the interest in the suit land, the 5th and 6th defendants submitted that the same did not amount to pursuit through unlawful or unprocedural means and for his benefit. To this end, the 5th and 6th defendants submitted that the 1st defendant did not confer any benefits to his relatives, hence his joinder as a co-defendant in Meru ELC *No. 21 of 2019* (OS). Therefore, any iniquities by the 1st defendant did not soil the hands of the 5th and 6th defendants since he was on a frolic of his own through initially authorized to pursue the family interest with the 2nd plaintiff.
81. The 5th and 6th defendants submitted they had been on the land before first registration on 5.1.1965. In contrast, upon registration on 2.12.1986, the deceased never took vacant possession and has extensively developed it with interruption, eviction, or objection till his death and therefore urge the court to find adverse possession proved against the defendants to the counterclaim.
82. On the grant issued to file the counterclaim, the 5th and 6th defendants submitted it has never been set aside, and given it was to file a suit for adverse possession Meru ELC *No. 21 of 2019*, this suit was filed during its pendency, hence the intention to consolidate the two which did not materialize making the grant valid since the subject matter is the same.
83. On the claim by the 2nd plaintiff, the 5th and 6th defendants submitted through their defense and counterclaim against struck out, the amended defense and counterclaim the 2nd plaintiff had to demonstrate that the then-existing charge was validly registered in the first place before removal. Further, since it was pleaded in the amended defense and counterclaim that it was statute barred under Sections 4 (4), 7, 16 & 19 of (Cap 22), the 5th & 6th defendants, relying on Sections 78 to 106 of the [Land Act 2012](#), submitted a presumption was that to be able to proceed with court proceedings for recovery of the money secured by the charge against the chargor, the 2nd plaintiff had agreed to discharge the charge. Therefore, the law did not envisage a situation where a charge sues the chargor to recover the money secured by the charge and still resort to realizing the security created by the charge. Therefore,



- the 5th and 6th defendants submitted by successfully prosecuting Meru HCCC No. 275 of 1994 to its conclusion, the 2nd plaintiff ended its rights under the charge by operation of law.
84. Further, the 5th and 6th defendants submitted immediately upon obtaining the judgment that the charge ceased to be lawfully registered against the suit land; therefore, the 2nd plaintiff cannot have its cake and eat it.
85. According to the 5th and 6th defendants, the 2nd plaintiff could not seek such a declaration as the suit land is not lawfully charged under Section 91 (2) of the Land Act. Flowing from this, the 5th and 6th defendants submitted 12 years to execute the decree elapsed in 2007; the death of the deceased did not affect the execution process, so under Order 24 Rule 10 of the Civil Procedure Rules, an application for execution upon the death of the decree debtor is precluded. Consequently, since the judgment comprised the whole of the then-charged debt balance, which became stale over time, recovery could not be renewed through the back door by the 2nd plaintiff seeking declaratory orders.
86. The 5th and 6th defendants submitted that the 2nd plaintiff was cleverly attempting a second bite of the cherry by using the unfortunate albeit unlawful acts of the 1st defendant, whose fate was yet to be determined in the criminal case and whether or not convicted it will not give the 2nd plaintiff any rights that it did not lawfully enjoy at the time of the alleged offense said to have occurred in 2018.
87. The 5th and 6th defendants submitted that the court should find the decree or debt stale and cannot be reinstated by declaring the charge lawfully registered against the suit land, more so in light of Section 80 of the Land Act that a charge acts as a security for the money lent only and does not confer upon the charge any other proprietary rights to the charged property. Once the secured money was decreed by a competent court to be due and owing in the previous suit, it was submitted that it could not again be realized through the charge since the charged property may have been sold in execution of the decree and not in the exercise of the statutory power of sale.
88. On prayers (e) & (f) of the further amended plaint, the 5th and 6th defendants submitted under Section 19 of the Limitation of Actions Act, an action may not be brought to recover the principal sum of money secured by a mortgage after 12 years, since the letter of offer as per D. Exh No. (4) was dated 6.2.1987; the loan payment was to be by 1989, and the 12 years to recover ended in 2001. Consequently, the claim and the charge became stale by operation of law and should be discharged forthwith or declared unlawfully registered 22 years after it became stale and unenforceable by operation of the law.
89. In the absence of an application for an extension of time, the 5th and 6th defendants submitted it was unlawfully existing as registered against the suit land. On the claims by the interested parties, the 5th and 6th defendants submitted that since the 1st defendant did not acquire the original title lawfully under the doctrine of *nemo dat quod, not habet*, a person cannot pass a better title than he holds, and so did the 1st & 2nd interested parties.
90. Regarding the claim based on adverse possession, the 5th and 6th defendants submitted that other than planting kei apple, the 2nd interested party was later denied entry to the land, as the family of Stephen Mwamba took over-cultivation of the land. Therefore, the alleged possession was not continuous, open, exclusive, or uninterrupted.
91. The 1st and 2nd interested parties relied on written submissions dated 24.11.2023. On the part of the 1st interested party, it was submitted that he produced a copy of land control board consent, transfer forms, sale agreements, and a green card, all showing he was a bonafide purchaser as held in Mohamed v Duba & another (Civil Appeal 83 of 2019) 2022 (KECA) 442 (KLR) March 18th, 2022, citing



with approval *Weston Gitonga & others v Peter Riungu* (*supra*) and *Katende v Haridar & Co. Ltd* (*supra*).

92. Regarding the 2nd interested party, it was submitted that the produced documents were proof of the sale of land and the ingredients of adverse possession since the last payment and entry in 1990. Reliance was placed on *Stephen Mwangi Gatunge v Onesmus Wanjau (sued in his capacity as the Administrator of the Estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (deceased)* (2022) eKLR citing with approval *Mbui v Maranya* (*supra*), *Wilson Kazungu Katana & 101 others v Salim Abdalla Bashwein and others* (2015) eKLR.
93. The court has carefully reviewed the pleadings, previous rulings and directives, and evidence tendered by the party's written submissions and the law cited. The issues calling for the court's determination are the following:-
- i. What was the effect of the rulings made on 19.10.2022, 22.2.2023, and 20.9.2023 regarding the parties' pleadings?
 - ii. If the 5th and 6th defendants, after the ruling(s) aforesaid, could still rely on the amended defense and counterclaim and the standalone preliminary objection.
 - iii. If the 1st plaintiff pleaded and proved fraud, illegality, and impropriety in the manner LR No. Kiiirua/Naari/54 transferred and subdivided by the 1-4th defendants.
 - iv. If the 2nd plaintiff had a right of action to sue over the events of 7.3.2018.
 - v. If the non-execution of the decree on time or at all was a bar to the 2nd plaintiff's case.
 - vi. If the charge became invalid or inoperational in law.
 - vii. If the eventual negotiation, acknowledgments, and agreements between the 1st, 5th, and 6th defendants revived an otherwise stale decree or claim,
 - viii. Whether the dismissal of HC Meru 163 of 1994 and ELC *No. 21 of 2019 OS* was a bar to the 1st, 5th, and 6th defendants claim or defense.
 - ix. If the 5th and 6th defendants can agitate for the rights of the late Stephen Mwamba in this suit.
 - x. If the interested parties are innocent purchasers for value without notice and are entitled to any reliefs sought,
 - xi. Whether the plaintiffs are entitled to the reliefs sought.
 - xii. What is the order as to costs?
94. The primary pleadings at the commencement of the hearing of this suit on 6.11.2023 were and remain the amended plaint dated 1.4.2019, further amended plaint dated 11.8.2020, the 5th and 6th defendant defense and counterclaim dated 14.11.2023; only as one against the 1st plaintiff; in the main suit, following striking out of that against the 2nd plaintiff reply to defense and defense to the counterclaim by the 5th & 6th defendants dated 16.1.2023.
95. By rulings on 19.10.2022, 22.2.2023, and 20.9.2023, the court granted the 5th and 6th defendants leave to file and serve a defense and counterclaim for 14 days, accompanied by documents per Order 7 of the *Civil Procedure Rules*. The 5th and 6th defendants did not seek leave under Section 56 of the *Kenya Deposits Insurance Act* to sue the 2nd plaintiff. So, when the amended defense and counterclaim dated 14.11.2023 was filed, the 2nd plaintiff filed a preliminary objection dated 12.1.2023, which was



- argued and determined on 22.5.2023, striking out the defense and the counterclaim. After the ruling on 22.2.2023, the 5th and 6th defendants never sought leave of court to re-file the struck-out defense and counterclaim or amend it only to relate to the 1st plaintiff.
96. Instead, the 5th and 6th defendants filed a notice of preliminary objection dated 22.5.2023, relying on the defense and counterclaim this time dated 2.11.2022 seeking for the dismissal or striking out of the 2nd plaintiffs further amended plaint for being statute barred under Sections 4 (4), 7, 16 & 19 of Cap 22. So, the 5th and 6th defendants had the impression that they had a fallback position to earlier pleadings. In the written submissions dated 15.12.2023, the 5th and 6th defendants refer to the amended defense and counterclaim dated 14.11.2022.
97. There cannot be a contradiction to the pleadings by the 5th and 6th defendants after the ruling striking out the amended defense and counterclaim.
98. The only difference between the two pleadings by the 5th and 6th defendants is the introduction of the word Kenya Finance Bank Ltd (liquidation) in place of Kenya Deposit Insurance Corporation. Therefore, the effect remained that no leave under Section 56 of Kenya Deposit Insurance was ever sought and obtained to sue the 2nd plaintiff through a counterclaim. Therefore, whether the 5th and 6th defendants rely on the fallback defense and counterclaim dated 14.11.2022 or the preliminary objection, without leave, the 5th and 6th defendants cannot sustain a claim against the 2nd plaintiff.
99. The 5th and 6th defendants filed a preliminary objection dated 11.5.2023, which is said to be premised on paragraph 5 of the defense and counterclaim dated 2.11.2022. The same challenged the two plaints filed by the plaintiffs. The court pronounced itself on whether or not the suit was caught up by Sections 4 (4), 7, 16, 18 & 19 of Cap 22. The court, in the ruling, addressed the issue of the cause of action by the plaintiffs as based on fraud, illegality, misrepresentation, and on actions alleged to have taken place on 7.3.2018, when the entry on the copy of the records to the title register was removed and replaced based on *Succession Cause No. 192 of 2017*. The land was registered in the name of the 1st defendant, who subdivided it into LR No's 5257, 5258, 5259, 5260, 5261, 5262, and 5263, yet the deceased had died on 7.11.1996. The cause of action remains that it arose on 7.3.2018. The 5th and 6th defendants have not persuaded the court otherwise to find the suit time-barred.
100. In trite law, parties are bound by their pleadings, and issues flow from them. In the pleadings by the 5th and 6th defendants, there was no leave to file a suit against the 2nd plaintiff, who is conjoined with the 1st plaintiff as regards the cause of action. The 5th and 6th defendants were never initial parties to the suit. They sought leave of court to come on board as defendants. The 1st and 2nd plaintiffs had not made any specific claims against the 5th and 6th defendants when they filed the further amended plaint.
101. The 5th and 6th defendants came on board and introduced a defense and counterclaim against the primary plaintiffs, which this court found incompetent to the extent of lack of leave to sue the liquidator. Once a pleading is struck out, it becomes inconsequential. The 5th and 6th defendants' defense and counterclaim against the 2nd plaintiff cannot be said to carry any claim or event attached to them. See *John Patrick Machira t/a Machira & Co. Advocated v Grace Wahu Njoroge* NRB HCCC No.3383 of 1995.
102. A cause of action relates to a factual situation that gives a party a right to sue the other. The 1st plaintiff, as indicated above, filed a reply to the defense and defense to the counterclaim dated 16.1.2023 denying the land belonged to the late Stephen Mwamba and asserted the suit was competently before court unlike Meru ELC *No. 21 of 2019* (OS). The 1st plaintiff pleaded that the charge was duly registered and was actively existing with the knowledge of the defendants, who raised no legal claim against the suit land. As to the counterclaim, the 1st plaintiff averred in paragraphs 10-20 of the defense that the



- 1st defendant and 1st interested parties colluded with the 5th & 6th defendants in dealing with the suit property, yet a suit filed by the late Stephen Mwamba against the estate was dismissed in 2000, and that any claim for adverse possession had not stated, when time began to run and was a wild goose chase. The 1st plaintiff also denied the claim was statute barred since the 1st defendant's rights had been active and were not successfully challenged by any party until the filing of this suit.
103. The 1st defendant to the counterclaim pleaded in paragraph 15 that the plaintiff to the counterclaim and their family members, as recently as 2009, had offered to buy the suit land from the 2nd defendant to the counterclaim, and therefore, limitation could not arise. Regarding the previous decree, the 1st defendant to the counterclaim averred that the 2nd plaintiff had sustained a continuous execution process up to 2018. The 1st defendant to the counterclaim averred the plaintiffs in the counterclaim had no legal or moral right to meddle in matters not concerning them as they were neither the owner of the land nor the legal representatives of the estate of the late Silas Judah Mbae and in any case the 1st defendant had negotiated on how to redeem the suit property from the 2nd defendant to the counterclaim by way of a private treaty.
104. The 1st defendant to the counterclaim averred the prayers were untenable, amounted to wishful thinking, lacked legal basis, and having lost in HCCC *No. 168 of 1992* and Meru ELC *No. 21 of 2019* (OS), the claim was *res-judicata*.
105. As indicated above, parties are bound by their pleadings. The 5th and 6th defendants failed to file a reply to defense to the reply and defense to the counterclaim dated 16.1.2023 by the 1st plaintiff. The same applies to the 2nd plaintiff's defense dated 11.1.2023 to the extent that the execution process had commenced before the lapse of 12 years and continued until the 1st, 5th, and 6th defendants took an active role in the execution process and made an offer acknowledging the debt. Additionally, the 5th and 6th defendants failed to challenge paragraph 20 of the 2nd plaintiffs' reply to a defense that as long as the charge subsisted and had not been discharged, with the debt remaining unpaid, a cause of action to recover the debt remained alive.
106. Moreover, the 5th and 6th defendants did not challenge the averments in paragraph 12 that it was only when the 1st defendant to the counterclaim approached it for a negotiated settlement that it was discovered that fraud had occurred in 2018. Through the said reply to the defense and defense to the counterclaim, the 1st and 2nd plaintiffs introduced further witness statements dated 16.1.2023 and 11.1.2023, respectively.
107. Given the preceding, there is no doubt that the primary issue raised by the plaintiffs in the primary pleadings revolved around the events of 7.3.2018. The 1st defendant never denied the contents of the pleadings or challenged the documents filed or produced by the plaintiffs, and the 2nd to 4th defendants that he fraudulently and unprocedurally obtained title to the suit land. His footprints were and are all over the documents filed by the 2nd – 4th defendants dated 11.3.2022. The 2nd defendant in the primary suit in the witness statement by the G.M Njoroge, a land registrar, confirmed that on 5.1.1965, the late Stephen Mwamba was the first registered owner who on 2.12.1986 transferred the land to Silas Judah Mbae who subsequently on 29.01.1985 charged the suit land with the 2nd plaintiff for 90,000/=.
108. Further, G.M Njoroge stated the suit land was transferred on 7.3.2018 by transmission to the 1st defendant in the primary suit vide *Succession Case No. 192 of 2016*, who then subdivided it into seven portions, namely Kiirua/Naari/5257-5263 all under his name and on 9.8.2018 a caution was placed by the 2nd interested party claiming purchaser's rights.



109. Additionally, the copy of records showed that on 25.10.2018, this court placed a temporary injunction on all the resultant parcels of land. The 2nd – 4th defendants filed a green card before the court for the seven portions, mutation form, and transmission documents for the suit land. All the documents showed the names of the 1st defendant at the center of the transactions. In *Kinyanjui Kamau v George Kamau* (2015) eKLR, the Court of Appeal said fraud must be pleaded and strictly proved on a standard higher than the required in ordinary suits. The same was stated in *Vijay Morjaria v Darbar* (*supra*) *Emfil Ltd v Registrar of Titles Mombasa and others* (2014) eKLR.
110. In *Wambui v Mwangi & others* CA No. 465 of 2019 (2021) KECA (144) (KLR) (November 19th, 2021) Judgment the court cited *Black's Law Dictionary* 9th Edition page 131 that fraud means a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to their detriment and in *Arihi Highway Developers Ltd v West End Butchery Ltd & others* (2015) eKLR it was held that courts should not provide succor for any crook using forgery, deceit or any fraud to acquire a legal and valuable title deceitfully snatched from a legally registered innocent proprietor. The court said it had to interrogate the root of the appellant's title and that courts should not sanction and pass as valid any title to property founded on fraud, deceitfulness, or contravened the decree, based on illegality, nullity, irregularity, unprocedurally obtained or otherwise a product of a corrupt scheme.
111. In this suit, fraud and illegality were pleaded in paragraph 10 of the 1st plaintiff's amended plaint and in paragraph 16 of the 2nd plaintiff's further amended plaint dated 11.8.2020. The 1st – 4th defendants failed to plead to those particulars through denial, rebuttal, or justification. They did not dispute the existence of the title deed in the name of the deceased and the subsequent charge registered by the 2nd plaintiff against the title deed.
112. The 1st defendant is shown to have acquired the suit property upon production of a succession grant. DW1 was unable to prove or show such a grant. He has admitted on oath that he misrepresented facts to the 2nd and 3rd defendants, who proceeded to effect the changes to the title register, transferred, and subdivided the suit land to himself without a discharge of charge or consent from the plaintiffs. The 2nd – 4th defendants did not file any defense, testify, or produce anything to show if a discharge of charge or consent was presented to them before a transmission of the land through a grant was effected. The conclusion is that the legal procedure regarding the discharge of charge to safeguard the rights of both chargor and chargee was ignored by the 2nd – 4th defendants in allowing entries to the title register on 7.3.2018.
113. Contrary to the pleadings, testimony, and written submissions by the 1st, 5th and 6th defendants, it did not matter that the charge may have been void, illegal, or unenforceable because of an alleged illegal acquisition of the property by the chargee, a previous alleged stale decree or a statute-barred, or inoperative charge due to effluxion of time. Two wrongs do not make a right.
114. In *M.W.K. v P.K.M. Interested party Equity Bank (K) Ltd* (2019) eKLR, the court cited with approval *Clark & others v Chadbourn & others* (1985) 1 ALL ER PC 211 that even if the defendants thought that the injunction was improperly obtained or too broad in its terms, there could have been no excuse for disobeying it, since the remedy was to either apply for its variation, setting aside or discharge. In *Alice Chemutai Too v Nickson Kipkurui Korir & others* (2015), eKLR succession proceedings had not mounted, and the estate was distributed. The court said it did not need rocket or space science to conclude that the acquisition of the title was fraudulent. The court said the 1st respondent could not have perpetrated the fraud alone and must have colluded with corrupt and morally deficient fellows in the land registry. Regarding third parties, the court said they should have conducted due diligence by digging deeper or probing into the title beyond an official search. The court cited *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* Eldoret ELC No.609B of 2012, that Sections 26



- (1) (b) of the [Land Registration Act](#) removes protection from an innocent purchaser or innocent title holder.
115. Applying the foregoing case law, the 1st defendant obtained title to the suit land without a discharge of charge and a confirmed grant. Not long ago, he had authored a letter dated 16.8.2009 with Gregory Kimathi, who testified herein on behalf of the 5th and 6th defendants. The letter dated 13.3.2019 from the Deputy Registrar of this court to the DCI Timau in response to the letter dated 5.3.2019 confirmed that in the succession register for Meru High, file no Meru HC *Succession Cause No. 192 of 2016* relating to the estate of the deceased and in particular LR no. Kiirua/Naari/54 was non-existent.
 116. DW1, in his evidence before this court, admitted that he misrepresented himself to the 2nd - 4th defendants, obtained the title deed, and proceeded to prepare and sign a mutation form, which was effected by producing the resultant subdivisions and title deeds under his name. The 5th and 6th defendants testified and submitted that though the actions of the 1st defendant were illegal, he was on a frolic of his own. Similarly, the 5th and 6th defendants pleaded, testified, and submitted that the charge was already void, unenforceable, and illegal, and this court should not cancel the illegal entries. The 5th and 6th defendants cannot have it both ways. They cannot disown the acts of the 1st - 4th defendants' actions and simultaneously seek to benefit from an illegality.
 117. It is not lost that the 1st, 5th, and 6th defendants have not pleaded when they became aware of the alleged illegal registration of the title by the deceased and the existence of the charge by the 2nd plaintiff. The 5th and 6th defendants did not plead or testify on what remedial action they took to have the 2nd - 4th defendants reverse the alleged illegal registration, charge, and discharge the title from the encumbrance allegedly registered in favor of the 2nd plaintiff.
 118. If they had any protectable rights, the 1st, 5th, and 6th defendants acquiesced to them; otherwise, they would have sued the plaintiffs as soon as they discovered the registration of the charge. No decisions made in their favor in the previous suits were produced before this court. The doctrine of estoppel prevents the 1st, 5th, and 6th defendants from acting inconsistent with the rights of the 2nd plaintiff, given the letter by the 1st defendant made for and on behalf of the family of the late Stephen Mwamba.
 119. Nothing prevented the 1st, 5th, and 6th defendants from suing the 2nd plaintiff the earliest they became aware of the charge and the outstanding debt. Vigilance would have expected that if the 1st, 5th, and 6th defendants occupied the land as early as 1965, 1987, and or 2009, they would have asserted their rights and brought up a case of fraud and illegality against the 1st and 2nd plaintiffs. He who comes to equity must come with clean hands. See [Kyangoro v KCB](#) (2004) KLR 126.
 120. The 1st, 5th, and 6th defendants are neither the chargor, the chargee, nor representatives of the two for them to invoke Sections 105 and 106 of the [Land Act](#). No pleadings with leave to that effect were made against the 2nd plaintiff for invalidation or re-open the charge on account of fraud or illegality. No evidence was availed to show that in 1987 or after 1996, when the deceased became the registered owner of the alleged property, the alleged equitable rights of the 1st, 5th, 6th defendants were agitated for or determined to finality by a court of competent jurisdiction.
 121. Strangely, if at all the 1st, 5th, and 6th defendants were furthering the interest of the late Stephen Mwamba as the first registered owner of the suit land, one would have expected the deceased Stephen Mwamba and or his representative to have sued the Land Registrar, perhaps alongside the 1st defendant to the counterclaim.



122. Through written submissions, the 5th and 6th defendants have tried as much as possible to disassociate themselves from the 1st defendant in the primary suit and raise new issues which were never pleaded. See *SNR v Remu Microfinance Bank Ltd & others* (2021) eKLR.
123. Counsel for the 5th and 6th defendants submitted that whether or not the 1st defendant has been charged with land fraud and whether or not he will be convicted or acquitted, is immaterial to the claim by the 2nd plaintiff. It is trite law that the estate of a deceased person can only be represented in any legal representation or transaction by a person duly authorized to do so on behalf of the estate and who has valid letters of administration. Confirmation of the grant had not occurred, so the transfer by the 1st defendant was against Section 82 of the *Law of Succession Act*. The 1st defendant was not the legal representative of the estate of Silas Judah Mbae, so the changes on 7.3.2018 to the title register and the resultant subdivisions were illegalities, nullities and fraudulently made. As held in *Macfoy v United Africa Co. Ltd* (1961) 3 ALL ER, whatever else happened after that was a nullity.
124. For the 1st – 4th defendants to deal with the deceased property other than as required under Sections 45, 79 and 82 of the *Law of Succession Act*, they were intermeddling with a deceased person's estate. Such a title and the subsequent transfers were unlawful and cannot be protected by the law. See *Morris Mwiti Mburugu v Denis Kimathi M'Mburugu* (2016) eKLR and *Pravinchandra Jannadas Kakad v Estate of Lucas Oluoch Mumia & others* (2022) eKLR.
125. Even assuming the 1st defendant had a grant, what consideration and capacity did he have from his late father to obtain the suit land by illegal means? The 5th and 6th defendants have distanced themselves that their consent to the 1st defendant following the land did not include illegal means. DW 1 did not say he acted as their trustee or was advancing any accrued interest, such as adverse possession for his family. The fingerprints of the 1st defendant are in the sale agreement with the 1st and 2nd interested parties. I find the claim on fraud, illegality, and unprocedural means by the plaintiffs against the defendants proved.
126. As to the status of the unexecuted decree and whether the cause of action is time-barred, the 5th and 6th defendants have belabored on whether the non-execution of the decree on time or at all disentitled the 2nd plaintiff from filing this suit. Notwithstanding that there is no valid defense and counterclaim against the 2nd plaintiff by the 5th & 6th defendants, this court, in its ruling dated 22.9.2023 on the preliminary objection dated 22.5.2023, found that the preliminary objection was not a pure point of law since it required the establishment of the facts and evidence at the hearing.
127. The 5th and 6th defendants have reiterated the preliminary objection in their final submissions dated 15.12.2023. In paragraph 27 of the ruling dated 20.9.2023, this court cited, *Rajnikant Shah v Habibi Bank A.G Zurich* (2016) eKLR and *Nicholas Murithi v B.B.K.* (2018) eKLR, *Shire v Tabitha Finance Co. Ltd* CA NRB No. 761 of 2000, *Afrofrieght Forwarders Ltd v Africa Liner Agencies* CA No. 23 of 2007, *Willis Onditi Odhiambo v Gateway Lush* (2014) eKLR and *Danson Murithi Ayub v Evans Mithamo Muroki* (2015) eKLR, *Richard Cheptige, another v K.C.B. Ltd* (2017) eKLR, *Pius Kimaigo Langat v Coop Bank Ltd* (2017) eKLR and *Gathoni v K.C.C. Ltd* CA No. 122 of 1981, *Divecon v Samani* (1995 – 1998) CA and *Deposit Protection Fund Board v Rosaline Njeri Macharia & another* (2016) eKLR. The burden was upon the 5th and 6th defendants to plead and prove the defense raised in the preliminary objection.
128. Starting with previous suits filed by the 5th and 6th defendants against the 1st plaintiff or between the two deceased persons, the 5th and 6th defendants did not avail any of the pleadings, judgments, or decrees in the former suits. The court cannot, therefore, make any conclusive findings on res judicata and stale decree.



129. The 5th and 6th defendants have appealed against the ruling of this court in Meru ELC No. 21 of 2019 (OS) and, at the same time, have come back to this court on a counterclaim for adverse possession. Such actions offend the doctrine of *sub-judice* under Section 6 of the [Civil Procedure Act](#). As held in [Kenya National Commission on Human Rights v Attorney General IEBC & 16 others](#) (2020) eKLR, the doctrine guards against the issuance of conflicting judgments and multiplicity of suits over the same issue and parties.
130. The 1st plaintiff has also pleaded *res-judicata* against the 5th and 6th defendants' counterclaim. He did not bring enough material to prove that fact. The court has reiterated the cause of action pleaded by the primary plaintiffs, which occurred on 7.3.2018. No evidence was availed to show that the previous decree related to the cause of action as pleaded herein. There is no evidence tendered that the 5th and 6th defendants had litigated the issues of legality, existence, propriety, expiry, and or unenforceability of the rights of either the plaintiffs against each other and their effect on the estate of the late Stephen Mwamba in the former suit or suits, such that the 2nd plaintiff would be said to be reviving an already stale decree or cause of action. As indicated above, the 5th and 6th defendants avoided pleading to the particulars of fraud, illegality, and the unprocedural manner in which LR No. 54 changed from the name of the deceased to the 1st defendant and subdivided into seven portions, some of which were transferred to the 1st interested party.
131. The submissions by the 5th defendant on page 3 at the last paragraph, paragraphs 1, 2, and 3 on page 4 as read together with paragraphs 3, 4, 5 of page 5, pages 6, 7, and 8 is evidence from the bar which were neither pleaded nor any material produced by the 5th & 6th defendants. However forceful or convincing written submissions are if not based on facts pleaded or documents tendered they cannot amount to evidence. See [Daniel Toroitich Arap Moi v Mwangi Stephen Murithi](#) (2014) eKLR. Pleadings, evidence and judgment in Meru ELC No. 21 of 2019 (OS), were not tendered by the 5th and 6th defendants. The same applies to Meru HCC No. 168 of 1992. No evidence was produced to show that the 5th and 6th defendants agitated for the charge to be declared invalid in the previous suit by the deceased or themselves. If the registration of the title deed in the name of the 1st plaintiff's late father was fraudulent or illegal, there is no evidence that the 5th and 6th defendants filed the suit based on fraud and on time as required from the date of discovery of such fraud.
132. On the capacity to sue, the grant issued to the 5th and 6th defendants was specific to suit number Meru ELC No. 21 of 2019. No evidence was produced to show if the grant was renewed to cover the instant suit and more so, leave sought to sue the 2nd plaintiff.
133. On Sections 78 to 107 of the [Land Act](#) and the presumption under Section 9 (1) thereof, there was no pleading made by the 5th and 6th defendants that the 2nd plaintiff had agreed to discharge the charge upon the institution of the suit to recover the loan and that after obtaining the decree or judgment in March 1995, it abandoned its other rights under the charge. The 5th and 6th defendants did not plead unjust enrichment against the 2nd plaintiff. Similarly, the 5th and 6th defendants did not plead that the decree in Meru HCC No. 275 of 1994 was a bar or resulted to the 2nd plaintiff ceding its rights under the charge by operation of the law.
134. The 5th and 6th defendants did not provide any evidence that after the previous judgment, the charge ceased to exist lawfully, and therefore, the 2nd plaintiff could not eat its cake and at the same time retain it. Similarly, the 5th and 6th defendants did not plead to any fraud, illegality, or legality of the charge by giving particulars thereon as required by law. Fraud must be specifically pleaded and proved, as held in [Virjay Morjaria v Darbar](#) (*supra*).



135. The 5th, 6th, and 1st defendants acknowledged the debt and opted to redeem the property. The letter acknowledged attempts to auction the property to realize the existing loan by the 2nd plaintiff. The 5th and 6th defendants did not raise the issues of legality, fraud, or irregularity in the said letter. The doctrine of estoppel applies against the 1st, 5th, and 6th defendants to renege on this as against the 2nd plaintiff. See *Titus Muiruri Doge v Kenya Cannery Ltd* (1988) eKLR, *Chase International Investment Corp & another v Laxman Kesbra & others* (1978) eKLR.
136. In any event, the 1st and 2nd plaintiffs also filed a defense to the issues relating to the registration of title charge, judgment, attempts to execute negotiations, and an agreement signed to repay the loan by the 1st plaintiff. To purport to challenge the charge and its existence to date and the readiness to redeem the loan by the 1st plaintiff, who can speak for and on behalf of the estate, the 5th and 6th defendants lack legal standing and basis.
137. Sections 90, 91, and 107 of the *Land Act* are irrelevant to the 5th and 6th defendants' defense and counterclaim for the alleged rights or interests of the 5th and 6th defendants *vis a vis* the charge has not been defined or determined. The 5th and 6th defendants produced no evidence that they sought to join the suit leading to the decree or that they sought to join the execution of the judgment delivered in March 1995.
138. The 5th and 6th defendants were and cannot be equated to a spouse of a chargor. No evidence was produced that they stopped the commencement of the recovery proceedings in the previous suit or sought an equitable remedy before the said court. There is no evidence that the 5th and 6th defendants have tried to stop the numerous auction advertisement sales as indicated in the exhibits produced by the 2nd plaintiff.
139. Above all, there was no evidence that the 5th and 6th defendants sought leave to file any case against the 2nd plaintiff to whom prayers (a), (c), (e), (f) and (s) relate, including the payment of requisite filing fees. The upshot is that I find the issues unproven in favor of the 5th and 6th defendants.
140. As to the claims by the interested parties, an illegality is an illegality. In *Dima management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021 (2023) KESC 30 KLR (21st April 2023) (Judgment) and *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022 (2023) KESC 79 KLR (22nd September 2023) (Judgment), the bar has been set higher for innocent purchasers for value without notice. The 1st interested party has not produced evidence of what consideration he paid for the suit land as held in *Alice Chemutai* (*supra*). He did not do more due diligence to establish the legality of the title deed held by the 1st defendant. He consented to a judgment while this suit was pending, including criminal charges against him and the 1st defendant. He does not deserve to be described as an innocent purchaser, for he willingly assumed the risk. As to the 2nd interested party, he dwelt with a party with no better title, and when he learned that the suit land was charged, there is no evidence that he conducted any official search other than visiting the 2nd plaintiff's office in the company of the late Stephen Mwamba. He did nothing to secure his rights against the 1st plaintiff since 1990. His claim was time-barred, lacking merits, and was not directed to anyone.
141. Consequently, the claim by the 1st and 2nd plaintiffs is allowed with costs in terms of prayer (a), (b) and (c) of the amended plaint dated 1.4.2019 and in terms of prayers (a), (b), (c), (e) & (f) of the further amended plaint dated 11.8.2020. Any defendants, agents, interested parties or persons claiming under the 1st defendant on the suit properties shall be issued with the mandatory statutory notice of eviction in line with the law.



142. Further, the claims by the 5th and 6th defendants against the primary plaintiffs and the 1st defendants in the primary suit are dismissed with costs to the primary plaintiffs. The interested parties' claims are also dismissed with costs to the primary plaintiffs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24TH DAY OF JANUARY 2024

In presence of

C.A Kananu/Mukami

Parties

Mr. Thangicia for the 1st Plaintiff and for Cheptumo for 2nd Plaintiff

1st Defendant present

Miss Maina for 2nd – 4th Defendants

Miss Kajuju for 5th & 6th Defendant

Mr. Kimathi for Interested Parties

HON. CK NZILI

JUDGE

