



Wambugu v Goodison One Hundred Twenty- Three Limited & 2 others (Environment and Land Case Civil Suit 141 of 2012) [2024] KEELC 1357 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 141 OF 2012
LL NAIKUNI, J
FEBRUARY 28, 2024**

BETWEEN

CLEMENT WAMBUGU PLAINTIFF

AND

GOODISON ONE HUNDRED TWENTY- THREE LIMITED .. 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

FRANCIS KAGUNDA 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Clement Wambugu the Plaintiff herein through an Amended Complaint dated 31st October, 2013 and filed in court on 23rd March, 2014. It was against the Goodison One Hundred Twenty-Three Limited, the Chief Land Registrar and Francis Kagunda 1st, 2nd and 3rd Defendants herein.
2. The Plaintiff as per the Complaint is described as an adult of sound mind residing and working for gain at Nairobi, the 1st Defendant is described as a limited liability Company duly incorporated under the Companies Act Cap 486 of the Laws of Kenya. The 2nd Defendant is a Government agent responsible for administering the land registries in Kenya and the 3rd Defendant is described as a male adult of sound mind residing in Mombasa.
3. Upon service of the Complaint and Summons to Enter Appearance, the Defendants filed their Memorandum of Appearance. Precisely, each of the Defendants filed their Statement of Defence as follows – the 1st Defendant filed it dated on 22nd August, 2021, the 2nd Defendant filed theirs dated 8th May, 2013 while the 3rd Defendant filed his dated 7th June, 2017 all opposing the contents of the Amended Complaint.



4. On 7th December, 2017 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - trial conference, it was fixed for full trial on 19th February, 2018.

II. The Plaintiff's case

5. Based on the filed pleadings by the Plaintiff and the Plaintiff the brief facts of the case are that at all material times the Plaintiff was the bona fide registered owner of plot number entitled to the possession of land situate at title number Galu Kinondo/330 within Kwale (Hereinafter referred to as the "The Suit Property"). The Plaintiff purchased the said plot from one Salimu Salimu Bendo to whom it had been allotted after adjudication. The purchase of the land was vide a duly executed Sale Agreement dated 10th August 1974, by both parties. The said Mr. Salimu Salimu Bendo offered for sale and sold the suit property before the first title to the property was issued and wrote to the Adjudication Office Kwale by a letter dated 10th August, 1974 stating that their register of allottees should henceforth reflect the Plaintiff's name as the owner of the property as he had sold the property to the Plaintiff. The said letter was duly witnessed by the Adjudication staff at the time.
6. Significantly, the Plaintiff paid the entire purchase price to the said Mr. Salimu Salimu Bendo, receipt whereof was duly acknowledged. Subsequently, the Plaintiff took possession of the plot as was stipulated in the said Agreement. The Plaintiff had since completion enjoyed quiet possession thereof up to and until recently when the 1st and 3rd Defendants and their agents, employees and/or Directors without a colour of right and in a most gruesome and obnoxious manner descended on the plot and trespassed thereon. On or about 27th July, 2012, the Plaintiff discovered that the 1st, 2nd and 3rd Defendants by themselves or their agents had fraudulently and unlawfully acted so as to deliberately deprive the Plaintiff his property.
7. The Plaintiff relied on the following particulars of fraud and illegality against the 1st Defendant:-
 - a. Failed to conduct due diligence in order to ascertain the true identity of the registered owner of the suit property.
 - b. Accepted an offer to purchase the suit property herein at a gross undervalue price of a sum of Kenya Shillings Ten Million (Kshs.10,000,000/-) when the actual value at the time was at least double the said sum.
 - c. Accepted to be used as a basis for a transfer, Title and identification documents which they knew or ought to have known were forged.
 - d. Gave false information to the Land Control Board in order to obtain the Letter of Consent from the Land Control Board.
 - e. Colluded with the 3rd Defendant to effect an illegal transfer
8. The Plaintiff relied on the following particulars of fraud and illegality against the 2nd Defendant:-
 - a. Failed to confirm the identity of the 3rd Defendant which they knew or ought to have known was false.
 - b. Accepted and approved Title and Identification documents from the 3rd Defendant which they knew or ought to have known were forged.
 - c. Acted in abuse of office and in a careless manner.
 - d. Approved the Consent of the Land Control Board which was procured on information which they knew or ought to have known to be false.



- e. Registered a transfer on the basis of false documents.
 - f. Colluded with the 1st and 3rd Defendant to effect an illegal transfer.
9. The Plaintiff relied on the following particulars of fraud and illegality against the 3rd Defendant:-
- a. Impersonated the Plaintiff.
 - b. Fraudulently held himself out as Mr. Clement Wambugu, the owner of the suit property.
 - c. Purported to sell Parcel No. Galu/Kinondo/330 knowing well that he was not legally entitled to do so,
 - d. Received money pursuant to the illegal sale knowing that he was not entitled to do so.
 - e. Forged identification documents bearing the names of the Plaintiff, Clement Wambugu.
 - f. Forged the Title of Parcel No. Galu/Kinondo330.
 - g. Gave false information to the Land Control Board for the purpose of procuring Consent to Transfer.
 - h. Presented forged documents at lands office purporting to be Clement Wambugu in order to effect an illegal transfer.
 - i. Colluded with the 2nd Defendant and 3rd Defendant to effect fraudulent and illegal Transfer of the suit property.
10. In view of the foregoing the Plaintiff contended that the said conduct of the Defendants, their agents, employees and/or Directors smacked of impropriety, was unconscionable, unlawful, malicious and amounts to trespass. The Plaintiff averred that having purchased the suit property for value and accordingly having taken possession thereof for all the years, he was entitled to quiet possession as well as exclusive and uninterrupted use thereof. In the circumstances, the Plaintiff contended that the 1st Defendants' conduct was unlawful and malicious and as such the Defendants were liable to general damages for trespass. The subsequent registration of the 1st Defendant as the proprietor of the suit property by the 2nd Defendant was unlawful.
11. According to the Plaintiff there was no other suit pending in any Court between the Plaintiff and the Defendants in respect of the subject matter of this suit. The Honourable Court has jurisdiction over this matter. The Plaintiff prayed for Judgment to be entered against the 1st, 2nd and 3rd Defendants jointly and severally for:-
- a. A Declaration that the Plaintiff is the bona fide and rightful owner of Plot Number Galu/Kinondo330 in Kwale
 - b. A declaration that the Transfer of L.R No. Galu/Kinondo330 to the 1st Defendant was illegal and fraudulent and null and void for all intents and purposes.
 - c. A permanent injunction do issue restraining the 1st Defendant jointly and severally whether acting by themselves, their agents, employees, servants, directors or whosoever from entering, trespassing, encroaching, selling, offering for sale, transferring, alienating, dealing and/or in any way interfering with the Plaintiff's use and/or quiet occupation of the suit property being Galu/Kinondo330 in Kwale



- d. Entries made in the Register in respect of the land parcel known as Galu/Kinondo330 be cancelled and consequently the Plaintiff be registered as the proprietor therein.
 - e. Vacant possession of the suit property
 - f. General Damages for Trespass
 - g. Cost of this suit.
 - h. Any interest on (e) and (f) above.
 - i. Any such other or further relief as this Honourable Court may deem appropriate.
12. The Plaintiff called its first witness on the 19th February, 2018 where the Witness testified as follows:

A. Examination - in - Chief of PW - 1 by Ms. Leli Advocate.

13. PW – 1 was sworn and testified. He identified himself as Clement Arthur Wambugu. He informed the Court that he was in the Court because his land had been claimed by someone else. In the early 1970s a friend of his told him that there were plots in Kwale for sale. His name was John Njora who was now deceased. The purchase price was about a sum of Kenya Shillings Seven Thousand Five Hundred (Kshs 7,500/-). He showed interest in the plot and they jointly bought it with Mary Nyaruai and they gave the money to John Njora. A sale agreement dated 10th August, 1974 was prepared between Salimu Salimu Bendo, Mary Nyaruai and the witness.
14. He told the court that upon signing the sale agreement, they also paid the statutory charges through Mr. Njora. The receipts were at pages 23, 24, 25 and 21. Later Mr. Njora came to Mombasa to collect the title deeds at pages 16 – 19. Later on Mr. Njora gave them maps, drawings and he visited the land which was bushy. The title deed was issued in his name. The land was sub - divided between them and he got half and Mary took the other half. He used to visit the land to confirm that the same was not grabbed.
15. He recalled that on 18th November, 2010, he applied for an official search and he confirmed that he was still the owner of the suit land. When he learnt that a neighbor's plot had been grabbed, he decided to check on the status of his plot which he did through another official search on 25th October, 2011. They also decided to get the rates payable (which was at page 27 to 28). He did another search on 27th June, 2012, that is when he realized that somebody else had been registered as the owner and the title deed had been issued (page 29) which had been issued in the name of the 1st Defendant. They reported the matter to the police and his lawyers.
16. He testified that following the report he made, the police arrested the 3rd Defendant for forging the documents to facilitate the fraudulent transfer of the documents. The land certificate used to transfer the land was different from his. The identity card used is also different from his, the PIN was also different. The 3rd Defendant was arrested and arraigned in Mombasa Chief Magistrate's Court and the case was still pending. It was criminal case no. 58 of 2013. At page 30 was the letter by the Chief Land Registrar following their complaint through his daughter. He later instructed his advocate to file this current suit.
17. He confirmed that he recorded a statement which he filed on 23rd August, 2013 and he produced the bundle of documents as Plaintiff Exhibit 1.



A. Cross examination of PW - 1 by Ms. Kiti Advocate

18. He told the Court that he was in the land late last year. There were no developments except kiosks which was adjacent. The kiosk owners kept an eye on their land. The witness personally reported the matter to the CID Headquarters. He was aware that Francis Kagunda was arrested and was facing criminal charges in Court. He had not visited the lands office at Ukunda. He had never met Francis Kagunda until they met in Court. Francis Kagunda purported that he was Clement Wambugu which was not true.

A. Re – examination of PW - 1 by Ms. Leli Advocate

19. He reiterated that he was Clement Wambugu. He never sold the land to anybody neither did he authorize anyone to sell the same on his behalf. Francis Kagunda fraudulently purported to sell it.
20. On 5th April, 2022 after seeking for a further hearing to call PW 2 who would substantiate the criminal charges against the 3rd Defendant, the Witness told the Honourable Court that:-

A. Examination of PW - 2 by the Ms. Opondo Advocate

21. PW – 2 was sworn and testified in English. He told the court that he was Sylvester Mwangi. He worked for EACC as an Investigator. Before he worked for the DCIO as an investigator unit no. 2016198. He would be assigned matters attached to land, prepare charge sheets for matters relating to land fraud. On this matter while in the office on 1st August, 2022, he received a complaint from Martin Bert that a property he had bought being Galu/Kinondo/ 330 from one Clement Wambugu that an imposter had come and claimed that the land actually belonged to him and he took possession from his statement he had paid a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) through the Law firm of Messrs. Mogaka, Mabeya & Omwenga Advocates.
22. He adopted his witness statement as part of the evidence. They discovered the following documents; identification card, Personal Identification Certificate (PIN) and title deed. The identification card that was presented to the purchaser belonged to Francis Kagunda. They submitted them in Mombasa Law Courts. The accused person was Francis Kagunda Maina alias Clement Wambugu; he identified the documents as the 1st Defendant's documents. The documents they got showed that he was born in 1958. The document he bought was for the year 1974 whereby he was 16 years. The name on the document was Clement Arthur Wambugu. The photographs attached were those of the fraudsters. – MFI at page 32.
23. He stated that in the course of investigations Mr. Martin Bert positively identified Mr. Francis Kagunda as the one who presented himself as Mr. Clement Wambugu. The KRA Pin presented was not among the ones held at KRA meaning it was made from the street. KRA indicated that they were not in their records. Subsequently, they also sent the KRA certificate for Clement Arthur Wambugu and KRA and it showed that they were correct. The original identification card for Artur Wambugu was no. 8884179 and for the fraudster was 64209255. The date of birth in the original card was the year 1939 while in the fraudster's it was for the year 1958. The KRA PIN number was A00XXXXX02M while the PIN for fraudsters was A003337209Z. The title deed was fake as it had a forged signature of the land registrar at pages 16 and 17 for the original owner. The fake title deed which they recovered had a different font and had no postal address. They subjected the same to forensic assessment.
24. The witness further told the court that from the documents gathered, Francis Kagunda never appeared anywhere, Clement Wambugu was the person who appeared before the Land Control Board when Salimu was transferring the land. According to him on the 10th August, 1974, Clement Wambugu paid



- a sum of Kenya Shillings Seven Thousand (Kshs. 7,000/-) to the vendor – Salimu Salimu as the value of the land. In this transaction Kshs 5/- was charged as Stamp duty. Clement Wambugu appeared before the Land Ordinance and paid Kshs 20/- and that is how he ended up with the title deed.
25. He told the court that in the cause of his investigations, he went to Kwale Land Registry where he discovered that out of the fake identification card and title deed Francis Kagunda managed to obtain fake title deed and pin in order to transfer the land to Martin Bert. It is on the strength of the fraudulent document that he recommended that the 3rd Defendant be charged in the Court of Law.
 26. The witness stated that where the charges were making a document, uttering a false documents and making a document of national identification card, uttering a fake identification card, making and uttering a document of KRA pin; obtaining case by false pretense a sum of Kenya Shillings Ten Million (Kshs 10,000,000/-). The 3rd Defendant was charged and the matter was still pending in the Chief Magistrates Court.
 27. Further the witness produced a further list of documents dated 23rd November, 2022 as Plaintiff Exhibits 14 to 26 and a witness statement dated 12th June, 2023. According to him in the cause of his investigations, he recorded the statement of Clement Wambugu. In the process, he recovered the following documents:-Certificate of title in respect of Galu/Kinondo/ 330His national identification card and his pin certificate. (Plaintiff Exhibit 19 and 20).
 28. Having received these documents, he proceeded to the land registry Kwale to request for the file, from the parcel file, he retrieved the transfer, KRA pin, national identification card and surrender certificate of the title (Plaintiff Exhibits Numbers 14, 15 and 18 of the Supplementary List of documents. By looking at the documents, he recovered from Clement Wambugu and the officials at the registry that there were many discrepancies. For instance, the KRA pin. He visited the Commissioner for Domestic income tax, Plaintiff Exhibit Numbers 18, when KRA replied indicating that there was KRA pin like such. Hence it was fraudulent. He further found out that for one to give a valid KRA, one needed to have a valid identification card. They proceeded to the registration of the person; (Plaintiff Exhibit No. 14).
 29. According to the witness they proceeded to discover the person who got the proceeds of the money. They got bank statements by themselves. The purchase price was for a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) to which Hans Consultants advanced a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) to Ndeda Advocates. The balance of a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-) was sent to Messrs. Mogaka, Mabeya & Omwenga Advocates being a client. He called Mr. Mabeya Advocate and the advocate gave him the names of Francis Kagunda as the beneficiary of the money. As the investigations progressed, he called Francis Kagunda who confirmed that he was the one who benefitted from the sale of the suit property. Francis confirmed that Mr. Clement Wambugu never benefitted from the proceeds. He therefore arrested Francis Kagunda and charged him with the charges before the Chief Magistrates Court.
 30. He told the Court that Mr. Clement Wambuga had been impersonated by Mr. Francis Kagunda. The case was concluded and Judgment was delivered on 2nd June, 2021. A copy of the Judgment had been attached in the Plaintiff's list of documents at page 29 to page 40. He was acquitted under the provision of Section 215 of the Criminal Procedure Code, Cap 75 Laws of Kenya as the Complainant absconded, he refused to attend court to give evidence. The Complainant in the criminal case was Mr. Martin Bert.

B. Cross examination of PW - 2 by Ms. Kiti Advocate

31. He confirmed that Mr. Francis Kagunda impersonated the original owner of the land Mr. Clement Wambugu and fraudulently forged the documents and hence transferred the land to Goodison One



Hundred Twenty-Three Ltd, the 1st Defendant. He caused an investigation from all the government offices and found out that indeed the 3rd Defendant forged the documents which he used to transfer the land to the 1st Defendant.

32. On 25th July, 2023 the Plaintiff through his counsel Ms. Opondo marked his case closed.

III. The 1st Defendant's case

33. On 22nd August, 2012, the 1st Defendant filed its statement of defence dated 22nd August, 2012 where it was their averment that save that one Clement Wambugu was at all material times registered as the owner of all that suit property. The 1st Defendant was a stranger to the contents of Paragraphs 4, 5, 6 and 9 of the Plaint and makes no admission thereto.

34. With reference to the contents of Paragraphs 7,8,10 and 11 of the Plaint, the 1st Defendant averred as follows:-

- a. By an Agreement for Sale dated 3rd February, 2012 between the 1st Defendant and a Mr. Clement Wambugu(hereinafter referred to simply to as "Wambugu"), Wambugu agreed to sell to the 2nd Defendant the suit property at a consideration of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000.00/=) and on other terms and conditions set out in the said Agreement for Sale;
- b. By a Transfer of Land dated 3rd April, 2012, Wambugu transferred to the 1st Defendant the suit property which measures 1.6 hectares in consideration of the said sum of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000.00/=) which Transfer was registered at the District Lands Registry, Kwale on 12th April, 2012;
- c. As at the date of the Agreement for Sale dated 3rd February, 2012 aforesaid, Wambugu was the duly registered proprietor of the suit property,
- d. As at the date of the execution of the Transfer of the suit property by Wambugu in favour of the 1st Defendant, Wambugu was still the duly registered proprietor of the suit property which proprietorship was confirmed by a Certificate of Official search issued by the Land Registrar, Kwale District;
- e. The 1st Defendant who was dealing with Wambugu who was the registered proprietor of the suit property was not obliged to investigate or inquire into the circumstances under which Wambugu became registered as the proprietor of the said property.
- f. When the 1st Defendant purchased the suit property, the same was not developed save for some temporary structures that had been put up at the edge of the said property next to the road and no one was in occupation of the property save for the owners of the said structures who were using the same as retail shops and who had also confirmed to the 1st Defendant that the suit property is owned by Wambugu. It was not true therefore as alleged by the Plaintiff that the Plaintiff had enjoyed quiet possession of the suit property since the year 1974 when the same was allegedly sold and transferred to the Plaintiff.
- g. The Plaintiff had not come out clearly on how the Plaintiff came to know of the 1st Defendant's occupation of the suit property so soon after the 1st Defendant had paid the purchase price of a sum of Kenya Shillings ten Million (Kshs.10,000,000.00) in full to Wambugu whom the Plaintiff has chosen not to join in these proceedings.



- h. The 1st Defendant avers that the circumstances and the manner in which these proceedings have been brought by the Plaintiff points to the fact that the Plaintiff has not come to Court with clean hands.
35. The 1st Defendant averred that following the registration of the transfer referred to above, the 1st Defendant was issued with a Title Deed for the suit property under the provisions of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) on 12th April, 2012. The 1st Defendant averred that it was an innocent purchaser of the suit property for value without notice of the alleged fraud on the part of Wambugu. The 1st Defendant's Title over the suit property was indefeasible save where such title was obtained by fraud to which the 1st Defendant was a party which was not the case in the circumstances the 1st Defendant having purchased the suit property for valuable consideration from a registered proprietor. no valid grounds under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) had been advanced by the Plaintiff to warrant the cancellation of the 1st Defendant's Title and an order for vacant possession sought by the Plaintiff against the 1st Defendant.
36. The 1st Defendant admitted to the jurisdiction of the Honourable Court.

IV. The 2nd Defendant's case

37. On 9th May, 2013 the 2nd Defendant filed a Statement of Defence dated 8th May, 2013 where he averred that the contents of Paragraph 4 of the Plaint are denied specifically that the Plaintiff is the registered owner of the property number Galu/Kinondo330 which was the subject matter of this suit and the 2nd Defendant put the Plaintiff to the strict proof thereof. The 2nd Defendant was not privy to the particulars of Paragraphs 5 and 6 of the Plaint were vehemently denied. The 2nd Defendant is a stranger to the contents of paragraph 7 of the Plaint.
38. According to the 2nd Defendant, they were and was not privy to the contents of Paragraphs 8, 9 and 10 of the Plaint. The 2nd Defendant was not aware of the contents of Paragraphs 11 of the Plaint the same was denied. Paragraph 12 of the Plaint was admitted and the 2nd Defendant submitted to the jurisdiction of the Honourable Court.
39. The 2nd Defendant called its first witness DW 1 on 21st June 2021.

A. Examination in Chief of DW - 1 by Ms. Kiti Advocate

40. The witness introduced himself as Dickson James Safari, the land registrar, Kwale at the time of his testimony. He could see the list of documents filed by the 2nd Defendants on 14th May, 2013. He produced the said documents as 2nd Defendant's Exhibit numbers 1 to 8. From the green card, the first allottee of Kwale/ Galu Kinondo/ 330 was one Clement Wambuguwho was allocated the land on 15th November, 1974. He was issued with a Certificate of Title on the same date. A transfer was effected to Goodison One Hundred Twenty-Three Limited on 12th April, 2012 for a consideration of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) and a title deed issued to that company. All the required documents were submitted to their office for registration by the law firm of Messrs. Anjarwalla & Khanna Advocates.
41. He told the Honourable Court that the documents which were presented to them were completion documents which included the original title deed of the transferor, Letter of land consent from the Land Control Board, rate clearance certificate, valuation report, receipts for payments of stamp duty and registration fees with copies of identification cards and pin certificates from the records. There was no evidence that there was any complaints and no documentation to show that there were any complaints.



B. Cross examination of DW - 1 by Ms. Opondo Advocate

42. He reiterated to the Court that he was the Land Registrar, Kwale. His duties entailed registration of land related documents, hearing and determination of boundary disputes, attending court sessions to give evidence on land related matters and other administrative duties, issuance of official searches was also one of his duties. At that time among their duties was to give letters of consent from the land control board in confirmation with the Land Control Board. He also heard and determined boundary disputes. He also received complaints relating to registration of titles. They also issue official searches. He could see the witness statements filed by the 1st Defendant on 22nd August, 2012 signed by Jonathan Stewart Phillip Coullson.
43. He told the court that he could see at paragraph which stated that the registration issued an unsigned certificate of official search. An unsigned certificate was not an official search. For a search to be authentic the register was to be signed, stamped, signed and sealed. He could not tell if the Registrar at that time gave out an unsigned search. The parcel files were kept in the registry strong room. The parcel files contained details pertaining to transactions that had occurred to a particular parcel of land and any other correspondences. He confirmed that the first person to be registered over the first land was Clement Wambugu.
44. He confirmed that the parcel contained documents of transactions. They had the adjudication record confirming that Clement Wambugu was allocated this particular parcel of land. They also had the green card indicating that Clement Wambugu was the first allottee. They also had a copy of a surrendered title bearing the name of Clement Wambugu.
45. According to the witness, he could see the 1st Defendant's list of documents filed on 22nd August, 2012. Document No. 2 was a copy of Mr. Clement Wambugu's National Identification card No. 88*79. The identification card was in the name of Clement Wambugu. The date of birth was indicated as 1958. He could also see the 2nd Defendant's list of documents filed on 14th May, 2013. The document numbers were copies of identification of the parties. He was not stationed in Kwale at the time but the records, the identity card was the one in the file.
46. The witness also told the court that he could also see the Plaintiff's bundle of documents filed on 8th March, 2017 at page 32 was a copy of an identification card bearing the name of Clement Arthur Wambugu identification card number 64209255 and the date of birth was in the year 1939. From the documents, he had Clement Wambugu at 1974 was 16 years old (1974 – 1958). These documents are usually submitted to their office when they are already attested to. The Registrar simply receives the documents for purposes of registration. The adjudication record which was the record that confirms the allocation of land to the individuals, in this case Clement Wambugu indicated that he acquired it through an adjudication process which was done in a different department from theirs.
47. The witness told the Court that he could see the document number 10 in the 1st Defendant's list of documents. It was a copy of the transfer dated 3rd April, 2012 of Kwale/ Galu Kindondo/ 330 by Clement Wambuguto 1st Defendant. It was a transfer dated 3rd April, 2012 of Kwale/ Galu Kinondo/ 330 by Clement Wambuguto the 1st Defendant. The identification number appearing in the card was 8884179. According to the documents he had, anyone under the age of 18 years was not eligible to acquire land. When they received the documents from the law firm of Messrs. Anjarwalla & Khanna, they were verified.
48. The witness could not confirm if there was any suspicion at the time. The parcel file had no complaints received. At page 30 of the Plaintiff's documents was a letter he did not recognize since the same was not



received in their office. He was not aware that there were ongoing proceedings against the 3rd Defendant. He had never appeared before Court in any Criminal Proceedings to testify against the 3rd Defendant.

C. Re – examination of DW - 1 by Ms. Kiti Advocate

49. He told the court that when parties are selling or buying properties, parties do not appear before them. The documents were presented by the Advocates clerks and the documents were attested to by the advocates for the parties. They only verify the documents as presented if they were in order, unless they received complaint. From the record, there was no complaint over this land.
50. The 2nd Defendant marked their case closed on 21st June, 2021.

The 3rd Defendant's case

51. On 8th June, 2017, the 3rd Defendant filed their Statement of Defence dated 7th June, 2017 where he contended that he was a stranger to the averments made in Paragraphs 4, 5, 5A, 6, 8, 9, 10 and 11 of the Amended Plaintiff. The 3rd Defendant denied the allegations of fraud made in paragraphs 7 and 7A of the amended Plaintiff and puts the Plaintiff to strict proof thereof. He submitted to the jurisdiction of the Honourable Court.

VI. Submissions

52. On 25th July, 2023 the Honourable Court in the presence of all the parties gave directions on the disposition of the amended plaintiff dated 31st October, 2013 by way of written submission. Pursuant to that on 18th October, 2023 after the Honourable Court confirming compliance set the Judgment date on notice.

A. The Written submissions by the Plaintiff

53. The Plaintiff through the Law firm of Messrs. Gikera & Vadgama Advocates, filed their written submissions dated 16th October, 2023. M/s. Opondo Advocate submitted that by his Amended Plaintiff dated 31st October 2013, the Plaintiff sought the reliefs against the Defendants as stated herein before. The Learned Counsel averred that the 1st, 2nd and 3rd Defendants filed their Statements of Defence on 22nd August 2012, 9th May 2013 and 7th June 2017, respectively, in which they denied the Plaintiff's claim. The 1st and 3rd Defendants, though served by substituted service in one of the local dailies with wide national circulation – “the Daily Newspaper” of 21st January, 2021 did not attend Court to Defend the suit. The hearing proceeded on 19th February, 2018, 21st June, 2021, 4th April, 2022 and 25th July, 2023 and the Plaintiff now presented his submissions based on his testimony, his witnesses' testimony and on the documents presented before the court.
54. The Learned Counsel summarized the background of the case that the Plaintiff purchased the suit property from Salimu Bendo vide a Sale Agreement dated 10th August 1974. He was registered as the proprietor and a title issued in his name on 15th November 1974. The Plaintiff claimed that sometime in July 2012 he discovered that the 3rd Defendant had colluded with the 1st and 2nd Defendants to effect fraudulent transfer of the Suit Property to the 1st Defendant who had taken possession of the Suit Property. The Plaintiff reported to the police who apprehended the 3rd Defendant and initiated prosecution in Criminal Case No.58 of 2013. The Plaintiff also instituted this suit for recovery of the Suit Property.
55. According to the Learned Counsel, the Plaintiff's case was that the Plaintiff (PW - 1) testified on 19th February 2018 and produced the Bundle of Documents dated 8th March 2017. The Plaintiff also



- called Sylvester Mango (PW - 2), who produced the Further Supplementary List of Documents dated 23rd November 2022 and further testified in support of the Plaintiff's case. PW - 1 was able to show the court how he purchased the Suit Property from Salimu Bendo by producing the sale agreement dated 10th August 1974. He showed how he paid the registration fees, land adjudication fees, land rates and interest before being issued with a Certificate of Title for the Suit Property dated 15th November 1974. PW - 1 also produced search results for the years 2010 and 2011 which showed that he remained the registered owner of the Suit Property.
56. She held that PW - 1 testified how, as part of his due diligence to safeguard his interest in the suit property, he discovered through a search conducted in June 2012 that the records were manipulated to show the 1st Defendant as the owner. PW - 1 was able to show the court how the 3rd Defendant in collusion with the 1st and 2nd Defendants procured his Identification Card and PIN Certificate and used them to transfer the title to the Suit Property in the 1st Defendant's name. PW - 1 testified how, as part of his due diligence to safeguard his interest in the suit property, he discovered through a search conducted in June 2012 that the records were manipulated to show the 1st Defendant as the owner. PW - 1 was able to show the court how the 3rd Defendant in collusion with the 1st and 2nd Defendants procured his Identification Card and PIN Certificate and used them to transfer the title to the Suit Property in the 1st Defendant's name.
57. PW - 1 pointed out to the court the inconsistencies in the documents he held, and the documents filed by the 1st Defendant in support of its case. He testified that his Identification Card Number was 6420955 with 224199088 as the Serial Number while the Identification Card used to transfer the Suit Property to the 1st Defendant had a different Card Number 8884179 and Serial Number 207434055. He also testified that his PIN Certificate was A00XXXXX02M while the PIN Certificate used in the transaction was A003337209Z. PW - 1 also pointed out to the court the difference in the date of births, that while his Identification Card showed his year of birth as year 1939, the one used in the transaction showed that the holder was born in the year 1968 and was six years old on 15th November 1974 when the Title was issued.
58. It was PW - 1's testimony that he complained to the Chief Land Registrar, Nairobi who wrote to also lodged a criminal complaint with the police who conducted investigations and charged the 3rd Defendant in Mombasa Criminal Case No. 58 of 2013. PW - 2 explained to the court in detail the steps he took upon receipt of the complaint on the illegal transfer of the Suit Property into the 1st Defendant's name. He demonstrated to the court how he obtained the documents used in the transaction over the Suit Property and how he carried out investigations to confirm their authenticity. PW - 2 collaborated PW - 1's testimony that the 3rd Defendant impersonated the Plaintiff and fraudulently held himself out as the Plaintiff by forging the Plaintiff's Identification Card, PIN Certificate and the Title Deed to the Suit Property and sold the Suit Property to the 1st Defendant.
59. PW - 2 stated that he attempted to confirm the authenticity of the PIN Certificate used in the transaction by contacting the Kenya Revenue Authority, however, the Kenya Revenue Authority formally disassociated itself from the issuance of PIN Certificate No. A003332709Z in a letter dated September 2012. PW2 also demonstrated to the court how he established that the 1st Defendant, through its Advocates, paid the deposit of a sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=) to the 3rd Defendant through the Law firm of Messrs. Ndeda & Company Advocates' account at Bank of Africa and the balance of a sum of Kenya Shillings Eight Million Nine Fourty Thousand (Kshs. 8,940,000.00/=) by way of RTGS through the Law firm of Messrs. Mogaka, Mabeya & Omwenga Company Advocates' account at Chase Bank. PW - 2 further testified that he used the information description offered by the 3rd Defendant's Advocates and arrested the 3rd Defendant whom he charged



in Mombasa Criminal Case No. 58 of 2013 with the offence of making false documents contrary to the provision of Section 347(d) of the Penal Code, Cap. 63 obtaining money by false pretenses contrary to provision of Section 313 of the Penal Code, Cap. 63 and obtaining registration by false pretenses contrary to the provision of Section 320 of the Penal Code, Cap. 63.

60. The Learned Counsel submitted that the Defendants' case was that the 2nd Defendant called one witness, Mr. Dick Safari, (DW) who testified on 21st June 2021 confirming the Plaintiff was the first allottee of the Galu/Kinondo330 and that he was issued with a title deed on 15th November 1974. DW - 1 testified that the lands department effected the transfer of the property to the 1st Defendant based on the documents submitted by 1st Defendant's Advocate's clerks. When shown the forged documents, DW - 1 was unable to explain why he registered the 1st Defendant as the proprietor of the Suit Property without first verifying the documents presented before him for registration. The 1st and 3rd Defendants, never attended court to refute the Plaintiff's case, therefore the Plaintiff's testimony remains uncontested.
61. On the issues of determination, the Learned Counsel relied on the following:- Firstly, whether the Plaintiff was the lawful proprietor of the suit property. The Learned Counsel submitted that the Plaintiff asserted that the Suit Property was first registered under the Registered Land Act Cap 300 (repealed). The provisions of Section 27 of the said Registered Land Act is replicated under Section 24(a) of the Land Registration Act No. 3 of 2012 which provided for the absolute ownership by a registered proprietor of any registered land in his favour. Section 27 of the Registered Land Act provides that subject to this Act:-
- “ a) 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;
 - b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”
62. The above provisions are repeated in Section 24(a) of Land Registration Act, No. 3 of 2012. The provision of Section 26 (1) of the Land Registration Act, No. 3 of 2012 provides that:
- “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 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.
63. The Learned Counsel asserted that he was the absolute proprietor of the suit property by virtue of the fact that he holds a genuine title to the property having purchased the property from the initial allottee Mr. Salimu Salimu Bendo. The Plaintiff further asserted that in view of the above provisions, his title was to be taken by all courts as prima facie evidence that he is the absolute and indefeasible owner of the Suit Property and that his title shall not be subject to challenge except on the ground of fraud or



misrepresentation to which he should be proved to be a party. The Plaintiff produced evidence which stands unchallenged that he is the registered proprietor of the Suit Property as evidenced in the Land Certificate issued on 15th November 1974.

64. The Learned Counsel averred that Defendants had not tabled before the court any evidence to impeach the Plaintiffs title on grounds such as fraud. The Plaintiff asserts that save for the 2nd Defendant, who was unable to dispute the Plaintiffs claim, the 1st and 3rd Defendants had sufficient notice to attend the hearing and challenge the Plaintiffs title, however, they never honored the notices.

65. In light of the above, the Learned Counsel urged the Honourable court to hold that he is the registered owner of the suit property to the exclusion of the 1st Defendant as his title has not been challenged.

66. Secondly, on the issue of whether the 1st Defendant was an innocent purchaser for value without notice. The Learned Counsel asserted that the 1st Defendant alleged in its Defence that it was an innocent purchaser of the suit property for value without notice of the fraud on the part of “Wambugu”, the person who sold it the Suit Property. Black’s Law Dictionary, 8th edition defines “bona fide purchaser” as:

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

67. The Learned Counsel asserted that the registration of the suit property in the name of the 1st Defendant was procured by fraud. Blacks Laws Dictionary defines fraud as:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

68. Further, Black’s Law Dictionary also defines ‘fraud’ as:-

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

69. The Learned Counsel acceded that the burden of proof is upon him to demonstrate to the Court that the Defendants committed acts of fraud and illegality in procuring the title to the Suit Property in the 1st Defendant’s name. The legal basis for the legal burden of proof was provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya which states as follows:-

- “1. Whoever desires an 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

70. The Learned Counsel stated that the Plaintiff had demonstrated through the documents produced how he acquired the suit title. The Plaintiff had shown the court the inconsistencies in the documents he holds, and the documents filed by the 1st Defendant in support of its case. In the case of “Weston Gitonga & 10 others – Versus - Peter Rugu Gikanga & another [2017] eKLR” the Honourable Court



cited with authority the Ugandan Case of “Katende – Versus - Haridar & Company Ltd (2008)2EA 173” it was held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine,(he) must prove that

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

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

71. The Learned Counsel submitted that the 1st, 2nd and 3rd Defendants perpetrated the fraud that occasioned the 1st Defendant’s registration of the Suit Property in its name through falsification of documents, therefore the 1st Defendant could not rely on the doctrine of bona fide purchaser for value to lay claim on the Suit Property. The 1st Defendant did not attend court or call the evidence of the person to register the property in its name were forgeries. The 2nd Defendant on the other hand was unable to explain the inconsistencies. The failure to call a witness or attend court to defend itself goes to demonstrate that the 1st Defendant participate in the fraud and therefore it could not benefit from the fraud or illegalities that made it acquire the title to the suit Property. Even if the 1st Defendant was not a partaker in the fraud, if the person who sold it the suit property had no good title to pass then its title cannot stand under the provisions of Section 26 (1) (b) of the Land Registration Act, No. 3 of 2012. The Plaintiff had therefore demonstrated that the identity of the person who sold and transferred the Suit Property to the 1st Defendant was questionable.
72. The Learned Counsel relied on the case of:- “Jonathan Namulala Nyongesa – Versus - Multi Business Shooters Investors Ltd & 3 others [2017] eKLR” which had similar facts to the present case. In that case, the court held as follows:-

“From the evidence on record I make a finding of fact that the 1st Plaintiff is the true Jonathan Namulala Nyongesa. That he was not at all involved in the alleged sale of this property. He had his original title. His National Identity Card, his KRA PIN were not used in this sale. He was impersonated by the fourth defendant who took photographs to impersonate him. I also find that he was not involved in any money transaction and he did not act in concert with the Defendants at all. I find that the defendants herein all had met at one point or another as earlier analyzed in this Judgment. They had dealings with each other and they all knew brought to have known that the sale transaction was fraudulent. That there was a forgery being committed. Indeed, they all knew when the money was deposited into the 4th Defendants account.”



73. The Learned Counsel asserted that the evidence presented showed that he was the rightful owner of the Suit Property, whose identity was stolen, documents falsely presented to effect an act of fraud. A fraudulent transaction, such as the 1st Defendant's negated the assertion of a bona fide purchaser under the definitions of the [Land Registration Act](#) and the cases cited above. In the case of:- "Suleiman Rahemtulla Omar & another – Versus - Musa Hersi Fahiye & 5 others [2014] eKLR" the Court of Appeal defined the duties bestowed upon a person claiming bona fide purchaser's interest. It held that:

"It is our view that counsel for both parties failed to carry out sufficient due diligence before committing their clients to the transaction. It is true that practically speaking counsel for the purchaser carries the heavier burden when it comes to carrying out due diligence. This is so because it is his client who stands to lose if he commits his funds to purchase a property that later turns out to be problematic. This does not however, absolve the vendor's counsel from the responsibility of confirming that his client has a good title to the property he seeks to dispose of and also that the property has a clear Title."

74. Similarly, in case of "Samuel Odhiambo Oludhe & 2 others – Versus - Jubilee Jumbo Hardware Limited & another [2018] eKLR" where the court had this to say regarding a title that had been fraudulently acquired:

"Section 26 of the [Land Registration Act](#) has breathed a sigh of relief to innocent proprietors whose properties have been fraudulently transferred in unscrupulous individual's names. The court cannot allow such injustice to hold root. The proprietors are protected under the law.

The court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title. In the case of "Arthi Highway Developers Limited – Versus – West End Butchery Limited and Others Civil Appeal No. 246 of 2013" the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of Dr. Joseph Arap Ngok – Vs – Justice Moijo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997 where the court categorically declared that:-

"Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the [Land Registration Act](#)) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

75. Finally, in the case of:- "Lawrence Mukiri Mungai – Versus - Attorney General & 6 others [2019] eKLR" the court was faced with a similar situation and it expressed itself as follows:-

"I have already held that the 2nd Defendant acquired the Suit Property from the plaintiff fraudulently. The effect of that finding is that the 2nd Defendant did not hold a valid title to the Suit Property that he could pass to the 3rd to 6th Defendants or to any other person... The foregoing notwithstanding, the 2nd defendant having acquired the Suit Property fraudulently and illegally, his title was null and void. A null and void title cannot confer valid



interest in land. The 2nd Defendant did not therefore have a valid title over the Suit Property that he could convey to the 3rd to 6th Defendants. The title that was transferred by the 2nd Defendant to the 3rd to 6th Defendants was equally invalid, null and void with the result that the 3rd to 6th Defendants acquired no interest in the Suit Property.....The Plaintiff held a legal title over the Suit Property. It follows therefore that even if the 3rd to 6th Defendants were innocent purchasers of the Suit Property for value without notice of the defect in the 2nd Defendant's title as alleged, the 3rd to 6th Defendant's right over the Suit Property cannot have priority over the Plaintiff's right to the same property which was first in time.

In the premises, it is my finding that the 3rd to 6th Defendants did not acquire a valid title over the Suit Property from the 2nd Defendant. The 2nd Defendant had no valid title and as such had none that he could convey to the 3rd to 6th Defendants.”

76. The Learned Counsel referred Court to the Supreme Court recent case of:- “Dina Management Limited – Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023]KESC 30 (KLR) (21 April 2023) (Judgment)” the court opined that though not complicit in the acquisition of the title in the Vendor's name, the Appellant ought to have conducted extensive due diligence before acquisition or completion of the transaction to rely on the defence of innocent purchaser for value without notice. the 3rd Defendant impersonated him and falsified documents which were used to convey illegal title to the 1st Defendant. That transaction was illegal and void ab initio.
77. Thirdly, on the issue of whether the Plaintiff should be granted the orders prayed for in the Plaintiff. The Learned Counsel submitted separately on the prayers as herein below.
78. Fourthly, on the issue of cancellation of register and reversion of the suit property in the Plaintiff's name, the Plaintiff sought inter alia a declaration that he was the bona fide and rightful owner of the suit property; the cancellation of the register in respect of the suit property; reversion of the registration and proprietorship to his name; and an injunction to stop further dealings with the suit property. The Learned Counsel asserted that the Plaintiff had demonstrated through documentary evidence how the 1st, 2nd and 3rd Defendants perpetrated the fraud through impersonation and forgery and caused the 1st Defendant's registration of the Suit Property in its name. The 1st Defendant did not acquire a proper title to the Suit Property as the 3rd Defendant who purported to sell it to it did not have a legal or equitable interest in the property so as to pass a good title to the 1st Defendant. The provision of Section 80 of the Land Registration Act has clothed the court with power to cancel any titles acquired through fraud. Section 80 of the Act provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
79. The Learned Counsel submitted that the Plaintiff was the lawful registered owner of the Suit Property, and it is only just and equitable that the court grants it the prayers (a), (aa),(b),(c) and (d) as prayed in his Amended Plaintiff.
80. Fifthly, on the prayer on damages for trespass, the Learned Counsel submitted that the Plaintiff claims damages for trespass on the basis that he had been denied use of the Suit Property by virtue of the



fraudulent registration of the property in the 1st Defendant's name. She relied on the definition of trespass by Clerk and Lindsell "Torts", 18th Edition at page 23:-

"any unjustifiable intrusion by one person upon the land in possession."

81. The Learned Counsel stated to the Honourable Court relied on the definition of trespass under Section 3(1) of the Trespass Act, Cap 294 which Act defined the same as:-

"Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier there of shall be guilty of an offence."

82. The Learned Counsel submitted that the fact that the 1st Defendant had the title to the Suit Property registered in his name is sufficient proof that it denied the Plaintiff his right to his property without any lawful or justifiable cause, which is sufficient proof that it was a trespasser. To support the claim for general damages for trespass, the Learned Counsel relied on the case of "Samuel Odhiambo Oludhe (above)" where the court held that:

"On the issue as to whether the Plaintiffs are entitled to general damages against the Defendant, it is trite law that trespass to land is actionable per se (without proof of any damages)."

83. Further, Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provided as follows on computation of damages in an action for trespass:-

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

84. The Learned Counsel asserted that the Plaintiff was alive to the fact that in awarding damages, the court will consider the value of the property before and after the trespass. To buttress the above the Learned Counsel relied on the case of "Nakuru Industries Limited – Versus - S S Mehta & Sons [2016] eKLR" the court observed:-

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

85. The Learned Counsel contended that in cases where there was a lack of evidence or documentation to ascertain the precise value of the property both before and after the trespass, as well as the extent of damage caused to the subject property by the actions of the trespasser, the court may grant nominal damages to the property owner. Nominal damages represent a reasonable amount intended to compensate the owner for the loss of the property's use and the deprivation they have suffered.



86. To buttress the above the Learned Counsel relied on the case of “Ochako Obinchi - Versus - Zachary Oyoti Nyamongo [2018] eKLR” where the court in awarding the Plaintiff damages for trespass the court held as follows:-

“...However, in as much as the plaintiff in the instant suit did not lead any evidence nor attach any documentation to establish the exact value of the suit property before and after the trespass and/or how much damage was occasioned on the suit property by the actions of the Defendant, he is still entitled to receive by way of damages such sum as would reasonably recompense him for being denied and deprived of the use of his house and the land for now a period of over 5 years. For this reason, I award the Plaintiff damages in the amount of Kshs. 100,000/- on account of nominal general damages for trespass together with interest at court rates from the date of this judgment until payment in full.”

87. According to the Defence filed by the 1st Defendant, the consideration for the Suit Property was a sum of Kenya Shillings Ten Million (Kshs.10,000,000/-). This was in the year 2012. The Learned Counsel asserted that the value of the property has since appreciated. The Plaintiff asserted that the registration of the suit property in the 1st Defendant’s name had deprived him use of the Suit Property for a period of over 12 years.

88. The Learned Counsel further submitted that he was entitled to receive by way of damages such sum as would reasonably recompense him for being denied and deprived of the peaceful and uninterrupted use of his legally acquired property.

89. On the issue of costs of the suit, the Learned Counsel averred that the provision of Section 27 of the *Civil Procedure Act*, Cap. 21 provides that costs unless for good reason shall follow the event. In the case of “Delilah Kerubo Otiso – Versus - Ramesh Chander Ndingra [2018] eKLR” the appellant had challenged the trials court's decision to award costs, and the Honourable Justices W. Ouko, R. N. Nambuye and Asike Makhandia in upholding the trial court’s decision held that:-

“On the issue of cost, it’s been held previously that costs are in the discretion of the trial court though the generally accepted principle is that costs follow the event, unless the court has good reason to order otherwise. The successful party will always have costs of his success, which is the case herein.”

90. The court further went on to refer to the cases of “Attorney General – Versus - Halal Meat Products Limited (2016) eKLR”, which had held thus:-

“Generally, costs ought to follow the event unless the court otherwise orders for good reasons.”

91. The Plaintiff has ably demonstrated through documentary evidence the length at which the Defendants went to deprive him of his property which evidence has not been controverted. As a result of the Defendants’ actions, the Plaintiff was forced to present this suit for recovery of his property and in the end incurred costs. The Learned Counsel submitted that he has proven his case against the Defendants and urges the Honourable Court to allow the suit as prayed and award him costs.

92. In conclusion, the Learned Counsel concluded that the Plaintiff had proved his case and therefore urged the Honourable Court to allow the suit as prayed.



B. The Written Submission by the 2nd Defendants

93. On 17th November, 2023, the Principal State Litigation Counsel attached at the Attorney General State office based at the County of Mombasa, filed their Written Submission. M/s. Nimwaka Kiti Advocate commenced her submissions by stating that the Plaintiff filed suit vide Complaint dated 31st October, 2013, where he sought for the above several enumerated prayers herein.
93. The Learned Counsel averred that the 2nd Defendant filed its defence on 9th May, 2013 and list of documents on 14th May, 2013. In its defence, the 2nd Defendant denied the allegations of fraud and collusion to defraud the Plaintiff of his property. From the proceedings therein, it was clear that the Plaintiff and the 1st Defendant had title to the suit property and were claiming ownership to the same. It was alleged by the 1st Defendant from its documents that they bought the suit property from the plaintiff one Clement Wambuguas shown through the emails exchange and the documents of transfer lodged at the Land Registry at Kwale.
94. The Learned Counsel posited that the Plaintiff in his pleadings and during the cause of the hearing claimed that he never sold his property to any one, he holds his original title and that if there was any sale to the 1st Defendant then the same was fraudulent. In the course of the proceedings, the Plaintiff filed an application dated 31st October, 2013 to amend the Complaint and also enjoin one Francis Kagundu the 3rd Defendant herein. The 3rd Defendant in the course of the proceedings turned out to be the alleged "Clement Wambugu" who sold the suit property to the 1st Defendant.
95. The 2nd Defendant witness, the Land Registrar testified that the right procedures were followed in terms of transfer of the suit property to the 1st Defendant. From the record in the green card it was recorded that the Plaintiff was the first registered owner/allottee of the property a fact which is not disputed by all the parties.
96. The 2nd Defendant testified that all the required documents for transfer were presented at the lands registry office for registration by the law firm of Messrs. Anjarwalla & co. Advocates, the documents included title deed of transferor, consent from land control board, clearance rate certificate, valuation report, payment of stamp duty and registration forms, copies of identity cards and pin certificate. The same being verified and attested by the Advocates who were handling the sale transaction, there was no reason to suspect any fraud.
97. He further testified that from the parcel file, there was no document or letter of complaint that was received concerning the suit property and was also not aware of any criminal proceedings against the 3rd Defendant. A sale agreement was entered into between the 1st Defendant and the Plaintiff for the sale of the suit property and each party was well represented by an advocate in the transaction. The required documents were deposited at the land registry and the property was transferred to the 1st defendant. It is her submission that the transfer was registered after all the statutory requirements had been met including payment of stamp duty, consent from land control board, and rate payment and clearance certificate from Kwale County Council.
98. From the record in the custody of the 2nd Defendant showed that one Clement Wambugu in consideration of Kenya shilling ten million (Kshs. 10, 000, 00.00/=) transferred the property to the 1st Defendant and title deed was issued. The 2nd Defendant denied any claims of negligence and fraud as enumerated at paragraph 7A of the Amended Complaint. The 2nd Defendant had no reason to doubt the veracity of the documents presented for the transaction for reasons that:-



- a. The sale agreement was drawn, attested by advocates of the high court who also witnessed the transfer forms.
 - b. Title deed of transferor was presented being Clement Wambugu.
 - c. Consent from the Land Control Board.
 - d. Clearance rate certificate, valuation report.
 - e. payment of stamp duty and registration forms.
 - f. Copies of identity cards and pin certificate.
99. According to the Learned Counsel, the Land Registrar produced the parcel file and the documents presented for registration that was 2nd Defendant exhibit numbers 1 to 8. It was her submission that all the procedures were adhered to and that there was no way that the 2nd Defendant would have known that the actual Plaintiff and the purported vendor were one and the same person.
100. The Leaned Counsel averred that the Plaintiff was raising allegations of fraud and collusion as against the 2nd Defendant. Hence, it was her submission that the Plaintiff had not brought/tendered any evidence before this court to prove that the 2nd Defendant colluded or facilitated the 1st and 3rd Defendants to acquire title illegally, un-procedurally or through a corrupt scheme thus the 2nd Defendant could not be made liable for the allegations of fraud.
101. The Learned Counsel contended that a party not only plead fraud in particulars of fraud but must also adduce evidence to support each and every particulars of fraud pleaded. To buttress on this legal position, the Counsel cited the case of:- “Koinange and 13 others – Versus - Koinange (1986) it was held thus:-
- “It is a well-established rule of evidence that whosoever asserts a fact Is under the obligation to prove it in order to succeed, the party alleging fraud, in this case the plaintiff’s had burden of proving it and they had to discharge that burden.”
102. Additionally, on the same breath, she cited the case of:- ”Ratilal Gordharibhai Patel – Versus - Lalji Makalji (1957) where it was held that:-
- “the burden of proof in fraud case is very high approaching but below the burden of proof beyond reasonable doubt....”
- Towards this end, the Plaintiff had not been established by the plaintiff as against the 2nd Defendant.
103. Further, based on the decision in the case of “R.G Patel vs Lalji Makani” cited in the case of “Gladys Wanjiru Ngacha – Versus - Theresa Chepsaat & 4 others (2013) eKLR where the court of Appeal held that allegations of fraud must be strictly proven:
- “although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than a mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court”.
- It was reiterated that the Plaintiff has not proved the pleaded fraud against the 2nd Defendant either to the required standard of law or at all. In conclusion, the Learned Counsel urged the Honourable Court that the Plaintiff’s suit be dismissed with cost to the 2nd Defendant.



VII. Analysis and Determination

104. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. This case proceeded whereby the Plaintiff and the 2nd Defendant gave evidence and produced several documents in support of their cases. It should be noted that the 1st and 3rd Defendants did not tender any evidence.
105. The suit has not been contested by the Defendants and in this case the 2nd Defendant's has joined issued with the Plaintiff and therefore the Plaintiff's evidence remains uncontroverted and unchallenged. Nonetheless, in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has crafted six (6) issues for its determination. These are:-
- a. Whether the suit instituted by the Plaintiff through the Plaintiff dated has any merit to wit:-
 - i. Was the title to the land validly and legally owned by the Plaintiff; or ii). Was the title to the land validly and legally owned by the 1st Defendant;
 - b. Whether or not the Plaintiff has proved the allegations of fraud levelled against the Defendants?
 - c. Whether or not the defence of innocent purchaser for value is availed to the 1st Defendant?
 - d. Whether the 1st Defendant trespassed onto the suit properties without the authority on the Plaintiff
 - e. Whether the Plaintiff is entitled to the orders sought
 - f. Who will bear the Costs of suit?

Issue a). Whether the Plaintiff is the duly legal and/or absolute registered proprietor to the suit land

106. Under this sub title, the main substratum in this suit is on the legal proprietorship to the suit land between the Plaintiff and the 1st Defendant herein. The Honourable Court examines if the Plaintiff has a valid title to the suit land. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:-

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

107. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR”, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it



for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

108. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

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

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

110. Who between the Plaintiff and 1st Defendant has certainly shown the root of her title? PW - 1 informed the Honourable Court that he was in the Court because his land had been claimed by someone else. In the early the year 1970s a friend of his told him that there were plots in Kwale for sale. His name was John Njora who was now deceased. The purchase price was about a sum of Kenya Shillings Seven Thousand Five Hundred (Kshs 7,500/-). He showed interest in the plot and they jointly bought it with Mary Nyaruai and they gave the money to John Njora. A sale agreement dated 10th August, 1974 was prepared between Salimu Salimu Bendo, Mary Nyaruai and the witness. He told the court that upon signing the sale agreement, they also paid the statutory charges through Mr. Njora. The receipts are at pages 23, 24, 25 and 21. Later Mr. Njora came to Mombasa to collect the title deeds at pages 16 – 19.

111. In the case of “Alice Chemutai Too – Versus – Nickson Kipkurui Korir & 2 Others [2015] eKLR” Justice Sila Munyao held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means



that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

112. I am in agreement with Munyao J. that the provision of Section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown. Certainly, I discern that the Plaintiff herein is the legal and absolute proprietor to the suit land with all the indefeasible title, rights and interest vested in him by the provisions of the law specifically Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. Juxtapose, the real title holder having led evidence that they neither sold nor transferred the suit land to the 3rd Defendant, is “prima facie evidence” that the 1st and 3rd Defendants got the suit land un-procedurally and irregularly and hence need to be canceled and/or revoked.

Issue No. b). Whether the 1st Defendant had valid title in respect to the suit property

113. Having found and held that the Plaintiff is the bona fide legal owner of the suit property, under this sub title, the Honourable Court is going to examine if the title that the 3rd Defendant transferred to the 1st Defendant. In my humble view, what becomes apparent is the import and tenor of the Doctrine of Nemo dat quod non habet, which signifies that he who has no title, cannot pass anything to the 2nd party at all.
114. In support of the foregoing position, it is important to take cognizance of the decision in the case of “Diamond Trust Bank Kenya Limited – Versus - Said Hamad Shamisi & 2 others [2015] eKLR”, where the court observed as hereunder:-

“Firstly, Section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner’s authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in BISHOPSGATE MOTOR FINANCE CORPORATION LTD V. TRANSPORT BRAKES LTD (1949) 1 KB 322, at pp. 336-337 when he stated:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

115. To this extend the 3rd Defendant had no good title to pass, the consequence thereof is that the 3rd Defendant acquired no title over the suit property and similarly, same thus could not confer any title in respect thereof, to anyone, let alone 1st the Defendant herein. In the foregoing, the 1st Defendant did not have a good title. Having carefully analyzed the available evidence, the Court finds and holds that the Plaintiff herein is the lawful owner of the suit property having satisfactorily explained the root of her title.



Issue No. c). Whether or not the Plaintiff has proved the allegations of fraud levelled against the Defendants

116. Under this sub-title the particulars of fraud levelled against the Defendants are enumerated at paragraph 7 and 7A of the Plaint. The 3rd Defendant in his defence stated that on the allegations of fraud, the same were denied. The 2nd Defendant also stated that they were strangers to the particulars of paragraph 7. Although, the witness called upon by the 2nd Defendant, DW 1 who told the Honourable Court that he could see the list of documents filed by the 2nd Defendants on 14th May, 2013. He produced the said documents as 2nd Defendant's Exhibits 1 to 8. From the green card, the first allottee of Kwale/ Galu Kinondo/ 330 was one Clement Wambugu who was allocated the land on 15th November, 1974. He was issued with a certificate of title on the same date. A transfer was effected to Goodison One Hundred Twenty-Three Limited on 12th April, 2012 for a consideration of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) and a title deed issued to that company. All the required documents were submitted to their office for registration by Law firm of Messrs. Anjarwalla & Khanna Advocates.
117. He told the Honourable Court that the documents which were presented to them were completion documents which included the original title deed of the transferor, land consent from the Land Control Board, rate clearance certificate, valuation report, receipts for payments of stamp duty and registration fees with copies of identification cards and pin certificates from the records. There was no evidence that there was any complaints and no documentation to show that there were any complaints.
118. When cross examined he stated that he was the land registrar, Kwale and his duties entailed registration of land related documents, hearing and determination of boundary disputes, attending court sessions to give evidence on land related matters and other administrative duties, issuance of official searches was also one of his duties. At that time among their duties was to give land control board consent in confirmation with the Land Control Board. He also heard and determined boundary disputes. He also received complaints relating to registration of titles. They also issue official searches. He could see the witness statements filed by the 1st Defendant on 22nd August, 2012 signed by Jonathan Stewart Phillip Coullson.
119. He told the court that he could see at paragraph which stated that the registration issued an unsigned certificate of official search. An unsigned certificate is not an official search. For a search to be authentic the register was to be signed, stamped, signed and sealed. He cannot tell if the registrar at that time gave out an unsigned search. The parcel files are kept in the registry strong room. The parcel files contained details pertaining to transactions that had occurred to a particular parcel of land and any other correspondences. He confirmed that the first person to be registered over the first land was Clement Wambugu.
120. He confirmed that the parcel contained documents of transactions. They had the adjudication record confirming that Clement Wambugu was allocated this particular parcel of land. They also had the green card indicating that Clement Wambugu was the first allottee. They also had a copy of a surrendered title bearing the name of Clement Wambugu.
121. According to the witness, he could see the 1st Defendant's list of documents filed on 22nd August, 2012. Document No. 2 was a copy of Mr. Clement Wambugu's National Identification card No. 88*79. The identification card was in the name of Clement Wambugu. The date of birth was indicated as 1958. He could also see the 2nd Defendant's list of documents filed on 14th May, 2013. The document numbers were copies of identification of the parties. He was not stationed in Kwale at the time but the records, the identity card was the one in the file.



122. The witness also told the court that he could also see the Plaintiff's bundle of documents filed on 8th March, 2017 at page 32 was a copy of an identification card bearing the name of Clement Arthur Wambugu identification card number 64209255 and the date of birth was 1939. From the documents, he had Clement Wambugas at 1974 was 16 years old (1974 – 1958). These documents are usually submitted to their office when they are already attested to. The Registrar simply receives the documents for purposes of registration. The adjudication record which was the record that confirms the allocation of land to the individuals, in this case Clement Wambugu indicated that he acquired it through an adjudication process which was done in a different department from theirs.
123. The witness told the Court that he could see the document number 10 in the 1st Defendant's list of documents. It was a copy of the transfer dated 3rd April, 2012 of Kwale/ Galu Kindondo/ 330 by Clement Wambuguto 1st Defendant. It was a transfer dated 3rd April, 2012 of Kwale/ Galu Kinondo/ 330 by Clement Wambuguto the 1st Defendant. The identification number appearing in the card is 8884179. According to the documents he had, anyone under the age of 18 years was not eligible to acquire land. When they received the documents from Anjarwalla & Khanna, they were verified.
124. The witness could not confirm if there was any suspicion at the time. The parcel file had no complaints received. At page 30 of the Plaintiff's documents was a letter he did not recognize since the same was not received in their office. He was not aware that there were ongoing proceedings against the 3rd Defendant. He had never appeared before Court in any Criminal Proceedings to testify against the 3rd Defendant. The 3rd Defendant denies the particulars of fraud indicating that if there was any fraud undertaken by the 3rd Defendant they may not have known as no complaints were made to their office.
125. According to the 1st Defendant on the contents of paragraph 7, 8, 10 and 11 stated that, by an Agreement for Sale dated 3rd February, 2012 between the 1st Defendant and a Mr. Clement Wambugu. Mr. Wambugu agreed to sell to the 2nd Defendant the suit property at a consideration of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000.00) and on other terms and conditions set out in the said Agreement for Sale. By a Transfer of Land dated 3rd April, 2012, Wambugu transferred to the 1st Defendant the suit property which measures 1.6 hectares in consideration of the said sum of Kenya Shillings Ten Million (Kshs. 10,000,000.00) which Transfer was registered at the District Lands Registry, Kwale on 12th April, 2012. As at the date of the Agreement for Sale dated 3rd February, 2012 aforesaid, Wambugu was the duly registered proprietor of the suit property, and as at the date of the execution of the Transfer of the suit property by Wambugu in favour of the 1st Defendant, Wambugu was still the duly registered proprietor of the suit property which proprietorship was confirmed by a Certificate of Official search issued by the Land Registrar, Kwale District.
126. The 1st Defendant who was dealing with Wambugu who was the registered proprietor of the suit property was not obliged to investigate or inquire into the circumstances under which Wambugu became registered as the proprietor of the said property. When the 1st Defendant purchased the suit property, the same was not developed save for some temporary structures that had been put up at the edge of the said property next to the road and no one was in occupation of the property save for the owners of the said structures who were using the same as retail shops and who had also confirmed to the 1st Defendant that the suit property is owned by Wambugu. It is not true therefore as alleged by the Plaintiff that the Plaintiff has enjoyed quiet possession of the suit property since 1974 when the same was allegedly sold and transferred to the Plaintiff.
127. The Plaintiff has not come out clearly on how the Plaintiff came to know of the 1st Defendant's occupation of the suit property so soon after the 1st Defendant had paid the purchase price of a sum of Kenya Shillings (Kshs.10,000,000.00) in full to Wambugu whom the Plaintiff has chosen not to join



- in these proceedings. The 1st Defendant avers that the circumstances and the manner in which these proceedings have been brought by the Plaintiff points to the fact that the Plaintiff has not come to Court with clean hands.
128. According to PW - 2 who was an investigator for the EACC to the Honourable Court that he received a complaint from Martin Bert that a property he had bought being Galu/Kinondo/ 330 from one Clement Wambuguthat an imposter had come and claimed that the land actually belonged to him and he took possession from his statement he had paid a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) through the law firm of Messrs. Mogaka, Mabeya & Omwenga Advocates.
 129. He stated that in the course of investigations Mr. Martin Bert positively identified Mr. Francis Kagunda as the one who presented himself as Mr. Clement Wambugu. The KRA Pin presented was not among the ones held at KRA meaning it was made from the street. KRA indicated that they were not in their records. Subsequently, they also sent the KRA certificate for Clement Arthur Wambugu and KRA and it showed that they were correct. The original identification card for Artur Wambugu was no. 8884179 and for the fraudster was 64209255. The date of birth in the original card was 1939 while in the fraudster's it was 1958. The KRA pin number was A00XXXXX02M while the fraudsters was A003337209Z. The title deed was fake as it had a forged signature of the land registrar at page 16 and page 17 for the original owner. The fake title deed which they recovered had a different font and had no postal address. They subjected the same to forensic assessment.
 130. The witness further told the court that from the documents gathered, Francis Kagunda did not appear anywhere, Clement Wambugu was the person who appeared before the Land Control Board when Salimu was transferring the land. According to him on the 10th August, 1974, Clement Wambugu paid a sum of Kenya Shillings Seven Thousand (Kshs. 7,000/-) to the vendor – Salimu Salimu as the value of the land. In this transaction Kshs 5/- was charged as Stamp duty. Clement Wambugu appeared before the Land Ordinance and paid Kshs 20/- and that is how he ended up with the title deed.
 131. He told the court that in the cause of his investigations, he went to Kwale Land Registry where he discovered that out of the fake identification card and title deed Francis Kagunda managed to obtain fake title deed and pin in order to transfer the land to Martin Bert. It is on the strength of the fraudulent document that he recommended that the 3rd Defendant be charged in the Court of Law.
 132. The witness stated that where the charges were making a document, uttering a false documents and making a document of national identification card, uttering a fake identification card, making and uttering a document of KRA pin; obtaining case by false pretense for a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-). The 3rd Defendant was charged and the matter was still pending in the Chief Magistrates Court.
 133. Further the witness produced a further list of documents dated 23rd November, 2022 as Plaintiff Exhibit Numbers 14 to 26 and a witness statement dated 12th June, 2023. According to him in the cause of his investigations, he recorded the statement of Clement Wambugu. In the process, he recovered the following documents:-Certificate of title in respect of Galu/Kinondo/ 330His national identification card and his pin certificate. (Plaintiff Exhibit 19 and 20).
 134. Having received these documents, he proceeded to the land registry Kwale to request for the file, from the parcel file, he retrieved the transfer, KRA pin, national identification card and surrender certificate of the title (Plaintiff Exhibit 14, 15 and 18 of the Supplementary List of documents. By looking at the documents, he recovered from Clement Wambugu and the officials at the registry that there were many discrepancies. For instance, the KRA pin. He visited the Commissioner for Domestic income tax, Plaintiff Exhibit 18, when KRA replied indicating that there was KRA pin like such. Hence it



was fraudulent. He further found out that for one to give a valid KRA, one needed to have a valid identification card. They proceeded to the registration of the person; (Plaintiff Exhibit 14).

135. According to the witness they proceeded to discover the person who got the proceeds of the money. They got bank statements by themselves. The purchase price was a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) to which Hans Consultants advanced a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) to Ndeda Advocates. The balance of sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-) sent to Mabeya Advocates being a client. He called Mr. Mabeya Advocate and the advocate gave him the names of Francis Kagunda as the beneficiary of the money. As the investigations progressed, he called Francis Kagunda who confirmed that he was the one who benefitted from the sale of the suit property. Francis confirmed that Mr. Clement Wambugu never benefitted from the proceeds. He therefore arrested Francis Kagunda and charged him with the charges before the Chief Magistrates Court.
136. He told the Court that Mr. Clement Wambuga had been impersonated by Mr. Francis Kagunda. The case was concluded and judgment was delivered on 2nd June, 2021. A copy of the judgment had been attached in the Plaintiff's list of documents at page 29 to page 40. He was acquitted under Section 215 of the Criminal Procedure Code, Cap 75 Laws of Kenya as the Complainant absconded, he refused to attend court to give evidence. The Complainant in the criminal case was Mr. Martin Bert.

137. Black's Law dictionary 10th Edition defines bona fide purchaser for value as

“someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the consideration that the purchaser has paid.”

138. In several Court of Appeal decisions inter alia “Elizabeth Wambui Githinji & 29 others – Versus - Kenya Urban Roads Authority supra” and “Lawrence P. Mukiri Mungai, Attorney Francis M. Mwaura Vs A. G. & 4 others” the court rendered itself thus;

“Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See Dr. Joseph Arap Ngok V Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.

The Ugandan case of *Katende v. Haridar & Company Limited* (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-

“..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;



- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

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

139. From the foregoing decision, it is worthy to note that condition number 5 has since been varied and consequently before one can benefit from the doctrine for bona fide purchase for value, same must established that the vendor had a valid title, as opposed to apparent valid title.
140. The 2nd Defendant through its DW 1 stated that they relied on the records obtained from the registry which indicated that the Plaintiff was the first allottee. According to the witness, he was very clear that even if there was any fraud committed the only thing that indicated the same was difference of identification card numbers and the PIN Certificate from Kenya Revenue authority were not authentic. The import and tenor of the Doctrine of bona fide purchaser for value and in particular the decision in “Katende – Versus - Haridar & Company Ltd (2008) 2 E.A 173”, has since been reviewed as explained vide the decision in case of “Mwangi James Njehia – Versus - Janetta Wanjiku Mwangi & another [2021] eKLR”, where the court explained as hereunder;

“.....We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*.

141. Was the suit land therefore transferred fraudulently to the 1st Defendant? ‘Fraud’ has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

142. Further Black’s Law Dictionary Ninth Edition at Page 731 also defines ‘fraud’ as:-

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

143. With the definition of fraud in mind and having held that the 1st Defendant documents were forgeries based on the fact that the person that was alleged to have signed them denied signing, the Honourable Court holds that view that it then follows that there were deceitful acts of providing documents that were not genuine or whose authenticity is in doubt and that amounts to fraud.



Issue No. d). Whether the 1st Defendant trespassed unto the suit properties without authority of the plaintiff

144. Under this sub heading, the Honourable Court wishes to expend a little bit of time on the concept of trespass as it is extremely prevalent from this suit. Trespass is governed under the provision of Section 3 (1) of the *Trespass Act*, Cap 294 provides that:-

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

145. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. Certainly, this Court strongly hold that being that the Plaintiff owned the suit properties are previously concluded in this Judgment and being that the Plaintiff never authorized the 1st Defendant to enter the suit properties, I am inclined to find that 1st Defendant had trespassed on the suit property belonging to the Plaintiff.

Issue No. e). Whether the Plaintiff is entitled to the orders sought

146. Under this sub title, the law protects title to land, but there are two instances wherein such title can be challenged. The Plaintiff has sought for the cancellation of the proprietorship of the 1st Defendant and reversion of the registration and proprietorship to her. The Court has already held and found that the Plaintiff is the lawful owner of the suit property, the registration of the 1st Defendant having been procured fraudulently and therefore null and void ab initio.

147. The first is where the title is obtained by fraud or misrepresentation, to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Court of Appeal in the case of “Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR”, 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, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

148. Having found that the Plaintiffs properly acquired the title to the suit property, and the 1st Defendant’s documents were fraudulently obtained the Court finds that the title held by the 1st Defendant or his claims on the suit properties ought to be impugned as it was acquired unprocedurally. It is apparent that the entries on the titles of the land were suspect.

149. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 which provides;

“ 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.

150. This Court having held and found that the transfer of the suit property to the 1st Defendant was done through fraud as the root of her title could not be explained, the Court further finds that the titles held by the 1st Defendants fall under the category of titles that must be impeached. The protection that was provided to the 1st Defendant by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. See the case of “Alice Chemutai Too – Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

151. The Court having found and held that the Certificate of title held by the 1st Defendant was procured by fraud and therefore null and void must then determine whether the said title can be cancelled.

152. Section 80(1) of the *Land Registration Act* comes into play herein. It provides:-

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

153. In view of this, this Court is fully satisfied that the Certificate of title held by the 1st Defendant was procured by fraud and as such it is impeachable and ought to be cancelled. Further this Court has already held and found that the Plaintiff is the legal owner of the suit property and it is only fair that the register be rectified by the 2nd Defendant to cure the fraud perpetrated by the 1st Defendant and return the suit property to its rightfully owner who has demonstrated how he purchased or earned the same.

154. The Plaintiff also prayed for damages of trespass, claiming on the basis that he has been denied use of the Suit Property by virtue of the fraudulent registration of the property in the 1st Defendant’s name. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

155. Trespass is described under the *Trespass Act* Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or



- permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)
156. A continuing trespass is defined in JOWITT’S DICTIONARY OF ENGLISH LAW 2ND EDITION as follows:-
- “A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”.
157. Finally, in CLERK & LINDSEL ON TORTS 16TH EDITION, paragraph 23 - 01, it is stated that:-
- “Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.
158. Further the Learned Counsel in their submissions, quoted the Halsbury’s Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:-
- “If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
159. The Learned Counsel also asserted that the Plaintiff is alive to the fact that in awarding damages, the court will consider the value of the property before and after the trespass. To buttress the above the Learned Counsel relied on the case of “Nakuru Industries Limited – Versus - S S Mehta & Sons [supra]” the court observed:-
- “In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to Property results in damage then the computation of damages is on the basis of restitution of Property. The value of the soil (or trees or fruits) which have been removed from that Property are all factored as well as the cost of restoration of the Property to the position it was in before the wrongful act was committed.”
160. According to the Defence filed by the 1st Defendant, the consideration for the Suit Property was a sum of Kenya Shillings Ten Million (Kshs.10,000,000/-). This was in the year 2012. In “Park Towers Ltd – Versus - John Mithamo Njika et al (2014) eKLR”, the Court held that: -
- “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.”
161. In the case of “Philip Aluchio – Versus - Crispinus Ngayo [2014] eKLR”, the Court held as follows:-
- “..... The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is lessThe Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess General Damages for trespass...”



162. There is no mathematical or scientific formula in these types of case and the guiding principles or factors are the circumstances of the case. Here there is no doubt that the 1st Defendant believing that he had good title entered the suit land and its actions caused interference with the Plaintiff's use and occupation of the suit property. However the Plaintiff did not provide the value with which this Honourable Court is to work with nor did he provide any valuation report of the land where the 1st Defendant trespassed. There is no Valuation Report to show the extent of damage. Nevertheless, Trespass is actionable per se. Additionally, the Plaintiff must have suffered considerably for being kept out of the use of his land. The Court also takes into account the 1st Defendant's mitigating factors that he was not aware of the fraud that occurred for him to obtain the suit property. But knowledge or contrary to it, the Law ought to be obeyed and people's constitutional rights to their properties respected.
163. Therefore, the Court proceeds to award a figure of a sum of Kenya Shillings Four Million Five Hundred (Kshs. 4,500,000/-) considering the length of time that the trespass has occurred being a period of over 12 years. I must also point out here that the exercise such as the one carried out here by the 3rd Defendant's acts caused a lot of pain and anguish and must be discouraged at whatever cost as long as the cost is lawful. Thus, the award the sum of a sum of Kenya Shillings One Million Five Hundred (Kshs. 1,500,000/-) additional on General Damages for being denied and deprived of the peaceful and uninterrupted use of his legally acquired property and the mental anguish the 3rd Defendant's acts have caused the Plaintiff.

Issue No. e). Who will bear the Costs of suit

164. It is trite law that costs is a discretionary of the Court. The Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

165. The provision of Section 27 of the [Civil Procedure Act](#) grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”

166. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the



proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

167. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

168. In the instant case, as this Honourable Court has opined above, the Plaintiff has proved his claim against the Defendants and therefore the Plaintiff has the costs of the suit as per the amended Plaintiff dated 31st October, 2013 to be paid by the 2nd and 3rd Defendant jointly. The 1st Defendant shall bear its own costs as they are also disadvantaged by the acts of the 3rd Defendant and the lack of diligence by the 2nd Defendant.

VIII. Conclusion and Disposition

169. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the 1st and 2nd Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgement be and is hereby entered in favour of the Plaintiffs against the 1st, 2nd and 3rd Defendants herein.
- b. That a Declaration that the Plaintiff is the bona fide, legal, absolute and rightful owner of all that parcel of land known as Land Reference Numbers Galu/Kinondo330 in Kwale
- c. That a declaration that the Transfer of L.R No. Galu/Kinondo330 to the 1st Defendant was illegal and fraudulent and null and void for all intents and purposes.
- d. That a permanent injunction do issue restraining the 1st Defendant jointly and severally whether acting by themselves, their agents, employees, servants, directors or whosoever from entering, trespassing, encroaching, selling, offering for sale, transferring, alienating, dealing and/or in any way interfering with the Plaintiff's use and/or quiet occupation of the suit property being Galu/Kinondo330 in Kwale.
- e. That an order is hereby made that the Entries made in the Register in respect of the land parcel known as Galu/Kinondo330 be cancelled and consequently the Plaintiff be registered as the proprietor therein.
- f. That this Honourable Court hereby makes an order for vacant possession of the suit property and its resubmission to the Plaintiff.
- g. That this Honourable Court awards the Plaintiff general damages for trespass to the tune of a sum of Kenya Shillings Four Million Five Hundred Thousand (Kshs. 4,500,000/-) on the suit property being Galu/Kinondo330 and a sum of Kenya Shillings One Million Five Hundred



Thousand (Kshs. 1,500,000/-) additional on General Damages for being denied and deprived of the peaceful and uninterrupted use of his legally acquired property and the mental anguish the 3rd Defendant's acts have caused the Plaintiff to be paid by the 2nd and 3rd Defendants only.

- h. That costs of the amended Plaint dated 31st October, 2013 shall be awarded to the Plaintiff to be paid by the 2nd and 3rd Defendants. The 1st Defendant shall bear its own costs.
- i. That the Interests on (g) and (h) above shall apply at court rates from the date of filing of this suit.

It is so ordered accordingly.

JUDGMENT DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.

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

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Otiende Advocate holding brief for M/s. Opondo Advocate for the Plaintiff.
- c. No appearance for the 1st Defendant.
- d. M/s. Kiti Advocate for the 2nd Defendant.
- e. No appearance for the 3rd Defendant.

