

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ELC CASE NO 5 OF 2022

CAROLA TOLKSDORF
PLAINTIFF

VERSUS

LENNY MURAYA MWANGI.....1ST
DEFENDANT

FRANCIS MAINA NJONJO.....2ND
DEFENDANT

LAND REGISTRAR-KWALE DISTRICT3RD
DEFENDANT

ATTORNEY GENERAL4TH
DEFENDANT

JUDGEMENT

BACKGROUND

1. The subject of this suit is Plot No. Kwale/Galu/Kinondo/1203 (suit property). The suit property is a subdivision of Kwale/Galu/Kinondo/185 belonging to Antonie Thaddee Bockle (Herein Bockle) who the plaintiff avers is as a long term friend. The property was sold by public auction on 11/01/2012 to the 1st Defendant in execution of the decree of the court issued in Mombasa SRMCC 364 of 2011. The suit in Mombasa was commenced by the 2nd Defendant for recovery of alleged agreed fees in services rendered to the

Plaintiff and her ex-husband one Reiten Winfred Johann (herein Reiten).

2. Pursuant to the foregoing, the Plaintiff herein filed a Judicial Review Miscellaneous Application No. 31 of 2013 at the High Court Mombasa against the 3rd Defendant and the 1st Defendant as Interested Party to expunge the entries made relating to the said Interested Party. It is alleged that the said proceedings were subsequently dismissed vide a ruling of the court on 7th March 2022. The plaintiff then moved to Msambweni law court where she instituted a claim against the Defendants herein which was subsequently for lack of pecuniary jurisdiction transferred to this court and registered as ELC Case Number E005/2022. It is the said case that is before the court for determination.
3. The Plaintiff claims that she has at all material times been the owner of the suit property. That the suit property was transferred to the plaintiff in consideration for love and affection by the appointed 'attorneys' of Mr. Bockle, namely Reiten Winfred Johanns her ex-husband and Diedrich Alois (herein Alois). That title was duly issued in the Plaintiffs name. That the Plaintiff has been in possession and has developed the suit property.
4. The 1st Defendant maintains that he spotted the advertisement for sale in the Nation newspaper, attended the auction where he emerged the highest bidder at Kshs. 5 million which he subsequently paid and the property duly transferred to him. His position is that he is an innocent

purchaser. Additionally, he contends that the Plaintiffs title was obtained unprocedurally, through fraud and misrepresentation. The 1st defendant by way of counterclaim terms the occupation of the suit property by the Plaintiff has been through use of force and amounts to trespass.

5. The 2nd Defendant is an advocate of this court and who instituted the proceedings in Mombasa that culminated into the decree that was satisfied through the auction of the suit property. His position largely mirrors the 1st Defendants as to due procedure followed in the auction leading to transfer of the suit property to the 1st Defendant and also impugns the Plaintiffs title as having been obtained fraudulently.
6. The 3rd & 4th Defendants deny all allegations of fraud levelled against it in registering the 1st Defendant and that if the transactions were a mistake, then it is as a result of the 1st and 2nd Defendants misrepresenting and misguiding the office of the 3rd Defendant. That reliefs sought by the plaintiff are neither available nor merited.
7. The Plaintiff in the plaint dated 8/4/2022 seeks among other reliefs a declaration that she is the lawful proprietor of the suit property as well as revocation of the 1st Defendant's title. On the other hand the 1st Defendant seeks the same prayers against the Plaintiff as well as eviction.

PLEADINGS

8. The above averments are contained in the parties' substantive pleadings filed in this suit. The 1st Defendant filed in response to the suit Statement of Defence

incorporating the counterclaim dated 6/5/2022 through the firm of Oyunge & Associates Advocates. The 2nd defendants Statement of Defence is dated 5/05/2022 through the firm of Njonjo Okello and Mutero Advocates. The 2nd Defendant subsequently filed a Notice of Intention to Act in person dated 2/5/2023. The 3rd & 4th Defendants filed their Statement of Defence dated 27/04/2022 through Mr. Paul Waga State Counsel in the office of the Attorney General. The details of the pleadings will be referred in the analysis and discussions herein to avoid repetition.

HEARING

9. The suit was heard viva voce on 4/10/23, 5/3/24, 4/4/24, 12/6/24 and 1/7/24.

PLAINTIFFS CASE/EVIDENCE

10. PW1 was the Plaintiff CAROLA TOLKSDORF. She adopted her witness statement dated 8/4/2022 as part of her evidence in chief. She testified that she did not know the 1st and 2nd Defendant and had never met them. According to her witness statement, she entered into an agreement for sale of the suit with Alois and Reiten who were attorneys of Mr. Bockle who transferred the suit to her in consideration of love and affection. She paid stamp duty of Kshs. 5,020/-. However, at this point Mr. Bockle died but his wife Imelda Thaddee Bockle (herein Imelda) presented the original title deed, transfer forms, stamp duty payment slip to the 3rd Defendant for registration. Title was issued in the Plaintiffs name on 8/12/2011. That she has lived permanently in the

suit property since the year 2011 though she had earlier in 1998 come into the property. The witness told the court that the owner of the suit property was Reiten her ex husband who bought the same around the year 1996/1997.

11. From the witness statement adopted as part of her evidence in chief the witness states that she built a permanent house complete with swimming pool, a garage and fence surrounding the suit property. That she conducted a search to confirm the status of the suit property and discovered the 1st Defendant was registered as owner pursuant to the court order dated 14/08/2012. That her lawyers upon perusing the suit file where the orders were issued discovered various anomalies which the witness highlighted. It was also her evidence in chief that the suit was registered in the 1st Defendants name without her consent or knowledge and the said name was introduced to deprive her of the use and quiet enjoyment of suit property.
12. The witness produced the documents listed in the Plaintiffs list of documents dated 8/4/21 as PEH 1-10; Supplementary List of documents dated 12/6/2023 PEX11 and the Supporting Affidavit sworn on 8/4/2022.
13. Cross examined by the 2nd Defendant the witness confirmed she is a Germany citizen on tourist visa in Kenya which she renews after every three months. Asked about the sale agreement referred in paragraph 8 of the Plaint the witness stated Reiten wrote her a letter giving her the land but she could not remember its date. That she did not pay Reiten in cash but gave him a car valued at about Euros

15,000. That she did not attend Land Control Board meeting for consent but gave money to Imelda who processed everything and brought her the title. The witness stated she was not aware that the court refused to set aside the order in SRMCC 364 of 2011 Mombasa. She started living permanently in the suit property in 2011 but was there intermittently in 1998/99. She built her first house through Mr. Bockle whom she used to send money though she had no contract in this regard.

14. On being cross examined by Mr. Oyonge the witness testified that Reiten was not in Kenya in 2011 when she gave Imelda money for the transfer. He was last in Kenya in the year 2002. On the pictures she produced PW1 admitted some had no dates. She was not aware of any court notice placed on the land around 2011-2012. Though she had workers on the property they never told him about such court papers. On being shown PEXB 5 which was a title under her name she conceded the same lacked part A and B. On PEX 4 KRA she acknowledged Alois had no PIN and the PIN indicated as his was Reiten's PIN. She testified that during the transfer of the property to her Bockle had died in 2005. She could not explain how stamp duty was paid using one PIN yet the attorneys were two. She stated she did not know the outcome of the JR proceedings she filed through the law firm of Gikandi.
15. Cross examined by Mr. Waga PW1 testified that she gave her original title to a Mr. Kioko at the firm of Gikandi and never got it back though he had seen him two months

before this hearing. She never wrote to the registrar to complain about her missing name. That she was never involved in the transaction that culminated in the registration of the 1st Defendant as owner of the suit property.

16. PW1 clarified in re-examination that she has presented a search dated 13/2/2013 before court. That PEX5 is certified true copy of original. That since 1998 no one has removed her from the suit property. The land registrar never called her when he changed the name in the title. That the 1st Defendant has never been to the suit property.
17. PW2 was REITEN WINFRED JOHANNIS who testified in Germany with the help of an interpreter. He confirmed the Plaintiff was his former spouse. He testified that he does not know the 1st and 2nd Defendants. Adopting his witness statement dated 5/12/2022 PW2 testimony was that he first came to Kenya in the year 1995 and left in 2000. He was never in Kenya in the year 2005 as evidenced by his passport produced before court. That he never owed the 2nd Defendant amount of Kshs 226,420/-. The witness reiterated the contents of paragraph 11 of his witness statement that the power of attorney dated 12/4/2005 was fake. That he was never served with any documents pertaining the proceedings commenced by the 2nd Defendant. That to the best of his knowledge the suit property belonged to him and his ex-partner.
18. Cross examined by Mr. Oyunge PW2 testified when he first came to Kenya in 1995 he stayed in a hotel but thereafter

he made about 7 -8 visits when he first stayed with Bockle and thereafter stayed in his own house in Galu Kinondo. He could not remember the title upon which this house was situate. Though he stated he had bought the land he did not remember the date of the agreement for the said purchase. On being shown the power of attorney (PEX2) dated 12/4/1996 the witness testified that he is the one who donated the power of attorney to Bockle though he PW2 did not sign it. He recalled signing a power of Attorney to the Plaintiff before he left in 2002 and his advocate has a copy. That he gave the original title of the land to the Plaintiff. That while he bought the property alone the power of attorney dated 12/4/96 bore his name and that of Alois because initially Alois was there but withdrew his shares and left. PW2 reiterated the land did not belong to Bockle but belonged to him and Alois. That Bockle was granted the power as an agent to buy land and build the house though he PW2 could not tell from whom the land was bought. On being shown paragraph 4 of his witness statement he noted it stated the suit property was a subdivision of a parcel that used to belong to Bockle though he could not confirm that the Power of attorney was wrong since he did not understand the witness statement very well as it was in English. He confirmed he bought the property from Bockle. He conceded he signed the witness statement in English and it was translated to him. Though he had the certificate of translation he could not find it.

19. The witness added that Alois had a wife. Alois left Kenya in the year 2000 though the witness did not leave the country together with him. Asked about how he transferred freehold land as a foreigner the witness stated he did not understand this.
20. On cross examination by the 2nd Defendant PW2 informed the court he did not know the whereabouts of Alois. He last saw him 6 years ago. PW2 could not remember the first time he knew about the dispute herein. On paragraph 8 of his witness statement he indicated that that he was last in Kenya in 2000 and not 2002. That he has no postal address in Kenya. On the KRA stamp duty declaration he confirmed he transferred the property to the Plaintiff in the year 2000. He acknowledged entry 1 thereof read 8/12/2011. He conceded there was joint title with Alois. About the letter of authority to the Plaintiff he noted it was dated 24/5/2022 and bore postal address 41670-00100 Nairobi which he did not know its owner. He conceded he did not sign the said letter. He confirmed he signed the document dated 5/12/22 (witness statement). That the specimen signature supplied was his original signature, he inserted the date thereon and that he signed the same in Germany.
21. Cross examined by Mr. Waga the witness confirmed that all documents purported to have been signed by him after the year 2000 are not true. That the right owner of the suit property at the moment was the Plaintiff.
22. The witness clarified in re-examination that he signed the witness statement and that the specimen signature was his

original signature. That he first gave power of attorney to Antonie Bockle who was his agent to buy the land and thereafter also to the Plaintiff ex wife. He confirmed he gave the plaintiff authority to institute proceedings vide the letter dated 24/5/22. That he did not understand about transfer of freehold land as a foreigner and he had a lawyer during the transaction. That while in Kenya he lived with Bockle in PW2 house. That he was seeing the KRA entry of 8/12/11 for the first time. On being shown the letter of authority dated 24/5/22 he confirmed it was from his advocate in the proceedings Lawrence Obonyo.

23. The Plaintiffs case was marked as closed.

2ND DEFENDANTS EVIDENCE

24. DW1 was FRANCIS NJONJO MAINA the 2nd Defendant. An advocate of the High Court practicing in Nairobi but once practiced in Mombasa in the year 2009. Adopting his witness statement dated 22/4/22 as his evidence in chief, the witness produced the documents in the list of documents dated 22/4/2022 - DW2EX 1-11. (sic should be DW1).

25. The witness states in his witness statement above that on 25/2/11 he instituted suit against Reiten, Alois and Carola the plaintiff for unpaid sum of Kshs.195,000.

26. The witness statement laid out the chronology of events and all the steps taken by the 2nd Defendant, the auction that culminated to the transfer of the suit property to the 1st defendant. The witness further averred that the Plaintiff has been depriving the 1st Defendant of his right to ownership

and enjoyment of the suit property by engaging in unnecessary court process such as judicial review 31 of 2013 Mombasa which was dismissed by the court in favor of the 1st Defendant. Further that it is untenable that the Plaintiff being on a visiting visa in Kenya would claim to own a freehold property when she is legally incapable of securing a Land Control Board consent a must have document when dealing with freehold property. That during the auction of the property in 2012 and which the witness visited with the valuer , the property was vacant and the Plaintiff developed it contrary to the law after title had issued to the 1st Defendant. That the developments on the property were accelerated in the year 2013 after the dismissal of the judicial review proceedings. That the Plaintiff having no valid title is not entitled to the prayers sought. The witness urged the Plaintiffs suit to be dismissed.

27. On being cross examined by Mr. Obonyo DW1 testified that the Plaintiff had previously instructed him in some matters. That the documents the witness prepared for the Plaintiff were part of his record. That he prepared the power of attorney for Reiten,Alois and the Plaintiff. The three were brought to his office by Imelda. He only knew the Plaintiff and had never met the others. He had no reason not believe they were not the ones. The witness conceded he had no evidence in court to rebut PW2 testimony that he has not been in Kenya since the year 2000. That while he retained the document for Carola he had nothing to show that the Plaintiff was in his office and signed documents. That he had

no documents in court to rebut the Plaintiffs contention that she was a stranger to him. That he moved the court in 2011 for a transaction undertaken in 2005 a delay of 6 years as he had expected they would come and pay.

28. The witness further confirmed the orders were obtained *ex parte* though the 'debtors' were served by substituted service with leave of the court. He conceded he did not attach the application for substituted service. On being referred to the valuation report the witness produced he noted the owner of the suit property was Antonie Bockle though he was not one of the defendants in the Mombasa CMC 364 of 2011. He conceded the Plaintiff was not in the irrevocable power of attorney. He conceded the power of attorney registered against the title is not the one he prepared and the latter was never registered. The witness could not produce a copy of the power of attorney he prepared as well as receipt for the partial payment of Kshs.5000/- he received for the services. DW1 stated he was not aware whether Mr. Bockle was deceased or not at the time of instituting said proceedings. He did not have evidence that Alois was in the country in 2008 though he was brought to his office and introduced himself as such. According to the witness the fact that there was judgement was evidence that the work was done. He conceded Imelda was not his witness to corroborate his testimony that the work was done.
29. The witness added that he acted for the 1st Defendant in the transaction though he was not sure if possession was

handed or not. He affirmed that he had no evidence to show that the postal Box Number 1443 used in the summons is registered in names of the 3 defendants he had sued. He conceded he had never received any letters from the said address. The witness confirmed the Kshs.195,000/- was paid to his law firm though he had not presented proof before court.

30. Cross examined by Mr. Oyunge DW1 testified that no appeal has been preferred against his suit. That he acted on a judgement. That the issue of his costs is resjudicata. On being shown demand letters dated 14/6/2011 and 17/3/2010 from the Plaintiffs bundle the witness confirmed he prepared the same. On being shown affidavit of non service the witness stated it showed there was attempt at service. That paragraph 3 of Brian Oduor affidavit sworn on 17/11/2011 refers to the property being vacant. That when he filed the suit he did not have the Limitation of Actions in mind. Explaining the meaning of irrevocable trust the witness stated he executed because the person holding the power of attorney is the owner.

31. Cross examined by Mr. Waga DW1 stated he had a letter of instructions he signed with the clients but it was not part of his evidence. He agreed that the passport presented by the Plaintiff did not indicate Reiten was in the country. On being shown paragraph 6 of affidavit sworn by Brian on 17/11/11 the witness confirmed neither Brian or Charo were going to be his witnesses in this matter. He conceded Imelda and Alois were entitled to the balance of the purchase price

and it was paid to Alois. He affirmed the power of attorney he prepared was never registered as confirmed by the Land Registrar since he lacked facilitation from the clients to register the same. That the basis for charging fees was the instructions.

32. With the above the 2nd Defendants case was marked as closed.

1ST DEFENDANTS EVIDENCE

33. DW2 was LENNY MURAYA MWANGI the 1st Defendant. He adopted his witness statement dated 16/05/22 as part of his evidence in chief and produced the documents listed in the list of documents of even date as part of his proof and the replying affidavit sworn on 22/8/22 DW2 EXH 1-8.

34. DW2 testified in cross examination by Mr. Obonyo that he got information about the ownership of the property after he purchased the land. That he did not do any due diligence before purchase. He confirmed that the 2nd Defendant who was introduced to him by the auctioneer helped him process the title. That he left the due diligence to his advocate. During the auction he did not know the land though he had an idea of the general location and where it could be. That he has been to the property about 4 times though at the time of bidding he had no information about its occupancy. That he visited the property in 2012 it was unoccupied. He disagreed that before 1992 there were buildings in the property and that the parties could be talking of two different plots.

35. DW2 admitted he visited the property in the company of a government surveyor to be shown the land he had acquired. He could not verify what was on the property when he visited less than three years ago because he was not given access but he was aware there were buildings. Though the surveyor visited the land after the purchase he did not have any report in this regard. That Alois and Reiten being non Kenyans cannot hold freehold title. He could not produce the search that showed Alois and Reiten as proprietors which he stated was supplied to him by the 2nd Defendant. On being shown the advertisement produced as his exhibit he noted it reflected the registered proprietor as Antonie Bockle. On being shown attachment 'LMM 7' in his affidavit he agreed Bockle was not a party to the Misc. Application 31 of 2013 neither was he a party to the suit filed by the 2nd Defendant. That while the Plaintiff produced photos allegedly taken before 2002 the witness could not confirm them. The witness confirmed that he visited the property in 2023 pursuant to the orders of the court but he was not accompanied by a surveyor as directed. He did point his property to the Plaintiff and her lawyer. The witness told the court he did not produce photos in proof that the property was vacant though the advertisement states the same was vacant.

36. Upon cross examination by Mr. Waga the witness confirmed he did not do due diligence. It was his first time purchasing a property during auction. He believed the court could still protect him in the circumstances or even if he got

bad title. He only got to know about Mr. Njonjos involvement through the auctioneers. He let Mr. Njonjo handle title processing because he seemed to know the background of the sale. That he visited the suit property in early 2012 with a surveyor and the witness was sure he visited the correct property. He could not remember the name of the surveyor. That the property was vacant though he did not present any report on the status of the land.

37. On cross examination by Mr.Njonjo the witness confirmed that the advertisement by Masanjo Investments bore the case number 364 of 2011, instructions from the CM Mombasa and the property as vacant residential property. The description matched the property during his visit. He confirmed Bockle had not sued him neither was he the registered owner at the time of the advertisement.

38. On re-examination the witness clarified that on the day he visited the property pursuant to the directions of the court he identified a gate, a building and a fence around the property.

3RD DEFENDANTS EVIDENCE

39. DW3 was Ms. SUSAN MUENI the Land Registrar Kwale employee Number 2016000474. The witness adopted her witness statement dated 28/06/24 as her evidence in chief and produced the documents in her list of documents dated 27/4/23- DW3 EX 1-12. DW3 took the court through the entries in the parcel register which she stated she had familiarised herself with. That there were complaints registered at the office by the Carola Tolksdorf that she had

been living in the land parcel from the early 1990s and there was a ploy by other people to take away her land because she was a foreigner. The witness observed in her statement that the alleged power of attorney that led to Diedrich Alois and Reiten Winfred Johann losing their property to Lenny Muraya was never registered in the green card. The registrars opinion was that conveyancing is concerned about rightful ownership and lawful passing of properties from one individual to another, if that is not adhered to then one cannot claim to have the rightful ownership.

40. DW3 evidence in cross examination by Mr. Obonyo was that the property was never transferred to Alois and Reiten. The property belonged to Bockle. The power of attorney was an encumbrance on the title. There was no other power of attorney registered after registration of the restriction in the green card. On the court order leading to the 1st Defendants proprietorship the witness testified that the registered owner (Bockle) was not part of the proceedings in Suit 364 of 2011. On the transfer produced from the parcel file the witness observed that the transferor is not the owner of the suit property. That the letter of consent (DW3 EX10) was a mandatory requirement though it was not issued to the transferor Brian Oduor who is the correct person to have obtained the consent. That the complaint by Carola referred in DW3 statement was not documented. That if the process is flawed a good title cannot pass and therefore no good title was passed to Lenny Muraya the 1st Defendant

41. Cross examined by Mr. Oyunge the witness reiterated no good title passed to the 1st defendant due to the irregularities pointed out above. On being referred to the power of attorney registered under entry number 3 of the green card (DW3 EX 9) the witness admitted it gave power to the donees to sign documents on behalf of the registered owner. DW3 stated she did not know the legal implication of an irrevocable the power of attorney. She observed there was no power of attorney registered in the suit property in favor of Carola the plaintiff. Based on the documents in the parcel file Carola has no legal claim as far as registration was concerned. With regard to the complaint referred to the witness statement DW3 stated though it was oral it was noted by the person/office who received it though the complaint itself was not in the registrars documents. On being shown the decree the witness confirmed it was addressed to Carola, Alois and Johann the individuals who were given the power of attorney by Bockle. She was not aware if the decree had been set aside and if it has not been varied then the 1st Defendant is still the registered proprietor. DW3 maintained however based on the documents used for registration the process was not followed.

42. The witness further explained that based on her experience in the registration of property arising from an auction the transferor should still be indicated as the registered owner, the court signs and the auctioneer is only to attach the completion documents that are required. In

view of the power of attorney the transferor should have been indicated as Bockle followed by the power of attorney it could not bear the name of Brian. According to the witness where the donees refuse or fail to sign the transfer they ought to inform the donor though she could not tell the next step should the donor refuse as well.

43. On cross examination by Mr. Njonjo, DW3 insisted the power of attorney did not pass any proprietary interest to Alois and Reiten but power to only execute instruments on behalf of Bockle the registered proprietor. That the instruments could be the completion documents. The witness was not sure if the donees could sell and keep the money. The witness denied she knew the Plaintiff and that she was working with her to defeat justice. She confirmed Carola has never held a title to the suit property. On being shown Corola's title dated 8/12/2011 the witness reiterated it was not part of the registrars' records. On the official search dated 13/02/2013 produced by the Plaintiff the witness stated though they use the register to indicate the parcel status the information given in the search could not have originated from the parcel file. She did not know if Carola was requested to submit a copy of her title at the time she attended the land registry to complain.

44. DW3 testified that the registered proprietor as at the date of her testimony was Lenny Muraya registered by E.N. Marwanga who the witness confirmed used to be land registrar at Kwale. She confirmed that she understood the 1st Defendant became registered through an auction and not

the power of attorney that was not registered. That she was not aware that in the coastal region if one cannot be issued with a title for one reason or other they could register a power of attorney. That as an advocate she was aware court orders have to be obeyed and can only be vacated through a court order. No court order has been served revoking the entry No. 4 in favour of the 1st Defendant. She admitted that the affidavit filed by Widad land registrar did not refer to the complaint by Corola neither did it state the 1st Defendant did not hold good title. There was no complaint by Bockle post 2012.

45. On re-examination DW3 clarified that everything done by the donees in the power of attorney dated 12/4/96 was to be done for Bockle and under his name as denoted in the words '...in my name' as he still remained the owner of the property. That a restriction is usually registered pursuant to a letter by an interested party stating the registrar should restrict and not deal without their consent. That upto 2012 the registered owner was Bockle. Bockle gave power of attorney to Alois and Reiten but the two names do not appear in the transfer to 1st Defendant. She reiterated her position that where there is a flawed process there is no good title and if the 1st Defendant did not get good title then Bockle is the one who remains with good title as the 1st registered proprietor.
46. With the above the 3rd Defendants case was marked as closed.

47. The court ordered parties to file and exchange their final written submissions. Parties complied.

SUBMISSIONS

Plaintiffs Submissions

48. Submissions filed on behalf of the Plaintiff are dated 5/08/2024. The following issues were identified for determination; -

- 1)** Whether the Plaintiff is the rightful owner and sole proprietor of the suit property?
- 2)** Whether the auction process through which the 1st Defendant acquired his Title was faulted to occasion nullification of his Title to the suit premises?
- 3)** Where the Court is in doubt, would the Court strike out all subsequent entries after Antonie Bockle, and Order that ownership of the property revert to Antonie Bockle?
- 4)** Who should bear the Costs of the instant suit.

49. Referring to the article 40 of the Constitution on the right to own property it is submitted that it is the courts duty to protect the proprietary rights of both the Plaintiff and the 1st Defendant with the proviso that no land can have two titles.

50. It is submitted that no allegations of fraud have been levelled against the Plaintiff's title to warrant its

cancellation under the provisions of section 26 of the Land Registration Act.

51. That the 1st Defendants title being under challenge it behoved him to show the legality of how he acquired the title as guided by the Court of Appeal in the case of **Munyu Maina- Vs- Hiram Gathina Maina (2013) eKLR**. That it was not enough for the 1st Defendant to dangle a title.
52. It is submitted that 1st Defendant was unduly registered as the owner of the suit property. That in spite of the Plaintiff holding title to the suit property at the time SRMCC 364/2011 was filed, the Plaintiff was never a party to the suit nor had she been served with summons and pleadings. That the purported auction of the suit property to the 1st Defendant was meant to sanitize the acquisition of the suit property by the 1st Defendant. It is stated there was no sufficient proof to corroborate the cheques presented in payment of the bid price were actually paid out such as bank statements. Moreover, the alleged receipt issued by the 2nd Defendant in respect of alleged the said cheques did not capture and or contain the cheque numbers.
53. On the other hand it is submitted that it is undisputed the Plaintiff has been in physical possession of the suit property since 1998, developed the property having received the same from Reiten Wilfred, who transferred it to the Plaintiff on consideration of love and affection. That

exhibits were provided. It is contended that possession has never passed to the 1st Defendant at any time. That in the absence of proving ownership or beneficial interest of the suit property, any actions of the 1st Defendant on the suit property amounts to trespass and/or encroachment. That this was unjustifiable intrusion upon the land in the possession of another. The court was referred to the definition of trespass in Clerk & Lindsell on Torts, 18th Edition at page 923 and Black's Law Dictionary.

54. It is was submitted that the 1st Defendant had failed to prove as required of him under Section 107(1) of the Evidence Act, that he is indeed the owner of the suit property and that the Defendant is a trespasser on the suit property.
55. The court is invited to invoke the Maxim "Nemo dat quod Non Habet rule - "no one gives what he doesn't have." to render the 1st defendants title a nullity ab initio.
56. That at the time a suit was instituted at the Mombasa law court, the Plaintiff herein had acquired ownership of the suit property herein by virtue of adverse possession.
57. The court is urged to make a finding that the suit property rightly belongs to the Plaintiff and proceed to grant orders prayed for in the Plaint, in their entirety.
58. On whether the auction process through which the 1st Defendant acquired his Title was faulted to occasion nullification of his Title to the suit premises, it was

submitted that the legal framework on legitimacy of title documents is governed by Sections 24, 25 and 26 of the Land Registration ACT. That a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The reasons raised earlier impugning the auction and why the 1st Defendants title is illegal are rehashed.

59. The court faced with two titles was invited to investigate the root of both the Plaintiff and 1st Defendants title who must show that their title has a good foundation and passed properly to the current title holder. Reliance is placed on the holding in Hubert **L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR**. It was submitted that the Plaintiff's title passes the test in Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others.
60. As to the 1st Defendants title it was contended it failed the above test for reasons already highlighted hereinabove.
61. On the whether the court would strike out all subsequent entries after Antonie Bockle, and order that ownership of the property revert to Antonie Bockle, the court was urged to invoke the Maxim of Equity the "Nemo dat quod Non Habet rule".
62. The court is invited to make a finding that the Plaintiff's suit is merited and grant the reliefs sought.

1st Defendants Submissions

63. The 1st Defendants submissions are dated 29th July 2024. Enumerating the genesis of how the 1st Defendant came to be registered as the registered owner following the advertisement of the suit property for sale by auction to satisfy a court decree, it submitted that the 1st defendant is an innocent purchaser at a public auction who believed he was dealing with the court and that the court had satisfied itself of the ownership of the property. That the 1st defendant cannot be blamed for his confidence in the court process. That the 1st defendant having paid the full bid price to the auctioneer and the 2nd defendant his title must be protected by the court. The court is referred to the case of **Katende Vs. Haridar & Company Ltd (2008) EA** on the definition of an innocent purchaser and what a party relying on the doctrine must prove to the court for the defence to be available.
64. That the allegations of fraud against the 1st Defendant by the plaintiff had not been proved as required under sections 109 and 112 of the Evidence of Act and the case of **Vijay Morjaria Vs. Nansigh Darbar & Another (2000)eKLR** and **Kinyanjui Kamau Vs George Kamau (2015)eKLR**.
65. It is submitted that the title held by the 1st Defendant is sacrosanct and anyone occupying the suit property without the former's permission is a trespasser. Citing sections 28 of the Repealed Act (cap 300) and 26 of the Land Registration Act 2012. That the 1st Defendant has

demonstrated he bought the property in legally procedural process sanctioned by the court. That the order was still in force and had not been set aside.

66. That the 1st Defendant is entitled to general damages for trespass and which should not be limited to nominal damages. The court is referred to the case of **Inverugia investment Ltd vs Hacket (1995) 1 WLR** which held that the claimant need not prove loss. That the plaintiff has dimunited the property by constructing thereon and connecting utilities without plan. The court is invited to grant Kshs. 2,000,000/- general damages and relies on 4 authorities which include **Weston Gitonga & 10 Others Vs Peter Rugu Gikanga & Ano. (2017)eKLR, Demutilla Nanyama Purumu Vs. Salim Mohamed Salim (2021)eKLR.**
67. The court is urged to grant the prayers sought by the 1st Defendant.

Submissions by the 2nd Defendant

68. The 2nd Defendants submissions are dated 26/07/2024. Explaining the genesis of these proceedings flowing from instructions to render consultancy services for Reiten, Alois and the Plaintiff, their failure to pay the agreed fees for the services, the filing of Mombasa SRMCC 364 of 2011, the ensuing decree and its execution vide the auction culminating into the sale and transfer of the suit property to the 1st Defendant and the gist of the Plaintiffs

case as pleaded and the evidence thereto, the 2nd defendant submitted as follows; -

69. Reviewing the evidence of PW1 and PW2 the 2nd Defendant states that their evidence was calculated to mislead the court. They approbate and probate at the same time. Why? The Plaintiff wants the court to believe that since Bockle the registered owner was not sued in SRMCC 364/2011 the said suit was irregular yet she also testified the property was transferred to her by her ex husband Reiten. The said Reiten PW2 stated he owned the land with Alois who later withdrew his share. That if Reiten had no proprietary interest in the land what was he transferring to his ex-wife.
70. Discussing the meaning of an irrevocable power of attorney (in reference to the power of attorney dated 12/4/96) as defined in Free Law Library and Blacks Law Dictionary 8th Edition, it is submitted that in the present suit Alois and Reiten had interests in the suit property which interest was not in favour of Bockle. That for the Plaintiff to state that the property was registered in the name of Bockle since a search stated as such was to ignore the law relating to irrevocable powers of attorney which convey along interests in the subject matter. It is posited that the interest in the suit property before auction vested with Reiten and Alois and these were the owners of the property. Further that there was no way Reiten would pass the interest to his ex-wife the Plaintiff

without the involvement of Alois as both holders of the irrevocable power of attorney had to sign to pass their interests. There was no proof tendered in this regard.

71. On the various flaws pointed by the Plaintiff with regard to the SRMCC 364/2011 it is submitted that a court order can only be attacked by having the same set aside. It must be obeyed even where the person aggrieved by the order believes it to be irregular or void. Reliance is placed on the case of **Hadkinson Vs Hadkinson (1952) All ER**. That accordingly all that has been raised by the Plaintiff against the order should be left to the court that issued the order. Reference is made to section 34(1) of the Civil Procedure Rules. In this regard the court is said to have no jurisdiction to impugn an order of the other court since it is not sitting on appeal. That this is a fresh suit challenging execution of a decree and must fail.
72. The 2nd Defendant adds that the Plaintiff did not prove her occupation of the suit property before the auction. That photos were produced which had no time indication and no corroboration by a neighbour, local administration, a worker that she was living in the neighbourhood since 1998 or building plans and receipts for expenditure incurred by the Plaintiff on the construction which was termed as strange.
73. It was submitted that the valuation report dated 29/9/2011 by Dominion Valuers confirmed the suit property as having been unimproved and vacant. That this

was corroborated by the 1st Defendant who testified that on his first visit to the property there were no structures. It is contended that the Plaintiff has never been registered as owner of the suit property. That the entire bundle produced by the 3rd Defendant had no records of the plaintiff's ownership. It is submitted that to the contrary all the documentation leading to the auction and registration of the 1st Defendant as proprietor of the suit property were presented in court. The court is urged to be careful at the title allegedly registered in the Plaintiffs name as it is suggested the Plaintiff is a liar who takes inconsistent positions for self-preservation and enrichment. Blowing hot and cold. The court is referred to the case of **Banque de Moseou Vs Kindersley (1950)2All ER** on the doctrine of approbation and reprobation and **Behan Okello Advocates Vs. National Bank of Kenya (2007)**.

74. Further that Bockle is not a complainant in these proceedings. That the Plaintiff did not plead she was filing the suit on behalf of Bockle and should not be allowed to speak outside of her pleadings that the land belongs to Bockle and it was sold without his participation in the lower court proceedings except with the consent from Bockle. It is for Bockle to file a claim.
75. On proof of fraud it is submitted that the Plaintiff has failed to prove that the auction was fraudulent to the required standard set by the courts in among other cases

Vijay Morjaria Versus Nasingh Madhusingh Darbar & Another [2000] eKLR and Kinyanjui Kamau Vs George Kamau (2015)eKLR.. Sections of 107 - 109 of the Evidence Act are also relied upon as to the burden of proof. That the Plaintiff pleads she was helped by Imelda the wife of Bockle to process the title and this points to the fact that both the 2nd Defendant and the Plaintiff knew Imelda who was the initial contact for the instructions issued for the services rendered resulting to the auction. That the unregistered power of attorney dated 12/4/2005 bore the passport numbers of Reiten and Alois which are not denied by Reiten and the Plaintiff. That in the absence of forensic opinion on the signature presented by Reiten and that on the said power of attorney the court should ignore Reitens denial since the court is not an expert.

76. The court was further referred to the letter of authority filed in SRMCC 364/2011 dated 24/5/22 showing that Reiten, Alois and the Plaintiff appeared before Felix Odhiambo Advocate on that date. The court was urged to disregard Reitens assertion that he was last in Kenya in the year 2000. That Reitens signature on this letter is clearly different from the one presented as his specimen signature. That Reitens lies to the court that he last met Alois 6 years ago when they seem to have both appeared before Felix Odhiambo Advocate where they gave

authority to Carola to deal with the present suit and the one finalised in the chief magistrate court.

77. The 2nd defendant also faults the Plaintiff for failure to sue the auctioneer who she alleges did not perform his work well and who was the proper party to sue for executing the court instructions. Reliance is placed on the case of **Nancy Kahoya Vs Expert Credit & Another (2015) eKLR.**
78. The LCB consent issued to Bockle for the transfer of the property to the 1st Defendant is defended on the basis that Board members may not have legal knowledge of what an irrevocable power of attorney entails. The court is urged to look at the substance of the consent and not form. It is submitted that all procedure was followed to the latter and the 1st defendant's title was issued procedurally.
79. It is submitted in view of the above the 1st defendant is sacrosanct and anyone occupying the suit property without the former's permission is a trespasser. The 2nd Defendant's submissions in this regard largely reflect the position taken by the 1st defendant including the legal provisions relied upon. The court is invited to dismiss the Plaintiff's case her title having been obtained unprocedurally and through a corrupt scheme.

The 3rd Defendants Submissions

80. Highlighting the parties' cases against their evidence the 3rd defendant identified four issues for determination

namely 1) whether Francis Njonjo had the legal standing to sell the suit property, 2) Whether Lenny Muraya Mwangi is entitled to be considered an innocent purchaser for value 3) whether the property still belongs to Antonie Thadee Bockle and 4) whether there was fraud, illegalities, unlawfulness by the 3rd defendant against the Plaintiff.

81. On whether the 2st Defendant had the legal standing to sell the property it is submitted that the court must make a discovery which among the litigants had the legal rights to the suit property as guided by the dictum of Sila Munyao J in **Hubert L Martin & 2 Others Versus Margaret J Kamar & 5 Others [2016] eKLR** and probe the entire history of the title from its roots to its current status. That each party was obligated to prove that their title had a good foundation and was properly passed to them.
82. It was observed that the 2nd defendant did not produce the letter of instructions for the legal services rendered. The alleged power of attorney prepared was never registered at the lands office. That indeed Reiten gave evidence of his passport to show he was not in Kenya in the year 2005 and denied issuing such instructions. That this meant there was no legal fees owing to the 2nd Defendant from Reiten and therefore no legal basis for selling the suit property. Moreover owners of the suit property were not served with the requisite notices.

83. On Whether the 1st Defendant is entitled to be considered an innocent purchaser for value, it was contended that since the 2nd defendant did not have the right to acquire and auction the suit property and citing the equity of Nemo datthen no good title passed to the 1st Defendant. Further that the 1st Defendant having worked with the 2nd defendant to procure his title this was an indication of collusion and he cannot be termed an innocent purchaser.
84. On whether the suit property still belongs to Bockle it is submitted that the irrevocable power of attorney did not transfer Bockles interest to the Reiten and Alois. That in view of the illegalities perpetrated by the 1st and 2nd defendant the formers title should be cancelled and the title revert to Antonie Thaddee Bockle the 1st registered owner of the suit property.

ANALYSIS AND DETERMINATION

PRELIMINARIES

85. There is preliminary issue that has been raised and which I think I must address at this point before I get into the substantive issues.
86. It has been contended by the 2nd Defendant that this court lacks jurisdiction to determine this suit by dint of the provisions of section 34 of the Civil Procedure Act which reads;-

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. Explanation.—

For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

87. It is the 2nd Defendants submission that the current proceedings are litigating over the manner and legality of the execution of the decree emanating from SRMCC 364/2011. I have reviewed the above provisions and the pleadings in the present suit. My understanding of the dispute before this court is that the Plaintiff is asserting

her interest in the suit property as the registered owner vide a title deed issued on 8/12/2011. She is challenging a title registered in the name of the 1st Defendant and wants to be declared the legitimate owner of the title. To me therefore this is a case of the existence of two titles held by different proprietors over the same property. The court therefore has jurisdiction to entertain this suit pursuant to the provisions of section 13 of the Environment and Land Court Act as read together with article 162 of the Constitution of Kenya 2010.

88. The court will later in this judgement revisit the provisions of section 34 above in view of the above observations and how the impact these proceedings.

ISSUES FOR DETERMINATION

89. The court has after consideration of the pleadings, the evidence led by the parties, documents presented and the submissions of the parties, the finding in above preliminary issue identifies the following issues for determination

- 1) Who between the Plaintiff and the 1st Defendant is the lawful owner of the suit property Kwale/Galu Kinondo/1203
- 2) Whether the 1st Defendant is an innocent purchaser
- 3) What orders should suffice to dispose of the Plaintiffs suit and the Counterclaim

4) Who should pay the costs of both the suit and counterclaim.

Who between the Plaintiff and the 1st Defendant is the lawful owner of the suit property Kwale/Galu Kinondo/1203

90. The Plaintiff case is that she is the registered owner of the suit property. That the suit property is a subdivision of plot No. Kwale/Galu Kinondo/185 which used to belong to Bockle. That Bockle sold the suit property to Diederich Alois and Reiten and executed a Power of Attorney in their favor in lieu of executing a transfer. The Power of Attorney was registered on 12/04/1996 and from that date the said two persons were the lawful proprietors of the suit property. That Alois and Reiten entered into an agreement with the Plaintiff for the sale of the property and being attorneys agreed to transfer the property to the Plaintiff in consideration of love and affection. That she paid stamp duty but Bockle died around the same time. She was then assisted by Imelda, Bockles wife who presented the documents for transfer at the lands office culminating into her registration. The Plaintiff's title has been challenged by both the 1st and 2nd Defendants as having been obtained fraudulently.
91. The property is registered under the legal regime of the Registered Land Act Chapter 300 of the laws of Kenya (now repealed). The following legal provisions are pertinent.

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;

92. The above provisions are reproduced in Section 24(a) of Land Registration Act, which applies by dint of section 107 of the Land Registration Act 2012 reads

“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.”

93. Section 26 (1) of the Land Registration Act 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 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.”

94. In the case of **Hubert L Martin & 2 Others Versus Margaret J Kamar & 5 Others [2016] eKLR** where the court stated thus;-

“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.”

95. Arising from the above legal provisions of the law and case law it is clear that an instrument of title is never an absolute proof of title but a rebuttable one. That where there are two or more competing interests there can only be one title. The court having noted that this is a matter of competing titles it must determine which party was able to show that it had a good foundation for the root of their title.
96. The Plaintiff therefore had the burden of proving that her title was acquired procedurally and without any fraud. The basis for the legal burden of proof is provided in **Section 107** of the **Evidence Act**, Chapter 80 of the Laws of Kenya which reads -
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 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.”
97. In support of her case PW1 produced the following documents in evidence;-
- 1) Title Deed for Kwale/Galu/Kinondo/1203 dated 12/04/1996 issued to Antonie Thaddee Bockle as the registered proprietor
 - 2) Power of Attorney dated 12/04/1996 from Antonie Thaddee Bockle appointing Diedderich Alois and Reiten Winfried Johann as his attorneys.

- 3) Mutation Form for Kwale/Galu/Kinondo/185
- 4) Stamp Duty Declaration assessment and Pay in slip for transfer of Kwale/Galu/Kinondo/1203 serial No.12927
- 5) Title Deed dated 10/06/2009 in the name of Carola TolksDorf
- 6) Certificate of Official search for Kwale/Galu/Kinondo/1203 dated 13/02/2013
- 7) Green card opened on 12/4/96 for Kwale/Galu/Kinondo/1203

98. The Plaintiff gave evidence on her own behalf and as called in evidence her ex husband as PW2. The court noted a number of gaps that emerged during the Plaintiffs and PW2 direct evidence and cross examination which cast a doubt on the Plaintiffs title. My review of the documents confirm that the 1st registered owner of the suit property was Antonie Bockle. How then did the title end up being in the Plaintiffs name?
99. According to PW1 witness statement it was her evidence that she entered into an agreement for sale of the suit property with Alois and Reiten. The agreement for sale was never produced in evidence. The witness in cross examination about the sale agreement also referred to in paragraph 8 of the Plaintiffs, indicated that Reiten her ex-husband wrote her a letter giving her the land. She could not remember its date neither did she produce this letter.

100. What did Reiten (PW2) have to say about the above sale agreement and or the letter referred to above by his ex wife. On cross examination Reiten recalled signing a Power of Attorney to the Plaintiff before he left in 2002. Though it was his evidence that he gave a copy of this document to his lawyer, this document was never produced. It got me wondering whether this document existed in the first place and if it did why it was not produced in evidence? My concern was answered by DW3 the Land Registrar who observed in cross examination that the parcel file did not show any power of attorney registered in the suit property in favor of Carola the Plaintiff.

101. But even then if Reiten was an attorney together with Alois why would he issue the alleged Power of Attorney to his wife under the hand of only one attorney and not both attorneys named in the power of attorney dated 12/04/1996. PW2 stated in cross examination that while the said Power of Attorney bore the two names, Alois had withdrawn his shares and left. No documentary proof was availed to prove the said withdrawal neither was Alois called as a witness to corroborate this evidence when he Alois appears to have signed the letter of authority in the year 2022 and was therefore aware of these proceedings. The witness later agreed in cross examination there was a joint title with Alois. I agree with the 2nd Defendants submission that there was no way Reiten would pass the

interest to his ex-wife the Plaintiff without the involvement of Alois as both holders of the irrevocable power of attorney had to sign to pass their interests.

102. Reiten was also shown the KRA Stamp Duty Declaration and though he reiterated he transferred the property to the Plaintiff in the year 2000 he acknowledged entry 1 therein which reads 'Date of Instrument' indicated the date to be 8/12/2011. The witness then tried to clarify that he was seeing this entry for the first time which to me does not work in his ex-wife favor since the same allegedly transfers the suit property to his ex wife and the particulars of the Owner/Vendor are indicated as a) Diederich Alois b) Reiten Winfried. I also noted the PIN number for Reiten is not provided in the said document.....

On PEX 4 KRA she acknowledged Alois had no PIN and the PIN indicated as his was Reiten's PIN.

103 Reiten further testified in cross examination that he made about 7 to 8 visits when he first stayed with Bockle and thereafter stayed in his own house in Galu Kinondo. He could not remember the title upon which this house was situated. Though he stated he had bought the land through Bockle he did not remember the date of the agreement for the said purchase. Be that as it may was the Plaintiff's title supported by the register.

104. A certificate of official search dated 13/02/2013 was produced in evidence by PW1 showing her as the proprietor of the suit property as at 8/12/11. Annexed to the plaintiffs affidavit sworn on 6/06/2013 in support of JR 31 of 2013 is anexture 'CT1' is a title deed dated 8/12/2011. Further I note that the green card produced in the Plaintiffs bundle does not bear this entry, neither does it have the entry dated 8/12/11. Instead, the next entry after entry No. 3 is entry No. 4 dated 14/9/2012 on the court order dated 14/8/2012 ordering the Land Registrar to register transfer dated 27/4/2012.
105. PW1 informed the court that Mr. Bockle died at the point when she had paid Stamp Duty but his wife Imelda Thaddee Bockle presented the original title deed, transfer forms, stamp duty payment slip to the 3rd Defendant for registration culminating into issuance of the title in her name on 8/12/2011. PW1 on being shown PEXB 5 which was a title under her name conceded the same lacked part A and B and my review confirms this observation. Imelda who assisted in processing this seemingly incomplete title, was never called as a witness and there was no explanation why. Additionally PW1 also had an opportunity to present her original title but her evidence that she had given it to a Mr. Kioko at Gikandi's office and never got it back was not convincing in view of her own evidence that she had seen the said Mr. Kioko two months before the hearing herein.

106. But let me turn to the evidence of the custodian of all land documents in Kenya, the Land Registrar sued in these proceedings as the 3rd Defendant.
107. DW3 produced the documents in the 3rd Defendants list of documents dated 27/4/23 DW3 EX 1-12. DW3 Ex 1 was Entries in the Green card. This green card is for Kwale/Galu/Kinondo/1203. My review of the same shows six entries. There was no entry dated 8/12/11 herein for the Plaintiffs alleged proprietorship. The Land Registrar confirmed Carola has never held a title to the suit property. On being shown Corola's title dated 8/12/2011 by the 2nd Defendant the witness reiterated it was not part of the Land Registrars' records. On the official search dated 13/02/2013 produced by the Plaintiff the witness stated though they use the register to indicate the parcel status the information given in the search could not have originated from the parcel file. In any event PW1 did not produce a green card that contained her entries rebut this evidence and or in proof of her allegations that the same were fraudulently removed from the parcel file. DW3 maintained that based on the documents in the parcel file Carola has no legal claim as far as registration was concerned which I respectfully agree with.
108. Moreover from the proviso of section 26 aforementioned, for Carolas title to be recognised it must feature in the register as registered on transfer since she is not the original registered owner for it to be considered as prima

facie evidence of title. There is clear demonstration that there is no such registration in the Green Card for the suit parcel.

109. There was an attempt by Counsel for the Plaintiff to introduce the doctrine of adverse possession through submissions filed on behalf of the Plaintiffs. That as at the time of registration of the 1st Defendant the Plaintiff had acquired the suit property by dint of adverse possession. I agree with the 2nd Defendant that the Plaintiffs claim before this court is not for adverse possession. Additionally, this is an issue that was not pleaded in the Plaint dated 8th April 2022. It is trite that parties are bound by their pleadings and cannot be allowed to depart from the same. See **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR**. I decline the invitation.

110. There was the whole debate of whether Reiten and Alois could transfer title to a third party as Attorneys under the irrevocable Power of Attorney dated 12/04/1996. I have already shown that even if they had the capacity to transfer there was no evidence to show they jointly signed any transfer or power of attorney to Carolla. Infact Reiten disowned the KRA stamp Duty Declaration paying for registration of the transfer dated 8/12/11 to Carola stating that he was seeing it for the first time. This was infact corroborated by PW1 who stated in cross examination that Reiten was not in Kenya in 2011 when she gave Imelda

money for the transfer. I will refrain from dealing with the issue of irrevocable power of attorney as it is a material issue touching on the auction. The reason for this will become clear later in this judgement.

111. Based on the foregoing it is clear that the Plaintiff has failed to demonstrate to the court the root of her title was perfect and that proper procedure was followed in obtaining the same. It is this courts finding that the root of the Plaintiffs title is tainted and flawed with illegalities and failure to follow procedure in its acquisition.

112. I must now address the 1st Defendants title. DW1 testified that he simply saw an advertisement in the newspaper, he was interested in buying land, he attended the auction as advertised, placed his bid which was the highest and later made the requisite payments and with the assistance of the 2nd Defendant the conveyancing was undertaken culminating into the registration of the 1st Defendant as proprietor. He states he is an innocent purchaser at an auction which was sanctioned by the court. The 1st Defendant responded to the suit by way of counterclaim. The 1st Defendants case is based on the documentation in support of the auction most of which were produced by the 2nd Defendant and including his own bundle. He also states that the Plaintiff title is fraudulent.

113. I will revisit the provisions of Section 34 of the Civil Procedure Rules which I addressed at the beginning of my discussions hereinbefore. The said provisions are couched

in mandatory obligatory terms that it is the court executing the decree that shall determine any emerging issues arising out of the satisfaction of the decree and not by a separate suit. It is not in dispute that there was an auction that was pursuant to the proceedings in SRMCC 364 of 2011. The Plaintiff impugns the said auction that resulted into the registration of the suit property into the 1st Defendants name as having been irregular and fraudulently undertaken casting aspersions on the 2nd Defendant. I think for purposes of section 34 herein this courts hands are tied. The present suit is not the proper forum for this court to investigate the processes that arose from SRMCC 364 of 2011. I will not tread into that discourse. My brief herein is limited to the Plaintiffs claim asserting her title over the suit property and not even Bockles title. I will not therefore belabor the point.

What orders should suffice to dispose of the Plaintiffs suit and the Counterclaim

114. in view of the above this court cannot declare the 1st Defendant an innocent purchaser without investigating his behaviour against the principles laid out in the case of **Katende Vs. Haridar & Company Ltd (2008) EA** as relates to the auction. This will essentially necessitate the court going into the details of the process that led to the auction and the 1st Defendants involvement which I have already shown I'm not permitted by statute.

115. The court has already made a finding that the plaintiff does not hold good title to the suit property. This therefore means the Plaintiffs suit is dismissed as against all the Defendants. The counterclaim claim is best struck off and which affords another future opportunity at filing a new suit after a determination on the legality of the auction pursuant to which he was registered as the registered proprietor.

116. The court has noted the invitation by the 3rd Defendant that the suit property should revert to Mr. Bockle. As far as I'm concerned this was not a prayer for consideration by the court and it can only be resolved after the findings on the legality or otherwise of the process that led to the auction and transfer of the property to the 1st Defendant.

117. The upshot of the foregoing is that the Plaintiff has failed to prove her claim over the suit property on a balance of probabilities. The following orders issue to dispose of both the suit and the Counterclaim;-

- 1) The Plaintiffs suit against the Defendants is hereby dismissed with costs to the Defendants.
- 2) The 1st Defendants counterclaim is struck out with no orders as to costs
- 3) Leave to appeal this decision is hereby granted if required.

118. Orders accordingly

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA
CTS

THIS 27TH DAY OF FEBRUARY 2025.

.....

HON. A.E DENA

JUDGE

27/2/2025