



**Onalo v Omollo & 6 others (Environment & Land Case 111 of 2013)
[2024] KEELC 6188 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 111 OF 2013
E ASATI, J
SEPTEMBER 19, 2024**

BETWEEN

PAUL ODUOL ONALO PLAINTIFF

AND

DUNCAN OCHIENG OMOLLO 1ST DEFENDANT

PAUL ODHIAMBO OMOLLO 2ND DEFENDANT

HEZBON OTIENO OSAWO 3RD DEFENDANT

JOHN ISWA ALIAS JOHN BIYA MUYESU 4TH DEFENDANT

HEDDA AKINYI OLOO 5TH DEFENDANT

PORTASH AKIDA OLOO 6TH DEFENDANT

HON ATTORNEY GENERAL 7TH DEFENDANT

JUDGMENT

Introductions

1. Vide the Further Amended Amended Plaintiff dated August 2, 2016, the Plaintiff, Paul Oduol Onalo, sued the seven (7) Defendants named therein. The Plaintiff claimed that he was at all material times the owner of land parcels known as Kisumu Nyalenda “B”/1097, Kisumu/Nyalenda “B”/1098 and a portion of Kisumu Nyalenda ‘B’/634 measuring 0.38 Ha. His complaint was that the Defendants without any authority, consent and/or permission from him caused all the three land parcels to be consolidated into land parcel No. Kisumu/Nyalenda ‘B’/634 which has been further re-surveyed and sub-divided hence creating new parcel numbers Kisumu/Nyalenda “B”/2478, registered in the names of the 1st and 2nd Defendants jointly, No. Kisumu/Nyalenda “B”/2479 in the name of the 4th Defendant



and Kisumu/Nyalenda “B”/2480 transferred to the 6th and 7th defendants which transfer was illegal, null and void.

He therefore sought for orders of: -

- a. permanent injunction restraining the Defendants jointly and severally, their agents and/or servants from alienating, trespassing on, transferring and/or in any other manner dealing adversely with land parcels known as Kisumu Nyalenda ‘B’/2478 and 2480 respectively (original numbers Kisumu/Nyalenda “B”/1097 and 1098 and Kisumu/Nyalenda/“B”/634.)
 - b. a declaration that the merger of land parcel number Kisumu/Nyalenda “B”/1097 and 1098 with Kisumu/Nyalenda ‘B’/634 was irregular and null and void.
 - c. a declaration that the Plaintiff is the rightful and legal owner of land parcels known as Kisumu/Nyalenda ‘B’/2478 and 2480 respectively (original number Kisumu Nyalenda ‘B’ 1097 and 1098 and a portion of Kisumu/Nyalenda ‘B’/634 measuring 0.38 Ha)
 - d. an order of cancellation of title to land parcel known as Kisumu/Nyalenda ‘B’/2478 purportedly registered in the names of the 1st and 2nd defendant.
 - e. an order of cancellation of title to land parcel known as Kisumu/ Nyalenda ‘B’/2480 purportedly registered in the names of the 5th and 6th defendants.
 - f. an order compelling the 7th Defendant to effect the transfer and registration of land parcel known as Kisumu/Nyalenda ‘B’/2478 and 2480 respectively (original numbers Kisumu/Nyalenda “B”/1097 and 1098 and a portion of Kisumu/Nyalenda ‘B’/634 measuring 0.38 Ha in the name of the plaintiff.
 - g. general damages for breach of contract as against the 1st, 2nd and 3rd defendants.
 - h. mesne profits.
 - i. in the alternative an order that the 1st and 2nd defendants refund the purchase price paid to them by the plaintiff for the land parcel numbers Kisumu/Nyalenda ‘B’/1097, 1098 and the portion of Kisumu/Nyalenda B’/634 measuring 0.34 Ha. (Current numbers Kisumu/Nyalenda ‘B’/2478 and 2480 at current market price of Kenya shillings four million four hundred thousand only (Kshs.4,400,000/=) together with interest of 20% per annum from the date of the purchase until payment in full.
 - j. costs of the suit
 - k. any other relief that the Honourable court may deem fit and just to grant.
2. The 1st and 2nd Defendants filed Amended 1st and 2nd Defendants’ Statement of Defence dated 29th September 2016 in response to the Plaintiff’s claim. They denied the Plaintiff’s claim and contended that the process, steps and procedures of the Plaintiff’s claim to parcels of land known as Kisumu/Nyalenda ‘B’/1097, 1098 and a portion of 634 were irregular, flawed, tainted with illegalities and unlawfulness to the extent to which no good title or lawful title over the said parcels of land passed to the Plaintiff. They denied the particulars of fraud pleaded in the Further Amended Amended Plaintiff and urged that the suit be dismissed with costs.
 3. The 5th and 6th Defendants filed Amended Statement of Defence and Counter-claim dated 29th September 2016. The 5th and 6th Defendants denied the Plaintiff’s claim and averred that they are the current registered proprietors of all that parcel of land known as Kisumu/ Nyalenda ‘B’/2480 which is adjacent to the parcels of land which are the subject matter herein but not part of what the plaintiff



lays claim over. The 5th and 6th Defendants denied service of any court order prohibiting registration of the land in their name as alleged by the Plaintiff and further denied all particulars of illegality set out in paragraph 11 of the Further Amended Amended Plaintiff.

4. A Statement of Defence dated 22nd October 2013 was filed on behalf of the 7th Defendant in response to the plaintiff's claim. The 7th Defendant denied the Plaintiff's claim and averred that parcel No. Kisumu/ Nyalenda 'B'/634 does not exist as the said parcel of land had been sub-divided. That if any transfer of land was done the same and subsequent registration were done while observing all the rules of procedure and the law.
5. The case against the 3rd Defendant was withdrawn vide Notice of withdrawal of suit dated 17th February 2015 and filed in court on 19th February 2015.
6. The 4th Defendant neither entered appearance, filed Defence nor participated in the proceedings despite being served with court process.

Summary of the Evidence

7. The Plaintiff's evidence comprised of his testimony and the documents he produced as exhibits and the testimony of 2 witnesses.
8. The Plaintiff testified that on 16/3/2009 he purchased 2 properties which are Kisumu/ Nyalenda 'B'/1097 and 1098. That he purchased Kisumu/Nyalenda'B'/1097 measuring 0.07 Ha at Kshs.1,000,000/= which he paid in full. That the witnesses were Paul Otieno Omollo and Duncan Ochieng Omollo. That he bought parcel No. 1098 measuring 0.13 Ha at Kshs.1.2 million. That the vendor was Hesbon Otieno Osawo, deceased. That he got title for land parcel No. Kisumu/Nyalenda 'B'/1097. That he was approached by Paul Odhiambo Omollo and Duncan Ochieng Omollo (the 2nd and 1st Defendants herein) for sale of Kisumu/Nyalenda 'B'/634. That he bought a portion measuring 0.38Ha of the land Ksh 2,200,000/= of which he paid Kshs.1,770,000/= and the balance was to be paid within 90 days' subject to completion of the sub-division and transfer process. That when he was buying parcel No. Kisumu/Nyalenda B/634, the property had not been registered. That through the Land Tribunal process in Kisumu East and West Land Disputes Tribunal case No. 3 of 2010 the agreement was that John Iswa be given 37 paces by 20 paces in parcel No. 634, the whole land be re-surveyed and the remaining part be retained by Duncan Ochieng Omollo. That thereafter a resurvey was done amalgamating parcel Numbers 1097, 1098 and 634. That a further sub-division was done creating the 3 parcels namely; No.s Kisumu/Nyalenda 'B'/2478, 2479 and 2480. That under the new- sub-division, the position of parcel No.s 1097 and 1098 fell under parcel No. 2480 while parcel No. Kisumu/Nyalenda B/ 634 fell under number Kisumu/Nyalenda B/2478. That parcel number Kisumu/Nyalenda B/2478 is in the names of Duncan Ochieng Omolo and Paul Odhiambo Omolo.
9. That parcel No. 2480 was subsequently registered in the names of the 5th and 6th Defendants in spite of the Land Registrar being served with a court order dated 14/5/2013.
10. The Plaintiff testified further that he had taken possession of the lands on the date of the agreements. That he fenced parcel No. 1097 and 1098 with a stone wall fence and has a gate up to now. That he engaged a valuer whose valuation report shows Kshs.4,000,000/= and that parcel No. 2480 was valued at Kshs.19,000,000/=. He prayed that the case of the 5th and 6th Defendants be dismissed as they got the transfer after they had been served with the court order.
11. On cross examination by Counsel for the 1st, 2nd, 5th and 6th Defendants, the Plaintiff stated that the acreage of Kisumu/Nyalenda 'B'/634 was 0.56 Ha. That parcel No. 1078 and 1079 have no mother title, that he did not have the adjudication register for the said parcels. That at the time of purchase



parcel Numbers 1097, 1098 and 634 were completely different. That he never dealt with Dismas and Margret who were registered owners but he dealt with Paul and Duncan (1st and 2nd Defendants). That this was in the year 2009. That the people he dealt with did not have Certificate of Grant. That parcel number 634 was initially in the name of John Iswa. That the outcome of a matter that was in court was to sub-divide parcel number 634 so that John Iswa gets his part and the other parties get their portions. That the other parties were Duncan and Paul. That the decision of the court was implemented wrongly by amalgamating parcel No.s 1097, 1098 and 634. That he did not have the transfer form for parcel No.s 1097 and 1098 or the receipts for the transaction. That it was Hezbon Otieno Osawo, deceased, who sold him land parcel known as Kisumu/Nyalenda 'B'/1098.

12. PW2 was a Court Process Server by the name of James Otieno Okudo. He testified that on 14/5/2013 he received a court order from Mr. Onyango P.D. Advocates for service upon the Land Registrar Kisumu. That he served the order upon one George who refused to sign saying that he was not a party to the suit. That thereafter he prepared an Affidavit of Service. He produced the Affidavit of Service and the order as exhibits P.34 and P.35.
13. On cross examination he stated that the person he served with the court order was sitting in the Land Registrar's office and that the Land Registrar was known as George Gachihe.
14. PW3 was one Nobert Kisanya a property valuer. He testified that he did valuation of property known as Kisumu/Nyalenda 'B'/2480 and Kisumu/Nyalenda 'B'/2478. This witness could not produce the report as he was not the maker. In his place one Pius Isanya Khaoya testified and produced the valuation report.
15. The evidence presented by the defence comprised of the testimonies of the 1st, 6th Defendants and the Land Registrar Kisumu, who testified on behalf of the 7th Defendant as DW3, and the documents they produced as exhibits. The 1st Defendant testified as DW1. He adopted the contents of his witness statement filed in court on 18/12/2013 as his evidence in chief.
16. He produced documents as exhibits. He stated that the 5th and 6th Defendants were the purchasers of a parcel of land known as Kisumu/ Nyalenda 'B'/2480. That the parcel was a result of the sub-division of Nyalenda 'B'/634. That the sub-division was done by District Surveyor under a court order in Kisumu Land Case No. 3 of 2010. That the Plaintiff was involved in the land by the 3rd Defendant. That they involved him in registering parcel No. 1079 which was an illegality.
17. On cross examination by Counsel for the 7th Defendant, he stated that parcel No. 634 was registered in the name of John Iswa the 4th Defendant who had bought the land from Dismas Ondati. That the court ordered sub-division of land parcel No. Kisumu/Nyalenda 'B'/634 which sub-division produced Kisumu/Nyalenda 'B'/2478, 2479 and 2480.
18. On cross examination by Mr. P.D. Onyango Advocate for the Plaintiff, DW1 stated that the land sale agreement shows that the sellers were himself and the 2nd Defendant selling the land parcel No. Kisumu/ Nyalenda 'B'/1079 to the Plaintiff. That land parcel No. Kisumu/Nyalenda 'B'/1097 was not in existence. That the Plaintiff's agreement in respect of land parcel No. Kisumu/Nyalenda 'B'/634 the sellers were the 1st and 2nd Defendants. That they transferred the land to the 5th and 6th Defendant on 20/6/2013.
19. DW2 was the 6th Defendant. He relied on the contents of his witness statement which was adopted as his evidence in chief. He narrated how him and his wife, the 5th Defendant, bought land parcel No. Kisumu/Nyalenda 'B'/2480 from the 1st and 2nd Defendants.



20. On cross examination by Counsel for the 7th Defendant he stated that he conducted search and saw the original title before buying the land.
21. And on cross- examination by Counsel for the Plaintiff, DW2 stated that he did the search and it showed that the land belonged to the people who were selling. That before buying the land, he visited it and found an old building which the sellers told him was put up by a person called Iswa. That they did not tell him who put up the gate.
22. DW3 was Nicholas Obiero, the Land Registrar Kisumu. He testified that land parcel number Kisumu/Nyalenda/'B'/634 was adjudicated in 1981 to one John Iswa, the 4th Defendant and registered in his name. That in July 1990 John Iswa sub-divided the land vide consent to sub-divide dated 27/7/1990. That the land was sub-divided into parcel No. Kisumu/Nyalenda 'B'/1097 and 1098 and the sub-division registered on 1/8/1990. That parcel No. Kisumu/Nyalenda'B'/1098 was transferred to one Richard Shikuku on 15/8/1990 and No. Kisumu/Nyalenda 'B'/1097 remained in the name of John Iswa.
23. That on 27th August 1997 one Margaret Ajwang Ochilo took to the Land registry documents from Kisumu H.C Succ. Cause No. 213 of 1990 for transfer on transmission in respect of the estate of Dismas Ondati Omollo. That the Land Registry was unable to register the documents because the deceased, Dismas Ondati had never been an owner of parcel number Kisumu/Nyalenda 'B'/ 634 and secondly because the said parcel did not exist as at that time as it had already been sub-divided. That later the Registry received a court order that the land parcel number Kisumu/Nyalenda 'B'/634 be sub-divided; John Iswa be given 37 paces by 20 paces and the remainder of the land be given to the estate of Dismas Ondati Omollo. That the land was never sub-divided beyond number 1097 in the name of John and 1098 in the name of Richard Shikuku.
24. On Cross- examination by Counsel for the Plaintiff, DW3 stated that the size of land parcel number 634 was 0.47 Ha. That there were attempts to sub-divide the land further which attempts were rejected. That he had no evidence that parcel Nos 1097 and 1098 were ever revoked.
25. On further cross-examination by Counsel for the 1st, 2nd, 5th and 6th Defendants, DW3 stated that the decision of the Tribunal was in favour of the claimants; the Omollos. He further stated that there was no evidence that parcel number Kisumu/Nyalenda'B'/2478 and 2480 were ever created and registered. That there is no evidence in the Lands Office that parcel numbers Kisumu/Nyalenda 'B'/ 2478 and 2480 were a result of sub-division of parcel numbers 1097 and 1098. That he did not have documents to show that Paul Otieno Onalo has a claim to the suit land or the resultant parcels.

Submissions

26. Written submissions dated 15th February 2024 were filed on behalf of the Plaintiff by P.D. Onyango & Co. Advocates. Counsel framed the issues for determination in the case to be.
 - a. Whether or not the Plaintiff purchased land parcel numbers Kisumu/Nyalenda 'B'/1097, 1098 and a portion of Kisumu/Nyalenda 'B'/634 from the 1st and 2nd defendants.
 - b. Whether or not land parcel number Kisumu/Nyalenda 'B'/1097 was transferred into the plaintiff's name.
 - c. Whether or not the defendants in carrying out he resurvey and sub-division of the land parcel number Kisumu/Nyalenda 'B'/634 interfered with the land parcel Number Kisumu/Nyalenda 'B'/1097 and 1098 and a portion of Kisumu/Nyalenda 'B'/634 which had been purchased by the plaintiffs.



- d. What are the reliefs the plaintiff is entitled to
- e. Who should bear the costs of the case.
27. On whether or not the Plaintiff purchased land parcel No.s Kisumu/Nyalenda 'B'/1097 and 1098 and a portion of land parcel No.Kisumu/Nyalenda 'B'/634 from the 1st and 2nd Defendants Counsel referred the court to the exhibits produced by the Plaintiff and Counsel submitted that the Defendants did not dispute that they sold the land parcel to the Plaintiff. That the total money received by the 1st and 2nd Defendants was Kshs.4,400,000/=. That the Plaintiff bought the said land parcel and took occupation including putting up a fence and a gate which evidence was confirmed by the 6th Defendant. Counsel relied on the provisions of Section 24 (a) of the Land Registration Act to the effect that the registration of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Counsel cited the cases of Joseph Kagunya – vrs- Boniface K. Mulli & 3 others (2018)eKLR and Republic vs City Council of Nairobi & 3 others [2014]eKLR to the effect that once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was outrightly illegal or that it was against public interest. Counsel submitted further that with regard to the land parcel that had already been transferred in favour of the Plaintiff and that the Plaintiff having been put in possession of the said land, there is a constructive trust that has been created which entitles him to the said land parcel and that the 1st and 2nd Defendants are not allowed to renege on the agreement and that they should be ordered to transfer to the plaintiff the parcels of land that he bought. Relying on the case of William Kipsoi Sigei –vs- Kipkoech Arusei & another (2019) eKLR, Counsel submitted that the Plaintiff who bought the parcels of land, paid the full purchase price for them and was put in possession by the 1st and 2nd Defendants is entitled to the relief sought.
28. On whether or not the Defendants' carrying out the resurvey and sub-division of the land parcel No. Kisumu/Nyalenda 'B'/634 interfered with land parcel numbers Kisumu/Nyalenda 'B'/1097 and 1098 which had been purchased by the Plaintiff.
29. Counsel submitted that the 1st and 2nd Defendants and the Plaintiff produced evidence that land parcel number Kisumu/Nyalenda 'B'/634 was sub-divided into 3 portions namely; parcel numbers Kisumu/Nyalenda 'B'/2478, 2479 and 2480 though this was denied by the Land Registrar. That land parcels No. Kisumu/Nyalenda 'B'/ 2480 was now occupying the place of parcel number Kisumu/Nyalenda 'B'/1097 and 1098. That this has rendered land parcel number Kisumu/Nyalenda 'B'/1097 obsolete, although the Plaintiff is still holding the original title deed which has not been revoked by the court or the Lands office. That the original size of land parcel number Kisumu/Nyalenda 'B'/634 was 0.47 Ha. but that the size was later on increase by the order of the surveyor. Counsel submitted that the Defendants in effecting the order of the Tribunal illegally extended the land parcel number Kisumu/Nyalenda 'B'/634 till it swallowed land parcels Kisumu/Nyalenda 'B'/1097 and 1098 which had been bought by the Plaintiff and were existing independently that the transfer of the land into the names of the 5th and 6th Defendants was illegal and unlawful and should be nullified. That these were transactions affecting Agricultural Land and transaction that were controlled and under the provisions of section 6(1) of the Land Control Act were void for all purposes unless the Land Control Board for the land Control area or division in which the land is situated gave its consent in respect of that transaction in accordance with the Act.
30. Counsel submitted further that the transfer in favour of the 5th and 6th Defendants was wrong as it was done in total disregard of the court orders prohibiting the transfer and that the 5th and 6th Defendants



cannot claim to be innocent purchasers for value. That the 6th Defendant confirmed that he went to the ground and found some structures including the fence which had been put up by the Plaintiff but still went ahead and purchased the land. That the court order barring the 1st and 2nd Defendants was issued on 14th May 2013 and served upon the 1st and 2nd Defendants and the Land Registrar on 16th May 2013 but that the land was transferred in favour of the 5th and 6th Defendants on 20th June 2023. That the said transfer was done illegally and should be revoked or annulled.

31. On what relief the Plaintiff is entitled to, Counsel submitted that since the Plaintiff bought title to and took occupation of land parcel known as Kisumu/Nyalenda/ 'B'/1097 the plaintiff is entitled to a declaration that he is the rightful owner of the said parcel of land and an order for cancellation of the new numbers that is Kisumu/Nyalenda 'B'/2478, 2479 and 2480. That the Plaintiff is also entitled to a permanent order of injunction barring the Defendants from dealing with the said land parcel in a manner that is adverse to the plaintiff's interest. That the Defendants be compelled to have the bought portion of land parcel No. Ksm/Nyalenda/'B'/634 transferred into the Plaintiff's name. That the plaintiff be awarded mesne profits since there has been interference with the Plaintiff's use and occupation of the suit land That there be an order cancelling sub-division and registration of parcel number Kisumu/nyalena'B'/2478 and 2480.
32. That in the alternative the Plaintiff be refunded all money he paid to the 1st and 2nd Defendants at the current market price as per the valuation report together with interest at 20% from the year 2010 till payment in full and costs of the suit.
33. On the counter-claim by the 5th and 6th Defendants, Counsel for the Plaintiff submitted that the 5th and 6th Defendants having not followed the proper and laid down procedure in acquiring the land parcel number Kisumu/Nyalenda/2480 their counter-claim should be dismissed with costs.
34. Counsel for the 1st, 2nd, 5th and 6th Defendant's framed 6 issues for determination namely: -
 - a. Who was/is the owner of L.R. No.Kisumu/Nyalenda B/634?
 - b. Was L.R No. Kisumu/Nyalenda 'B'/634 ever sub-divided and if so by who and what were the resultant titles?
 - c. Did Land parcel numbers Kisumu/Nyalenda 'B'/1097 and 1098 that the Plaintiff alleges to have bought ever exist?
 - d. Did the 5th and 6th Defendants acquire title to land parcels Kisumu/Nyalenda 'B'/2478 and 2480?
 - e. Based on the evidence by Mr. Nicholas Obiero, the County Lands Registrar what orders can the court make?
 - f. Who bears the cost of the suit and the counter-claim by the 5th and 6th Defendants?
35. Relying on the case of James Muniu Mucheru -vs- National Bank of Kenya Ltd (2019) eKLR, Counsel submitted that the Plaintiff shoulders the burden of proof on the main case while the 5th and 6th Defendants shoulder the burden of proof for their counter-claim.
36. On the 1st issue of who was the owner of land parcel No. Kisumu/Nyalenda 'B'/634, Counsel submitted that the evidence of Nicholas Obiero settles the question of ownership of the land. Counsel submitted that before adjudication the parcel of land was owned by Dismas Wandati Omollo who sold a portion thereof to John Biya Muyesu. That during adjudication John Iswa alias John Biya Muyesu had the entire parcel of the land registered in his names and he purported to have sub-divided it into two: Kisumu/Nyalenda 'B'/1097 and 1098. That he transferred parcel No. Kisumu/Nyalenda



- 'B'/1098 in favour of Mr. Richard Shikuku. That before the process initiated by Mr. John Iswa could be completed, Margaret Ajwang Ojilo who was the administratrix of the estate of Dismas Wandati Omollo applied to be registered as owner of land parcel No. Kisumu/Nyalenda 'B'/634 by way of transmission. The application was rejected because Dismas Wandati had never been registered as owner of the parcel of land.
37. That a Tribunal case instituted by the 1st and 2nd defendants was allowed wherein the Tribunal directed that L.R No. Kisumu/Nyalenda 'B'/634 be sub-divided such that the Respondent, John Iswa, gets 37 paces by 20 paces and the rest of the land be registered in the name of the claimants.
 38. That according to the 7th defendant, the decision of the Tribunal was yet to be implemented. That Mr. Nicholas Obiero conceded that implementation of the decision of the Tribunal would result in the sub-division of L.R No. Kisumu/Nyalenda 'B'/634 into 2 so that one portion goes o John Iswa alias John Biya Muyesu and the remaining portion goes to the 1st and 2nd Defendants.
 39. That the titles claimed by the Plaintiff namely No. Kisumu/Nyalenda 'B'/1097 and 1098 have no foundation, they are not based on any documents and/or instruments recognized by the law and/or evidence. That the title claimed by the 5th and 6th defendants are as a result of implementation of the decision of the Tribunal as adopted by court.
 40. That accordingly notwithstanding the contention by Mr. Nicholas Obiero, the documents availed by the 1st and 2nd Defendants indicate that there had been a sub-division of the said parcel of land into 3 parcels. That the documents speak for themselves. That oral or parol evidence cannot be admitted to contradict the contents of the substance of the document. Counsel relied on the case of Jacobs -vs- Batavio and General Plantations Limited (1924) Ch D 287 at page 295 to support submission and the case of Prudential Assurance Company of Kenya Limited -Vr- Sukhivender Singh Jutney and Another. That the only legitimate sub-division was pursuant to the decision of the Kisumu East West Land Disputes Tribunal and the order in Kisumu CMC Land Case No. 3 of 2010 which gave rise to three parcels namely; Kisumu/Nyalenda 'B'/2478, 2479 and 2480. That these titles did not originate from parcel Nos 1097 or 1098 hence the plaintiff cannot get an order for the transfer of the said titles in his favour as he did not purchase or in any other way acquire them.
 41. That there is no evidence that the 1st and 2nd Defendants ever had title to the said parcels of land that they could transfer to the Plaintiff. That the 1st and 2nd Defendants' testimony was that the creation of document for L. R No. Kisumu/Nyalenda 'B'/ 1097 and 1098 was the result of the works, machinations and craftiness of their uncle a Mr. Hezbon Otieno Osawo, deceased and the Plaintiff and that they were not privy to the same.
 42. That there is no basis for an award of damages as mesne profits or a refund by the 1st and 2nd Defendants.
 43. On what order the court should make, Counsel submitted that the duty of the court is to do substantive justice. That the claim by the 5th and 6th Defendant is sound based on the circumstances of the case and the doctrines of equity. Counsel relied on the case of Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR and Article 10(2) (b) of *the Constitution* to support the submission.
 44. That no damages are awardable to the Plaintiff for breach of contract. Reliance was placed on the case of Kenya Tourism Development Corporation –vs- Sundowner Lodge Ltd [2018] eKLR.
 45. Counsel urged the court to find in favor of the 1st, 2nd, 5th and 6th Defendants on the basis of the evidence on record.
 46. Written submission dated 19th March 2023 were filed by Callen Masaka, Principal Litigation Counsel, on behalf of the 7th defendant. Counsel submitted that the Land Registrar who testified as an expert



and custodian of land ownership documents confirmed that land reference No. Kisumu/Nyalenda 'B'/634 was subject of a dispute at adjudication. That the Land Registrar and surveyor were ordered to carry out survey in compliance to orders in Kisumu CMC Land Case No. 3 of 2010 which adopted the findings of the Tribunal. That the Land Registrar produced documents showing that the original parcel number Kisumu/Nyalenda 'B'/634 was sub-divided into two pieces registered as No. Kisumu/Nyalenda 'B'/1097 in the name of the 4th Defendant and No. Kisumu/Nyalenda 'B'/ 1098 in the name of one Richard Shikuku and that the records remain so to date. That allegation of existence of parcel No. Kisumu/Nyalenda 'B'/ 2478, 2479 and 2480 is only between the parties. That the official records at the lands office do not have such.

47. Relying on the provisions of sections 7 and 9 of the *Land Registration Act*, Counsel submitted that the duty to keep and maintain register of any document vests with the Land Registrar. Counsel relied on the case of *Mwangi James Njehia and another -vs- Simon Kamau Civil Appeal No. 177 of 2019* to support the submissions. Counsel submitted further that clearly the suit land belongs to the 4th Defendant and one Richard Shikuku. That parcel No. Kisumu/Nyalenda 'B'/1097 belongs to the 4th Defendant as there has been no substitution the suit abated and as such the parcel cannot be the subject of submissions or judgment. That Richard Shikuku who is the owner of parcel No. Kisumu/Nyalenda 'B'/1098 was not made a party in the suit hence no orders can be issued against him. Counsel urged the court to find no merit in the suit and the counter-claim and to dismiss the same with costs.

Issues for determination.

48. From the pleadings filed, evidence adduced and submissions placed before the court and particularly the issues framed by the parties in their respective submissions, the following are the issues that emerge for determination herein:
- a. Whether or not the Plaintiff entered into land sale agreement(s) with the 1st and 2nd Defendants for the purchase of land parcel No.s Kisumu/Nyalenda 'B'/1097 and 1098 and a portion of Kisumu/Nyalenda 'B'/634.
 - b. Whether or not the 1st and 2nd Defendants passed a good title to the Plaintiff in respect of land parcel known as Kisumu/Nyalenda 'B'/1097.
 - c. Whether or not the plaintiff is entitled to transfer of land parcel known as Kisumu/Nyalenda 'B'/1098 by the 1st and 2nd Defendants.
 - d. Whether or not the Defendants resurveyed land parcel number Kisumu/Nyalenda 'B'/634 thereby amalgamating land parcel numbers Kisumu/Nyalenda 'B'/1097 and 1098 into No. Kisumu/Nyalenda 'B'/634.
 - e. Whether or not the Plaintiff is entitled to refund of the purchase price by the 1st and 2nd Defendants as an alternative remedy.
 - f. Whether or not the Plaintiff is entitled to the relief sought in the Further Amended Amended Plaintiff.
 - g. Whether or not land parcel No. Kisumu/Nyalenda 'B'/ 634 was the subject of litigation and whether the outcome thereof was implemented.
 - h. Whether or not transfer of land parcel No Kisumu/Nyalenda 'B'/2480 to the 5th and 6th Defendants was lawful.
 - i. Whether the 5th and 6th Defendants are entitled to the relief sought in their counter-claim.



- j. Who bears the costs of the suit and of the counter-claim.

Analysis and determination.

49. Whether or not the plaintiff entered into a land sale agreement with the 1st and 2nd Defendants for the purchase of land parcel numbers Kisumu/Nyalenda 'B'/1097, 1098 and apportion of 634.
50. The plaintiff pleaded in paragraph 4 of the Further Amended Amended Plaintiff that on 28th January 2010 he purchased a portion of land parcel number Kisumu/Nyalenda 'B'/634 measuring 0.38 Ha. from the 1st and 2nd Defendants at Kshs.2,200,000/=, that on 10th March 2009 he purchased land parcel number Kisumu/Nyalenda 'B'/1097 from the 1st and 2nd Defendants at Kshs.1,000,000/= and land parcel number Kisumu/Nyalenda 'B'/1098 from the 3rd Defendant at Kshs.1,200,000/= which he paid fully.
51. He testified and produced land sale agreements and copies of cheques and acknowledgement notes for payments made to prove the purchase.
52. In particular, the plaintiff produced the land sale agreement dated 16/3/2009 for the sale of land parcel known as Kisumu/Nyalenda 'B'/1097 measuring 0.07 Ha. According to the said agreement, the sellers were Paul Odhiambo Omollo ID No. 2173XXXX and Duncan Ochieng Omollo ID No. 2771XXXX. The buyer was the Plaintiff and the purchase price Kshs.1,000,000/=. It was stated in clause 3 of the agreement that a deposit of Kshs.500,000/= had been paid at the execution of the agreement and the balance of Kshs.500,000/= was to be paid within 90 days from the date of execution of the agreement. The agreement was witnessed by an Advocate and one Dan Otuge Ochieng ID No.2039XXXX. Though the 1st and 2nd Defendants denied involvement in the sale, the 1st Defendant in his testimony stated:
- “I know Paul Oduol Onalo. He was involved in the land because of my uncle the 3rd Defendant herein. They involved us in registering the land parcel No. 1097 in my name. This was an illegality. They claimed it was a sub-division of parcel No. KSM/Nyalwnda “B”/634. I was not involved in the sub-division.”
53. On Cross examination he stated that the land parcel No. 1097 was not in existence. That it was Hesbon Otieno who was doing all these. On the basis of the documents produced by the Plaintiff, I find that the Plaintiff entered into a land sale agreement with the 1st and 2nd Defendants for the purchase of land parcel known as Kisumu/Nyalenda 'B'/1097. The agreement was signed by the 1st and 2nd Defendants as sellers. The signatures were not denied.
54. The Plaintiff also produced a land sale agreement dated 16th March 2009 in respect of the land parcel known as Kisumu/Nyalenda 'B'/1098 measuring 0.13 Ha. According to the agreement, the seller was Hezbon Otieno Osawa of ID No.0661XXXX and the Plaintiff the purchaser. The purchase price was indicated to be Kshs.1,200,000/=. Clause 3 of the agreement stated that a deposit of Kshs.500,000/- was made at the execution of the agreement and the balance of Kshs.700,000/= was to be paid within 90 days from the date of execution of the agreement. Similarly, the agreement was witnessed by an advocate and one Dan Otuge Ochieng. It was signed by all the parties. Hezbon Otieno Osawa was the 3rd Defendant in the suit. The case against him was withdrawn wholly by the Plaintiff upon his (Hezbon's) demise.
55. On the basis of the agreement and the subsequent acknowledgement of payment and copies of cheques produced as exhibits, I find that it is not true that the Plaintiff entered into a land sale agreement for



- purchase of land parcel No. Kisumu/Nyalenda 'B'/1098 with the 1st and 2nd Defendants but with Hezbon Otieno Osawa, deceased.
56. Further the plaintiff produced as exhibit a land sale agreement dated 18th January 2010 for the sale of a portion of land comprised in title number Kisumu/Nyalenda 'B'/634. The size of the sold portion of the said parcel of land was not indicated in the agreement. As per the agreement, the sellers were Paul Odhiambo Omollo ID No. 2173XXXX1 and Duncan Ochieng Omollo ID No. 2771XXXX and the purchaser the Plaintiff herein. The purchase price was stated to be Kshs.2,200,000/= of which as stated in clause 3 of the agreement, a deposit of Kshs.1,770,000/= was paid in cash at the execution of the agreement leaving a balance of Kshs.430,000/= to be paid within 30 days from the date of execution of the agreement but subject to completion of sub-division process and transfer of the property into the purchaser's name. The agreement was witnessed by an Advocate and a number of witnesses.
 57. On the basis of the documents and evidence placed before court, I find that the Plaintiff entered into a land sale agreement with the 1st and 2nd Defendants for the sale of a portion of land parcel No. Kisumu/Nyalenda 'B'/634.
 58. The next issue for determination is whether or not the 1st and 2nd defendants passed a good title to the Plaintiff in respect of land parcel No. Kisumu/Nyalenda 'B'/1097.
 59. It was the Plaintiff's case that upon purchase of land parcel No. Kisumu/Nyalenda 'B' /1097, title was processed in his name and that as at the time of filing suit he was the registered owner thereof.
 60. The Plaintiff produced among other document a copy of title deed dated 29th April, 2009 showing that he was the registered owner of land title number Kisumu/Nyalenda 'B'/1097 measuring 0.07 Ha. He also produced a copy of register (Green card) showing that the said parcel of land was first registered in the name of one Dismas Wandati Omolo on 1/8/1990 when the register in respect thereof was opened, transmitted to one Margaret Ajwang Ochillo on 28/1/1998 and on the same date transferred to the 1st and 2nd Defendants as a gift. The said copy of register (green card) shows that the title deed was issued to the Plaintiff on 13/3/2009.
 61. The Plaintiff also produced a copy of Certificate of Official Search showing that the land was registered in the name of the 1st and 2nd Defendants. No evidence of the process followed to have the land registered in the Plaintiff's name was exhibited. There was no evidence of Application for and Consent of the Land Control Board in respect of the transfer. No evidence of payment of stamp duty and other levies necessary for transfer and registration of land and no transfer form. The 1st and 2nd Defendants denied transferring the parcel of land to the Plaintiff. The 1st Defendant who testified as DW1 denied that they ever owned title to land parcel No. Kisumu/Nyalenda 'B'/1097. He stated that creation of the documents for the said land was the work of his uncle Hezbon Osawa. And that it was an illegality. The Land Registrar who testified as DW3 denied that land parcel No. Kisumu/Nyalenda 'B' /1097 had ever been in the name of the 1st and 2nd Defendants. According to the records placed before court by DW3 the only existing land parcel No. Kisumu/ Nyalenda 'B'/1097 was the one that was created after sub-division of parcel No. Kisumu/Nyalenda 'B'/ 634 and which was still registered in the name of John Iswa. The land Registrar produced a copy of register in respect of the same title. It shows that the land parcel No. Kisumu/Nyalenda 'B'/1097 measuring 0.34Ha being a sub-division of plot No. Kisumu/Nyalenda 'B'/ 634 was registered in the name of John Iswa on 1/8/1990 when the register was opened.
 62. The court is faced with the documents produced by the Plaintiff on the one hand and the documents produced by the Land Registrar on the other hand each set telling a totally different story about the land parcel number Kisumu/Nyalenda B/1097. Counsel for the 7th Defendant referred the court to



the provisions of sections 7 and 9 of the *Land Registration Act* regarding documents of ownership of land. Section 7(1) provides:

“There shall be maintained, in each land registration unit, a land registry in which there shall be kept: -

- a. A land register in the form to be determined by the Commission,
- b. The cadastral map,
- c. Parcel files containing the instruments and documents that support subsisting entries in the land register
- d. Any plans which shall, after a date appointed by the Commission, be geo-referenced’
- e. The presentation book, in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry,
- f. An index, in alphabetical order, of the names of the proprietors and
- g. A register and file of powers of Attorney.

Section 9(1) places the mandate to maintain the documents upon the Land Registrar as follows: -

“The Registrar shall maintain the register and any document required to be kept under this Act in secure, accessible and reliable format...”

63. In *Mwangi -vs- Thiro & 2 others* (Environment & Land Case 122 of 2014) [2022] KEELC 14423 (KLR) the court observed that the Land Registrar is the custodian of all the documents in the Land Registry with power/mandate to produce the same as evidence in court or other proceedings.
64. Therefore, the court will rely on the documents that were produced by the Land Registrar as the lawfully recognized custodian thereof.
65. From the documents produced by the Land Registrar, it is clear that the 1st and 2nd Defendants had never had title to the said parcel of land.
66. The meaning of this is that the 1st and 2nd Defendants could not pass a good title to the Plaintiff as they had none. The *Nemo dat quod habet* principle is applicable. In the case *Daniel Kiprugut Maiywa – vs- Rebecca Chepkurgut Maina* [2019] the court observed that:-

“The *nemo dat* principle means that one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title receives nothing”.

67. I find that the 1st and 2nd Defendants or whoever else purported to transfer land parcel No. Kisumu/ Nyalenda B/1097 to the Plaintiff did not pass a good title to the Plaintiff. The plaintiff thence received nothing.



68. The third issue for determination is whether or not the Plaintiff is entitled to transfer of land parcel known as No. Kisumu/Nyalenda 'B'/1098 by the 1st and 2nd Defendants.
69. Having found that the Plaintiff has no sale agreement with the 1st and 2nd Defendants in respect of land parcel No. Kisumu/ Nyalenda 'B'/1098 but with the 3rd Defendant and noting that the 3rd Defendant was reported to have passed on, that no substitution was done for him and that the suit against him was wholly withdrawn by the Plaintiff; also noting that the evidence placed before court shows that it is to the 3rd Defendant the Plaintiff paid the purchase price for the land parcel No. Kisumu/ Nyalenda 'B'/ 1098, further noting the evidence of DW3, the Land Registrar, that the 3rd Defendant, deceased, had never been owner of land parcel No. Kisumu/Nyalenda 'B'/1098, that the land parcel No. Kisumu/ Nyalenda 'B'/1098 as per the official records is the one created after sub-division of land parcel No. Kisumu/Nyalenda 'B'/634 and registered in the name of one Richard Shikuku who is not a party in the suit; I find no basis to hold that the Plaintiff is entitled to transfer of land parcel No. Kisumu/ Nyalenda 'B'/1098 to him by the 1st and 2nd Defendants.
70. The next issue for determination is whether or not the Defendants resurveyed land parcel number 634 thereby consolidating the Plaintiff's land parcel numbers Kisumu/Nyalenda 'B'/1097 and 1098 into parcel number Kisumu/Nyalenda 'B'/634.
71. The plaintiff pleaded in paragraph 8 of the Further Amended Amended Plaintiff that the Defendants without any authority consent and permission from him caused all the three land parcels to wit; Kisumu/Nyalenda 'B'/1097 and 1098 Kisumu/Nyalenda 'B'/634 to be consolidated hence creating parcel number Kisumu/Nyalenda 'B'/634 which was further re-surveyed and sub-divided and new mutations created hence creating the new parcel numbers Kisumu/Nyalenda 'B'/2478, 2479 and 2480. The Plaintiff testified that during the resurvey the size of land parcel No. Kisumu/ Nyalenda 'B'/634 was irregularly increased to 0.56 from 0.47 because land parcel Nos 1097 and 1098 were consolidated into it. However, no evidence was produced of land consolidation, merger or amalgamation or the process thereof as known in law or at all. The testimony of the Land Registrar and the documents produced by him including the adjudication record show that land parcel No. Kisumu/ Nyalenda/'B'/634 as at adjudication measured approximate 0.47 Ha, that the same was sub-divided into 2 pieces measuring 0.34 Ha and 0.13 Ha which are the pieces that exist in the official records to date. There is no evidence in the official records that the size of land parcel No 634 was ever changed to 0.56. There is also no evidence from the official records of the existence of parcel Numbers Kisumu/ Nyalenda 'B'/1097 and 1098 before subdivision of or simultaneously with No. Kisumu/Nyalenda 'B'/ 634. The official records show that parcel No. Kisumu/Nyalenda 'B'/1097 in the name of John Iswa and 1098 in the name of Richard Shikuku came into being only as resultant parcels after the title for No. Kisumu/Nyalenda 'B'/634 was closed upon sub-division. I have noted that from the evidence of the Plaintiff that the purported parcel No. Kisumu/Nyalenda 'B'/1097 in the name of the 1st and 2nd Defendants and No. 1098 in the name of the 3rd Defendant were created on 1/8/1990. This was the same day the existing official titles No. 1097 and 1098 in the name of John Iswa and Richard Shikuku were created. It appears some unscrupulous character(s) was running a parallel "Land Registry" issuing fake documents with the same dates and parcel numbers as the official documents.
72. The Plaintiff claimed that the size of parcel No. 634 was irregularly increased to 0.56 from 0.47 because of the consolidation with parcel No.s 1097 and 1098. If this were to be true then the size of parcel No. 634 would have increased to 0.67Ha because the total size of parcels No. 1097 (0.07Ha) and 1098 (0.13Ha) as per the Plaintiff's land sale agreements was 0.20Ha.



73. I find no evidence that the Defendants consolidated and/or merged or amalgamated parcel numbers 1097, 1098 and 634 or any other parcels of land to create parcel No. 634 or that parcel no. 634 was re surveyed to produce Nos 2478, 2479 and 2480.
74. The next issue for determination is whether or not the Plaintiff is entitled to refund of the purchase price by the 1st and 2nd Defendants.
75. The Plaintiff sought in the alternative that an order be made that the 1st and 2nd Defendants refund the purchase price paid to them by him for the land parcel numbers 1097, 1098 and a portion of 634 measuring 0.38 Ha. (current numbers Kisumu/Nyalenda 'B'/2478 and 2480) at current market price Kenya shillings four million, four hundred thousand (Ksh 4,400,000/=) together with interest of 20% per annum from the date of purchase until payment in full.
76. The land sale agreements, the acknowledgements of payment and the copies of cheques produced as exhibits show that the 1st and 2nd Defendants were paid some money by the Plaintiff pursuant to the sale agreements. The land sale agreement dated 16/3/2009 for land parcel No. Kisumu/Nyalenda B/1097 shows that at the execution of the agreement the 1st and 2nd Defendants were paid Kshs 500,000/= a subsequent acknowledgement note dated 8th April, 2009 signed by the 1st and 2nd Defendants in the presence of the an advocate and Daniel Otuge Ochieng shows that Kshs 500,000/= in cash was paid to the 1st and 2nd Defendants being final settlement of the purchase price in respect of land title No. Kisumu/Nyalenda/ 'B'/1097. The money was paid by the plaintiff who also signed the acknowledgement note.
77. The land sale agreement dated 28th January 2010 for the purchase of a portion of land parcel No. Kisumu/Nyalenda/ 'B'/634 shows that on the date of execution of the agreement, the 1st and 2nd Defendants received Kshs 1,770,000 from the Plaintiff leaving a balance of Kshs 430,000/= No evidence was produced for payment of the balance of Kshs 430,000/= The total amount received by the 1st and 2nd Defendants from the Plaintiff was therefore Kshs. 2,770,000/-. The other payments made were to Hezbon Otieno Osawo amounting to Kshs 1,200,000/= as follows; on the date of execution of the agreement dated 16/3/2009 Kshs 500,000/=: vide acknowledgement note dated 8/4/2009- Kshs 600,000/= and vide the acknowledgement note dated 28th March 2009, Kshs 100,000/= to make a total of the full agreed purchase price of Kshs 1,200,000/=.
78. The Plaintiff is therefore entitled to the money paid namely; Kshs 2,770,000/= from the 1st and 2nd Defendants.
79. The next issue for determination is Whether or not the plaintiff is entitled to the relief sought.
80. On the basis of the findings herein the Plaintiff is entitled to the alternative prayer for refund of the purchase price paid to the 1st and 2nd Defendants and interest thereon.
81. The next issue for determination is whether or not land parcel No. Kisumu/Nyalenda 'B'/634 was the subject of litigation and whether the outcome of the litigation was implemented.
82. It was the case of the 1st, 2nd, 5th and 6th Defendants that land parcel No. Kisumu/Nyalenda B/634 was the subject of litigation particularly at the Land Disputes Tribunal whose decision was adopted by the CM's Court in Kisumu Land case No. 3 of 2010 as a judgment of the court. That the subsequent subdivision of the said parcel of land was pursuant to the said court decision. The Defendants produced documents as exhibits to prove this.
83. While it was submitted on behalf of the 1st, 2nd, 5th and 6th Defendants that land parcel No. 634 was subdivided in compliance of the decree in case No. 3 of 2010, this position was not supported by the



official records produced by the Land Registrar. The Land Registrar testified that there was no evidence in the official records to show that the decision of the court was ever implemented. That the sub-division of Land parcel No 634 to create 2478, 2479 and 2480 was unknown in the official records. That the land was sub-divided in 1990 and since then no sub-division has been done.

84. I find that the parcel of land No. 634 was a subject of litigation but the outcome of that litigation has never been implemented.
85. The next issue for determination is whether or not transfer of land parcel No Kisumu/Nyalenda/ 'B'/2480 to the 5th and 6th Defendants was lawful.
86. The case of the 5th and 6th Defendants is that they are the current owners of Land parcel No. Kisumu/Nyalenda B/2480 having acquired it at a valuable consideration. That the land was originally comprised in No. Kisumu/Nyalenda B/634 which was sub-divided pursuant to a court order issued in Kisumu chief magistrate's court case no. 3 of 2010 Paul O. Omollo & another vs John Iswa and another. That at the time of purchase they conducted search and established that the land was registered in the names of the sellers. The search dated 15/3/2013 was produced as exhibit. It showed that as at 15/3/2013, the land parcel No. Kisumu/Nyalenda B/ 2480 was a subdivision of No. Kisumu/Nyalenda B/ 634, it measured 0.30 Ha and was registered in the names of the 1st and 2nd Defendants.
87. That subsequently they entered into a land sale agreement with the 1st and 2nd Defendants for the purchase of the land. They produced land sale agreement dated 15/3/2023 as exhibit. It was in respect of land parcel known as Kisumu/Nyalenda B/ 2480 at an agreed purchase price of Kshs.4,900,000. The sellers were the 1st and 2nd Defendants herein. Another relevant document exhibited by the 5th and 6th Defendants was Stamp Duty Declaration Assessment & Pay-in-Slip which show that stamp duty for the transfer of the land in favour of the 5th and 6th Defendants was Kshs.14, 040/=. That the declared value of the land was Kshs.700,000/=. The 5th and 6th Defendants also produced a title deed in respect of the said parcel of land in their names.
88. The other documents produced by the Defendants are those that transferred the land in favour of the 1st and 2nd Defendants. The documents were signed by the court on behalf of John Iswa who was the first registered owner of title number Kisumu/Nyalenda B/634 and one of the judgement debtors in case no 3 of 2013.
89. The 1st and 2nd Defendants admit selling and transferring the land to the 5th and 6th Defendants.
90. Up to this point and relying on the documents exhibited by and on behalf of the 5th and 6th Defendants the court would have held that the 5th and 6th Defendants did due diligence and that the land was lawfully transferred to them.
91. However, the evidence of DW3, was that the transaction of sale and transfer between 1st and 2nd Defendants and the 5th and 6th Defendants and the subsequent registration of the suit land in favour of the 5th and 6th Defendants was not reflected in the official records in the Land Registry. That according to the official records, land parcel No. Kisumu/Nyalenda B/2480 does not exist. That there is no evidence that parcel No. 634 has ever been subdivided into 2478, 2479 and 2480 or that the court order in No 3 of 2010 has ever been implemented.
92. That the official records show that the land still belongs to John Iswa and Richard Shikuku who are holders of parcel numbers 1097 and 1098 respectively.



93. In view of the evidence of the Land Registrar as the custodian of the official records I find that the transfer of the land to the 5th and 6th Defendants was unlawful as it is not registered and does not reflect in the official land records.
94. The next issue for determination is whether or not the 5th and 6th Defendants are entitled to the prayers in their Counter-claim.
95. The prayers sought by the 5th and 6th Defendants in their Counter-claim are: -
- a. the plaintiff's suit against both/either of them be dismissed with costs
 - b. an order of permanent injunction be issued restraining the Plaintiff (Defendant to the counter-claim) by himself, his agents, servant, employees and/or any person(s) claiming his authority from entering encroaching, ingress, remaining on/in/over carrying any activities actions, developments erections, constructions, or in any other way/manner interfering with the proprietary rights of the 5th and 6th Defendants (Plaintiff in the counter-claim) over in/on and in respect of all that parcel of land known as Kisumu/ Nyalenda 'B'/2480
 - c. an order for eviction of the Plaintiff (Defendant in the court-claim) by himself, his agent, servant employees and/or any person (s) claiming his authority from the within all that parcel of land known as Kisumu/ Nyalenda 'B'/2480.
 - d. General damages (mesne profits) for trespass and loss of use of all that parcel of land known as Kisumu/ Nyalenda 'B'/2480 at Kshs 5000/- per month with effect from July 2013 until served of the parcel of land in vacant possession or eviction of the plaintiff.
 - e. Costs of the Counter-Claim.
96. I find that the 5th and 6th Defendants are not entitled to the prayers in the Counter claim. As the suit land does not exist in the official records, granting orders of general damages, injunction and eviction will be in vain.
97. It appears the 5th and 6th Defendants like the Plaintiff fell prey to some fraudulent syndicate involving creation of fake documents parallel to the authentic documents in the land registry.
98. On the other hand, the 1st and 2nd Defendants who do not deny selling the land to the 5th and 6th Defendant may pursue implementation of the court order in case No 3 of 2010 and lawfully transfer the land to the 5th and 6th Defendants. In any event DW3 admitted that if the court order had been implemented, parcel No. 634 would have been resurveyed, 37 paces by 20 paces thereof given to John Iswa and the remainder to the 1st and 2nd Defendants.
99. The counter-claim was against the Plaintiff only. The author(s) of the documents the 5th and 6th Defendants relied on to transact; the certificate of official search, receipts, stamp duty assessment, and title deed (which documents DW3 disowned), were not joined in the Counter-claim.

Determination

100. For the foregoing reasons, I find that the Plaintiff has partially proved his case against the 1st and 2nd Defendants on a balance of probabilities. I enter judgement in his favour against the 1st and 2nd Defendants for: -
- i. Refund of the purchase price paid to the 1st and 2nd Defendants being Kshs 2,770,000.



- ii. Interest on (i) above at court rates from the date the money was paid to the 1st and 2nd Defendants to the date of full and final payment to the plaintiff.
 - iii. Costs of the suit to be paid by the 1st and 2nd Defendants.
101. I find that the Counter claim by the 5th and 6th Defendants has not been proved. The counterclaim is hereby dismissed with no order as to costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Onyango for the Plaintiff

Onsongo for the 1st, 2nd, 5th and 6th Defendants.

Juma h/b for Masaka for the 7th Defendant.

