



**Makau (Suing as the Legal Representative of the Estate of Makau Kimeu - Deceased) v Nzile; Nzile (Plaintiff to the Counterclaim); Makau & 3 others (Defendant to the Counterclaim) (Environment & Land Case 69 of 2013) [2024] KEELC 6021 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6021 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 69 OF 2013  
A NYUKURI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**ANCENT MUISYO MAKAU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MAKAU KIMEU - DECEASED) ..... PLAINTIFF**

**AND**

**MUAMBA MANG'ATI NZILE ..... DEFENDANT**

**AND**

**MUAMBA MANG'ATI NZILE ..... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**ANCENT MUISYO MAKAU ..... DEFENDANT TO THE COUNTERCLAIM**

**PATRICK NGEWA MAKAU ..... DEFENDANT TO THE COUNTERCLAIM**

**GREGORY KIMEU MAKAU ..... DEFENDANT TO THE COUNTERCLAIM**

**BONIFACE MWANGI WAKIURU .... DEFENDANT TO THE COUNTERCLAIM**

**JUDGMENT**

1. On 30<sup>th</sup> August 2013, Ancent Muisyo Makau, one of the legal representative of the estate of Makau Kimeu sued Muamba Mangati Nzile vide a plaint dated 30<sup>th</sup> August 2013 seeking the following orders;
  - a. An order of this Honourable Court removing the caution imposed by the defendant over Athi River/Athi River Block 5/92.
  - b. An order directed to the defendant to release the original tile in respect of Athi River/Athi River Block 5/92 within 30 days of the order in default the said title be declared as lost and the Land Registrar, Machakos do issue a fresh title herein.



- c. A permanent injunction restraining the defendant, his agents and/or servants from trespassing, interfering and/or carrying out any construction, building or erecting any structures, selling and or disposing off or carrying out any operations and/or any activities whatsoever or otherwise on the plaintiff's parcel of land known as Athi River/Athi River Block 5/92 situated in Machakos
  - d. Costs
2. The plaintiff averred that Makau Kimeu (deceased) was the registered owner of the parcel of land known as Athi River/Athi River Block 5/92 (suit property) and that on 30<sup>th</sup> July 2009, Gregory Kimeu Makau and Patrick Ngewa Makau purported to sell the suit property to the defendant at a consideration of Kshs. 400,000/- which the defendant settled in full and was given the original title documents. The plaintiff stated that the aforesaid transaction was illegal and a nullity as the vendors had no capacity to sell the suit property and no consent of the Land Control Board was granted. It was the plaintiff's assertion that the vendors were beneficiaries of the deceased's estate and the family agreed that the consideration received by the vendors be refunded to the defendant so that the original title can be returned to the estate of the deceased.
3. The plaintiff further averred that he offered the defendant a bankers cheque for Kshs. 570,000/- in exchange of the original title but the defendant declined the cheque and lodged a caution on the title. The plaintiff also stated that the defendant had engaged in wanton destruction of the suit property.
4. In defence, Muamba Mangati Nzile, the defendant (hereinafter referred to as the Original defendant) filed a defence and counterclaim dated 2<sup>nd</sup> December 2013 and added Patrick Ngewa Makau, Gregory Kimeu Makau and Boniface Mwangi Makau as 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The original defendant amended defence and counterclaim on 25<sup>th</sup> February 2019 and later amended it on 13<sup>th</sup> September 2021. The original defendant denied the plaintiff's claim and stated that the legal representatives of the estate of the deceased are Ancent Muisyo Makau and Patrick Ngewa Makau. He stated that the vendors had represented to counsel who handled the sale transaction that prior to his demise, the deceased had apportioned his property to his family and that the suit property belonged to the vendors, as per the agreement letter in Kamba language signed by the deceased's family members including Makau Kimeu (deceased) stating that the suit property belonged to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein. He stated that the plaintiff and his brothers were engaging in illegalities trying to dispossess him of his land by trying to sell to other persons. He stated further that the plaintiff's suit was premised on greed, and that a search obtained in 2018 showed that the suit property was registered in the name of Patrick Ngewa Muisyo on 5<sup>th</sup> October 2018 and a new title deed issued to him. He stated that the transaction was unlawful as he held the original title and that he sought an order against them to transfer the property to him. That the fraud was demonstrated in that by a Gazette Notice No. 5824, the Land Registrar ordered the deceased Makau Kimeu to surrender the title deed to Patrick Ngewa Makau and Ancent Muisyo Makau and in default a new title would issue. He stated that this action was meant to subvert justice.
5. In the amended counterclaim, the defendant sought the following orders;
  - a. A declaration that the purchase of the said property being Athi River/Athi River Block 5/92 by the defendant/plaintiff to the counterclaim from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was valid and proper and the property belongs to the defendant Muamba Mungati Nzile.
  - b. An order that the title on LR. No. Athi River/Athi River Block 5/92 issued to Patrick Ngewa Makau or such person thereof claiming under him if any be cancelled and the title be issued in the name of the defendant Muamba Mungati Nzile.



- c. In the alternative and without prejudice to the above an order that the title on LR. No. Athi River/Athi River Block 5/92 issued to Patrick Ngewa Makau or such other persons in equality or subsequently under him and in particular Boniface Mwangi Wakiuru thereof be cancelled and an order that the administrators to the estate of the late Makau Kimeu do execute all requisite documents of transfer of Title No. Athi River/Athi River Block 5/92 in favor of the defendant/plaintiff to the counterclaim or in the alternative the Deputy Registrar does execute requisite documents of transfers in his favour, upon the failure of the administrators to do so.
  - d. An order that the plaintiff/1<sup>st</sup> defendant to the counterclaim together with the 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> defendants or any persons claiming with through any or all of them do vacate the suit premises and an order for eviction and/or demolition of structures on LR No. Athi River/Athi River Block 5/92 therein, if any.
  - e. Cost of this suit with interest at court rates.
  - f. Such other and further relief as the court may deem fit and just to grant.
6. On 17<sup>th</sup> February 2024, the 4<sup>th</sup> defendant filed a statement of defence dated 17<sup>th</sup> August 2021. He denied the defendant's counterclaim and averred to be a stranger to the contents in the defence and counterclaim. He stated that on 19<sup>th</sup> February 2018, he entered into a land sale agreement with the 2<sup>nd</sup> defendant/Patrick Ngewa Makau purchasing the suit property at Kshs. 5,000,000/-. He stated that at the time of purchase, he conducted a search on the title of the suit property and there was no encumbrance, caveat or stay order. He stated further that before payment of the full consideration, he was given possession of the suit property by the 2<sup>nd</sup> defendant as a sign of good faith and on that basis obtained all approvals for construction thereon. He stated that he was only made aware of this case in October 2020 when he attempted to pay land rates.
  7. He averred that he was never contacted by the court, the registry or the parties to the suit on the caveat placed and that he is a stranger to the dispute before court and was led to believe that the title was free of encumbrances as confirmed by the search that he conducted.
  8. Despite service, Patrick Ngewa Makau and Gregory Kimeu Makau did not enter appearance or file defence.
  9. At the hearing, Ancent Muisyo Makau the plaintiff did not attend and hence his claim was dismissed with costs. Therefore, the suit only proceeded for the hearing of the defendant's counterclaim, where the only other party that participated in the proceedings was the 4<sup>th</sup> defendant. The matter was heard by way of viva voce evidence.

### **Original Defendants' evidence**

10. PW1 was Muamba Mangati Nzile, the original defendant. He adopted the contents of his two witness statements dated 2<sup>nd</sup> December 2013 and 29<sup>th</sup> January 2020 as his evidence in chief. It was his testimony that vide a sale agreement dated 30<sup>th</sup> July 2009, he purchased the suit property from Patrick Ngewa Makau and Gregory Kimeu Makau at a consideration of Kshs. 400,000/- which he paid in full. He stated that prior to the aforesaid purchase, the vendors informed him that their father Makau Kimeu had given them the suit property before his demise. That to show this fact, they produced before the parties advocates a letter in Kamba language signed by their family members including their late father Makau Kimeu, to that effect.
11. He also stated that upon completion of payment, he took possession of the suit property as he awaited finalization of the transfer process. It was his case that when he realized that the vendors intended to



- renege the agreement, he placed a caution on the title of the suit property. He further averred that on a recent visit to the property, he noted that the same had been subdivided into several  $\frac{1}{8}$  acre plots. He stated that the vendors proposed to buy the suit property from him at Kshs. 510,000/- which he refused. He maintained that the sale of the suit property to him was proper and lawful.
12. The witness stated that in 2018, he discovered that the suit property had unlawfully been transferred to Patrick Ngewa Makau, even when he had the original title deed which was given to him at the time of purchase by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  13. It was his evidence that he discovered that a grant of letters of administration were issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 25<sup>th</sup> February 2013 which grant was confirmed. He stated further that he discovered that there was a Gazette Notice No. 5824 issued by the Land Registrar, Machakos one G. M. Njoroge and dated 14<sup>th</sup> June 2018 to the effect that if the registered proprietor persists in failing to surrender the original title deed to the registrar, then the title will be dispensed with and the land transferred to the administrators who are the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He pointed out that as the registered proprietor of the suit property was Makau Kimeu who was the deceased father of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants who died on 13<sup>th</sup> August 2004, it was not possible for him to deliver title, a fact known to the Land Registrar.
  14. He maintained that it was a fraudulent and criminal act perpetrated by the Land Registrar and the other defendants to defraud the defendant of his land as the Registrar must have been aware of the succession matter. He pointed out that the title of the suit property was transferred to Patrick Ngewa Makau who was one of the persons who sold him the suit property. He also stated that on 18<sup>th</sup> November 2018, this court issued orders preserving the status quo of the suit property which orders were served upon the Land Registrar on 21<sup>st</sup> November 2018 upon payment of registration fees of Kshs. 500/-.
  15. That the witness' advocates visited the Lands office severally to obtain search in vain. He stated that his advocate wrote a letter dated 23<sup>rd</sup> January 2019, whereof the Land Registrar stated that he could not trace the original order, which led to service of a certified copy thereof on the Land Registrar on 14<sup>th</sup> February 2019. He also averred that after attempts to conduct search were fruitless, his advocate subsequently wrote another letter on 14<sup>th</sup> May 2019. He reiterated that he deserved orders sought in the counterclaim as his purchase was lawful.
  16. PW1 produced documents attached to three lists of documents; namely the lists dated 2<sup>nd</sup> December 2013, 29<sup>th</sup> January 2020 and other documents. He produced copies of identity cards of Gregory Kimeu Makau and Patrick Ngewa Makau; copies of proposed petition for letters of administration intestate proposing to appoint Gregory Makau and Patrick Makau as administrators; grant of letters of administration to Patrick Ngewa Makau and Ancient Muisyo Makau; confirmed grant of letters of administration issued in Machakos HCSC No. 803 of 2012; search of the suit property issued on 5<sup>th</sup> October 2018; extracts of Gazette Notice No. 5824; Order dated 19<sup>th</sup> November 2018 as served on the Machakos County Land Registrar; certified copy of order served upon Land Registry on 4<sup>th</sup> February 2019; duly received letter dated 23<sup>rd</sup> January 2019; complaint letter to the Land Registrar dated 14<sup>th</sup> May 2019; letter to the Cabinet Secretary on failure to obtain a search and sale agreement dated 30<sup>th</sup> July 2009.
  17. He also produced copy of the original title deed; proof of completion of payment of completion; letter dated 6<sup>th</sup> August 2012 from Njeru Nyaga & Company Advocates to A. M. Mbindyo & Company Advocates; letter dated 29<sup>th</sup> May 2013 from Njeru Nyaga & Company Advocates to A. M. Mbindyo & Company Advocates; letter dated 13<sup>th</sup> June 2013 from A. M. Mbindyo & Company Advocates to Njeru Nyagah & Company Advocates; official search of the suit property as at 10<sup>th</sup> March 2020 and



a copy of the confirmed grant. The witness also showed the court the original title deed for LR. Athi River/Athi River Block 5/92.

18. On cross examination, he stated that he did not have a copy of the letter referred to in his statement of 2<sup>nd</sup> December 2013. He also stated that he did not have proof of subdivision of the suit property. He stated that the certificate of confirmation was issued on 27<sup>th</sup> September 2013. He stated that he had known the 4<sup>th</sup> defendant personally for many years but had never talked to him about this matter. He stated that the search obtained on 18<sup>th</sup> February 2020 showed that at the time the suit property was registered in the 4<sup>th</sup> defendant's name. He maintained that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had authority to sell the suit property. In reexamination, he stated that the letter from the defendants written in Kamba language was left with his advocate. He stated that the confirmed grant showed that the suit property was given to Patrick Makau, the same person who sold him the property.
19. PW2 was Alphonse Muema Mbindyo, an Advocate practicing in the name and style of A. M. Mbindyo Advocates. He adopted his witness statement dated 4<sup>th</sup> October 2018 as his evidence in chief. It was his testimony that he was a personal friend of Muamba Mangati Nzile the original defendant, whom he had known for 20 years. He stated that on 30<sup>th</sup> July 2009, Muamba Mangati Nzile, Gregory Makau and Patrick Makau went to his office in Nairobi and informed him that they intended to enter into a sale of land agreement in respect of Parcel Athi River/Athi River Block 5/92 at an agreed consideration of Kshs. 400,000/-. That he learnt that Gregory Makau and Patrick Makau were step brothers.
20. He further testified that upon perusal of the title, he noted that the same was in the name of Makau Kimeu, who the vendors stated that prior to his demise, had apportioned the suit property to them. He stated that the two vendors produced a letter written in Kikamba language and signed by their family members including their father Makau Kimeu, giving them the land. He stated further that the two vendors informed him that they had authority of their family members to obtain letters of administration and requested the witness to prepare petition application forms for them.
21. PW2 further testified that having been satisfied with the answers given to him by the vendors, he prepared the sale agreement which was duly executed by the parties, whereof they deposited the original title in his office. He stated that he also prepared application for grant of letters of administration and that on that date, the vendors were paid Kshs. 250,000/-. He stated that despite the two brothers signing application for succession forms, they never came back with the requisite consents only for him to learn that they intended to renege on the sale agreement. He also stated that he wrote letters to the firm of Njeru Nyaga & Company Advocates for the two brothers which letters were responded to. Further that he prepared the sale agreement with genuineness of purpose of mind.
22. In cross examination, he stated that he had been in legal practice for 29 years. He confirmed that as at the date of the agreement, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not have grant of letters of administration and therefore had no capacity to sell the land. He stated that he was presented with a letter in Kamba language although he had not presented it to court. In reexamination, he stated that the transaction was made in good faith and the title of the suit property deposited in his office and vendors signed application for grant of letters of administration in his office. That marked the close of the original defendant's case.

#### **4<sup>th</sup> defendant's case**

23. DW1 was Boniface Mwangi Wakiuru the 4<sup>th</sup> defendant in this matter. He adopted the contents of his witness statement dated 17<sup>th</sup> August 2021 as his evidence in chief. It was his evidence that in January 2016, having visited the locality where the suit property is situated for the anniversary of his best friend's death, he indicated his wish to purchase land within the area to Reuben Nzuki his late best



- friend's father. He stated that on 26<sup>th</sup> January 2018, Reuben Nzuki informed him that one Patrick Ngewa Makau intended to sell land which was in his neighbourhood. That he met Patrick Ngewa who informed him that the land belonged to his father, was in the process of succession and the same would be transmitted to his name.
24. He further testified that he requested for a copy of the title, which he used to obtain an official search of the property confirming that indeed the property was in the name of the late Makau Kimeu. He stated that Patrick Ngewa reconfirmed that he was going to inherit the suit property and that title would be issued in his name. He averred that it was on the strength of this assurance that he proceeded to sign a land sale agreement on 19<sup>th</sup> February 2018 for a consideration of Kshs. 5,000,000/-. That the parties agreed that the consideration was to be paid in instalments as title was not in the name of Patrick Ngewa Makau.
  25. DW1 also stated that Patrick Ngewa Makau informed him later in 2018 that the title had been registered in Patrick's name and that he was now able to transfer the same to the witness. He stated that he did a second search of the suit property and noted that there was no encumbrance or court order in respect of the title. According to the witness, as far as he could investigate, all that he had been informed by the vendor was true and there was no cause for concern. He stated that he paid instalments of the purchase price through bank deposits, Mpesa and cash through out the year.
  26. It was his testimony that in July 2018 when he had paid half of the purchase price, Patrick Ngewa Makau allowed him to take possession of the land and even went to the ground breaking whereof they took photographs together, indicating good faith on the latter's part. He stated that he was able to get electricity on the suit property from two kilometers away from a school and also began construction thereon. He stated that since 2018, he has planted over 3000 trees and constructed his workers' living quarters. He also stated that he had 80 goats and over 100 chicken on the suit property.
  27. The witness stated that it is only around October 2020 that he learnt that there was a caveat on his land when he went to pay for land rates and was asked for a recent search. That upon obtaining the search, he learnt that a stranger was claiming his land. He maintained that he never received any communication of the caveat on the suit property yet by the time the order was being issued, the land was in his name. He insisted that he was an innocent purchaser for value and that if the defendant's claim is allowed, he stands to lose more than the land as he has made significant development on the property. He urged the court to dismiss the original defendant's counterclaim.
  28. He further stated that when he paid the entire balance, that is when he got consent to transfer the land to him. He stated that he did not know that Patrick had already sold the land at the time he purchased the same, and that even after a caveat was placed on the land, Patrick did not communicate to him. He stated that if he had not obtained a search, the plaintiff would have proceeded to obtain judgment against him. He insisted that he never knew of the transaction between the defendant and Patrick Ngewa Makau.
  29. He produced documents attached to his list of documents dated 17<sup>th</sup> August 2021. He produced copy of a title deed for Athi River/Athi River Block 5/92 in his name; sale agreement dated 19<sup>th</sup> February 2018; Gazette Notice No. 5824 dated 14<sup>th</sup> June 2018; copy of identity card and Pin certificate of Patrick Ngewa Makau; stamp duty payment slip dated 24<sup>th</sup> September 2018; invoice for payment for development application dated 14<sup>th</sup> September 2020; KCB funds transfer to Patrick Makau dated 12<sup>th</sup> April 2019; copy of title deed for Athi River/Athi River Block 5/92 for Patrick Ngewa Makau; consent from the Land Control Board dated 5<sup>th</sup> September 2018 and photographs of the suit property before and after purchase.



30. On cross examination, he informed court that when he obtained official search certificate for the suit property, the title was in the name of the late Makau Kimeu. He stated that Patrick did not show him any other document apart from a copy of the title but informed him that succession was ongoing. He stated that they did their agreement in a hotel and no advocate was involved. He stated that one of the witnesses brought the agreement. He stated that he had no reason to look for the original title deed. He stated that he paid the entire consideration of Kshs. 5,000,000/- by different means, and finished paying in 2018.
31. It was also his testimony that Patrick Ngewa Makau granted him vacant possession of the property on payment of deposit. He further confirmed that Patrick Ngewa Makau gave him the Gazette Notice filed before court. He confirmed that the Gazette Notice required Makau Kimeu to surrender the original title which was not possible. He stated that it was his first time to buy land. He stated that it was in 2020 when he obtained a search of his property that he found a caveat on the title and stated that he had not produced the search. He stated that he had been paying rates. He stated that he got title of the suit property in his name in 2018. He stated further that he was not aware of any other search showing different proprietorship.
32. DW1 denied having been complicit in the transaction with Patrick, and stated that he started building his house in 2020, after he noted that there was a caveat on the title indicating that status quo should be preserved. He stated that despite the order for maintaining status quo, he proceeded to construct on the land because it was his land. He also stated that he was told that if it was a village home he did not need construction approvals from the authorities. He further averred that he was not aware that Patrick had already sold the suit property. He also stated that he never participated in the matter since 2013 and that the defendant ought to have placed a caveat on the land in those 6 years.
33. In reexamination, he stated that when he met Patrick Makau in a hotel to enter into agreement with him, he did not know him as he had never met him before. He stated that it was not a must for him to have an advocate to draft the sale agreement. He stated that in 2018 when he conducted a search on the suit property, there was no caution on the title and that he was given possession before completion of payment. He stated that if there was a caution on the land it could not have been transferred to him. He stated that Patrick Makau gave him the Gazette Notice and told him he was pursuing title and therefore he did not doubt him. He stated that the defendant's letter of 2020 claimed that the caution had not been registered. He stated that it was not his duty to ensure the caution is registered when the order was issued in 2018. That marked the close of the 4<sup>th</sup> defendant's case.
34. Parties filed written submissions in support of their respective cases. On record are two sets of submissions filed by the original defendant on 12<sup>th</sup> June 2023 and 6<sup>th</sup> October 2023 and submissions filed by the 4<sup>th</sup> defendant on 5<sup>th</sup> September 2023.

### **Submissions by the original defendant**

35. Counsel for the original defendant narrated the history of the suit property stating that on 30<sup>th</sup> June 2009 the original defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants entered into a land sale agreement in respect of the suit property on the basis that the property had been apportioned to them by dint of a family agreement written in Kamba and signed by family members including the registered proprietor Makau Kimeu. Counsel submitted that among the documents signed by the vendors were transfer forms and application for grant of letters of administration, only for them to attempt to renege the agreement and offer to refund Kshs. 400,000/- and later Kshs. 510,000/- as per the letters of their advocates Njeru Nyaga Advocates. Counsel observed that a search conducted on 5<sup>th</sup> October 2018 which was produced in court showed that the suit property was as at that time registered in the name of Patrick Ngewa



- Makau and that when this matter came up on 11<sup>th</sup> October 2018, on the application of the original defendant and in the presence of counsel for the plaintiff, an order for maintenance of status quo was issued. That these orders were confirmed on 19<sup>th</sup> November 2018 pending hearing determination of the suit and lodged at the Land Registry on 21<sup>st</sup> November 2018.
36. Counsel submitted that thereafter the defendant was unable to obtain a search from the land's registry prompting his counsel to write several letters without success culminating in his letter to the Cabinet Secretary Lands dated 28<sup>th</sup> January 2020, upon which he obtained a search on 10<sup>th</sup> March 2020. Counsel pointed out that Entry No. 8 for 25<sup>th</sup> September 2018 showed registration in the name of Boniface Mwangi Wakiuru; Entry 9 of 25<sup>th</sup> October 2018 showed title deed issued and Entry No. 10 for 21<sup>st</sup> November 2018 showed registration of court order in Machakos ELC 69 of 2013 for status quo to be maintained pending hearing and determination of the suit.
  37. Counsel compared the second search issued after the Minister's intervention dated 10<sup>th</sup> March 2020 and the search obtained on 5<sup>th</sup> October 2018 and observed that the latter showed that as of 5<sup>th</sup> October 2018, the suit property was in the name of Patrick Ngewa Makau and not Boniface Mwangi Wakiuru as portrayed in the second search.
  38. It was further submitted that the original defendant further discovered the other defendants' acts of irregularity, illegality and fraudulent activities, namely that grant of letters of administration were applied for and issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the counterclaim on 24<sup>th</sup> January 2013 and confirmed on 27<sup>th</sup> September 2013 and in the confirmed grant the suit property was given to Patrick Ngewa Makau. Counsel observed further that the Gazette Notice 5824 required the registered proprietor (Makau Kimeu) in 30 days to surrender the title deed and failure would result in issuance of a title to Patrick Ngewa and Ancent Muisyo Makau. Counsel argued that since the registered proprietor was a deceased person who had died 14 years earlier obviously the notice could not be complied with and therefore the intention of the notice was unlawful.
  39. Further, counsel argued that from the pleadings of the original plaintiff Ancent Makau, it was clear that there was a caution placed on the title of the suit property. Counsel argued that the same was therefore irregularly removed without notice to the defendant, which was contrary to the provisions of the Registered *Land Act* (Repealed).
  40. Counsel submitted that the 4<sup>th</sup> defendant initially filed notice of motion dated 29<sup>th</sup> December 2020 seeking to be joined to this suit as interested party, and subsequently filed his statement of defence to the counterclaim dated 12<sup>th</sup> August 2021 and filed on 17<sup>th</sup> February 2023. Counsel submitted that from the onset, the 4<sup>th</sup> defendant was patently economical with the truth and that his intention was to deliberately hoodwink, deceive and mislead the court to perceive and see him as a victim of circumstances which is not the position as he was an active participant together with the other defendants to defeat the ends of justice. He stated that this is demonstrated in the fact that although the 4<sup>th</sup> defendant alleged to have conducted searches, there is no proof that any search was ever done on the title prior to his purchase of the same. In addition, counsel submitted that although the 4<sup>th</sup> defendant was emphatic that they did not involve a lawyer in the drafting of his agreement which was done in a hotel, paragraph 8 (d) of his agreement dated 19<sup>th</sup> February 2018 shows that the lawyer for both parties was John Were Odera who also signed the agreement. Counsel questioned why the lawyer was not asked to give evidence.
  41. Counsel observed that with the 4<sup>th</sup> defendants known reputation as a renowned activist, it was totally unlikely that he was led to a hotel like sheep for slaughter in his correct senses and executed an agreement in total oblivious to his financial protection. It was further contended for the original defendant that



- even if the 4<sup>th</sup> defendant's testimony were to be believed that there was no lawyer involved for his alleged Kshs. 5,000,000/- there were no receipts or any single proof evidentiary payment of Kshs. 5,000,000/- five years after the alleged agreement, which means that there was "crooked business" going on with the tacit knowledge, consent and approval of the 4<sup>th</sup> defendant. Counsel argued that the only receipt for Kshs. 403,000/- produced was so unclear and does not show who was being paid and for what.
42. Regarding alleged payment by the 4<sup>th</sup> defendant of stamp duty, counsel submitted that the payment slip produced is not evidence of payment of stamp duty but merely an invoice which the 4<sup>th</sup> defendant was misleading court that that was payment as there is no receipt.
43. Counsel argued that Equity will not allow a statute to be used as a cloak for fraud. Counsel submitted that the defendants used Section 8 of Cap 300 Laws of Kenya (repealed) which allowed the Land Registrar to require production of an instrument to perpetrate an illegality through the Gazette Notice No. 5824 as the 2<sup>nd</sup> defendant connived with the Land Registrar knowing that Makau Kimeu who was deceased could not present the original title deed to the Land Registrar. Counsel submitted that from the 4<sup>th</sup> defendant's testimony in his witness statement he clearly stated that he knew that Makau Kimeu was deceased and therefore he must have known that the deceased could not appear before the Land Registrar. Counsel faulted the 4<sup>th</sup> defendant and argued that he could not possibly allege ignorance in drawing up the sale agreement, and ignorance on the contents of the Gazette Notice but proceed to appoint an advocate to defend him. Counsel argued that during examination in chief and cross examination, the 4<sup>th</sup> defendant did not come across as illiterate, unknowledgeable and unschooled but presented himself as literate, composed, confident, share and refined, and that therefore for him to allege that he did not know what was meant by the contents of the Gazette Notice No. 5825 is false and should be rejected by this court.
44. It was further submitted for the defendant that the 4<sup>th</sup> defendant testimony that he discovered existence of a court order preserving the status quo when he went to seek development approval but proceeded to develop the land because it was in his name and he saw no need to obey a court order shows illegality, impunity, recklessness and contemptuous of the law on his part as shown on the official search of 5<sup>th</sup> October 2018, which means that the suit property continued to be in the name of Patrick Ngewa Makau, a reason the original defendant was unable to get search until the intervention of the Cabinet Secretary. He argues that the subsequent search confirmed tempering with the Land Registry records.
45. On whether the original defendant deserves the orders sought in the counterclaim, counsel submitted that provisions of *the Constitution* statute land and equity assists this court towards a just resolution. Reliance was placed on Article 40 (2) and 40 (b) of *the Constitution*, Section 120 of the *Evidence Act*, and Sections 45 and 80 of the *Law of Succession Act*.
46. Counsel argued that where a person by their action cause another person to act on believing that their representation was true, the former cannot deny the truth of that thing. In relying on Section 45 of the *Law of Succession Act*, counsel submitted that as the suit property had been gifted by the late Makau Kimeu to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the said property was no longer free from alienation nor distribution, save to the two sons and that the defendants evidence was confirmed by the fact that the suit property was given to the 2<sup>nd</sup> defendant with the consent of the 1<sup>st</sup> and 3<sup>rd</sup> defendant.
47. Regarding equity, counsel submitted that equity regards the beneficiary as the owner. Counsel submitted that it was the intention of the late Makau Kimeu to gift his property to his two sons and hence there was assumed ownership, upon which the two disposed the same to the original defendant hence what remained was to complete the transaction by obtaining grant of letters of administration as the original defendant had already received the original title deed, and the signed transfer documents,



the vendors passport photos, identity cards and pin certificates and therefore the defendants are estopped by law from denying the truth of their representations to the original defendant.

48. Counsel argued that as the law cannot cover all situations, equity comes in to ensure fairness and justice.

#### **Submissions by the 4<sup>th</sup> defendant**

49. Counsel gave a summary of the case and submitted that the original defendant's case was that he lawfully purchased the suit property from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, when the same was registered in the name of Makau Kimeu, while the 4<sup>th</sup> defendant's case is that he purchased the suit property from the 2<sup>nd</sup> defendant at a time he had confirmed letters of administration and the property belonged to their deceased father Makau Kimeu. Counsel further submitted that the 4<sup>th</sup> defendant obtained a search which showed that the suit property was registered in the name of the late Makau Kimeu. Counsel also submitted that thereafter the 2<sup>nd</sup> defendant gave the 4<sup>th</sup> defendant a new title in his name as he said he would and the 4<sup>th</sup> defendant for the second time conducted an official search, which search confirmed that the title was indeed in the name of the 2<sup>nd</sup> defendant. Further that the 2<sup>nd</sup> defendant also gave the 4<sup>th</sup> defendant a Gazette Notice to show that he was in the process of having title transferred to his name. That it was on this basis that the 4<sup>th</sup> defendant purchased the suit property, took possession and only learnt of the court order when he sought development approvals.
50. On whether the original defendant had proved his claim, counsel placed reliance on Sections 107, 108, 116 and 112 of the Evidence Act and submitted that he has been in possession of the suit property and that the certificates of official search show that he is the owner and that the title passed to him was good, while the burden to show otherwise lay on the original defendant, which the latter failed to discharge.
51. Counsel also submitted that the allegation by the original defendant that the transfer to the 4<sup>th</sup> defendant was irregular, illegal and tainted in fraud are mere accusation without basis or proof. Counsel submitted that the 4<sup>th</sup> defendant was not aware at the point of the agreement that the suit property had an encumbrance. Counsel argued that fraud cannot be by conjecture but must be proved.
52. On whether the original defendant is the legal and legitimate purchaser of the suit property, counsel argued that the original defendant conceded in evidence that he was aware that the suit property had not gone through succession. Reliance was placed on Sections 45 and 82 of the Law of Succession Act and counsel submitted that no person can deal with immovable property of a deceased person without a confirmed grant. The court was referred to the case of *In Re Estate of the late Epharus Nyambura Nduati (Deceased)* [2021] eKLR for the proposition that a valid sale of estate property can only be done by administration after confirmation of grant.
53. It was also submitted that the original defendant was represented by counsel in good standing and therefore he knew that purchase was a nullity from the onset. To buttress this position, counsel referred to the case of *Linus Riungu M'Kanga v. Erastus Njagi Kamundi* [2018] eKLR. Counsel argued that sale before confirmation of grant is unlawful, whether or not the buyer is aware of the status of succession, whether or not the beneficiaries and the buyer agreed; and whether or not the consideration was received. On that basis, counsel submitted that the plaintiff was not a legitimate purchaser and therefore not entitled to the orders sought.
54. On the question of fraud alleged by the original defendant, counsel submitted that fraud was not pleaded against the 4<sup>th</sup> defendant. Counsel argued that although the original defendant alleged collusion between the 4<sup>th</sup> defendant and the other defendants, there was no evidence to show the nexus of the 4<sup>th</sup> defendant or his involvement. Counsel pointed out that the original defendant's other documents showed that the caveat was only registered after the property had been sold to the 4<sup>th</sup>



- defendant and therefore there was no way the 4<sup>th</sup> defendant would have known that there was an encumbrance. Counsel argued that the responsibility of registration of an encumbrance rests with the Land Registrar.
55. On the Gazette Notice No. 5824, counsel submitted that it was the 2<sup>nd</sup> defendant who took out the notice and the 4<sup>th</sup> defendant could not have known the contents beforehand. Counsel argued that legal documents are confusing to lay people and the fact that the 4<sup>th</sup> defendant is a civil rights activist does not mean that he was able to interpret the contents thereof. Counsel argued that the original defendant was not clear on whether his complaint was that the 4<sup>th</sup> defendant was aware of the Gazette Notice or was part of the connivance. Counsel argued that there was no evidence to establish the 4<sup>th</sup> defendant's intention and that this court cannot make an assumption of someone's thoughts.
56. Regarding the issue of fraud, counsel referred the court to provisions of Order 2 Rule 2 of the Civil Procedure Rules and the cases of *In Re Estate of David William Kigumi Kimemna (deceased)* [2021] and *R. G. Patel v. Lalji Makanji* [1957] EA 314 for the proposition that the original defendant failed to prove fraud. Counsel argued that fraud was not pleaded by the original defendant although it was only raised during trial and that therefore the same amounted to conducting a trial by ambush. Counsel argued that the original defendant cannot rely on allegations of fraud without particularizing them in his pleadings.
57. On whether the 4<sup>th</sup> defendant was a bona fide purchaser for value without notice as to defect in title, counsel relied on the decision in the case of *Weston Gitonga & 10 Others v. Peter Rugu Gikanga & Another* [2017] eKLR and submitted that a bona fide purchaser is one who genuinely intends to purchase property offered for sale and does not intend to acquire it wrongly. Counsel enumerated the elements of bona fide purchaser including establishment that the holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; the vendors had apparent valid title; he purchased without notice of any fraud and he was not a party to any fraud.
58. Counsel submitted that the evidence on record shows that the 4<sup>th</sup> defendant was shown a copy of title by the 2<sup>nd</sup> defendant which he used to conduct a search and confirmed that the suit property was registered in the name of the late Mutua Kimeu. That he was also shown confirmed grant issued on 24<sup>th</sup> January 2013 and the Gazette Notice. That the 2<sup>nd</sup> defendant evidently committed to ensure the title was transmitted to him so that he transfers it to the 4<sup>th</sup> defendant and that therefore there was no cause for concern. Further that the 4<sup>th</sup> defendant conducted a second search and confirmed that there was no encumbrance on the title, before paying the balance of the consideration.
59. Counsel argued that the above facts demonstrate that the 4<sup>th</sup> defendant conducted due diligence, in respect of the suit property, acquired vacant possession and at the time of purchase he had no knowledge of any encumbrance on the title or any knowledge of the alleged fraud. Counsel argued that therefore the 4<sup>th</sup> defendant was a bona fide purchaser for value without notice as to defect of the title.
60. On whether the 4<sup>th</sup> defendant obtained good title to the suit property, counsel argued that being an innocent purchaser for value he obtained good title to the suit property which title is absolute and indefeasible. Counsel cited Article 40 of *the Constitution* and the case of *Nairobi Permanent Markets Society & 11 Others v. Salima & 2 Others* and Section 26 of the *Land Registration Act* for the proposition that a certificate of title is proof of indefeasible and absolute ownership. Counsel argued that title in the 4<sup>th</sup> defendant's name was registered upon completion of a succession process and conduct of adequate due diligence hence acquired good title.
61. Reference was also made to Section 80 (2) of the *Land Registration Act* and the case of *Kuria Greens Limited v. Registrar of Titles & Another* [2011] eKLR for the proposition that the register shall not



be rectified to affect title unless the proprietor had knowledge of omission, fraud or mistake. Counsel maintained that the 4<sup>th</sup> defendant was a complete stranger to the dispute before court and he believed that the title was free of any encumbrance. Counsel submitted that the 4<sup>th</sup> defendant demonstrated by photographs evidence and invoice for payment for development application that he had developed the land and installed electricity thereon before he became aware of this suit.

62. Counsel argued that should the court revoke title, in comparison with the original defendant, the 4<sup>th</sup> defendant stands to suffer more damage. Counsel also submitted that the 4<sup>th</sup> defendant had provided consent from the Land Control Board and a KRA payment slip to show that stamp duty was paid for purchase of a property and that therefore the regular process of transfer was followed by the 4<sup>th</sup> defendant. Counsel argued that the 4<sup>th</sup> defendant having not been party to the fraud, obtained a good title over the suit property.

### **Rejoinder by the original defendant**

63. In a rejoinder to submissions filed by the 4<sup>th</sup> defendant, the original defendant filed response submissions on 6<sup>th</sup> October 2023. It was counsel's submissions that this court had the onerous and dutiful task of scrutinizing, analyzing and determining the competing interests of the parties before it. It was submitted for the original defendant that the original defendant does not contest the fact that he purchased the suit property from Patrick and Gregory before grant of letters of administration were made. Counsel argued that the original defendant's interest can be deemed to have been a novel equitable interest that was sanitized upon the property being transferred to one of the vendors, Patrick Ngewa Makau which was a redemption to the original defendant's assertion and vindicates and validates his claim. Counsel submitted that the original defendant's agreement of sale may have been irregular but not downright illegal but subsequent actions and performances by the vendors vindicates and validates the original defendant's claim.
64. Counsel argued that the interpretation of Section 45 (1) of the *Law of Succession Act* ought to take into account the African Context and Particulars Kenyan Communities, including the Kamba Community where a parent may gift their child land, hand over title, but refuse to transfer the same to the child for fear that the child will dispose the property during the parent's lifetime. Counsel argued that this fear still persists today. Counsel argued that the vendors in anticipation of getting confirmed grant, went further to execute transfer forms in favour of the original defendant and handed him copies of their passport photographs and identity cards.
65. Counsel maintained that the 4<sup>th</sup> defendant cannot exonerate himself from the other defendants' fraudulent schemes for the reasons including his failure to produce documents demonstrating payment of Kshs. 5,000,000/- to the purported vendor; exhibiting deliberate snide and or selective amnesia to the interpretation of the Gazette Notice which required the deceased to produce title; and deliberately defying a court order registered on the title for maintenance of status quo, by carrying on activities on the land.
66. Counsel urged the court to consider the interpretation of what is irregular is not illegal but what is illegal is criminal with penal connotation. It was their argument that the irregular acts of the vendors was subsequently sanitized.

### **Analysis and determination**

67. The court has carefully considered the pleadings, evidence and both counsels' well researched submissions. While this suit was initiated by Acent Muisyo Makau who is a brother of Patrick Ngewa Makau and Gregory Kimeu Makau, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively the three brothers chose to



keep off these proceedings and left the fight to the alleged purchasers who are the original defendant and the 4<sup>th</sup> defendant to the counterclaim. It is clear that while this suit subsisted, the 4<sup>th</sup> defendant allegedly purchased the suit property in 2018.

68. It is not in dispute that at the time of the purchase of the suit property by the original defendant, the suit property was registered in the name of the late Makau Kimeu and the vendors thereof who are Patrick Ngewa Makau and Gregory Kimeu Makau were not administrators of the estate of Makau Kimeu (deceased). In addition, no grant of letters of administration for the estate of Makau Kimeu (deceased) had been made or confirmed. Besides, the 4<sup>th</sup> defendant allegedly purchased the suit property six years after this suit had been filed, and when the ownership of the suit property had been disputed and claimed by both the plaintiff Acent Muisyo Makau and the original defendant, a Muamba Mangati Nzile.
69. Although the original defendant claimed in his counterclaim that his purchase was declared valid, in his submissions he argued that although the said purchase was irregular for want of confirmed grant, the same was not illegal and that it was sanitized by the fact that one of the vendors, that is Patrick Ngewa Makau, who had been gifted the suit property by his father while alive was apportioned the suit property on confirmation of the grant. Therefore, the original defendant anchored his claim on equity.
70. On the other hand, the 4<sup>th</sup> defendant's position was that the sale of the suit property to the original defendant was unlawful and contrary to Sections 45 and 82 of the Law of Succession Act and subsequent actions by the vendor cannot change that fact or legitimize the unlawful purchase. In addition, the 4<sup>th</sup> defendant anchors his claim on the doctrine of innocent purchaser for value without notice of defect in title.
71. In view of the above, it is the considered view of this court that this matter raises three issues for determination, namely;
- a. Whether the sale of the suit property to the original defendant was valid and enforceable.
  - b. Whether despite non compliance with the provisions of the Law of Succession Act, in equity, the original defendant is the real owner of the suit property.
  - c. Whether the 4<sup>th</sup> defendant is an innocent purchaser for value, and if yes whether that gives him a superior right to the right of the original defendant, if any
  - d. Whether the original defendant deserves the orders sought in the counterclaim.

**A. Whether the sale of the suit property to the original defendant was valid and enforceable.**

72. The legality of the agreement between the original defendant and the defendants in the counterclaim was not contested by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who entered into the agreement with the original defendant. Even the Plaintiff who faulted the agreement did not give his testimony. However, Section 107 of the Evidence Act places the burden of proof on a claimant whether or not the claim is opposed.
73. Section 82 (a), (b) (i) and (ii) of the Law of Succession Act forbids sale of a deceased person's property before confirmation of grant and provides as follows;

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;



- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—
  - i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
  - ii. no immovable property shall be sold before confirmation of the grant;

74. Section 45 of the *Law of succession Act* provides that interfering with the property of a deceased person amounts to intermeddling. The same provides as follows;

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
2. Any person who contravenes the provisions of this section shall—
  - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

75. Therefore, it is clear that a contract for sale of immovable property belonging to a deceased person before confirmation of the grant of letters of administration in regard to such deceased's estate is void and unenforceable. It therefore follows that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had no capacity to sell the suit property to the original defendant and I hence find that the contract of sale of the suit property to the original defendant was void and unenforceable, for failure to comply with provisions of the *Law of Succession Act*.

**B. Whether despite non compliance with the provisions of the *Law of Succession Act*, in equity, the original defendant is the real owner of the suit property**

76. On whether despite non compliance with provisions of the *Law of Succession Act*, the original defendant was the equitable and real owner of the suit property, it was the original defendant's argument that at the time of the agreement, the vendors had a family agreement in Kamba language in which Makau Kimeu gifted the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant as subsequently demonstrated in the confirmed grant and that the latter's conduct in handing over the original title deed together with duly executed transfer forms and executed application for grant of letters of administration caused the original defendant to act on their representation, paying the full purchase price and that the intention of the parties ought to be upheld. Therefore, the original defendant's claim is based on equity.

77. On the other hand, the 4<sup>th</sup> defendant argued that as the sale of the suit property to the original defendant occurred before confirmation of the grant then the same was unlawful and unenforceable, subsequent actions of the defendants notwithstanding.

78. In our jurisdiction, equity is no longer merely common law principle, it is now a constitutional imperative binding all persons and bodies whenever they apply or interpret the law. Article 10 of *the*



Constitution recognizes equity as one of the national values and principles of governance, and provides as follows;

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
  - (a) applies or interprets this Constitution;
  - (b) enacts, applies or interprets any law; or
  - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
  - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
  - (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

79. Therefore this court being a state office is bound to apply equity in interpreting and applying the law. Equity, being a concept that entails fairness and justice, is a tool of legal adjustment applied in circumstances where the playing field is imbalanced and tilted in favour of injustice if the literal application of the law were to be adopted with the obvious result of injustice against one party as the other party ends up unjustly enriching themselves.

80. Article 159 of the Constitution provides for judicial authority as follows;

1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
  - (a) justice shall be done to all, irrespective of status;
  - (b) justice shall not be delayed;
  - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
  - (d) justice shall be administered without undue regard to procedural technicalities; and
  - (e) the purpose and principles of this Constitution shall be protected and promoted.
- (3) Traditional dispute resolution mechanisms shall not be used in a way that—
  - (a) contravenes the Bill of Rights;
  - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
  - (c) is inconsistent with this Constitution or any written law.

81. Therefore, with the Constitution of Kenya 2010 came a paradigm shift in the exercise of judicial authority with courts retooled to dispense substantive justice with greater accuracy. The Constitution



obligates courts to administer substantive justice and underscores the notion that judicial outcomes ought to reflect ideals of justice, fairness and good conscience, taking into account our realities and circumstances as a people.

82. In case where the literal application of the law would lead to obvious injustice, *the Constitution* expects the court to infuse equity and justice in its decision to achieve an outcome that reflects fairness and justice. In the same breath, courts should guard against being enablers of miscreants misusing the law as a tool for deceit, fraud and economic malfeasance for unjust enrichment as such an outcome will essentially create disenchantment. Therefore, equity and good conscience must be woven in the interpretation and application of the law to achieve the substantive justice envisaged under our Constitutional design.

83. The Black's Law Dictionary, 11<sup>th</sup> Edition defines equity as;

Fairness, impartiality, even handed dealing....The body of principles constituting what is fair and right; natural law....The recourse to principles of justice to correct or supplement the law as applied to particular circumstances; the judicial prevention of hardship that would otherwise ensue from the literal interpretation of a legal instrument as applied to an extreme case or from the literal exclusion of a case that seems to fall within what the drafters of the instrument probably intended.

84. Therefore, equity is a principle of fairness and justice applied to put right, remedy, correct or supplement the law where injustice would result from the literal interpretation and application of the law as the law itself cannot provide for all conceivable circumstances. Thus, equity requires application of "good conscience" in interpretation of legal instruments so that the same does not culminate in unconscionable and unjust outcomes.

85. In the case of *Willy Kimutai Kitilit v. Michael Kibet* [2018] eKLR, where literal application of the provisions of section 3 of the Contract Act and section 38 of the *Land Act* would have resulted in injustice in the circumstances of that case, the Court of Appeal applied equity and the doctrine of constructive trust and stated as follows;

The doctrines of equity are part of our laws although Section 3 of the *Judicature Act* subordinates common law and the doctrine of equity to *the Constitution* and written law in that order. Section 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* as amended clearly stipulates that the requirements that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in *Yaxley v. Gotts* [2000] ch. 162 (Yaxley's case) on which the court in *Macharia Mwangi Maina* decision relied, among others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct.

86. Similarly, in the case of *Maina & 87 Others v. Kagiri (Civil Appeal 6, 26 & 27 of 2011)* (consolidated) [2014] KECA 880 (KLR) (22 January 2014) (judgment) the Court of Appeal aptly stated as follows;

In *Yaxley v. Gotts & Another* [2000] ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to



transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in *Llyods Bank PLC v. Rosset*, [1991] 1 AC 107, 132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Noting in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property.

Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman v. Steadman* [1976] AC 536, 540,

If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the facts of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.

87. In the case of *Shah & 7 Others v. Mombasa Bricks & Tiles Limited & 5 Others* (Petition 18 (E020) of 2022 [2023] KESC 106 (KLR) (28 December 2023) (Judgment), the Supreme Court of Kenya, agreed with the position taken by the Court of Appeal in *Willy Kimutai Kitilit* (Supra) and *Maina & 87 Others* (Supra) and further stated as follows;

(85) Section 28 provides that unless the contrary is expressed in the register all registered land shall be subject to overriding interests as may for the time being subsist and affect the same without being noted in the register. These overriding interests include trusts.

(86) While Sections 25, 26 and 28 of the *Land Registration Act* recognize that the rights of a registered proprietor of land are absolute and indefeasible, there are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests including trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of *the Constitution* therefore, the limitation of the right to property is provided under the law, and includes a constructive trust.

(87) We have found that the doctrines of equity are part of our laws .....and while *the constitution* entitles every person to the right to property at Article 40, this right is not absolute. We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.

88. Constructive trust is an equitable remedy where the holder of a title has an equitable duty to convey it to another, on the basis that if he retains the property, he would be unjustly enriched.

89. The *Blacks Law Dictionary* 11<sup>th</sup> Edition defines constructive trust as;

An equitable remedy by which a court recognizes that a claimant has a better right to a certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by



fraud or theft (as with embezzlement of money) is exchanged for other property to which the wrongdoer gets title. The court declares a constructive trust in favour of the victim of the wrong, who is given a right to the property rather than a claim for damages. The obligation of the constructive trustee is simply to turn the property over to the constructive beneficiary.

90. In the case of *Soulos v Korkontzilas* [1997] 2 SCR 217, the Canadian Supreme court held as follows;

The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good, conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

91. In the case of *Twalib Hatayan & Another v Said Saggar Ahmed Alheidy & 5 Others* [2015] e KLR, the court held as follows;

As earlier stated with constructive trusts, proof of parties intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of constructive trust is thus meant to guard against unjust enrichment.

92. In this case, it is not disputed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants entered into a sale of land agreement with the original defendant on 30<sup>th</sup> July 2009 for purchase of the suit property at a consideration of Kshs. 400,000/- which was paid in full. At the time of signing the agreement, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants represented to the original defendant that their father Makau Kimeu had gifted them the suit property while he was alive and even showed the original defendant a family agreement in Kamba language to that effect, which was signed by Makau Kimeu. To demonstrate their intentions, they handed over to the original defendant the original title deed; duly executed transfer forms; duly executed application for grant of letters of administration and copies of their identity cards and passports. This evidence was not rebutted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants who chose not to testify. In view of the above, it is clear that the intentions of the parties to the agreement dated 30<sup>th</sup> July 2009 was to dispose and transfer to Muamba Mangáti Nzile the proprietary interests of Patrick Ngewa Makau and Gregory Kimeu Makau in the suit property, on the basis of the latter’s proprietary interest therein acquired by virtue of them having been gifted the same by their father the late Makau Kimeu.

93. The original defendant has demonstrated by evidence that the registration of the 2<sup>nd</sup> defendant as proprietor of the suit property was by fraud, because despite a caution subsisting on the title, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants unlawfully caused issuance Gazette Notice No. 5824 by the Land Registrar Machakos, requiring a dead person to surrender the original title deed in 30 days and in default a new title would be issued to Patrick Ngewa Makau and Ancent Muisyo Makau, when the registered proprietor was already dead at the time of the Gazette Notice and when in fact the original title deed was in possession of the original defendant and which possession was the basis of this suit.

94. In view of the above facts, the question that this court asks is whether it be fair, conscionable, in good conscience and amount to justice for this court to allow the 2<sup>nd</sup> defendant to retain the suit property on



the basis of his lack of capacity to sell, when in 2009 he represented to the original defendant that the suit property belonged to him by virtue of being a gift from his father, which position was confirmed by the confirmed grant where he was granted the suit property; he received from the original defendant the full purchase price thereof being the sum of Kshs. 400,000/- and handed over the original title deed, executed transfer documents, executed application for grant of letters of administration and copies of their identification documents? I do not think that that would be fair or right or just and in tandem with equity. Equity would frown on such state of affairs. Allowing the 2<sup>nd</sup> respondent to keep the suit property because he had no capacity and when he used fraud to get title in his name, would be allowing him to unjustly enrich himself by using fraud, deceit, criminal and corrupt acts to deprive the original defendant of his property. Since the suit property had been gifted to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant by their father, upon purchase, the original defendant gained proprietary interest therein which became an overriding interest on the title. The 2<sup>nd</sup> defendant's registration was therefore as a trustee for the original defendant. Section 28 (b) of the *Land Registration Act* provides that all registered land is subject to overriding interests without them being noted on the register and which include trusts. Therefore, the registration of the 2<sup>nd</sup> defendant as proprietor of the suit property was subject to a constructive trust in favour of the original defendant, as the 2<sup>nd</sup> defendant was a beneficiary of the estate that he had sold to the original defendant.

95. I take the view that although section 82 of the *Law of succession Act* provide that sale of immovable property of a deceased person shall not be done before confirmation of a grant, in circumstances where the sale is by a beneficiary of the same property, the said legal provision does not affect the creation and operation of a constructive trust in favour of the purchaser, like in this case. Indeed, I agree with a similar position taken by the Court of Appeal of Uganda in the case of *Dr. Diana Kanzira v. Herbert Rwanchwende & Another* (Civil Appeal No. 81 of 2020) [2023] UGCA 286 (2 Novembr 2023) (Coram Bamugemereire, Kibeedi & Gachirabake JJA), where it was held as follows;

A beneficiary has legal capacity to validly dispose of his/her beneficial interest without the notice or prior consent or authorization by the holder of letters of administration.

96. In the case of *Muyingo & 3 Others v. Kakembo* (HCT -OU-LD-CA 16 of 2022) [2024], the High Court in Uganda, in upholding the principles of equity where a beneficiary with no grant of letters of administration sold her land, stated as follows;

29. The general position of the law is that without grant of letters of administration, no person has any right whatsoever to sell or otherwise deal with property of a deceased person (see *John Kihika & Another v. Absolomon Tinkamanyive*, Court of Appeal Civil Appeal No. 86 of 2014).

30. However, there are exceptional cases where the pursuit of the ends of justice, demands that a sale of land by a beneficiary be upheld as valid and enforceable. This is necessary to advance the course of justice. This is especially so, where the conduct of the parties is such that a sale of land by the beneficiary is generally acknowledged to have taken place, but the beneficiaries of the estate turn around to deny the validity of the sale, on grounds of lack of letters of administration.

97. In view of the above evidence, it is clear that the suit property herein had been gifted to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by their father, which they sold to the original defendant. The fact that the suit property belonged to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant was indeed confirmed by the confirmed grant which apportioned the suit property to the 2<sup>nd</sup> defendant.



98. In this case, while the grant of letters of administration was issued to both Patrick Ngewa Muisyo and Acent Muisyo Makau, it is telling that it was only Acent Muisyo Makau who filed this suit, yet from the confirmed grant, the suit property was given to his co-administrator, Patrick Ngewa Makau. It is clear that the plaintiff's claim was just a strategy of the 2<sup>nd</sup> defendant to execute his unconscionable acts and renege the sale of the suit property to the original defendant.
99. In the premises, I find and hold that despite want of capacity on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants regarding the sale agreement dated 30<sup>th</sup> July 2009, in view of the fact that the suit property had been gifted to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the same having been given to the 2<sup>nd</sup> defendant as per the confirmed grant; the 2<sup>nd</sup> and 3<sup>rd</sup> defendants having received the entire purchase price from the original defendant, and subsequently having handed him the original title deed, duly executed the transfer instrument, application for grant of letters of administration and identification cards and passport photographs, I find and hold that the 2<sup>nd</sup> defendant was a constructive trustee for the original defendant and therefore the original defendant is the equitable and real owner of the suit property.

**C. Whether the 4<sup>th</sup> defendant is a bona fide purchaser for value without notice of defect in title.**

100. The Black's Law Dictionary 11<sup>th</sup> Edition defines a bona fide purchaser as follows;

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

101. Therefore a bona fide purchaser is one who honestly purchases property for valuable consideration in good faith without being aware of any defect in the title. Therefore, they must demonstrate having conducted due diligence before purchase.

102. In the case of *Katende v. Haridau & Company Limited* [2008] 2EA 173 the Court of Appeal of Uganda stated as follows;

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

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

103. In this matter, the 4<sup>th</sup> defendant pleaded and testified that he was an innocent purchaser for value without notice on the basis that he obtained two official searches before purchase of the suit property. His testimony was that he obtained official search certificate regarding the suit property which showed that the suit property was in the name of the late Makau Kimeu. He further testified that he conducted a second official search which confirmed that the suit property had been transferred from the late



Makau Kimeu to the 2<sup>nd</sup> defendant Patrick Ngewa Makau. According to him, he only learnt of a court order registered against the title on 2020 when in the process of paying land rates and obtaining development approvals. To support his position, he produced a title deed; sale agreement; Gazette Notice No. 5824 dated 14<sup>th</sup> June 2018; copies of the identity card and pin of the 2<sup>nd</sup> defendant; KRA stamp duty payment slip; invoice for development application; KCB funds transfer to Patrick Makau dated 12<sup>th</sup> April 2019; copy of title deed in the name of Patrick Ngewa Makau; consent of the Land Control Board and photographs.

104. In opposition to the 4<sup>th</sup> defendant's proposition, the original defendant argued that the 4<sup>th</sup> defendant was not an innocent purchaser for value as alleged but that he was party to the other defendants' fraudulent dealings that resulted in the 4<sup>th</sup> defendant's title. The basis for this argument was that the 4<sup>th</sup> defendant did not produce any search certificates before his alleged purchase; that he did not present evidence of payment of the consideration of Kshs. 5,000,000/-; that his allegation that he did not engage an advocate in preparing the sale agreement was not correct because the name of the advocate who prepared the agreement is on the agreement in paragraph 8 thereof; that he did not provide evidence of payment of stamp duty; that the fact that he conceded to have proceeded to construct on the suit property even after knowing of an order of the court for maintenance of status quo demonstrated impunity on his part; that official search as of 5<sup>th</sup> October 2018 showed that the registered proprietor was Patrick Ngewa Makau but subsequent searches upon intervention of the Cabinet Secretary for Lands, showed interference with the title records and that the 4<sup>th</sup> respondent ought to have noted the mischief in the Gazette Notice No. 5824.
105. Having considered the evidence on record, it is clear that although the 4<sup>th</sup> defendant alleged to have conducted two official searches on the suit property which showed that the land was initially in the name of Makau Kimeu and later transferred to Patrick Makau, he did not produce a single official search to back up this claim. In my view, an innocent purchaser being a person who honestly intends to purchase property at a valuable consideration and in good faith, must demonstrate conducting due diligence. It is in the public domain that due diligence in this country starts but does not end with obtaining an official search. Obtaining an official search is a preliminary matter before a reasonable purchaser considers whether or not they want to proceed with purchase a property, because the search reveals the owner and the date such owner was registered and if there are any encumbrances, among other particulars. The 4<sup>th</sup> defendant who appeared before me, is a literate person, who in his testimony demonstrated a fair understanding of basic steps in purchase of land in Kenya. Therefore, for the 4<sup>th</sup> defendant to allegedly purchase property worth Kshs. 5,000,000/- without obtaining a search, cannot be said to be a bona fide purchase.
106. In addition, although the 4<sup>th</sup> defendant alleged to have purchased the suit property at Kshs. 5,000,000/-, the only evidence of payment of money to the 2<sup>nd</sup> defendant is a KCB Bank slip dated 12<sup>th</sup> April 2019 for the sum of Kshs. 403,000/-. No other evidence was presented by the 4<sup>th</sup> defendant to show payment of the entire consideration. This is despite his evidence that he completed paying the consideration in 2018. In my view, in a society like ours where there are many fraudsters and turncoats preying on unsuspecting victims, as there are honest human beings, it would be expected that the 4<sup>th</sup> defendant would as a basic requirement have proof of payment of the entire consideration, and or a substantial amount thereof, since an innocent purchaser must demonstrate payment of valuable consideration. In this case, the payments made by the 4<sup>th</sup> defendant is less than 10% of the alleged agreed consideration. In the premises, I find and hold that the 4<sup>th</sup> defendant failed to prove purchase of the suit property for valuable consideration. It is unsettling that even with the evidence of nonpayment of over 90% of the alleged consideration, where the only evidence for payment of consideration is payment



- made in April 2019, the 4<sup>th</sup> defendant was allegedly registered as proprietor of the suit property on 25<sup>th</sup> September 2018.
107. Besides, although the 4<sup>th</sup> defendant produced a KRA payment slip for the sum of Kshs. 100,000/- dated 24<sup>th</sup> September 2018, the same is ordinarily generated when a tax payer intends to pay tax, and is not evidence of payment of tax. The 4<sup>th</sup> defendant did not produce evidence of payment of stamp duty tax of Kshs. 100,000/- or any part thereof and therefore it is clear that his registration as proprietor of the suit property was done without payment of stamp duty, which in my view is unlawful.
  108. The 4<sup>th</sup> defendant argued that having constructed on the suit property he would suffer loss as compared to the original defendant. Having considered his invoice for payment of development application, it is clear that there is neither evidence of payment to the County Government of Machakos for the approval of development, nor evidence that the said development was approved. But most importantly, it was the 4<sup>th</sup> defendant's evidence that before he began developing the suit property, he was made aware of the order of this court registered on 21<sup>st</sup> November 2018 for maintenance of the status quo on the suit property. He testified that despite the aforesaid court order, he went ahead to construct on the suit property because according to him, the land was his. In my view, this does not depict good faith on the part of the 4<sup>th</sup> defendant and only demonstrates the contempt of the court and the disregard of the original defendant's claim, conduct shown in this matter by the plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who interfered with the suit property purporting to sell it to the 4<sup>th</sup> defendant while there were orders issued on 19<sup>th</sup> November 2018 for maintenance of the status quo. This means that the 4<sup>th</sup> defendant was determined to have the suit property notwithstanding other parties' claim thereto or defect in title.
  109. One of the documents relied upon and produced by the 4<sup>th</sup> defendant as the basis of his alleged purchase was the Gazette Notice No. 5824 dated 14<sup>th</sup> June 2018. In the Gazette Notice, it was indicated that whereas Makau Kimeu was the registered proprietor of the suit property and that there was a High Court Succession Cause No. 803 of 2012 wherein it was ordered that the suit property be transferred to Patrick Ngewa Makau and Ancent Muisyo Makau and that there was a confirmation of grant, Makau Kimeu was given a Notice of 30 days to surrender the original title deed to the Land Registrar and in default the production thereof would be dispensed with and an instrument of transfer would be registered and a title issued in the names of Patrick Ngewa Makau and Ancent Muisyo Makau; and the title issued earlier to Makau Kimeu would be deemed cancelled and of no effect.
  110. Essentially, the notice was requiring a dead person, namely Makau Kimeu to produce his original title deed. This is the person that the 4<sup>th</sup> defendant knew was deceased father of the defendants. Therefore the 4<sup>th</sup> defendant knew that what was in the notice could not be complied with as the person required to comply was deceased. It was also clear from the notice that the plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not in possession of the original title. In those circumstances, a reasonable honest purchaser would inquire the circumstances of the non-availability of the original title deed. In this case, the 4<sup>th</sup> defendant did not give any evidence as to having made such inquiry.
  111. The 4<sup>th</sup> defendant's position and evidence that they prepared the sale agreement in a hotel without involvement of a lawyer was demonstrated to be incorrect as paragraph 8 (d) of the sale agreement was specific that "The lawyer for the two parties is John Were Odera". Again, at the last page of the agreement the name of the lawyer, being John Were Odera, his stamp and signature are clearly indicated and therefore, the 4<sup>th</sup> defendant's credibility is in question.
  112. For the reasons given above and in view of the fact that the 4<sup>th</sup> defendant failed to demonstrate obtaining an official search certificate before transacting with the 2<sup>nd</sup> defendant; failed to show payment of the full consideration; failed to show payment of stamp duty; deliberately violated the status quo



order of this court dated 19/11/2018; was aware of a fraudulent Gazette Notice No. 5824; I find and hold that the 4<sup>th</sup> defendant is not a bona fide purchaser for value without notice of defect in title.

**D. Whether the original defendant deserves the orders sought in the counterclaim.**

113. The original defendant sought to be registered as owner of the suit property. The original defendant produced evidence of the search certificate dated 5<sup>th</sup> October 2018 showing that as of that date, the suit property was registered in the name of Patrick Ngea Makau. He stated that he thereafter sought to obtain another search but his request was declined by the Land Registrar prompting him to seek the intervention of the Cabinet Secretary for Lands, which now led him being issued with the search certificate dated 10<sup>th</sup> March 2020 whose entries differed with the search dated 5<sup>th</sup> October 2018. This second search shows Entry No. 8 for 25<sup>th</sup> September 2018 being registration of Boniface Mwangi Wakiuru; Entry No. 9 of 25<sup>th</sup> October 2018 indicating title deed issued and Entry No. 10 of 21<sup>st</sup> November 2018 showing registration of the order of the court for maintenance of status quo. The original defendant maintained that the discrepancy demonstrated in the two official searches herein regarding who was registered as proprietor of the suit property as at 5<sup>th</sup> October 2018; and the land registrar's refusal to issue him with subsequent searches, until the intervention of the Cabinet Secretary for lands, demonstrated interference with the land registry records in favour of the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant did not produce any search certificate to show ownership before his alleged purchase and since the original defendant's evidence was not shaken on cross examination, it is my view that at the instance of the plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, with the corrupt assistance of the Land Registrar Machakos, the records in the land registry were tempered with whereof Entry No. 8 for registration of Boniface Mwangi Wakiuru was backdated to precede the order for maintenance of status quo. This is because if that entry had been valid, as having occurred on 25<sup>th</sup> September 2018, it could have been indicated in the official search certificate issued to the original defendant on 5<sup>th</sup> October 2014. The 4<sup>th</sup> defendant was therefore a beneficiary of fraud, deceit, illegality and corruption and having been found not to have been a bona fide purchaser for value without notice, this court cannot allow him to enjoy the outcome of such illegality. Therefore, I am satisfied that the original defendant is the equitable and real owner of the suit property and should be awarded the same.
114. In the premises, I am satisfied that the original defendant, Muamba Mang'ati Nzile has proved his case on the required standard against all the defendants to the counterclaim and I enter judgment for him against the plaintiff Ancient Muisyo Makau and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as follows;
- a. A declaration is hereby made that the doctrine of constructive trust applies to the purchase of LR. No. Athi River/Athi River Block 5/92 by the original defendant Muamba Mangati Nzile.
  - b. An order is hereby issued that the title for LR. No. Athi River/Athi River Block 5/92 formerly registered in the name of Makau Kimeu and later issued to Patrick Ngewa Makau and subsequently to Boniface Mwangi Wakiuri be and is hereby cancelled.
  - c. Ancient Muisyo Makau and Patrick Ngewa Makau being the administrators of the estate of Makau Kimeu are ordered to transfer LR. No. Athi River/Athi River Block 5/92 to Muamba Mang'ati Nzile the original defendant herein within 30 days of this judgment and in default, the Deputy Registrar of this court is authorized to execute all requisite documents to transfer the said parcel of land to Muamba Mang'ati Nzile.
  - d. An order is hereby issued that the plaintiff Ancient Muisyo Makau and the 2<sup>nd</sup>, 3<sup>rd</sup> and all persons claiming through them including the 4<sup>th</sup> defendant are ordered to vacate the suit property in 60 days, in default, an order of eviction and demolition of structures on Parcel Number LR. No. Athi River/Athi River Block 5/92 to issue.



- e. The costs of the counterclaim shall be paid to Muamba Mang'ati Nzile the original defendant, by the plaintiff, and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

115. The suit by Acent Muisyo Makau is hereby dismissed with costs to the original defendant.

116. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Nadida for 4<sup>th</sup> defendant

Ms. Mwanzia holding brief for Mr. Mutua for the original defendant

Court assistant – Josephine

