



**Kabura ([Suing as the Administrator of the Estate of Johnstone Njuguna Mwangi]) v Munene & 3 others (Environment & Land Case 7 of 2023) [2024] KEELC 13358 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13358 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 7 OF 2023  
JO MBOYA, J  
NOVEMBER 21, 2024**

**BETWEEN**

**ANNAH WANJIRU KABURA ..... PLAINTIFF  
[SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHNSTONE  
NJUGUNA MWANGI]**

**AND**

**WILSON SAMUEL MUNENE ..... 1<sup>ST</sup> DEFENDANT  
FRANCIS GITAU NGANGA ..... 2<sup>ND</sup> DEFENDANT  
PETER GATHENYA ..... 3<sup>RD</sup> DEFENDANT  
ANNE NJERI MUCHENE ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. The Plaintiff herein filed and or commenced the instant suit vide Plaintiff dated the 4th September 2020 and wherein the Plaintiff sought for various reliefs. Subsequently, the Plaintiff was thereafter amended and re-amended resting with the amended Plaintiff dated the 1st November 2021.
2. Vide the amended Plaintiff dated the 1st November 2021, [which constitutes the operative pleading] the Plaintiff have sought for the following reliefs [verbatim]:
  - i. A declaration that the suit land LR number 12672/73 IR No 91087 belongs to the Plaintiff and or the Estate of Johnstone Njuguna Mwangi.
  - ii. An Order of Permanent Injunction directed to the defendants to cease ever interfering with property No. LR 12672/73 IR 91087.



- iii. An order for cancellation and or revocation of any title and or transfer done in favour of the 4th defendant and thereafter the chief land Registrar be directed to process fully registration of grant issued in favour of the plaintiff and subsequently issue the plaintiff with a provisional title to LR NO.12672 IR 91087 the plaintiff having lost and reported loss of the original title and advertised the said loss as required in law.
  - iv. An order directed to the defendants and or their agents or servants to vacate and give up vacant possession of LR NO 12672/73 IR 91087 to the plaintiff immediately failure to which the plaintiff with the help of the OCPD of the area do proceed to evict by lawful means the defendants and or their agents or servants from the Suitland LR NO 12672/73 IR 91087 and demolish any structure of the defendants or their agents on the suit land.
  - v. General damages for trespass and malicious damage to the Plaintiff's property.
  - vi. Costs of this suit;
  - vii. Any other or further relief as this court may deem just.
3. Upon being served with the Plaint under reference, the 1st, 2nd and 3rd Defendants duly entered appearance and filed a statement of defence and counterclaim dated the 24th September 2020. The counterclaim on behalf of the 1st, 2nd and 3rd Defendants seeks for the following relief[s]:
- i. THAT the Honourable Court do find and declare:
    - a. Neither the 2nd Defendant nor lte Farmers co-operative Society Limited executed the alleged agreement and transfer.
    - b. The purported agreement, acknowledgement and transfer were fraudulently procured by the Plaintiff
  - ii. The Plaintiff's Title to land parcel L.R Number 12672/73 I.R No 91087 situate within Runda; Nairobi County be Annulled and/or cancelled and the same be registered in favour of the 2nd Defendant.
  - iii. That a permanent injunction be issued against the Plaintiff through herself. her agents, servants from further interfering with the parcel of land known as L.R Number 12672/73 I.R No 91087 situate within Runda Nairobi County.
  - iv. Any such other or further relief as this Honourable Court may deem appropriate to be made.
  - v. That general damages be awarded to the Defendants for the Plaintiff's fraudulent misrepresentation.
  - vi. That the Plaintiff's suit against the Defendant is be dismissed with costs to the Defendants.
  - vii. An order to the Registrar for cancellation and rectification of the land register to cancel the names of the Plaintiff's late husband.
  - viii. Costs and interest on costs be awarded.
4. On the other hand, the 4th Defendant herein though brought on board pursuant to the re-amended Plaint does not seem to have entered appearance and/or filed any defence. Furthermore, the 4th Defendant did not participate in the proceedings.
5. First forward, the instant matter came up for pre-trial directions on various dates resting with the 12th February 2024; whereupon the advocates for the parties confirmed that same [advocates] had filed the



requisite pleadings; list and bundle of documents and witness statements. In this regard, it was agreed that the matter was thus ready for hearing.

6. Arising from the foregoing, the court proceeded to and confirmed the matter for hearing. Furthermore, the court fixed/scheduled the matter for hearing.

### **Evidence By The Parties’:**

#### **a. Plaintiff’s Case:**

7. The Plaintiff’s case revolves around the evidence of two [2] witnesses, namely, Annah Wanjiru Kabura and Emanuel Karisa Kenga. Same testified as PW1 and PW2, respectively.
8. It was the testimony of the witness [PW1] that same is the Plaintiff in respect of the instant matter. Furthermore, the witness contended that by virtue of being the Plaintiff in respect of the instant matter same [witness] is therefore conversant with the facts of the case.
9. Additionally, the witness [PW1] averred that same has since recorded a comprehensive witness statement dated the 14th December 2021. In this regard, the witness sought to adopt and rely on the contents of the said witness statement. Instructively, the witness statement dated the 14th December 2021 was thereafter adopted and constituted as the evidence in chief of the witness.
10. On the other hand, the witness adverted to the list and bundle of documents dated the 14th December 2021. The witness averred that the said list contains 29 documents. Besides, the witness sought to tender and produce the various documents at the foot of the list and bundle of documents as exhibits before the court.
11. There being no objection to the production of the documents at the foot of the list and bundle of documents dated the 14th December 2021; same [documents] were produced and admitted as exhibits P1 to P29, respectively.
12. It was the further testimony of the witness that same [PW1] has also filed a further list and bundle of documents dated the 17th March 2023. In this regard, the witness sought to tender and produce the said documents as exhibits before the court. Suffice it to state that the documents under reference were thereafter tendered and produced as exhibits P30 to P33, respectively.
13. Additionally, the witness averred that same has also filed a supplementary list and bundle of documents dated the 22nd September 2023. For good measure, the witness sought to tender and produce the documents thereunder as exhibits before the court. Instructively, the documents at the foot of the said list and bundle of documents were produced as exhibits P34 to P35, respectively.
14. Finally, the witness adverted to a list and bundle of documents dated the 7th March 2024 and thereafter sought to tender and produce the documents at the foot of the said list. In this regard and in the absence of any objection, the single document at the foot of the list dated the 7th March 2023 was tendered in evidence and marked as exhibit P36.
15. Other than the foregoing, the witness adverted to the further amended Plaint dated the 1st November 2021; and thereafter invited the court to grant the reliefs sought thereunder. Furthermore, the witness added that same has also filed a verifying affidavit.
16. On cross examination by learned counsel for the 1st, 2nd and 3rd Defendants, the witness averred that same [witness] is the widow of Johnstone Njuguna Mwangi, now deceased. In addition, the witness testified that same has since procured and obtained the grant of letters of administration in respect of the estate of the said Johnstone Mwangi [now deceased].



17. It was the further testimony of the witness that her late husband [Johnstone Mwangi] bought/purchased the suit property from one Francis Gitau Nganga. Furthermore, the witness averred that the suit property was purchased at a consideration of Kes.300, 000/= only.
18. Whilst still under cross examination, the witness averred that same [witness] did not witness the payment of the purchase price. In any event, it was the testimony of the witness that same is not aware of whether the purchase price was duly paid or otherwise.
19. It was the further testimony of the witness that same [PW1] was however present when her late husband paid Kes.50, 000/= only to Francis Gitau Nganga.
20. The witness further testified that same procured and obtained a copy of the sale agreement from the various documents that were under the custody of her deceased husband. At any rate, it was the testimony of the witness that same [witness] saw the original copy of the sale agreement.
21. On further cross examination, the witness averred that same last saw the original copy of the sale agreement in the year 2019. However, the witness clarified that she took photocopies of the sale agreements and the rest of the documents and thereafter handed over the copies to her [witness] advocate on record.
22. It was the further testimony of the witness that the suit property was previously registered in the name of Ite Farmers Cooperative Society Ltd. For good measure, the witness intimated that same has tendered and produced before the court a copy of the letter showing that the land previously belonged to Ite Farmers Cooperative Society Limited.
23. It was the further testimony of the witness that same has also filed and produced a copy of the transfer document that was signed by Ite Farmers Cooperative Society Ltd. However, it was the further testimony of the witness that the transfer documents which same [witness] has produced is not signed by Ite Farmers Cooperative Society Ltd.
24. Whilst under further cross examination, the witness averred that same is aware that a transfer instrument must be submitted/presented to the land registry. Furthermore, the witness averred that prior to registration, the transfer instrument must be paid for.
25. On the other hand, it was the testimony of the witness that there is also a requirement for payment of stamp duty. Nevertheless, the witness averred that same [PW1] has not produced before the court any evidence pertaining to payment of stamp duty.
26. It was the further testimony of the witness that same [witness] has also not gone to the land registry to have the suit property transferred unto her [witness]. In addition, the witness testified that same has not procured a certificate of title in respect of the suit property.
27. Whilst still under further cross examination, the witness averred that same [witness] recalls to have lodged the transfer documents at the land registry for registration. However, the witness clarified that despite lodgement of the transfer documents, same [witness] has not been issued with a certificate of title over the suit property.
28. It was the further testimony of the witness that same is aware that the suit property has since been sold to the 4th Defendant. Nevertheless, the witness added that the sale and transfer of the suit property to the 4th Defendant is fraudulent.
29. On the other hand, it was the testimony of the witness that same [witness] has previously been arrested and charged with the offence of fraud. However, the witness clarified that the arrest in question was



- not in respect of the suit property. Furthermore, the witness added that the arrest in question related to a land at Ginthunguri.
30. Whilst still under cross examination, the witness averred that same lost various document[s] relative to the suit property. In particular, the witness clarified that same lost the certificate of title in respect of the suit property.
  31. It was the further testimony of the witness that upon discovery of the loss of the certificate of title in respect of the suit property, same [witness] reported the loss to the police. In this regard, the witness averred that same was thereafter issued with a police abstract denoting the loss of the certificate of title.
  32. It was the further testimony of the witness that same has been paying rates over and in respect of the suit property. Instructively, the witness averred that the rates have been paid to and in favour of Nairobi City Council [now defunct] and now Nairobi City County Government.
  33. On further cross examination, the witness averred that her late husband was issued with a ballot over and in respect of the suit property. Furthermore, the witness averred that the suit property was sold to her late husband [the Deceased] before the certificate of title was issued.
  34. It was the further testimony of the witness that the suit property lawfully belongs to her late husband. Furthermore, the witness averred that same [witness] has neither sold nor transferred the suit property to anyone.
  35. On re-examination, the witness averred that the suit property was lawfully bought/purchased by her late husband. In any event, the witness added that same knew that her late husband [the Deceased] was the owner of the suit property from the certificate of title which same found in the midst of her husband's documents.
  36. Whilst still under re-examination, the witness averred that same also procured and obtained the sale agreement between her late husband, namely, Johnstone Njuguna Mwangi and Francis Gitau Nganga. In particular, the witness reiterated that the suit property belongs to the estate of her deceased husband.
  37. It was the further testimony of the witness that the ballot in respect of the suit property was done by Francis Gitau Nganga. Furthermore, the witness averred that it is the said Francis Gitau Nganga who thereafter sold the suit property to her late husband.
  38. On the other hand, it was the testimony of the witness that the transfer instrument was duly lodged at the land registry.
  39. The second Witness who testified on behalf of the Plaintiff was one Emanuel Karisa Kenga. Same testified as PW2.
  40. It was the testimony of the witness [PW2] that same was previously employed by the National Police Service. Furthermore, the witness averred that same attained the rank of commissioner of police.
  41. On the other hand, the witness testified that same is a forensic documents examiner. The witness posited that same has been a forensic documents examiner for more than 30 years. In this regard, the witness averred that same therefore has the requisite expertise and knowledge in documents examination.
  42. It was the further testimony of the witness that in respect of the instant matter, same [witness] was instructed by the firm of M/s Njonjo Okello & Co Advocates to undertake forensic documents examination on a number of documents. In particular, the witness averred that the documents were forwarded unto him [witness] vide forwarding letter dated the 13th April 2021.



43. It was the further testimony of the witness that upon receipt of the various documents which were forwarded unto him same [witness] examined the documents and thereafter prepared a report dated the 14th April 2021. Instructively, the witness sought to tender and produce the report as an exhibit before the court.
44. There being no objection to the production of the report as an exhibit before the court, same [report dated 14th April 2021] was tendered and produced as exhibit P19.
45. Other than the foregoing, the witness averred that same received further documents from the firm of M/s Njonjo Okello & Co Advocates with instructions to undertake documents examination in respect of same. In this regard, the witness averred that same [witness] also undertook due examination and thereafter prepared another report dated the 11th March 2023.
46. Furthermore, the witness thereafter sought to tender and produce before the court the report dated the 11th March 2023. Suffice it to point out that the report under reference was duly adduced and marked as exhibit P33.
47. On cross examination by learned counsel for the 1st, 2nd and 3rd Defendants, the witness averred that same is duly qualified as a forensic documents examiner. In addition, the witness averred that currently same is undertaking forensic documents examination as a private examiner.
48. It was the further testimony of the witness that same deployed and used various machines in the course of documents examination. In particular, the witness adverted to a microscope which same [witness] used for purposes of enlargement.
49. Whilst still under cross examination, the witness averred that he [witness] is the person who undertook the examination. However, the witness added that there is no one who undertakes checking and approval of the work done by him [witness].
50. Additionally, the witness testified that the documents which were forwarded to him [witness] from the firm of M/s Njonjo Okello & Co Advocates were photocopies. Nevertheless, the witness added that the photocopies were clear and legible. In this regard, the witness testified that the documents were therefore suitable for examination and comparison purposes.
51. With the foregoing testimony the Plaintiff's case was closed.

**b. 1st, 2nd and 3rd Defendants' case:**

52. The 1st, 2nd and 3rd Defendants [hereinafter referred to as the Defendants] case revolves around the evidence of 5 witnesses, namely, Francis Kago, Chief Inspector Susan Wambugu, Elizabeth Gicheha, Peter Gathenya and Francis Gitau Nganga. Same testified as DW1, DW2, DW3, DW4 and DW5, respectively.
53. It was the testimony of the witness [DW1] that same is the secretary of Ite Farmers Cooperative Society Limited. In addition, the witness averred that same [witness] has been the secretary of the society since the year 1990.
54. It was the further testimony of the witness that by virtue of being the secretary of the society same [witness] is therefore conversant with the facts of this case. In any event, the witness averred that same has since recorded a witness statement dated the 2nd November 2023. In this regard, the witness sought to adopt and rely on the witness statement.
55. Suffice it to state that the witness statement dated the 2nd November 2023 was thereafter adopted and constituted as the evidence in chief of the witness.



56. Other than the foregoing, the witness averred that same has highlighted and referenced various documents at the foot of his witness statement. In this regard, the witness adverted to the certificate of title, the original ballot and a copy of the members register of Ite Farmers cooperative Society Limited.
57. There being no objection to the production of the various documents, the witness tendered and produced same [ the Documents] as exhibits D1 to D3, respectively.
58. It was the further testimony of the witness [DW1] that same has also referenced various letters at the foot of his witness statement. To this end, the witness sought to tender and produce before the court the various letters as exhibits. Instructively, the letters adverted to at the foot of the witness statement were tendered and produced as exhibits D5 to D13, respectively.
59. On cross examination by learned counsel for the Plaintiff, the witness averred that same has been the secretary of Ite farmers Cooperative Society Ltd since the year 1990. Furthermore, the witness averred that the chairperson of the society has been Mr. Njau Rimui.
60. Whilst still under cross examination, the witness averred that same has the authority of the society to attend court and to give evidence on behalf of the society. Nevertheless, the witness clarified that the authority is not one of the documents which has been tendered before the court.
61. It was the further testimony of the witness that the society is still active and operational. Nevertheless, upon being referred to various gazette notices, the witness averred that the gazette notices relate to the liquidation of Ite Farmers Cooperative Society Ltd. Furthermore, the witness averred that the gazette notice also alludes to the appointment of a liquidator.
62. Whilst under further cross examination, the witness averred that despite the gazette notices, the society was never wound up. In any event, the witness added that the liquidation notices were subsequently lifted by the commissioner of cooperative societies.
63. It was the further testimony of the witness that the books of the society were never handed over to the liquidator. In particular, the witness averred that the books have been under the custody of the officials of the society.
64. On further cross examination, the witness averred that same is conversant with one Francis Gitau Nganga. In particular, the witness stated that Francis Gitau Nganga was a member of the society.
65. It was the further testimony of the witness that Francis Gitau Nganga was member number 106. Furthermore, the witness averred that Francis Gitau Nganga balloted for a portion of the societies land. In any event, the witness added that balloting for the various sub-divisions was undertaken on the 25th March 2000.
66. It was the further testimony of the witness that the society retained and engaged the law firm of M/ s Ndungu Njoroge & Kwach Advocates for purposes of undertaking conveyance on their behalf. However, the witness added that subsequently the conveyance on behalf of the society was taken over by the firm of M/s Alice Kamau & Co Advocates.
67. Upon being referred to a copy of transfer instrument filed on behalf of the Plaintiff; the witness averred that the documents bears his signature. Furthermore, the witness testified that the signature of the chairman is also contained on the transfer document.
68. On further cross examination, the witness averred that same has also availed the various letters before the court. In particular, the witness averred that the various letters were sent to Francis Gitau Nganga.



69. Other than the foregoing, it was the testimony of the witness that various members of the society sold their plots before the issuance of titles.
70. On re-examination by learned counsel for the Defendants, the witness stated that the society never received any official communication from the commissioner of cooperative societies. Furthermore, the witness averred that the society has never been liquidated.
71. On further re-examination, it was the testimony of the witness that same [witness] is aware that the liquidation notice was lifted. However, the witness clarified that same has not tendered in evidence a copy of the evidence pertaining to the lifting of the liquidation order.
72. It was the further testimony of the witness that the books of the society have been under the custody and care of the official[s] of the society. In particular, the witness added that the books of the society have been under his [witness] custody.
73. It was the further testimony of the witness that the transfer documents which has been filed by the Plaintiff herein is incomplete. Furthermore, the witness added that the signature alluded to at the foot of the incomplete transfer are contained on a different page.
74. Whilst still under re-examination, the witness averred that same [witness] did not transfer any piece of land to the Plaintiff. In addition, the witness stated that Francis Gitau Nganga also did not sell his land before balloting.
75. The second witness who testified on behalf of the Defendants is Chief Inspector of Police Susan Wambogo. Same testified as DW2.
76. It was the testimony of the witness [DW2] that same is an employee of National Police Service. Furthermore, the witness added that same is currently attached to the Directorate of Criminal Investigation [DCI].
77. It was the further testimony of the witness that same [witness] is also a forensic document examiner. In this regard, the witness averred that same is therefore competent and qualified to undertake forensic examination.
78. Furthermore, the witness averred that on the 6th April 2021 same [witness] received an exhibit memo form from the directorate of criminal investigations [Land Fraud Investigations Unit] with instructions to undertake examination of the questioned documents that were marked A1 to A6, respectively.
79. It was the further evidence of the witness that upon receipt of the documents attached to the Exhibit Memo Form, same [Witness] proceeded to and undertook the forensic document examination. In addition, the witness averred that same thereafter prepared a report dated the 11th May 2021. In this regard, the witness sought to tender and produce before the court the report under reference.
80. Suffice it to state that the report dated the 11th May 2021 was thereafter tendered and produced as exhibits D20.
81. On cross examination, by learned counsel for the Plaintiff, the witness testified that same is a qualified and experienced documents examiner. Furthermore, the witness testified that same received the various documents from the Land Fraud Investigations Unit. In any event, the witness added that the documents were attached to the Exhibit Memo Form.
82. Whilst still under cross examination, the witness averred that same [witness] is conversant with one Emanuel Karisa Kenga. Besides, the witness added that the said Emanuel Karisa Kenga was previously



- a document examiner with the National Police. Nevertheless, the witness added that same [Emanuel Karisa Kenga] has since left the National Police Service.
83. The third Witness who testified on behalf of the Defendants was one Elizabeth Gichea. Same testified as DW3.
  84. It was the testimony of the witness [DW3] that same is an advocate of the High Court of Kenya. Furthermore, the witness averred that previously same was a Principal Land Registrar. Nevertheless, the witness averred that same has since retired.
  85. It was the testimony of the witness that as pertains to the instant matter, same has since recorded a witness statement dated the 28th October 2020. Furthermore, the witness sought to adopt and rely on the contents of the witness statement under reference.
  86. Suffice it to point out that the witness statement dated the 28th October 2020 was thereafter adopted and admitted as the evidence in chief of the witness. Additionally, the witness averred that in the body of her witness statement, same [witness] has referenced the certificate of title in respect of L.R No. 12672/73. The witness averred that the certificate of title indicates that same was signed by herself. Furthermore, the witness averred that the certificate of title contains two entries.
  87. It was the further testimony of the witness that entry number two at the foot of the said certificate of title adverts to the transfer in favour of Johnstone Njuguna Mwangi. Besides, the entry in question is shown to have been entered/registered on the 23rd December 2002. Nevertheless, the witness averred that the entry shown as number two [2] was never signed by her. Furthermore, the witness also stated that same did not sign any provisional transfer in favour of Johnstone Njuguna Mwangi.
  88. It was the further testimony of the witness that the provisional transfer was neither assessed for stamp duty nor affixed with the requisite stamp duty.
  89. On cross examination by learned counsel for the Plaintiff, the witness averred that the certificate of title in respect of L.R No. 12672/73 which same [witness] has been shown is indicated to be a certified copy.
  90. On the other hand, the witness adverted to a certificate of official search which has been filed by the Plaintiff. For good measure, the witness posited that the certificate of official search is indicated to have been signed by S Njoroge.
  91. Whilst still under cross examination, it was the testimony of the witness that entry number two on the certificate of title indicates that the suit property was transferred to Johnstone Njuguna Mwangi. Furthermore, the witness averred that the entry is indicated to have been registered on the 21st December 2003.
  92. On further cross examination and upon being referred to the provisional transfer, the witness averred that same is indicated to have been presented on the 23rd December 2002. Nevertheless, the witness clarified that the document was/ is shown to have been presented on the 23rd December 2002 and not 23rd December 2003.
  93. Whilst under further cross examination, the witness averred that the Provisional transfer before the court is indicated to have been executed by officials of Ite Farmers Cooperative Society Limited.
  94. On re-examination, the witness averred that the signature which has been affixed against entry number two [2] on the certificate of title does not belong to her. In particular, the witness stated that same did not sign the provisional transfer.



95. Whilst under further re-examination, the witness averred that same did not sign entry number two which purports that the suit property was being registered in favour of Johnstone Njuguna Mwangi. For good measure, the witness posited that the entry in question is not authentic.
96. The fourth witness who testified on behalf of the Defendants is Peter Gathenya. Same testified as DW4.
97. It was the testimony of the witness [DW4] of the witness that same has been working and residing at Runda Estate within the city of Nairobi. Furthermore, the witness averred that same is conversant with the facts of the instant matter. In any event, the witness testified that same has since recorded a witness statement dated the 2nd April 2024. In this regard, the witness sought to adopt and rely on the witness statement.
98. Suffice it to point out that the witness statement dated the 2nd April 2024 was thereafter adopted and constituted as the evidence in chief of the witness.
99. On cross examination, by learned counsel for the Plaintiff, the witness averred that same is conversant with Francis Gitau Nganga and Wilson Munene. Furthermore, the witness added that same has been employed as a worker on the suit property.
100. It was the further testimony of the witness that his employer has been Francis Gitau Nganga. It was the further testimony of the witness that there was another person who purported to lay a claim to the suit property. The witness averred that because of the 3rd Party who is laying a claim to the suit property, Francis Gitau Nganga proceeded to and erected a structure on the suit property.
101. On re-examination, the witness averred that same is the caretaker of the suit property. In any event, the witness added that same has been the caretaker of the suit property since the year 2002.
102. On further re-examination, the witness averred that there is no one else who has claimed the suit property. Nevertheless, the Witness averred that it is the advocate for the Plaintiff, who once went to the suit property and laid a claim thereto.
103. The fifth witness who testified on behalf of the Defendants is Francis Gitau Nganga. Same testified as DW5.
104. It was the testimony of the witness that same is the 2nd [ Second] Defendant in respect of the instant matter. Furthermore, the witness averred that by virtue of being the 2nd Defendant same [witness] is conversant with the facts of this case.
105. Other than the foregoing, the witness averred that same has since recorded a witness statement dated the 23rd March 2021. In this regard, the witness thereafter sought to adopt and rely on the witness statement. Suffice it to state that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
106. Additionally, the witness averred that same has since filed list and bundle of documents. The list and bundle of documents is dated the 22nd September 2022. In this regard, the witness sought to tender and produce the various documents as exhibits before the court. Instructively, the documents were thereafter tendered as exhibit[s] D1 to D20, respectively.
107. The witness further adverted to another list and bundle of documents dated the 22nd September 2022 and which documents the witness sought to tender and produce before the court. In the absence of any objection, the documents at the foot of the second list dated the 22nd September 2022 was produced and marked as exhibit D21.



108. It was the further testimony of the witness that same was a member of Ite Farmers Cooperative Society. Furthermore, the witness averred that by virtue of being a member of Ite Farmers Cooperative Society same [witness] was entitled to a share of the societies land.
109. Other than the foregoing, the witness averred that same was allocated plot number 12672/73. In particular, the witness averred that same is the owner of the suit property.
110. On cross examination by learned counsel for the Plaintiff the witness averred that the suit property was lawfully allocated unto him. In any event, the witness averred that same was member number 106.
111. Upon being shown a copy of the sale agreement indicating his name, the witness stated that the sale agreement indicates that same [witness] was selling the suit property to Johnstone Njuguna Mwangi. However, the witness testified that the sale agreement is fraudulent. In any event, the witness added that same did not sell the suit property to Johnstone Njuguna Mwangi.
112. Whilst still under further cross examination, the witness averred that same is conversant with one Rosemary Njeri Gitau. In any event, the witness added that Rosemary Njeri Gitau is his [witness] wife.
113. It was the further testimony of the witness that the signature which is shown on the face of the sale agreement does not belong to him. Furthermore, upon being referred to the letter dated the 20th March 2000, the witness averred that same did not write the impugned letter.
114. It was the further testimony of the witness that same is conversant with the 1st Defendant. For good measure, the witness averred that the 1st Defendant is his son.
115. Whilst still under further cross examination, the witness adverted to a letter dated the 22nd October 2020. In particular, the witness averred that the letter under reference came from a Land Registrar and same relates to the suit property.
116. It was the further evidence of the witness that the letter under reference confirms that the certificate of title held by Johnstone Njuguna Mwangi is false and fraudulent.
117. On re-examination by learned counsel for the Defendants, the witness averred that same [witness] is the lawful owner of the suit property. Furthermore, the witness averred that the sale agreement which has been adverted to is a forgery.
118. Upon being referred to the letter dated 20th March 2000 which is said to have been written to Ite Farmers Cooperative Society, the witness indicated that same did not write the impugned letter. Furthermore, the witness clarified that the signature thereon does not belong to him.
119. With the foregoing testimony, the 1st, 2nd and 3rd Defendants' case was closed.

**c. 4th Defendant's Case:**

120. Though the 4th Defendant was joined into the instant matter pursuant to the re-amended Plaintiff same [4th Defendant] neither entered appearance nor filed a statement of defence.
121. Additionally, the 4th Defendant did not participate in the hearing. Simply put, there was no representation for and on behalf of the 4th Defendant.

**Parties' Submissions:**

122. Upon the close of the hearing, the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.



123. Thereafter the Plaintiff filed written submissions dated the 8th August 2024 whereas the 1st, 2nd and 3rd Defendants filed written submissions dated the 2nd September 2024. Suffice it to point out that the two [2] sets of written submissions form part of the record of the court.
124. On the other hand, it is imperative to underscore that even though the court has neither reproduced nor rehashed the written submissions filed on behalf of the respective parties, the contents thereof have been considered and taken into account.
125. Finally, it suffices to posit that the court is grateful to the respective advocates for their endeavours that enabled the hearing of this matter to be prosecuted and concluded with a record six months from the commencement of the hearing. In addition, the court is also grateful to the parties for the comprehensive written submissions which have been filed.

#### **Issues for Determination:**

126. Having reviewed the pleadings filed [amended amended Plaintiff and statement of defence and counterclaim] and upon taking into account the evidence tendered and finally upon considering the written submissions on record, the following issues do crystalize [emerge] and are thus worthy of Determination;
  - i. Whether the Plaintiff has tendered and placed before the court evidence to demonstrate ownership of the suit property.
  - ii. What reliefs/remedies if any ought to be granted.

#### **Analysis and Determination:**

##### **Issue Number 1**

Whether the Plaintiff has tendered and placed before the court evidence to demonstrate ownership of the suit property.

127. The Plaintiff herein [who is the Legal Administratrix of the estate of one Johnstone Njuguna Mwangi] filed the instant suit contending that the property known as L.R No. 12267/73 [the suit property] was lawfully sold to and in favour of her deceased husband by one Francis Gitau Nganga.
128. It was the further contention by the Plaintiff that Francis Gitau Nganga [DW5] sold the property unto her late husband shortly after Francis Gitau Nganga had balloted for the suit property at Ite Farmers Cooperative Society Ltd. Instructively, it was posited that what constituted the suit property arose from the larger property which was hitherto owned by Ite Farmers Cooperative Society Ltd.
129. To vindicate the contention that the suit property was lawfully sold to and in favour of Johnstone Njuguna Mwangi [now deceased], PW1 tendered and produced before the court a copy of the sale agreement dated the 28th March 2000 and a letter dated the 24th April 2000, which was indicated to have been generated and signed by the vendor [DW5].
130. Other than the sale agreement and the letter, which have been referenced in the preceding paragraph, PW1 also tendered and produced before the court a copy of the Provisional transfer instrument which is said to have been executed by the officials of Ite Farmers Cooperative Society Ltd and which transfer instrument is said to have been deployed for purposes of transferring the suit property to and in favour of Johnstone Njuguna Mwangi [now deceased].
131. On the other hand, PW1 also tendered and produced before the court a copy of the certificate of title in respect of the suit property and wherein entry number 2 indicates that the suit property was transferred



- and registered in favour of Johnstone Njuguna Mwangi. Instructively, the certificate of title indicates that the transfer in favour of Johnstone Njuguna Mwangi [now Deceased] was effected on the 23rd December 2002.
132. Additionally, the copy of certificate of title which was tendered before the court and upon which the Plaintiff relies to underpin the claim of ownership to the suit property is also shown [said] to have been executed/registered by one E N Gicheha [010]. Notably, the said E N Gicheha was a registrar of titles.
133. I have adverted to and highlighted the aforesaid documents because the Plaintiff's case gravitates and revolves around the said documents. In any event, the said documents constitutes the foundation and/or the root of the Plaintiff's title to the suit property.[See the holding in the case of Munyu Maina versus Hiram Gathiha Maina [2013] eklr].
134. Having adverted to and highlighted the aforesaid documents, it is no apposite to examine and consider the validity and propriety of each document taking into account the totality of the evidence tendered.
135. I beg to start with the sale agreement dated the 28th March 2000. Same is indicated to have been entered into between Johnstone Njuguna Mwangi and Francis Gitau Nganga. Furthermore, it was indicated that Francis Gitau Nganga was selling the suit property to and in favour of Johnstone Njuguna Mwangi.
136. Even though the sale agreement was tendered and produced before the court, the vendor of the suit property, who is said to have executed same disputed the validity and veracity of the said sale agreement. To this end, it is instructive to take cognizance of the evidence of Francis Gitau Nganga. Same testified as DW5.
137. Whilst addressing the question of the sale agreement and during cross examination by learned counsel for the Plaintiff the witness [DW5] stated thus;
- “I have seen the agreement produced before the court. The postal address is shown thereon. the sale agreement before the court has and contains the ballot number. I balloted on the 25th February 2000. I have the ballot before the court.
- The sale agreement is before the court and the same shows the size of the land that was balloted for”.
138. Whilst still under cross examination, the witness stated thus;
- “I am conversant with one Rosemary Njeri Gitau. The said Rosemary Njeri Gitau is my wife. The sale agreement relates to my share of the land at Ite Farmers Cooperative Society Ltd. However, I wish to state that the signature herein is not my signature”.
139. Other DW5 who spoke to the question of the sale of the suit property, it is also instructive to take cognizance of the evidence of DW1. For good measure, DW1 was Francis Kago.
140. Whilst under cross examination by learned counsel for the Plaintiff, the witness posited that same has been the secretary of Ite Farmers Cooperative Society Ltd since 1990. The witness also averred that same is the one who had the custody of the books of the society.



141. Whilst under re-examination by learned counsel for the 1st, 2nd and 3rd Defendants DW1 spoke to the question of [sic] the sale of the land to Johnstone Njuguna Mwangi. Instructively, the witness has stated as hereunder;

“I wish to state that Fracis Nganga did not sell his land before balloting. I do confirm that Johnstone Njuguna Mwangi was not our member”.

142. Taking into account, the evidence by DW1 and DW5 respectively, the sale agreement which the Plaintiff has adverted to and which forms the crux [substratum] of the Plaintiff’s case has been disputed. In this regard, it was therefore incumbent upon the Plaintiff to bring forth evidence to demonstrate that indeed the impugned sale agreement was duly and lawfully executed.

143. To my mind, the proof as to the validity and propriety of the impugned sale agreement could only be demonstrated and established by calling the attesting witness. In this case, the sale agreement under reference shows that same was executed in the presence of one Njau Rumui. For good measure, proof of due execution of the said sale agreement required the presence and testimony of the said witness.

144. At any rate, it is not lost on the court that the said witness Mr. Njau Rimui is said to be alive. To this end, it suffices to revert to the evidence of DW1 whilst under cross examination by learned counsel for the 1st Defendant. The witness stated as hereunder;

“The Chairman has been Mr. Njau Rimui. Mr. Njau Rimui has been the chairman. I found him serving as the chairman of the society. I am aware that Mr. Njau Rimui is not dead. He is sick but alive”.

145. From the foregoing excerpts what come to the fore is that the witness who is said to have been present at the time of the execution of the agreement is alive. However, same was not called by the Plaintiff.

146. The evidence of the said witness, namely, Mr. Njau Rimui would have helped the court to determine the veracity or otherwise of the impugned sale agreement. In any event, the position of the law is that due execution of such an agreement stands proved by calling the attesting witness.

147. To this end, it suffices to cite and reference the provisions of Section 71 of the *Evidence Act*, Chapter 80 Laws of Kenya. For coherence same states as hereunder;

71. Proof of execution of document required by law to be attested.

If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.

148. It suffices to underscore that the execution of the impugned sale agreement has been disputed by the vendor. In this respect, it was therefore the obligation of the Plaintiff to call for and bring forth the attesting witness. Instructively, the attesting witness was said to be alive.

149. Notwithstanding the import and tenor of the provisions of Section 71 of the *Evidence Act* [sura], no efforts were taken by the Plaintiff to procure the attendance of Mr. Njau Rimui to give evidence. In



- this regard, the failure to call Mr. Njau Rimui must therefore found a basis for adverse inference against the Plaintiff herein.
150. To my mind, even though the Plaintiff called one Emanuel Karisa Kenga [PW2] in an endeavour to prove the signature of the vendor, it is important to underscore that the evidence of PW2 cannot supplant/ circumvent the statutory provisions of Section 71 of the *Evidence Act*, Chapter 80 Laws of Kenya.
151. To amplify the obligation of the Plaintiff to discharge the burden of proving due execution of the impugned sale agreement, it suffices to cite and reference the decision of the Supreme Court of Kenya in the case of *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), where the Supreme Court of Kenya stated and held thus;
49. Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
50. This Court in *Raila Odinga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”
51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.
152. Secondly, the Plaintiff’s case is also underpinned by the Letter dated 20th April 2000, which is said to have been written by Francis Gitau Nganga [DW5]. Similarly, it is indicated that the said letter was addressed to Mr. Njau Rimui.
153. Nevertheless, it is instructive to observe that the writing and execution of the said letter has also been disputed by the Francis Gitau Nganga. Insofar as the said letter has also been disputed, it was therefore the obligation of the Plaintiff to bring forth plausible and credible evidence to demonstrate the validity and veracity of the said letter.
154. Suffice it to state that yet again the Plaintiff herein did not go the extra mile in an endeavour to discharge the burden of proof cast upon her. [See Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].
155. Thirdly, the Plaintiff’s case is also underpinned by the Provisional transfer instrument which is said to have been executed by the officials of Ite Farmers Cooperative Society Ltd to and in favour of Johnstone Njuguna Mwangi, now deceased. For good measure, PW1 contended that the impugned provisional transfer instrument was duly submitted to the land registry for purposes of registration.



156. Pertinently, PW1 stated thus whilst under re-examination by learned counsel for the Plaintiff. Same testified as hereunder;

“The transfer has been signed. The transfer relates to plot number 73. I do confirm that the transfer was lodged at the land office. There is evidence that the transfer was lodged at the land registry”.

157. Furthermore, whilst under cross examination by learned counsel for the 1st, 2nd and 3rd Defendants, PW1 stated as hereunder;

“I have filed a copy of the transfer document that was signed by Ite Farmers Society. I now wish to confirm that the transfer has not been signed by Ite Farmers Society Ltd. I have not confirmed whether the transfer was done at the offices of the named advocate. I am aware that the transfer must thereafter be submitted to the land registry. The transfer should have been paid for. I don't know whether my husband paid stamp duty. I have not produced any evidence of payment of stamp duty. I have not gone to the land registry to have the suit property transferred to me”.

158. What becomes apparent and evident from the testimony of PW1 is to the effect that the impugned Provisional transfer instrument is questionable and suspect. I say questionable and suspect because on one account the witness is stating that the transfer has not been executed by Ite Farmers Cooperative Society Ltd whilst on the other hand and without blinking an eye, the same witness takes a diametrically opposed position.

159. I must underscore that in matters of evidence, the demeanour of every witness matters. In this regard, the demeanour of PW1 creates an impression that same [PW1] is not being truthful and candid with the court. For good measure, something appears to be a miss.

160. Before departing from the provisional transfer which has also been adverted to by the Plaintiff, it is apposite to address two [2] other outstanding issues. Firstly, even though the provisional transfer instrument was said to have been executed by Ite Farmers Cooperative Society Ltd, DW1 denied and disputed execution of same by the official of Ite Farmers Cooperative Society.

161. Pertinently, DW1 stated thus whilst under re-examination by learned counsel for the Defendants;

“I can see the document by the Plaintiff and i wish to clarify that the document of transfer is incomplete. Furthermore, i wish to state that the signature are on a different page. I did not transfer any land/plot to the Plaintiff. I wish to state that Francis Gitau Nganga did not sell his land before balloting”.

162. Instructively, DW1 is clarifying that the impugned provisional transfer is not only incomplete, but same [Provisional Transfer] did not originate from Ite Farmers Cooperative Society.

163. The last albeit critical issue on [sic] the provisional transfer instrument relates to the question of its registration. Suffice it to point out that it was contended that the impugned provisional transfer instrument was registered at the land registry by one E. N Gicheha – Registrar of titles.

164. Nevertheless, the person who was said to have entered and registered [sic] the provisional transfer instrument, namely, Elizabeth Gicheha testified before the court and clarified that same did not register the impugned provisional transfer instrument. Furthermore, Elizabeth N Gicheha [DW3] also posited that the signature affixed on the provisional transfer instrument is not her signature.



165. Whilst under re-examination, by learned counsel for the Defendants, DW3 stated thus;
- “I do wish to state that the signature at the foot of the provisional transfer is not mine. I did not sign the provisional transfer. The signature is not mine”.
166. The provisional transfer instrument is a critical document that underpins the transfer and registration of a landed property. In this regard, the significance of the said transfer instrument cannot be gainsaid.
167. Be that as it may, the Plaintiff herein brought forth before the court a provisional transfer instrument and which same contended to have been duly registered at the land registry. However, the land officer who is contended to have registered the document has disowned the registration thereof.
168. To my mind, the Plaintiff has yet again failed in vindicating the efficacy of the transfer and registration of the suit property in favour of Johnston Njuguna Mwangi [now deceased].
169. Further and at any rate, it is not lost on this court that prior to and before a transfer instrument can be registered, the transferee [in this case Johnstone Njuguna Mwangi] ought to have paid the requisite stamp duty and the registration fees. However, in this case no evidence was tendered to demonstrate payment of stamp duty or even the registration fees.
170. Other than the provisional transfer instrument, whose validity has been impugned, there is the certificate of title that was also brought forth by the Plaintiff. Suffice it to point out that the Plaintiff contended that her late husband [Johnstone Njuguna Mwangi] was issued with a certificate of title.
171. Nevertheless, the certificate of title which was tendered before the court was similarly contested. In fact, Elizabeth N Gicheha [DW3] who is said to have made the entry number two [2] and thereafter signed same disputed the impugned entry.
172. For good measure, DW3 stated thus;
- “I can see entry number 2 on the certificate of title. The said entry is a transfer to one Johnstone Njuguna Mwangi. The entry is shown to have been registered on the 23rd December 2002. The entry was not signed by myself. I did not sign the entry. I have also seen the provisional transfer. The provisional transfer is indicated to have been executed by myself”.
173. Whilst still giving evidence in chief, DW3 [Elizabeth Gicheha] stated thus;
- “However, I do state that I didn’t sign the transfer”.
174. Without belabouring the point, the certificate of title which the Plaintiff espouses before the court has also been impugned. However, despite the weight of evidence against the certificate of title, the Plaintiff herein did nothing to controvert the evidence tendered.
175. Finally, the Plaintiff’s claim to be the lawful and legitimate proprietor of the suit property was also scuttled by the letter dated 22nd October 2020. For good measure, the said letter emanated from the office of the chief land registrar and same posited that the certificate of title bearing the name of Johnstone Njuguna Mwangi is false.
176. To contextualize the said position, it is imperative to reproduce the evidence of DW5 [Franci Gitau Nganga] whilst under cross examination by learned counsel for the Plaintiff.



177. Same testified thus;

“Referred to the letter by Mr. S Njoroge and the witness states that the letter is dated the 22nd October 2020. The letter came from the land registrar and the same relates to the suit property. the letter concerns the veracity of the certificate of title held by one Johnstone Njuguna Mwangi. The letter indicates that the title by one Johnstone Njuguna Mwangi is false”.

178. Flowing from the evidence on record, there is no gainsaying that the Plaintiff herein has neither established nor proved the veracity of the certificate of title bearing the name of Johnstone Njuguna Mwangi, now deceased.

179. On the contrary, evidence abound that the documentation being relied upon and propagated by the Plaintiff are forgeries and fraudulent. For good measure, the Plaintiff herein seems to have indulged in commission of criminal activities in her endeavour to defraud the 2nd Defendant of the suit property.

180. Having adverted to the foregoing evidence, the question that remains outstanding is whether the mere holding of a certificate of title, [whose root is dubious], would confer indefeasibility to the holder thereof. To my mind, the position of the law is settled. In particular, a Certificate of Title obtained contrary to and in contravention of the Law is void and illegal.

181. To start with, the Court of Appeal in the case of *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR, stated as hereunder;

I hasten to point out that that Section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.

182. The position of illegally acquired certificate of title was also revisited and elaborated upon by the Court of Appeal in the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment), where the court stated and held as hereunder;

64. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.

183. Arising from the foregoing exposition, my answer to issue number one [1] is threefold. Firstly, the documentation being relied upon by the Plaintiff herein to underpin her claim for ownership of the suit property are not only fraudulent and illegal, but same are vitiated to the root. Instructively, a court of law cannot close its eyes to the scope of fraud attendant to the impugned document[s].

184. Secondly, it was incumbent upon the Plaintiff to discharge the evidential burden of proof towards her endeavour to convince the court that same has lawful rights to the suit property. Unfortunately, the Plaintiff failed in her endeavour to do so. Pertinently, the provisions of Section 71 of the *Evidence Act*, Chapter 80 Laws of Kenya were neither adhered to nor complied with.



185. Thirdly, the certificate of title which the Plaintiff propagates before the court was procured illegally and unlawfully. In this regard, the provisions of Section 26[1][b] of the Land Registration Act comes into play. Instructively, the certificate of title espoused by the Plaintiff herein is vitiated by the doctrine of Ex-nihilo-nihil-fit [out of nothing come nothing]. [See the decision of the court appeal in Caroget Investment Limited v Aster Holdings Limited, City Council of Nairobi, Commissioner of Lands, Registrar of Titles & Attorney General (Civil Appeal 82 of 2018) [2019] KECA 79 (KLR) (Civ) (6 December 2019) (Judgment)].

## Issue Number 2

### What Reliefs/Remedies if any ought to be granted.

186. The Plaintiff herein sought a plethora of Reliefs and remedies at the foot of the re-amended Plaintiff. Instructively, the Plaintiff sought for a declaration that the suit property lawfully belongs to and comprises of the Estate of Johnstone Njuguna Mwangi, now deceased. However, whilst discussing issue number one, the court has since found and held that the Plaintiff's claim are not only misconceived but vitiated to the root. Suffice it to point out that the Plaintiff herein is not entitled to a declaratory order. For good measure, the grant of such an order would be inimical to the rule of law.
187. The other relief that has been sought for is an order of permanent injunction directed against the Defendants herein. Suffice it to point out that an order of permanent injunction would only issue to protect the rights of the legitimate owner of the property and not otherwise. [See the holding in the case of Waas Enterprises Limited versus Nairobi City Council and another [2024] eKLR]
188. Notably, in respect of the instant matter, the court has found and held that the Plaintiff is not the lawful and legitimate owner of the suit property. In this regard, same [Plaintiff] cannot procure and benefit from an order of permanent injunction.
189. Thirdly, the Plaintiff sought for an order to cancel and revoke the certificate of title in the name of the 4th Defendant and to compel the registrar to issue a certificate of title in favour of the Plaintiff. I am afraid that the Plaintiff herein is not entitled to such an order.
190. Other than the foregoing, the Plaintiff has also sought for an order of eviction as against the Defendants. Nevertheless, is not lost on the court that the suit property lawfully belongs to the 2ND Defendant. In this regard, an order of eviction cannot therefore issue against the lawful owner.
191. Finally, the Plaintiff sought for general damages for trespass. However, it is common ground that before one can propagate a claim for damages for trespass, the claimant must demonstrate ownership rights to the designated land. In this regard, it suffices to reiterate that the Plaintiff is not the registered owner of the suit property. Same therefore cannot thus partake of and benefit from a claim for damages for trespass.
192. On the other hand, the 1st, 2nd and 3rd Defendants have raised a counterclaim and wherein it has been contended that the certificate of title held by the and bearing the name of Johnstone Njuguna Mwangi [now Deceased] is a nullity and thus ought to be revoked. Suffice it to posit that the totality of the evidence on record demonstrate[s] that the impugned certificate of title was/is a nullity. To this end, the impugned certificate of title merits cancellation.
193. The other order, that has been sought at the foot of the counterclaim is a permanent injunction barring and prohibiting the Plaintiff from interfering with the suit property. I have since found and held that the suit property lawfully belongs to the 2nd Defendant. In this regard, the 2nd Defendant



is entitled to the statutory privileges, rights and Interest[s] underpinned by the provisions of Sections 24 and 25 of the Land Registration Act 2012.

194. Furthermore, the scope of the 2nd Defendant's right to and in respect of the suit property are well highlighted in the case of Mobansons (Kenya) Limited v Registrar of Titles, Mary Murtazza Ondatto & Attorney General (Petition 103 of 2012) [2017] KEELC 2730 (KLR) (6 June 2017) (Ruling).
195. For coherence, the court stated and held thus;

(18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

196. Notably, there is no gainsaying that the 2nd Defendant merits and deserves an order of permanent injunction. [See the holding in the case of *Nguruman Limited versus Jan Bonde Nielsen and Others*[2014] eklr]
197. Finally, the Defendants have also sought for an order for cancelation of the certificate of title [sic] bearing the name of one Johnstone Njuguna Mwangi. Instructively, evidence abound that the impugned certificate of title was procured irregularly and illegally. In this regard, same [certificate of title] cannot be left to stand.

### **Final Disposition**

198. Flowing from the discourse [details enumerated in the body of the judgment] it must have become apparent that the Plaintiff herein has failed to prove her claim on a balance of probabilities. [See Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya].
199. In the premises, the final orders that commend themselves to the court are as hereunder;
- a. The Plaintiff's suit be and is hereby Dismissed
  - b. Costs of the suit be and are hereby awarded to the 1st, 2nd and 3rd Defendants.
  - c. The counterclaim dated the 24th September 2020 be and is hereby allowed in the following terms;



- i. A declaration be and is hereby issued to the effect that neither the 2nd Defendant nor Ite Farmers Cooperative Society Ltd executed the sale agreement nor the transfer instrument in favour of Johnstone Njuguna Mwangi, now deceased.
- ii. A declaration be and is hereby issued that the purported sale agreement, acknowledgement and transfer instrument were fraudulently procured by Johnstone Njuguna Mwangi [now deceased] and by extension the Plaintiff.
- iii. The certificate of title in respect of L.R No 12672/73 [I.R No 91087] bearing the name of Johnstone Njuguna Mwangi be and is hereby cancelled and revoked.
- iv. A declaration be and is hereby issued that the suit property L.R No. 12672/73 lawfully belongs to and is the property of the 2nd Defendant [Francis Gitau Nganga].
- v. There be and is hereby issued an order of permanent injunction to restrain the Plaintiff either by herself, agents, servants and anyone claiming under her from entering upon, interfering with and/or in any other manner whatsoever dealing with the suit property L.R No. 12672/73.
- vi. Cost of the counterclaim be and are hereby awarded to the 2nd Defendant only.
- vii. Any other relief not expressly granted is hereby declined.

200. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.**

**OGUTTU MBOYA.**

**JUDGE.**

**In the presence of:**

Benson – court assistant

Mr. Njonjo for the Plaintiff

Mr. Kiarie Joshua & Ms. Musyoka for the 1st, 2nd and 3rd Defendants.

N/A for the 4th Defendant

