



**Rainbow Investments Limited v Mbatia; Mbatia (Plaintiff to the Counterclaim);  
Taib & 2 others (Defendant to the Counterclaim) (Environment & Land Case  
108 of 2010) [2024] KEELC 13727 (KLR) (9 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13727 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 108 OF 2010  
LL NAIKUNI, J  
DECEMBER 9, 2024**

**BETWEEN**

**RAINBOW INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**ANNE MBATIA ..... DEFENDANT**

**AND**

**ANNE MBATIA ..... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**ABDALLAH ALI TAIB ..... DEFENDANT TO THE COUNTERCLAIM**

**RAINBOW INVESTMENT LIMITED .... DEFENDANT TO THE  
COUNTERCLAIM**

**REGISTRAR OF LANDS ..... DEFENDANT TO THE COUNTERCLAIM**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains to a civil suit instituted by way of the Plaint dated 15<sup>th</sup> April, 2010 and filed on 16<sup>th</sup> April, 2010 by Rainbow Investment Limited, the Plaintiff herein against Anne Mbatia, the Defendant herein. This is close to fourteen (14) years ago while pending before this Court.
2. Upon service of the pleading and Summons to Enter Appearance, the Defendant complied through filing of a Memorandum of Appearance and subsequently filed their further further further amended statement of defence and Counter - Claim dated 23<sup>rd</sup> September, 2020 and filed on 24<sup>th</sup> September,



2020 against Abdallah Ali Taib, Rainbow Investment Limited and Registrar of Lands, the Defendants in Counter - Claim herein.

3. The Plaintiff and 2<sup>nd</sup> Defendant in Counter - claim and the 1<sup>st</sup> Defendant in the Counter - Claim, responded to the filed Statement of Defence through filing of a Reply to the Statement of Defence and Defence to Counter - Claim filed on 9<sup>th</sup> June, 2017 and a Counter - Claim amended on 3<sup>rd</sup> November, 2020.
4. It is instructive to note that upon request by parties herein, the Honourable Court conducted a very successful site visit (“Locus in Quo”). Subsequently, a comprehensive report was prepared and shared among the parties herein. The said report has been attached to this Judgement for ease of reference whatsoever.

## II. Description of the Parties in the suit

5. The Plaintiff/2<sup>nd</sup> Defendant in the Counter - Claim was described as a limited liability company incorporated in the Republic of Kenya while the Defendant/Plaintiff in the Counter - Claim was described as a female adult of sound mind and understanding working for gain as a farmer and residing at Marikani within the County of Mombasa.
6. The 1<sup>st</sup> Defendant in the Counter - Claim was described as a male adult of sound mind and understanding – working as a businessman while the 3<sup>rd</sup> Defendant in the Counter - Claim was described as a Public Officer appointed under the provision of Section 12 of the [Land Registration Act](#), No. 3 of 2012 and mandated to carry out the functions as prescribed in the Act including Registration of Interest in title amongst other duties

## III. Court directions before the hearing

7. Nonetheless, on 12<sup>th</sup> November, 2020, during the Pre – Trial conference, the Honourable Court fixed the hearing dated on 15<sup>th</sup> June, 2021 with the parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “viva voce” evidence with the Plaintiff/Defendant in Counter - Claim witness (PW - 1) testifying in Court on 15<sup>th</sup> June, 2021 at 12.05 pm after which they marked their case closed and the Defendants calling their witnesses on various dates after which they marked their cases closed.

## IV. The Plaintiff/2<sup>nd</sup> Defendant in Counter - Claim’s case

8. From the filed pleadings, at all material the Plaintiff was and is still registered as the leasehold proprietor for a term of ninety-nine (99) years with effect from 1<sup>st</sup> April, 1996 of all that property known as L.R. No. 22525 MARIKANI CR.N. 146 comprising 3.780 Hectares (approximately 9.341 acres or thereabout) registered at the Mombasa Land Titles Registry on the 17<sup>th</sup> April, 1998 (Hereinafter referred to as “the Suit Property”). On or about the 4<sup>th</sup> January, 2008, as a purchaser for value on notice, the Plaintiff bought the suit property. It was dully transferred and registered to him and he assumed proprietorship from Abdalla Ali Taib. On or about March, 2010, the Defendant threatened to trespass and indeed trespassed, erected poled wire fence and forcibly detained the suit property without consent and/or authority from the Plaintiff.
9. The Defendant had also put a notice board with the words “not for sale” thereby causing injury and damage to the Plaintiff. Despite demand made by the Plaintiff to vacate, stop trespassing, pull down wire fence and removing the “not for sale” notice board she had refused and/or neglected necessitating this suit as she continued to enter the suit property and harvest thereon. The Plaintiff had by reason of



the foregoing suffered loss and damage and the Plaintiff was being deprived of the use and enjoyment of the suit property.

10. The Plaintiff averred that unless restrained by this Honourable Court, the Defendant would continue to trespass, erecting fence, harvest and forcibly detain the suit property or deal with the suit property in manner inconsistent with the interest of the Plaintiff.
11. The Plaintiff acknowledged that there was no pending suit between itself and there were no previous proceedings in any court between the Plaintiff and the Defendant over the suit property. The Cause of action arose at Mariakani within the jurisdiction of the Honourable Court.
12. For the reasons whereof, the Plaintiff prayed for Judgment to be entered against the Defendant for: -
  - a. A permanent injunction restraining the defendant from using, developing on or construction on, trespassing on, entering upon, committing to waste and/or harvesting any crops therefrom or otherwise interfering with and/or in any manner dealing with land known as L.R. NO.22525, CR.N.146.
  - b. Damages for trespass and forcible detainer
  - c. Costs of and incidentals to this suit
  - d. Such other or further relief or orders which this Honourable Court may deem fit to grant
13. The Plaintiff responded to the 1<sup>st</sup> Defendant's Counter - Claim through a response dated 30<sup>th</sup> December, 2020 where they averred that the Plaintiff joined issues with the 3<sup>rd</sup> Defendant on its defence save for where the same consisted of admission and that the Plaintiff reiterated the entire contents of the Counter – Claim.
14. The Plaintiff called its witness PW - 1 on 15<sup>th</sup> June, 2021 who testified thus: -

**A. Examination in Chief of PW - 1 by Okanga Advocate:-**

15. Testified under oath and in Kiswahili language, PW - 1 identified himself as SAID MBOVU HASSAN MWADZAYA. He told the court that he was a businessman and was currently working with the Plaintiff's company as the Property Manager. He was employed there in August 2019. His duties entailed looking for properties for sale and purchase. He would ascertain whether they had valid documents. Sometimes, he was sent to go to the government offices to check the validity of documents. He also visited the properties once in a while. He had his employment identity card, and employment card.
16. The witness went further to state that he recalled recording a witness statement with the Plaintiff's advocate and another one with the advocate for the 1<sup>st</sup> Defendant. He relied on his witness statement recorded on 30<sup>th</sup> October, 2019 and filed on 20<sup>th</sup> January, 2020 and had it adopted as his evidence in chief. He was aware of the suit property. It was L.R. No. 22525 CR. No. 146 along the Mombasa – Nairobi Road at Mariakani. He was last on the plot the day before his testimony. The Plaintiff also filed some list of documents dated 21<sup>st</sup> February, 2019 and filed on the same date which he produced the said documents as exhibits in this case Plaintiff Exhibit 1 to 7.
17. According PW – 1, the Plaintiff acquired the suit property from Ali Abdalla Taib for a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00/=). The property was transferred to the Plaintiff on 4<sup>th</sup> April, 2008 and registered in the Plaintiff's company's name. Stamp duty was paid to the Government and receipts were issued. Stamp duty paid was for a sum of Kenya Shillings Ninety Thousand and ten



(Kshs. 90,010/-) on 18<sup>th</sup> January, 2007. They paid for the rates to the Urban Council County Council and now County Government of Kilifi. The suit land belonged to Rainbow Investments Limited.

18. PW - 1 alleged seeing Anne Mbatia, the Defendant herein, when he wanted to carry out development of the suit property which was around the time they filed the suit around 4<sup>th</sup> January, 2008. According to the boundary, the Defendant's house was outside the suit plot; the land was open to the time of his testimony. If there were any animals in the Defendant's home he could not tell. Abdalla Taib stated that the land was first land and was also cited to him by the Government. He asked the court to assist them to get vacant possession to enable them use the same as a yard. He prayed that the Court granted the reliefs sought herein. He also prayed that the Court awarded the Plaintiff costs and damages. He also produced the documents filed on 3<sup>rd</sup> January, 2012 as Plaintiff Exhibit Numbers 8 – 13 respectively.

#### **B. Cross examination of PW - 1 by Ms. Mango Advocate.**

19. PW - 1 confirmed that he resided in Mariakani and was born there 62 years ago at the time of his testimony. He was the Property Manager of the Plaintiff's company and had been employed by the Plaintiff. Although he was not licensed he was employed; the case was filed in the year 2010. Among the documents produced, there was no resolution made by the company to file suit. There were no minutes passed by the company to file suit. He had authority to testify on behalf of the Plaintiff. The authority was not among the documents filed on 21<sup>st</sup> February, 2019, and also not among the documents filed on 3<sup>rd</sup> July, 2013. Ali Ramadhan Ali Mwasahu who swore the verifying affidavit was employed temporarily at the time and was no longer in employment.
20. PW - 1 told the court that he knew Ali Ramadhan Ali personally. He was born in Mariakani. He was not the Chairman of Mariakani Town council then. They were not closely related. His duties involved verifying whether land purchased had proper or valid documents. The Plaintiff had many properties and each property had a file. As a property manager, he had to keep the record. He had the file with him here in court. He was employed in the year 2019. The Plaintiff purchased the property in the year 2007 and transfer was done in April 2008. He was not yet employed officially then, then was casually or temporarily employed. He was there as a casual worker from the year 2006. His duties were to look for property to buy/sell.
21. PW - 1 confirmed to the Plaintiff's company and informed them there was land/property for sale. They went to the site. The Defendant had her house there and was there to date. There was no other neighbor. They went around the land, but found the Defendant was outside the boundary. The property was empty. The Plaintiff bought the property in the year 2007. In his file he did not have a copy of the sale agreement. Abdalla Taib had the copies of the sale agreement and the transfer documents. The Plaintiff bought the property for at a sum of Kenya Shillings One Million (Kshs. 1,000,000/-). He did not have any documents showing the Plaintiff paid Abdalla Taib the said purchase price for the bank transfer. Abdalla Taib was a former Mayor and now an Attorney. He was also a party to this suit. The witness was aware, Abdalla Taib has stated that he was allocated the suit land by the Kilifi County Council.
22. According to the witness he had no application by Mr. Taib for allocation. He had seen a notice by the council that they would give out or allocate land. He had not seen any minutes or gazette notice for setting apart. He was not aware if any compensation was given to the people who were on the land. Mr. Taib would be able to answer that he had been doing a search severally. In the year 2007, there was the original title, not a search. The title was still in the name of Abdalla Taib. In the year 2010, when they filed suit, they had the original title. The original title got lost when Abdalla Taib moved his office from one place to another. The application for issuance of Provisional title was first done by Swaleh and later by Abdalla Taib in the year 2018.



23. The witness had seen the documents filed by Abdalla Said. He stated that he was allocated the land by the County Government. The letter of allotment was dated 4<sup>th</sup> December, 1996. He was to make acceptance within 39 days. Taib according to the witness would come to court and testify on that. He had seen the documents filed by Abdalla Said; who stated that was allocated the land by the County Government. The letter of allotment is dated 4<sup>th</sup> April, 1996; he was to make acceptance with 30 days; the witness saw the receipt for the payment he made which was dated 25<sup>th</sup> October, 1996 and was for a sum of Kenya Shillings Four Hundred and Two Thousand Five Hundred (Kshs. 402, 500/-) paid to the Ministry of Lands. There were many conditions on the title.
24. Special condition number 2, the property was to be development within 24 months. When the Plaintiff bought the land, it had possession to date. Consent was given for the transfer. Condition No. 9 can be answered by the Government. According to their pleadings (Paragraph 5 of Plaintiff) the defendant trespassed on the land in March 2010. He could see the documents at page 71 of the defendant's documents was a letter by Khatib & Co. dated 24<sup>th</sup> September, 2009. At page 72 was a letter dated 15<sup>th</sup> October, 2009 written to the Plaintiff. He did not think they had a copy of that letter. They had been paying rates. Rates and rent have been paid ever since the land was purchased. They had paid up to date.
25. According to the witness, he had seen the documents filed by the Defendant. He had seen her sale agreement and a set of photographs at page 51 was an application done in the year 2005 to survey the property. He had also seen a drawing sketch. He did not know when adjudication was done. Adjudication came later. During adjudication, people raise objections. When they saw land's, people come to their land, they came to court as they had gotten title much earlier in the year 1996.
26. PW - 1 told the court that according to the lease, it commenced from 1<sup>st</sup> April, 1996. The deed plan was drawn on 6<sup>th</sup> November, 1996. Among the documents filed by the Plaintiff was the Certificate of incorporation. Rainbow Investments Limited was incorporated on 15<sup>th</sup> November, 2007. They fenced with a barbed wire, but later applied to put in a perimeter wall. They paid stamp duty. The date of instrument was 18<sup>th</sup> February, 2007; the Defendant was staying next to the suit property.

### **C. Cross examination by Mr. Sitonik Advocate.**

27. PW - 1 confirmed that he could see the letter dated 14<sup>th</sup> December, 2007 in 1<sup>st</sup> Defendant's list of documents. It was a consent to transfer the suit property from Mr. Ali Taib to the Plaintiff. The consent was signed by D.N. Nganga, the Town Clerk. The property was bought from Mr. Ali Taib. Mr. Taib got his title on 1<sup>st</sup> April, 1996. At the time they were purchasing the property, Mr. Taib was still the registered owner. He was not aware if the title had been challenged. The property was transferred to Rainbow in 2008. At the time Rainbow bought the property, he was not aware that the Defendant had any title. He could see title issued on 3<sup>rd</sup> November, 2014 to the Defendant. This was almost 6 years after Rainbow had gotten title in its name.
28. PW - 1 told the court that when the Plaintiff company purchased the property, he was among those who went to the land. The portion of land was empty and is still empty up to now. They first attempted to fence the land after they purchased it so as to undertake development activities on it. However, this was not possible as there were a lot interruption from the Defendant and her agents. They insisted that the land was theirs. They kept asking them to stop. As a result, they were advised to file a suit.
29. It was the Plaintiff who brought the suit to court. He could see documents at page 21 of 1<sup>st</sup> Defendant's documents. There was stamp of National Bank dated 21<sup>st</sup> December, 2007. Below it was another date 20<sup>th</sup> December, 2007. The amount that was to be paid was a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000/-). The stamp duty was paid after the company had been formed. At the time they visited



the property, the Defendant's house borders the Plaintiff's property. The witness did not find any cows within the portion which Rainbow Investment Limited, the Plaintiff herein bought. At the time, there was no cultivation going on.

**D. Re - examination of PW - 1 by Mr. Okanga Advocate.**

30. PW - 1 stated that he had authority from the Plaintiff, Rainbow Investment Limited to give evidence in court. They bought the property in the year 2007. It was transferred the following year - 2008. They tried to develop the property, but there was a lot of commotion and resistance from the Defendant and her agents. He was aware of an application that was made seeking to dismiss the suit because it was an adjudication section. However, the said application was dismissed. It was Mr. Abdalla Taib who could produce a copy of the sale agreement. Their advocate was Nabhan Swaleh Advocates. When he visited the plot, as per the boundary, on the east there was a house. The suit property was unoccupied. It was vacant. The Plaintiff company was incorporated in 15<sup>th</sup> November, 2007. Going by the certificate of incorporation. The Plaintiff was in existence at the time of the purchase of the suit land. He reiterated that their advocate acting for them in the transaction was Nabhan Swaleh & Company Advocates.
31. On 15<sup>th</sup> June, 2021 the Plaintiff marked its case as closed through the Learned Counsel Okanga Advocate.

**V. The Defendant/Plaintiff in Counter - Claim's case**

32. The Defendant herein filed a further further further Amended written Statement and Counter - Claim amended on 23<sup>rd</sup> September, 2020. In the Statement of Defence, the Defendant denied the contents of Paragraphs 3 and 4 of the Plaint. The Plaintiff further denied the contents of Paragraph 5 of the Plaint to wit that it threatened to trespass and indeed trespassed, erected a poled wire fence on or about March, 2010. Instead, it stated that it had been in occupation of the suit premises since the year 1978 and in the course made extensive improvements on the said property.
33. In response to Paragraph 6 of the Plaint, the Defendant admitted having installed the 'Not for Sale' sign when strangers started visiting her premises and disrupting her quiet enjoyment and denies that this has caused injury and damage to the Plaintiff as the Plaintiff had never been in occupation. In response to Paragraph 7 of the Plaint, the Defendant denied the averments thereof. In response to Paragraph 8 of the Plaint, the Defendant denied that the Plaintiff had suffered any loss and damages.
34. In response to Paragraph 9 of the Plaint, the Defendant stated that she was not a trespasser and she was entitled to deal with the suit premises as she deemed fit and further stated that the Plaintiff had no recognizable interest in the land for which the court should grant orders sought. The Defendant herein averred that the purported transfer and registration of all that Parcel of Land known as L.R. NO.22525/ MARIAKANI CR. NO. 146 in favour of the Plaintiff herein. to wit Rainbow Investment Limited was irregular, illegal, fraudulent, null and void as a result of which the said Title never conferred ownership to the Plaintiff.
35. The Defendant relied on the following particulars of fraud/ irregularities and illegalities: -
  - a. The folio register number was missing from the title.
  - b. The Deed Plan of the title never indicated who drew it.
  - c. The purported Deed Plain had no stamp of the Director.
  - d. That the said suit property had never been set apart by the Commissioner of Lands.
  - e. The Title was issued way before the allotment letter was done.



- f. The purported Deed Plan was drawn after the title was issued.
36. Further the Defendant averred the following: -
- a. Acquiring land with the knowledge that it had been fraudulently and illegally acquired.
  - b. Failure to carry out due diligence before acquiring the land to wit requesting for: -
    - i. The Application made by the Vendor requesting for the setting apart and the purpose of which the request was made together with the sketch plans.
    - ii. The formal written acceptance of the conditions of the Allotment.
    - iii. The Notice that was given before the setting apart was done.
    - iv. The Resolution and minutes by the Council that passed the setting apart
    - v. Gazette Notice that was issued pursuant to the setting apart.
    - vi. Evidence that compensation if any had been paid to persons affected by the setting apart
  - c. Failure to pay any consideration on the said acquisition
  - d. Accepting a Grant given under the wrong statute.
  - e. Accepting a Title whose Deed Plan was drawn after Title issued
  - f. Accepting a Title whose Deed Plan never had the stamp of the Director of Survey.
  - g. Accepting a Title with a Deed Plan that never showed who drew it.
  - h. Accepting a Title whose Folios Register Number and comps number was missing.
  - i. Acquiring the land without investigating the occupation and possession of the Property by the Defendant.
37. The Defendant averred that it had at all material times prior to the purported registration and the institution of this suit resided on the suit property since the year 1978 without any interference from any person. The Defendant never contended the averments made at Paragraph 10 of the Plaint. In response to paragraph 11, the Defendant stated that the suit land was under adjudication and this Honourable Court lacked the jurisdiction to entertain this suit. The Defendant admitted the jurisdiction of the Honourable Court. For reasons whereof, the Defendant prayed that Plaintiffs suit be dismissed with costs.
38. In her Counter - Claim the Plaintiff averred that she had been on this suit premises since the year 1978 when the said premises were purchased by the husband. Upon the Purchase of the suit premises the Plaintiff in the Counter - Claim had undertaken extensive farming activities on the said parcel and had peaceful and quiet enjoyment of the said suit premises. On or about March 2010, the 2<sup>nd</sup> Defendant purported to evict the Plaintiff from the suit premises alleging that they held Title to part of the land being L.R. NO. 22525/Mariakani CR NO.146.
39. Upon further investigation, it emerged that the 2<sup>nd</sup> Defendant had purchased the said property from the 1<sup>st</sup> Defendant sometimes on 4<sup>th</sup> January, 2008 and title issued by the 3<sup>rd</sup> Defendant. The said suit property had from since the year 1978 never been set apart and it was only recently in January, 2010 that the said suit property which falls under the Kawala 'A', 'B' and Kadzodzo Madzimbandi was declared an adjudication section.



40. The Plaintiff in the Counter - Claim averred that the 2<sup>nd</sup> Defendants title never at any time form part of the plots that had been set apart by the Commissioner of Lands as being private property as at the 29<sup>th</sup> day of January, 2010. Therefore, upon the area being declared an adjudication section, the said suit property was allocated to the Defendant/Plaintiff by the demarcation officer in charge and Title Number MARIAKANI KAWALA 'B' /2 issued thereafter.
41. The Plaintiff in the Counter - Claim averred that the purported title issued by the 3<sup>rd</sup> Defendant, in favour of the 1<sup>st</sup> Defendant and later to the 2<sup>nd</sup> Defendant i.e. L.R. 22525/MARIAKANI CR 146 was irregular, illegal, fraudulent, null and void and as a result of which it cannot confer ownership.
42. The Plaintiff in the Counter - Claim relied on the following particulars of fraud/ irregularities and illegalities as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants: -
- a. Registering the Parcel of Land into the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without the knowledge of the Plaintiff.
  - b. Perpetrating the fraud of the 1<sup>st</sup> Defendant by purchasing the suit property with the knowledge, that the same had been acquired fraudulently, illegally.
  - c. Receiving a document for Registration that lacked a reference to the volume and folio of the register relating to the land affected by the transaction.
  - d. Receiving a deed plan for registration bearing no stamp of the Director nor Title of who name of the Surveyor who drew it.
  - e. Receiving a Grant for Registration given under the wrong statute.
  - f. Causing the registration of the suit land to be registered illegally and or without following the due procedures.
  - g. Purchasing the property before conducting due diligence.
  - h. Causing a document that lacked the signature of the director of survey to be registered.
  - i. Causing a document that lacked a reference to the volume and folio of the register to be registered.
  - j. Failing to follow due process whilst seeking setting apart to wit: -
    1. Failing to make the requisite application for the setting a part of the land and purposes for which it is required.
    2. Failing to obtain the requisite consent and resolution from the Council approving the Setting Apart.
    3. Failing to obtain the Gazette Notice issued pursuant to the setting apart.
    4. Failing to obtain the Notice given by the Council to the persons affected by the Setting Apart.
    5. Failing to make a formal acceptance of the conditions of the Allotment.
    6. Failing to fulfil the terms of the Allotment
  - k. Passing off as genuine a Title given under the wrong statute.
  - l. Passing off as genuine a Title whose Deed Plan was drawn after Title issued.



- m. Passing off as genuine a Title whose Deed Plan never had the stamp of the Director of Survey.
  - n. Passing off as genuine a Title whose Deed Plan never showed who drew it.
  - o. Passing off as genuine a Title whose folio register numbers and comps number was missing.
  - p. Selling off the land with the knowledge that the Plaintiff was in occupation and possession
43. The Plaintiff in the Counter - Claim averred that Purported Title L.R. NO. 22525 Mariakani CR NO. 146 being held by the Plaintiff 2<sup>nd</sup> Defendant was obtained fraudulently. In the alternative and without prejudice to the foregoing. the Plaintiff averred that she had been in open peaceful continuous and uninterrupted exclusive occupation of the suit property since the year 1978 and has therefore become entitled to the Suit Property by way of adverse possession.
44. For reasons whereof, the Plaintiff in the Counter - Claim prayed for Judgment to be entered against the Defendants for the following reliefs:-
- a. A declaration that the Title issued i.e. L.R. No. 22525 Mariakani C.R. NO. 146 was issued irregularly and obtained fraudulently.
  - b. A declaration that the Plaintiff in the counter claim was and had been since 1978, in lawfully occupation of the suit land, also known as L.R. NO.22525 MARIAKANI CR. NO.146.
  - c. A declaration that the Plaintiff in the Counter claim is the lawful owner of the suit land known as CR.NO. 22525, MARIAKANI CR NO.146.
  - d. That the title issued to the 2<sup>nd</sup> Defendant in the counter claim Rainbow Investment over L.R. NO.22525 MARIAKANI CR. NO. 146 be cancelled.
  - e. That the Plaintiff in the Counter Claim be registered as the owner of L.R. NO. 22525 MARIAKANI CR.NO.146 and a title issued on her name.
  - f. A declaration that Title Number MARIAKANI KAWALA 'B'/2 was issued lawfully to the Plaintiff.
  - g. In the alterative, a declaration that the Plaintiff has acquired lawful Title through Adverse Possession and therefore Title Number KAWALA 'B'/2 is lawful.
45. Subsequently, the Defendant/Plaintiff in the Counter - Claim called her first witness – DW – 1 on 27<sup>th</sup> April, 2023 at 10. 30 am. DW – 1 testified as follows:-

**A. Examination in Chief of DW - 1 by Mr. Omwenga Advocate.**

46. DW - 1 was sworn and testified in the English language. He identified himself as MR. EZEKIEL KIRIMI KIANYA. He told the court that he had recorded a witness statement dated..... He worked with the Ministry of Lands and had done so for 20 years. From the years 2008 to 2010 he was at Kilifi. He was in charge of District Land and Settlement Officer (DLASO). His involvement to the suit land was mainly in the declaration of the adjudication and allocation of Land in that Section. Parcel No. 2, he appointed the Recording and Demarcation and Surveying Officer. Parcel No. 2 Kawala B – was given to Anne Wanjiru Mbatia. The process of the allocation entailed the declaration of the Land Adjudication by the Minister and he appointed an officer. He referred Court to the provision of Section 3 of the *Land Adjudication Act*, Cap. 284 (Now repealed).
47. In this area the Recording Demarcation and Surveying was done through a letter dated 9<sup>th</sup> April, 2010. A Notice of Established of the Adjudication Section Page 75 which he produced as Defendant Exhibit



- 1. The area commenced at Kwa Mama Mbatia from the North East Course – etc. It included the land for the Defendants. He gave the particulars of all the parties concerned and he wrote to the then Commissioner of Land and he issued the Clearance Certificate on 29<sup>th</sup> January, 2010 found on Page No. 77. He got the Clearance but with an exception of LR No. 23914, LR. 21623 and 22243 and 7242. He stated that the suit land was not one of these which had been set apart. He did not know for the reason for that. The letter was produced as Defendant Exhibit No. 2.
48. It was from there that he proceeded to make a declaration – “Defendant Exhibit 1”. Anne Mbatia went to their offices to lodge a complaint. The witness wrote a letter dated 21<sup>st</sup> April, 2010 (Defendant Exhibit 3) to court to the effect that the matter that the parcel No. 2 was not one of the exceptions of the land to be set apart (See the documents on Page 80 = “Defendant Exhibit -4”). He later on learnt that the titles were out and she collected her title. The letter dated 15<sup>th</sup> October, 2009 – (at page 2) indicated that he advised the Law firm of Messrs. Khatib & Company Advocates accordingly on the Land Registration No. 22525 – (see Defendants Exhibit – 5).
49. DW - 1 told the Court that he was responding to their letter dated 24<sup>th</sup> September, 2005. He issued a Notice to the Chief to Convene a Baraza for public – i.e. public participation. Indeed, a meeting was held on 31<sup>st</sup> March, 2010 at Mnagoni. For a person to be allocated land, his officers had to ascertain the rights and interest – e.g. whose building never belonged to and entitlement. Anne Mbatia was allocated parcel MARIAKANI/KAWALA “B”/2. They ascertained that there was a good home, plantations and settlement on the ground. DW – 1 himself was the one on the ground – All these were concerns noted by the Demarcation Adjudication Officer. That was all.

#### **B. Cross examination of DW - 1 by Mr. Okanga Advocate.**

50. DW - 1 confirmed that he was stilling working for the Land Registry – Ministry of Lands. Indeed, he was authorized to attend court to tender evidence. He had not liaised with the Land Registrar of Mombasa. He wrote a letter to the Chief which was not dated. It did not bear the official stamp indicating that the letter was received. There were no minutes to that effect. The letter only indicated the fact that the area was for declaration of “KAWALA B”. He confirmed there were other adjudication areas – including KAWALA “A”. He wrote the letter to the Commissioner of Land before the declaration of the Section. He did not recognize he issued a Letter of Allotment. He further stated that he wrote the statement without guidance. There were no supposition nor possibilities that the plot No. 22525 may have been part of the parcel for exception.

#### **C. Cross Examination by DW - 1 by Mr. Sitonik Advocate.**

51. DW - 1 reiterated the contents of the letter dated 29<sup>th</sup> January, 2010. He was referred to a letter written to him by his boss which he did not have in Court. He visited the land for M/s. Mbatia in the year 2010. He normally worked around the area before the declaration was made.
52. On being referred to Defendants Exhibit No. 5 – being a letter he wrote to Messrs. Khatib & Co. Advocates. He stated that it was for in the year 2009. He took a stand for Ms. Mbatia. These were correspondences but what he knew was that he visited the land in the year 2010. He wrote a letter in the year 2010. He was aware that there was a Ruling by High Court in the year 20<sup>th</sup> November, 2010 by Justice Azangalala rejecting the opinion by the Land Adjudication Officer. He was referred to the Declaration of 9<sup>th</sup> April, 2010 – Defendant Exhibit - 1.
53. On being referred to a letter dated 11<sup>th</sup> December, 2014 on page 47, DW - 1 stated that for a declaration section to be completed it took 7 days for anyone to raise any objections. The process called for objection to be raised from the beginning to the end. There were contained under the provision of



Sections 3 to 29 of the [Land Adjudication Act](#), Cap. 284 (Now repealed) – which were mechanisms for resolving any dispute raised before title deeds were issued. The appeal was to be preferred to the Land Adjudication Board and then to the Minister whose decision was final. According to the DW – 1, the title deed issued to the Plaintiff was fake and irregular.

**D. Cross Examination of DW - 1 by M/s. Kiti Advocate.**

54. DW - 1 told the court that he engaged the Land Surveyor in the process. They wrote to the Commissioner of Land for clearance and copied to the Director of Surveyors.

**E. Re - Examination of DW - 1 by Mr. Omwenga Advocate.**

55. DW - 1 confirmed that the notice had a date of the meeting. It was 31<sup>st</sup> March, 2010 date and place.

56. On 13<sup>th</sup> July, 2023 the Defendant/Plaintiff in Counter - Claim herself testified as DW – 2. She told the court that: -

**A. Examination in Chief of DW - 2 by Mr. Omwenga Advocate.**

57. DW - 2 was sworn and testified in the Kiswahili language. She identified herself as ANNE WANJIRU MBATIA. She was a citizen of Kenya bearing all the particulars in her national identity card. She was born on 1<sup>st</sup> January, 1957. She resided and was a farmer near Mariakani at a place called Mangoni stage. She had a farm there. The farm consisted of poultry and livestock keeping. She recorded a supplementary witness statement dated 23<sup>rd</sup> September, 2020 to be adopted. There were list of documents - 34 documents – produced as Defendant’s Exhibit numbers 1 to 34. According to her they got the land in year 1978 through purchase for value. They bought part of it in instalments. This was in the years 1978, 1980 and 1982 when they completed. Upon completion, they were given the documents. They took possession. They used to buy it from the chief. They had a sale agreement and in the year 1995, it was demarcated and they got the Land Adjudicated.

58. According to DW - 2, in the year 2010, there was a session/ baraza where they were informed that the land was to be demarcated. The land adjudication process went on smoothly. There was no objection. After the year 2010 she was given title deed. She was referred to the Original Certificate of title deed which was in her name for Land Reference Mariakani/Kawala “B” 2 – 7.06HA to Ann Wanjiru Mbatia and her Identity Card numbers. It was issued on 3<sup>rd</sup> November, 2014 and bearing serial No. 0XXXXX3 – Entry No. 1 on 28<sup>th</sup> January, 2014.

59. DW - 2 told the court that she knew the Plaintiff had been sued by them and there was a Counter - Claim. She was not in agreement with the prayers. She urged the suit to be dismissed. She prayed that the title deed for the Plaintiff to be cancelled/ revoked and her title to be declared to be valid having been in occupation of the land from the year 1978. She sought for prayers 41 of the Plaintiff.

**B. Cross Examination of DW - 2 by Mr. Okanga Advocate.**

60. DW - 2 confirmed that they bought the land at three (3) times. These were in the years 1978, 1980 and 1982. It was her husband who would pay but she dealt with the sale transactions. She stated this referring to the sale agreement. The seller had no title deed. They bought the 1<sup>st</sup> one being 3.08 Acres in the year 1978. It’s the Department of Agriculture who did the measurements. They bought Mlangoni which she confirmed was a big place/area. The sale agreement never provided the details of his neighbors nor the size/ area of the land they bought.



61. On being referred to the second agreement of the year 1978, the witness stated that there was no title deed and the acreage; they are the one who took the measurements. With reference to the supplementary affidavit – paragraph 2 – the suit property on the Certificate of title showed it was gotten in the year 2014. On being told that Rainbow Investment Limited got its title earlier than hers she held that theirs must have been obtained through fraudulent means. Her testimony was that she bought the land rightfully. When her husband bought the land they would use the locational Chief who would show them the land and the acreage. The only paper they had was the sale agreement. It bore no official stamps from the Chief's office. Her land was the one she occupied and was carrying out the extensive cultivation and farming.

**C. Cross Examination of DW - 2 by Mr. Sitonik Advocate.**

62. DW - 2 confirmed that she had seen the title deed with Rainbow Investment Limited. The property measured 3.08 acres. She reiterated that the Defendant bought their parcels as – 3 parcels in the years 1979, 1980 and 1982. Later on they were amalgamated into one parcel. It was her husband who bought the lands. They got married in the year 1974.

63. On being referred to the Certificate of Marriage, she stated that she married Mr. Wilfred Stephen Mbatia. But on being referred to the Court order of 24<sup>th</sup> August, 2009, she swore an affidavit indicating that there was a person called Wilfred Wanjui Mbatia, presumed to be lost. When referred to a letter dated 11<sup>th</sup> September, 1997 to the Municipal Council of Mombasa it indicated having been by Wilfred W. Mbatia which indicated that he held 2 plots. She disagreed with the contents of the letter.

64. DW - 2 stated that she had 5 children; one male and 4 females. She indicated that she did not know when Ali Taib got his title deed. With reference to the letter written by Wilfred S. Mbatia dated 9<sup>th</sup> November, 1996 she stated that it indicated that he bought the land in the year 986; they bought the land and constructed using mud/earth temporary structure, then constructed a permanent house. From the sale agreement her names did not appear. There was no identity card details as women never got them. She had never seen the land being claimed by Rainbow Investment Limited

**D. Cross Examination by DW - 2 by M/s. Kiti Advocate.**

65. DW - 2 confirmed that she had informed the court that the sellers of land were indigenous people and without title deeds. They were the ones who took measurement and the owners. They involved the agricultural Officials for pointing out the exact location of the land. They never involved the Land Surveyors. In the year 1995 they involved the Urban Department/Council, she was aware that ALI TAIB was given title in the year 1996 instead of them. He was the one who sold the land to Rainbow Investment Limited. She was aware of the process of acquisition of land.

**E. Re - Examination of DW - 2 by Mr. Omwenga Advocate.**

66. DW - 2 reiterated that there were two names Wilfred S. Mbatia and Wilfred W. Mbatia on the documents. They were both the names of her husband. They belonged to one and the same person. On the acreage of the year 1972, it showed the land measuring .....and in the year 1989 the land measured..... From the allocation it was the same acreage up to when they were in occupation. It had never been added. To date there had been no objection on the matter to date.

67. On 21<sup>st</sup> February, 2024, the Defendant/ Plaintiff in counter claim called DW - 3 who testified that:-



**A. Examination in Chief of DW - 3 by Mr. Omwenga Advocate.**

68. DW - 3 was sworn and he testified in Kiswahili language. He identified himself as SAMUEL SIKUKUU KATETEI and a Citizen of Kenya with all the particulars held in his national identity card. He was born on 1<sup>st</sup> July, 1940. He swore the witness statement dated 30<sup>th</sup> May, 2012. He knew a lady called Ann Mbatia. She had been his neighbor for over 50 years. She was a farmer who kept livestock – goats, cattle, poultry and cultivates on the land.

**B. Cross Examination of DW - 3 by Mr. Okanga Advocate.**

69. DW - 3 confirmed that he knew the Defendant/Plaintiff in the Counter - Claim. He confirmed where she occupied was a property sold to her by the Mwakulu family.

**C. Cross Examination of DW - 3 by Mr. Sitonik Advocate.**

70. DW - 3 stated that he knew the people who sold the land to Mr. Wilfred Mbatia. They sold to him 4 acres. It's on that portion that Anne had occupied and constructed her residence and carried out her farming.

**D. Re - Examination of DW - 3 by Mr. Omwenga Advocate.**

71. DW - 3 reiterated that apart from the livestock keeping, she also cultivated on the land.

**A. Examination in Chief of DW - 4 by Mr. Omwenga Advocate.**

72. DW - 4 was sworn and testified in Kiswahili language. He identified himself as RODGERS J.K. BAWA. He was born on 12<sup>th</sup> December, 1964 and resided in Tudor, Mombasa. He had sworn the witness statement dated 20<sup>th</sup> May, 2012. He knew M/s. Ann Mbatia from the year 2001. He had been sent to assist her on her farm on agricultural work as he was an expert. He assisted her in preparing the Silage (underground storage for mixture of cattle feeds) for her livestock. He did not know the size of the land as he mainly concentrated on farming activities.

**B. Cross Examination of DW - 4 by Mr. Sitonik Advocate.**

73. DW - 4 confirmed that he did not know the exact size of the suit land. He was informed by M/s. Ann Mbatia that the land was hers.

**A. Examination in Chief of DW - 5 by Mr. Omwenga Advocate.**

74. DW - 5 was sworn and testified in the Kiswahili language. He identified himself as Mr. NDEGWA CHIRO JABU. He was a citizen of Kenya with all the particulars on the national identity card. He told the court that he was born in the year 1955 and lived in Mariakani. On 30<sup>th</sup> May, 2012 he swore the witness statement. He knew M/s. Ann Mbatia. She was his neighbor. It was his father who sold her the land – totally 8 <sup>1/2</sup> acres. At first he bought 4 acres, then later on added a further 4 acres and finally <sup>1</sup>/<sub>2</sub> acres. She kept livestock and undertook cultivation. It was close to over 10 years since she bought the land.

**B. Cross Examination of DW - 5 by Mr. Okanga Advocate.**

75. DW - 5 testified that he was educated and was close to 70 years of age. He had seen the sale agreement. The seller of 4 acres – was called Chiro Jabu Zuha who sold 4 acres. The <sup>1</sup>/<sub>2</sub> acres was sold by Mutaka hence it was 8 <sup>1</sup>/<sub>2</sub> acres. He was not aware of the 16 acres being claimed by her. He knew of the size of



land was done by the footsteps an acre would be 70 by 70 feet. He did not have a title deed. He knew DW - 3 Mr. Shikukuu very well. He was aware that Ms. Anna Mbatia kept livestock - sheep, cattle, goats, poultry and cultivate on that place.

**C. Cross Examination of DW - 5 by Mr. Sitonik Advocate.**

76. DW - 5 confirmed being aware that she bought 9 ½ acres.

**D. Cross Examination of DW - 5 by M/s Kiti Advocate.**

77. DW - 5 reiterated that their land bordered the railway lines. He knew all the land was sold to Ms. Mbatia alone and no one else.

**E. Re - Examination of DW - 5 by Mr. Omwenga Advocate.**

78. DW - 5 stated that he had not seen anyone else on the land. He was not educated.

**A. Examination in Chief of DW - 6 by Mr. Omwenga Advocate.**

79. DW - 6 was sworn and testified in English language. She identified herself as being M/s. NANCY DATEE WANGUI. She was a citizen of Kenya with all the particulars as borne in her national identity card. She testified that she was born on 1<sup>st</sup> January, 1975. Her witness statement was dated 30<sup>th</sup> May, 2022. She lived at Mtwapa. Anne Wanjiru Mbatia was her mother. She had five siblings – 4 sisters and one brother and they were in court regarding their land. They had lived there from the year 1980. The land was 10 acres in size. They were 3 portions. Her mother was a farmer. She kept livestock, poultry and cultivated on the land. The land was occupied in year 1980. She had occupied the suit land for the past 40 years.

**B. Cross Examination of DW - 6 by Mr. Sitonik Advocate.**

80. DW - 6 reiterated that she knew how her mother had come to be on the land. By then, she had been under 10 years. She knew and witnessed the execution of the sale agreements. She could not remember the exact years when this happened.

81. On 21<sup>st</sup> February, 2024 the Defendant/ Plaintiff in Counter - Claim through her Counsels Mr. Omwenga and M/s. Mango closed her case.

**VI. The 1<sup>st</sup> Defendant in Counter Claim's case**

82. The 1<sup>st</sup> Defendant in Counter - Claim filed a Statement of Defence to the further further further Amended Counter - Claim amended on 3<sup>rd</sup> November, 2020. The 1<sup>st</sup> Defendant averred that at all material times he had been the duly registered owner of the land being LRA No.22525/Mariakani CR No.146/I – the suit property, until 4<sup>th</sup> January, 2008 when he sold it to the 2<sup>nd</sup> Defendant herein.

83. The 1<sup>st</sup> Defendant denied the contents of Paragraph 5 of the Counter - Claim and averred that neither had the Plaintiff ever been in possession of the suit premises, nor had the Plaintiff's husband ever purchased the suit property. The 1<sup>st</sup> Defendant denied the contents of Paragraph 6 to the effect that there had never been any farming activities on the suit property and the Plaintiff had never been in occupation of the suit property. The 1<sup>st</sup> Defendant further stated that when he transferred the suit property to Rainbow Investment Limited, the 2<sup>nd</sup> Defendant herein, the property was vacant. There was no farming activities or any building structure erected therein as alleged.



84. In response to Paragraph 7, the 1<sup>st</sup> Defendant denied evicting the Plaintiff from the suit property allegedly on or about March 2010 and averred that he had never met the Plaintiff and in fact only became aware of her during the proceedings of this suit. Paragraph 8 of the Counter - Claim was admitted. The 1<sup>st</sup> Defendant denied the claim under Paragraph 9 and averred that the suit property was not subject to any adjudication process at all. The contents of Paragraphs 10 and 11 were strictly denied.
85. The 1<sup>st</sup> Defendant in Counter - Claim denied the contents and all the particulars of fraud under Paragraph 12 and averred that the title issued by the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> Defendant and later to the 2<sup>nd</sup> Defendant was in line with due process. In further response, the 1<sup>st</sup> Defendant averred that the transfer of the suit property to the 2<sup>nd</sup> Defendant was in line with due process.
86. The 1<sup>st</sup> Defendant strictly denied the contents of Paragraph 13 and put the Plaintiff to strict proof as the title of the suit property was not obtained fraudulently. The 1<sup>st</sup> Defendant denied Paragraph 14 of the Counter - Claim and averred that the Plaintiff had not been in occupation of the suit since the alleged year of 1978 or at all, therefore the claim of land adverse possession never arose at all.
87. In general response to the whole Counter - Claim, the 1<sup>st</sup> Defendant in Counter - Claim averred as follows: -
- a. The Plaintiff in the Counter - Claim was not the registered proprietor of the Plot L.R No. 22525 Mariakani C.R No.146/ I.
  - b. The Plaintiff in the Counter - Claim was not entitled to the Plot L.R No.22525 Mariakani C.R No.146/I by way of land adverse possession or at all.
  - c. The Plot L.R No. 22525 Mariakani C.R No.146/I was registered to the 2<sup>nd</sup> Defendant in the Counter - Claim.
  - d. The Plaintiff was an outright trespasser in the suit property.
88. In view of the forgoing, there was no legal basis for the prayers sought in the Counter - Claim. Reasons whereof, the 1<sup>st</sup> Defendant prayed that:-
- a. The Defendant/ Plaintiff in Counter - Claim's Further Further Further Amended Defence and Counter - Claim be struck out with costs together with interest thereon.
  - b. Judgment be entered for the Plaintiff in the Counter - Claim against the Defendant as prayed in the Plaint
89. The 1<sup>st</sup> Defendant called their witnesses on 22<sup>nd</sup> February, 2024 where DW - 1 for the 1<sup>st</sup> Defendant testified as follows:-

**A. Examination in Chief of DW - 1 for the 1<sup>st</sup> Defendant in the Counter - Claim by Mr. Sitonik Advocate.**

90. DW - 1 was sworn and testified in English language. He identified himself as being Mr. ABDULLA ALI TAIB. He was a citizen of Kenya bearing all the particulars on his national identity card. He was a business. He recorded his witness statement dated 28<sup>th</sup> January, 2020. He made reference to documents filed 30<sup>th</sup> January, 2020 - 1<sup>st</sup> Defendant Exhibit numbers 1 to 18. He was brought to court and accused of having acquired the suit property illegally. He applied for the land and documents. He was allocated the land legally. He visited the property. It was title No. 22525 for a 99 Years lease from 1<sup>st</sup> April, 1996. The land measures 3.78HA. The date of the title was 3<sup>rd</sup> April, 1998. The beneficiary was himself - Mr.



Abdalla Ali Taib. He was able to identify the land before and after the allocation. Upon the visit there was nothing on it apart from the natural bushes and some wild plantations. His last visit before selling it was in the year 2006. The buyer wanted to see it before committing.

91. According to the witness, by then there was no human occupation nor activities on the land. He sold it to Rainbow Investment Ltd. All the details on how he acquired the property and the process was all captured in his witness statement.

### **B. Cross Examination of 1<sup>st</sup> Defendant's DW - 1 by Mr. Omwenga Advocate.**

92. DW - 1 told the court that from the documents produced being Defendant Exhibit Numbers 1 to 18 there was no application for allocation of the suit property i.e. he did not have it on record. There was no letter of no objection from the Mariakani County Councils for the allocation of the suit land nor were there any minutes to that effect. He did not have a grounds report indicating that the plot was available for allocation. There was no copy of the Kenya Gazette Notice for the Change of User of the land. With reference to Exhibit No. 17 the witness stated that it was a Letter of Allotment dated 4<sup>th</sup> April, 1996. There was no formal written acceptance for the Plot.
93. According to the witness, he was to have made the payment after 30 days. However, he made payment on 23<sup>rd</sup> October, 1996 and 25<sup>th</sup> October, 1996 which was 6 months from the date of the letter. With reference to the special conditions No. 2, he was given 6 calendar months. He never submitted Plans for Development to Mariakani Council. He went to the grounds by the year 1996, there was no one in the neighboring surroundings and no buildings. There was only an Abattoir across the road. He acquired the title of the land on 3<sup>rd</sup> April, 1998.
94. Accordingly, DW - 1 got a caretaker – called Mr. Kimanzi Mwilu on the land to ensure that there were no squatters. He never undertook any development on it. He then transferred the suit land to Rainbow Investment Limited. He had no evidence of any payment made by Rainbow Investment Limited. He re – affirmed that the land measured 3.78 HA.
95. On being referred to the Deed Plan being Defendant Exhibit no. 15, the witness told the court that he neither knew the land surveyors who prepared the Deed Plan, the neighbor nor boundaries of the suit land with other surrounding parcels. There was another Deed Plan on Page 20. He did not know the identity of persons who had gone to the ground. He was referred to page 20; DW - 1 told the court that the same showed Carbide Channels. He stated that the number was missing on the Approved Development Plan. It bore no signature for the Commissioner of Lands nor was it dated. He did not have any documents in court to show that he applied for the plot.

### **C. Cross Examination of DW - 1 by Mr. Okanga Advocate.**

96. DW - 1 confirmed that the acquisition of the Plot was not by fraud. It was above board. He made payment as follows:-
- a. Kenya Shillings Twenty Nine Thousand Four hundred (Kshs. 29,400/-) on 23<sup>rd</sup> October, 1996.
  - b. Kenya Shillings Four Hundred and Two Thousand (Kshs. 402,000/-) on 25<sup>th</sup> October, 1996.
97. The County of Mariakani never rejected the payment. In total the payment was a sum of Kenya Shillings Five Sixty Thousand (Kshs. 560,000/=) (on page 25). The Letter of Allotment was dated 4<sup>th</sup> April, 1996 (on page 17). According to the witness, he was issued with a title deed on page 11. There was no complaint lodged. On being referred to the Deed Plan, the witness stated that there was nothing on the plot to do with the rearing of livestock and cultivation. On being referred to his Affidavit Paragraph 3 by an Advocate called Nabhan Swaleh DW - 1 confirmed that he was handed the original title deed



to him. He never acquired the title deed illegally nor irregularly as alleged. He was never told by the Mariakani Council that the land was set aside for something else.

98. According to DW -1 he had never met M/s. Anne Mbatia. On page 47 there was a letter dated 11<sup>th</sup> February, 2014 by the National Land Commission (NLC) addressed to M/s. Anne Mbatia; the letter according to him was not addressed to him with regards to Plot No. 22525. On being referred to the MAP, he stated that he did not know about KWALA “A” and “B”. as far as he was concerned, the place was called Kichinchinoni Area.

#### **D. Re - examination of 1<sup>st</sup> Defendant (DW 1) by Mr. Sitonik Advocate.**

99. DW - 1 on being referred to the Letter of Allotment, he confirmed that the conditions were set by the Municipal Council. He had never received any warning for the breach of any of the conditions. The payment he made at pages 23 and 24 were never rejected by the County Council. He was referred to the Deed Plan – at page 15 dated 6<sup>th</sup> November, 1995 and 20 dated 20<sup>th</sup> May, 1996 the witness stated that by the time of being issued with the title, there was no plan to revoke the title deed.

#### **E. Court notes:-**

100. The DW – 1 indicated he handed over the original title deed to the buyer upon selling it. However, the buyer Rainbow Investment Limited indicated that the title deed got lost. That there was an affidavit sworn by Advocate Avaban Swaleh under paragraphs 3 and 4 to the effect that the original title and completion documents could not be found. Hence, as a result, they applied for a replacement and was issued with a Provincial Title Deed.
101. On 7<sup>th</sup> June, 2024 despite the Defence having closed their case, for the sake of having technical and skilled expertise benefit to the matter, it was agreed by the consensus of all the parties that both Mr. Edward Marenye Kiguru, a Private Land Surveyor engaged by the Defendant and Mr. Perter R. J Wanyama, the former Coast Regional Land Surveyors summoned by the Honourable Attorney General – the 3<sup>rd</sup> Defendant, herein be allowed to testify. Thus, below is their evidence as follows:-

#### **A. Examination in Chief of Mr. Edward K. Kiguru by Mr. Omwenga Advocate.**

102. Mr. Kigiruu was sworn and testified in English language< He informed Court that he was a Licensed Land Surveyor of 51 years experience. He worked for the Government for 35 years. He rose to the level of Provincial Land Surveyor. He then left to become a Private Surveyor. On being instructed by both the Law firms of Messrs. Mogaka Omwenga & Mabeya Advocates and Kanyi J. & Company Advocates, he prepared a Land Survey report dated 28<sup>th</sup> May, 2024 which he produced on behalf of the Defendants. He adopted it as part of his evidence in support of this case. Further, he had also attached some documents i.e. 9 of them as part of the evidence to be adduced herein. His mandate was to find out the genesis of the parcels Mariakani/Kawala “B”/2 and LR. No. 22525; a topographical Survey and give his observations. He stated that Parcel Mariakani “B”/2 resulted from an adjudication process of Kawala “B” Adjudication Section by the Government. He informed Court that Kawala “B” was declared an Land Adjudication section by the Kilifi District Land Adjudication & Settlement Officer vide a letter dated 9<sup>th</sup> April, 2010. He stated that, on 3<sup>rd</sup> November, 2014 the title Deed with respect to kawal B/2 was issued to M/s. Mbatia.
103. Mr. Kiguruu stated that the land known as LR. No. 22525 was contained on Survey Plan No. F/R 310/195 and computation numbers 37579. It was based on the Letter of Allotment reference numbers 47501/71 dated 6<sup>th</sup> May, 1996 in favour of Mr. Abdalla Ali Taib and a Part Development Plan reference Numbers 131.KLF.1.96. A Survey was undertaken by a Government Surveyor on 14<sup>th</sup> August, 19196



and was approved by the Director of Surveys on 1<sup>st</sup> November, 19196. A Deed Plan No. 209739 was processed by the Director of Surveys and was used to prepare the 99 years Lease Grant no. CR. 146 by the Commissioners of land in favor of Mr. Ali and registered on 17<sup>th</sup> April, 1998.

104. From his report, there were the following observations: -

- a. He did the report for Kawala “B” and the issues of the title issued to M/s. Anne Wanjiru Mbatia. With regard to the parcel known as Land Reference No. 22525/Mariakani CR No. 146 he enclosed a Survey Plan and provided a brief background/history on how the survey exercise was undertaken. His own assessment was that the whole exercise was based on the Letter of Allotment. He had stated that a title deed was issued to Mr. Abdalla Taib and later on transferred to the Rainbow Investment Limited.
- b. According to him on the Land Reference No. 22525 – the beacons were not in existence at the time of writing this report.
- c. The survey Plan did not contain the information on the Letter of Allotment as this was a new survey. He had indicated that the Railway line was not well placed. It was not correct from what was on the ground/ the reality on the ground. There had been a shift of the Railway line by 10 meters to the County of Kwale – though this was
- d. During the Land Adjudication, it was alleged that their Land Survey was done in the year 1996 it was not recognized.
- e. In essence, Land Reference No. 22525 was an irregularity. It was shown in Kawala “B”.
- f. Land Reference No. 22525, was surveyed on what was known as Trust Land which was land set aside to be under the then Local County Council to hold on behalf of the ordinarily residents of the location where the land was situated by origin, birth, descents clan or ethnic background. To obtain ownership/proprietorship hence be issued with a title deed the County Council had just and foremost set aside the said portion, prepare a PDP and issued a Letter of Allotment upon approval by a meeting of the full Council under Cap 265.
- g. Thus, it was granting a Letter of Allotment to be approved by the Director of Survey and then a Certificate of Lease processed by the Commissioner of Land to be registered by the Land Registrar. Without perusing this procedure, the ownership or the title allegedly issued then became an irregularity. This would be a major discrepancy. Leading to the nullification or revocation of the title deed altogether for being null and void.
- h. Clearly there was an overlap to the Railway Land. It was a very poorly done land survey exercise. In the given circumstances, the title deed should never have been issued at all.
- i. In conclusion, the Surveyor observed that LR No. 22525 fell mainly on Kilifi Trust land. There appeared to be no records of setting apart process of the subject land in order to facilitate subsequent allocation and issuance of Grant (vide Letter of Allotment & PDP) by the Commissioner of Lands. Further more, the survey of LR. No. 22525 has flaws which should have rendered the survey null.

#### **B. Cross Examination of Mr. Kiguru Surveyor by Mr. Sitonik Advocate.**

105. The witness stated that the survey exercise for Mariakani Kawala “B”/2 was done in the year 1996 by the Government of Kenya. Being issued with a title deed before a Surveying exercise was undertaken and a Map developed for an area was an irregularity. He was referred to the observation made from his report. He stated that while looking for the beacons they could not locate them at all on the ground.



He had said the beacon did not exist but perhaps what he meant was that the beacons could not be located. He wished to have that statement corrected.

106. With reference to the letter dated 29<sup>th</sup> January, 2010 by the Land Adjudication officer to the Director of survey. He believed it was the one that made him arrive at that statement and hence the said conclusion. With regard to Paragraph 1 of the said letter. He got the said information through computation and also taking that this information was readily available to the public.
107. The witness affirmed that this property fell within the legal regime of Trust Land and hence governed by the Trust *Land Act* Cap. 288 which he doubted the procedure was followed upon acquiring the said title. To him the title was irregular for failing to adhere with the said legal procedures on Setting Aside Land found to be within Trust Land. The land spilt into 2 counties – the County of Kwale through the Railway line and the County of Kilifi. In his report, he was not able to pick up Kawala “B” as that was never his mandate. He strongly held that his report was complete.

## VII. The 3<sup>rd</sup> Defendant in Counter - Claim’s case

108. The 3<sup>rd</sup> Defendant called its first witness DW - 1 on 7<sup>th</sup> June, 2024 who testified at 4 pm at the site visit as follows:-

### A. Examination in Chief of DW 1 for the 3<sup>rd</sup> Defendant in Counter - Claim Mr. PETER R.J. WANYAMA by M/s Kiti Advocate.

109. The 3<sup>rd</sup> Defendant witness testified on oath in English language. He was the Regional Land Surveyor – Rift Valley. However, in the period of November, 2016 to November, 2020 he was attached at the Coast Region under the same designation. He had worked as a Surveyor for a period of 34 years. He was the one who prepared the Land Survey report dated 3<sup>rd</sup> February, 2020 and which he wished to produce as evidence in chief. Further, he had prepared a List of documents filed in court on 5<sup>th</sup> October, 2020 which included:-
- a. A Survey Plan – F/R. No. 310/195 in Respect to Land Reference No. 22525.
  - b. A Letter of Allotment dated 4<sup>th</sup> April, 1996 – un-surveyed Industrial Plot – Mariakani.
  - c. A Preliminary Index Diagram for Kwale “B” registration section –
110. He testified that he did the surveying, he found out there was an overlapping of the survey Plan FR No. 310/195 in respect of Land Reference No. 22525 onto the satellite imagery of Kawala “B” registration Section. It was observed that the two parcels of land in the suit overlapped onto each other and therefore a highlight regarding the background surrounding the acquisition of the two (2) titles may be the only way that could assist in the resolution of the dispute at hand.
111. In other words, when he overlay the two (2) preliminary index diagrams, he discovered that Land Reference No. 22525 fell onto a place of Kawala “B”. Similarly, when you overlay diagrams 13 of Kawala “B” Parcel 3030 of Kwale “B” overlaps onto parcel No. Kawala “B”/2 and by extension onto parcel No. 22525. In other sense, there were 3 parcels indicated on the maps. The acquisition of Land Reference No. 22525.
112. The Land Reference No. 22525 resulted from an allocation by the Commissioner of Lands to one Mr. Abdalla A. Taib vide a Letter of Allotment Reference No. 42503/XI dated 4<sup>th</sup> April, 1996. It was accompanied by relevant Part Development Plan (PDP) – No. 131.KLF.3.96 which was the location of the land. The survey was undertaken the same year and was approved by the Director of Surveys on 1<sup>st</sup> November, 1996 and the Director of Physical Planning on 20<sup>th</sup> May, 1996. The Land



- measures 3.780HA (approximately 9.341 acres) and the survey is contained on the Survey Plan F/R. No. 310/195 Deed Plan No. 209739 was accordingly prepared and a Certificate of Lease issued to the allottee for the period of 99 years with effect from 1<sup>st</sup> April, 1996.
113. The parcel No. Kawala B/2 was derived from the land adjudication process that started in the year 2012 – through Index Diagram of the year 2015 with reference to the ground survey. There was an overlap of the 3 parcels from the date of acquisition survey was done in the year 1996. While Kawala Land Adjudication was done in the year 2012 and was completed in year 2016.
114. According to the witness, it was just an observation that the person who did this survey should have done due diligence to have seen that there already in existence another parcel of land a number allocated to the land, Kawala “A” adjudication was done in the year 2010. Hence the Land Adjudication officer ought to have known that there already existed an adjudication and that was why there was an overlap.
115. On 18<sup>th</sup> December 2007, the allottee transferred the parcel of land to a company trading in the names and style of RAINBOW INVESTMENT LTD. – the Plaintiffs in this matter. The original Allottee had been MR. ABDALLA A. TAIB – the 2<sup>nd</sup> Defendant. Parcel Mariakani/Kawala “B”/2 resulted from an Adjudication process of Kawala “B” Adjudication Section – from year 2012. After the adjudication there was publication of Preliminary Index Diagram by the Director of Survey – in November, 2016. The parcel falls on Kawala “B”.
116. Title Deed was issued on 3<sup>rd</sup> November 2014 to ANNE WAMBIRU MBATIA – the 1<sup>st</sup> Defendant. It was not clear how the title was issued before the publication of the MAPS by the Director of Surveys. In conclusion he stated as follows:-
- a. Kawala “B” Adjudication Section was done years after the allocation and survey of Land Reference No. 22525.
  - b. Thus, it was incumbent upon the Adjudication Officer to respect the existing surveys in order to avoid any overlaps. This did not happen.
  - c. He concluded that due diligence was not exercised when the Mariakani Kawala “B” adjudication section was being undertaken thus making the parcel Mariakani/Kawala “B”/2 to overlap onto Land Reference No. 22525 which had already been surveyed and whose survey Plan F/R No. 310/195 was in existence.
117. DW - 1 produced the following documents:-
- a. The survey plan F/R No. 310/195 in respect to Land Reference No. 22525.
  - b. The Preliminary Index Diagram No. 13 for parcel Mariakani/Kawala “B”/2.
  - c. Preliminary Index Diagram No. 45 for the Kawala “A”/Kadonzo/303 together with a diagram showing Land Reference No. 22525 overlaid onto parcel Mariakani/Kawala “B”/2.
  - d. The satellite Imagery for ease of reference – as Exhibits 1, 2, 3, 4, 5 and 6 respectively.

**B. Cross Examination of DW 1 -3<sup>rd</sup> Defendant in the Counter - Claim by Mr. Okanga Advocate.**

118. The witness confirmed that he had been a Land Surveyor for the past 34 years. When referred to the report filed in the year 2020 he stated that he prepared it 4 years ago and at paragraph 3 it was on the allocation of the title deed which showed the title was issued before the Map. It’s the map that supported the registration. In his opinion that was an irregularity. Plot No. 22525 and Mariakani



Kawala “B” in the documentation the parcels were not the same but on the ground there was an overlap as they saw during the site visit conducted by court.

119. Kawala “A” – 303 was distinct but it overlapped onto plot no 22525 and Kawala “B” he never found the boundary nor the beacons on Plot No. 303. His survey report was complete as plot No. 303 was not part of the case nor his assignment. The Google Map was done from the offices/desk and not on the ground. There were beacons shown on the map. The beacons existed as they did lift this from the existing information. It was not possible to have several parcels on one parcel. He confirmed that parcel No. 25252 existed. They had followed the verified procedure in their findings.

#### **C. Cross Examination of DW - 1 - 3<sup>rd</sup> Defendant in Counter - Claim by Mr. Sitonik Advocate.**

120. The witness told the court that in his 34 years’ experience as a Land Surveyor, he had never seen a title precedent a map. There were many statutory authorities which were passed before a Letter of Allotments were issued. There was overlapping of 3 titles. Parcel No. 25252 came first. Referred to Page 20 of the 1<sup>st</sup> Defendant Supplementary List of documents. It was a PDP for parcel No. 22525 dated 20<sup>th</sup> May, 1996. It was a crucial document, it showed where the property was - then a survey is done – then Deed Plan No. 209732 on Page 15 dated 6<sup>th</sup> November, 1996 – then came after the survey.

#### **D. Cross Examination of DW1 - 3<sup>rd</sup> Defendant in Counter Claim by Mr. Omwenga Advocate.**

121. On being referred to the Letter of Allotment and PDP the witness told the court that it was the PDP that came first before any other documents e.g. the Letter of Allotment. The PDP was dated 20<sup>th</sup> May, 1996. It was approved on 22<sup>nd</sup> April, 1996 for Plot No. 22525 the Letter of Allotment was issued on 22<sup>nd</sup> April, 1996. He confirmed that the Letter of Allotment was done before the PDP. Hence the PDP was irregular.
122. According to the witness, before preparing the report, he had not seen the ground report for parcel No. 22525. He never saw the Kenya Gazette Notice. The ground reports were not mandatory. The reports were available with the Director of Surveyor. He was not aware that the Commissioner of lands needed to write a letter to indicate the land was available for allocation. He had seen the parcel No. 22525 fall within two (2) counties – Kilifi and Kwale which was not normal.
123. During the ground survey, he never saw any beacons on the ground. They never came to the ground. From the Survey Report, there were no signatures as it normally goes to the Director of Survey for his verification. There were the signatures by the Director of Survey. The witness could not confirm that there was a letter by Commissioner of Land to indicate that the land was not available for allocation. The entire property Land Reference No. Mariakani/Kwale “B”/2 was fully developed. There existed a large farm – of livestock, poultry and plantation of maize farm for feeding the cattle – silage. He never saw any other documents for setting apart the Plot No. 22525.
124. On 7<sup>th</sup> June, 2024 the 3<sup>rd</sup> Defendant in the Counter claim called their case to a close through their Learned Counsel M/s. Kiti.

#### **VIII. Submissions**

125. On 7<sup>th</sup> June, 2024, upon the closure of the Plaintiff and Defendants, the Honourable Court directed that the parties to file their written submissions within stringent timeframe thereof on. Indeed, all the parties complied accordingly. Pursuant to that on 24<sup>th</sup> October, 2024 the Honourable Court reserved a date to deliver its Judgement on 12<sup>th</sup> November, 2024.



## A. The Written Submissions by the Plaintiff

126. The Plaintiff through the Law firm of Messrs. Okanga & Company Advocates filed their written submissions dated 22<sup>nd</sup> July, 2024. Mr. Okanga Advocate commenced his submissions by stating that the Plaintiffs had proved its case and was thus available for the prayers sought in its Plaint dated the 15<sup>th</sup> day of April, 2010.
127. The Learned Counsel averred that to establish its case, the Plaintiff called one witness PW1 one Said M. Hassan Mwadzaya the property Manager of the Plaintiff who adopted his Statement dated the 30<sup>th</sup> October, 2013 and further produced as exhibits numbers 1 to 7 the documents captured in the Plaintiff's list of documents dated the 21<sup>st</sup> February, 2019 and further list of documents dated the 3<sup>rd</sup> July, 2013 as the Plaintiff's list of exhibits to further buttress the Plaintiff's case against the Defendant relating to the suit property Plot No.22525 CR No.146 that indeed the Plaintiff is the registered owner of the parcel of land having purchased the same from one ABDALLA ALI TAIB.
128. It was the evidence of PW - 1 SAID M.HASSAN MWADZAYA, that the Plaintiff purchased the parcel of land known as LR No. 22525 situated in Mariakani for a sum of of Kenya Shillings One Million (Kshs.1,000,000/-) from one ADBALLA ALI TAIB and the said parcel of land registered in the names of the Plaintiff on the 4<sup>th</sup> January, 2008. That the Plaintiff had been paying rates as captured in the Plaintiff's further list of documents dated the 3<sup>rd</sup> July, 2013 and produced as exhibit No. 10 by the Plaintiff. It was the further the evidence of PW - 1, that when he visited the suit land with the aim of fencing a lady came to the Plot and claimed that the parcel of land belonged to her and thus prompting the filing of the current suit against the Defendant Anne Mbatia as the Plaintiff is the registered owner of the parcel of land known as Plot No.22525 CR No. 146 measuring approximately 3.780 Hectares. The Learned Counsel referred the court to the exhibited Title Deed of Plot No. 22525 CR No.146 and the Postal search dated the 23<sup>rd</sup> October, 2018 showing, that the Plaintiff was the registered owner of the suit property and thus entitled to the reliefs sought in its Plaint dated the 15<sup>th</sup> day of April 2010.
129. The Learned Counsel concluded that the Honourable Court should allow their suit and further dismiss the Counter - Claim by the Defendant as the same had not been proved to the required standard by the Defendant Ann Mbatia. According to the Learned Counsel based on the above evidence and the exhibits produced by the Plaintiff the Plaintiff closed its case and prayed to the Honourable Court to allow its suit with costs against the Defendant Anne Mbatia.
130. According to the Learned Counsel, the Defendant's case was that to disapprove the Plaintiff's case, the Defendant filed her defence dated the 24<sup>th</sup> May, 2010 which she had gradually amended a total of five times resting in her FURTHER AMENDED Defence dated the 23<sup>rd</sup> September,2020 and also has Counter-claim against the Plaintiff's suit. The Defendant Ann Mbatia further produced exhibits in her list of documents dated the 30<sup>th</sup> May, 2022 and her further supplementary list of documents dated the 23<sup>rd</sup> September, 2020 and calling a total of 6 witness to dislodge the Plaintiff's suit and have the said suit dismissed with costs. The Learned Counsel briefly narrated the evidence tendered by the Defendant Ann Mbatia and her witness.
131. The 1<sup>st</sup> witness to give evidence in favour of the Defendant Ann Mbatia was DW - 1 one EZEKIEL KIRIMI KIANIA. It was the brief evidence of the witness that he was now based in Embu and worked with the Ministry of Lands for 24 years. It was his evidence that between the years 2008 up to 2010, he was in charge of Kilifi Land Adjudication Area. It was his further evidence that he was in charge of demarcation of Kawala "B" and also in charge of recording interest of people and further appointed a survey officer and was further in charge of supervision of KAWALA B/2 Adjudication center. The highlight of the witness evidence was to the effect that he wrote to the commissioner of



Lands informing the commissioner that KAWALA “B” had been declared an adjudication area and wanted to know if there were parcels of land which the Commissioner of Lands had set a part. It was his evidence that he received a clearance letter dated the 29<sup>th</sup> January, 2010 and in the said letter which had been produced by the Defendant Ann Mbatia as D exhibit No. 2 Plot No. 22525 CR No. 146 did not feature in the said letter. It was the evidence of DW - 1 that he wrote a letter to the Deputy Registrar High Court, Mombasa informing him/her of the above position that Plot No.22522 CR.146 does not exist as not part of land set apart. The letter was dated the 21<sup>st</sup> April 2010 and produced as Defendant Exhibit 3. He further wrote a letter to the firm of KHATIB & CO. ADVOCATES informing the said firm that the documents by the Plaintiff were faulty. The witness DW - 1 maintained that the Defendant ANN MBATIA was allocated Plot No. KAWALA B/2 after the witness followed the demarcation process.

132. According to the Learned Counsel under Cross-examination the following points came out:-
- a. That the clearance letter dated the 21<sup>st</sup> April, 2010 was addressed to Director of Land Adjudication & Settlement Nairobi and not the witness Ezekiel Kiri Kania and further, the letter reference No. RQ13/26 VOL VI/17 of 21<sup>st</sup> October, 2009 was lacking among the Defendant’s list of documents. It was the further statement of the witness that they usually consult a surveyor while conducting a demarcation process. No letter inviting the Government surveyor to assist in the process was exhibited by the witness and or the name of the surveyor concerned. The exhibit No.2 being the clearance letter dated the 20<sup>th</sup> January, 2010 is of no evidential value as the Plot No.22525 CR No.146 was set apart way back in 1996 some 14 years before the KAWALA B was declared as adjudication section in 2010
133. The Learned Counsel submitted that the 2<sup>nd</sup> witness of the Defendant to take the stand was ANN MBATIA - DW - 2. In brief the said witness stated that she was a farmer and that she bought plots three times i. e in the years 1978, 1980 and 1982. The said witness adopted her supplementary witness statement dated the 23<sup>rd</sup> September, 2020 running into 41 paragraphs and the supplementary list of documents, containing exhibits 1 to 35. The witness further relied on her copies of documents dated the 30<sup>th</sup> May, 2012 and her first witness statement dated the 30<sup>th</sup> May, 2012. In her first statement of 30<sup>th</sup> May, 2012, the witness DW2 Ann Mbatia, has stated, that the Plaintiff, obtained the title to Plot No.22525 CR.146 fraudulently and the same narration had been captured in her supplementary witness statement where again she had stated at Paragraph 39 that the title deed to Plot No.22525 CR.146 was obtained fraudulently by ABDALLA ALI TAIB. Thus, the transfer to the Plaintiff Rainbow Investment Limited was also fraudulent, illegal and irregular and has stated a total of 23 reasons why the said title Deed in the names of the Plaintiff should be cancelled.
134. To further disapprove the Plaintiff’s suit, the Defendant produced what she termed Sale Agreement of 6<sup>th</sup> June, 1982 and the Sale Agreement of 7<sup>th</sup> August 1978 which she relied on that her husband WILFRED WANJUI MBATIA purchased the suit land from the owners and the various letters from her husband and the Provincial Administration and also the County Council of both Kilifi and Mariakani and finally the title deed issued in her names being Plot No. Mariakani Kawala B/2 and further urging the Honourable Court to dismiss the Plaintiff’s suit and allow her Counter-claim based on the Three (3) Sale Agreements and the correspondents between her husband Wilfred Mbatia and the Government agencies.
135. On Cross-examination by the advocates for the Plaintiff, ABDALLA TAIB and the States Counsel, the following points came out:-
- a. The Sale Agreements exhibited by the Defendant Ann Mbatia were unsurveyed parcels of land with no sketch maps



- b. The Sale Agreement of 7<sup>th</sup> August, 1978 was for unsurveyed parcel of land measuring 3.8 hectares purchased from Dzuha Dzombo Muhamed Mulako wa Mudalu and Chiro Njambu for a sum of Kenya Shillings Four Thousand (Kshs.4,000/-). The Learned Counsel referred the Court to the Defendant's list of documents dated the 30<sup>th</sup> May, 2012 and its surprising, that the same Dzuha Dzombo on 4<sup>th</sup> March, 1980 was selling to the same WILFRED S.MBATIA a plot measuring 3.8 acres for a sum of Kenya Shillings Four Thousand (Kshs.4,000/-). The Learned Counsel humbly submitted that there was a possibility that the two agreements could be referring to the unsurveyed parcel of land as it beats logic why the Vendors could sell a plot measuring 3.8 Hectares for 4,000/- Shillings and again sell a Plot measuring 3.9 acres for the same amount.
136. Further the Learned Counsel submitted that to buttress her case against the Plaintiff the Defendant Ann Mbatia called DW - 3 – Mr. Samuel S. Katetei whose brief evidence was to the effect that he was a neighbor to the Defendant. The Defendant further called DW4 Rodgers K. Bawa who worked with the Agricultural research institute and who stated that he has worked with the Defendant Ann Mbatia and taught her how to make silage but the said witness said he did not know the size of the Plot the Defendant was occupying.
137. The 5<sup>th</sup> witness to be called by the Defendant was Ndegwa Chiru Jabu. It was the evidence of the witness that the Defendant was sold to a parcel of land measuring 8 ½ acres and was doing farming activities in the area and that the Plot was sold to the Defendant in 1978 and that they were measuring the land using footsteps and done by walking. It was the further evidence of the witness that Mulako sold 1 ½ acres to Ann Mbatia and that he did not have a title deed to his parcel.
138. The last witness to be called by the Defendant was her eldest daughter Nancy Datee Wanjui (DW - 6). And her evidence was that her and her parents stated staying in the land in year 1982 and that her other siblings were both in the suit land which according to her measures approximately 9-10 Hectares. With the evidence of DW - 6, the Defendant Ann Mbatia Closed her case.
139. The 1<sup>st</sup> Defendant in the Counter-claim according to the Learned Counsel Abdalla Ali Taib then took the stand to defend himself against the Defendant ANN MBATIA. The said witness gave evidence to the effect that he resides in Mombasa County and a businessman. The said witness adopted his statement dated the 28<sup>th</sup> January, 2020 and further produced the Documents contained in his supplementary list of documents as exhibits 1 to 18 and further stated that he acquired Plot No. 22525 CR.146 legally after receiving the letter of allotment and paying a sum of Kenya Shillings Four and Two Thousand Five Hundred (Kshs. 402,500/-)and further payments to the Town Council of Mariakani.
140. The said witness exhibited payments of Four Hundred and Seven Thousand Five Hundred (Kshs. 407,500/-) paid on 25<sup>th</sup> October, 1996 payments of a sum of Kenya Shillings Twenty-Nine Thousand Four Hundred (Kshs. 29,400/-) paid on 23<sup>rd</sup> October, 1996, rents payments of a sum of Kenya Shillings Five Hundred and Sixty Thousand (Kshs. 560,000/-) paid on 25<sup>th</sup> March, 2004. Payment of rents amounting to Kenya Shillings Seventy Thousand (Kshs. 70,000/-) paid on 23<sup>rd</sup> May,2006. In a nutshell the witness stated that his acquisition of Plot No.22525 CR.146 was above board and when transferring the Plot to Rainbow Investment Limited the suit land was empty without any building and or farming activities and further, he visited the land in 1996 and the suit property was empty and there was nobody in the land. The witness confirmed transferring the land to Rainbow Investment Limited and further that the parcel of land was in Kawala “A” and not Kawala “B”.
141. When cross examined he maintained that there were no developments on the suit property and further that he was shown the suit land by the Government surveyors and that none of the payments made



- to the Mariakani County Council were rejected by the concerned authorities the 1<sup>st</sup> Defendant in the Counter-claim, then closed his case.
142. The Learned Counsel submitted that the 3<sup>rd</sup> Defendant in the Counter claim also called his witness through the Attorney General one Peter J. R Wanyama, the Regional Surveyor of Rift Valley who was the then the Regional surveyor of Mombasa. He had worked for a period of 34 years as a Land Surveyor. The said witness proceeded to file his Report regarding Plot No.22525 CR No.146 and MARIAKANI/KAWALA B/2. In brief the witness stated that Plot No.22525 CR No.146 resulted from ad allocation by the Commissioner of Lands and that the parcel of land known as MARIAKANI/KAWALA B/2 resulted from and adjudication process of Kawala “B” Adjudication section which was started sometimes in the year 2012 and culminated in the publication of the PRELIMINARY INDEX DIAGRAM by the director of surveyor in November 2016.
143. Further, it was the evidence of the 3<sup>rd</sup> Defendant’s witness Mr. Wanyama, that the title deed in the Defendant’s hand was issued to her even before the publication of the preliminary index diagrams by the Directors of surveyor which according to him was irregular. The witness further gave evidence that there was overlaying of the survey Plan F/R No.310/195 in respect of L.R No.22525 onto the satellite imagery of Kawala ‘B’ registration section and it was noted that the two parcels of land overlap onto each other and further that Kawala ‘B’ adjudication section was done years after the allocation and survey of L. R No. 22525. The witness further gave evidence to the effect that the position on the ground shows there are three (3) parcels namely L. R. 22525 C.R 146, Kawala 303 and Mariakani/Kawala B/2 though his main findings concerned Plot LR No. 22525 C.R 146 and Mariakani/Kawala ‘B’/2 which showed an overlaying of SURVEY PLAN F/R NO.316/195. The witness further gave evidence to effect that Plot C.R No. 22525 C.R 146 was allotted to one ABDALLA ALI TAIB which said Plot was accompanied by PDP No.131.KLF 396 which was approved by the Director of Physical Planning on 20<sup>th</sup> May, 1996.
144. It was further the evidence that the surveyor who were involved in the Kawala ‘B’ adjudication process ought to have done due diligence as there was L. R No. 22525 C.R No.146 whose records existed and further the surveyor ought to have known that Plot No. KAWALA “A” 303 also existed. The witness then proceeded to produce his report and survey report as the 3<sup>rd</sup> Defendant exhibits and with the above evidence the witness was subject to cross examination.
145. The Learned Counsel highlighted the points that came out during cross examination as:-
- a. The title could not proceed a survey.
  - b. Plot No.CR 22525 CR 146 did exist as per the survey records.
  - c. Survey Plan F/R 310/195 was done and a title for Plot No.CR 22525 was issued.
  - d. That the Survey ought to show where the Plots should exist and that the deed Plan is replica of survey undertaken. With the above evidence, the 3<sup>rd</sup> Defendant proceeded to close its case
146. According to the Learned Counsel, the last witness to take the stand was DW – 8, Mr. Kiguru who gave evidence in favour of the Defendant Ann Mbatia. The said witness who stated, that he was a Licenced Surveyor for the last 51 years gave a ground report touching on both KAWALA B/2 in favour of Ann Mbatia and Plot No.CR 22525 CR 146. It was the evidence of DW8, that the survey of Plot No. 22525 CR 146 was poorly done as some sections fall on trust land, and further that the railway line cross Plot CR No.22525 CR 146 and thus should not have been approved.
147. The Learned Counsel highlighted the points that came out during cross – examination of DW – 8 as such:-



- a. That a survey Report should come out before the title was issued.
  - b. He did not pick Kawala “A” 303 as he was focusing on Plot No. Mariakani/Kawala B/2 and LR No. 22525 CR 146.
148. According to the Learned Counsel, with the above evidence, all the parties to the suit closed their respective cases.
  149. On the issue of whether the Plaintiff has proved its case on a balance of probability, the Learned Counsel submitted that the Plaintiff had proved its case to the required standard, that indeed it acquired the parcel of land known as CR No.22525 CR 146 from one Abdalla Ali Taib, after conducting due diligence and the parcel transferred to its name and a title issued.
  150. The witness exhibited the certified true copy of the suit land and the rates payments for the suit land i.e. L R No.22525CR 146. The Learned Counsel submitted that LR No. 22525 CR146 was granted to Abdalla Ali Taib way back in the year 1996 and from the site visit by the Honourable Court a large portion of the land is largely empty with no permanent buildings. The 1<sup>st</sup> Defendant Abdalla Ali Taib through his evidence, demonstrated how he acquired the suit property LR No.22525 CR.146 and the payments made as stipulated in the allotment letter dated the 4<sup>th</sup> April 1996 and the payments of the Plot rents by the said Abdallah Ali Taib to the Mariakani Town Council. All the searches from the Mombasa LAND Registry showed that the Plot Known as CR NO.22525 CR 146 was in the names of the Plaintiff, having acquired the title deed in the year 2008.
  151. The Learned Counsel further submitted that drawing the Court’s attention to the fact that at the time of filing the suit the Defendant Ann Mbatia had no title Deed in her hand.
  152. On whether the Defendant Ann Mbatia had proved her Counter - Claim against the Plaintiff, the Learned Counsel went further to state that the Defendant had failed to dislodge the Plaintiff’s suit and further failed to prove her Counter-claim. The Defendant Ann Mbatia had raised a defence that the Title to Plot No. 22525 CR 146 was obtained illegal, irregular and that the said title Deed should be cancelled by the Honourable Court. The Learned Counsel averred that evidence to be presented by the Defendant ANN MBATIA, should be above a preponderance of probability and below a reasonable doubt. The Defendant had pleaded a total of 16 grounds of fraud against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  153. The Learned Counsel asserted that they shall humbly examine the 16 grounds pleaded the Defendant Ann Mbatia to have the title Deed cancelled. On ground (a) the Learned Counsel humbly contended that ANN MBATIA must be informed when the title deed of Plot No. LR 22525 CR 146 was created by the relevant Government arms and the Commissioner of lands.
  154. <sup>1</sup>They further submitted that the particulars of fraud did not hold water as for example (9) of the particulars of fraud that the Plaintiff failed to conduct due diligence can be fraud pause. The particulars of fraud alleged by the Defendant did not hold water and the same should be rejected by the Honourable Court as having not been proved.
  155. The Learned Counsel opined that the Honourable Court rejected the allegations of fraud as the Provincial Surveyor Mr. Wanyama never in any way state that Plot No. LR 22525 CR 146 was obtained by fraudulent means, but stated that the said parcel of land existed and further laid blame on the surveyor who was tasked with mapping Kawala “B” adjudication section and move so the suit land fell in Kawala “A” and not Kawala “B”.

<sup>1</sup> (content missing)



156. The Defendant according to the Learned Counsel had prayed for land adverse possession against Plot No. L R 22525 CR 146. The Learned Counsel went further to argue that the prayer for adverse possession was also misplaced as the Defendant Ann Mbatia had claimed that the title to the parcel of land LR No. 22525 CR 146 was acquired fraudulently and thus the same should be cancelled. Having challenged the title of the Plaintiff, the claim for adverse possession fell on the way side and the same could not issue.
157. There was no evidence led by the Defendant Ann Mbatia that the irregularities alleged in the Allotment were fatal to the title Deed first issued to ABDALLA ALI TAIB and then transferred to the Plaintiff after conducting the due diligence. No further evidence was led by the Defendant Ann Mbatia that the payments made to the Mariakani Town Council and payments made to the departments of land, payments of a sum of Kenya Shillings Four and Two Thousand Five Hundred (Kshs.402,500/-), a sum of Kenya Shillings Five Sixty Thousand (Kshs.560,000/-) at the Town Council of Mariakani on 25<sup>th</sup> March, 2004, a sum of Kenya Shillings Seventy Thousand (Kshs. 70,000/-) on 23<sup>rd</sup> May, 2005, and Kenya Shillings Seventy Thousand (Kshs. 70,000/-) 20<sup>th</sup> February, 2006 were also made irregularly and illegally by the 1<sup>st</sup> Defendant in the Counter - Claim.
158. It was the contention of the Learned Counsel that the Honourable Court makes a finding that the payments went to show that the 1<sup>st</sup> Defendant in the Counter-claim obtained the title deed to Plot No.22525 CR No.146 regularly and the transfer of the same to the Plaintiff proper.
159. On the applicable law, the Learned Counsel drew the attention of the court to section 26 of the [Land Registration Act](#) No.3 of 2012 where the section states as follows:-

S.26

- (1) The certificate of title issued by the Registrar upon Registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner subject to the encumbrance's easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except:-
- a) On the ground of fraud or, misrepresentation to which the person is proved to be a party OR
  - b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

S.26

SUBPARA (2)

A certified copy of any registered instrument signed by the Registrar and sealed with the seal of the Registrar shall be received in evidence in the same manner as the original.

160. The Learned Counsel went further to state that Section 26 protected the sanctity of a title deed and thus the Plaintiff having produced the Grant title of CR No. 22525 CR 146 which said Plot measures about 3.8 Hectares, the law i.e. the [Land Registration Act](#) 2012 takes the Plaintiff Rainbow Investment Limited as the proprietor and owner of the parcel of land. The Learned Counsel urged the Court to make a finding as such.
161. The Learned Counsel drew the attention of the Court to the fact that at the time of filing the suit in the year 2010, the Plaintiff had no title Deed to the suit land and further by challenging the Plaintiff title which she wanted the Honourable Court to cancel she cannot claim to have acquired the said



suit property by way of adverse possession. For a party to succeed in the cancellation of a title, the evidence tendered must be above a balance of probability and below reasonable doubt and further, the party alleging fraud must prove the particulars of fraud alleged. The provision of Section 26 of the *Land Registration Act* stated, that the title could only be challenged on the grounds of fraud or misrepresentation which evidence must be led that the person indicated as the registered owner was a party to the fraud and or misrepresentation which led to the acquisition of the title.

162. The Learned Counsel submitted that the Defendant Ann Mbatia had further failed to prove the particulars of fraud alleged in her Counter - Claim. The Learned Counsel was guided by the following authorities “Environment and Land Case No. E002 OF 2020 – Eviline Karigu (Suing as the Administrator of the Estate of the Late Muriungu Mchuka alia Miriungu M’gicguga – Versus – Mchabari Kinoro”.
163. The Learned Counsel asserted that the above case, which is persuasive upon the Honourable Court, Hon. Justice YANO, held that the Certificate of title were to be taken by the court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per section 26 of the *Land Registration Act* and further that the documents are prepared and issued by the Land Registrar and in the absence of contrary documents from the office of title and registrar the court had no reason to find the title documents to be fraudulent.
164. In conclusion, the Learned Counsel urged the Honourable Court to allow the Plaintiff’s suit and further dismiss the Counter - Claim by the Defendant as the same had not been proved to the required standard by the Defendant Ann Mbatia.

#### **B. The Written Submissions by the Defendant**

165. The Defendant through the Law firm of Messrs. Kanji J & Company Advocates filed her written submissions dated 30<sup>th</sup> July, 2024. Both Mr. Omwenga and M/s. Mango Advocates submitted that vide a Plaint dated 15<sup>th</sup> April, 2010, the Plaintiff sought inter alia the following orders:-
  - a. A permanent injunction restraining the defendant from using, developing/constructing or trespassing or dealing with Land known as LR NO. 22525 CR No.146.
  - b. Damages for trespass and forcible detainer.
  - c. Costs of the suit
  - d. Any other relief which Court may grant.
166. On 23<sup>rd</sup> September, 2020, the Defendant filed a further further further Amended Defence and Counter - Claim. The Defendant sought the following orders against one Abdallah Ali Taib, Rainbow Investment Limited, (Plaintiff) and the Registrar of Lands:-
  - a. A declaration that Title No. L.R. NO. 22525 CR No. 146 was issued irregularly and obtained fraudulently.
  - b. That the Title issued over L.R. No. 22525 Mariakani, CR No. 146 in the name of Rainbow Investment Limited be cancelled.
  - c. A declaration that Title No. Mariakani/ Kawala/B2 was issued lawfully.
  - d. In the alternative, that the Plaintiff has acquired lawful Title through adverse possession and therefore Title No. Mariakani/ Kawala B/2 is lawful



167. According to the Learned Counsel, the Plaintiff called one Said Mbovu Hassan a Property Manager working for the Plaintiff. He adopted his statement dated 30<sup>th</sup> October, 2019 and produced documents filed on 21<sup>st</sup> February, 2019 and produced as Exhibits numbers 1 -7 and documents dated 3<sup>rd</sup> July, 2013 as Exhibits numbers 8-13. It was the Plaintiff evidence that the Parcel L.R. NO. 22525 CR NO.146 was purchased from one Abdallah Ali Taib for a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00/=) and transferred to the Plaintiff on 4<sup>th</sup> April, 2008.
168. The Plaintiff further stated that Stamp Duty of a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000/-) was paid on 18<sup>th</sup> January, 2007 and the Plaintiff continued to pay the rates to the County Government of Kilifi. Abdallah Taib had stated that the land was Trust Land that had been allocated to him by the Government. Sometimes in January 2008, the Plaintiff met the Defendant who had trespassed on the land when he visited the suit land to carry out development hence the reliefs sought.
169. On the Defendant's evidence, the Learned Counsel submitted that the Defendant called 6 witnesses. DW - 1 Ezekiel Kiriimi Kiania. He adopted his Witness Statement dated 26<sup>th</sup> March, 2012. He stated that he works with the Ministry of Lands and that in the years 2008 and 2010 he was the Land Adjudication & Settlement Officer in Kilifi and participated in the declaration of the Adjudication and allocation of land in that section and that Parcel Mariakani Kawala B/2 was allocated to the Defendant (Anne Mbatia).
170. He further stated that the process of allocation entailed a declaration of the Land Adjudication by Minister and Appointment of an officer. This was done vide the letter dated 9<sup>th</sup> April, 2010 produced as Defendant Exhibit No. 1 at (Page 75) of the Defendants list and the adjudication area was to commence at Kwa Mbatia (The Defendant's place). He stated that he also received clearance form from the Commissioner of Lands vide the letter dated 29<sup>th</sup> January, 2010 (Defendant Exhibit No. 2 (Page 77) for the area with exception of Parcels L.R. 23914, L.R. No. 21623, L.R. No. 27243 and L.R. No.7242 which were said to have been set apart earlier. That he thereafter issued a Notice to the Chief to convene a baraza for Public Participation on 31<sup>st</sup> March, 2010 (Letter at Page 74).
171. Upon receiving Complaint from the Defendant, vide a letter dated 21<sup>st</sup> April, 2010 Defendant Exhibit No. 3 (Pages 78) he had informed the Court, that L.R. No. 22525 CR No. 146 had not been exempted in the Commissioners letter clearing the area for adjudication and that the area was undergoing adjudication. He further stated that in response to the letter by Plaintiffs Advocates dated 24<sup>th</sup> September, 2009 (Pages 71) of Defendants list, vide a letter dated 15<sup>th</sup> October, 2009 Defendant Exhibit No. 5 (Pages 72) he informed the Advocates that the acquisition documents held by the Plaintiffs were faulty and requested the Plaintiffs to see him which they did not do.
172. The witness went further to state that after the process, the land was allocated to the Defendant on 15<sup>th</sup> April, 2010 (Pages 80) and a Title issued in her favour (Page 81.). DW - 2 Anne Wanjiru Mbatia -The Defendant testified she adopted her statement dated 23<sup>rd</sup> September, 2020 as her evidence in chief and produced documents on the Supplementary list of documents dated 23<sup>rd</sup> September, 2023 as Defendant Exhibit No. 1 - 35.
173. <sup>2</sup>The Defendant stated that the Suit Parcel was bought by her husband Wilfred Mbatia from Dzuha Dzombo, M. Mudalu, Njoka Dzombo and Chiluda Dzombo in the years 1978, 1980 and 1982 as per the Sale Agreements produced as Exhibit Numbers 2, 3 and 4 and had been residing on the premises since the year 1978 carrying out farming and extensively developed it.

<sup>2</sup> (content missing)



174. In the year 1995, the Defendants husband made an application to the Council to have Parcels surveyed and attached the Sale Agreements, the Survey Report by the Ministry of Agriculture done in the year 1991 (Defendant Exhibit 6) and paid Consent fees for the Process to be done and the Town Clerk gave no objection to the proposed Development of the Plots (Defendant Exhibit No. 11) and registration of the land in the Defendants husband name (Defendant Exhibit No. 14).
175. The Defendant further testified that in October, 1999 the husband disappeared having lodged complains that someone else was claiming their land, never to be heard of again and was legally presumed dead in the year 2009 – Defendant Exhibit No. 19 (Page 66). The Defendant continued living on the land peacefully with Kari using her farm to conduct Agricultural Shows in the year 2003, 2008 – Defendant Exhibit 20 (Page 67).
176. The Defendant further stated that in March, 2010, she attended a baraza convened for purposes of declaring Kawala “B” an Adjudication Section by the Officer Ezekiel Kiania Defendant Exhibit 26 (Page 74) and vide a letter dated 9<sup>th</sup> April, 2010 residents were notified that Kawala “B” had been declared an Adjudication Section and that the area covered would be from her house Defendant Exhibit No. 27 (Pages 75-76). She further stated that she was aware the Commissioner of Lands had exempted certain Parcels of Land which had been set apart earlier and the Plaintiffs Parcel had not been exempted (Exh 28) (Pages 77) and the Plaintiff never laid any claim of their rights and interest during the adjudication process on the said land.
177. The Defendant stated that on 15<sup>th</sup> April, 2010 the Adjudication was completed and an Adjudication Certificate was issued to her Defendant Exhibit No. 30 (Pages 80) and on 3<sup>rd</sup> November, 2024 she was issued with Title to the Land Defendant Exhibit No. 31 (Pages 81). The Defendant further stated that the Title given to Abdallah Taib and transferred to Rainbow Investment Limited was fraudulently and irregularly obtained as due process was not followed whilst seeking setting apart by Abdallah Ali Taib, and she counter - claimed against Abdallah Taib, Rainbow and the Land Registrar for cancellation of the Title held by Rainbow Investment Limited, a declaration that Title Kawala B/2 was issued lawfully to her.
178. DW - 3 Samuel Katetei testified by adopting his Witness Statement dated 30<sup>th</sup> May, 2012. He confirmed that the Suit Property was part of the land that had been sold to the Defendants husband and that they had been neighbors for over 50 years with the Defendant who was carrying out farming on the land.
179. DW - 4 Rodgers J.K. Bawa testified and adopted his Statement of 30<sup>th</sup> May, 2012. He stated that he worked with KARI as a Technical Assistant and confirmed he knew the Defendant from the year 2001 as she had been their contact farmer and he had been responsible for putting up demonstration plots in the land and taught the Defendant how to make silage (a mixture of fermented cattle feed – maize, sorghum and molasses stored underground).
180. DW - 5 Ndegwa Chiru Jabu testified and adopted his witness statement dated 30<sup>th</sup> May, 2012. He confirmed that he was aware that his father Chiro Nyambu sold land in the year 1978 to the Defendant’s husband. He had known the Defendant for over 30 years and she has been carrying out farming activities on the land. DW - 6 - Nancy Wanjiru - a daughter to the Defendant testified. She adopted her recorded witness statement dated 30<sup>th</sup> May, 2012. She stated that she and her siblings have been residing on the suit property since the year 1982. She confirmed that the Defendant carried out farming on her land and keeps livestock and they have been in occupation for over 40 years. The Defendant thereafter closed her case and matter proceeded for hearing of the Counter - Claim.
181. On the evidence of the counter claim, the Learned Counsel guided the court to the evidence of the 1<sup>st</sup> Defendant Mr. Abdallah Ali Taib, testified and adopted his statement dated 28<sup>th</sup> January, 2020 and



- produced documents on the list of documents dated 30<sup>th</sup> January, 2020 as Exh 1-18. He stated that he was brought to Court for having been accused for acquiring the suit property illegally. He stated that he applied for and was allocated the suit property measuring 3.78 ha by the Government of Kenya on behalf of Kilifi County Council. He identified the land before and after allocation and that there was nothing on the land and neither was there human occupation or activities.
182. He stated that he paid a sum of Kenya Shillings Four Thirty One Thousand Nine Hundred (Kshs. 431,900/-) on 23<sup>rd</sup> October, 1996 and 25<sup>th</sup> October, 1996 for the allotment and after property was registered he paid rent to the Town Council of Mariakani and later transferred property to Rainbow Investment Limited on 4<sup>th</sup> January, 2008 on receiving consideration. The 2<sup>nd</sup> Defendant, Rainbow Investment never called any evidence on the Counter - Claim. The 3<sup>rd</sup> Defendant called former Regional Land Surveyor, Mr. Wanyama who produced his report dated 24<sup>th</sup> February, 2020 Defendant Exhibit - 1 and list of documents filed on 5<sup>th</sup> October, 2020 produced as D - 3 Exh 2-6 which included the letter of allotment, Survey Plan F/R 310/195 in respect of L.R. 22525, Preliminary Index Diagram Number 13 for Kawala B/2 Number 13 and Number 45 for Plot Number 303 and Diagram for L.R. 22525 Overlaid on Parcel Mariakani B/2.
183. It was his evidence that on overlaying the Survey Plan FR 310/195 in respect of LR 22525 onto the imaginary of Kawala B/2 the two plots overlapped onto each other. He stated that L.R. 22525 had resulted from an allocation by the Commissioner of Lands to Abdallah Ali Taib vide a Letter of Allotment dated 4<sup>th</sup> April, 1996. The survey was undertaken the same year and approved by Director of Survey on 1<sup>st</sup> November, 1995 and Director of Physical Planning on 20<sup>th</sup> May, 1996 and that it had measured 3.780 ha. The survey is contained in FR 310/195 and Deed Plan Number 209739 was prepared and a Certificate of Lease issued for 99 years from 1.4.1996. The allottee then transferred the Land to Rainbow Investment Limited on 18<sup>th</sup> December, 2007.
184. In respect to Mariakani Kawala B/2., it was his evidence that the Parcel was a result of adjudication process that started in 2012 and culminated in the Publication of Preliminary Index Diagrams by Director of Survey in November, 2016. The Title falls under Sheet 13. The acreage is 7.060 ha and Title was issued on 3<sup>rd</sup> November, 2014 to Anne Mbatia but however it was not clear how the Title was issued before the publication of the maps by the Director of Surveys.
185. Lastly, he concluded that Kawala B/2 Adjudication was done after the allocation and survey of L.R. No. 22525 and it was incumbent upon the adjudication officer to respect the existing surveys to avoid overlaps and hence due diligence was not exercised. That further an overlay of Diagram 45 of Kawala A/ onto diagram 13 revealed there was an overlap between Parcels Kawala A/303 and Mariakani Kawala B/2.
186. By consent of the parties DW - 6 one Edward Kiguru testified on behalf of the Defendant. He stated he had over 51 years in Survey. It was his evidence that Parcel Kawala B/2 resulted from an adjudication process of Kawala "B" by the Government. The declaration was made vide a letter dated 9<sup>th</sup> April, 2010 and a clearance given by the Commissioner of Lands through his letter dated 29<sup>th</sup> January, 2010. Title deed was then issued to Anne Mbatia on 3<sup>rd</sup> November, 2014 with a Search confirming the ownership. He further confirmed that the PID (reference map) Properly and accurately identified the Property and reflects its dimensions with the acreage being 7.06 ha and that the Property was extensively developed.
187. He stated that in respect to L.R. No. 22525, the said land is contained on Survey Plan FR 310/195 and that the said land was as a result of an allotment letter dated 6<sup>th</sup> May, 1996 in favor of Abdalla Ali Taib and a Part Development Plan. A Survey was undertaken in 1996, Deed Plan issued and used to



- prepare the 99 years lease grant by Commissioner to Ali Taib Abdala and later transferred to Rainbow Investments Limited.
188. He further testified that LR 22525 was surveyed on Trust Land which was land set aside to be under the local county to hold on behalf of ordinary residents. He however stated that there were no records of the setting apart process to facilitate the allocation and issuance of the grant by Commissioner of Lands as provided under Cap 265.
  189. He further stated that he was not able to identify any beacons, the Survey Plan FR/301/195 did not indicate the requisite information concerning the authority for survey approvals, the survey indicated an incorrect railway line alignment and most importantly L.R. No. 22525 was not amongst the list of properties exempted by the Commissioner through his letter of 29<sup>th</sup> January, 2010 during declaration of Kawala B Adjudication Section and that indeed the Parcels 22525 and Kawala B/2 overlap on to each other and L.R. 22525 lied between two counties majorly in Kilifi and Part in Kwale.
  190. He concluded that the Title 22525 was therefore irregular and should never have been given and should be revoked and annulled. The Surveyor produced his Report as Dex 36 together with attached documents being the PID Map for Kawala “B”, Site photos, drawings, Google aerial photos, copies of Titles for both properties, Survey Map FR/310/195, Letter of Allotment, PDP, District Land Adjudication Officer declaration and clearance letter by Commissioner of Lands.
  191. From the foregoing evidence, and fact that both Surveyors were in agreement that the history of acquisition of the Titles was important. The Learned Counsel chose to rely on the following issues for determination:-
    - a. Whether the alienation/allocation of the Suit Property L.R. No 22525 in favor of Abdalla Ali Taib was lawful, legal and valid and in accordance with the provisions of Trust Land Act, Cap 288 Laws of Kenya, now repealed.
    - b. Whether Rainbow Investment Limited (Plaintiff) acquired lawful interests and Rights over and in respect of L.R. No.22525.
    - c. Whether the Land Adjudication process and issuance of Title Mariakani/ Kawala B'/2 to Anne Mbatia (Defendant) was lawful legal and valid and in accordance with Land Adjudication Act, Cap 284 now repealed.
    - d. Whether the Plaintiff (Rainbow Investment Limited) is entitled to reliefs sought.
    - e. Whether the Defendant (Anne Mbatia) is entitled to reliefs sought in the counterclaim.
    - f. Who bears the cost of the suit and of the counterclaim.
  192. On whether the alienation/allocation of the Suit Property L.R. No 22525 in favor of Abdalla Ali Taib was lawful, legal and valid and in accordance with the provisions of Trust Land Act, Cap 288 Laws of Kenya, now repealed, the Learned Counsel submitted that it was the Plaintiffs evidence (Rainbow Investment Limited) and the 1<sup>st</sup> Defendant evidence (Abdallah Ali Taib) that the suit land was trust land that had been allocated by the Government on behalf of Kilifi County Council to Abdallah Ali Taib in 4/4/1996 and Title issued in 1998 before it was transferred to Rainbow Investment Limited.
  193. Trust Land was vested in County Councils to hold for the benefit of persons who were ordinarily resident in that area. The manner in which Trust Land is governed is laid out in the Trust Land Act (now repealed) Part IV which elaborated two types of setting apart, one by Government and the other by the County Council. Section 7 provided for setting apart at the instance of the Government and provided:-



1. Where written Notice is given to a Council under Subsection I of Section 118 of *the Constitution* that an area of Trust Land is required to be set apart for use and occupation for any of the purposes specified in sub section (2) of that section the Council shall give notice to the requirement and cause the notice to be published in the gazette.
  2. Before publishing Notice Council may require Government within a reasonable time
    - i. To demarcate the boundaries of the land
    - ii. To clear any boundaries
  3. A notice under Section 5 of the Sections shall specify the boundaries of the land required and purposes for which the land is required to be set apart and shall also specify a date before which applications for compensation are to be made to the District Commissioner.
  4. Where the whole of the compensation awarded under Section 9 has persons who had applied .....the Council shall make a publish in the Gazette and Notice settling the land apart.
194. According to the Learned Counsel the provision of Section 7 referred to Section 118 (2) of the repealed constitution which provided that:-
2. The purpose for which Trust Land may be set apart under the sections are:-
    - a. The purpose of the Government of Kenya
    - b. The purposes of a body corporate established for public purposes by an Act of Parliament
    - c. The purposes of a company registered under the Law relating to Companies in which shares are held by or on behalf and the Government of Kenya
    - d. The purposes for the prospecting for or the extraction of minerals or mineral oils.
195. From the foregoing, Government could only set apart Trust Land for Public purposes and not for a private enterprise. The provision of Section 13 of the Act provided for setting apart by the County Council and provided in Pursuance of Section 117 (I) of *the Constitution*, 'a council may set apart an area of Trust Land vested in it for use and occupation:-
- a. By any public body or authority for public purposes or
  - b. For the purposes of extraction of minerals or mineral oils
  - c. By any person/persons for purposes which in the opinion of the Council are likely to benefit persons ordinarily resident in the area or any other area of Trust Land vested in the Council either by reason of the use to which the area set apart is to be put or by reasons of the revenue to be derived from rent therefrom.
196. The provision of Sections 13 (2) provides the following procedure shall be followed before land is set apart under subsection. (I) of this section:-
- a. The Council shall notify the Chairman of the Relative Divisional Board and the proposal to set apart the land and Chairman shall fix a day.....when the Board shall meet to consider the proposal and chairman shall inform the Council of the day and time of meeting.



- b. The Council shall bring the proposal to set apart title land to the Notice of the People of the area concerned and inform them the day and time of meeting of the Divisional Board when proposals will be considered.
  - c. The Divisional Board shall hear a record in writing the representation of all persons present at the meeting and submit to Council its written recommendations.....together with a record of the representations made.
  - d. The recommendation of the board shall the confedered by the Council and the proposal to set apart shall not be taken to have been approved by the Council except by a resolution passed by a majority of the members of the Council provided where setting apart is not recommended the Board concerned the resolution shall require to be passed by  $\frac{3}{4}$  of all members of the Council.
  - e. Where Council approved and proposal to set apart land in accordance with subsection 2(d) the Council shall cause a Notice of the Setting apart to be published in the gazette.
197. The provision of Sections 7 (3), 4, 8 (1) 9 and 10 and 11 were to apply “mutatis mutandis” in which:-
- a. A Notice was then to be issued specifying the boundaries of the land required to be set apart and the purpose and also specify a date when applications for compensation are to be made to the District Commissioner.
  - b. That full compensation was to be paid by the by the Council to any resident of the area of land set apart who under African Customary Law .....has any right to occupy any part thereof and or one who is in some other way prejudicially affected by the setting apart.
198. In cross examination of the Plaintiff, one said Mbovu Hassan Mwadzaya confirmed he had not seen:-
- a. Any application by Abdallah Ali Taib requesting for setting a part of the land and the use for which the request was made.
  - b. Any notice by Council confirming that the land had been set apart.
  - c. Minutes of the Council confirming the sitting that approved the setting apart nor the gazette notice confirming setting apart.
  - d. He was not aware if any compensation had been given to any persons that may have been on the land/or affecting by the setting apart.
199. Additionally, in cross – examination, DW - 1 Abdallah Ali Taib confirmed:-
- a. From the documents he produced there was no application for allocation of the suit property and the use for which he required the land.
  - b. There were no minutes from the County Council approving the setting apart and allocation of the Suit Property
  - c. There was no ground report indicating that the plot was available for allocation
  - d. There was no Kenya Gazette for the user of the land and confirming the setting apart.
200. The 1<sup>st</sup> Defendant Abdalla Ali Taib was unable to demonstrate that the process provided under the provision of Section 13 (2), of the Act, for setting apart by the Council had been followed before Title was issued. The 1<sup>st</sup> Defendant Abdallah Ali Taib stated that the Parcel 22525 had been allotted to him through the Allotment letter dated 4<sup>th</sup> April, 1996. The Letter of Allotment stated on the General Clause, to wit:- ”this letter of allotment is subject to and the grant will be under the provisions of the



Government Lands Act (Cap 280) and Title issued under Registration of Titles Act or the Registered Land Act (Cap 300).'

201. Thereafter the Title issued to Abdallah Ali Taib was issued under the Registration of Titles Act contrary to the Provisions of The Registered Lands Act Section 2 (d) that provided the Act shall apply to, 'all land which from time to time is set apart under Section 117 or Section 118 of the Constitution'. The Commissioner of Lands could only have issued a Certificate of Lease in the prescribed form under the Registered Land Act. On cross examination, the 1<sup>st</sup> Defendant confirmed:-
- a. That he did not give his formal acceptance of the conditions on the allotment within thirty days or at all.
  - b. That he did not pay the standard premiums as outlined within thirty days but paid the same 6 months after.
  - c. That he did not fulfil condition Number 2 of the special conditions embodied in the allotment letter requiring him to submit building plans to the local authority within 6 calendar months and did not develop the property.
202. The Survey process leading to the issuance of Title in respect to L.R. 22525 was irregular, this was admitted by both Surveyors Edward Kiguru and P. Wanyama who observed that:-
- a. Wanyama confirmed that as the allotment letter was done before the PDP the PDP was therefore irregular.
  - b. Both Surveyors were not able to get records of the setting apart process.
  - c. Both Surveyors confirmed that the suit parcel fell within two counties, Kwale and Kilifi which was not normal, no beacons were identified and that the suit parcel encroached into part of the 30 meters railway line.
  - d. Both Surveyor confirmed an overlap of Parcel 22525 and Kawala B/2 onto each other which was not normal
203. The Learned Counsel referred to the case of "ELC NUMBER 198 OF 2012 MOMBASA:- Nicholas Munyi Kaigua – Versus - The Presbyterian Foundation as The Trustees and Others", Justice Munyao stated that:-

"The Plaintiff has elaborated on the genesis of his titles as I have set out above. It is apparent that the area where the land is located was declared an adjudication area, for I have seen the letter dated 4<sup>th</sup> February 2010 from the Director of Land Adjudication and Settlement, clearing for purposes of adjudication, the area identified 'as Kawala 'A' and 'B' and Kadzodzo Madzimhani as an adjudication section, except for the land parcels LR Nos. 23914, 21623, 27243, and 7242. The 1<sup>st</sup> defendant asserts the right to possess the land on the basis of a title for 24 acres issued in respect of LR No. 208405, which it also claims was set apart. You will observe that the Director of Land Adjudication did not exempt any land described a LR No. 208405. It follows that titles to the land falling in this area, except for the four parcels of land exempted, could only be properly issued following the adjudication process. I thus doubt the authenticity of the title to LR No.208405 or to any of its subdivisions. Nevertheless, I choose to interrogate this so called 'setting apart' to see if indeed it followed the law."



204. The Learned Counsel averred that the Judge upon interrogating the setting apart process found the same not to have complied with provisions of the law and upheld Title of the Plaintiff issued through the: Adjudication process.
205. The Learned Counsel also referred to the case of “Funzi Island Development Limited and Others – Versus - County Council of Kwale, Commissioner of Lands And 2 Others (2014) eKLR”, the Court of Appeal Judges held:-

“Moreover, the Grant was issued contrary to the statute. Section 2 (d) of the RLA which commenced on 16<sup>th</sup> September, 1963 provides that the Registered Land Act shall apply to:-

All land which from time to time is set apart under Section 117 or Section 118 of the Constitution.

It follows that the Commissioner of Lands could only have issued a Certificate of Lease in the prescribed form under the Registered Land Act. A grant which does not conform with the law is invalid.

The Council held the Trust land for the benefit of the residents. Statutory procedural safeguards which are imposed for the benefit of the persons affected by the exercise of administrative powers by a statutory body are normally regarded as mandatory. Further, where the statute imposes a duty to notify the persons affected and to hear their representations, the statutory body should genuinely comply and a full and sufficient opportunity accorded to the persons affected to make their representations (Grunwick Processing Laboratories Limited – Versus - Advisory, Conciliation and Arbitration Services (1978) AC 655, In the Union of the Beneficiaries of Whippingham Church Commissioners for England (1954) AC 245. The Procedural safeguards in Section 13(2) of the Trust Land Act which are described as mandatory particularly the requirements for issuing a notice, hearing and recording the resident’s representation and ultimately, and more importantly, approval by Council by resolution passed by a majority of the members of the Council went to the jurisdiction to set apart Trust Land. Even if the land were Trust Land, the non-compliance with the mandatory procedural requirements together with the breaches of the law by the Commissioner of Lands as shown above rendered the setting apart ultra vires and the subsequent Grant a nullity.”

206. Further in case of:- “Geoffrey Mungai Thiong’o And Another – Versus - Alexander T. Kaminichia and Others ELC NO.E346 OF 2022 (2024) K (EELC 3622 (KLR)”, the Honourable Judge stated:-

“The 1<sup>st</sup> Defendants acceptance and payment was made outside the stipulated 30 days. It is trite law that where the terms of a Letter of Allotment are neither adhered to nor complied with timeously, the impugned letter of allotment is rendered redundant and becomes otiose. In the case of Joseph Kamau Muhoro – Versus - The Attorney General and Another (2021) eKLR the Court stated:-

‘Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, (in writing as required), the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void a nonexistent.

In support of the foregoing holdings, it is important to take cognizance of the decision in the case of Dr. Syedna Mohamed Burhannudin Saheb & 2 Others – Versus - Benja Properties and 2 Others (2007) eKLR. In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi,



Counsel for Defendants argument, that the expired letter, when acted upon, had been 'revived' through conduct. The letter had expired. It was dead. There was nothing to 'revive'.

207. They therefore submitted therefore that the alienation/ allocation of the Suit Property L.R. No. 22525 in favor of Abdalla Ali Abdallah was unlawful, illegal and void.
208. On whether Rainbow Investment Limited (Plaintiff) acquired lawful interests and rights over and in respect of L.R. No. 22525, the Learned Counsel submitted that PW 1 said Hassan Mwadzaya in cross examination confirmed:-
- a. There was no Sale Agreement in respect of the Sale from Abdalla Ali Taib to Rainbow Investment Limited.
  - b. The property was bought for one million but had no evidence to show it was paid out.
  - c. He had no documentation relating to the allocation/alienation of the land to Abdalla Ali Taib ie.no application, ne minutes of the Council, no notice and was not aware if any compensation had been made to anybody.
  - d. That he did not have the Original Title as it got lost when Abdallah Ali Taib moved offices. Did not carry any due diligence (no search was conducted prior to purchase).
  - e. That conditions on Title provided that property was to be developed within 24 months. Naz not complied with.
  - f. That the Plaintiff did not raise any objection during the adjudication process but filed the instant suit.
209. DW - 1 Abdalla Ali Taib in cross examination as shown supra:-
- a. Was not able to demonstrate that the process of alienation/allocation of Parcel 22525 was followed as prescribed under the Trust Land Act.
  - b. Confirmed he did not fulfil the condition on the timelines set on the letter of allotment nor on the Title.
  - c. The Survey Process was flawed as demonstrated by both Surveyors and
  - d. He did not produce any evidence confirming receipt of the purchase price paid out by the Plaintiff.
210. They submitted that as the Title in favor of Ali Abdalla Taib was not lawfully, legally and validity obtained as shown supra he could not pass a good title to the Plaintiff (Rainbow Investment Limited).
211. Further in the case of:- “Munyu Maina – Versus - Hiram Gathiha Maina (2013) eKLR”, the Honourable Court of Appeal Judge stated:-

“We state that when a registered Proprietor's root of Title is under challenge, it is not sufficient to dangle the instrument of Title as proof of ownership. It is this instrument of Title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the Title and show that the acquisition was legal, formal and free from any encumbrance including any and all interests which need not be noted on the register. It is our considered view that the Respondent did not go this extra mile that is required of him and no evidence was led to rebut the Appellants testimony.”



212. The Plaintiff confirmed not having carried out any due diligence. Not even a Search prior to Purchase of the Property. In “ELC Number 128 of 2011, Esther Ndegi Njiru and Another – Versus - Leonard Gatei”, the Honourable Judge stated:-

“The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the tile.”

213. Further, the Plaintiff did not afford himself the defence of a bona fide purchaser for value without notice as he neither pleaded the same and failed to prove the following ingredients as was enunciated in the case of “Katende – Versus - Haridar and Company Limited (2008) eKLR” where Court of Appeal in Uganda held:

“.....it suffices to describe a bona fide Purchaser as a person who honestly intends to purchase property offered for Sale and does not intend to acquire it wrongly. For a purchaser to rely on the bona fide doctrine must prove.”

- a) He purchased for valuable consideration
- b) Vendors had apparent valid Title.

214. They submitted that neither the Plaintiff or the Defendant proved the legality of the acquisition was the Title and were not able to show that the acquisition was legal and free and therefore no rights accrued to the Plaintiff.

215. On whether the Land Adjudication process and issuance of title Mariakani/ Kawala B/2 to Anne Mbatia (Defendant was lawful, legal and valid and in accordance with *Land Adjudication Act*, Cap. 284 (now repealed); the Learned Counsel submitted that Section 3 of the *Land Adjudication Act* provided:

1. The minister may by order apply the act to any area of Trust Land if
  - a) The County Council to whom had it vested so requests.
  - b) The minister considers it expedient that the rights and interest of persons in the land should be ascertained.
  - c) *Land Consolidation Act* does not apply to the area

216. Upon the appointment by the Minister of an adjudication officer of the Adjudication area, Section 5 provides that the Adjudication officer shall by Notice either:-

- a) Establish Adjudication Sections within the adjudication area
  - b) Establish the whole adjudication area as an adjudication section
2. That the notice, the adjudication officer
    - a) Shall define the area of the adjudication Section.



- b) Shall declare that interest in the land will be adjudicated and recorded in accordance with the Act
  - c) Fix period within which persons claiming interest must make lis claim to the recording officer
217. The provision of Section 13, provided that any person who considers that he has an interest in land within the adjudication section shall make a claim to the recording officer and point out boundaries. Section 23 further provides.....in preparing the adjudication record, the recording officer, if he is satisfied that:
- a) ..
  - b) ...
  - c) land has been set apart under *the Constitution*, shall determine the person in whom the land is vested to be the owner of the land set apart
  - d) ...
  - e) ..
3. Each of the forms which comprise the adjudication record shall contain the following information
- a) The number of the Parcel as shown on the demarcation map and the appropriate area
  - b) A record of
    - i) The name and description of owner
    - ii) Where the land has been set apart, the year and number of the Gazette Notice by which and the purpose for which the land was set apart and
218. The provision of Section 27 further provides when all objection had been determined and time of appeal expired, the Director shall certify that the register is final subject to outstanding appeals and forward the register to the Chief Land Register who shall cause registration to be effected in accordance with the adjudication register.
219. The Learned Counsel opined that the Land Adjudication process and issuance of Title Mariakani/ Kawala B/2 for the Defendant was lawful, legal and valid and in accordance with the law. There was consensus that the area in which the suit property was situate as trust land. The Defendant was able to prove:-
- a. That she had been on the land since 1978, she having purchased the same from the locals as seen from Sale Agreement – Defendant Exhibit 2, 3 and 4 (Pages 38,39 and 40) and extensively developed the same.
  - b. The Adjudication officer produced the Notice establishing the Adjudication Section as provided under Section 5 Supra (Exh 27),(Page 75), convened a meeting for the said declaration at Mnagoni for purposes of the declaration Exh 26 (Pages 74).
  - c. A letter dated 29<sup>th</sup> January, 2010 by the Commissioner of Lands clearing the area save for mentioned properties was produced Exh 28 (Pages 77)



- d. An adjudication certificate dated 15<sup>th</sup> April, 2010 Exh 30 (Pages 80) was issued to the Defendant and thereafter Title after the close of the Register Exh 31 (Pages 81)
220. The Learned Counsel proceeded to state that it was the Defendants evidence that upon the area being declared an adjudication section, the Plaintiffs (Rainbow Investment Limited) did not lay any claim of their rights or interest to the said property but they instead filed the instant suit. Section 15 a(ii) mandated the adjudication officer to demarcate all boundaries of land which had been set apart under the constitution and it was therefore crucial for the Plaintiff to have laid their claim when the adjudication process commenced.
221. Further having failed to lay a claim, the recording officer in preparing the adjudication record was not satisfied that the Land 22525 had been set aside. Further the fact that having failed to lay a claim, the recording officer in preparing the adjudication record was not satisfied that the Land 22525 had been set aside. Further the fact that the Defendants Title was issued before publication of the map could not invalidate the Title as both Surveyors Edward Kiguru and P. Wanyama used the same reference Map (PID) which clearly showed the Defendants property and the boundaries as were confirmed on the ground.
222. Lastly the conclusion by P R Wanyama that due diligence was not exercised when Mariakani Kawala B/Adjudication Exh Section was being undertaken by the Adjudication Officer was not tenable as:-
- a. The parcel was not amongst those exempted by the Commissioner of Lands.
  - b. Having failed to lay claim Adjudicating officer did not demarcate all boundaries of the land already set apart and the adjudication record did not register the said parcel as having been set apart.
223. Therefore, they urged the Court to find that the Title to the Defendant was issued lawfully and was legal.
224. On whether the Plaintiff (Rainbow Investment Limited) was entitled to the reliefs sought. The Learned Counsel submitted that the Plaintiff was not entitled to the reliefs sought in the Plaint as the Plaintiff did not acquire any interest in the Suit Parcel 22525 in light of the fact that the process in the acquisition of the said Title was flawed as demonstrated supra and neither was the Plaintiffs an innocent Purchaser for value.
225. On whether the Defendant (Anne Mbatia) was entitled to the reliefs sought in the counter claim, the Learned Counsel submitted that the Defendant sought to have the Title L.R. No.22525 CR NO. 146 cancelled and a declaration that Title Mariakani Kawala B/2 was issued lawfully amongst other reliefs. At Paragraph 12, of the Further Further Further Amended Defence and Counterclaim, the Defendant particularized particulars of fraud, irregularities and illegalities against the Plaintiff (Rainbow) 1<sup>st</sup> Defendant (Abdalla Ali Taib) and the Registrar of Lands.
226. They submitted that the Defendant had been able to prove the particulars of fraud as against the defendants in the Counter - Claim and shown that the suit property was acquired through a flawed setting aside process to which each of the Defendants participated in with knowledge it was fraudulently acquired. They therefore submitted that the Defendant having pleaded and proved the particulars of fraud was entitled to the reliefs sought.
227. On the issue of who bears the costs of the suit and the counter claim, the Learned Counsel submitted that Section 27 of the Civil Procedure Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge still for good reason otherwise order. The



Defendant prayed that in light of the foregoing submissions, the Plaintiffs suit be dismissed with costs and the Court do award costs of the counterclaim against the Defendants.

### **C. The Written Submissions by the 1<sup>st</sup> Defendant in the Counter - Claim**

228. The 1<sup>st</sup> Defendant in the Counter - Claim through the Law firm of Messrs. Sitonik Advocates filed their written submissions dated 31<sup>st</sup> October, 2024. Mr. Sitonik Advocate commenced the submissions by stating that Abdallah Ali Taib the 1<sup>st</sup> Defendant in the Counter - Claim was introduced into these proceedings by Anne Mbatia, the Defendant in the main suit. The 1<sup>st</sup> Defendant was allotted the Property, measuring approximately 3.78 Hectares, now known as L.R. No. 22525 on 4<sup>th</sup> April, 1996 and was issued with a Title Deed on 3<sup>rd</sup> April, 1998 subsequently he transferred the property to the Plaintiff on 4<sup>th</sup> January, 2008.

229. Subsequently, the Defendant purportedly secured a Title Deed dated 3<sup>rd</sup> November, 2014 purportedly covering and or including the 1<sup>st</sup> Defendant's portion. The Defendant in her Further Amended Statement of Defence and Counter - Claim dated 23<sup>rd</sup> September, 2020 and filed on 24<sup>th</sup> September, 2020 challenged the 1<sup>st</sup> Defendant's initial title upon the following grounds:-

- a. At paragraph 9, the Defendant claimed that the 1<sup>st</sup> Defendant's portion of land was an Adjudication section and that the Property was only duly set apart in January 2010.
- b. At paragraph 10, the Defendant claimed that the portion did not form part of the plots that had been set apart by the Commissioner of Lands as being private Property as at 29<sup>th</sup> January, 2010.
- c. At paragraph 12, the Defendant claimed that the 1<sup>st</sup> Defendant's title was irregular, illegal, fraudulent, null and void and further stated several particulars of fraud/irregularities and illegalities

230. The Learned Counsel crafted two issues arising for determination as between the Defendant in the main suit and the 1<sup>st</sup> Defendant in the Counter - Claim as follows:-

Firstly, on whether the 1<sup>st</sup> Defendant's portion was part of the adjudication section, the Learned Counsel submitted that in support of her claim that the 1<sup>st</sup> Defendant's portion was an adjudication section, the Defendant in her Pleadings claimed as follows:-

- a. At paragraph 9 of the Counter Claim, claimed that the suit Property had from since 1978 never been set apart and it is only recently in January, 2010, that the said suit Property which falls under Kawala 'A', 'B' and Kadzodzo Madzimbani was declared an adjudication section.
- b. At paragraph 10 of the Counter - Claim, the Defendant claimed that the Title initially held by the 1<sup>st</sup> Defendant did not at any time form part of the plots that had been set apart by the Commissioner of Lands as being private Property as at the 29<sup>th</sup> January, 2010.
- c. At paragraph 12(j)1-6 alleged particulars of fraud/irregularities as against the Defendant on claims that there was failure to follow due process whilst seeking setting apart his portion.
- d. The Defendant at paragraph 31 of her Witness statement relied on a letter dated 29<sup>th</sup> January, 2010 marked as D-Exb-28 and the Plaintiff relied on this letter to support her claim that the Defendant's portion was part of the adjudication section.



- e. At paragraph 33 of the Witness statement, the Defendant relied on the letter dated 21<sup>st</sup> April, 2010 from the District Land & Adjudication Officer and the said letter is produced as D-Exb-29 in support of the claim that the Defendant's portion was part of the adjudication.
231. In support of her above claims, the Defendant called Mr. Ezekiel Karimi Kiania as a Witness who claimed in his testimony that:-
- i. The Defendant's Property had not been set apart as at 29<sup>th</sup> October, 2010 and sought to rely on a letter dated 29<sup>th</sup> October, 2010 from the Commissioner of lands and the same was produced as the Defendant Exhibit No. 2.
  - ii. The Witness claimed that parcel number LR. Number 22525 was not among the properties exempted by the letter dated 29<sup>th</sup> October, 2010.
  - iii. The Witness further relied on the letter dated 9<sup>th</sup> April, 2010 referred to and produced as Defendant Exhibit No. 27 at paragraph 30 of the Defendant's written statement
232. The Claim by the Defendant and Mr. Ezekiel Karimi could not be sustained because: -
- a. Mr. Abdallah Ali Taib, the 1<sup>st</sup> Defendant testified and presented his Witness Statement dated 28<sup>th</sup> January, 2020 and filed on 31<sup>st</sup> January, 2020 together with the Supplementary List of Documents of even date which documents were produced as the 1<sup>st</sup> Defendants Exhibits Number 1 to 18.
  - b. The 1<sup>st</sup> Defendant demonstrated that he got allotted the Property now known as Plot Number 22525 vide allotment letter on 4<sup>th</sup> April, 1996 (see page 17-19 of the bundle of documents).
  - c. The Defendant demonstrated that he made payments in line with the allotment letter,(see page 21-28 of the bundle of documents.)
  - d. He was issued with a Title for Property number 22525 on 3<sup>rd</sup> April, 1998.(see page)to 15 of the 1<sup>st</sup> Defendant's bundle of documents.)
  - e. The 1<sup>st</sup> Defendant having been allocated the Property in 1996 and issued with a Title in 1998 then the Property number 22525 could not have been part of the adjudication section.
  - f. The letter dated 29<sup>th</sup> January, 2010 (D-Exb-2) could not form the basis for the claim that Property number 22525 was part of the adjudication section as at 29<sup>th</sup> January, 2010 because:-
    - i. The Defendant and her Witness were unable to demonstrate the context of the letter considering that the letter dated 29<sup>th</sup> January, 2010 was specifically in response to the Adjudication officer's letter ref RQ/3/26 VOL.VI/17 of 21<sup>st</sup> October, 2009 as per paragraph 1 of the letter.
    - ii. PW-1 admitted on cross-examination that he had not availed the letter dated 21<sup>st</sup> October, 2009 for the Court to examine the same and understand the context of the subject letter dated 29<sup>th</sup> January, 2010 produced in court.
    - iii. The failure to avail the letter dated 21<sup>st</sup> October, 2009 can only lead to the reasonable inference that the said letter which prompted the response of 29<sup>th</sup> January, 2010 was averse to the Defendant's position and the failure to avail the letter permitted the Court to draw an adverse inference as against Anne Mbatia, the Defendant. They relied on the decision in case:3- "Nesco *Services Ltd – Versus - CM Construction (F.A)Ltd. Machakos,*



High Court Civil Appeal No.75 of 2019” where the Court in addressing the provisions of section 112 of the Evidence Act, stated:-

“Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party...adverse inference should be drawn upon a party who fails to call evidence in his possession.”

233. The Learned Counsel submitted that in any event the issue as to whether Property number 22525 was part of the Adjudication Section was now Res Judicata because:-

- a. On 18<sup>th</sup> April, 2010, the Defendant lodged an Application seeking to stay proceedings in this matter on the basis that the Property number 22525 was part of the Adjudication Section.
- b. The Defendant claimed that the Property Number 22525 was under the adjudication process and hence the Court had no jurisdiction to hear and determine the matter on the basis of the provisions of Sections 5 and 30 of the Land Adjudication Act.
- c. The Defendant further relied on the letters issued by the District Land Adjudication & Settlement officer declaring Kawala ‘B’ an Adjudication Section.
- d. In its ruling dated 20<sup>th</sup> September, 2010, the Court at page 3 of the Ruling stated:-

With respect to the Said Property, Title number CRN 146 has been issued under the Registration of Titles Act. The Land has been allocated I.R. Number 22525 and comprises 3.780 Hectares or thereabout. The registered proprietor is now the Plaintiff having had it transferred to it from the original grantee, Abdalla Ali Taib. The suit Property has therefore been ascertained. A certificate of postal Search carried out on 14<sup>th</sup> April 2010, indicates that as at the said date the Plaintiff was the registered proprietor. That registration has not been cancelled. That being the position, the suit Property cannot be the subject of any adjudication process under the Land Adjudication Act and the Notice issued by the Kilifi district Land Adjudication and Settlement officer on 9<sup>th</sup> April 2010, could not and does not refer to the suit Property.’ (See the Ruling at pages 43 to 46 of the 1<sup>st</sup> Defendant's bundle of documents).

- e. The Ruling was delivered in the presence of Ms. Mango, Advocate for the Defendant.
- f. No appeal or Review was lodged as against the Court's findings of 20<sup>th</sup> September, 2010.
- g. Consequently, the issue as to whether Property number 22525 was part of the adjudication section was fully determined by the Court with the conclusion that the letter dated 9<sup>th</sup> April, 2010 could not apply to the Property number 22525 and that the same was not part of the adjudication section.
- h. The Defendant could not therefore purport to re-litigate the same issue afresh and is now stopped by the provisions of section 7 of the Civil Procedure Act.

234. Secondly, on the whether the 1<sup>st</sup> Defendant’s title was irregular and/ or obtained fraudulently. The Learned Counsel submitted that in her counter claim, the Defendant claimed as follows:-



- a. Under paragraph 7, claimed that on or about March 2010, the Plaintiff herein who is also the 2<sup>nd</sup> Defendant in the Counter-Claim purported to evict the Defendant from the Suit Premises alleging that they held Title to part of the land being L.R.No.22525/Mariakani Cr. No.146.
- b. Under paragraph 9, claimed that since 1978 the Property had never been set apart and was only adjudicated in January 2010.
- c. Under paragraph 10, that the Property did not form part of the properties that had been set apart by the Commissioner of lands as being private Property as at 29<sup>th</sup> January, 2010.
- d. Under paragraph 12, the claims that the title to LR. No. 22525 was irregular, illegal, fraudulent, null and void and enumerated several particulars of alleged fraud/irregularities and illegalities as against the 1<sup>st</sup> Defendant's Title

235. The Claim by the Defendant could not be sustained factually and legally because:-

- a. The claim that the Property number 22525 was part of the adjudication section fails considering the Court's Ruling of 20<sup>th</sup> September, 2010 on the material issue and the same is now Res Judicata.
- b. The 1<sup>st</sup> Defendant availed documentary evidence to demonstrate that:-
  - i. He got allotted the Property now known as Plot Number 22525 vide allotment letter on 4<sup>th</sup> April, 1996 (see page 17-19 of the bundle of documents).
  - ii. He made the requisite payments in respect of the allotment letter, (See page 21-24 of the bundles of documents).
  - iii. He was issued with a Title for Property number 22525 on 3<sup>rd</sup> April, 1998. (See page 1 to 15 of the bundle of documents).
  - iv. He duly paid the Plot Rents and rates to the Town Council of Mariakani/See pages 25, 26, 27 and 32 of the Defendant's bundle of documents).
  - v. On 13<sup>th</sup> December, 2007, he was issued with a Clearance Certificate by the Town Council of Mariakani. (See page 28 of the documents).
  - vi. On 14<sup>th</sup> December, 2007, the Town Council of Mariakani issued a Consent allowing the Defendant to transfer the Property. (See page 29 of the bundle).
  - vii. The 1<sup>st</sup> Defendant at paragraph 9 of his Written testimony testified that the Sale and Transfer of the Property No.22525 to the Rainbow Investment Ltd was handled by Nabhan Swaleh, Advocate and produced an Affidavit sworn on 21<sup>st</sup> October, 2014 by Nabhan Swaleh confirming that he actually handled the transaction on behalf of the parties and that he had misplaced the original Title and the entire file in his office.

236. The Defendant's position was further corroborated by the Testimony of the Registrar of lands because:-

- a. The Registrar confirmed the authenticity of the 1<sup>st</sup> Defendant's documents.
- b. The Registrar confirmed that the allotment process to the issuance of the Title in respect of the property number 22525 was regular.



237. The Defendant according to the Learned Counsel was unable to substantiate by way of credible evidence the particulars of irregularity/fraud or illegalities raised in the Counter-Claim as against the 1<sup>st</sup> Defendant at all. The Defendant failed to discharge her onus of proof because the law requires that the allegation of fraud and or illegalities not only pleaded but strictly proven. We rely on the case of “Susan Nyokabi Ngoci & Another – Versus - Kimson Holding Ltd & Another [2015] KEELC 719(KLR)” where the Court emphasized that the person alleging Fraud had the burden of proving the same and the standard of proof is higher than the ordinary proof on balance of probabilities. The Defendant's initial was a first registration and indefeasible in nature as per the provisions of Section 26 of the [Land Registration Act](#) and the same was unimpeachable unless proved that it was acquired illegally by fraud or misrepresentation. The Learned Counsel relied on the Court of Appeal decision in “Nelson Nvamache Obuba - Versus - Itira M. Ntabwatana (Civil Appeal 30 of 2019 [2022] KECA 1425 (KLR)” where the Court in addressing the legal sanctity of a Certificate of Title issued to a proprietor, stated at paragraphs 46 that:-

“If the Certificate of Title is not impeachable by dint of Section 26 (1) [Land Registration Act](#), it follows that the fact of registration, in a sense, renders moot any investigation whether Land Control Board Consent was required and obtained or not. This is because section 26, in essence, provides the statutory presumption that all the procedures that were required to be fulfilled before issuance of the Certificate of Title were, in fact, so fulfilled. This section only allows that presumption to be defeated in the limited number of instances comprehended in the exceptions to the times when a Certificate of title will be held not to be conclusive evidence of proprietorship of land. Differently put, any failure to adhere to the administrative or procedural steps not rising to the threshold provided in the exceptions enumerated in section 26(1)-including the failure to obtain Land Control Board Consent-cannot be ground to impeach an otherwise validly issued Certificate of Title to land in Kenya. The very issuance of the Certificate of title inoculates the proprietor from challenges to the title outside the narrow statutory exceptions enumerated in Section 26 (1) of the [Land Registration Act](#).”

238. In the premises they urged the Honourable Court find that there are no legal reasons for impeaching the 1<sup>st</sup> Defendant's initial title to property number 22525 and the Counter-Claim had not been legally substantiated as against the 1<sup>st</sup> Defendant and the same to be dismissed with costs.

## **IX. Analysis and Determination**

239. The Honourable Court has keenly assessed the filed pleadings by all the parties herein, the written submissions and the myriad of cited authorities, the relevant provisions of [the Constitution](#) of Kenya, 2010 and the statutes. To begin with, the Honourable Court is guided by the provision of Sections 107 (1), 108 & 109 of the [Evidence Act](#), Cap. 80 on “the Burden of Proof”. It which provides that:-

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

240. While the provision of Section 108 provides:-

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”



241. And section 109 provides:-

“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 for by law that the proof of that fact shall lie on any particular person.”

242. In the case of “Charter House Bank Limited (Under Statutory management – Versus - Frank N. Kamau [2016] eKLR”, the Court of Appeal when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence stated inter alia’:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the Defendant.

..... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified.”

243. Having considered the pleadings, the evidence and submissions I will adopt the issues as agreed with some slight amendments. In order to reach an informed, reasonable and just decision in the suit, the Honourable Court has condensed the subject matter in the following six (6) detailed and salient issues for its determination. These are:-

- a. Whether the alienation/allocation of the Suit Property L.R. No 22525 in favor of Abdalla Ali Taib was lawful, legal and valid and in accordance with the provisions of Trust Land Act, Cap. 288 Laws of Kenya, now repealed.
- b. Whether Rainbow Investment Limited (Plaintiff) acquired lawful interests and Rights over and in respect of L.R. No.22525.
- c. Whether the Land Adjudication process and issuance of Title Mariakani/ Kawala B’/2 to Anne Mbatia (Defendant) was lawful legal and valid and in accordance with Land Adjudication Act, Cap. 284 (now repealed).
- d. Whether the Plaintiff (Rainbow Investment Limited) is entitled to reliefs sought.
- e. Whether the Defendant (Anne Mbatia) is entitled to reliefs sought in the Counter - Claim.
- f. Who bears the cost of the suit and of the counterclaim

**ISSUE No. a). Whether the alienation/allocation of the Suit Property L.R. No 22525 in favor of Abdalla Ali Taib was lawful, legal and valid and in accordance with the provisions of Trust Land Act, Cap 288 Laws of Kenya, now repealed**

244. The Site Visit report - Before embarking onto the analysis of the above issue under this sub – title, as indicated the Honourable Court conducted a site visit (“Locus in Quo”) with the concurrence and presence of all the parties. Pursuant to that, a report was prepared and its therefore reproduced verbatim herein below for ease of reference.

REPUBLIC OF KENYA



IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 108 OF 2010

RAINBOW INVESTMENTS LIMITED.....PLAINTIFF

\* VERSUS –

ANNE WANJIRU MBATIA.....DEFENDANT

COUNTERCLAIM

ANNE WANJIRU MBATIA.....PLAINTIFF

-VERSUS-

ABDALLA ALI TAIB .....1<sup>ST</sup> DEFENDANT

RAINBOW INVESTMENTS LIMITED.....2<sup>ND</sup> DEFEDANT

REGISTRAR OF LANDS.....3<sup>RD</sup> DEFENDANT

A SITE VISIT REPORT ON A VISIT HELD AT THE SUIT PROPERTY AT MAZERAS, KILIFI COUNTY ON 24<sup>TH</sup> JANUARY 2024 2.00PM

#### I. Preliminaries.

1. The team arrived at the site at 2.00pm. The site is situated along Nairobi – Mombasa highway. It is close to 45 Kilometers from the Mombasa City Centre. It touches on the said tarmac road on the County of Kilifi and Kwale.
2. The session assembled and it started with a word of by one of the members. Introductions were conducted and the purpose of the visit was explained by the Judge. The visit commenced in earnest and several observations were made. Eventually, this report was prepared.

#### II. The Report

##### A. The Court

1. Hon. Justice L.L Naikuni – The ELC Judge.
2. M/s. Fridaus Mbula – the Court Assistant.
3. Mr. Ian Okwaro- the Legal Researcher.
4. Mr. George Omondi – the Judge’s Usher.

##### B. The Plaintiffs

1. Mr. Okanga Advocate for the Plaintiff.
2. Mr. Sitonik Advocate for the Plaintiff.
3. Mr. Saidi Madzaya representing the Plaintiff.
4. Mr. Feruz representing the Plaintiff.

##### C. The Defendant

1. Mr. Omwenga Advocate for the Defendant.
2. M/s. Mango Advocate for the Defendant.



3. Mrs. Anne Mbatia – Defendant & Counterclaimant
4. Mr. Edward Kiguru – Private Land Surveyor.
5. Ms. Grace Mbatia – Daughter to the Defendant & Counter - Claimant
6. Mr. Wilfred Mbatia - Son to the Defendant & Counter - Claimant
7. M/s Winnie Mbatia - Daughter to the Defendant & Counter – Claimant.
8. M/s Rose Tomaka - Friend to the Defendant & Counter – Claimant.
9. M/s. Kiti Advocate for the Honorable Attorney General.
10. Mr. Peter Wanyama – the Government Surveyor.

#### D. Security Operatives

1. Superintendent of Police (SSP) – Mr. Adan Ibrahim O.C.P.D, Kilifi County.
2. Chief Inspector -Mr. Titus Mwaya Mariakani police station.
3. PC Peter Masese – Mombasa Law Courts attaché.
4. PC Kaviti – attached at the Mombasa Law Courts.
5. CPL. Elijah Mwathi.
6. PC. Tobias Lango.
7. PC. Yola Chemaswet.
8. CPL. Clifford Mugendi.
9. PC Cleophas Seguna.
10. PC David Ngeno.

(Hereinafter all referred to as “The Team”).

#### III. The purpose for the Site Visit

3. The Court informed the team the purpose of the site visit (“Locus in Quo”). It indicated that this was pursuant to a Court made on ..... in accordance with the provision of Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -  
Power to court to inspect;  
“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”  
While Order 40 Rule 10 (1) (a) provided to wit: -  
“The Court may, on the application if any party to a suit, and on such terms as it thinks fit: -  
a. Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.
4. By consensus of the parties, it was agreed that Site Visit be conducted led by the two surveyors Mr. Wanyama and Mr. Kiguru as experts. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities



on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.

5. Hence, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties' evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
6. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

#### IV. The Procedure

7. The procedure upon which the site visit was to be conducted was explained to the team present. The surveyors began by producing all the relevant documents which would be used in the exercise such as the Registered Index Map (RIM) map sheet no 13 for Kawala "A" published in July 2010 where both surveyors produced identical maps and they agreed on one, Preliminary Index Diagram, a similar RIM Map for Kawala "B" which was published on November 2016, F/R 310/195 for L.R. 22525 and Deed Plan No. 209739. It was also by consensus that the advocates for both the plaintiff and the defendant and counterclaimant would assist in the exercise.
8. The team was then led by both the Plaintiff and the Defendants who were knowledgeable of the place by moving around within and without the suit land.

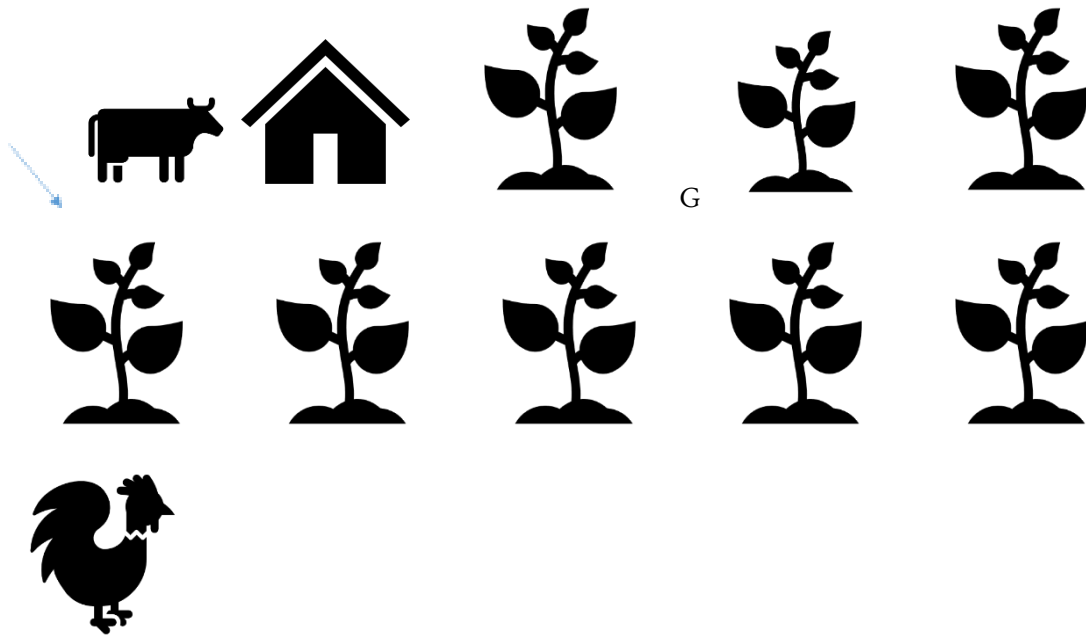
#### VI. The observations made by the team

9. The team made the following observations.

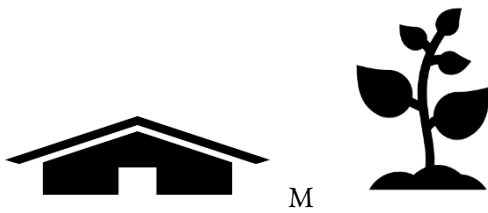
##### A. The location and size:-

The suit property is located along the Mazeras - Mariakani Highway right next to the road and it is on the right-hand side as you moving towards Mariakani. It is a few kilometers from the Shell Bonje Petrol station and adjacent to Petro City petrol station. The site were situated on all that parcel of land known as Land Reference Numbers 22525/Kawala "B" and Land Reference Number 2/Kawala "A". It measures approximately 10 Acres thereabout. There were two noticeable buildings or homesteads, one belonging to the defendant and counterclaimant which had four bedrooms and the other belonging to Wilfred Mbatia of eight bedrooms. The whole suit property is not fenced but there were some euphobia trees acting as a natural fence on the side that bordered the highway. There is also a maize plantation towards the north side while the homestead has been fenced to the south. On the south side there is a perimeter wall by Petrocity petrol station which has encroached in the six metre allowance for access to the west side. The manager of the same was summoned by this court and was informed of the same.

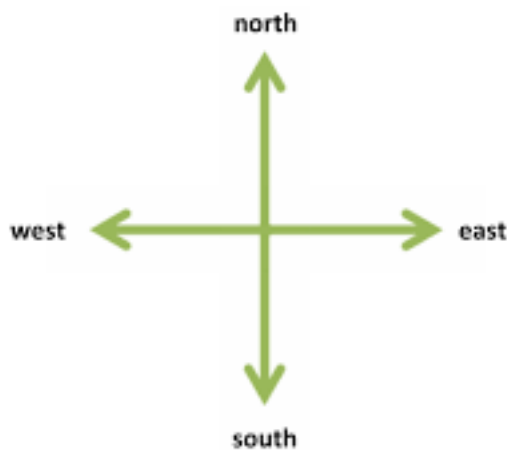




RAZING AREA



AZERAS-MARIAKANI



B. The northern boundary

The team then walked along the eastern boundary and at this juncture, Mr. Kiguru’s associates unleashed a GPS which the court applauded and they were able to mark the point where the overlay of Kawala A/2 began on the suit property. The whole team proceeded to walk until the other point of the overlay ended which was noted. The boundary of L.R Kawala A/2 to the north was diagonal while



the boundary of L.R Kawala B/22525 was perpendicular to the same. Mr Feruz claimed that the maize had been planted on part of his property which is where the overlay began. There is a small patch of land which was not cultivated by maize and it seems to be a seasonal swamp.

#### C. The Western Boundary

A railway line was visible as the team started walking toward the west side and upon measurements by the gaps, the team agreed that both parties had left a lot of allowance for the railway line. The law prescribes 30 metres from the middle of the line. As the team was walking along the west boundary, there were several observations such as:

- a. The Defendant and Counter - Claimant alleged that there was an old railway line which had been shifted by about 10 metres which is where the current railway line is.
- b. The south boundary of the Kawala A/2 had significantly crossed over the railway line onto the other side which is Kwale County.
- c. There was evidence of concrete fencing posts which seems to have been demolished by unknown people.

D. The Southern Boundary Upon reaching the south side from the west side, cattle could be seen and there was several long chicken coops with hanging chicken feeders. The defendant and counterclaimant stated that she had 5800 chicks. The court also expressed interest on the methods of farming cattle and drainage of waste which went directly to the maize plantation. The affected portion or overlay portion is around 3 acres which was confirmed by the surveyors and the team. There was a grazing area on the south west of the suit property and a pen where the goats were being kept together with calves. The cattle were kept in a shed next to the chicken coop. After the said site visit, the team assembled at the point where the meeting began which was under a tent which was then used as a makeshift court for the hearing which proceeded. The hearing of the matter as slated for the day took pace immediately thereafter.

#### V. CONCLUSION

10. Upon completion of the tour around the two properties, the Court made the following directions: -
  - a. That the Honourable Court to prepare and share the Site Visit report accordingly.
  - b. That parties given timeframe upon which to finalise the written submissions.
  - c. That the Honourable Court reserved a date for the delivery the Judgment on 19<sup>th</sup> September 2024.

In conclusion, the site visit was conducted by this court and the sessions ended at 5.16 pm.

THE SITE VISIT REPORT PREPARED AND DATED THIS.....10<sup>TH</sup> .....DAY OF  
.....JUNE.....2024.

.....

HON. MR. JUSTICE L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT

MOMBASA

245. Under this sub – title, the Honourable Court shall endeavor to examine the law governing the allotment of land in Kenya; the various procedures required and whether the 1<sup>st</sup> Defendant’s allotment was lawful and procedurally done being the main substratum of the case and whereby the same will



determine the course of this suit. The Honourable Court takes cognizance to the fact that land in Kenya is a very sensitive and emotional issue whereby its used as a means for livelihood. For that very reason, it has to be handle with a lot of circumspect. As a matter of information, according to the provision of *the Constitution* of Kenya categories land into three – Public; Private and Community land.

246. First and foremost, I wish to refer to the provision of Section 7 of the *Land Act*, No. 6 of 2012 which itemizes the following modes of acquisition of title to land in Kenya. These are:-
- a. allocation;
  - b. land adjudication process;
  - c. compulsory acquisition
  - d. prescription
  - e. settlement programs;
  - f. transmission
  - g. transfers;
  - h. long term leases exceeding twenty-one years created out of private land ; or any other manner prescribed in an Act of Parliament.
247. What is allocation? Whenever the National or county government determined that it is necessary to allocate a specific public land, the Cabinet Secretary or the County Executive Committee member in charge of land matters shall make a formal request to the Commission for the appropriate course of action. It is important that we start by distinguishing between “alienation” and “allocation” of land. The provision of Section 2 of the Lands Act defines “alienation of land” as the sale or other disposal of the rights to land; while “allocation of land” means the legal process of granting rights to public land.
248. The provision of Article 67 of *the Constitution* that establishes the National Land Commission gives it power to, inter alia, manage public land on behalf of the national and county governments. The suit land is public land as defined under Article 62 (1) (a) of *the Constitution* and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County. Article 62 (2) of *the Constitution* provides that the land shall be administered on behalf of the County residents by the National Land Commission. Section 5 (1)(a) of the *National Land Commission Act* is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under section 5(2) of the Act the Commission may,
- “ on behalf of, and with the consent of the national and county governments, alienate public land.”
249. Section 12 of the *Land Act* grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.
250. At least thirty days prior to the allocation the Commission should send a notice to the governor in whose county the public land proposed for allocation is located and to the head of the governing body of any administrative subdivision having development control, among others. The notice should then be published in the Kenya Gazette and at least once a week for a period of three weeks and thereafter



published in a newspaper of general circulation in the general vicinity of the land being proposed to be offered for allocation. In this new regime though it is clear beyond any peradventure that it is the role of the Commission, and not a county government, to allocate public land. The allocation must however comply with the laid down constitutional and statutory procedure as stated above.

251. Fundamentally, two statutes come to fore here – The *Land Adjudication Act*, Cap, 284 (Now repealed) and the Trust *Land Act*, Cap 288. The two are so inter twined. From the very onset, I must admit and applaud the Learned Counsels for the Defendant for having caused an indepth analysis of these legislation and thus there will be no need to belabor the point nor re – invent the wheel. Save to state that the preamble of the Act holds that:-

“ An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust Land, and for purpose connected therewith and purposes incidental thereto”

Section 3 ( 1 ) holds that:- “The Minister may by order apply this Act to any area of Trust land if:

- a. The County Council in whom the land is vested so requests, and;
- b. The Minister considers it expedient that the rights and interests of person inland should be curtained and registered.

Section 5 (1) The adjudication officer shall by notice either:-

- a. Establish adjudication sections within the adjudication section.
- b. Establish the whole adjudication area as an adjudication section.

252. The process of the land adjudication is well spelt out from the Act which included the composition of the land adjudication register all the persons who are ordinarily residents of the area based on clan, tribe or customary rights. All dispute in form of objections are well catered for through the well established structures such as the Land Adjudication Committees and Boards (See sections 10 to 12). The objections proceed upto the Appellate level constituted by the Minister and whose decision is final, See Section 29. The Courts of Law have no role at all in resolving dispute unless its through seeking for prerogative writs under the Judicial review emanating from the decision and the process undertaken by the Ministers Appeal but with the sanction or consent by the Land Adjudication Officer under the provision of Section 30.

253. On the other hand, by virtue of Section 115 of *the Constitution* of Kenya 1963, all Trust land within the jurisdiction of any County Council vested in the council for the benefit of the persons ordinarily resident on that land. However, in pursuance of section 117 and 118 of *the Constitution* and sections 7 and 13 of the TLA the council has power to set apart an area of Trust land either for purposes of Government on application by Government or by the council on its own volition for other purposes, including purposes which in the opinion of the County Councils are likely to benefit the residents of the area by reason the use to which the area is to be put or by reason of the revenue to be derived from rent in respect thereof. However, there are stipulated procedures in the TLA to be followed by the council in setting apart an area of Trust land in either case.

254. Section 114(1) of the 1963 Constitution defined Trust land by description. Pursuant to that definition Trust land includes:

“ land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust *Land Act* as in force on 31<sup>st</sup> May, 1963,) and



which on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of Trust land board.”

255. There is no gain-saying that Article 40(1) of *the Constitution* grants and protects the right to acquire and own property. Similarly, Article 40(3) forbids the state against depriving of any person of property of any description. Article 40(6) however expressly provides that property which has been found to have been acquired unlawfully does not enjoy the constitutional safeguards provided under Articles 40(1), (2), (3), (4) and (5) of *the Constitution*. It is in light of this express constitutional framework that a party seeking protection in respect of public property acquired and converted into private property has a mandatory obligation to demonstrate to the court that the title held by it was procedurally acquired hence it is entitled to protection.
256. The County Councils held the Trust land for the benefit of the residents. Statutory procedural safeguards which are imposed for the benefit of the persons affected by the exercise of administrative powers by a statutory body are normally regarded as mandatory. Further, where the statute imposes a duty to notify the persons affected and to hear their representations, the statutory body should genuinely comply and a full and sufficient opportunity accorded to the persons affected to make their representations (“Grunwick Processing Laboratories Limited – Versus - Advisory, Conciliation and Arbitration Services [1978] AC 655”; “In re The Union of the Beneficiaries of Whippingham Church Commissioners for England [1954] AC 245”. The procedural safeguards in section 13(2) of the Trust *Land Act* which are described as mandatory particularly the requirement for issuing a notice, hearing and recording the residents’ representations and ultimately, and more importantly, approval by council by resolution passed by a majority of the members of the council went to the jurisdiction to set apart Trust land. Even if the land were Trust Land, the noncompliance with the mandatory procedural requirements together with the breaches of the law by the Commissioner of Lands as shown above rendered the setting apart ultra vires and the subsequent Grant a nullity.
257. The provision of Section 12 of the Trust *Land Act* gives a right of access to the High Court to:
- “any person claiming a right or interest in land set apart”... for among other things  
“determination of the legality of setting apart.”
258. The word “interest” is very wide and, includes the appellants’ commercial interest in the circumstances of this case. In the case of: “Commissioner of Lands – Versus - *Kuntse Hotel Limited – Civil Appeal No. 234 of 1995* (unreported)” this Court held that the Respondent (Kuntse Hotel) had a sufficient interest in the land in front of its Hotel whose development would have blocked the view of the hotel from the highway thereby affecting the business and was therefore entitled to a hearing before the plot was allocated to the interested party by the Commissioner of Lands.
259. The 1<sup>st</sup> Defendant in the Counter - Claim has argued that he was allotted the Property, measuring approximately 3.78 Hectares, now known as L.R. No. 22525 on 4<sup>th</sup> April, 1996 and was issued with a Title Deed on 3<sup>rd</sup> April, 1998 subsequently he transferred the property to the Plaintiff on 4<sup>th</sup> January, 2008. Accordingly, the 1<sup>st</sup> Defendant argued that on 18<sup>th</sup> April, 2010, the Defendant lodged an Application seeking to stay proceedings in this matter on the basis that the Property number 22525 was part of the Land Adjudication Section.
260. The Defendant claimed that the Property Number 22525 was under the adjudication process and hence the Court had no jurisdiction to hear and determine the matter on the basis of the provisions of Sections 5 and 30 of the *Land Adjudication Act*, Cap. 284. The Defendant further relied on the letters



issued by the District Land Adjudication & Settlement officer declaring Kawala 'B' an Adjudication Section. In its ruling dated 20<sup>th</sup> September, 2010, the Court at page 3 of the Ruling stated:-

“With respect to the Said Property, Title number CRN 146 has been issued under the Registration of Titles Act. The Land has been allocated I.R. Number 22525 and comprises 3.780 Hectares or thereabout. The registered proprietor is now the Plaintiff having had it transferred to it from the original grantee, Abdalla Ali Taib. The suit Property has therefore been ascertained. A certificate of postal Search carried out on 14<sup>th</sup> April 2010, indicates that as at the said date the Plaintiff was the registered proprietor. That registration has not been cancelled. That being the position, the suit Property cannot be the subject of any adjudication process under the [Land Adjudication Act](#) and the Notice issued by the Kilifi district Land Adjudication and Settlement officer on 9<sup>th</sup> April 2010, could not and does not refer to the suit Property.’ (See the Ruling at pages 43 to 46 of the 1<sup>st</sup> Defendant's bundle of documents).

261. The Ruling was delivered in the presence of Ms. Mango, Advocate for the Defendant. Critically speaking, from the records, no appeal or Review was lodged as against the Court's findings of 20<sup>th</sup> September, 2010. Consequently, the issue as to whether Property number 22525 was part of the adjudication section was fully determined by the Court with the conclusion that the letter dated 9<sup>th</sup> April, 2010 could not apply to the Property number 22525 and that the same was not part of the adjudication section. The Defendant could not therefore purport to re-litigate the same issue afresh and is now estopped by the provisions of section 7 of the [Civil Procedure Act](#).

262. The Court will reproduce the entire ruling dated 20<sup>th</sup> September, 2010 being that the same seemed to have resolved an issue of the Judgment:-

“This is an application by the Defendant, Ann Mbatia, seeking one order, apart from costs, namely, that this suit be stayed on the main ground that the suit property is land within an Adjudication Section. The application has been brought under the provisions of sections 5 and 30 of the [Land Adjudication Act](#), sections 3A and 63 (e) of the [Civil Procedure Act](#) and Order L Rule 1 of the Civil Procedure Rules. The application is supported by an affidavit sworn by the defendant's advocate Cecilia Mango. It is deponed in the said affidavit, inter alia, that after investigation, counsel has discovered that the suit property is now under the process of adjudication and this court cannot entertain these proceedings which relate to an interest in the suit property. To the affidavit is annexed, inter alia, a Notice issued by the District Land Adjudication & Settlement Officer, Kilifi, declaring Kawala “B” an Adjudication Section. The application is opposed and there are grounds of opposition filed by the plaintiff's advocates. The gist of the opposition is that the suit property is already registered under the Registration of Titles Act and is therefore not subject to any adjudication process.

When the application came up for hearing on 17<sup>th</sup> June, 2010, counsel agreed to file written submissions which were duly in place by 30<sup>th</sup> July, 2010. The submissions merely restated the parties' stand-points taken in their affidavit and grounds of opposition respectively.

I have considered the application, the affidavit, the grounds of opposition and the submissions of counsel. I have further given due consideration to the authorities cited. Having done so, I take the following view of the matter. The notice issued by the District Adjudication & Settlement Officer on 9<sup>th</sup> April, 2010, refers to Kawala “B” Adjudication Section and reads in part as follows:-



“All rights and interests in land within this Adjudication Section will be ascertained and recorded in accordance with the provisions of the [Land Adjudication Act](#) and any person claiming such rights or interest is required to present his claim to the recording Officer either in person or by duly authorized agents.

In accordance with section 30 of this Act with effect from the date of this notice, except with prior consent in writing to the Adjudication Officer, no person shall institute and no court shall entertain any civil proceedings whatsoever in which any right or interest in land within this Adjudication Section is called in question until the Adjudication Register for this Adjudication Section has become final in all aspects under Section 29 of the Act.”

Section 30 (1) of the [Land Adjudication Act](#) referred to in the notice reads as follows:-

“30 (1) Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29 (3) of this Act.”

And section 29 (3) is in the following terms:-

“

“29

- (3) When all the appeals have been determined, the Director of Land Adjudication shall
  - (a) .....
  - (b) certify on the duplicate adjudication register that it has become final in all respects.....”

The process of adjudication therefore precedes registration under any of the registration regimes under our Law. As the Act itself suggests, the purpose of adjudication is to ascertain and record all rights and interests in the Land under adjudication. After ascertaining and recording the rights and interests, registration follows. With respect to the suit property, title number CRN 146 has been issued under the Registration of Titles Act. The Land has been allocated L.R. Number 22525 and comprises 3.780 hectares or thereabouts. The registered proprietor is now the plaintiff having had it transferred to it from the original grantee, Abdalla Ali Taib. The suit property has therefore been ascertained. A Certificate of Postal Search carried out on 14<sup>th</sup> April, 2010, indicates that as at the said date the plaintiff was the registered proprietor. That registration has not been cancelled. There is no evidence to that effect any way. That being the position, the suit property cannot be the subject of any adjudication process under the [Land Adjudication Act](#) and the Notice issued by the Kilifi District Land Adjudication and Settlement Officer on 9<sup>th</sup> April, 2010, could not and does not refer to the suit property.

With all due respect to counsel for the Defendant, all the authorities cited considered land to which the [Land Adjudication Act](#) applied unlike in this case.

The defendant’s application lodged on 18<sup>th</sup> April, 2010 has no merit and is dismissed with costs.

It is so ordered.



DATED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms. Mango for the Defendant/Applicant and Mr. Mushelle holding brief for Mr. Okanga for the Plaintiff/Respondent.

263. Based on “the Doctrine of Stare Decisis” this Honourable Court is bound by this decision from this Court. By that as it may, on the issue of whether the 1<sup>st</sup> Defendant’s title was irregular and/ or obtained fraudulently, argued that he availed documentary evidence to demonstrate that he got allotted the Property now known as Plot Number 22525 vide allotment letter on 4<sup>th</sup> April, 1996 (see page 17-19 of the bundle of documents). He made the requisite payments in respect of the allotment letter, (See page 21-24 of the bundles of documents). He duly paid the Plot Rents and rates to the Town Council of Mariakani/See pages 25, 26, 27 and 32 of the Defendant’s bundle of documents). On 13<sup>th</sup> December, 2007, he was issued with a Clearance Certificate by the Town Council of Mariakani.(See page 28 of the documents).
264. The 1<sup>st</sup> Defendant at paragraph 9 of his Written testimony testified that the Sale and Transfer of the Property No.22525 to the Rainbow Investment Ltd was handled by Nabhan Swaleh, Advocate and produced an Affidavit sworn on 21<sup>st</sup> October, 2014 by Nabhan Swaleh confirming that he actually handled the transaction on behalf of the parties and that he had misplaced the original Title and the entire file in his office.
265. The Defendant on the other has contended that it was the Plaintiffs evidence (Rainbow Investment Limited)and the 1<sup>st</sup> Defendant evidence (Abdallah Ali Taib) that the suit land was trust land that had been allocated by the Government on behalf of Kilifi County Council to Abdallah Ali Taib in 4/4/1996 and Title issued in 1998 before it was transferred to Rainbow Investment Limited. Trust Land was vested in County Councils to hold for the benefit of persons ordinarily resident in that area. The manner in which Trust Land is governed is laid out in the Trust Land Act (now repealed) Part IV which elaborated two types of setting apart, one by Government and the other by the County Council.
266. From the foregoing, Government could only set apart Trust Land for Public purposes and not for a private enterprise. The provision of Section 13 of the Act provided for setting apart by the County Council and provided in Pursuance of Section 117 (I) of the former Constitution, ‘a council may set apart an area of Trust Land vested in it for use and occupation. The 1<sup>st</sup> Defendant Abdalla Ali Taib was unable to demonstrate that the process provided under Section 13 (2), of the Act, for setting apart by the Council had been followed before Title was issued. The 1<sup>st</sup> Defendant Abdallah Ali Taib stated that the Parcel 22525 had been allotted to him through the Allotment letter dated 4<sup>th</sup> April, 1996. The Letter of Allotment stated on the General Clause, this letter of allotment is subject to and the grant will be under the provisions of the Government Lands Act (Cap 280) and Title issued under Registration of Titles Act or the Registered Land Act (Cap 300).
267. Thereafter the Title issued to Abdallah Ali Taib was issued under the Registration of Titles Act contrary to the Provisions of The Registered Lands Act, Cap. 300 (Now repealed) Section 2.(d) that provided the Act shall apply to, ‘all land which from time to time is set apart under Section 117 or Section 118 of the former Constitution’. The Commissioner of Lands could only have issued a Certificate of Lease in the prescribed form under the Registered Land Act.



268. I further take note that the 1<sup>st</sup> Defendant's position was further corroborated by the Testimony of the Registrar of lands witness for the 3<sup>rd</sup> Defendant in Counter - Claim who confirmed the authenticity of the 1<sup>st</sup> Defendant's documents and that the allotment process to the issuance of the Title in respect of the property number 22525 was regular and proper.
269. At the beginning of the sub – title analysis and determination this Court opined itself that he who alleges must prove. The Defendant/Plaintiff in Counter - Claim has alleged that the allocation of the 1<sup>st</sup> Defendant was irregularity/fraud or illegalities as raised in the Counter-Claim but the evidence of the 3<sup>rd</sup> Defendant's witness watered down the fraud claims on acquisition of the suit land.
270. Further, Abdallah Ali Taib, the 1<sup>st</sup> Defendant in his claim testified and presented his Witness Statement dated 28<sup>th</sup> January, 2020 and filed on 31<sup>st</sup> January, 2020 together with the Supplementary List of Documents of even date which documents were produced as the 1<sup>st</sup> Defendants Exhibits Numbers 1 to 18. The 1<sup>st</sup> Defendant demonstrated that he got allotted the property now known as Plot Number 22525 vide the Letter of Allotment on 4<sup>th</sup> April, 1996 (see page 17-19 of the bundle of documents). Abdalla Taib demonstrated that he made payments in line with the allotment letter. I discern that the fact that the 1<sup>st</sup> Defendant having been allocated the Property in the year 1996 and issued with a Title in 1998 then the Property number 22525 could not have been part of the adjudication section.
271. The “setting apart” was said to be under Part IV of the Trust Land Act, Cap 288, Laws of Kenya. It will be recalled that under the pre-2010 Constitution, Trust Land was vested in County Councils to hold for the benefit of persons ordinarily resident in that area. This was covered in Chapter IX of the now repealed 1963 Constitution. The manner in which Trust Land was governed was laid out in the Trust Land Act (now repealed) specifically Part IV thereof. Part IV elaborated two types of setting apart; one by the Government and the other by the County Council. The former governed an instance where the Government needed part of the trust land for its purposes while the later governed instances where it was the County Council that required the land. The setting apart by the Government was addressed in Section 7 which was drawn as follows :-

7. Setting apart at instance of Government

- (1) Where written notice is given to a council, under subsection (1) of section 118 of the Constitution, that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette.
- (2) Before publishing a notice under subsection (1) of this section, the council may require the Government, within a specified reasonable time—
  - (a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as the council may direct;  
and
  - (b) to clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land, and, if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation.



- (3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner.
- (4) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in the notice given under subsection (1) of this section has been deposited in accordance with section 11 of this Act the council shall make and publish in the Gazette a notice setting the land apart.

272. It will be observed that the Government could only set apart Trust land for public purposes. I have not seen any allowable setting apart by the Government for a private enterprise. Both the repealed Constitution and the Trust *Land Act*, made provision for compensation for those who had a right under customary law to occupy the land, where such land was acquired and set apart.

273. The other permissible setting apart was by the County Council itself under Section 13 of the Trust *Land Act*. This is where the County Council itself, not the national Government, needed land for its purposes. The purposes were laid out in Section 13 of the Trust *Land Act*, as follows :-

- (a) By any public body or authority for public purposes;
- (b) For the purpose of the extraction of minerals or mineral oils;
- (c) By any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area is set apart is to be put or by reason of the revenue to be derived from rent therefrom.

274. I therefore do not see the legality of this purported setting apart published in the letter of 9<sup>th</sup> April, 2010. Neither was this land recognized when the area was declared an adjudication area. It follows that this Gazette Notice could not override the declaration of adjudication of the area. Title to the land could therefore only properly issue through the adjudication process and not through the purported “setting apart” process that the 1<sup>st</sup> defendant clings on. The title issued after the purported “setting apart” cannot override the titles issued following the adjudication process.

275. Indeed, there was an elaborate adjudication process that was undertaken for the suit properties; which did not yield any objection and a title was issued to the 1<sup>st</sup> Defendant. On the ground therefore, I find the allocation of the suit land to the 1<sup>st</sup> Defendant in the counter claim was lawful and legal.

**ISSUE No. b). Whether Rainbow Investment Limited (Plaintiff) acquired lawful interests and Rights over and in respect of L.R. No.22525**

276. Under this sub tile we shall examine whether the Plaintiff acquired lawful interests and rights over the suit property. I wish to start by making reference to the case of “Mwangi James Njehia – Versus -Janetta Wanjiku Mwangi & another [2021] eKLR”, the court stated as follows:-

“ 37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura – Versus -Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014* this Court



cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

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

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.
39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard-earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”



277. This court has already adjudged that the 1<sup>st</sup> Defendant in the Counter - Claim obtained his title legally which according to him was a lease of 99 years. Furthermore, Section 27 of the Registered Land Act (or Registration of Titles Act) provides for interest conferred upon registration thus:

“27. Subject to this Act –

- a. ...
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

278. The Defendant/ 1<sup>st</sup> Plaintiff in Counter - Claim contended that the Plaintiff was not entitled to the reliefs sought in the Plaint as the Plaintiff did not acquire any interest in the Suit Parcel 22525 in light of the fact that the process in the acquisition of the said Title was flawed as demonstrated supra and neither was the Plaintiffs an innocent Purchaser for value. Black’s law Dictionary (8<sup>th</sup> Edition) defines a “bona fide purchaser” as:

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

279. In the case of “Dina Management Limited – Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)”, the Supreme Court stated that, for a court to establish whether a party is a bona fide purchaser for value, the court must first establish the root of the title right from the first allotment. The Court upheld the dicta in “Samuel Kamere – Versus - Lands Registrar, Kajiado, Civil Appeal No 28 of 2005 [2015] eKLR” and stated that: -

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property ....”

280. This position has recently been reaffirmed by the Supreme Court of Uganda in “Lwanga – Versus - Mubiru and Others (Civil Appeal 18 of 2022) [2024] UGSC 7”, where the court held: -

“The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.

The definition of bona fide purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”.

Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9<sup>th</sup> Edn Page 199)

A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9<sup>th</sup> Edn.



It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith.

The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.

In the case of *Jones v. Smith* [1841] 1 Hare 43, the Chancery Court held: “a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her” See *Yakobo M. N Senkungu & Others v. Cresencio Mukasa* Civil Appeal No 17 of 2014.

281. Additionally, in the Supreme Court decision in “*Dina Management Limited – Versus - County Government of Mombasa* (supra)”, the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser. This is because a title to land is not contrived out of oblivion, and nor is it created from a vacuum. In Kenya, land is classified as either public land, community land or private land. Article 64 of *the Constitution* defines private land as any land that has been designated private by an Act of Parliament, as well as land that is registered and held by anyone under a freehold or leasehold tenure. A title to land denotes a registered ownership of land, and every title has a root in one or another of the classifications. A good root of title means that a title to land is traceable back to its origins.

282. In the case of “*Kukan & another (Administrators of the Estate of the Late Jason Kukan Lila) – Versus - Kibutha* (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR)” this Court affirmed the standards of due diligence laid out by Mutungi, J in the case of “*Esther Ndegi Njiru & Another – Versus - Leonard Gatei* [2014] eKLR” where the learned judge held as follows:

“The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title.

283. From his evidence the Plaintiff told the court that before purchasing the suit property; the property was registered to the 1<sup>st</sup> Defendant who had been paying his rent and had produced evidence to show and prove that the same had not been raised as a fraudulent title by the Municipal Council of Kilifi.

284. It is clear from this provision that a certificate of title issued by the Registrar to, inter alia a purchaser of land upon a transfer, is a “prima facie” conclusive evidence that the person named as proprietor of the land is the absolute and legal owner with all the indefeasible rights, interest and title vested in him by law. The Defendant/1<sup>st</sup> Plaintiff in the Counter - Claim contended that the title held by the Plaintiff has not been passed lawfully and legally as the same had not been obtained legally. In my view though having concluded that the title by the 1<sup>st</sup> Defendant in Counter - Claim was lawfully and legally acquired; it was a good title to pass.



285. Furthermore, the sanctity of the certificate of title, which was procedurally and legally acquired, was underscored by the court in the case “Ocean View Plaza – Versus - The Attorney General (2002)eKLR”, where the Honourable court stated and held as hereunder;

“Allotment of land to a citizen or others protected under *the Constitution*, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act. It is not in evidence that such procedure was followed. Indeed it is categorically denied that the provisions of the said Act were applied to the pieces of land the subject of this case.”

286. In my humble albeit considered view, the Plaintiff has placed before the Honourable court credible and believable evidence that same is the lawful, legitimate and registered proprietor of the suit property; and thus same deserves to enjoy the rights, interests and privileges provided for and established by dint of Sections 24 and 25 of the *Land Registration Act*, 2012.

**ISSUE No. c). Whether the Land Adjudication process and issuance of Title Mariakani/ Kawala B/2 to Anne Mbatia (Defendant) was lawful legal and valid and in accordance with *Land Adjudication Act*, Cap 284 now repealed**

287. According to the Defendant/b1<sup>st</sup> Plaintiff in Counter - Claim, and to support called Mr. Ezekiel Karimi Kiania as a Witness who claimed in his testimony that:-

- i. The Defendant's Property had not been set apart as at 29<sup>th</sup> October, 2010 and sought to rely on a letter dated 29<sup>th</sup> October, 2010 from the Commissioner of lands and the same was produced as the D-Exb-2.
- ii. The Witness claimed that parcel number LR Number 22525 was not among the properties exempted by the letter dated 29<sup>th</sup> October, 2010.
- iii. The Witness further relied on the letter dated 9<sup>th</sup> April, 2010 referred to and produced as D-Exb-27 at paragraph 30 of the Defendant's written statement.

288. In her Counter - Claim the Plaintiff averred that she had been on this suit premises since the year 1978 when the said premises were purchased by the husband. Upon the Purchase of the suit premises the Plaintiff in Counter - Claim had undertaken extensive farming activities on the said parcel and had peaceful and quiet enjoyment of the said suit premises. On or about March 2010, the 2<sup>nd</sup> Defendant purported to evict the Plaintiff from the suit premises alleging that they held Title to part of the land being L.R. NO. 22525/Mariakani CR NO.146.

289. Upon further investigation, it emerged that the 2<sup>nd</sup> Defendant had purchased the said property from the 1<sup>st</sup> Defendant sometimes on 4<sup>th</sup> January, 2008 and title issued by the 3<sup>rd</sup> Defendant. The said suit property had since the year 1978 never been set apart and it was only recently in January, 2010 that the said suit property which fell under the Kawala 'A', 'B' and Kadzodzo Madzimani was declared an adjudication section.

290. The Plaintiff in the Counter - Claim averred that the 2<sup>nd</sup> Defendants title did not at any time form part of the plots that had been set apart by the Commissioner of Lands as being private property as at the 29<sup>th</sup> day of January, 2010. Therefore, upon the area being declared an adjudication section, the said suit property was allocated to the Defendant-Plaintiff by the demarcation officer in charge and Title Number MARIKANI KAWALA 'B' /2 issued thereafter.



291. In her evidence she stated that they got the land in year 1978 from purchase; they bought part of it in instalment – in years 1978, 1980 and 1982 they completed. They completed and were given the documents. They took possession. They used to buy from the chief. They had a sale agreement and in the year 1995, it was demarcated and they got the Land Adjudicated. According to the Defendant there was a session/baraza where they were informed that the land was to be demarcated. The process went on smoothly. There was no objection. After the year 2010 she was given title deed – referred to the Original Certificate of title deed in her name for land Reference Mariakani/Kawala “B” 2 – 7.06HA to Ann Wanjiru Mbatia Identity Card No. 2\*2 issued on 3<sup>rd</sup> November, 2014 serial No. 0\*3 – Entry No. 1 on 28<sup>th</sup> January, 2014.
292. According to the 3<sup>rd</sup> Defendant’s witness Title Deed was issued on 3<sup>rd</sup> November 2014 to ANNE WAMBIRU MBATIA – the 1<sup>st</sup> Defendant. It was not clear how the title was issued before the publication of the MAPS by the Director of Surveys. In conclusion he stated as follows:-
- a. Kawala “B” Adjudication Section was done years after the allocation and survey of Land Reference No. 22525.
  - b. Thus, it was incumbent upon the Adjudication Officer to respect the existing surveys in order to avoid any overlaps. This did not happen.
  - c. Due diligence was not exercised when the Mariakani Kawala “B” adjudication section was being undertaken thus making the parcel Mariakani/Kawala “B”/2 to overlap onto Land Reference No. 22525 which had already been surveyed and whose survey Plan F/R No. 310/195 was in existence.
293. DW - 1 produced the following documents:-
- a. The survey plan F/R No. 310/195 in respect to Land Reference No. 22525.
  - b. The Preliminary Index Diagram No. 13 for parcel Mariakani/Kawala “B”/2.
  - c. Preliminary Index Diagram No. 45 for the Kawala “A”/Kadonzo/303 together with a diagram showing Land Reference No. 22525 overlaid onto parcel Mariakani/Kawala “B”/2. The satellite Imagery for ease of reference – as Exhibits 1, 2, 3, 4, 5 and 6 respectively
294. The evidence by the two Land Surveyor was critical here. Mr. Peter Wanyama told the court that in his 34 years’ experience as a Land Surveyor, he had never seen a title preceding a map. There were many authorities which were passed before a Letter of Allotments are issued. There was overlapping of 3 titles. Parcel No. 25252 came first. Referred to Page 20 of the 1<sup>st</sup> Defendant Supplementary List of documents. It was a PDP for parcel No. 22525 dated 20<sup>th</sup> May, 1996. It was a crucial document, it showed where the property was - then a survey is done – then Deed Plan No. 209732 on Page 15 dated 6<sup>th</sup> November, 1996 – then came after the survey.
295. The Survey Act (Cap 299, Laws of Kenya), Section 22 of that Act provides thus:
- “ Any survey of land for the purposes of any written law for the time being in force relating to the registration of transactions in or of title to land (other than the first registration of the title to any land made in accordance with the provisions of the Land Consolidation Act (Cap. 283) or the Land Adjudication Act (Cap.284)) shall be carried out under and in accordance with the directions of the Director.”



296. Section 7 of *Land Registration Act* requires that a land registry be maintained in every registration unit, in which a land register is to be kept, together with other relevant documents. The relevant provision thus reads:
- “There shall be maintained in each registration unit, a land registry in which there shall be kept—
- (a) a land register, in the form to be determined by the Commission...”
297. In relation to the creation of registration units, Section 6 (1) of the Act thus provides:
- “For the purposes of this Act, the Commission in consultation with National and County Governments may, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units.”
298. I take note that there were two surveys and two witnesses with vest knowledge of the same who gave two different and contradicting conclusions. It is trite that the acreage depicted on the title should be reflected on the ground especially in fixed boundaries. It is unfortunate that the Land Surveyors and the Land Registrar have continued to give conflicting reports on the parcels of land under dispute.
299. Going by the report of Mr. Kiguru, the Private Land Surveyor dated 28<sup>th</sup> May, 2024 presented by the Defendant the survey exercise for Mariakani Kawala “B”/2 was done in the year 1996 by the Government of Kenya. Being issued with a title deed before a Surveying exercise was undertaken and a Map developed for an area was an irregularity which testimony was disputed by the 3<sup>rd</sup> Defendant’s witness who told the court that he did the surveying, he found out there was an overlapping of the survey Plan FR No. 310/195 in respect of Land Reference No. 22525 onto the satellite imagery of Kawala “B” registration Section.
300. The parcel No. Kawala B/2 was derived from the land adjudication process that started in the year 2012 – through Index Diagram of 2015 with reference to the ground survey. There is an overlap of the 3 parcels from the date of acquisition survey was done in 1996. While Kawala Land Adjudication was done in the year 2012 and was completed in year 2016. This was after the title for the 1<sup>st</sup> Defendant had already obtained and after the Court had already ruled on the authenticity of the title held by the Plaintiff which had been transferred to it by the 1<sup>st</sup> Defendant in the counter claim.
301. The Defendant/Plaintiff in Counter - Claim had alleged and contended that the transfer and registration of the suit property in the name of the Plaintiff was informed by fraud and illegality. I have noted that no credible evidence was placed before the Honourable court, other than the mere allegations adverted to in the Counter - Claim and particulars alluded to therein.
302. Suffice it to point out that a Party who is keen to propagate a claim or defense of fraud or illegality, is not only called upon to particularly plead such a claim; but also to supply the Honourable court with cogent, credible and verifiable evidence in proof of the particulars cited and alluded to.
303. In respect of a claim/defense founded on fraud, the position of the law is now trite, established and hackneyed. Invariably, the decision in the case of “Kuria Kiarie – Versus - Sammy Magera (2017) eKLR” would suffice.
304. For coherence, the Court of Appeal stated and held as hereunder;



25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].
305. Furthermore, the position as pertains to a claim of fraud as well as the requisite standard of proof attendant thereto, was also adverted to and succinctly illuminated upon in the case of “*Kinyanjui Kamau – Versus - George Kamau* [2015] eKLR”, where the Honourable Court expressed itself as follows:-
- “.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.
- Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
306. Clearly, if the Defendant herein were keen to propagate the claim and contention that the Plaintiff herein procured and obtained the title to the suit property by fraud and illegality, then it behooved the Defendants to place before the Honourable court credible evidence in proof of the various particulars that were alluded to and contained in the body of the Defense and Counter-claim.
307. The Defendant/ 1<sup>st</sup> Plaintiff in the Counter - Claim did not discharge the burden of proof as stated in section 107(1) of the *Evidence Act*, Cap. 80 which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In nutshell, therefore, the Defendant/ Plaintiff in counter claim has not proved the fraud and how she came about the allocation after the land was already allotted. Her claim must fail.

**ISSUE No. d). Whether the Plaintiff (Rainbow Investment Limited) is entitled to reliefs sought**

308. Under this sub title the court will examine whether the Plaintiff is entitled to the prayers sought at the foot of the Plaint. The Plaintiff prayed for judgment against the Defendant for: -
- a. A permanent injunction restraining the defendant from using, developing on or construction on, trespassing on, entering upon, committing to waste and/or harvesting any crops therefrom or otherwise interfering with and/or in any manner dealing with land known as L.R. NO.22525, CR.N.146.
  - b. Damages for trespass and forcible detainer
  - c. Costs of and incidentals to this suit
  - d. Such other or further relief or orders which this Honourable Court may deem fit to grant



309. I have previously held in this court in the case of “Bandari Investments & Co. Ltd – Versus - Martin Chiponda & 139 others[2022] eKLR”, that:-

“Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

39. It’s the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.

The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd – Versus - Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

310. Premised on the certificate of title, it is imperative to state and observe that the issuance of such certificate of title, is prima facies evidence of ownership, unless there is Evidence of Fraud, Illegality or impropriety, to defeat the same. In this regard, the provisions of Sections 24 and 25 of the [Land Registration Act, 2012](#), are imperative. Consequently, on the basis of certificate of title herein, there is no gainsaying that the Plaintiff ought and should be entitled to enjoy the rights and privileges arising therefrom, unless good cause is shown, which is not the case herein.

311. To underscore the extent of rights, interest and privileges that accrue to the holder of a certificate of title, it is imperative to take cognizance of the decision of the Court of Appeal in the case of “Elizabeth



Wambui Githinji & 29 others – Versus - Kenya Urban Roads Authority & 4 others [2019] eKLR”, ( Per Ouko PCA) where it was stated and held as hereunder;

“It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in Dr. Joseph Arap Ngok – Versus - Justice [Mojjo ole Keiwua & 5 others, Civil Appeal No Nai 60 of 1997](#) and [Charles Karathe Kiarie & 2 Others v Administrators of Estate of John Wallance Muthare \(deceased\) & 5 others, Civil Appeal 225 of 2006](#).

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.

The object of the Torrens system was, in very compelling language, explained in the decision of the Privy Council in Gibbs – Versus - Messer [1891] AC 247 PC at page 254 as follows:-

“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.”

312. From the foregoing, it is imperative to underscore that the rights of a title holder, (the Plaintiff herein not excepted), can only be vitiated, if it is proved and established that registration of the property in his name was procured by fraud, misrepresentation and /or on account of some illegality. However, such a claim must be established and proved. Other than the foregoing, the issuance of a certificate of title vests in the registered owner inviolable rights over and in respect of designated property and thus his rights thereto are statutorily insulated and constitutionally sanctioned, as espoused and entrenched in Article 40 of [the Constitution](#) 2010.
313. Having found that the Plaintiff is the bona fide purchaser and legal proprietor of the suit property in accordance with Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012 being that it is the registered owner of the suit property as per the transfer of lease title done in April 2008 and the photos attached by the Plaintiff as at the time the suit was filed. The Plaintiff is hereby granted the order for permanent injunction.
314. The Plaintiff also sought for damages for trespass and forcible detainer. Trespass has been defined by Clerk and Lindsell on Torts, 18<sup>th</sup> edition at Pg.23 as;
- “any unjustifiable intrusion by one person upon the land in possession.”
315. I am satisfied on the material placed before me that the Plaintiff is the registered proprietor of the suit land. The Plaintiff has accused the defendant of encroaching upon its land. The Defendant having



entered onto the Plaintiff's suit land without any lawful or justifiable cause while the Plaintiff was in possession the Defendant was therefore a trespasser. As to whether the Plaintiff is entitled to General Damages for trespass. In the case of "Park Towers Limited – Versus - John Mithamo Njika & 7 others (2014)eKLR, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

316. In the case of "Philip Aluchio – Versus - Crispinus Ngayo [2014]eKLR", the Court held as follows:-

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less .....

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

317. According to the Plaintiff evidence stated that he paid Abdalla Taib a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) for the bank transfer but being that time has passed and the value of the suit has been raised over the years this Honourable Court proceeds to award a nominal figure of a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/-)as general damages for trespass. Forcible Detainer is an offence under criminal law and this Court cannot award any damages; the parties can pursue this through the necessary channels.

#### **ISSUE No.e). Whether the Defendant (Anne Mbatia) is entitled to reliefs sought in the Counter - Claim**

318. Under this sub title the Court has already elaborately demonstrated that the Defendant's interest in the land was obtained unlawfully. The Plaintiff in the Counter claim prayed for Judgment to be entered against the Defendants for same:-

- a. A declaration that the Title issued i.e. L.R. No. 22525 Mariakani C.R. NO. 146 was issued irregularly and obtained fraudulently.
- b. A declaration that the Plaintiff in the counter claim was and had been since 1978, in lawfully occupation of the suit land, also known as L.R. NO.22525 MARIKANI CR. NO.146.
- c. A declaration that the Plaintiff in the Counter claim is the lawful owner of the suit land known as CR.NO. 22525, MARIKANI CR NO.146.
- d. That the title issued to the 2nd Defendant in the counter claim Rainbow Investment over L.R. NO.22525 MARIKANI CR. NO. 146 be cancelled.
- e. That the Plaintiff in the Counter Claim be registered as the owner of L.R. NO. 22525 MARIKANI CR.NO.146 and a title issued on her name.
- f. A declaration that Title Number MARIKANI KAWALA 'B'/2 was issued lawfully to the Plaintiff.
- g. In the alternative, a declaration that the Plaintiff has acquired lawful Title through Adverse Possession and therefore Title Number KAWALA 'B'/2 is lawful



319. The Defendant's claim was one of fraud and an alternative prayer of adverse possession. The doctrine of adverse possession in Kenya is founded under the *Limitation of Actions Act*, CAP 22 Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:
- a. A right of action to recover land does not unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
  - b. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
  - c. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land in reversion is taken to be adverse possession of the land".
320. On the other hand, Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and provides that:
- “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
321. The Defendant/Plaintiff in Counter - Claim had alleged and contended that she had acquired the property by operation of law and on the basis of the doctrine of adverse position. Notwithstanding the foregoing, it is also important to revert to the contents of the Counter - Claim and Defense, which was filed by and on behalf of the Defendants. Notably, paragraphs 7A and 7B of the Statement of Defense and paragraph 12 of the counterclaim adverts to particulars of fraud and illegality and misrepresentation attendant to the procurement of the certificate of title by the Plaintiff
322. In the premises, the question that does arise that the Honourable court must grapple with; is whether the Defendants herein, who are challenging the validity of the Plaintiff's title, can in the same vein also stake a claim premised on adverse possession. My understanding of the Doctrine of adverse possession is that the claimant (the person contending to be in adverse possession) must first and foremost concede to, acknowledge and admit the title of the owner of the property which is in question. Indeed, as indicated the doctrine of adverse possession is hinged on the provisions of Sections 7, 13, 17, 37 and 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya.
323. However, in this respect, the Defendant herself is contending that same are the lawful owners of the suit property save for the fraud, illegality and misrepresentation applied by the Plaintiff, culminating into the issuance of the certificate of title in his name.
324. In my humble view, the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or



better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.

325. To buttress the position that one cannot implead fraud and adverse possession or better still trust and adverse possession in the same cause of action; it is instructive to take cognizance of the holding of the Court of Appeal in the case of “Catherine Koriko & 3 Others – Versus - Evaline Rosa (2020)eKLR”, where the Court of Appeal held as hereunder;

“A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants’ application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No 105 of 2010. I cannot be blind to this attempt and I decline to condone the same”.

326. The position that cannot advance a claim for fraud and adverse possession in the same cause was also discussed in the case of “Haro Yonda Juaje – Versus - Sadaka Dzenzo Mbauro & Kenya Commercial Bank (2014) eKLR”, where the Court stated:

“(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff’s averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”

327. Clearly, the Defendant herein cannot be heard to impugn the Plaintiff’s title and allege that same was procured by fraud, illegality and misrepresentation, on one hand, while advancing the claim for adverse possession on the other hand. It was incumbent upon the Defendant to exercise their right of election and thus discern their appropriate cause of action. To the extent that the Defendant did not exercise her right of election, same are caught in between advancing a claim for fraud, trust and adverse possession, which claims constitutes the antithesis of the other. In short, the claim for fraud and adverse possession, are like oil and water.

328. Notwithstanding the foregoing, even assuming that the claim for adverse possession had been legitimately pleaded, I would still have had difficulty in granting same in favor of the Defendant. I say so, insofar as no credible evidence was placed before the court to show occupation and possession being that there is evidence by the time the suit was being filed there was nobody on the suit land; the property was vacant evidenced by photographs produced by the Plaintiff.

329. Finally, it is important to underscore that the person seeking to persuade the court that same is entitled to an order for adverse possession, must place before the court, cogent and tangible evidence to demonstrate continuous and uninterrupted occupation, possession and use of the suit property for the requisite statutory duration. (See the holding of the court of appeal in the case of “Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi (2020)eKLR”.



330. As stated before, the burden of proving that she was an adverse possessor laid with the Defendant in accordance with the provision of Sections 107, 108 and 109 of The *Evidence Act*, Chapter 80 Laws of Kenya), to place before the Honourable court credible evidence and in the event of default, then her claim must no doubt, fail.
331. The Defendant has laid a claim to suit property through her allocation which was found to be irregular which the Court also notes was not allocated to her but rather a third party who according to her was missing. The Defendant also laid claim for adverse possession, the court has found and held that no credible evidence was placed before the court to demonstrate that she was in occupation of the property at the time this suit was filed in 2010. Therefore, I strongly hold that the Defendant is not entitled to any prayer made in the Counter - Claim as she failed to prove her case.

#### **ISSUE No. f). Who bears the cost of the suit and of the Counter - Claim**

332. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
333. In the case of:- “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

334. In the present case, I reiterate that the Plaintiff has been able to establish their case as pleaded from the filed pleadings against the Defendant therefore, I proceed to award them the costs of their suit and the Counter - Claim. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant are also awarded the costs of the Counter - Claim to be paid by the Defendant/Plaintiff in Counter - Claim.

#### **X. Conclusion and Disposition**

335. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established its case against the Defendant herein. For avoidance of doubt, I proceed to make the following specific orders:
- a. That Judgment is hereby entered in favour of the Plaintiff as pleaded in Plaint dated 16<sup>th</sup> April, 2010 in its entirety.



- b. That the Defendant claim as per the Counter – Claim dated 23<sup>rd</sup> September, 2020 be and is hereby found to lack merit and the same is dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counter - Claim.
- c. That an order for permanent injunction do and is hereby issued restraining the Defendant from using, developing on or construction on, trespassing on, entering upon, committing to waste and/or harvesting any crops therefrom or otherwise interfering with and/or in any manner dealing with land known as L.R. NO.22525, CR.N.146.
- d. That general damages for trespass be and is hereby assessed and awarded in the sum of Kenya Shillings Three Million, Five Hundred Shillings only (Kshs 3,500,000/-); and same shall attract Interest from the date of Judgment.
- e. That the costs of this suit vide the plaint dated 16<sup>th</sup> April, 2010 are awarded to the Plaintiff. The 1<sup>st</sup> Defendant, Plaintiff/ 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant in Counter - claim are awarded the costs of the further Amended Counter - Claim dated 23<sup>rd</sup> September, 2020.

**JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....9<sup>TH</sup> .....DAY OF .....DECEMBER.....2024.**

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

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Okanga Advocate for the Plaintiff/2<sup>nd</sup> Defendant in the Counter - Claim.
- c. Mr. Omwenga & M/s. Mango Advocates for the Defendant/Plaintiff in the Counter - Claim.
- d. Mr. Sitonik Advocate for the 1<sup>st</sup> Defendant in the Counter – Claim.
- e. M/s. Kiti Advocate for the 3<sup>rd</sup> Defendant in the Counter – Claim.

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