



**Muchanga Investments Limited v Habenga Holdings Limited & 8 others;  
Barclays Bank of Kenya Limited (Interested Party) (Environment & Land  
Case 1180 of 2014) [2025] KEELC 3379 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1180 OF 2014**

**OA ANGOTE, J  
MARCH 27, 2025**

**BETWEEN**

**MUCHANGA INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**HABENGA HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JINA ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**TELESOURCE COM LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEYS, MINISTRY OF LANDS &  
HOUSING ..... 4<sup>TH</sup> DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING, MINISTRY OF LANDS &  
HOUSING ..... 5<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES, MINISTRY OF LANDS &  
HOUSING ..... 6<sup>TH</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR, MINISTRY OF LANDS &  
HOUSING ..... 7<sup>TH</sup> DEFENDANT**

**JOHN MUGO KAMAU ..... 8<sup>TH</sup> DEFENDANT**

**JOSEPH KANG'ETHE WANYOIKE (FOR THE ESTATE OF CARMELINA  
NGAMI MBURU) ..... 9<sup>TH</sup> DEFENDANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... INTERESTED PARTY**



## JUDGMENT

### Introduction

1. The dispute herein is in respect of land located in the exclusive, prestige, leafy suburbs of Karen, Nairobi, measuring approximately 135 acres. This is not an ordinary land dispute, it is a full-blown adventure in real estate chaos that has continued to bedevil this country since 1895, when Kenya was declared a British Protectorate.
2. The court is confronted with numerous title documents in the names of different entities dating back to 1973, numerous Deed Plans, correspondences, and a legal battle so entangled that even the land itself might be confused as to owns it.
3. The Plaintiff instituted this suit through a Plaint dated 1<sup>st</sup> September 2014, in which it sought Judgment against the Defendants as follows:
  - a. A declaration that the Plaintiff, Muchanga Investments Limited, is the lawful owner of all that parcel of land known as Land Reference Number 3586/3 (Original Number 3586/2/3).
  - b. A declaration that the Certificate of Title Number I.R. 37285 over Land Reference Number 3586/3 issued to the Plaintiff, Muchanga Investments Limited, on 11<sup>th</sup> February 1983 is legally valid.
  - c. A declaration that Certificate of Title Number I.R. 32276 over Land Reference Number 3586/3 purportedly issued to the 1<sup>st</sup> Defendant by the 4<sup>th</sup> Defendant and subsequently issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is illegal, null and void.
  - d. A declaration that the 4<sup>th</sup> and 5<sup>th</sup> Defendants Approval of the subdivision of Title Number I.R. 32276 over Land Reference Number 3586/3 together with all Deed Plans in respect thereof issued to the 3<sup>rd</sup> Defendant is illegal, null and void.
  - e. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from entering/alienating/subdividing or dealing in any other way with the property known as Land Reference Number 3586/3 belonging to the Plaintiff.
  - f. A permanent injunction restraining the 3<sup>rd</sup> Defendant from presenting any purported subdivision or Deed Plans from Land Reference Number 3586/3 to the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants for Approval and/or Registration.
  - g. Costs of this suit.
  - h. Any other or further relief that this Honourable Court may deem fit and just to grant.

### The Plaintiff's case

4. The Plaintiff's case is that it is the registered proprietor of the suit property which is Land Reference Number 3586/3 I.R. Number 37285 (Original Number 3586/2/3) which measures 54.39 Hectares



- (approximately 135 acres) situated in Karen Nairobi. It asserted that it was issued the Certificate of Title to the suit property on 11<sup>th</sup> February 1983 and was registered as I.R Number 37285/1, which title is in its possession.
5. The Plaintiff stated that it has been in possession of the suit property at all material times and that it has duly paid all land rent and Nairobi City Council Rates with respect to the suit property and has never sold it or transferred any part of it.
  6. The Plaintiff claims that it sought and obtained approval to subdivide the suit property in 1985 from the Ministry of Lands and the Nairobi City Council. As a result, it avers, Grant Numbers I.R. Nos 74050 and 74051 were issued together with 199 deed plans; that it subsequently cancelled the subdivision in 2012-2013 and surrendered I.R. No. 74050 and 74051 and the 199 Deed Plans and that the suit property was thereafter restored to its original state as Land Reference Number 3586/3, comprising 54.39 Hectares.
  7. The Plaintiff argued that the 1<sup>st</sup> Defendant has illegally and fraudulently obtained an illegal Certificate of Title Number I.R 32276, Land Reference Number 3586/3, comprising 54.39 Hectares which was purportedly issued on to it on 16<sup>th</sup> February 1973.
  8. The Plaintiff contended that the Certificate of Title Number IR No. 32276 issued to the 2<sup>nd</sup> Defendant, and subsequently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is illegal, invalid and incapable of creating any interest over the suit property.
  9. The particulars of illegality and fraud iterated by the Plaintiff are that the purported Certificate of Title number I.R. Number 32276 issued to the 1<sup>st</sup> Defendant is indicated as being pursuant to a transfer registered as Number 94/23 in the original title yet entry Number 23 in the original title is an assent to another entity over a parcel of land known as 3586/2/2, which is not related to LR No. 3586/3.
  10. It is the Plaintiff's case that the Certificate of Title Number IR 32276 issued to the 1<sup>st</sup> Defendant does not have the original land reference number quoted on it; that the purported transfer of title number IR32276 from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was effected on 26<sup>th</sup> April 1983, which was before the 2<sup>nd</sup> Defendant's date of incorporation on 5<sup>th</sup> October 1995.
  11. Further, the Plaintiff averred, the purported transfer IR 32276 from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant was registered on 17<sup>th</sup> March 1994 which was before the 3<sup>rd</sup> Defendant's date of incorporation on 14<sup>th</sup> September 2005 and that the transfer instrument transferring title number 32276 from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant bears a different Land Survey plan number from the Certificate of Title.
  12. It was contended by the Plaintiff that the transfer instrument between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants over the Certificate of Title number I.R. 32276 is not dated and does not bear any evidence of stamp duty payment and that it bears annual rent different from that indicated in the Certificate of Title.
  13. Further still, the Plaintiff claimed, the 3<sup>rd</sup> Defendant has illegally and fraudulently used the invalid Certificate of Title Number IR 32276 to subdivide the suit property and that it obtained invalid and illegal Deed Plans for the subdivision with a view to disposing of the illegally subdivided parcels of land. The Plaintiff argued that the 3<sup>rd</sup> Defendant has used forged approval letters purportedly from the 4<sup>th</sup> and 5<sup>th</sup> Defendants to subdivide the Plaintiff's land.



### **The 3<sup>rd</sup> Defendant's case**

14. The 3<sup>rd</sup> Defendant opposed the suit through a Defence and Counterclaim dated 2<sup>nd</sup> June 2016. In its Defence, the 3<sup>rd</sup> Defendant asserted that it is the rightful and registered owner of the suit property through a bona fide sale and purchase from the legally registered owner which commenced in 1998.
15. The 3<sup>rd</sup> Defendant asserted that the Plaintiff has never been the registered owner of the suit property and has never been in possession of the same and that the reason the Plaintiff cancelled the subdivision survey was because the Plaintiff knew that it had trespassed and was dealing with the suit property in violation of the 3<sup>rd</sup> Defendant's rights.
16. The 3<sup>rd</sup> Defendant contended that the suit property known as L.R. No. 209/3586/3 ceased to exist when the subdivision was concluded and new Certificates of Title L.R No. 3586/202-398 were issued in 2014 and that consequently, the Plaintiff's cause of action is non-existent in law. The 3<sup>rd</sup> Defendant denied that it has illegal Deed Plans in its possession as claimed by the Plaintiff.
17. Josphert Milimu Konzolo, the 2<sup>nd</sup> Plaintiff in the Counterclaim, averred that he has always been a Director of the 3<sup>rd</sup> Defendant (the 1<sup>st</sup> Plaintiff in the Counterclaim), which was incorporated on 14<sup>th</sup> September 2005 under Certificate of Incorporation number C.119313. He stated that on 13<sup>th</sup> March 1998, him, together with his wife, entered into a sale agreement to buy the suit property LR No. 209/3598/3, IR 31187, Deed Plan 100122 from the legally registered owner, John Mugo Kamau.
18. The 2<sup>nd</sup> Plaintiff in the Counterclaim averred that his wife, Noelle Imbaga Konzolo, paid the 10% deposit of the purchase price and the balance was to be paid over time as mutually agreed between the parties; that the vendor thereafter surrendered the original certificate of title to his Advocate and that the last instalment of the purchase price of Kshs. 400,000/- was paid to the vendor in December 2001 and the Vendor signed and handed over the completion documents to his advocate.
19. The 2<sup>nd</sup> Plaintiff in the Counterclaim stated that he instructed their advocate to get the vendor to sign two sets of transfer documents, one in favor of Josphert Milimu Konzolo and his wife Noelle Imbaga Konzolo as transferees and the other set in the name of Telesource.com, which was then a business name, which they were in the process of registering as a company.
20. According to the 2<sup>nd</sup> Plaintiff in the Counterclaim, it was when the 3<sup>rd</sup> Defendant, Telesource.com, (the 1<sup>st</sup> Plaintiff in the Counterclaim) was incorporated in 2005 that he instructed his Advocate to execute the transfer documents which had been signed by the vendor transferring the said property to the 3<sup>rd</sup> Defendant.
21. It is the case of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in the Counterclaim that the transfer of the suit property from John Mugo Kamau to the 1<sup>st</sup> Plaintiff was completed in October 2005 without any legal challenge and a Certificate of Title IR 31187 issued after paying the requisite fees including stamp duty.
22. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in Counterclaim asserted that the Plaintiff/Defendant in Counterclaim unlawfully and illegally embarked on a process to grab the suit property, which they discovered in 2009 when the said Defendant in the Counterclaim purported to pay rates to the suit property posing as the owner of the property.
23. It is their position that the Defendant in the Counterclaim (the Plaintiff in the main suit) has never been a legally registered owner of the suit land. They contend that to facilitate its grabbing of the land, the said Plaintiff/Defendant in the Counterclaim produced illegal and forged documents over the suit property, including a Certificate of Title IR No. 37285.



24. It is their further assertion that the Plaintiff/Defendant in the Counterclaim embarked on a process of illegally and unlawfully depriving the 3<sup>rd</sup> Defendant/1<sup>st</sup> Plaintiff in the Counterclaim of the suit property through an unlawful survey and subdivision between 2012-2013 and that the Plaintiff used the forged certificate IR No. 37285 to fraudulently induce the Nairobi City Council and the Ministry of Lands to issue it with the requisite approvals for sub-division of the land.
25. The Plaintiffs in Counterclaim stated in the Defence that they decided to subdivide the suit property and engaged the services of a surveyor, who prepared the required documentation and submitted a new sub-division scheme on their behalf for registration by the government and that the sub-division was approved and the Plaintiffs were issued with new Deed Plan numbers L.R No. 3586/202-398 and new Certificates of Title to the 196 parcels of land.
26. As such, they asserted, LR No. 209/ 3586/3 ceased to exist when the 196 certificates of title were issued. They further averred that since the completion of the subdivision, the Certificates of Title numbers LR No. 209/3586/380,381, 382, 388 and 390 had already been lawfully transferred by the 1<sup>st</sup> Plaintiff to Wanainchi Supplies Limited, amongst others.
27. The Plaintiffs in the Counterclaim pray for Judgment against the Plaintiff/Defendant in the Counterclaim for orders that:
  - a. A declaration that the 1<sup>st</sup> Plaintiff, Telesource.com Limited is the legal and lawful owner of the suit property herein formerly known as LR No. 209/3586/3 and since the sub-division is presently known as L.R. Numbers 209/3586/202-398 situated in Karen area within the County of Nairobi.
  - b. A declaration that Telesource.com Limited is the registered and legal owner of the suit property herein formerly known as L.R. No. 209/3586/3 has the right guaranteed in Article 40 of *the Constitution* to deal as it pleases with the said property, which right included sub-dividing the suit property to L.R. Numbers 209/3586/202-398.
  - c. A declaration that the Certificate of Title Number IR 37285 purportedly issued to the Defendant in the Counterclaim, Muchanga Investment Limited on 11<sup>th</sup> February 1983 is a forgery, illegal and therefore null and void ab initio.
  - d. That the Honourable Court does revoke and/ or nullify the Defendant herein illegal Certificate of Title known as Number I.R. 32276 and declare it illegal, null and void.
  - e. A declaration that the Defendant herein has no known legitimate claim and/ or any right over the suit property herein.
  - f. A permanent injunction restraining the Defendant in the counterclaim, their agents, employees, servants, and/or anyone acting at their behest or whosoever else from interfering with the Plaintiff's right to property including quiet possession thereof as enshrined in law.
  - g. A permanent injunction restraining the Defendant in the counterclaim, their agents, employees, servants, and or anyone acting at their behest or whosoever else from transferring, selling, alienating, charging, trespassing, fencing, subdividing, dealing in or interfering in any manner whatsoever with the Plaintiffs property herein formerly known as L.R. No. 209/3586/3 and since the sub-division is presently L.R. No.s 209/3586/202-398.
  - h. Costs of this suit.
  - i. Any other relief that this Honourable Court may deem fit and just to grant.



28. The Plaintiff/Defendant in the Counterclaim, through a Reply to Defence and Defence to Counterclaim, denied that the suit property was registered in the name of John Mugo Kamau and averred that the said John Mugo Kamau did not have a valid Certificate of Title in the suit property.

#### **The 4<sup>th</sup> – 7<sup>th</sup> Defendants' case**

29. The Attorney General filed a Statement of Defendant on behalf of the 4<sup>th</sup>-7<sup>th</sup> Defendants dated 3<sup>rd</sup> June 2016. The Attorney General denied the contents of the Plaintiff's claim and asserted that the 4<sup>th</sup> -7<sup>th</sup> Defendants had no knowledge of occupation of the suit property. The Attorney General contended that no cause of action can be instituted against the government based on possession of the suit property.

#### **The 9<sup>th</sup> Defendant's case**

30. The 9<sup>th</sup> Defendant, Joseph Kang'ethe Wanyoike, a representative of the Estate of Carmelina Ngami Mburu, opposed the suit through an Amended Defence and Counterclaim. He denied that the Plaintiff was the registered proprietor of the suit property.
31. The 9<sup>th</sup> Defendant asserted that the land was lawfully owned by the late John Mburu, who died intestate on 27<sup>th</sup> October 1981 and was survived by two wives, Carmeline Mburu and Mary Nduta, who are both deceased. The 9<sup>th</sup> Defendant pleads that the suit property Land Reference No. 37285 (Original LR No. 94 I.R. No. 372850) in a lease of 999 years, therefore belongs to the estate of John Mburu.
32. It was averred that on 11<sup>th</sup> February 1983, the Plaintiff was purportedly issued with a Certificate of Title IR No. 37285 and at the same time, inexplicably, the Plaintiff had a title entry number 315M, both of which were registered on the same day and after the demise of John Mburu and that he reported the matter to the Directorate of Criminal Investigation for investigations into the anomaly.
33. It was averred that the DCI then requested them to tender documentation in support of the claim that M/S Francis Da Gama Rose was at all material times the legal representative of John Mburu and that the late Carmeline Ngami Mburu furnished them with copies of documentation in proof.
34. According to the 9<sup>th</sup> Defendant, on 31<sup>st</sup> January 1978, John Mburu (deceased) secured a loan from Barclays Bank of Kenya of Kshs. 675,000/- to develop the suit property, and on 30<sup>th</sup> June 1978, Da Gama Rose & Co. Advocates wrote a letter forwarding a cheque of Kshs. 500,000. This letter, it was averred, was copied to John Mburu.
35. The 9<sup>th</sup> Defendant averred that M/S Da Gama Rose Advocates consistently and unscrupulously manipulated documents and converted the deceased's property for their own use and to their own interests. Furthermore, it is their averment that upon the demise of John Mburu, all his property, which was under the care of the Public Trustee, M/S Francis Da Gama Rose altered the documentation with the purpose of divesting the Public Trustee of their lawfully acquired responsibility, with the intention of disposing of the property for his own benefit.
36. It is the 9<sup>th</sup> Defendant's case that the Public Trustee so carelessly and recklessly handled the property of John Mburu under his administration that he disposed of some of the property at less than market rates, and which mismanagement provided a platform for fraudsters to intermeddle in the said property.
37. The 9<sup>th</sup> Defendant claimed that the suit property belongs to Carmelina Mburu and other beneficiaries of the estate of John Mburu; that the suit property has ever been transferred to the Plaintiff or any



other third party and that the Plaintiff obtained its title through fraudulent means and the same is null and void.

38. The 9<sup>th</sup> Defendant highlighted that the directors of the Plaintiff happen to be of the Da Gama Rose family, one which whom is Francis da Gama Rose and that this raises the possibility that the lawyer, who had access to John Mburu's documents, could have been an accomplice in depriving the deceased of the subject property.
39. In his Counterclaim, the 9<sup>th</sup> Defendant has sought that Judgment be entered in favour of the estate of Carmelina Mburu as follows:
  - a. That the honourable court do declare that the parcel of land known as LR No. 209/3586/3 formed part of the estate of the Late John Godhard Ichahuria Mburu and the same should revert to his estate.
  - b. That the grants held by any third parties and any subdivisions of LR No. 209/3586/3 by the Plaintiff or Defendants is void ab initio the same having been irregularly and fraudulently procured.
  - c. That the purported sale of L.R. No. 209/3586/3 by the Interested Party to the Plaintiff is void ab initio.
  - d. Costs of the suit and interest thereon.

## Hearing and Evidence

### The Plaintiff's evidence

40. The hearing of the suit commenced on 25<sup>th</sup> April 2017. The Plaintiff adduced the testimony of three witnesses.
41. The former Vice-President of the Republic of Kenya, Arthur Moody Awori, PW1, relied on his statement dated 3<sup>rd</sup> October 2016. He testified that he was a director of the Plaintiff, Muchanga Investments Limited, which was incorporated in 1978 under C.17432.
42. It was the testimony of PW1 that the Plaintiff purchased the suit property, L. R. No. 3586/3 in 1982 and was issued with a Certificate of Title Number I.R. 37285 on 11<sup>th</sup> February 1983.
43. He asserted that on 29<sup>th</sup> April 1983, him and his wife, Ruth Awori, in their capacity as directors, attended a board meeting of Muchanga Investments Limited, where it was reported that Barclays Bank of Kenya, Market Branch had agreed to give credit to Da Gama Rose (Investments) Limited and the Plaintiff, Muchanga Investments Limited, agreed to guarantee the repayment of the loan and to execute a legal charge over its suit property known as L. R. No. 3586/3 at Langata Nairobi.
44. According to PW1, it was resolved that the Plaintiff would create a legal charge for Kshs. 10, 500,000 over the suit property in favor of Barclays Bank; that he signed the resolution dated 29<sup>th</sup> April 1983 and that indeed the Plaintiff created the legal charge over the suit property as security for advances to Da Gama Rose (Investments) Limited. PW1 stated that he ceased to be a director of the Plaintiff upon becoming Vice President.
45. In cross-examination, PW1 testified that the directors of the Plaintiff company were himself, his wife and Horatius Da Gama Rose, who was the executive director of the Plaintiff company. He admitted that he was also a director of Da Gama Rose Investments Limited. It was his evidence that although he saw the sale agreement, he could not recall if he signed the same.



46. According to PW1, he recalls that the Plaintiff bought the suit property during an auction conducted by Barclays Bank. He averred that the purchase price was paid to the Bank and that the issue of payment was handled by the executive director of Muchanga Investments Limited. PW1 stated that he did not have the minutes of the board where a resolution was passed to purchase the property.
47. PW1 admitted that the firm of Francis Da Gama Rose & Co. Advocates were the advocates of both Muchanga Investments Limited and Da Gama Rose (Investments) Limited.
48. The witness was referred to several letters that were written in 1978 and specifically the letter dated 30<sup>th</sup> June 1978 by Francis Da Gama which was copied to J.G Mburu. PW1 denied that they were receiving rent on behalf of J.G. Mburu and asserted that Muchanga Limited did not obtain the property in a fraudulent manner.
49. PW1 in re-examination, referred to the letters dated 18<sup>th</sup> January 1978, 6<sup>th</sup> July 1978 and 20<sup>th</sup> July 1978 and deponed that the letters show that the process of sale was still ongoing, and was not completed in 1978. He stated that Muchanga Investments Limited did not purchase the suit property in an auction. Rather, it was his evidence, the property was being sold by Barclays Bank as administrator of the owner, at the purchase price at Kshs. 1,250,000.
50. PW2, Suleiman Abdul Shakur Harunani, stated that he is a licensed surveyor, with license registration number 117, issued to him on 25<sup>th</sup> April, 1980 and that he used to work in the Director of Surveys office. He stated that he was familiar with the suit property L. R. No. 3586/3 and that he got to know about the property in the 1970's, when a licensed surveyor came to the survey office and submitted subdivision plans of the suit property into three portions.
51. PW2 stated that on 15.02.1978, Mr. Horatius Da Gama Rose commissioned him to conduct a preliminary subdivision of the suit property into two and a half acre plots; that the Plaintiff was at that time desirous of purchasing the land and that he had a letter of instruction dated 15.02.1978, which letter was signed by Francis Da Gama Rose & Co. Advocates.
52. He averred that he carried out the subdivisions and presented the subdivision scheme to the Nairobi City Council; that the City Council wrote back and told him that the area was under a zone where the size of land was 5 acres and not 2 ½ acres and that he then informed his client that the subdivision scheme had been rejected, and he returned the cheque to his client.
53. It was PW2's testimony that the matter went quiet until 1985 when Mr. Horatius Da Gama Rose asked him to subdivide the property into ½ acre piece each; that he got approval from the Nairobi City Council and that he moved to the site and created 199 plots out of the 134.4 acre land namely LR No. 3586/3/1 – 3586/3/199.
54. PW2 averred that on 12<sup>th</sup> July 2013, on instructions from the Plaintiff, he surrendered the 199 deed plans to the Director of Survey for cancellation, so that the land could revert to the original 134.4 acres and that the deed plans were stamped "cancelled" and the land reverted to its original status.
55. PW2 stated that he had been shown a purported survey over the suit property carried out by a licensed surveyor called L. K. Gitau on behalf of Telesource.com Ltd, the 3<sup>rd</sup> Defendant and that this survey was a complete mirror and copy of the subdivision initially carried out by his firm in 1985, and is a complete forgery.
56. PW3 was Dimitri Da Gama Rose who stated that he is a director and general manager of the Plaintiff company. He relied on his statement dated 23.10.2016 and the statements sworn by his late father, Horatius Da Gama Rose.



57. In the statement sworn by Horatius Da Gama Rose on 1<sup>st</sup> September 2014, he stated that in 1982, he entered into negotiations with the legal representatives of the Estate of Arnold Bradley, Barclays Bank of Kenya Limited, for the purchase of the suit property, and that following the successful negotiations, the Plaintiff purchased the property from the legal representatives of the deceased, Barclays Bank of Kenya Limited for the sum of Kshs. 1,250,000.
58. It was averred by the Director of the Plaintiff that the Bank subsequently executed the transfer dated 29<sup>th</sup> December 1982 over the property in the Plaintiff's favor and that the Plaintiff was duly registered by the Registrar of Titles on 11<sup>th</sup> February 1983 and Certificate of Title I.R. 37285 registered as I.R. No. 37285/1 was issued to the Plaintiff on 11<sup>th</sup> February 1983. The transfer to the Plaintiff was then duly registered against the original title (I.R. 94) as Number I.R. 94/24.
59. Horatius Da Gama Rose stated that the mother title for LR No. 3586 was a Grant registered as No. IR 94/1 Portion No. 46, Deed Plan No. 10979 and the land comprised of approximately 160 acres; that the title to the mother title IR No. 94/1 was registered in the Land Registry at Nairobi on 3<sup>rd</sup> August 1921 and that the original property was subsequently subdivided into ten sub plots, Land Reference Numbers 94/3, 94/4, 94/5, 94/6, 94/7, 94/8, 94/9, 94/10/ 94/11 and 94/12, which were transferred to different purchasers.
60. Horatius Da Gama Rose stated that the original title shows in entry number 4, that Plot No. 94/4 was transferred to Arnold Bradley on 27<sup>th</sup> February 1928; that Plot No. 94/4 was later subdivided into Land Reference No. 3586/1 and Land Reference 3586/2 and that entry No. 13 on the mother title shows that LR No. 3586/1 was transferred to William Berilam on 27<sup>th</sup> January 1942 and Certificate of Title No. I.R. 5579 was issued, leaving LR No. 3586/2 in the name of Arnold Bradley.
61. Horatius Da Gama Rose asserted that entry No. 22 on the mother title shows that on 2<sup>nd</sup> March 1978, Barclays Bank International Limited registered a Probate of the will of Arnold Bradley against the remainder of his title known as Land Reference No. 3586/2. He asserts that the mother title shows that on 2<sup>nd</sup> March 1978, LR No. 3586/2 was further sub-divided into two sub-plots being L.R No.12243 and L. R. No.3586/3 and that these facts show the Plaintiff's root of title.
62. Horatius Da Gama Rose stated in his statement that the Plaintiff has been in physical possession of the suit property from the date it was issued with the certificate of title until the date of his statement.
63. Horatius Da Gama Rose, through PW3, stated that it was brought to his attention on 8<sup>th</sup> May 2014 that Telesource.com Limited, the 3<sup>rd</sup> Defendant, had purportedly been issued approved plans for the subdivision of the suit property and that the said title and sub division was fraudulent.
64. Horatius Da Gama Rose stated in his further witness statement dated 3<sup>rd</sup> June 2016 that from the affidavit sworn by Waweru Mathenge from Barclays Bank on 9<sup>th</sup> December 2014, Arnold Bradley died on 22<sup>nd</sup> October 1973 and his last will and testament dated 15<sup>th</sup> August 1969 was registered in court on 24<sup>th</sup> July 1974 in High Court Probate and Administration Cause Number 50 of 1974.
65. It was his evidence that Barclays Bank of Kenya was appointed as the Executor of the Estate and they therefore had the authority and capacity to deal with his estate; that grant of Probate of the Estate of Arnold Bradley was registered against the title of the suit property on 2<sup>nd</sup> March 1978 and that the transfer of the property by Barclays Bank to the Plaintiff is genuine.
66. It was the evidence of PW3 that the transfer of the suit property to the Plaintiff is also supported by various correspondences between Kaplan & Stratton Advocates and Francis Da Gama Rose & Co.



- Advocates, who were acting for the Vendor and Purchaser respectively, and that the certificate of title allegedly obtained by John Mugo Kamau is fraudulent, illegal, null and void.
67. PW3 stated that the purported transfer of the suit property from Arnold Bradley to John Mugo Kamau dated 23<sup>rd</sup> August 1978 is fraudulent because Arnold Bradley died on 22<sup>nd</sup> October 1973.
  68. Further, it was argued, while the transfer was allegedly drawn by F. Hopley, Solicitor, one Fredrick Hopley died on 27<sup>th</sup> July 1960 as per the Gazette Notice dated 30<sup>th</sup> August 1960 and that according to the records from the Registrar of Births and Deaths, John Mugo Kamau died on 27<sup>th</sup> April 2002, before the date of transfer.
  69. As to the claim on behalf of the Estate of Carmelina Mburu that the suit belongs to John Mburu, Mr. Horatius Da Gama Rose stated in his statement that there is no evidence on record to show who transferred the suit property to John Mburu on 7<sup>th</sup> March 1978 and that the mother title IR 94 produced by Catherine Njeri Nganga is fraudulent as it does not contain an entry showing the registration of the grant of probate of the will of Arnold Bradley, yet it contains a transfer of 2.109 Hectares to Arnette Therese, the daughter of Arnold Bradley, which transfer was pursuant to the Will of Arnold Bradley.
  70. Horatius Da Gama Rose asserted that the suit property is not listed in the schedule of Assets of John Mburu in Succession Case No. 859 of 1981 and that the letter produced by Catherine Njeri Nganga dated 30<sup>th</sup> June 1978 from Francis Da Gama Rose & Co. and purportedly copied to J.G. Mburu is a forgery. According to Horatius Da Gama Rose, the original shows that the letter is copied to J.M. Mbaru.
  71. It was the evidence of PW3 that Francis Da Gama Rose was his grandfather, who was a lawyer based in Nakuru and the founder of Francis Da Gama Rose & Co. Advocates; that his father, Horatius, was a lawyer by profession, who initially joined his grandfather's law firm but he later left to become a businessman; that his father never worked at Sharpley Barret & Co. Advocates and that the advocate who worked at Sharpley Barret & Co. Advocates was his father's cousin.
  72. PW3 admitted that the initial attempts at subdivision came before Muchanga Investments Limited bought the property. He further stated that the company was incorporated for the purposes of acquisition of the suit property and that he did not know if the company has any other land. He denied that the property was owned by John Godhard Mburu.

### **The 3<sup>rd</sup> Defendant's evidence**

73. The 3<sup>rd</sup> Defendant presented the testimony of three witnesses. DW1, Josephat Milimu Konzolo, stated that he is the co-founder and director of Telesource.com Limited, the 3<sup>rd</sup> Defendant. DW1 stated that he bought the suit property and that the land is currently registered in the name of the 3<sup>rd</sup> Defendant. He stated that the title was surrendered to the Government for subdivision. DW1 relied on his statement dated 2<sup>nd</sup> June 2016.
74. In his statement, he stated that the 3<sup>rd</sup> Defendant's company was incorporated as number C.119313; that he identified the suit property for purchase; that the vendor of LR No. 209/3586/3 was one John Mugo Kamau, who agreed to sell the suit property to them at a consideration of Kshs. 96 million and that the sale agreement between the parties was entered into in 1998.
75. It was the evidence of DW1 that they paid a 10% deposit on execution of the agreement on 13<sup>th</sup> March 1998; that the agreement provided for payment of the balance of the purchase price in equal instalments of Kshs. 10,800,000 every 6 months from June 1998 to completion; that the parties,



- however, agreed to monthly payments which were paid until December 2001 and that upon final payment, Mrs. Konzolo collected the completion documents from their advocate Mr. Macmillan Mutinda Mutiso, who had prepared the agreement for sale.
76. DW1 averred that he and his wife agreed that they should transfer the property to a company; that at that time, the payment of stamp duty was not a priority; that their advocate got the vendor to sign two sets of transfers over a number of years; that one set had the transferees as himself and his wife, and the other was Telesource.com.
  77. It was his evidence that at the time, Telesource.com existed as a business name; that the business name was eventually registered as a company on 14<sup>th</sup> September 2005 and that the transfer in its favor was lodged on 17<sup>th</sup> October 2005.
  78. DW1 stated that their advocate, Mr. Mutinda, did an official search at the Ministry of Lands on 26<sup>th</sup> June 2005 which confirmed that Mr. John Mugo Kamau was the registered proprietor of LR No. 209/3586/3; that Mrs. Konzolo personally paid stamp duty of Kshs. 3,840,000 which amount included a penalty for late payment and that the transfer was effected on 21<sup>st</sup> October 2005 to Telesource.com Limited, the 3<sup>rd</sup> Defendant, and a Certificate of Title to the 3<sup>rd</sup> Defendant was issued.
  79. It was the evidence of DW1 that his wife passed on in 2013 and her sudden demise affected his ability to trace the documents she had in her custody, which he continues to search for.
  80. DW1 informed the court that in 2009, he made inquiries with the Nairobi City Council as to why no invoice for rates were sent to him; that he was informed that someone else was paying the rates over the property and that in the process, they learnt that someone had presented a scheme to subdivide the land using the forged Certificate of Title No. 37285 under the name Muchanga Investment Limited, the Plaintiff herein.
  81. DW1 stated that they engaged a surveyor to prepare the required documentation and submitted their sub-division scheme to the government; that the documents were approved and the 3<sup>rd</sup> Defendant was issued with original Deed Plan Numbers LR No.s 3586/202-398 and new certificates of title and that they were issued with 196 certificates of title and transferred Certificates of Title numbers LR /209/3586/380,381, 382, 388 and 390 after sub-division to Wanainchi Supplies Limited.
  82. In cross-examination, DW1 asserted that he visited the suit property before he purchased; that there was a house on the suit property occupied by a European family; that John Mugo Kamau told him that that he had leased the land to the European family and was later informed that the family had left and that he was not aware that the rent clearance certificate dated 10/01/2003 he had produced was fake.
  83. According to DW1, he did not have the receipt for the payment of stamp duty and he was not aware that the receipt for stamp duty which was used to transfer the land to the 3<sup>rd</sup> Defendant was fake.
  84. He reiterated that he purchased the suit property from John Mugo Kamau and that he paid the purchase price in cash. DW1 admitted that he had been charged in a criminal case in relation to this suit alongside his lawyer. It was the evidence of DW1 that he did not know Habenga Holdings Limited, the 1<sup>st</sup> Defendant, or Jina Enterprises Limited, the 2<sup>nd</sup> Defendant.
  85. The 3<sup>rd</sup> Defendant's second witness, DW2, Macmillan Mutinda Mutiso averred that he is an advocate of the High Court of Kenya, practicing in the name of M. Mutinda & Associates Advocates. He adopted his witness statement dated 2<sup>nd</sup> June 2016 as his evidence in chief.
  86. He stated that in 1998 Mr. John Mugo Kamau presented to him a copy of his title; that Mr. John Mugo Kamau was selling the suit property to Mr. and Mrs Konzolo and that the parties asked him to



draw up the sale agreement as per the terms which they had agreed on. That the agreement is dated 13.03.1998 and was signed by the vendor and purchaser before him.

87. DW2 deponed that the purchase price was Kshs. 96,000,000; that the 10% deposit was paid by Mrs Konzolo in cash in his office; that the balance of the purchase price was paid in installments until completion; that when the purchasers completed payment in 2001, he prepared a final schedule which was signed by John Mugo Kamau on all the pages and that he then prepared the transfer instrument, witnessed the execution of the transfer and appended the stamp on the transfer document.
88. The 3<sup>rd</sup> Defendant's witness averred that the parties signed several sets of transfers bearing the years 2001, 2002, 2003, 2004 and 2005 because the parties had not made up their mind in which name the property was to be registered and that the registration of transfer was pursued by Mrs. Konzolo and he was not involved in the registration of the transfer.
89. In cross-examination, DW2 asserted that although the date of certification of the transfer is 2005, Mr. John Mugo Kamau did not appear before him in that year. He denied that he was the one who registered the documents.
90. DW2 denied knowing that John Mugo Kamau had died when Mrs. Konzolo applied for the consent of the Land Control Board. He stated that he prepared an application for consent in 2001 which was executed by John Mugo Kamau, but maintained that it was Mrs. Konzolo who lodged the application for consent. He admitted that it is wrong for a person to apply for consent in respect of a property belonging to a dead person.
91. When referred to the transfer of the title, the witness stated that it was clear that the registration of the transfer came before it was booked for registration. It was his evidence that he was not concerned about how John Mugo Kamau obtained the land.

#### **The 4<sup>th</sup> -7<sup>th</sup> Defendants evidence**

92. The 4<sup>th</sup> -7<sup>th</sup> Defendants adduced the testimony of five witnesses. DW4 was Geoffrey Moses Mugendi, an Assistant Director Physical Planning at the Ministry of Lands. He relied on his statement dated 20.07.2016 as his evidence in chief.
93. In his statement, he averred that with respect to LR 3586/3, he checked the records held in their office and did not come across any information or document pertaining to the existence of any part development plan or approved development application.
94. It was his evidence that the purported subdivision of the suit property by the 3<sup>rd</sup> Defendant ought to have gone through the process of approval by the county government of Nairobi, with the Director of Physical Planning playing his statutory role under Section 32 of the Physical Planning Act, before survey, registration and issuance of the resultant deed plans and certificates of lease.
95. It was his evidence that they looked at the record and there was no such entry. The same record, it was asserted, would contain information for the approved plan. He stated that the alleged sub-division never happened and it does not exist.
96. DW5 was Peter Kang'ethe Kahuho, who worked as a Land Secretary at the Ministry of Lands. He relied on his statement as his evidence in chief. In his statement, he stated that he obtained a copy of the transfer document in respect of the office of the Chief Land Registrar on 24<sup>th</sup> October 2014 which related to John Mugo Kamau as the seller and Telesource.com Ltd as the buyer.
97. According to DW5, before he could confirm the authenticity of the transfer, he verified the payment of stamp duty, valuation of the land and the consent issued by the Land Administration Division.



98. He stated that the transfer to the 3<sup>rd</sup> Defendant was allegedly done on 25<sup>th</sup> October 2005 and that the certificates of leases were signed by W.M Muigai, Land Registrar, on 16<sup>th</sup> July 2014 and that the date of the transfer from John Mugo Kamau to Telesource.com Ltd was indicated as 25<sup>th</sup> October 2015, which is materially different from the date entered on the Certificate of Title which is 21<sup>st</sup> October 2005.
99. According to the 5<sup>th</sup> Defendant, the stamping of the transfer document on the entire front page of the transfer page is a major deviation from the norm; that ordinarily, stamping would be done on the blank margin of the document or an additional page would be appended for stamping and that he was aware that Muchanga Investments Limited, the Plaintiff, surrendered two titles and cancelled the subdivision of the entire parcel of land, which subdivision had previously been done and deed plans issued accordingly.
100. DW6 was Wilfred Muchae, a Principal Land Surveyor in the office of the Director of Survey in the Ministry of Lands. He relied on his witness statement dated 15.09.2023 as his evidence in chief. He stated that where a deed plan is prepared by a licensed surveyor, the surveyor upon preparation of the deed plan is required to submit it to the Director for Surveys for signing, sealing and approval.
101. DW6 further stated that once survey records are cancelled, they cannot be used for any further land registration and that a record of the same is nevertheless maintained by the Director of Surveys office for purposes of control. In cross-examination, he stated that he had not exhibited any document impugning any of the titles.
102. DW7 was Emmanuel Arunga who works with EACC as the Head of Operations. He relied on his statements dated 05.06.2016 and 11.02.2015. He stated that after investigation, he made several findings, including that several public officers connived with other individuals to fraudulently process ownership documents in favour of Telesource.com Ltd, the 3<sup>rd</sup> Defendant.
103. In his covering report, DW7 found that the title obtained from the land office in the custody of the Land Registrar did not indicate who transferred the land to John Mugo Kamau; The IR number on the Certificate of Title issued to John Mugo Kamau is 31187 given on 24<sup>th</sup> August 1978 and that when randomly compared with IR No. 32487, given to Othniel Gakaho Njungwa, investigations observed that the latter was issued on 14<sup>th</sup> August 1978, yet should have been issued after Mugo's title.
104. It was the evidence of DW7 that the Rent Clearance Certificate No. 308335 dated 10<sup>th</sup> Jan 2005 issued to John Mugo Kamau, kept in the records of the Chief Land Registrar and presented by Josphert Konzolo to the EACC is a forgery and the certificate of stamp duty number 46189 issued from the Department of Lands does not appear in any of the records maintained at Lands.
105. According to the report by DW7, the transfer from John Mugo Kamau to Telesource.com as entered in the certificate of title shows that the date of transfer is 21<sup>st</sup> October 2005 but does not indicate the area of land transferred, the IR number given or the LR number and that the transfer document between Arnold Bradley and John Mugo Kamau as provided by Josphert Konzolo shows that the transfer was effected on 24<sup>th</sup> August 1978, yet Arnold Bradley had passed away in 1973.
106. It was the evidence of DW7 that there were three scenarios where the title to the suit property ended up in the 3<sup>rd</sup> Defendants hands. The first was the title presented by the Chief Land Registrar which shows that the suit property was transferred to John Mugo Kamau but does not indicate whoever transferred the parcel to him.
107. The second scenario, according to the DW7, is that Josphert Konzolo presented a transfer of the suit property from Arnold Bradley to John Mugo Kamau dated 24<sup>th</sup> August 1978, at which time Arnold



- Bradley had passed on. In both these scenarios, John Mugo Kamau transferred the suit property to the 3<sup>rd</sup> Defendant on 21<sup>st</sup> October 2005.
108. DW7 stated that the third scenario is derived from documents obtained from the Survey Office which had been presented by Josphert Konzolo in 2011 while seeking to be supplied with the certified copies of the deed plans. These documents, DW7 stated, show that the suit property was owned by Habenga Holdings Ltd, who transferred the land to Jina Enterprises Limited on 26<sup>th</sup> April 1983 and Jina in turn transferred the land to Telesource on 17.8.1994.
  109. DW7 observed that these variations only occur in cases of fraudulent attempts to obtain a property and while failing in the initial attempt, forget to erase the records and subsequently use other methods to obtain the property. The deponent concluded that the property belongs to Muchanga Investments Limited and recommended that all the persons involved in the attempts to fraudulently transfer the property to the 3<sup>rd</sup> Defendant should be charged in a court of law.
  110. In cross-examination, DW7 stated that following the report, the Commission did not sanction investigations as it did not have a properly constituted commission and that the land was valued at Kshs. 8 billion.
  111. DW7 averred that he spoke to an officer of Barclays Bank, who stated that they have no record of the transfer and that the Bank would have needed instruction from the Will. He stated that Barclays Bank sold the land to the Plaintiff in 1978.
  112. According to DW7, the mother title which was genuine had an IR no 94/24, and this was the one in the Ministry of Lands, and the one without this entry was fake. He stated that IR 94 was introduced for the first time in 1919 and transfers were entered all through until 1978, when John Mugo came into the picture
  113. DW8 was Edwin Wafula, a Land Registrar with the Chief Land Registrar since 2008. He adopted his statement as his evidence in chief. He stated that he was aware that the EACC carried out investigations with respect to the suit property. DW8 averred that the IR number issued to John Mugo Kamau is 31187 given on 24<sup>th</sup> August 1978, as per the records maintained by the Chief Land Registrar and when the same was randomly compared with an IR No. 32487 given to Othniel Gakaho Njuguna on 14<sup>th</sup> August 1978, investigations observed that the latter came before the one issued to John Mugo which is not logical.

### **The 9<sup>th</sup> Defendant's case**

114. The 9<sup>th</sup> Defendant, Joseph Kang'ethe Wanyoike, testified as DW9. He adopted his witness statement dated 16<sup>th</sup> May 2024 as his evidence in chief and produced the list of documents dated 25.01.2015 as 9DEXB1. In his statement, he averred that the suit property was owned by the late John Godhard Mburu who died intestate on 27<sup>th</sup> October 1981. He contends that the suit property belongs to the estate of the late John Mburu.
115. DW9 stated that on 11<sup>th</sup> February 1983, the Plaintiff was issued a Certificate of Title No. 37285 and at the same time, the Plaintiff had a title entry number 315M, both of which were registered on the same day and at the same time. He stated that he was aware that Catherine Njeri reported the inexplicable double titling to the DCI for investigations into the anomaly, and submitted documents to support her claim.
116. DW9 averred that the late John Godhard Mburu secured a loan from Barclays Bank on 31<sup>st</sup> January 1978 for Kshs. 675,000 to develop the suit property, and claims that on 30<sup>th</sup> June 1978, Francis Da



- Gama Rose & Co. Advocates wrote a letter forwarding a cheque of Kshs. 500,000, which letter was copied to John Mburu, his client.
117. The 9<sup>th</sup> Defendant argued that Francis Da Gama Rose Advocates consistently and unscrupulously manipulated documents with the purpose of divesting the Public Trustee of his lawfully acquired responsibility, and with the intention of disposing of the suit property for his benefit.
  118. He stated that it is suspicious that the Directors of Muchanga Investment Limited happen to be part of the Da Gama Rose family, which one Francis Da Gama Rose is part of, the same advocate who was the lawyer to John Mburu. This, it was argued, raises the possibility that the lawyer had access to the deceased's estate documents.
  119. In cross-examination, DW9 deponed that he has no title in the name of John Mburu nor does he have a transfer in favour of John Mburu. He stated that he also did not have a receipt for stamp duty, nor a receipt for land rates and rent. While he asserted that John Mburu took a loan of Kshs. 675,000/-, he did not have a charge document in his documents.
  120. He stated that he has the title to LR 8536/2, which is the mother title to the suit property and that the title has the name of John Mburu. He could not however see the name on the title.
  121. DW10 was Nicholus Etyang, who, before his retirement, was in charge of the Land Fraud Unit at the DCI. He acknowledged the report dated 22.04.2015, which had his signature. He stated that the DCI did not conclude its investigations when it was directed to hand over the investigations to EACC.
  122. He stated that they received a report from the wife of the former PC, Carmelina Mburu claiming the suit property. DW10 found that no documentary evidence had been furnished by Carmelima Ngemi Mburu to give directions on her claim; that the DCI had found that the documents furnished by Konzolo were genuine and that the investigation were to be concluded once Da Gama Rose clarified the issues raised in the complaint. According to DW10, the incomplete report was furnished to EACC.

### **Submissions**

123. The Plaintiff, through its Counsel, submitted that it is trite that each party claiming the property must show the root of their ownership. Counsel relied on the cases of Hubert L. Martin and 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR and the Court of Appeal case of Munyu Maina versus Hiram Gathiha Maina.
124. Counsel submitted that the Plaintiff has proved to the required standard that it is the legal and bona fide owner of the suit property; that it is only the Plaintiff who produced the mother title of the land from which the suit property was derived, IR 94 and that the Plaintiff also produced the Certificate of Title for LR No. 3568/3 under IR No. 37285 dated 11<sup>th</sup> February 2014, which shows sequential entries with the original grant.
125. Counsel submitted that from the mother title, IR 94/4 was transferred to Arnold Bradley and that on 27<sup>th</sup> July 1942, 20.2 acres of the land was transferred to William Bertram Warner, which was LR No. 3586/1 and the remaining land LR No. 3586/2 belonged to Arnold Bradley; that at Entry No.20, Arnold Bradley's land LR No. 3586/2 was subdivided into two plots on 2<sup>nd</sup> March 1978 and on the same date, grant of Probate of the Will of Arnold Bradley to Barclays Bank was entered into the title as Entry Number 22; and that the probate shows that Arnold Bradley died on 22<sup>nd</sup> October 1973 and the Probate to his estate was issued to Barclays Bank on 24<sup>th</sup> July 1974.
126. Counsel submitted that it is only Barclays Bank International which had the legal capacity to carry out legal transactions over the suit property after 24<sup>th</sup> July 1974. Accordingly, it was submitted, the



- transfer to the Plaintiff by Barclays Bank through the transfer instrument was lawful. Counsel asserts that the certificate of title was issued on 22<sup>nd</sup> February 1983 in favour of the Plaintiff, and the same was registered as Entry No. 24 in the Original Grant.
127. With respect to the 3<sup>rd</sup> Defendant's Certificate of Title, the Plaintiff's Counsel submitted that Certificate of Title IR No. 31187 on which the 3<sup>rd</sup> Defendant's claim is based is fraudulent, illegal, null and void for multiple reasons.
  128. First, they submit, the purported transfer from Arnold Bradley to John Mugo Kamau as produced by the 3<sup>rd</sup> Defendant is dated 23<sup>rd</sup> August 1978, which is not possible because the grant of Probate of the estate of Arnold Bradley shows he died on 24<sup>th</sup> July 1974. It was submitted that the solicitor who supposedly prepared the transfer, F. Hopley, died on 27<sup>th</sup> July 1960, as evidenced in the Kenya Gazette Notice dated 30<sup>th</sup> August 1960.
  129. It is Counsel's further submission that the transfer instrument between John Mugo Kamau and Telespurce.com Ltd shows that it was received at the Ministry of Lands Central Registry on 25<sup>th</sup> October 2005 and it was registered as IR Number 31187 on 21<sup>st</sup> October 2005. They submit that this is irregular because it suggests that the 3<sup>rd</sup> Defendant became proprietor four days before the transfer was received at the registry.
  130. Counsel contended that since John Mugo Kamau did not have a valid Rent Clearance Certificate, there was no valid consent from the Commissioner of Lands to transfer the property to the 3<sup>rd</sup> Defendant and the transfer is void ab initio. Counsel relied on the Court of Appeal case of Frann Investment Limited vs Kenya Anti-Corruption Commission & 6 others [2024] KECA 714 (KLR).
  131. It was Plaintiff's Counsel submission that the 3<sup>rd</sup> Defendant presented to the Department of Surveys a different Certificate of Title for the suit property when the 3<sup>rd</sup> Defendant was applying for certified copies of the Deed Plans.
  132. The Plaintiff's Counsel submitted that the Administrator of the Estate of Carmelina Mburu has no locus standi to bring a claim on behalf of the Estate of John Mburu as they argue that Carmeline Mburu was not the Administrator of the Estate of John Mburu. It was submitted that the Affidavit of the Assistant Public Trustee at page 28 to 31 of the 9<sup>th</sup> Defendant's List of documents, confirmed that it is the Public Trustee who was the Administrator of the Estate of John Mburu.
  133. It is their argument that neither Carmelina Mburu nor James Kang'ethe Wanyoike were appointed as administrators of the Estate of John Mburu.
  134. Counsel submitted that should this court proceed to consider the 9<sup>th</sup> Defendant's counterclaim, then it is their position that the 9<sup>th</sup> Defendant did not produce a certificate of title for the suit property in the name of John Mburu and that the affidavit by the Public Trustee contained in the 9<sup>th</sup> Defendant's list of documents does not list the suit property as belonging to the properties of John Mburu.
  135. It was Counsel's submission that the Plaintiff adduced sufficient evidence to prove that it has been in possession of the suit property from the time of purchase till 2014 when the suit was filed. This includes Land Rent Clearance Certificate for 2014 showing that the Plaintiff had paid all land rent up to 2014; evidence of rates payments since the property was transferred to the Plaintiff; electricity bills from 1983 to 1990; communication from Safaris Unlimited who were tenants of the suit premises dated 11<sup>th</sup> December 1986 to 14<sup>th</sup> June 1993; security contract over the suit property between the Plaintiff and BABS security Service Limited; letters by Hillcrest International School dated 11<sup>th</sup> August 2011 and 9<sup>th</sup> November 2012; judgement in Civil Appeal No. 25 of 2002 Muchanga Investments Limited



versus Safari Unlimited (Africa) Limited and Others and the Lease agreement between Muchanga Investments limited and Safari Unlimited Africa Limited dated 10<sup>th</sup> May 2010.

136. Counsel for the 3<sup>rd</sup> Defendant submitted that the 3<sup>rd</sup> Defendant has produced documentation in support of its claim over the suit property and has established the root of its title.
137. It was the 3<sup>rd</sup> Defendant's Counsel's submission that the entry on the title produced by the 3<sup>rd</sup> Defendant indicates that indeed, John Mugo Kamau was the registered owner of the suit property at the time the Konzolos entered into the sale agreement. It was further his submission that there is nothing irregular about preparing transfers in the name of an entity which is anticipated for registration.
138. They argue that in the event that the company would not have been incorporated, Mr. Konzolo would have proceeded to register the title under his name.
139. According to the 3<sup>rd</sup> Defendant's Counsel, the Plaintiff's title is illegitimate and should not enjoy protection of Section 26(2) of the [Land Registration Act](#). Counsel submitted that the Plaintiff failed to produce copies of the sale agreement between itself and Barclays Bank, the original transfer, the registered charge over the property or documents to prove that the estate of Arnold Bradley was in actual existence.
140. Counsel contended that although the Plaintiff produced the provisional transfer, there was no proof to show that the final transfer was duly executed and registered. Counsel asserted that the Plaintiff failed to show if the alleged Will of Arnold Bradley was ever propounded and a grant of Probate issued.
141. Counsel relied on the case of Presbyterian Foundation vs Kibera Siranga Self Help Group Nursery School [2023] KECA 371 (KLR) where the court held that where there are competing interest, parties are required to produce evidence of title, starting with a good root of title and an unbroken chain of ownership. They also relied on the Court of Appeal case of Munyu Maina vs Hiram Gathia Maina [2013] eKLR.
142. With respect to Plaintiff's attempt to subdivide the property in 1997, Counsel noted that two months after the Plaintiff was issued with the two subdivided titles the registrar entered a caveat under Section 65(1)(f) of the Registration of Titles Act (now repealed), which section empowers a registrar to enter a caveat to inter alia prevent fraud or improper dealing. They submit that the Plaintiff engineered the subdivisions as an attempt to sanctify the illegal title under their possession
143. The 3<sup>rd</sup> Defendant's Counsel submitted that the Plaintiff has failed to discharge its burden of proof as laid out in Sections 107, 109 and 112 of the [Evidence Act](#). Counsel relied on the definition of the standard of proof on the balance of probabilities as stated in Miller vs Minister of Pensions [1942] All ER 372. They also relied on the Court of Appeal's determination in Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000] eKLR.
144. Counsel for the 3<sup>rd</sup> Defendant submitted that the 9<sup>th</sup> Defendant did not provide documentation to prove his claims to the property. It was submitted that the Certificate of Title produced belongs to a different suit property.
145. The Honourable Attorney General relied on the cases of Nelson Kazungu Chai & 9 others vs Pwani University College [2017] eKLR and Hubert L. Martin & 2 others vs Margaret J. Kamar & 5 others [2016] eKLR. They submitted that it is incumbent upon this court to evaluate the evidence in support of each party's case.



146. On the issue of whether the Plaintiff has provided a valid and legal title to the suit property, Counsel for the Honourable Attorney General submitted that the Plaintiff's ownership of the suit property is reliant on the Certificate of Title IR No. 37385 registered as IR 373285/1 on 11<sup>th</sup> February 1983.
147. He submitted that the transfer to the Plaintiff is indicated as Entry No. 24 in the Register of Titles No. 94. He urged the court to take cognizance of the holding in *Dr. Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua* [1997] eKLR and *Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & Others* [2019] eKLR on the importance of the title in confirming ownership rights.
148. It was the Honourable Attorney General's submission that the Plaintiff satisfied the burden of proof in this matter, and tendered credible and sufficient evidence to discharge the burden of proof which lay on the Plaintiff in line with Sections 107, 108 and 109 of the *Evidence Act*.
149. According to the Attorney General, the Plaintiff has also placed before this court cogent, credible and plausible evidence of fraud and illegality as against the 3<sup>rd</sup> and 9<sup>th</sup> Defendants.
150. Counsel submitted that the creation of title has to accord with the applicable law; that John Mugo never obtained any lawful title to the suit property and there was no lawful interest capable of being transferred to the 3<sup>rd</sup> Defendant.
151. As to the 9<sup>th</sup> Defendant's claim, the Honourable Attorney General submitted that the 9<sup>th</sup> Defendant did not have the locus to commence a claim on behalf of the estate of John Mburu. Counsel argued that it is important to appreciate the necessity of obtaining a grant of letters of administration before commencing any proceedings of the estate of the deceased.
152. Counsel for the 9<sup>th</sup> Defendant submitted the 9<sup>th</sup> Defendant gave an elaborate and documented history of how John Mburu acquired title and possession to the suit property: that John Mburu was registered as the proprietor of the suit property on 7<sup>th</sup> March 1978 for a term of 999 years and that he thereafter secured a credit facility of Kshs. 675,000/- from Barclays Bank to develop the suit property.
153. They contended that the 3<sup>rd</sup> Defendant failed to meet the standards highlighted of a bona fide purchaser and that the title held by the 3<sup>rd</sup> Defendant is invalid as the same was acquired through fraudulent means. They argue that the 3<sup>rd</sup> Defendant's Director (DW1) admitted that he did not carry out due diligence to the required standards before purchasing the property.
154. Counsel submitted that the investigations carried out by DCI were preliminary and were never finalized. Counsel urged that the report was inconclusive with respect to the ownership of the suit property and the irregular subdivisions occasioned on the suit property. It was counsel's submission that EACC's report was unconstructive as it was based on the inconclusive report by the DCI.

### **Analysis and Determination**

155. Having considered the pleadings, the evidence and submissions filed by the parties to this suit, the following issues arise for determination:
  - a. Whether the Plaintiff lawfully acquired title to the suit property.
  - b. Whether the 3<sup>rd</sup> Defendant lawfully acquired title to the suit property.
  - c. Whether the 9<sup>th</sup> Defendant has locus standi; and if so,
  - d. Whether the 9<sup>th</sup> Defendant established that John Mburu was the lawful proprietor of the suit proprietor.



156. This suit concerns the ownership of Land Reference Number 3586/3 which measures 54.39 Hectares (approximately 135 acres) (the suit property) situated in Karen, Nairobi County. The Plaintiff, the 3<sup>rd</sup> Defendant and the 9<sup>th</sup> Defendant have each laid claim to the suit property. The three parties have argued that the other parties illegally and fraudulently obtained title to the land.
157. The Plaintiff's case is that it purchased the suit property from Barclays Bank, which was acting as Executor of the Will of Arnold Bradley, and that in 1983, it was registered as the proprietor of the land and was issued Certificate of Title IR 37285, LR No. 3586/3. The Plaintiff asserted that it has been in occupation of the suit property since then.
158. The Plaintiff stated that it initially sought to subdivide the suit property in 1985, and indeed obtained two Certificates of Title and 199 Deed Plans, but it later surrendered the titles and Deed Plans and the suit property reverted back to the original LR No. 3586/3.
159. The Plaintiff has sought that this court declares that it is the lawfully registered owner of the suit property; that the title which purportedly passed from the 1<sup>st</sup> to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is null and void; that the purported subdivision of the suit property undertaken by the 3<sup>rd</sup> Defendant is illegal, null and void and for cancellation of the titles that were issued to the 3<sup>rd</sup> Defendant and John Mburu, represented by the 9<sup>th</sup> Defendant.
160. The 3<sup>rd</sup> Defendant, on its part, avers that through its director, it acquired the suit property from John Mugo Kamau through an agreement of sale dated 13<sup>th</sup> March 1998; that upon completion of payments in 2001, and thereafter incorporating the 3<sup>rd</sup> Defendant in 2005, the suit property was transferred to the 3<sup>rd</sup> Defendant which was issued with Certificate of Title No. IR 31187 for the same land the Plaintiff is claiming.
161. The 3<sup>rd</sup> Defendant avers that the suit property, L.R. No. 209/3586/3, ceased to exist because it was subdivided and new Certificates of Title L.R Nos. 3586/202-398 were issued in 2014 and consequently, the Plaintiff's cause of action is non-existent in law.
162. The 3<sup>rd</sup> Defendant has filed a Counterclaim against the Plaintiff in which it has sought to be declared the lawfully registered proprietor of the suit property. It has also, inter alia, sought that this court nullifies the Plaintiff's Certificate of Title IR 37285, L.R. No. 209/3586/3.
163. The 3<sup>rd</sup> Defendant's title has been challenged by the Plaintiff as well as by the Attorney General, on behalf of the 4<sup>th</sup> to 7<sup>th</sup> Defendants. The Plaintiff and the Attorney General have argued that John Mugo Kamau did not have a title to pass to the 3<sup>rd</sup> Defendant because he purports to have bought the land from Arnold Bradley in 1978, when in actual fact, Arnold Bradley died in 1973.
164. The 3<sup>rd</sup> Defendant's title is also challenged on the grounds that the transfer from John Mugo Kamau to the 3<sup>rd</sup> Defendant was registered in 2005. However, it is contended, John Mugo Kamau died in 2002 and the said transfer was a nullity.
165. Further, it has been argued that the 3<sup>rd</sup> Defendant had presented and used another different set of title and documents when it applied for the sub division of the land, and not the direct transfer from John Mugo Kamau.
166. The 9<sup>th</sup> Defendant, Joseph Kang'ethe Wanyoike, Executor of the estate of the late Carmelina Mburu, averred that the suit property is in fact the property of the estate of John Mburu, the late husband of Carmelina Mburu. He asserts that John Mburu was registered as the proprietor of the suit land on 7<sup>th</sup> March 1978 and that he thereafter secured a credit facility of Kshs. 675,000 from Barclays Bank to develop the suit property.



167. It is the 9<sup>th</sup> Defendant's contention that M/S Francis Da Gama Rose Advocate consistently and unscrupulously manipulated and altered documents and converted the deceased's properties, including the suit property, to his interests and had it registered in his company's name, the Plaintiff.
168. In the 9<sup>th</sup> Defendant's Counterclaim, it has sought that this court declare that the suit property formed part of the estate of the late John Godhard Ichahuria Mburu and that the same should revert to his estate. The 9<sup>th</sup> Defendant has sought that this court declares that the titles held by third parties in respect to the suit property were procured illegally and fraudulently.
169. The Plaintiff and the Attorney General have stated that Joseph Kang'ethe Wanyoike, the 9<sup>th</sup> Defendant, lacks the locus standi to appear in this suit for the estate of John Mburu. They contend that neither him nor the late Carmelina Mburu hold letters of administration of the Estate of John Mburu.
170. In any case, they assert, the 9<sup>th</sup> Defendant has not presented documentary evidence of John Mburu's title to the suit property and that John Mburu purported to acquire the suit property in 1978 after the demise of Arnold Bradley.
171. All the claims of ownership in this suit arise between 1978 and 2005, under the regime of the Registration of Titles Act (repealed). Section 23(1) of the RTA prescribes that a court shall take a certificate of title as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof. Such a title may however be challenged on the grounds of fraud or misrepresentation to which he is proved to be a party.
172. Each party has a dual burden. The first is to prove that they acquired their title lawfully. In discharging this burden, each party must go beyond producing the title document and establish the root of their title. The parties have each referenced the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] KECA 94 (KLR), where the Court of Appeal held that:

“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 encumbrances including any and all interests which need not be noted on the register.”

173. Similarly, in *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] KEELC 1092 (KLR), the court held as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of



processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

174. This court is further guided by the determination of the Court of Appeal in *Presbyterian Foundation vs Kibera Siranga Self Help Group Nursery School* [2023] KECA 371 (KLR), in which matter it set out the elements of a good root of title where there are competing interests. The Appellate Court held that:

“The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title starting with a “good root of title.” A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title.”

175. In the same decision, the court also noted that in civil cases, the standard of proof is on a preponderance of probabilities. Accordingly, where there are multiple stories that are mutually destructive, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. It stated:

“The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.”

176. It is trite that claims of fraud, like in this case, must not only be pleaded but must be proved as well. The Court of Appeal in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* [2015] KECA 816 (KLR) cited with approval the following passage from *Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition* at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas. 685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

#### **a. Whether the Plaintiff lawfully acquired title to the suit property.**

177. It is not disputed by all the parties that the mother title, IR 94/4, measuring approximately 160 acres, was transferred to Arnold Bradley and that on 27<sup>th</sup> July 1942, IR 94/4 was sub divided into two



portions, with one of the portions measuring 20.2 acres being transferred to William Bertram Warner, which was LR No. 3586/1.

178. It is also not disputed that the remaining land, LR No. 3586/2, remained in the name of Arnold Bradley until his death in 1973. At entry number 20, Arnold Bradley's land, LR No. 3586/2 was subdivided into two plots on 2<sup>nd</sup> March 1978. This the date when the suit property, LR No. 3586/3 measuring 54.4 Ha (approximately 134 acres) was created, with the remaining small portion of land measuring approximately 4 acres being bequeathed to his daughter at entry number 21.
179. On the same date, that is 2<sup>nd</sup> March, 1978, grant of Probate of the Will of Arnold Bradley to Barclays Bank was registered and endorsed on the title as entry number 22. The Probate shows that Arnold Bradley died on 22<sup>nd</sup> October 1973 and the Probate to his estate was issued to Barclays Bank on 24<sup>th</sup> July 1974.
180. It is not disputed that the Plaintiff company was incorporated on 18<sup>th</sup> April 1978. A certificate of incorporation to that effect was produced in evidence. Hon. Moody Awori, PW1, testified that the directors of the Plaintiff company as at the time of incorporation were himself, his wife and Horatius Da Gama Rose, who was the executive director of the Plaintiff company. However, he retired as a director of the company when he was appointed the Vice President in the year 2003.
181. The Plaintiff's case is that it bought the suit property from Barclays Bank Limited, which was as the Executor of the Will of Arnold Bradley for a consideration of Kshs. 1,250,000. Horatius Da Gama Rose, the executive director of the Plaintiff, indicated in his written statement, which was adopted as his testimony, that the negotiations with the Bank to purchase the suit property began in 1982, with the property being registered in the Plaintiff's name in 1983.
182. However, it is apparent from several letters produced by the Plaintiff in its two bundles and in the 9<sup>th</sup> Defendant's bundle, that negotiations between Barclays Bank, the firm of Kaplan & Stratton Advocates, who were acting for the Bank, and Francis Da Gama Rose, the father of Horatius Da Gama Rose, in respect to the sale of the suit property, began way back in 1977 and not 1982.
183. To buttress its claim of ownership to the suit property, the Plaintiff adduced into evidence "a Provisional Transfer" in its favor from Barclays Bank registered on 11<sup>th</sup> February 1983. This is the transfer that gave rise to the Plaintiff's title.
184. The two legal issues which this court will consider is whether Barclays Bank was vested with the capacity to sell the suit property to the Plaintiff, and whether indeed the Plaintiff has established that it lawfully purchased the suit property.
185. The Plaintiff produced a Will executed by Arnold Bradley dated 15<sup>th</sup> August 1969. In his Will, Arnold Bradley appointed his wife, Ms. Jeannette Sarah Bradley to be the sole Executrix and Trustee of his 'Kenya Will'. The Will provided that in the event his wife predeceases him or fails to take out Probate of his Will, which he termed his 'Kenya Will', he appointed Barclays Kenya D.C.O. to be the Executor and Trustee of the Will. Clause 3 of the Will in this respect stated as follows:

"In the event of my said wife predeceasing me or failing to take out Probate of this my Kenya will then I appoint Barclays Bank D.C.O. to be the Executor and Trustee of this my Will with power to act by its proper officer or officers and also to act as Bankers to my Estate for all purposes upon the terms usual between the Bank and a customer and the Bank shall also be entitled to remuneration for its services as such Executor and Trustee by fees and otherwise



in accordance with the terms of remuneration charged by it at the date of my death for its service in acting as Executor and Trustee of a Will...”

186. It is not clear whether Arnold Bradley’s wife predeceased him or simply neglected to take out Probate of this Will. In any case, Barclays Bank of Kenya took out Probate of the Will in High Court Probate Administration Cause No. 50 of 1974.

187. As noted in the grant of Probate, the Bank was required to make a full inventory of the property and credits of the late Arnold Bradley and to exhibit the said inventory within six months from the date of the grant, and also to render to the court a true account of the property and credits within one year from the said date.

188. The powers of the Executor to dispose of the property at that point in time was prescribed under Section 90 of the Indian Probate and Administration Act of 1881, which stated:

- “(1) An Executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.
- (2) The power of an Executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.
- (3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—
- (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under section 4, or
- (b) lease any such property for a term exceeding five years.
- (4) A disposal of property by an Executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property.”

189. Section 12 of the 1881 Indian Probate Act prescribed that when a Probate of Will is granted, it establishes the Will from the death of the testator and renders valid all intermediate acts of the Executor as such. This provision has been maintained under Section 80(1) of the Law of Succession 1981.

190. Under the 1881 Indian Probate and Administration Act, there was no express requirement for confirmation of grant. The Patna High Court in *Ramcharan Singh vs Mst. Dharohar Kuer* AIR 1954 PATNA 175 quoted with approval the finding of the court in *Kadiyala Venkata Sabamma vs Katreddi Ramayya* (1932) 34 BOM LR 764, which held that under the 1881 Act, it was not compulsory for an Executor to take out Probate. It stated:

“There can be no doubt that in England the title of an Executor is derived from the will and not from probate, though it is probate alone which authenticates his right: see *Williams on Executors*, Edn. 12 p. 1226. Section 12 Probate and Administration Act, is a reproduction of Section 188, Succession Act of 1865, and it has always been recognised that the latter



Act was largely based on English Law. It is not suggested that this doctrine is for any reason inapplicable to the wills of Hindus and their Lordships think that the material parts of Sections 4 and 90 which are set out above, afford a strong indication in themselves that the legislature intended to adopt it.

...

So, too Section 90(2) ...clearly conceives of an Executor not clothed with probate being able to dispose of the property "vested in him under Section 4... It makes such power subject to any restriction imposed by the will "unless probate has been granted," in which case the Court may relieve him from the restriction. In view of the terms of this section their Lordships think it would be impossible to hold that before probate nothing vested in the Executor, and that he had no power of disposal at all."

191. It is therefore trite law that under the law then, an Executor's title dates from the death of the deceased and springs from the Will, not from the grant of Probate. In the case of *Kothari vs Qureshi & Another* [1967] EA 564, this distinction was made thus:

"It is elementary law that an Executor's title dates from the death of the deceased and springs from the will not from the grant of probate. An Executor's actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will. Probate is merely authentication of the will in such cases...The position of an administrator is different; his rights date from the grant of letters of administration and any prior acts of administration of the estate can only be validated by the doctrine of relation back from the grant..."

192. From the above law and court's decisions, there was no legal imperative to register the Probate of Will, as is the current position under the *Law of Succession Act* 1981. This court must all the same ascertain if the Bank undertook its mandate as vested upon it by the Will of Arnold Bradley.
193. In his Will, Arnold Bradley bequeathed a four (4) acres portion of LR No. 3586 which was occupied by his daughter Arnette, Therese Benson, together with all buildings and improvements thereon to the said daughter for her own use and benefit absolutely.
194. The Bank as Executor effected the transfer of these four acres to Annette Therese Benson, which is recorded in IR 94 as Entry No. 23. It is noted that LR 3586/2/2 measuring 2.019ha was transferred to Arnold Bradley's daughter under Certificate of Title IR 31884. This entry was registered on 2<sup>nd</sup> March 1978.
195. Further still, in his Will, Arnold Bradley bequeathed the rest of his 'Kenyan estate' not disposed of unto his trustee to be sold and the proceeds of such sale to be held in trust for the beneficiaries of his Estate. The Will states:

"I give devise and bequeath all my Kenya estate not hereby or by any codicil hereto otherwise disposed of unto my Trustee upon trust as when and how they shall think fit to call in, sell and convert into money such part thereof as may not consist of money with power to postpone such sale calling in and conversion in whole or in part for such period as they without being liable for the exercise of discretion in so postponing may think property and with power to retain any part thereof in the same state of investment as at my death and upon trust out of my ready money and the money to arise from such sale, calling in and conversion (after paying of costs) to pay or provide for my funeral and testamentary expenses and Kenya debts and all Kenya duties payable out of my Kenya Estate and any legacies given hereby or by



any codicil hereto and the Kenya duty on any legacy given free of duty but so that all legacies and duties shall be paid primarily out of my personal and movable Kenya Estate and upon trust to hold the residue of such money and the investments for the time being representing the same and any part of my Kenya Estate for the time being unconverted (hereinafter referred to as “ my Residuary Kenya Estate”) upon the trusts hereinafter mentioned.

My Trustee shall hold my residuary Kenya Estate upon trust for my friend Edith Dorothy Brounger..”

196. DW7, Emmanuel Arunga, from the EACC was cross-examined on the contents of an Affidavit sworn by Waweru Mathenge, Company Secretary from Barclays Bank. Counsel for the 3<sup>rd</sup> Defendant also relied on this affidavit as it gives an overview of the role that the Bank played as Executor and trustee of the Estate of Arnold Bradley.
197. With respect to the suit property, which measures 54.39 hectares, the Will stated that it was to be sold and the profits held in trust for Edith Dorothy Brounger. The Bank noted in the Affidavit sworn by Waweru Mathenge, its Company Secretary, that Edith Dorothy Brounger died on 29<sup>th</sup> January 1974.
198. The Bank’s Company Secretary further deposed that the Probate of her Will (Edith Dorothy Brounger) was granted to the administrator of her estate, Thomas Owen Crundwell. However, by a deed dated 26<sup>th</sup> August 1975, Mr. Crundwell disclaimed all interest in the residue of Mr. Bradley’s Kenyan estate.
199. Mr. Waweru, the Banks’s Company Secretary, deponed in his Affidavit, and in cross examination during the hearing of an interlocutory application, that pursuant to Section 30 of the Indian Succession Act (now repealed), Mr. Bradley’s children, being of full age, became entitled to the residue of the estate in equal shares absolutely.
200. He stated that through A Further Deed of Family Arrangement in 1979, the residue of the estate of Arnold Bradly was to be distributed equally between Annette Therese Benson and Imogen Lindsay Poppleton.
201. The Bank’s position was that the consequence of Mr. Crundwell rejecting the bequest from Arnold Bradley’s Estate was that the suit property fell for distribution under the rules of intestacy. The Company Secretary of the Bank submitted that Section 30 of the Indian Succession Act 1925 prescribed that:

“ A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.”
202. The distribution of the estate between Arnold Bradley’s daughters was thereby in accordance with the laws on intestacy. Arnold Bradley gave his Trustee/Executor the rights to sell the suit property and after settling his debts and paying for his funeral expenses, to hold the balance of the funds obtained therefrom in trust for his Estate.
203. The role of trustee was undertaken by Barclays Bank. The Bank annexed executorship statements on the Affidavit of its Company Secretary. The statements detail the manner in which they managed the trust account for the benefit of Annette Therese Benson and Imogen Lindsay Poppleton, the children of Arnold.
204. These records do not however disclose the date when the suit property was sold nor the purchaser of the land. The records do not even show the receipt of the proceeds from the sale of the suit property. The Company Secretary only stated that the process of transferring the suit property and payment of



- legal fees had been completed as at 31<sup>st</sup> January 1983. The Bank neither produced in evidence the sale agreement, evidence of payments nor the transfer document.
205. The issue of whether the Plaintiff bought the suit property was contested by the Defendants. This notwithstanding, and despite producing correspondences by the advocates and the Bank running from 1977 in respect to the sale of the suit property, the Plaintiff did not adduce the sale agreement to show the terms under which it bought the suit property, if at all.
  206. Nothing would have been easier than for the Plaintiff to call a witness from Barclays Bank to present proof of the sale of the suit property, or to produce this crucial document. The Bank on its part, through the Affidavit sworn by Mr. Waweru Mathenge, other than stating that the suit property was sold, did not state to whom the land was sold, for how much and how the proceeds were applied.
  207. This court has carefully considered the documentary evidence adduced by the Plaintiff, particularly the letters between Barclays Bank, Francis Da Gama Rose and Co. Advocates and Kaplan and Stratton Advocates exchanged in 1978, as well as the letter dated 30<sup>th</sup> June 1978 annexed on the 9<sup>th</sup> Defendant's Bundle.
  208. The subject reference of all these letters, LR No. 3586/3 Langata Nairobi, is identical. The references of the parties are also identical in all the letters. With respect to the firm of Kaplan & Stratton, their reference is WDG/86/2165; the reference of the letters by Francis Da Gama Rose & Co. Advocates is NRB/D.751/17 and the reference of Barclays Bank's letters is BM/E. 1286/NSE.
  209. These references are also on the letter dated 30<sup>th</sup> June 1978 produced by the 9<sup>th</sup> Defendant, which letter, although denied by the Plaintiff, read alongside other letters, weaves together a scheme perpetrated by the Plaintiff in respect to the suit property, under the direction of its demised executive director, Horatius Da Gama Rose and advocate Francis Da Gama Rose.
  210. From the letters produced by the Plaintiff and the 9<sup>th</sup> Defendant, this court makes the following findings of fact. In the transaction for the sale of the suit property which began before 1978, the firm of Kaplan & Stratton Advocates acted for Barclays Bank, as Executor and Trustee of the Estate of Arnold, and the firm of Francis Da Gama Rose & Co. Advocates acted for J.G. Mburu, until late 1978, when Horatius Da Gama Rose, as a director of the Plaintiff came into the picture.
  211. This finding is made on the basis of the letters dated 30<sup>th</sup> June, 1978 and 15<sup>th</sup> August 1978, authored by Francis Da Gama Rose and Co Advocates and addressed to Kaplan and Stratton Advocates (advocates for the Bank). In the letter dated 30<sup>th</sup> June, 1978, Francis Da Gama Rose Advocate enclosed a cheque for Kshs. 500,000 "in accordance with clause 2 (b) of the agreement."
  212. In the said letter, the purchaser's advocate asked the Bank's advocate to confirm that his client has until 30<sup>th</sup> September, 1978 to furnish them with the consent for the change of user. Although the letter of 30<sup>th</sup> June, 1978 did not name the client, the letter was copied to J. G. Mburu. In the absence of evidence to the contrary, this court can only conclude that the client who had paid the said sum was J. G. Mburu, who could as well be John Godhard Ichahuria Mburu, who died in 1981, and currently represented by the 9<sup>th</sup> Defendant.
  213. Francis Da Gama Rose Advocate authored another letter dated 15<sup>th</sup> August, 1978 to the Bank's advocate, Kaplan and Stratton, in which he forwarded the balance of the purchase price of Kshs 625,000. In the said letter, the advocate stated as follows:

"Re: L.R No. 3586/3 - Langata



We refer to the previous correspondence with regard to this matter and enclose herewith our cheque for Kshs 625,000 being the balance of the purchase.

Please release the entire purchase price i.e Shs 1,250,000 to Barclays Bank International Limited (Trustee Branch), Nairobi upon their undertaking that they shall comply with the terms of our letters of 14<sup>th</sup> July, 1978 and 1<sup>st</sup> August, 1978 and also the terms of the Agreement of Sale dated 16<sup>th</sup> December, 1977...”

214. This letter did not mention the name of the client Francis Da Gama Rose & Co. Advocates were acting for. However, the letter dated 15<sup>th</sup> August, 1978 confirmed that there was a Sale Agreement dated 16<sup>th</sup> December 1977, which had been signed way before the incorporation of Muchanga Investments Limited, the Plaintiff herein. The purchase price was paid on the basis of the said Sale Agreement.
215. The existence of the signed Sale Agreement before the incorporation of the Plaintiff is further confirmed by the letter dated 18<sup>th</sup> January, 1978 produced by the Plaintiff. In the said letter, the firm of Kaplan & Stratton enclosed the duly signed agreement, and informed the firm of Francis Da Gama Rose & Co. Advocates that they were proceeding to have the same stamped.
216. The letter dated 30<sup>th</sup> June 1978, which is in the 9<sup>th</sup> Defendant’s bundle, gives an indication of whom Francis Da Gama Rose & Co. Advocates were acting for, and the source of the purchase price. I say so because, it is trite that advocates ordinarily copy letters to their clients. This letter was copied to their client, J.G. Mburu, and not the Plaintiff.
217. Considering that the Plaintiff’s own letters shows that there was a sale agreement as at 16<sup>th</sup> December, 1977, which had been signed by both parties as at 18<sup>th</sup> January, 1978, and the Plaintiff having been incorporated on 18<sup>th</sup> April, 1978, it follows that neither the Plaintiff nor Horatius Da Gama Rose, the executive director of the Plaintiff, purchased the suit property.
218. This position is collaborated by the testimony of PW1 and the statement of Horatius Da Gama Rose, the Directors of the Plaintiff, which was adopted as his testimony. The two Directors informed the court that the Plaintiff entered into negotiations with the legal representatives of the Estate of Arnold Brandley, Barclays Bank Limited for the purchase of the suit property in the year 1982.
219. As I have stated, by 1982 the Sale Agreement dated 16<sup>th</sup> December, 1977 had already been signed, and the entire purchase price released to the Bank’s advocate. The evidence as to whether the purchase price was ever released to the Bank in trust for the Estate of Arnold Brandley was not adduced by the Plaintiff or the Bank.
220. That explains why the Plaintiff did not produce the Sale Agreement dated 16<sup>th</sup> December, 1977 in evidence. Indeed, PW1, the Plaintiff’s Director as at the time of incorporation, stated that although he saw the Sale Agreement, he does not remember signing it. It was his evidence that he could not remember the amount of money the Plaintiff paid for the land, and that the Plaintiff purchased the land in 1983, having stated the negotiations in 1982.
221. The evidence before this court further shows that by 1982, when the Plaintiff’s Directors say they entered into negotiations with the legal representative of the Estate of Arnold Brandley, and the subsequent registration of the title in the name of the Plaintiff in 1983, J. G. Mburu, who was Francis Da Gama Rose’s client, had died in 1981.
222. It is therefore the finding of this court that there was a Sale Agreement between the Bank and a third party, which this court has found on circumstantial evidence, to be the late John Mburu, and not the Plaintiff. However, neither the Plaintiff nor the 9<sup>th</sup> Defendant adduced the said Sale Agreement.



223. Further, it is the finding of this court that the late John Mburu had paid part of the price for the suit property, through his then advocate, and pursuant to the 1977 Sale Agreement, Barclays Bank forwarded the title of the suit property to the firm of Francis Da Gama Rose Advocates on 7<sup>th</sup> September 1978.
224. It is after this date of 7<sup>th</sup> September 1978 that there was a material change in the transaction as several letters by the Bank and its advocates, Kaplan & Stratton, to Francis Da Gama Rose & Co. Advocates went unanswered.
225. These are the letters dated 25<sup>th</sup> October 1978, 24<sup>th</sup> November 1978 and 29<sup>th</sup> November 1978, which sought the income tax reference of Francis Da Gama Rose & Co. Advocates' client for the purposes of exemption from capital gains tax. The subsequent letter is dated 7<sup>th</sup> December 1978, advising N.A. Dundas, a tenant on the suit property, that the suit property had been sold, and that he ought to make monthly rental payment to Muchanga Investments Ltd.
226. It is curious that despite numerous letters by the Bank, the purchaser's advocate declined to give the details of his client to the Bank or the Income Tax Department for exemption from Capital Gains Tax. This, in my view, was due to the fact that the Advocate did not to transfer the property to the person who had signed the Sale Agreement dated 16<sup>th</sup> December, 1977.
227. The Plaintiff, and the firm of Francis Da Gama Rose & Co. Advocates endeavored through falsehood to conceal the earlier transaction which commenced with the 1977 sale agreement. This court has carefully considered the Plaintiff's bundles and testimony of witnesses, and arrived at the conclusion that no Sale Agreement was ever executed between the Plaintiff and the Bank.
228. Further, there is no evidence before this court to show that any purchase price was paid by the Plaintiff, and acknowledged by Barclays Bank, which was acting on behalf of the beneficiaries of the Estate of Arnold Brandley. Indeed, the Company Secretary of the Bank, in his Affidavit, did not allude to any payment of the purchase price to the Bank by the Plaintiff, or at all.
229. Horatius Da Gama Rose was the Executive Director of the Plaintiff company, and was the son of Francis Da Gama Rose Advocate. He also worked in the firm of Francis Da Gama Rose & Co. Advocates as an advocate.
230. The foregoing analysis leads this court to conclude that Francis Da Gama Rose Advocate and Horatius Da Gama Rose, the Plaintiff's executive director, and also an Advocate, abused their positions of trust as advocates to their client as at 16<sup>th</sup> December, 1997 and had the suit property transferred to their company, the Plaintiff.
231. Unfortunately, the Estate of the J.G. Mburu, who was their client in question, cannot enforce the 1977 Sale Agreement because they neither have the Sale Agreement, nor evidence to show that the purchase price that was paid for the suit property passed to Barclays Bank as contemplated in the Will of Arnold Brandley.
232. For those reasons, notwithstanding that the Plaintiff took possession of the suit property in 1983, and has been paying the requisite rent and rates, this court must conclude that the Plaintiff has failed to establish that it lawfully acquired title to the suit property.
233. Indeed, based on the documents on record, it is the finding of the court that the Certificate of Title for L.R. No. 3586/3 dated 11<sup>th</sup> February, 1983 in the name of the Plaintiff, Muchanga Investments Limited, was fraudulently acquired.



### **Whether the 3<sup>rd</sup> Defendant lawfully acquired title to the suit property**

234. The 3<sup>rd</sup> Defendant's case is that it lawfully purchased the suit property from John Mugo Kamau through an agreement of sale dated 13<sup>th</sup> March 1998 between Josphert Milimu Konzolo and his wife Noelle Imbaga Konzolo for a consideration of Kshs. 96 million. At this point in time, Telesource.com Limited, the 3<sup>rd</sup> Defendant, had not been incorporated.
235. Mr. Josphert Milimu Konzolo testified that he paid the entire purchase price in cash, which was acknowledged by the vendor, who upon completion, signed a schedule of acknowledgment of payment. He also stated in court that him and his wife agreed that they should transfer the property to a company and they asked their advocate to ensure that this option was kept available to them in the transfer documents.
236. According to the 3<sup>rd</sup> Defendant, their advocate got the vendor to sign two sets of transfers over a number of years. These transfers were dated 2001, 2002, 2003, 2004 and 2005. Mr. Konzolo testified that when they eventually registered Telesource.com as a company on 14<sup>th</sup> September 2005, they lodged the transfer for registration on 17<sup>th</sup> October 2005.
237. The Plaintiff contends that the 3<sup>rd</sup> Defendant's title is fraudulent as the purported transfer from Arnold Bradley to John Mugo Kamau is dated 23<sup>rd</sup> August 1978, yet Arnold Bradley had died on 22<sup>nd</sup> October 1973. The Plaintiff adduced a copy of the Probate of the Will of the Estate of Arnold Bradley issued in High Court Probate and Administration Cause Number 50 of 1974.
238. The Plaintiff also relied on the mother title IR 94 which at entry number 22 indicates that the Grant of Probate of the Estate of Arnold Bradley was registered against the title of the suit property on 2<sup>nd</sup> March 1978. The evidence that Arnold Bradley died on 22<sup>nd</sup> October 1973 was not rebutted and stands uncontroverted. And yet, at on point has it been alleged that John Mugo Kamau purchased the suit property from Arnold Bradley. The purported transfer of the tile to John Mugo Kamau was on the face of it fraudulent.
239. The root of the 3<sup>rd</sup> Defendant's title is thereby tainted, as John Mugo Kamau could not possibly have acquired the property from Arnold Bradley at the time he claimed.
240. Even if this court was to somehow find that John Mugo Kamau had legal title to the suit property, which he did not, the registration of the title in favor of the 3<sup>rd</sup> Defendant is riddled with several procedural and legal gaps which render the same null and void.
241. I say so because as at 2005, when the transfers in favor of the 3<sup>rd</sup> Defendant were lodged for registration, it has not been disputed that the vendor, John Mugo Kamau was deceased. The Plaintiff adduced a copy of his death certificate from the Registrar of Births and Deaths, which shows that John Mugo Kamau died on 27<sup>th</sup> April 2002.
242. On the basis of the weight of the evidence presented by the Plaintiff and by the EACC, this court is satisfied that the title issued to the 3<sup>rd</sup> Defendant, IR No. 31187 was fraudulent, illegal, null and void ab initio.
243. The effect of this finding is that the purported subdivision undertaken by the 3<sup>rd</sup> Defendant, the issuance of Deed Plan numbers L.R No. 3586/202-398 and Certificates of Titles to the 196 new parcels of land which were created in 2014 are therefore null and void ab initio. Equally, the sale of title numbers LR No. 209/3586/380,381, 382, 388 and 390 to Wanainchi Supplies Limited by the 3<sup>rd</sup> Defendant was unlawful, null and void ab initio.



244. There is also in existence Title IR 32276 for the same land in the name of the 3<sup>rd</sup> Defendant. According to the copy of the title adduced by the Plaintiff, this title was first registered in the of the 1<sup>st</sup> Defendant on 2<sup>nd</sup> March 1978, then transferred to the 2<sup>nd</sup> Defendant on 26<sup>th</sup> March 1983 and then transferred to the 3<sup>rd</sup> Defendant on 17<sup>th</sup> March 1994. The 3<sup>rd</sup> Defendant has itself denied the validity of this title.
245. Indeed, Title IR No. 32276 does not indicate from whom the 1<sup>st</sup> Defendant purchased the suit property from and there is no evidence to support its validity. This court therefore finds that the said title is fraudulent and invalid. The same is for cancelling.

**Whether the 9<sup>th</sup> Defendant established that John Mburu was the lawful proprietor of the suit proprietor.**

246. The 9<sup>th</sup> Defendant, Joseph Kang'ethe Wanyoike, as an administrator of the estate of the late Carmelina Mburu has argued that the suit property lawfully belongs to the estate of the late John Mburu. He argued that Francis Da Gama Rose, who was the advocate of John Mburu prior to his demise, abused his privilege and obtained the suit property for his own interests.
247. In her statement, the late Carmelina Mburu informed the court that upon the demise of John Mburu and the appointment of the Public Trustee as the Administrator of the Estate of John Mburu, Francis Da Gama Rose failed to list the suit property as one of the assets of the estate.
248. The 9<sup>th</sup> Defendant presented before this court several documents to support the counterclaim including the certificate of title for the suit property registered in the name of John Mburu; a letter from the firm of Francis Da Gama Rose to John Mburu dated 30<sup>th</sup> June 1978; the letter dated 30<sup>th</sup> June 1978 from Francis Da Gama Rose to Kaplan & Stratton Advocates and the death certificate of John Godhard Ichahuria Mburu who died on 27<sup>th</sup> October 1981.
249. Also produced are the letters of administration intestate dated 23<sup>rd</sup> August 1983 in favour of the Public Trustee of Kenya; letter dated 13<sup>th</sup> October 1983 from the Public Trustee to Carmelina Mburu; letter dated 17<sup>th</sup> September 1990 from Carmelina Mburu to the office of the Attorney General; the letter dated 4<sup>th</sup> August 1997 from Carmelina Mburu to the office of the President and the letter dated 30<sup>th</sup> April 2014 to the Director of the Ethics and Anti-Corruption Commission.
250. Both the Plaintiff and the Honourable Attorney General have contended that Joseph Kang'ethe Wanyoike has no locus standi to bring a claim on behalf of the Estate of John Mburu. They argue that Carmelina Mburu was not the Administrator of the Estate of John Mburu and Joseph Wanyoike has not been appointed as a personal representative of the estate of the late John Mburu.
251. It is not a disputed fact that it is the Public Trustee who was the Administrator of the Estate of John Mburu. Further, that while Joseph Kang'ethe Wanyoike has been appointed as a personal representative of the estate of Carmelina Mburu, he has not been appointed as a personal representative of the estate of John Mburu.
252. It is trite that locus standi is a primary point of law which would render a suit incompetent. Section 82(a) of the *Law of Succession Act* provides that personal representatives shall exercise the power to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.
253. It should be pointed out that the provisions in Section 82 of the *Law of Succession Act* can only be fully exercised by a substantive administrator, who is the person holding, not a Limited Grant, but a full Grant.



254. That being so, the 9<sup>th</sup> Defendant does not have the locus standi to represent the Estate of John Mburu for lack of a full grant in that respect. The 9<sup>th</sup> Defendant's Defence and Counterclaim is accordingly incompetent and for dismissal.
255. Were this court to consider the 9<sup>th</sup> Defendant's suit on its merits, this court has made a factual finding that the circumstantial evidence shows that John Mburu indeed entered into a sale agreement with Barclays Bank and paid the purchase price of Kshs. 1,250,000 to his then advocate, Francis Da Gama Rose.
256. However, there was no evidence that the Bank received the money, neither was the actual sale agreement produced in evidence to enable the court to know its terms.
257. Fundamentally, however, the 9<sup>th</sup> Defendant's bundle of documents has a copy of the mother title showing that John Mburu was registered as the owner of the suit property on 7<sup>th</sup> March, 1978. This entry is fraudulent because it is missing the critical entry of the issuance of the Probate of Will to Barclays Bank on 2<sup>nd</sup> March 1978.
258. Further, there is no evidence to show that indeed the Executor of the Will of the late Arnold signed the transfer in favour of John Mburu before the purported transfer to John Mburu on 7<sup>th</sup> March, 1978.

### **The final orders of the court**

259. This court has found that none of the parties in this suit are the lawful proprietors of the suit property. This means that the last entity to hold legal title to the property was Barclays Bank International Limited, as Executor and trustee of the Estate of Arnold Brandley. The Bank did not however enter appearance and did not give any evidence as to the surviving heirs of Arnold Bradley.
260. According to the Affidavit of the Bank's Company Secretary, prior to the year 2000, the provided trustee services through Barclays Trust Investment Services. He deposed that the investment arm of Barclays Investment Services was sold to Old Mutual Asset Managers and trustee business wound up.
261. The court having declared all the titles that were issued in respect of the suit property after the demise of Arnold Brandley were fraudulent, the suit property, being L.R No. 3586/3 measuring 54.39 Hectares (approximately 135 acres) should revert to the Executor of the Will of Arnold Brandley, and be administered pursuant to the provisions of the [Law of Succession Act](#).
262. Since 2014, when Mr. Waweru Mathenge swore an affidavit on behalf of Barclays Bank, this court takes judicial notice that the London based Barclays Bank International Limited has since sold off its interest in Barclays Africa, which is now functioning under the name Absa Bank.
263. What then becomes of the suit property? This court is guided under Section 3A of the [Civil Procedure Act](#) to exercise its inherent powers to make such orders as may be necessary for the ends of justice. As held by the Court of Appeal in Kenya Power & Lighting Company Limited vs Benzene Holdings Limited t/a Wyco Paints [2016] KECA 73 (KLR), this inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.
264. In these circumstances, it is necessary that the Public Trustee takes out letters of administration with respect to the suit property, for the purposes of ascertaining the surviving heirs of Arnold Bradley.
265. Section 7 of the [Public Trustee Act](#) prescribes that a court may on its own motion or at the application of the Public Trustee issue letters of administration over the estate of a deceased person.



266. This court, however, does not have the legal mandate to issue letters of administration. This is a preserve of the High Court. This court can only enjoin the office of the Public Trustee to make an application at the High Court for issuance of letters of administration.
267. In the circumstances, and for the reasons given above, the court makes the following final determinations:
- a. A declaration be and is hereby issued that the Plaintiff, (Muchanga Investments Limited), the 1<sup>st</sup> Defendant (Habenga Holdings Limited), the 2<sup>nd</sup> Defendant (Jina Enterprises Limited), the 3<sup>rd</sup> Defendant (Telesource.com Limited) and John Gohard Mburu acquired Certificates of Title in respect of Land Reference Number 209/3586/3 situated in Karen area within the County of Nairobi, unlawfully and fraudulently.
  - b. A declaration be and is hereby issued that the Certificates of Title held by the Plaintiff, (Muchanga Investments Limited), the 1<sup>st</sup> Defendant (Habenga Holdings Limited), the 2<sup>nd</sup> Defendant (Jina Enterprises Limited), the 3<sup>rd</sup> Defendant (Telesource.com Limited), John Gohard Mburu and or any person acting under them in respect of Land Reference Number 209/3586/3, situated in Karen area within the County of Nairobi, are null and void.
  - c. A declaration be and is hereby issued that any Deed Plans and Certificates of Title emanating from the sub-division of Land Reference Number 209/3586/3, including, but not limited to L.R. Numbers 209/3586/202-398, situated in Karen area within the County of Nairobi, are null and void.
  - d. An order be and is hereby issued directing the Chief Land Registrar to cancel and revoke all the Certificates of Title in respect of Land Reference Number 209/3586/3, and any sub-divisions thereof, which include, but not limited to L.R. Numbers 209/3586/202-398.
  - e. Save for the Public Trustee, a permanent injunction be and is hereby issued restraining all the parties to this suit and the Counterclaim, their agents, employees, servants, and/or anyone acting at their behest or whosoever else from transferring, selling, alienating, charging, trespassing, fencing, subdividing, dealing in or interfering in any manner whatsoever with Land Reference Number 209/3586/3.
  - f. The Public Trustee shall, within 30 days of the delivery of this Judgment, and pursuant to the finding of this court, file an application before the High Court at Nairobi for appointment as Administrator of the Estate of Arnold Bradley, over his residual estate, being Land Reference Number 3586/3, for the purpose of identifying the beneficiaries of the estate, if any, and distribution of Land Reference Number 3586/3 in accordance with the *Law of Succession Act*.
  - g. Each party shall bear its/his own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Wena for Plaintiff

Mr. Kimutai for Kago for 3<sup>rd</sup> Defendant



Mr. Okayo holding brief for Mr. Odari for Interested Party

Mr. Glen holding brief for Owour for 9<sup>th</sup> Defendant

Mr. Allan Kamau for 4<sup>th</sup> – 7<sup>th</sup> Defendant

Court Assistant: Tracy

