



**Elms v Taisir & 2 others (Environment & Land Case 192 of 2021)
[2023] KEELC 16795 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 192 OF 2021
LL NAIKUNI, J
FEBRUARY 28, 2023**

BETWEEN

JEAN MARGARET ELMS PLAINTIFF

AND

MADFIDH KARAMA TAISIR 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

I. Preliminary

1. The Judgment before this Honorable Court pertains to a Suit instituted by Jean Margaret Elms, the Plaintiff herein. The Plaintiff moved this Honorable Court under the Certificate of Urgency, a Notice of Motion application and a Plaint dated 16th September, 2021 the pleadings were filed in Court on 20th September, 2021 against the 1st, 2nd and 3rd Defendants herein. She sought temporary injunction Orders restraining the Defendants from further dealing with all that parcel of Land Known as Sub-division No. 794 (Original No. 68/12) of Section II Mainland North delineated on Land Survey Plan No. 70063 measuring 0.47 acres situate in the County of Mombasa (Hereinafter referred to as “The Suit Land”) until the case was heard and determined. On 18th October, 2021 the Honorable Court granted the Plaintiff orders to the effect that the current status quo be maintained meaning having both possession and title be preserved until the application was heard and/or until further orders of this Court.
2. Based on the affidavit of service sworn by Mr. Titus Munyao Nyenge dated 15th October, 2021, the 2nd and 3rd Defendants were successfully served with Summons to enter appearance. Indeed on 19th January, 2022, 2nd and 3rd Defendants entered appearance and filed a Statement of Defence dated 17th



January, 2022. On 3rd March, 2022 the Plaintiff filed a Reply to the filed Defence by the 2nd and 3rd Defendants herein.

3. On 18th October, 2021, the Plaintiff sought and was granted leave of Court to serve the 1st Defendant by way of substituted means, under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010. Indeed, the Plaintiff proceeded to publish an advertisement notice in one of the local dailies “The Daily Nation” newspaper the edition of 27th October, 2021 which has a wide national circulation. Despite this still the 1st Defendant failed to neither complied with the provisions of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010 to wit, entering appearance, filing any Defences and/or Counter Claim and filing of documents and witness statements to the suit filed against the Plaintiff.
4. On 24th February, 2022 the Plaintiff requested Judgment in default to be entered against the 1st Defendant under the Provision of Order 10 Rules 4, 7, 9 and 10 of the Civil Procedure Rules, 2010. However, being a land matter and its sensitivities, the Court directed that the matter proceeds on for formal proof against the 1st Defendant at an appropriate fixed period.
5. On 16th June, 2022 and 7th October, 2022 the matter proceeded on for full trial and both the Plaintiff and the 2nd and 3rd Defendants closed their cases. I must hasten to state that this is one of those cases that this Court has handled in such an expedient record time.

II. The Plaintiff’s Case

6. From the filed pleadings the Plaintiff held that at all material times, she was the bona fide registered owner of all that property known as suit land having jointly acquired it with her husband Brian Elms (Hereinafter referred to as “The Deceased”) for value and obtained registration of their interest as Joint owners on the title deed on 7th December, 1977 conferring absolute ownership of the property free from any encumbrances. The husband died on 26th June, 2020 and the interest was transferred to her who survived the deceased. She averred having been regularly paying the land rates for the Suit property.
7. However, it was the averments by the Plaintiff that in late August and September, 2021 while conducting routine official search at the Land Registry, she discovered that the Defendants jointly and severally and without any lawful consent or knowledge of the Plaintiff and /or the deceased fraudulently, illegally, un procedurally and/or through corrupt scheme secretly, purported to register an alleged transfer of the suit land to the 1st Defendant on 20th March, 1980 at an alleged consideration of sum of Kenya Shillings Thirty Five Thousand (Kshs. 35,000.00). Additionally, the Plaintiff discovered that on 16th May, 2015 the 2nd Defendant issued a Notice of Intent to issue a Provisional title to the 1st Defendant for the Suit land by Gazette Notice issue of 16th January, 2015. The Plaintiff under Paragraph 15 of the Plaint provided detailed particulars of the allegation of fraud, illegalities, unlawfulness, misrepresentation and corrupt scheme allegedly perpetrated by the 1st, 2nd and 3rd Defendants herein.

In the final analysis, the Plaintiff sought for the following prayers: -

- a. For Judgment against the Defendants be entered.
- b. A declaration that the transfer registration of thereof and consequential Certificate of Title or Provisional Certificate of Title of the Suit Property issued to the 1st Defendant and any documents obtained to procure Provisional title vide Gazette Notice No. 197 of 16th January, 2015 or such registration of the 1st Defendant’s interest of title to the property known as Sub-division No. 794 (Original No. 68/12) of Section 1 Mainland North delineated as Land Survey Plan Number 70063 measuring 0.47 acres situated in the County of Mombasa in the name



of the 1st Defendant without the consent of and/or payment of due compensation to the Plaintiff were obtained fraudulently, unprocedurally and illegally through corrupt Scheme hence unlawful null and void ab –initio.

- c. A order of rectification of the Land Register to cancel and expunge entry No. 7 in the Land Register relating to the property known as sub - division No. 794 (original No. 68/12) of Section II Mainland North delineated on land Survey Plan Number 70063 measuring 0.47 acres situate in Mombasa County and/or any other entries relating to registration of transfer and issuance of Certificate of Title or Provisional Certificate of Title thereof in the name of the 1st Defendant or his nominee, assignee or representatives and restoration of the Plaintiff as the Sole registered owner of the said property.
 - d. An order of Permanent Injunction to restrain the Defendants, their servants, agents, employees, proxies or anyone claiming under them any other person from trespassing, entering upon, occupying, constructing on, developing, selling, disposing off, transferring, leasing, charging, encumbering to 3rd Parties and/or in any other manner dealing or interfering with the Plaintiff's quiet peaceful possession, enjoyment or use and/or ownership of the Suit property.
 - e. Costs of the Suit.
8. The Plaintiff summoned one witness Plaintiff Witness (PW) – 1 who testified on behalf of the Plaintiff. The examination in chief and was Cross - examined and re - examined as follows: -

Examination - in - Chief of PW - 1 - Mr. Litoro Advocate.

PW – 1 testifies and sworn in the English language. PW – 1 is called M/s. Jean Margaret Elms. She was a holder on national identity bearing No. 13837185. Her date of birth 30th October, 1943. She was the Plaintiff in this matter. She has the witness statement dated 16th September, 2021. She wished to adopt the statement as part of her evidence. She wished to rely on the list of documents dated 16th September, 2021. She did not know the 1st Defendant when her husband who died 26th June, 2020. She was trying to get the Grant Letters of Administration. It's when she found someone had been registered into their land. They bought their land in year 1977, she had lived on that property, they had lived there from year 1971 at Mishomoroni.

She had never heard of the 1st Defendant. She wants the Court to grant the prayers so that she may get the probate. The error was caused by the Registrar of title documents.

Cross Examination by PW – 1, Mr. Waga Advocate

9. PW – 1 stated when her lawyers appeared before the Land Registrar Offices, they were told that there was an error – that the suit was registered in the names of the 1st Defendant herein. Her land was sub - division No. 794 (original No. 68/12) of Section II Mainland North delineated on land Survey Plan Number 70063 measuring 0.47 acres situate in Mombasa County. To rectify the mistake, they filed the case in court. Her advocates had written several letters to that effect. For two years they were trying to rectify this mistake. She urged Court to grant her the prayers sought from the filed pleadings.

Re - Examination of PW - 1 by Mr. Litoro Advocate

10. PW – 1 was referred to page 38 on the Entry No. 7 of the Provisional titles deed. She refuted ever having sold the land to anybody. She held that the entry was not in her original title deed. According to her, there had never been a sale of land to anybody.



III. The 2nd & 3rd Defendants' Case

11. The 2nd & 3rd Defendants filed a Defence and list of documents. From their filed Defence, the 2nd and 3rd Defendants denied all the allegations made out under Paragraphs 1 to 20 of the Plaint. By and large, to them they were not privy to most of the averments made out thereof by the Plaintiff. They argued that the Plaintiff failed to adhere with the mandatory Notice of Intention to Sue the government prior to the institution of the Suit not having served upon the Attorney General. Hence, all these made the Suit fatally and incurably defective and failed to be against the 2nd and 3rd Defendants herein.
12. The 2nd and 3rd Defendants summoned one Witness – the Land Registrar, Defendant Witness – 1 (DW-1) who testified on examination in chief, cross examination and re-examination as follows: -

Examination in Chief – DW - 1 Mr. Waga Advocate.

13. DW – 1 testifies and sworn in English language. Her name is Sheila Soita and a holder of Employment personal No. 20200206739. She was a Land Registrar based at the Land Registry, based at the County of Mombasa. She joined the Ministry of Land in the year 2020. She was an Advocate of High Court of Kenya. Her testimony was that before she joined the Ministry of Land, she was private practice. She was aware of the List of documents by Hon. Attorney General – filed on 11th March, 2022. She undertook to rely on the statement. The title was CR - No. 11533 before Court. From their copy the registered owner was MAHAFUDH KARAMA, the 1st Defendant herein as per 15th January, 1982.
14. DW – 1 informed Court that although from the records, the 1st Defendant was the legal registered owner but from their records there were no supporting documents to indicate that there was a transfer between the Plaintiff and this registered owner. In other words, the following documents were missing from the parcel file. These are:-
 - a. Duly executed Transfer instruments.
 - b. Assessed and paid for stamp duty, receipt.
 - c. A Valuation Report.

Accordingly, DW – 1 as a Land Registrar, she came to a conclusion that it could be a wrong entry on the title. She indicated that the search showed under the entry No. 7 the owner was MAHAFADH KARAMA. She confirmed that there was no evidence of transfer, payment of stamp duty and valuation report to support this entry.

DW – 1 stated that in an ideal situation it would have been expected the Plaintiff could have been the Vendor having sold the land to Mahafadh Karama as the Purchaser. She was the one who signed the transfer form. She confirmed the dispute was on Section II. What was mentioned from the Gazette notice was Section I. Mr. Mahafadh stated that his title deed was lost.

15. There is a Gazette Notice No. 197 dated 16.1.2015 by the Plaintiff (Page 41) of the Plaintiff's Bundle. The Gazette Notice is making reference to Land Reference No. 794/MN/Section I and the same was being gazette by MR. MAHAFUDH KARAMA. Yet the suit land was No. 794/MN/Section II. So her conclusion was that the Applicant had a different parcel and it's the land registry that made the error. In simple terms the entry was an error and should never be made. She believed it was an honest mistake and not fraudulent as the owner even applied for publication of the Gazette. Maybe that explain why the 1st Defendant had never entered appearance. She concluded by stating that this was a wrong entry. It needed to be rectified.

Re - Examination of DW-1, Mr. Litoro Advocate



Nil.

Cross Examination of DW - 1 Mr. Litoro Advocate: -

Nil

IV. The Submissions

16. On 7th October, 2022 upon the closure of the Plaintiff, the 2nd and 3rd Defendants' case. All Parties were directed to file their Written Submissions within stipulated time frame. Pursuant to that upon compliance, the Honorable Court reserved 21st March, 2023 as the date to deliver its Judgment or earlier on notice.

A. The Written Submissions by the Plaintiff

17. On 26th October, 2022, the Learned Counsels for the Plaintiff Messrs. Litoro & Omwebu Advocate, filed their Written Submissions dated 19th October, 2022. Mr. Litoro Advocate commenced by providing a detailed background of this matter based on the filed Pleadings and both documentary and oral evidence adduced in Court during the proceedings.

18. The Counsel submitted on two (2) broad issues.

Firstly, whether the Plaintiff was the bona fide registered owner of the Suit property. On this issue the Counsel relied on the legal Provision of Section 26 (1) of the *Land Registration Act* No. 3 of 2012 and the decision of:- where Court held that it is tasked with making a discovery as to which of the two (2) titles should be upheld by stating as follows: -

“..... This investigation must start at the root of the title and follow all processes and procedures that brought forth the two (2) titles at hand. It follows that the title that is to be upheld is that which confirmed to procedure and can properly trace its roots 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 roots. No Party should take it for granted that simply because they have a title deed or Certificate of Lease, they have a right over the property. The other Party also has a similar document and there is therefore no advantage in hiring one's case solely on the title document that they hold”.

Based on this, the Learned Counsel averred that the Court imposed an obligation upon each Party to demonstrate their title had a good foundation and was passed properly to them.

The Learned Counsel further relied on the Court of Appeal decision of:- “Munyua Maina –Versus- Hiram Gathiha Maina (2013) eKLR”, where the Court held: -

“Where a registered proprietor's root of title was under challenge it was not sufficient to dangle the instrument of title that was in challenge and hence the registered proprietor ought to go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances”.

19. The Learned Counsel asserted that the authenticity of the title deed for the Plaintiff had never been challenged by any of the Parties herein. Indeed, the Counsel held that the Plaintiff demonstrated to this Honorable Court that her deceased husband and herself jointly obtained the ownership and/or title to the Suit from one John Hugh Auchinleck Jewell at a consideration of Kenya Shillings Twenty



Thousand (Kshs. 20,000.00) and had been from that time been in actual possession of the said suit land and kept the original title documents.

He submitted that the Plaintiff and the deceased being joint owners of the Suit property shared equal interest in the Suit property. Legally, the effect on the joint tenants/ ownership upon the demise of one of joint owners was that the interest vested on the surviving owner. Being the co – owners to the suit property, the Plaintiff and the deceased husband owned equal shared interest in the Suit Property. For this legal position, the Learned Counsel relied on the Provision of Section 91 (4) of the [Land Registration Act](#), No. 3 of 2012 and the myriad of decisions of “Cornella Nabangela Nabwana –Versus- Edward Vitalis Akuku & 2 others (2017) eKLR; NNK –Versus- JNK (2020) eKLR and KN –Versus- MPN (2017) eKLR”.

To this end the Counsel concluded that the Plaintiff was the bona fide owner of the Suit property, the interest to the said property having vested in the Pursuant to the right of survivorship. The Learned Counsel averred that the Defendants failed to prove legitimately of the Certificate of title issued to the 1st Defendant. The Defendant Witness – (DW-1) confirmed to Court that there existed neither record of transfer documents from the Plaintiff to the 1st Defendant nor payment of Stamp duty as per the requirement of The [Stamp Duty Act](#), Cap 480. Indeed, the Defendant Witness –(DW-1) held that the entry was made by genuine error of the Land Registry. The Learned Counsel relied on the provisions of Sections 26 (1), 37 (2) and 46 of the [Land Registration Act](#), No. 3 of 2012. Indeed the 1st Defendant who never entered appearance nor filed any Defence, failed to produce evidence to impeach the title held by the Plaintiff.

20. Secondly, the other limb submitted on by the Learned Counsel was that the Plaintiff was entitled to the reliefs sought in light of the uncontroverted “Prima facie” evidence of title and the fact that the Plaintiff had satisfied the legal and evidentially threshold stipulated in the cited decision. To buttress on this argument the Learned Counsel relied on the plethora of decisions of:- “Kyangaro -Versus - Kenya Commercial Bank Limited & Anor (2004 1KLR 126 as cited in “Patrick Waweru Mwangi & Anor – Versus- Housing Finance Co. of Kenya Limited (2013) eKLR to wit that: -

“He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. He who come to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity”.

21. The Learned Counsel submitted that the Plaintiff had approached Court with clean hands and had made a full disclosure regarding the Suit Property and the ownership of the Suit land. On the other hand, he argued that the hands of the 1st, 2nd and 3rd Defendants were soiled by their non - disclosure, fraudulent and misrepresentation of facts. He held that the Defendants had at first stated that there had been no transfer registered but then held the said registration had been caused by the Plaintiff.

This fact was never supported by any evidence. Indeed the Defendant Witness (DW-1) testified that this entry was altered and thus was an error caused by the Land Registry Personnel.

Furthermore, the 2nd Defendant had up to date failed to renounce the title deed held by the 1st Defendant as a result of fraud and/or forgery nor recall it for its cancellation. Therefore the Defendants were adamant in violating the Plaintiff’s right to property as enshrined by Article 40 of [the Constitution](#) of Kenya, 2010. On this point he cited the case of “Alberta Moe Gachie –Versus- Attorney General and 4 Others (2006) eKLR”. For all these reasons the Plaintiff prayed for the filed Suit and the relief sought to be allowed.



B. The Witness Submissions by the 2nd and 3rd Defendants

22. On 9th November, 2022, the Office State Counsel acting for the 2nd and 3rd Defendants filed their Written Submissions dated 7th November, 2022. Mr. Wagah Advocate commenced by providing brief background to the issue before this Honorable Court. Basically, he submitted on three (3) broad issues.

Firstly, whether the Plaintiff was the registered owner to the Suit Land. He held that to prove her case the Plaintiff produced the original title deed and clearly stated she never transferred it to anyone including the 1st Defendant. She held that she lived on the Suit land. However, the Learned Counsel held that during the Cross-examination, the Plaintiff indicated that she never filed a Complaint with the 2nd Defendant nor notified him of any abnormalities of the Certificate of title deed. The Learned Counsel as a way of admission, the Learned Counsel stated that from the evidence by Defendant Witness- (DW-1), it was indicative that the Suit Property was owned by the Plaintiff. That the entry in the Certificate of title that indicated the property was transferred to the 1st Defendant was an entry done by mistake as the 1st Defendant was not the owner of the land. Based on the above, the Land Counsel conceded that beyond any reasonable doubt that the Plaintiff was the bona fide owner to the Suit Property.

23. The Learned Counsel further stated that taking that the 1st Defendant failed to file any document to challenge the evidence of the ownership of the suit land by the Plaintiff, the 2nd and 3rd Defendants were in favor of the Plaintiff's case.

Secondly, the Learned Counsel held that without any doubt that there was an error on the face of the title of the Plaintiff. From the testimony of the Defendant Witness – (DW-1), it confirmed that there was no copy of transfer, payment of Stamp duty, Valuation report and no booking form showing that the completion documents were presented to facilitate the transfer of the suit land to the 1st Defendant.

24. Thirdly, on whether there was any fraud, illegalities, unlawfulness, misrepresentation and corruption perpetrated by the 1st and 2nd Defendants against the Plaintiff, the Learned Counsel argued that the Plaintiff failed to prove any of these allegations whatsoever. Thus allegations being of Criminal nature, the Plaintiff ought to have proved it. The Counsel averred that the Plaintiff testified that no one had ever tried to remove her from the Suit Property a clear indication that there neither existed any conspiracy between the 1st and 2nd Defendants nor any illegality. On this point, his contention was that in the given circumstances, the suit property still remained intact. He held that, according to the evidence of Defendant Witness – (DW-1) it indicated that the title number for the Plaintiff and the 1st Defendant were closed - Land Reference No. MN/I/794 and MN/II/794 respectively. On the issue of the public officers not being liable, the Learned Counsel cited the provision of Section 52 of the Societies Act Cap 108 provided: -

“No suit shall lie against any Public Officer for anything done or omitted to be done by him in good faith and without the negligence in the intended exercise of any power or the Intended Performance of any duty conferred or imposed on him”

To buttress on the above the Learned Counsel relied on the decision of “Ali Mohamed Kivuji & Anor – Versus- Registrar of title, Mombasa & 2 Other; Josephine Naisinya Mbatia & Anor (Interested Parties) (2019) eKLR” where the Court held: -

“It is trite law that fraud must not only be pleaded but the same must be specifically proved”.



The Learned Counsel argued that the Court should find that the Plaintiff failed to prove fraud, conspiracy and illegality against the 2nd Defendant.

In the long run, the Learned Counsel, urged Court to dismiss the Suit on grounds that the Plaintiff failed to issue the mandatory Notice of Intention to Sue as referred by law but came to Court without attempting to sort out the problem first and foremost.

V. The Issues for Determination

25. I have keenly considered all the filed Pleadings being the Plaintiff, List of documents by the Plaintiff, the Statement of Defence by the 2nd and 3rd Defendants, the adduced oral evidence by the summoned witnesses, the Written Submissions, the Cited authorities and the relevant provisions from *the Constitution* of Kenya, 2010 and Statutes.

For the Honorable Court to arrive at an informed, just, reasonable and equitable decision, the Honorable Court has framed the following three (3) salient issues for its determination. These are:-

- a. Whether the Plaintiff was the bona fide legal and absolute registered proprietor to the Suit Land both indefeasible interest, title and rights vested on him by law?.
- b. Whether the Parties herein are entitled to the Relief sought?
- c. Who will meet the costs of the Suit?

VI. Analysis and Determination

ISSUE NO. (a) Whether the Plaintiff was the bona fide legal and absolute registered proprietor to the Suit Land both indefeasible interest, title and rights vested on him by law.

Brief facts

26. Before embarking on the analysis of this sub-division it's imperative that the Honorable Court embarks on the brief facts of this case.

From the filed pleadings at all material times, the Plaintiff and the deceased jointly acquired with equal shares the Suit Property in the year 1977 from one John Hugh Auchinleck Jewell at a consideration of Kenya Shillings Twenty Thousand (Kshs. 20,000.00). Indeed, they had been in actual possession from that time onwards with a Certificate of title deed. Upon the demise of the deceased the ownership revolved up the surviving parties as provided for by law. The Plaintiff held she continued paying all the Pre- requisite rates without failure. However, in the Course of title, it came to her attention that the property had been fraudulently transferred to the 1st Defendant.

In the course of time, the 2nd Defendant issued a notice which was published in the Kenya Gazette for the Provision of the Provisional Title Deed for the Suit Property issued in the names of the 1st Defendant.

As a result, she sought for the legal redress from the Honorable Court by filing this Suit. On its part despite being served by way of substituted means by publishing a notice and/or advertisement in one of the local newspapers, the 1st Defendant failed to neither enter appearance nor file a Defence.

The 2nd and 3rd Defendants though filed a Defence where under Paragraph 8 of Defence held that the Property may have been transferred to the 1st Defendant by the Plaintiff but arising from the evidence by Defendant Witness – (DW-1) the 2nd and 3rd Defendants conceded that indeed the Suit Property was registered in the names of the Plaintiff and her admission that the entry in the register must have been an



error apparent caused by the Personnel at the Land Registry. Defendant Witness – (DW-1) confirmed from the parcel file there was missing the relevant documents such as the transfer documents, Stamp duty payments and Valuation report as required by law. Finally, despite this admission, the 2nd & 3rd Defendants strongly refuted the existence of there being any conspiracy on fraud or illegality taking that the Plaintiff failed to prove it as required by law and the fact that the Plaintiff had never been evicted from the occupation and possession of the Suit Land. That is adequate on facts.

27. Now turning to the issues under this sub- heading. I fully concur with the well-articulated submissions by both the Counsels for the Plaintiff and 2nd & 3rd Defendants to the effect that the Suit Land at all material time was in the names of the Plaintiff and the deceased. Thus, there is no dispute on the ownership of the suit property. Upon the demise of the deceased, the legal effect was that the suit Land as provided for under Section 91 (4) of Land Registration Act, the interest of the Joint owner vests on the surviving owner. Therefore, the suit property belongs to the Plaintiff. Additionally, the Honorable Court is guided by the Provisions of Section 7 (1) of the Land Act No. 6 of 2012 on the methods upon which once acquires ownership to land. Section 7 (1) provides:-

- (a) allocation;
- (b) land adjudication process;
- (c) compulsory acquisition;
- (d) prescription;
- (e) settlement programs;
- (f) transmissions;
- (g) transfers;
- (h) long term leases exceeding twenty one (21) years created out of private land; or
- (i) any other manner prescribed in an Act of Parliament.

28. In the instant case, it's not in dispute the Plaintiff and the deceased acquired the Suit by Sale or acquisition from one John Hugh Archinleck Jewell in the year 1977 upon paying a consideration of a sum Kenya Shillings Twenty Thousand (Kshs. 20,000.00/-) and from then they had been physical and actual possession. It was later on the Plaintiff found out the Property had been erroneously registered in the names of 1st Defendant an issue eloquently testified by the DW – 1 in her evidence.

On this particular issue, the Honorable Court has had to be informed by the legal ration found in the Court of Appeal case of:- “Munyu Maina –Versus - Hiram Gathitha Maina (2013) eKLR” at Paragraph 17 held as follows: -

“We state that when a registered proprietor root of title is under challenges, 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 and all interest which need not to be noted on the register”.

29. Despite of the 1st Defendant having been served with Summons to enter appearance, he failed to file any Defence. The Court can not fail to assume that this was deliberate attitude on the part of the 1st Defendant. For this reason, this Court is left to conclude that the title documents by the Plaintiff was not challenged. It's my view that the title held by the 1st Defendant was erroneously acquired as clearly



confirmed by the evidence by Defendant Witness- (DW-1). It follows that the Land Register has to be rectified.

30. Besides, although the 2nd and 3rd Defendants in their Defence Paragraph 8 of the Defence held: -

“Further to the averments the 2nd Defendant avers that, if ever a transfer was registered in favour of the 1st Defendant which is denied, then the same was under the instructions of the Plaintiff”.

I find the above assertions rather curious, misplaced and unfounded. Clearly, it's the DW – 1 who was summoned by the 2nd and 3rd Defendants to testify on their behalf who emphatically stated that there was no prove in the parcel file whatsoever in form of evidence such as a duly executed Sale Agreement, Transfer form, Stamp duty payment as required by the Provision of Cap 480 and Valuation Report to have constituted or construed an aspect of the sale of the land to an innocent purchaser for value on notice. None of such existed and hence where did the Learned Counsel all of a sudden obtain this strategy of information from is unclear. In conclusion as per the requirement of Sections 24, 25 and 26 (1) of *Land Registration Act* and the Admission by the Defendant Witness – (DW-1) and the Counsel for 2nd and 3rd Defendants, certainly the Suit Property belonged to the Plaintiff as the legally registered owner.

ISSUE No. (b) Whether the Parties herein are entitled to the Relief sought?

31. Having caused such an elaborate analysis above, it's not in doubt the Suit Property belongs to the Plaintiff. From both oral and empirical documentary evidence, the Plaintiff has been able to adequately demonstrate the root of her title to date where she lived on it. She is entitled to all the Prayers sought from the filed Plaintiff accordingly.

32. Juxtapose, from the records, despite of proper service effected, the 1st Defendant failed to file any Defence challenging the title by the Plaintiff and supporting his title deed. I am left to conclude that his title deed is impeachable as it was acquired by error caused by the Land Registry Personnel.

Additionally, the evidence by Defendant Witness – (DW-1) as the custodian of land documents is extremely critical. She strongly held that from the parcel file no transfer documents exists, Stamp duty payment nor Valuation report. It's incumbent that this error ought to be rectified immediately.

33. Furthermore, the Plaintiff also sought for permanent injunction orders. Permanent Injunction orders are perpetual injunction granted by Court upon merit of case after evidence in support of and against the claim has been tendered and one which fully determines the right of the Parties before the Court. The Honorable Court is fully satisfied that the Plaintiff and with the support of the 2nd and 3rd Defendants in their admission as the prima facie registered owner to the suit property has executed her role and duty so well as executed by the provisions of the law. I discern here that she is entitled to the Permanent Injunction sought from her filed pleadings as held in the case of:- “Kenya Power & Lighting Co. Limited –Versus - Sheriff Molana Habib (2018) eKLR”. For these reason, I will proceed to grant the orders sought by the Plaintiff.

34. However, although the Plaintiff has pleaded of fraud, illegality and misrepresentation of facts under Paragraph 15 of the Plaintiff to have taken place but I disagree with the Plaintiff here. In doing so, I fully concur with the Learned Counsel for the 2nd and 3rd Defendants the Plaintiff never proved these allegations. I am persuaded by the Provision of Section 107 of the *Evidence Act* Cap 80, that it's he who alleges that has to prove it. These are serious allegations bordering on criminality and there ought to be empirical documentary evidence such as Documents Examination Report or DCIO report or



complaint adduced to this effect in Court. None of them were produced. For that reason, I proceed to dismiss that allegation.

ISSUE NO. (c) Who will meet the costs of the Suit?

35. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of “Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

36. Additionally, the cases of Rosemary Wambui – Versus – Ihururu Dairy Co – operatives Societies Limited (2014), eKLR, Cecelia Karuru Ngayu – Versus – Barclays Bank of Kenya & Another (2016), eKLR and the Supreme Court fortified this position in the cases of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

37. Based on these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is that the Plaintiff has succeeded in establishing her case. Therefore, the Plaintiff is entitled to costs of the suit accordingly.

VII. Conclusion and Disposition

38. Ultimately, having conducted an elaborate analysis of these issues framed herein, the Court is satisfied that the Plaintiff has been able to establish her case on preponderance of probabilities and on the admission of the 2nd and 3rd Defendants specifically and for avoidance of doubt I proceed to grant the following orders: -

- a. THAT Judgment be entered in favour of the Plaintiff against, jointly and severally the 1st, 2nd and 3rd Defendants herein.
- b. THAT a declaration that the transfer registration of thereof and consequential Certificate of Title or Provisional Certificate of Title of the Suit Property issued to the 1st Defendant and any documents obtained to procure Provisional title vide Gazette Notice No. 197 of 16th January, 2015 or such registration of the 1st Defendant’s interest of title to the property known as Sub-division No. 794 (Original No. 68/12) of Section II Mainland North delineated as Land Survey Plan Number 70063 measuring 0.47 acres situated in the County of Mombasa in the name of the 1st Defendant without the consent of and/or payment of due compensation to



the Plaintiff were obtained fraudulently, un-procedurally and illegally through corrupt Scheme hence unlawful null and void ab –initio.

- c. THAT an order be and is hereby made to have the 2nd Defendant directed herein within the next One Hundred and twenty (120) days from the delivery of this Judgement to re – call for the title held by the 1st Defendant for its cancellation, expunging and rectification of the Entry No. 7 of the Land Register under the provision of Section 79 (1) & (2) and 80 (1) and (2) of the Land Registration Act, No. 3 of 2012 in relating to the property known as sub-division No. 794 (original No. 68/12) of Section II Mainland North delineated on land Survey Plan Number 70063 measuring 0.47 acres situate in Mombasa County and/or any other entries relating to registration of transfer and issuance of Certificate of Title or Provisional Certificate of Title thereof in the name of the 1st Defendant or his nominee, assignee or representatives and restoration of the Plaintiff as the Sole legal and absolute registered owner of the suit property.
- d. THAT an order be and is hereby made of Permanent Injunction to restrain the 1st, 2nd and 3rd Defendants, their servants, agents, employees, proxies or anyone claiming under them any other person from trespassing, entering upon, occupying, constructing on, developing, selling, disposing off, transferring, leasing, charging, encumbering to 3rd Parties and/or in any other manner dealing or interfering with the Plaintiff's quiet peaceful possession, enjoyment or use and/or ownership of the Suit property.
- e. THAT the Costs of the Suit to be met by the 1st Defendant

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2023

HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:-

(a) M/s Yumnah Court Assistant.

(b) Mr. Litoro Advocate for the Plaintiff.

(c) Mr. Mwandeje holding Mr. Wagah Advocate for the 2nd and 3rd Defendants.

(d) No appearance for the 1st Defendant.

