



Ngati & 3 others v Mutie & 7 others (Environment and Land Case Civil Suit 63 of 2018) [2023] KEELC 17878 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 63 OF 2018**

**JO MBOYA, J
MAY 18, 2023**

BETWEEN

**DAVID NGATI 1ST PLAINTIFF
JOSEPH YUDA MAKII 2ND PLAINTIFF
JAMES NDETO 3RD PLAINTIFF
BONIFACE MATHEKA 4TH PLAINTIFF**

AND

**ELIPHAZ MUTINDA MUTIE 1ST DEFENDANT
ANDREW MBITHI 2ND DEFENDANT
SHEM NYANGAU ONCHOKA 3RD DEFENDANT
KENYA CURIO AND CRAFT JUA KALI ASSOCIATION 4TH DEFENDANT
GODFREY MBUURI GICHURA 5TH DEFENDANT
CHIEF LAND REGISTRAR 6TH DEFENDANT
ATTORNEY GENERAL 7TH DEFENDANT
NATIONAL LAND COMMISSION 8TH DEFENDANT**

JUDGMENT

Introduction and Background:

1. Vide Plaintiff dated the 13th February 2018, the Plaintiffs’ herein approached the Honourable court seeking for the following Reliefs;



- i. A Declaration that the suit land L.R No 21695; belongs to Embakasi Village Crafts Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association).
 - ii. An order vesting the suit land to the Plaintiff Society, namely, Embakasi Village Crafts Jua Kali Association.
 - iii. A finding that the 6th Defendant acting through the Registrar of Titles acted negligently in issuing the Titles I.R No. 178414, 178415, 178416 purporting to be the legal and bona fide subdivisions of I.R No. 155062 that was non-existent and Fake.
 - iv. A Declaration that any Transaction done by the 1st, 2nd, 3rd and 5th Defendants without the authority, mandate, consent and or knowledge of the Members of the Society, namely, Embakasi Village Crafts Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association), are Fraudulent, Illegal, Null and void ab initio.
 - v. A Declaration that the title I.R No. 155062 and the subsequent sub-divisions and titles I.R No's I.R No. 178414, 178415, 178416 are illegal, fraudulent null and void and the same ought to be canceled.
 - vi. A Declaration that any purported transfer, alienation or any manner of dealings done by the Defendants on the suit Land without the approval, consent and knowledge of the majority Members of Embakasi Village Crafts Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association) are illegal null and void.
 - vii. An order canceling the title I.R No. 155062.
 - viii. An order canceling titles numbers I.R No's I.R No. 178414, 178415, 178416.
 - ix. An order that National Land Commission do issue to Embakasi Village Crafts Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association) with an allotment Letter over L.R No. 21695.
 - x. An order that the Chief Land Registrar through the Registrar of Titles do issue to the Embakasi Village Crafts Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association) with a valid title over the original L.R No. 21695; Deed Plan number 203395.
 - xi. Cost of the suit.
 - xii. Any Other or Further Reliefs as this Honourable court may deem fit just to grant.
2. Upon being served with the Summons to enter appearance and Plaintiff in respect of the instant matter the 1st, 2nd, 3rd, 4th and 5th Defendants duly entered appearance and filed statement of defense on the 8th July 2019. On the other hand, the 6th and 7th Defendants entered appearance and filed Statement of Defense on the 14th March 2018.
 3. In addition, the 8th Defendant also entered appearance and thereafter filed a Statement of Defense on the 25th June 2018.
 4. Subsequently, the Plaintiff herein filed a Reply to the Statement of Defense filed by and on behalf of the 1st to the 5th Defendants. For clarity, the Reply to the Statement to Defense was filed on the 22nd August 2019.
 5. Suffice it to point out that upon the close of pleadings, the subject matter was listed for Case Conference/Pre-trial directions, whereupon it was confirmed that the Parties had filed and exchanged



the requisite documents and witness statements. Consequently, the subject matter was confirmed for hearing and same was thereafter set down for hearing.

Evidence by the parties:

a. The Plaintiffs' Case:

6. The Plaintiffs' case revolves around the Evidence of one witness, namely, Joseph Yuda Makii, who testified as PW1.
7. It was the testimony of the witness that same is a member of Embakasi Village Crafts Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association), together with the rest of the Plaintiffs herein. Further, the witness testified that the Members of the Association herein are indigenous hand craft traders in Kenya and that initially same were carrying out their trade at Kigali open air market, up to and including the year 1996; when the said market was demolished and taken over by Private Developers.
8. Furthermore, the witness testified that the Members thereafter came together and formed an Association known as Nairobi Curios Jua Kali Association and contributed monies towards the purchase and acquisition of the parcel of land located within Embakasi Area. In this regard, the witness averred that the land in question was known as L.R No 21965t, which had hitherto been allocated to Mukamu Holdings Ltd.
9. It was the further testimony of the witness that even though the Members of the Association collected so much money, towards and in respect of the purchase of the Landed property, the 1st, 2nd and 3rd Defendants, who were the inaugural Officials of the Society failed to provide and supply proper accounts relating to the amounts that were utilized to purchase the suit property; and even accounts in respect of the balance, if any, that was not utilized.
10. In addition, the witness also averred that other than the failure by the 1st and 2nd Defendants to account by the monies that were collected by the Members towards the purchase and acquisition of the suit property, the named Defendants have also failed to facilitate the carrying out of Elections of the Association. In this regard, the witness testified that the 1st to 3rd Defendants have continued to hold themselves as the Officials of the Association.
11. It was the further evidence of the witness that owing to the failure by the 1st to 3rd Defendants to call for, convene and hold the Elections of the Association, the rest of the Plaintiffs and himself endeavored to obtain assistance of the office of the Registrar of Societies. However, the witness added that the various attempts to obtain the intervention of the Registrar of Society came to naught.
12. Additionally, the witness testified that after failing to obtain the assistance and help of the Registrar of Societies, the rest of the Plaintiffs, himself and the Members of the Association opted to elect a Caretaker Committee, which was thereafter granted authority, consent and mandate to ran the affairs of the Society; and in particular, to Petition the Registrar of Societies for the holding of elections in respect of Association.
13. On the other hand, the witness also testified that the Caretaker committee which was elected by the Members were also authorized by the Members of Association to file the instant suit, with a view to recovering the suit property from the fraudsters, who had grabbed the land belonging to the Association.
14. Moreover, the witness testified that on or about November 2016; the Members of the Association were shocked and surprised to discover that the 1st, 2nd, 3rd, 4th and 5th Defendants had fraudulently procured



- and obtained titles in respect of the suit property and thereafter proceeded to subdivide same into three portions, albeit without the knowledge and authority of the members of the Association.
15. Owing to the foregoing, the witness averred that the impugned actions by the 1st to the 5th Defendants was calculated to defraud the members of the Association of their rights to and entitlement in respect of the suit Property.
 16. Further, it was the testimony of the witness that having realized the impugned actions and activities by the 1st to 5th Defendants herein, the rest of the Plaintiffs and himself lodged a complaint with the National Land Commission, wherein same sought the intervention with the Commission to revoke and cancel the title documents that had hitherto been issued and registered as I.R No 178414, 178415 and 178416, respectively.
 17. In addition, the witness testified that upon the lodgment of the complaint with the National Land Commission, the Commission herein entertained the complaint and thereafter generated an award, wherein it was found and held that the Certificate of titles which had hitherto been issued in the names of the 1st, 2nd and 3rd Defendants were irregular and hence ought to be canceled and nullified.
 18. Other than the foregoing, the witness referred to the Witness Statement dated the 13th February 2018; and sought to adopt and rely on same. In this regard, the witness statement was duly admitted and adopted as the further Evidence- in- chief of the witness.
 19. Furthermore, the witness also referred to the List and Bundle of Documents dated the 19th January 2022; and thereafter sought to have same produced as Exhibits. For completeness, the documents at the foot of the List were thereafter admitted and produced as Exhibits P1 to P41, respectively.
 20. On cross examination, by Learned counsel for the 1st, 2nd 3rd and 4th Defendants, the witness herein testified that same was an official of the association as at the 13th February 2018. However, the witness contended that same did not bring to Honourable court any documents to confirm and establish that same was indeed and Official of the Association.
 21. In addition, the witness stated that same does not have any Certificate from the Registrar of Societies to confirm that he is an Official of the named Association.
 22. Whilst under cross examination, the witness stated that by the time the rest of the Plaintiffs and himself came to court, they (Plaintiffs) did not state that same are the officials of the two named Associations.
 23. Furthermore, the witness also testified that he has a copy of a Letter/confirmation from the Registrar of Societies showing that he is an official of the association and the letter is dated the 7th November 2022. Nevertheless, the witness admitted that the said Letter was procured and obtained long after the instant suit had been filed.
 24. On the other hand, the witness stated that the title in respect of the suit property, which same are seeking to cancel and or nullify is currently registered in the name of Kenya Curios Association, albeit through the names of the 1st, 2nd and 3rd Defendants.
 25. Other than the foregoing, it was the testimony of the witness that the suit property ought and should be registered in the name of Embakasi Curio Jua Kali Association. Besides, the witness also testified that he is not an Official of Nairobi Curio Jua Kali Association.
 26. As to whether same is conversant with Kenya Curios Jua Kali Association, the witness stated that same only came to know of the said association when he discovered that the titles in respect of the suit property had been registered in the name of the said Kenya Curios Jua Kali Association.



27. In addition, the witness also testified that the titles to the suit property are currently registered in the names of the 1st, 2nd and 3rd Defendants, who are shown to be registered as the Trustees of the said Kenya Curios Jua Kali Association.
28. Whilst under further cross examination, the witness stated that even though the rest of the Plaintiffs and himself have sought to have the suit property transferred to and registered in the name of Embakasi Village Jua Kali Association, neither him nor the rest of the Plaintiffs are officials of the said Association.
29. In any event, the witness added that the rest of the Plaintiffs and himself constitutes the Caretaker committee which was elected by the members of the Association. However, the witness quickly admitted that the caretaker group has never been registered nor recognized by the Registrar of Societies.
30. On cross examination by Learned counsel for the 6th and 7th Defendants, the witness stated that same is conversant with the 1st, 2nd and 3rd Defendants herein; and that the said Defendants are Officials of Nairobi Curios Jua Kali Association.
31. On the other hand, it was the testimony of the witness that the rest of the Plaintiffs and himself, carried out and undertook a search as pertains to the ownership of the suit property and that same discovered that the suit property was transferred and registered in the names of the 1st, 2nd and 3rd Defendants.
32. Be that as it may, the witness also stated that the rest of the Plaintiffs and himself have sued on behalf of Embakasi Village Craft Jua Kali Association. Nevertheless, the witness added that the officials of the said Association procured and obtained titles to the suit property in their names and not in the name of the Association.
33. With the foregoing testimony, the Plaintiffs' case was closed.

b. The 1st, 2nd and 3rd Defendants' Case:

34. The 1st, 2nd and 3rd Defendants' case revolves around the Evidence of two witnesses namely, Andrew Mbithi and Eliphaz Mutinda Mutie, who testified as DW1 and DW2, respectively.
35. It was the evidence of DW1 that the 1st and 3rd Defendants and himself are the duly elected and registered officials of Embakasi Village Crafts Jua Kali Association and thus authorized and mandated to carry out and undertake the affairs of the said Association.
36. On the other hand, the witness averred that even though the 1st and 3rd Defendants and himself are official of Embakasi Village Craft Association, the said Association is however separate and distinct from Nairobi Curios Jua Kali Association.
37. Other than the foregoing, the witness indicated that same had recorded a Witness Statement dated the 15th August 2019; and which witness statement same sought to adopt and rely on. For good measure, the witness statement dated the 15th August 2019 was thereafter admitted and constituted as the Evidence- in -chief of the witness.
38. Furthermore, the witness herein alluded to a List and Bundle of Documents dated the 17th January 2023; and same sought to adopt and rely on the documents at the foot of the said List. In this regard, the documents at the foot of the said List were duly marked and admitted as Exhibits D1 to D18, respectively.
39. In addition, the witness also alluded to a second List dated the 17th January 2023 and same also implored the Honourable court to adopt and admit the named documents. For good measure, the documents



at the foot of the second List of Documents were admitted and marked as Exhibits D19 to D26, respectively.

40. Other than the foregoing, the witness pointed out that the 1st, 2nd, 3rd and 4th Defendants had filed a Statement of Defense dated the 12th June 2019; and hence same sought to adopt and rely on the contents of the Statement of Defense.
41. On cross examination by Learned counsel for the Plaintiffs, the witness pointed out that same had a copy of the Certificate of Title relating to the suit property before the court. In addition, the witness clarified that the certificate of title over and in respect of the suit property are registered in the names of the 1st, 2nd and 3rd Defendants, albeit as trustees of Kenya Curios Jua Kali Association.
42. Further and In any event, the witness stated that he is the secretary of Kenya Curios Jua Kali Association, whilst the 1st Defendant is the chairman of the Association.
43. Whilst under further cross examination, the witness stated that the land in question belongs to Kenya Curios Jua Kali Association and not Embakasi Village Craft Association. For clarity, the witness added that the association which was hitherto known as Nairobi Curio Jua Kali Association was dissolved and changed its name to Kenya Curios Jua Kali Association.
44. Nevertheless, whilst under further cross examination and upon being shown copies of the minutes which was produced by same, the witness acknowledged that the minutes before the Honourable court were in respect of Embakasi Village Craft Curios Jua Kali Association. Nevertheless, the witness pointed out that the minutes reflects Embakasi Village Curios Jua Kali Association because of the meeting culminating into the minutes was held in land in question, namely, the suit property.
45. As pertains to and in respect of the change of name of the association from Nairobi Curios Jua Kali Association to Kenya Curios Jua Kali Association; the witness pointed out that same has adduced before the Honourable court the minutes authorizing the change of name.
46. On re-examination, the witness pointed out that the organization started off as Nairobi Curios Jua Kali Association, but thereafter same changed her name to Kenya Curios Jua Kali Association.
47. Furthermore, the witness also pointed out that same is aware and knowledgeable of Embakasi Village Craft Association and added that he is the Secretary of the said Association. Nevertheless, the witness clarified that Embakasi Craft Jua Kali Association does not own the suit property.
48. The Second witness called and who testified on behalf of the 1st, 2nd, 3rd and 4th Defendants is one Eliphaz Mutinda Mutie. For clarity, same testified as DW2.
49. It was the evidence of DW2 that the 2nd and 3rd Defendants herein are Officials of Embakasi Village Craft Jua Kali Association and that both the 2nd and 3rd Defendants and himself have been duly authorized and mandated to transact for and on behalf of the said association. In any event, the witness also testified that Nairobi Curios Jua Kali Association and Embakasi Village Craft Jua Kali Association, are two separate and distinct Associations.
50. Furthermore, the witness also testified that neither Nairobi Curios Jua Kali Association and Embakasi Village Craft Jua Kali Association, are the registered owners of the suit property. For good measure, the witness testified that the suit property belongs to Kenya Curios Craft Jua Kali Association and that the property is currently registered in the names of the 1st, 2nd and 3rd Defendants, albeit as Trustees.
51. Additionally, the witness pointed out that as pertains to the instant matter, same has recorded a witness statement dated the 15th August 2019; and which witness statement the witness sought to adopt



and rely on as his Evidence- in chief. In this regard, the Witness statement was duly admitted and constituted as the Evidence in chief of the witness.

52. Other than the foregoing, the witness also alluded to the List and Bundle of documents dated the 17th January 2023; and which had hitherto been identified by DW1. Nevertheless, the witness adopted the contents of the documents.
53. On cross examination by Learned counsel for the Plaintiff, the witness testified that the Members of Kenya Curios Jua Kali Association started off as Nairobi Curios Jua Kali Association; and thereafter changed their name to Kenya Curios Jua Kali Association. Nevertheless, the witness added that he was the chairman of Nairobi Curios Jua Kali Association.
54. Additionally, it was the testimony of the witness that the suit property, which is the subject of the dispute before the Honourable court hitherto belonged and was registered in the name of Nairobi Curios Association before same was converted to and became known as Kenya Curios Jua Kali Association. Further, the witness added that currently the land in question belongs to Kenya Curios Jua Kali Association, wherein he is the chairman.
55. While under further cross examination, the witness stated that the suit property does not belong to Embakasi Village Craft Jua Kali Association.
56. On re-examination, the witness stated that he is the chairman of both Embakasi Village Craft Jua Kali Association, as well as Kenya Curios Jua Kali Association.
57. With the foregoing testimony, the case for the 1st, 2nd, 3rd and 4th Defendants' was duly closed.

c. The 6th and 7th Defendants' Case:

58. Though the 6th and 7th Defendants duly entered appearance and filed Statement of Defense, same however did not file any List and Bundle of documents. In addition, the 6th and 7th Defendants also did not file any List of Witnesses and witness' statements.
59. Arising from the foregoing, the Learned counsel for the 6th and 7th Defendants intimated to the Honourable court that same was not calling any witness. In this regard, the case for the 6th and 7th Defendants were closed without any evidence being tendered and/or being adduced.

d. The 8th Defendant's Case

60. Similarly, the 8th Defendant entered appearance and filed Statement of Defense. Other than the named pleadings, the 8th Defendant never filed any List or Bundle of Documents.
61. Furthermore, the 8th Defendant also did not file any List of witnesses or witness' statement. Consequently, it is imperative to state that the 8th Defendant's case was also closed without production/ adduction of any evidence.

Submissions by the Parties

a. PLAINTIFFS' SUBMISSIONS:

62. The Plaintiffs' filed written submissions dated the 9th February 2023; and same have raised, highlighted and canvassed three issues for consideration and determination by the Honourable court.
63. Firstly, Learned counsel for the Plaintiffs' has submitted that the Plaintiffs' herein are lawful and legitimate Members of Embakasi Village Craft Jua Kali Association and that by virtue of being



Members of the said Association, the Plaintiffs' herein have the requisite mandate, capacity and authority to file and maintain the subject suit on behalf of Embakasi Village Craft Jua Kali Association.

64. In addition, Learned counsel for the Plaintiff has submitted that it would be naïve for the Defendants herein to argue and contend that the Plaintiffs have no capacity to sue for and on behalf of Embakasi Village Craft Jua Kali Association, yet the same Defendants have not explained to the Honourable court, what measures and or steps same have taken to protect the rights of the Members of Embakasi Village Craft Jua Kali Association, as pertains to the suit property.
65. In any event, Learned counsel for the Plaintiffs has submitted that the Plaintiffs herein have acted in good faith in filing and mounting the instant suit and further, that the suit herein is calculated to protect the interests of the Members of Embakasi Village Craft Jua Kali Association, which has over 400 members.
66. Secondly, Learned counsel for the Plaintiffs' has submitted that the suit property was bought, purchased and acquired with the monies that were contributed by the Members of the Association. However, despite the fact that the monies were contributed by the Members of the Association, the 1st, 2nd and 3rd Defendants, have failed to tender accounts over and in respect of the monies collected.
67. In any event, Learned counsel has submitted that the 1st, 2nd and 3rd Defendants have similarly proceeded to and caused the suit property to be sub-divided into three portions and thereafter transferred and registered the resultant subdivision in their names, allegedly as Trustees of Kenya Curios Jua Kali Association.
68. Be that as it may, Learned counsel has submitted that the transfer and registration of the suit property in the name of the 1st, 2nd and 3rd Defendants, albeit on trust for Kenya Curios Jua Kali Association; was undertaken fraudulently and without the authority of the Members of Embakasi Village Craft Jua Kali Association.
69. Thirdly, Learned counsel has submitted that the Plaintiffs' herein and the rest of the Members of Embakasi Village Craft Jua Kali Association lodged a complaint with the National Land Commission, seeking to have the subdivision of the suit property canceled and rescinded; and thereafter to have the suit property transferred and registered in the names of Embakasi Village Craft Jua Kali Association.
70. Moreover, Learned counsel has contended that upon the lodgment of the complain with the National Land Commission, the Commission entertained and adjudicated upon the Complaint, culminating into a determination wherein the Commission ordered/recommended that the subdivisions touching on and affecting the subdivision be canceled and nullified. However, counsel has added that the recommendations of the Commission have not been acted upon.

b. The 1st, 2nd, 3rd and 4th Defendants' Submissions:

71. The 1st, 2nd, 3rd and 4th Defendants herein filed written submission dated the 6th March 2023; and in respect of which Learned counsel has highlighted and canvassed four issues for due consideration and determination by the Honourable court.
72. Firstly, Learned counsel has submitted that insofar as the Plaintiffs' herein are not the elected and bona fide officials of Embakasi Village Craft Jua Kali Association, same have no capacity to file, commence and maintain the instant suit, which essentially touches on and concerns what is claimed to be the property of the Association.
73. In addition, Learned counsel for the named Defendants has submitted that the fact that the Plaintiffs' herein are not the bona fide and elected officials of the said Association is duly acknowledged and



admitted by the Plaintiffs themselves in terms of paragraph 12 of the Plaint dated the 13th February 2018.

74. To vindicate the submissions that only elected and bona fide officials of the Association can sue on behalf of the Association, Learned counsel for the Defendants has cited and relied on various decisions, inter-alia, the case of Islamia Madrasa Society versus Zaphar Niaz & 8 Others (2021)eKLR, Trustees of Kenya Redeemed Church & Another versus Samuel Obiya & 5 Others (2011)eKLR, Free Pentecostal Fellowship of Kenya versus Kenya Commercial Bank, Nairobi HCC 5116 of 1982 (OS) (unreported) and African Othodox Church of Kenya versus Rev. Omuroka & another (2014)eKLR, respectively.
75. Secondly, Learned counsel for the 1st, 2nd, 3rd and 4th Defendants has also submitted that the suit as against the 4th Defendant is similarly incompetent and invalid, insofar as the 4th Defendant is an Association/Society, which cannot sue or be sued in her own name. For clarity, Learned counsel has pointed out that the 4th Defendant could only be sued through the official/Trustees thereof.
76. In support of the foregoing submissions, Learned counsel has cited and relied on the decision in the case of Simu Vendors Association versus Town Clerk, City Council of Nairobi & Another (2005)eKLR.
77. Thirdly, Learned counsel for the 1st, 2nd, 3rd and 4th Defendants has submitted that even though the Plaintiffs pleaded and particularized the claim based on fraud, the Plaintiffs' herein have however failed to tender and/or adduced sufficient evidence to prove the claim on fraud.
78. In particular, Learned counsel has submitted that it is not enough for a litigant to plead and particularize fraud and thereafter imagine that the Honourable court would proceed to grant such a claim, albeit in the absence of cogent, credible and plausible Evidence being tendered/ placed before the Honourable Court.
79. In support of the submissions that the plea/claim on fraud has not been duly proved and established, Learned counsel has cited and relied upon the cases inter-alia, Vijay Morjaria versus Nansigh Madhusigh Dabar & Another (2000)eKLR, Central Bank of Kenya versus Trust Bank Ltd & 4 Others (1996)eKLR and Umila W/o Mahendra Shah versus Barclays Bank International Ltd & Another (1979)eKLR and Moses Parantai & Another (suing as the legal representatives of Sospeter Mukuru Mbeere) versus Stephen Njoroge Macharia (2020)eKLR.
80. Finally, Learned counsel has submitted that even though the Plaintiffs' herein filed and lodged a complaint with National Land Commission touching on and concerning the suit property, it is imperative to state that the suit property was private property and hence it is submitted that National Land Commission did not have Jurisdiction to entertain and/or to adjudicate upon the said dispute.
81. In this regard, Learned counsel has submitted that National Land Commission therefore lacked the requisite Jurisdiction to entertain the complaint which was allegedly placed before it by the Plaintiffs.
82. In a nutshell, Learned counsel has implored the Honourable court to find and hold that the Plaintiffs have neither established nor demonstrated their claim to the requisite standard. Consequently and in this regard, Learned counsel has impressed upon the court to dismiss the Plaintiffs' suit.

Issues for Determination

83. Having reviewed the Pleadings filed by and on behalf of the Parties and upon taking into account the oral evidence that was tendered; and upon considering the written submissions which were duly filed by the Parties, the following issues do arise and are thus worthy of determination;



- i. Whether the Plaintiffs' herein are seized and possessed of the requisite Locus Standi to commence, mount and maintain the subject suit (sic) on behalf of Embakasi Village Craft Jua Kali Association.
- ii. Whether the 4th Defendant herein can be impleaded and sued in her own name and if not; whether the suit against the 4th Defendant is a nullity.
- iii. Whether the claim founded and anchored on Fraud has been duly and suitably proved.
- iv. Whether the Plaintiffs' are entitled to the Reliefs sought at the foot of the Plaint.

Analysis and Determination

Issue Number 1 : Whether the Plaintiffs' herein are seized and possessed of the requisite Locus Standi to commence, mount and maintain the subject suit (sic) on behalf of Embakasi Village Craft Jua Kali Association.

84. The Plaintiffs' herein have filed and mounted the instant suit allegedly for and on behalf of Embakasi Village Craft Jua Kali Association. For good measure and indeed, the Plaintiffs' have pointed out that the instant suit has been mounted for and on behalf of 400 members of the named association.
85. Furthermore, the Plaintiffs' have also contended that even though some arM members of Embakasi Village Craft Jua Kali Association, the same have endeavored to procure and obtain accounts from the 1st, 2nd and 3rd Defendants, relating to the various monies which were collected by an on behalf of the members of the association and or in respect of the purchase of the suit property. Nevertheless, the Plaintiffs' have added that despite best efforts, the 1st, 2nd and 3rd Defendants have failed and or refused to supply the accounts.
86. On the other hand, the Plaintiffs' have averred that the members of the Association and themselves have made various efforts to seek the intervention of the Registrar of the society with a view to addressing the Leadership dispute in respect of Embakasi Village Craft Jua Kali Association; but the Registrar of Societies have failed to act or intervene.
87. Premised on the foregoing and In this respect, the Plaintiffs' have thus averred that the Members of the Association decided to elect a caretaker committee, who were mandated/tasked with (sic) the authority to ran the affairs of the Association; and also to petition the Registrar of Societies to call for and convene proper elections of the Association.
88. Instructively and based on the foregoing, the Plaintiffs' herein are confirming that indeed same are not the bona fide and duly elected officials of Embakasi Village Craft Jua Kali Association.
89. Further, it is imperative to recall and re-collect that during cross examination of PW1 same, is on record as stating that neither the rest of the Plaintiffs nor himself, are officials of Embakasi Village Craft Jua Kali Association.
90. For the avoidance of doubt, PW1 stated as follows during cross examination;

“I don't have any confirmation to show that I was an official. I have no certificate from the registrar of society to confirm as much. I wish to confirm that when I came to court I did say that I am not an official of the two association”.



91. Whilst under further cross examination, PW1 testified as hereunder;

“The titles of land which were are seeking to be canceled are in the name of Kenya Curios Jua Kali Association albeit registered in the names of the 1st, 2nd and 3rd Defendants. However I wish to add that the land belongs to Embakasi Village Craft Jua Kali Association. I am not an official of Nairobi Curio Jua Kali Association. I wish to add that Nairobi Curios Jua Kali Association does not exist”.

92. Furthermore, the witness went ahead and stated as follows;

“Kenya Curios Jua Kali Association has been sued, I have prayed for the land to be transferred to Embakasi Village Craft Jua Kali Association. However, the said organization has not been sued. The caretaker group was neither recognized nor registered by the registrar of societies”.

93. From the foregoing excerpts, what comes out clearly is that the Plaintiffs’ before hand are neither the duly elected nor registered officials of Embakasi Village Craft Jua Kali Association. For good measure, any elected official of a registered society would be duly conferred and authenticated by the Registrar of Societies in accordance with the provisions of the *Societies Act*, Chapter 108 Laws of Kenya.

94. However, in respect of this matter, PW1 who testified before the Honourable court clearly admitted and confirmed that the Registrar of Societies has neither recognized nor registered any of the Plaintiffs as an officials of the said Embakasi Village Craft Jua Kali Association.

95. In addition, PW1 also conceded that *the Constitution* of Embakasi Village Craft Jua Kali Association, does not recognize a caretaker committee. Worse still, the witness conceded that the purported caretaker group has not been recognized by the Registrar of societies.

96. Arising from the foregoing discourse, the question that the Honourable court must deal with and or address is; whether the persons who are not the registered officials of the Society can purport to commence, originate and or maintain a suit for and on behalf of the Society/ Association or otherwise.

97. To my mind, a suit by and on behalf of registered Society or an Association can only be mounted by or against the elected and registered Officials/Trustees of the designated society. Invariably, it is the said elected officials who are bestowed with the authority and mandate to act for and on behalf of a society by dint of *the Constitution* of such society or such other constitutive charter, that establishes the society in question.

98. Corollary, it is therefore crystal clear that any person other than the duly elected officials of the society, cannot purport to commence, originate and/or maintain a suit on behalf of such society. In this respect, if a suit is so mounted, then such a suit is Mis-concieved, invalid and thus legally untenable.

99. As pertains to the foregoing position, it is imperative and appropriate to take cognizance of the holding of the Court in the case of Trustees of Kenya Redeemed Church & Another versus Samuel M’Obuya & 5 Others (2011)eKLR, where the court held as hereunder;

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due office holders.”



100. Recently, this court in the case of *The Executive Committee of Ngei Estate Phase II versus Eric Mureith Waweru Milimani* ELC No. E013 of 2020 (unreported), stated and held as hereunder;

“To my mind, a Society and/or an Association, is devoid of the requisite legal personality, which inheres in incorporated bodies, for Example, Companies, Co-operative societies and Political Parties, the latter which is registered under the *Political Parties Act*, 2011.

Whereas duly incorporated bodies, are vested with legal capacity and/or personality to sue and/or be sued in their own names, the converse obtains in respect of Unincorporated bodies, inter-alia, Societies registered under the *Societies Act*, Chapter 108 Laws of Kenya.

At any rate, it is common ground and worthy of repetition that a society or an association, which is not a body corporate, can only sue through her Registered Trustees or Officials, but not in her own name.

On the other hand, it is also worth mentioning that where the Society or Association is suing in the names of her officials, it is imperative that the names of the Officials as opposed to the Titles be used. For clarity, no legal suit can be filed under the guise of chairman, secretary and treasurer of some society/association.

Notwithstanding the foregoing, it also bears repetition that there is no legal capacity that inheres in a body known as the Executive committee, in the manner that has been used by the Plaintiff/Respondent herein. For the avoidance of doubt, the said purported Executive committee, comprises of known persons whose names ought to have been used, subject to the impugned organization being registered in accordance with the law.”

101. Inevitably, I come to the conclusion that the Plaintiffs herein, who are neither the duly elected officials of Embakasi Village Craft Jua Kali Association, are not seized of the requisite capacity and/or locus standi to commence and or maintain the instant suit, allegedly for and on behalf for the said society.
102. Additionally, it is imperative to state and underscore that Locus standi is so central and critical, so much so that, where a party is devoid and divested of the requisite Locus standi, then such a party cannot be heard to contend that same has a cause of action capable of being interrogated by a court of law.
103. Simply put, Locus standi is a threshold question and thus every litigant, who is desirous to approach the seat of justice, must establish and justify that same is seized of the requisite capacity to sustain the intended claim/complaint before the Honourable court.
104. In the case of *Julian Adoyo Ongunga & another versus Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of *Fanuel Evans Amudavi, Deceased*) [2016] eKLR, the Court held and stated as hereunder;

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

29. In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before



the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.

105. In a nutshell, the instant suit that has been commenced by the current Plaintiffs' is therefore invalid and a nullity ab initio. Consequently and on this point alone, the entire suit beforehand is rendered stillborn and legally untenable.

Issue Number 2

Whether the 4th Defendant herein can be impleaded and sued in her own name and if not; whether the suit against the 4th Defendant is a nullity.

106. There is no gainsaying that the 4th Defendant, who has been impleaded and sued by the Plaintiffs herein is not a body corporate and or legal entity, as known to law. In this respect, it is not lost on the court that only corporate bodies and/or legal entities are juristic persons capable of suing and/or being sued in own names.
107. As pertains to unincorporated bodies, whether a society or an association, it is common ground that same can only sue and/or be sued through her registered officials and/or trustees. Inevitably, no suit can be mounted and/or maintained as against a Society/Association in her own name.
108. In this respect, case law abound. Firstly, it is appropriate to adopt, restate and reiterate the holding of Githua J in the case of Peter Taracha & Anor -Vs- Holiness Church & Anor [2016] eKLR, where the Honourable Judge stated:-

“I have carefully gone through the entire Societies Act Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act. I thus wholly agree with the sentiments expressed by Justice Bosire (as he then was) in John Ottenyo Amwayi & others V Rev. George Abura & others HCCC No. 6339 of 1990 when he stated as follows:-

“The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names”

109. Additionally, there is the decision in the case of Kiserian Isinya Pipeline Road Resident Association & others V Jamii Bora Charitable Trust and Another Civil Appeal No. 307 of 2006 Hon. Justice Alnashir Visram (as he then was) relying on several authorities including the case of Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank HCC No. 5116 of 1992 (O.S) struck out an appeal with costs on grounds inter alia that it had been lodged by appellants whose majority consisted of unincorporated entities which did not have capacity to sue. In the Free Pentecostal Fellowship in Kenya case (supra) Justice Bosire (as he then was) expressed himself in the following terms :-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.



In the instant matter, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name”.

..... It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue. The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law.”

110. Premised on the foregoing, it is imperative and common ground that where a suit is mounted by or against a society in her own name, such a suit is legally untenable. Furthermore, where suit is mounted against a non-existent legal entity, such a suit cannot be redeemed by way of any amendment or at all. Suffice it to point out, such a suit is Dead and in the Morgue, let alone being in the ICU.
111. To this end, it suffices to borrow from the court of appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another [2016] eKLR, where the court stated and held as hereunder;
- [27] Mr. Waweru Gatonye, counsel for the appellant, conceded in his written submission that his firm made the mistake of omitting the word “Board” after the word “Fund” which resulted in the plaintiff in the suit being Deposit Protection Fund instead of Deposit Protection Fund Board. What was the legal effect of this error? First, a plaintiff is defined in Black’s Law Dictionary, Ninth Edn as “the party who brings a civil suit in a court of law”. The “plaintiff” in the struck out suit, not being a legal body, there was clearly no plaintiff in law. A “suit” that is not instituted by a plaintiff who has no legal personality cannot be said to have a plaintiff as a party and is consequently a nullity. If a suit is a nullity, it is incapable of resuscitation. No life can be breathed into it. It is dead. It does not exist and it is therefore incapable of amendment.
112. In view of the foregoing, I come to the inescapable conclusion that the suit as against the 4th Defendant; which is a society and thus not capable of being sued in own name, was thus a nullity ab initio. In any event, the suit was incapable of redemption, by any amount of amendment or ingenious legal arguments of whatsoever nature.

Issue Number 3

Whether the claim founded and anchored on Fraud has been duly and suitably proved.

113. The gravamen and or substratum of the Plaintiffs’ suit before the Honourable court is that the 1st, 2nd, 3rd, 4th and 5th Defendants fraudulently and illegally caused the title over and in respect of the suit property to be transferred and registered in the name of the 1st, 2nd and 3rd Defendants, yet the suit property belongs to and should have been registered in the name of Embakasi Village Craft Jua Kali Association.
114. Premised on the foregoing and in this respect, the Plaintiffs’ claim is squarely predicated on fraud and illegality.
115. Insofar as the Plaintiffs’ herein have impleaded and alluded to fraud, it was incumbent upon the Plaintiffs’ to not only plead and particularize fraud and illegality, but same needed to adduce before the Honourable court cogent and credible evidence to establish and demonstrate the claim pertaining to fraud.



116. Notwithstanding the foregoing, it is evident and apparent that the Plaintiffs' herein, by not being the registered proprietor(s) of the suit property, same cannot be heard to agitate/ propagate a claim anchored and founded on fraud.
117. In addition, having found and held that the Plaintiffs' herein are neither the registered nor elected officials of (sic) Embakasi Village Craft Jua Kali Association, the question that needs to be addressed is whether the Plaintiffs can be heard to ventilate the claim (sic) for and on behalf of the society wherein same are not the designated officials.
118. Clearly; and without the fear of contradiction, it is my conclusion that the Plaintiffs' herein have no such capacity.
119. Nevertheless and having not tendered nor adduced any credible evidence pertaining to fraud, this Honourable court can certainly not venture to make any positive determination to and in favor of fraud.
120. Suffice it to point out that fraud is a quasi-criminal imputation and hence any one, the Plaintiffs herein, not excepted, desirous to prove fraud must place before the Honourable Court clear, credible and cogent evidence capable of establishing the case beyond a balance of probabilities. Short of that, the claim founded on fraud must invariably fail.
121. To this end, it is appropriate to recall and reiterate the established position as posited in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].
122. Subsequently, the position was reiterated in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR; wherein the Honourable Court of Appeal expressed itself as follows:-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.
- Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
123. Recently, the position was succinctly highlighted, underscored and amplified in the case of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR, where the court of Appeal stated and held;
27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a Consent for transfer cannot be obtained on the same day is well below



the standard of proof set under the authorities cited. We need not belabour this issue as we are satisfied that it was neither properly pleaded nor strictly proved.

124. To surmise, the Plaintiffs' claim founded and anchored on fraud and illegality, is thus devoid of merits and hence not capable of being sustained by the Honourable court, on account of luck/want of cogent evidence.

Issue Number 4:

Whether the Plaintiffs are entitled to the Reliefs sought at the foot of the Pleat.

125. The Plaintiffs' herein had sought for a plethora of reliefs at the foot of the Pleat beforehand. However, in the course of addressing the issues raised in the preceding paragraphs, this Honourable court has found and held, inter-alia, that the Plaintiffs herein are devoid and bereft of the requisite Locus standi to commence and maintain the instant suit.
126. On the other hand, it is also no lost on the court that the Plaintiffs' herein had also sought for an order that the Honourable court be pleased to direct the National Land Commission to issue the Plaintiffs' with a Letter of allotment in respect of the suit property.
127. However and for the avoidance of doubt, I beg to point out that whosoever desires to procure an allotment of public land, must make the requisite application to the National Land Commission in accordance with the provisions of Section 13 of The Land Act, 2012.
128. Furthermore, it is also worthy to state and underscore that National Land Commission is an Independent Constitutional Commission, created and established vide Article 67(1) of the Constitution 2010; and hence same is not amenable to the direction of any authority and/or person, in the discharge of her mandate. See Article 249 (2) (b) of The Constitution, 2010.
129. Notwithstanding the foregoing, the Plaintiffs' herein have sought to persuade the Honourable court to issue an order to direct and compel National Land Commission to issue same with a Letter of allotment; and thereafter certificate of title in respect of the suit property.
130. Clearly and to my mind; the issuance of such an order, if at all , would amount to an absurdity, insofar as the Honourable court would be overstepping her mandate and Jurisdiction.
131. In amplification of the fact that an independent constitutional commission, like the National Land Commission, is not amenable to the direction of any authority or person as pertains to the manner in which same executes her mandate, it is imperative to adopt the succinct explication of the law as espoused in the case of Njenga versus Judicial Service Commission & 9 others (Civil Appeal 234 of 2017) [2022] KECA 1429 (KLR) (2 December 2022) (Judgment), where the Court of Appeal stated and observed as hereunder;

“The 3rd respondent was established by the National Gender and Equality Commission Act, 2011 pursuant to article 59(4) of the Constitution. Section 4 thereof gave it the status of a commission within the meaning of Chapter 15 of the Constitution. The objects of such commissions included the promotion of constitutionalism, to protect the sovereignty of the people as well as to secure the observance of the Constitution by all State organs. The 1st respondent was also an independent commission created under article 248 of the Constitution, with similar objects. As independent commissions, they were not subject to the direction or control of any other person or authority. The structures within which each of those commissions operated was set out in statute, and nothing in those laws or



in *the Constitution* suggested that the 3rd respondent could give binding advice to the 1st respondent. The 3rd respondent's advisory opinion was not binding on the 1st respondent.

132. Simply put and for good measure; the reliefs seeking that the National Land Commission be directed to issue a Letter of allotment, is similarly misconceived and legally untenable.

Final Disposition

133. Having calibrated upon the foregoing issues, it is now appropriate and expedient, to bring the Judgment to closure. However, in the course of the discourse, the court has made various findings, relating to the pertinent issues, which are paramount to the determination of the suit beforehand.

134. Insofar as the Honourable court has made the various observations and findings, it is now imperative to state that the suit by and on behalf of the Plaintiffs herein, was clearly misconceived, bad in law and legally untenable.

135. Consequently and in the premises, same be and is hereby ordered struck out, with Costs to the 1st, 2nd, 3rd and 4th Defendants; to be agreed upon and in default, same to be taxed and certified by the Deputy Registrar of the Environment and Land Court.

136. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. Philip Omoiti h/b for Mr. Jos Mutisya for the Plaintiffs

Ms. Wambua h/b for Mr. Aminga Opiyo for the 1st to 4th Defendants

N/A for the 6th, 7th and 8th Defendants

N/A for the 5th Defendant

