



Kuya & another v Kamau; Waruimbo (Interested Party) (Environment & Land Case 50 of 2014) [2023] KEELC 20210 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 50 OF 2014
A NYUKURI, J
SEPTEMBER 27, 2023**

BETWEEN

TERESIA MUTHONI KUYA 1ST PLAINTIFF

AGNES WAMBUI KUYA 2ND PLAINTIFF

AND

JOHN NDUNGU KAMAU DEFENDANT

AND

STANLEY WANG'ENDO WARUIMBO INTERESTED PARTY

JUDGMENT

Introduction

1. By plaint filed on 24th June 2014 and amended on 14th October 2019, the Plaintiff in this matter sought the following orders;
 - a. An injunction restraining the Defendant, his agents and or his servants from trespassing into the suit property.
 - b. A declaration that the suit property legally and rightfully belongs to the estate of the deceased.
 - c. A declaration that the suit property, Land Reference Number 14812/5 measuring ten decimal one four hectares (10.14 ha) be transferred back to the estate of the deceased.
 - d. A mandatory injunction for the removal of any structures put on the suit property by the Defendant.
 - e. General damages.
 - f. Costs of this suit.



- g. Interests on (b) and (c) above at court rates.
 - h. Any such other or further relief(s) as this Honourable Court may deem appropriate to grant.
2. The Plaintiff averred that the late Moses Kuya Ole Kina (hereinafter referred to as Moses) entered into a fraudulent transaction with the Defendant who purportedly bought 10.14 Ha from the late Lekina Ole Kuya Noonkileti (Noonkileti) whereof Moses misrepresented himself as having the Power of Attorney of the registered owner, when none was in existence. That the 10.14 Ha was to be excised from parcel IR. No. 53193 in the name of Noonkileti measuring 34.85 Ha. He stated that the Defendant failed to meet his obligations in regard to the said sale agreement and specifically on payment of full purchase price. He further averred that the Defendant and Moses colluded and unlawfully subdivided the suit property and transferred the alleged purchased portion to the Defendant without disclosing to the family members. That at the time of the transaction Noonkileti was old and sickly and did not understand the impact of the transaction.
 3. The Plaintiff averred that the transaction by the Defendant was fraudulent as Moses purported to have a Power of Attorney when non existed, swearing a false affidavit to declare that title for IR 53192 was lost when it was not; procuring a new title when the original existed; failing to actually subdivided IR 53192 on the ground and obtaining title IR 14812/5 fraudulently. They further averred that the Defendant transferred to himself a bigger portion than what was agreed and that he failed to pay the consideration.
 4. On 14th July 2014, the Defendant filed defence, which was amended on 25th July 2019 and further amended on 19th November 2019 introducing a counterclaim. The Defendant denied the Plaintiff's claim and stated that he properly purchased the suit property which was lawfully transferred to him upon fulfilling all the obligations under the sale agreement and he is entitled to use the same as he pleases.
 5. He stated that the suit against him was malicious as he was the only one targeted out of several other purchasers who purchased land in respect of the same parcel of land.
 6. In the counterclaim, the Defendant averred that he was the registered proprietor of parcel registered as LR 14812/5 measuring 10.4 Hectares having bought the same from the late Noonkileti by an agreement dated 9th June 1988 and signed by the Plaintiff and the late Moses who was son and appointed attorney of the then registered owner. He stated that their initial agreement was for purchase of 50 acres at a consideration of Kshs. 220,000/- but that during subdivision in 1993, the same was revised to 25 acres (approximately 10.4 hectares and the purchase price of Kshs. 250,000/- fully paid. He averred that on completion of the purchase price, the parties appeared before the Land Control Board at Machakos on 29th April 1999 which was granted allowing the transfer and that the transfer instrument was registered on 10th May 1999. He also stated that when a dispute on ownership arose in 2012, the then District Commissioner confirmed that the land belonged to the Plaintiff.
 7. It was further averred by the Defendant that it was only after the death of Moses that the Plaintiffs began contesting the Defendant's ownership of the suit property. He stated that the Plaintiffs continued to sell land from his parcel of land, denying him an opportunity to use the same. He sought the following orders;
 - i. A declaration that the suit property originally known as Land Reference No. 14812/5 measuring 10.14 Ha and parcels resulting from the subdivision thereof is the sole property of the Defendant.



- ii. An order of injunction directed against the Defendant's restraining them either by themselves and or their relatives and or their servants and or their agents from trespassing into land parcel originally known as Land Reference No. 14812/5.
 - iii. A mandatory injunction for the removal of any structures put on the suit property by the Plaintiffs.
 - iv. General damages for trespass and denial to develop the land.
 - v. Costs of this counterclaim.
 - vi. Any other or further relief as this Honourable Court may deem necessary.
8. Vide a Notice of Motion dated 31st May 2019, Stanley Wangendo Waruimbo sought for joinder to this suit as Interested Party and was duly joined as such, pursuant to the order of this court made on 9th July 2019.
 9. Therefore on 10th March 2020, the Interested Party filed defence dated 6th March 2019. He averred that he was aware that there was a Power of Attorney issued to Moses. He also stated that the original land parcel 14812 was 50.79 Hectares and in 1991 the same was subdivided giving rise to LR 52191 and 53192 whereof 15.77 Ha were transferred to one Emmanuel Ngolanya Simon. That in 1999, the Defendant purchased 10.14 Ha from Moses and upon transfer the original owner Noonkileti was left with land measuring 24.71 Ha. He also stated that pursuant to a court order, the remaining land was subdivided in favour of Geoffrey Ngunjiri Wainaina and that therefore the late Noonkileti remained with 16.60 Ha.
 10. The Interested Party stated that in 2013, together with his wife, they brought 3 acres of land from the Defendant, and therefore had 3 acres hived off from L.R No. 14812/5 leading to his parcel No. LR. 14812/44 which he has subdivided and sold to third parties. He maintained that he acquired his parcel legally. No response was filed by the Plaintiffs in respect of the defence filed by the Interested Party.
 11. The suit proceeded by way of viva voce evidence.

Plaintiffs' evidence

12. PW1 was Musiane Kuya Koyi a son born to the 1st Plaintiff and the late Moses. He is also the grandson of the late Noonkileti. He adopted his witness statement as his evidence in chief. His testimony was that land known as LR No. 14812 grant IR 49685/1 in Machakos County measuring 50.19 Hectares was registered in the name of the late Noonkileti. He stated that the Defendant entered into negotiations with the late Noonkileti for sale of part of the suit property but that the negotiations aborted. That the late Noonkileti called a family meeting of all the family members and explained that the negotiations for sale of land to the Defendant failed and that thereafter he handed the original title documents to Teresia Muthoni Kuya, the 1st Plaintiff herein, which document she still had at the time of hearing.
13. The witness stated that in 1999 when the late Noonkileti was still alive, the late Moses called a family meeting in the presence of the Defendant and requested for the Original title deed to enable him transfer the land to the Defendant, which request was declined. That at that time the late Moses purported to be in possession of the Power of Attorney for the late Noonkileti although the same was not registered. He stated that although the suit land had a caveat, both the Defendant and the late Moses caused to be gazetted the loss of the title document thereby obtaining a new title document and subsequently secretly obtained consents and caused the land to be subdivided without involving the other family members. He stated that in 2009, surveyors visited the suit property, placed beacons thereon whereof the Plaintiffs were informed that they were on the land illegally.



14. PW1 further testified that the late Moses and the Defendant caused the suit property to be registered in the Defendant's name by fraud as the late Moses had no Power of Attorney, swore a false affidavit declaring loss of the title of the suit property; obtaining new title when the original title was in the Plaintiffs' custody and that they caused subdivision of the land at the land's registry and not on the ground. He stated that the transactions by the late Moses and the Defendant were fraudulent and ought to be nullified and the land ought to revert to the family.
15. He stated that the late Noonkileti died in 1998, and that on 19th March 1999 when the Defendant got his title, the former had already died. That on 21st April 1999 when the parties allegedly attended the Land Control Board, and on 14th December 1999 when the consent was allegedly issued the late Noonkileti was already dead.
16. In cross-examination, he testified that the suit property had earlier belonged to Embakasi Group Ranch and was initially known as Plot Number 48. He also stated that there were negotiations between his father the late Moses and the Defendant, although he was not privy to those negotiations. That when Moses sought for title document to transfer title to the Defendant, it was in 1996 when Noonkileti was alive. He stated that the Power of Attorney was dated 24th March 1995 when both Moses and Noonkileti were alive.
17. PW2 was Agnes Wambui Kuya, the 2nd Plaintiff in this matter. She adopted the contents of her witness statement dated 14th September 2020 as her evidence in chief. Her testimony was that she was one of the widows of the late Moses. She stated that the two Plaintiffs who were widows of the late Moses were joint administrators of the estate of the late Noonkileti. Her witness statement was the same and copied word for word with the witness statement of Musiane Kuya Kuyo PW1, which has been captured herein above. In summary, she stated that although the Defendant had began negotiations for purchase of the suit property with the late Noonkileti, those negotiations failed and did not result in any agreement. That the original title deed of the suit property was handed over to her by the late Noonkileti around 1996. She stated that the late Moses and the Defendant entered into a fraudulent transaction by causing the gazetting of loss of the title deed of the suit property, when they knew that the same was in custody of PW2 and had the suit property transferred to the Defendant by using forged documents not executed by the late Noonkileti. She said the Defendant's letter dated 19th March 1999 purported to have been written by the late Noonkileti was forged as he was dead by that date. She produced documents attached to her list of documents dated 15th September 2020 and filed on the same date. She produced grant of letters of administration; official search certificate; certificate of title; Kenya Gazette Notice of 25th June 1999; copy of Power of Attorney; and the death certificate of the late Noonkileti.
18. In cross-examination, she stated that she did not know that on 17th December 1993, Noonkileti consented to the subdivision of the suit property. She stated that the Defendant's transfer instrument showed it was signed by holder of ID No. 31xxx/1 and that document No. 10 was signed on 4th April 1997. She stated that she had no minutes to show she was given the original title and stated that the Defendant had been told he paid less money for the suit property, but that she did not know how much money was paid. She denied having been aware of a meeting between the late Moses, the late Noonkileti and the Defendant.
19. She further stated that the Defendant came on the suit property in the company of police officers and that the family had a meeting and agreed that the Defendant had paid less money for the suit property. She stated that she was not aware that the suit property had been subdivided by an order of the court. She stated that one Geoffrey Ngunjiri had a land dispute with the late Noonkileti but that she did not



know that the former was granted part of the suit property by the court. That marked the close of the Plaintiff's case.

Defendant's evidence

20. DW1 was John Ndungu Kamau, the Defendant in this matter. He adopted contents of his witness statement dated 9th October 2020 as his evidence in chief. His testimony was that by an agreement dated 9th June 1988, the late Moses agreed to sell to him 50 acres of land to be excised from land known as Plot No. 48 allocated by Embakasi Group Ranch. That the consideration was Kshs. 220,000/- and that he paid the entire consideration as follows; Kshs. 45,000/- on execution of the agreement; Kshs. 90,000/- on 21st June 1988; Kshs. 9,000/- on 9th February 1989; Kshs. 60,000/- on 20th July 1989 and Kshs. 21,000/- on 15th January 1992.
21. He also stated that upon completion of payment, the seller failed to effect transfer which led him to seek the intervention of the District Commissioner Machakos through his letter of 8th November 1993. He stated that on 29th April 1997, both the vendor and purchaser (Defendant) went to the law firm of Mwaura & Company Advocates so as to execute transfer documents but the vendor declined and asked to be paid Kshs. 250,000/- before the execution thereof. He stated that he fully paid the said amount and the father of the seller went to the Land Control Board and applied to subdivide the land as he only agreed to transfer 10.04 Ha to the Defendant. That on 19th March 1999, he signed an acknowledgement that he had consented to transferring 10.04 Ha to the Defendant.
22. The witness stated that on 21st April 1999, they appeared before the Land Control Board and consent for transfer in his favour was granted. He stated that he even obtained proceedings from the Land Control Board. That he subsequently obtained title for LR No. 14812/5 IR No. 157232. That his ownership of the suit property was confirmed by the Chief Land Registrar in a letter dated 15th October 2012 and the District Commissioner in his letter dated 9th October 2012. He stated that he took possession of the suit property and began paying rates since 1997. He maintained that his purchase of the suit property was proper and that the father of the late Moses attended the Land Control Board twice and confirmed the sale.
23. He stated that no objections were raised by the Plaintiffs until both Moses and Noonkileti died. He denied being party to any form of fraud and stated that he got less acreage than what he paid for and that he was satisfied after they agreed before the Land Control Board. He prayed for the Plaintiffs' suit to be dismissed and that his counterclaim be allowed.
24. He produced documents attached to his list of documents dated 9th October 2020. He produced certificate of title for LR No. 14812/10 (Original No. 14812/5/5); sale agreement dated 9th June 1988; payment acknowledgement note; record of expenses incurred on behalf of the seller; consent for subdivision dated 17th December 1993; transfer dated 9th April 1997; confirmation of consent to transfer by the late Noonkileti dated 20th March 1999; application for consent to the Land Control Board dated 31st March 1999; consent from the Land Control Board for transfer to Defendant dated 5th May 1999; General Power of Attorney in favor of Moses Ole Kina registered on 4th April 1997; Gazette Notice No. 3492 of 25th June 1999; form of registration presented on 10th May 1999; receipt for registration of transfer dated 10th June 1999; minutes of the Land Control Board for 29th April 1999; receipt dated 14th December 1999; receipt for survey; receipts for moneys paid at Municipal Council of Mavoko; letter dated 15th October 2012 by the Chief Land Registrar; and letter dated 9th October 2012 by the Chief Land Registrar.



25. In cross-examination, he stated that he knew the late Noonkileti whom he met in 1988. He stated that he could not recall when Noonkileti died. He maintained that he bought the suit property from the late Moses who was the first son of the late Noonkileti as he informed him that he had power to sell the suit property and that he was the owner thereof. He testified that he came to know the registered owner of the suit property when the late Moses took him to the land's office in early 1990's and that they were chased away by the Land Control Board. He stated that the transfer produced as document No. 6 on the Defendant's list of documents was signed by the late Noonkileti. He stated that he was told that Noonkileti had died and that he attended the Land Control Board with the late Moses. He maintained that Noonkileti together with his grandson and Moses attended the Land Control Board with him. He insisted that Noonkileti was alive when they attended the Land Control Board.
26. He also stated that he was not aware if the late Moses had obtained grant of letters of administration for the estate of the late Noonkileti. He maintained that as at 25th June 1999 when Gazette Notice for loss of title was published, Noonkileti was alive and signed the forms with his thumb print. He stated that he was not aware of the late Noonkileti's death certificate. He emphasized that all the transactions were done by involving the late Moses, the late Noonkileti and the Defendant.
27. The witness also stated that he knows the Interested Party who bought three acres from him in 2013. He stated that he has already subdivided the property and that his title is no longer in its original form. That marked close of the defence case.

Interested Party's evidence

28. IP-1 was Stanley Wangendo Waruimbo, the Interested Party in the suit. He adopted contents of his witness statement dated 6th March 2020. His evidence was that he purchased three acres from the Defendant herein which was hived from LR. No. 14812. He stated that parcel LR. No. 14812 was registered in the name of the late Noonkileti and that the same was measuring 50.79 Ha. He stated that the late Noonkileti had sold part of the land to one Emmanuel Ngoloni Sinui, being CT IR 52191, LR 14812/1 survey plan No. 15659 bearing 34.85 Ha in the name of Noonkileti.
29. The witness also stated that in 2003 land measuring 8.09 Ha was sold to one Geoffrey Ngunjiri Wainaina being CT IR 91442 Title deed LR No. 14812/3 deed plan number 16486. He stated that the Defendant herein purchased land known as LR 14812/5 deed plan 205619 measuring 10.14 Ha.
30. He stated that on 6th December 2013 he entered into land sale agreement with the Defendant whereof he purchased 3 acres, which was hived off and known as LR. No. 14812/5. That he thereafter obtained title LR No. 14812/44 in his name. He stated that he subdivided his parcel into twelve plots which he has sold remaining with one plot being LR No. 14812/56. He maintains that the original land registered in the name of the late Noonkileti was subdivided leaving a balance of 16.60 Ha for Noonkileti estate. He sought for the suit to be dismissed. Although he filed a list of documents on 10th March 2020, no document or exhibit was attached to that list.
31. In cross-examination, he testified that there is no dispute in regard to his title and that he was not aware that his title came into existence after the owner of the title passed on. He stated that some young people had been barring him from accessing his parcel of land. He stated that he purchased his title upon conducting official search on the Defendant's title which showed the land belonged to the Defendant. That marked the close of the Interested Party's case.
32. Subsequently, parties filed their written submissions. On record are the Plaintiff's submissions filed on 10th May 2022; the Defendant's submissions filed on 18th January 2023 and the Interested Party's submissions filed on 13th July 2023.



Plaintiffs' submissions

33. Counsel for the Plaintiffs submitted that the sale agreement relied upon by the Defendant was entered into between the Defendant and the late Moses in 1988, without the involvement of the late Noonkileti. Counsel submitted that the Power of Attorney was allegedly done on 24th March 1995 and the transfer instrument signed by the late Moses on behalf of the late Noonkileti in 1997; and that therefore all acts done before the Power of Attorney was signed in 1995, are not binding on the late Noonkileti. Counsel maintained that it is only acts done by the late Moses after the signing of the Power of Attorney in 1995, that bind the estate of the late Noonkileti.
34. Counsel maintained that as the late Noonkileti died aged 115 years old, and the Plaintiff's evidence being that he was old and sickly it means that he had no ability of understanding the nature of the transactions undertaken by the late Moses and the Defendant herein. Counsel submitted that death of a party to a transaction means that properties must revert to their estate.
35. It was further submitted for the Plaintiff that the application for consent and the consent to the Land Control Board was obtained in 1999 when Noonkileti was already dead. Therefore, counsel submitted both defence exhibits 6 and 7 were prepared in 1999 when Noonkileti was already dead. Counsel argued that the transaction herein proceeded until 2009 which is after the transfer had been done.
36. Counsel also submitted that the late Moses obtained a new title when the Plaintiffs were in possession of the old title. Further that the evidence of the Interested Party had no relevance in this matter as he purchased land from the Defendant and that he is not innocent.
37. Counsel argued that the Power of Attorney having been signed by the late Noonkileti without involving the whole family was therefore fraudulently acquired as Noonkileti always involved his family in his land transactions which is why he handed over the original title to the Plaintiffs. Counsel argued that most of the documents produced by the Defendant were forged as they were signed after the death of Noonkileti. Counsel also argued that if the Power of Attorney was to be assumed to be genuine, then the fact that it was registered on 27th March 1997, means that the agreement entered on 9th June 1988, was not binding on Noonkileti. Counsel argued that as Noonkileti died on 9th June 1998, the Power of Attorney ceased to be in force from that date. Counsel argued that upon death the deceased's estate was subject to the *Law of Succession Act*.
38. While placing reliance on the cases of *Loice Wanjiru Meru & 3 Others v. John Migui Meru* [2017] eKLR and *In Re Estate of Boniface Njeru Ngemi (Deceased)* [2020] eKLR, counsel argued that the Power of Attorney loses its validity on the death of the donor.
39. On the question of fraud, counsel referred to the case *Mutsonga v. Nyati* [1984] KLR for the proposition that fraud must be strictly proved above balance of probability but below the standard required in criminal cases of beyond reasonable doubt. Counsel argued that the Plaintiff had demonstrated fraud for the reason that the sale agreement of 9th June 1988 had not been signed by the owner of the land Noonkileti; that Noonkileti having died in 1998 could not have continued transacting thereafter and therefore the authenticity of D-Exhibits 7, 8, 9 and 14 were questioned; that the allegation of loss of original title when it was in the Plaintiff's possession was a misrepresentation and that the Defendant obtained title on 10th May 1999 before the lost title was Gazetted.

Defendant's Submissions

40. Counsel for the Defendant submitted that the main issue was whether the Plaintiffs had proved that the Defendant had obtained the suit property by fraud. Counsel argued that the Defendant was clear



in his evidence on how he acquired the suit property, as he produced the sale agreement between him and the late Moses dated 9th June 1988 and evidence of payment of the consideration. Counsel argued that it was upon payment of the consideration that the registered owner of the mother title sought subdivision of the land in the dispute as per the consent dated 17th December 1993 as the subdivision was for three portions for 10.5 Ha, 10 Ha and 8.09 Ha. Counsel submitted that the subdivision was the first step towards implementing the agreement of 1988.

41. It was further submitted for the Defendant that parties signed the transfer dated 9th April 1997 and that the Power of Attorney was signed by the late Noonkileti on 24th May 1995 and registered as P/A 31642/1 on 4th April 1997. Counsel maintained that the transfer lawfully conveyed the suit property to the Defendant and that what remained was the ministerial process of transfer. It was pointed out for the Defendant that the Gazette Notice No. 3492 of 25th June 1999 communicated that an instrument of transfer was executed in favour of the Defendant.
42. Counsel also submitted that in cross-examination PW 1 admitted that he became aware of the transaction herein in 1996 at time when his grandfather Noonkileti was still alive and that together with his mother, they waited until the title holder and the donee had died to bring this suit in 2014.
43. Counsel maintained that the disputed transaction is based on the sale agreement, Power of attorney and the transfer. Counsel cited Section 107 of the *Evidence Act* to argue that whoever alleges must prove and that no evidence was presented to challenge the authenticity of the transaction. Counsel submitted that the General Power of Attorney produced by the Defendant was registered and no evidence was produced to show that it was not genuine.
44. In addition, it was submitted for the Defendant that although the Plaintiff faulted the Gazette Notice, no evidence for documents supporting the Gazette Notice were produced and therefore the Gazettement process was not impeached. Counsel held the view that the Plaintiffs' claim was a clever scheme to deprive the Defendant of property he lawfully acquired, as the suit was filed when their own relatives being Moses and Noonkileti had passed on. Therefore, counsel argued that the Plaintiffs had failed to prove their case.
45. On the counterclaim, counsel submitted that the Defendant had demonstrated that he had a legal contract which was properly entered into and implemented. Counsel submitted that the Defendant fully paid the purchase price and the transfer instrument was executed upon which title was issued. Counsel relied on Section 26 (1) of the *Land Registration Act* No. 3 of 2012 and the case of Jeremiah Mwaura Mithanga & Another v. Njoroge Kuria Joseph [2016] eKLR, for the the proposition that a holder of title is entitled to absolute ownership thereof if there is no evidence that title was obtained by fraud.
46. Reliance was placed on the case of Koinange & 13 Others v. Koinange [1986] KLR 23 for the proposition that the standard of proof for fraud is above that of balance of probability. Counsel argued that the Defendant's title had not been impeached, and that if it was the Plaintiffs who were interfering with the Defendant's ownership thereof. Counsel argued that the Defendant had proved his counterclaim on the required standard.

Interested Party's submissions

47. Counsel for the Interested Party submitted that it was not disputed that he had purchased 3 acres from the Defendant upon conducting official search of the Defendant's title and that he had subdivided his land and sold 11 plots thereof save for title for LR. No. 14812/56. Counsel submitted that the only dispute was how the Defendant's title was acquired.



48. Counsel submitted that the Plaintiffs were in a meeting when it was confirmed that the Defendant had bought part of the larger title and that it is not disputed that the Plaintiffs still hold 16.60 Ha. Reliance was placed on the cases of James Nguru Kathuri v. Duncan Runji Kathuri [2010] eKLR and Joel Kiprono Koskei v. Jane Koskei [2008] eKLR for the proposition that allowing the Plaintiffs claim would be unfair and unjust as they will have their cake and eat it.
49. It was contended for the Interested Party that if the Plaintiffs' claim is allowed, the Interested Party stands to suffer irreparable loss and damage that cannot be compensated by an award of damages. Counsel argued that the Interested Party had since subdivided his 3 acres into 12 plots selling 11 plots and only leaving one plot for himself.
50. Counsel argued that the Interested Party is entitled to the right to protection of property, access to justice and fair hearing. Counsel cited the case of Arnacherry Limited v. Attorney General [2014] eKLR and relied on Article 40 of *the Constitution* of Kenya 2010 and Article 17 of the Universal Declaration of Human Rights to submit that the right to own property is a universal right protected under the law. Counsel argued that the Interested Party had shown how he acquired his title.

Analysis and determination

51. The court has carefully considered the pleadings, evidence and submissions in their entirety and two issues emerge for determination, namely;
 - a. Whether the Defendant fraudulently acquired title for land parcel LR. No. 14812/5 (formerly 14812/4/1).
 - b. Whether the Defendant is entitled to the orders in the counterclaim.
52. Article 40 (1) and (6) of *the Constitution* of Kenya 2010 protects proprietary rights in respect of lawfully acquired property and provides as follows;
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 - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
 - a. of any description; and
 - b. in any part of Kenya.
 6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
53. A certificate of title is by law held as conclusive evidence of proprietorship unless the acquisition of that certificate is unlawful. Section 26 (1) (a) and (b) of the *Land Registration Act* provides as follows;
26.
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
54. It is therefore clear that the law only protects property whose process of acquisition leading to title, is a process that is lawful, without any taint of fraud, illegality, want of procedure or corruption.
55. The main dispute herein is the Plaintiffs' allegations that the Defendant obtained registration of the suit property by fraud. The Black's Law Dictionary defines fraud as follows;

A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.
56. It is trite law that allegations of fraud must be specifically pleaded and strictly proved. In the case of *Vijay Morjaria v. Nansingh Madhusingh Darbar & Another* [2000] eKLR, the court 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 interfered from the facts.
57. The standard of proof for fraud is higher than the standard required in ordinary civil cases of the balance of probabilities but lower than the standard required in criminal cases of beyond reasonable doubt. In the case of *Ndolo v. Ndolo*, the court held as follows;

We start by saying that it was the Respondent who was alleging that the will has 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.
58. In the instant case, the Plaintiff listed six particulars of fraud in paragraph 5 of their amended plaint as follows;
 - i. Purporting to have a Power of Attorney when the same was false.
 - ii. Swearing an affidavit to declare the title for IR 53192 lost when the same was false.
 - iii. Procuring a new title for IR 53192 when the original still existed and was in safe custody of the Plaintiffs.
 - iv. Subdividing the parcel of land IR 53192 in the registry without actual subdivision on the ground.
 - v. Having title IR 14812/5 issued fraudulent and with material non disclosure.
 - vi. Being fraudulent generally.
59. It is not disputed that the Defendant and the late Moses entered into a sale of land agreement on 9th June 1988. While the Plaintiff allege that there was no Power of Attorney they concede that as at



24th March 1995 when the same was signed the late Noonkileti was alive. In addition, that Power of Attorney was registered on 4th April 1997 as No. P/A 31642/1. The Plaintiffs cannot purport to be unaware of the said Power of Attorney, when they are the ones who first filed it in court on 24th June 2014 when they filed this suit. In fact, the Plaintiffs filed a transfer dated 9th April 1997 signed by the late Moses as Attorney of Noonkileti. As at that time, the Plaintiffs who were ably represented by counsel did not fault the Power of Attorney and their only grievance was that the entire consideration had not been paid. It was not until 14th October 2019, which is over five years later that the Plaintiffs introduced alleged fraud as against the Defendant. As the Plaintiffs were in custody of the disputed Power of Attorney signed by their husband the late Moses and did not raise any contention on the same, it is my view that the allegations of fraud on the same are merely an afterthought. This is because the Defendant came on the suit property in 1996 as conceded by the Plaintiffs while Moses died in 2009, yet no claim was filed against Moses in regard to the Power of Attorney. In addition, the witness statement by the Plaintiffs did not suggest that the Power of Attorney in issue was not signed by Noonkileti. What the Plaintiffs raised was that the same was not registered. Having found that the allegation of non registration was not true as the same shows that it was registered as P/A No. 31642/2, I do not find any evidence of fraud on that account.

60. The allegations that subdivision was done in the registry and not on the ground is in my view baseless as it is the Plaintiffs who first produced letter of consent dated 17th December 1993, approving subdivision of Parcel 14812/1 into three portions of 10.50 Ha; 10 Ha and 8.09 Ha. The Defendant exhibited receipts for payment for survey, which indeed confirms that subdivision was done.
61. Although the Plaintiffs alleged that a new title for IR 53192 was issued when it was in safe custody of the Plaintiffs, no evidence of Gazette Notice was produced by the Plaintiffs. I have considered the Gazette Notice produced by the Defendant. It is dated 25th June 1999. The same is in respect of title for LR. No. 14812, registered as IR No. 49685/1 measuring 50.79 Hectares. On the other hand, the title the Plaintiffs alleged were in their custody was produced by the Plaintiffs as P-Exhibit 1, which is title for IR No. 53192 LR 14812/1 measuring 34.85 Hectares. It is clear that the title that the Plaintiff has, which is for IR No. 53192 measuring 34.85 is different from the title that was gazetted being IR No. 49685/1 measuring 50.7 Ha. As the Plaintiffs title is LR. No. 14812/1, and not the Gazetted title No. 14812, it appears what the Plaintiffs hold is a subdivision of the title that was Gazetted. For those reasons, I find and hold that the title that was Gazetted was different from the title that is in the Plaintiffs' custody and therefore that did not demonstrate fraud.
62. The Plaintiffs also alleged that a false affidavit for loss of title for IR No. 53192 was made. No such affidavit was produced in evidence by the Plaintiffs and therefore that allegation was not proved by the Plaintiffs. As the transfer was signed during the life of Noonkileti and the same having not been faulted by the Plaintiffs, the transaction herein cannot be said to be fraudulent as the transfer only endorsed the agreement of 1988. In the premises having considered that the sale between the Plaintiffs' husband and the Defendant is not disputed neither is the transfer signed on 24th March 1997 on the basis of a Power of Attorney signed in 1995, it is my finding that no fraud has been proved by the Plaintiffs as against the Defendant. That being the case, the Plaintiffs' case lacks merit and the same is hereby dismissed with costs.
63. On the counterclaim, the Defendant sought a declaration that LR. No. 14812/5 and the resultant subdivisions thereof be declared as the Defendant's sole property; an injunction to restrain the Plaintiffs from trespassing on that property; and general damages for trespass and costs of the counterclaim.



64. It is not disputed that the Defendant is the registered proprietor of LR No. 14812/5 measuring 10.14 Ha. Having found that the acquisition of the said property was not by fraud, it follows that the Defendant's ownership thereof is protected in law. Section 24 of the [Land Registration Act](#) provides the rights conferred on an absolute proprietor of land by registration. Therefore the Defendant is entitled to enjoy his property to the exclusion of everyone else including the Plaintiffs. In the premises, the Defendant deserves both injunction to bar the Plaintiffs from trespassing on the suit property and the removal of any structures erected thereon by the Plaintiffs.
65. On the question of damages for trespass, it is trite that damages ought not only be pleaded but they must also be strictly proved. Having considered the Defendant's evidence as contained in his witness statement of 9th October 2020, there is no mention of when and to what extent the Plaintiffs trespassed on the suit property. In my view therefore, the Defendant has not proved damages for trespass and that claim is therefore rejected.
66. In the end, I find and hold that the Plaintiffs' claim lacks merit and the same be and is hereby dismissed with costs. I consequently enter judgment for the Defendant against the Plaintiffs jointly and severally in the following terms;
- a. A declaration be and is hereby made that the suit property originally known as Land Reference No. 14812/5 measuring 10.14 Hectares and parcels resulting from the subdivision thereof is the sole property of the Defendant.
 - b. An order of injunction be and is hereby issued against the Plaintiffs, restraining them either by themselves and or their relatives and or their servants and or their agents from trespassing into land parcel originally known as Land Reference No. 14812/5.
 - c. The Plaintiffs are ordered to remove their structures on LR. No. 14812/5 within 90 days of this judgment and in default the said structures be removed by the Defendant at the Plaintiffs' expense.
 - d. The costs of the Plaintiffs' suit and the counterclaim are awarded to the Defendants.
67. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Loki for Plaintiffs

Mr. Nagwere holding brief for Mr. Mutia for Defendant

Mr. Githui for Interested Party

