



**Gichuru v Kinyanjui & another (Environment & Land Case 148 of 2016)
[2023] KEELC 20090 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 148 OF 2016
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

MARY WAMBUI GICHURU PLAINTIFF

AND

JOHN B KARUGA KINYANJUI 1ST DEFENDANT

**JANES SAMUEL KINYANJUI (SUED AS THE LEGAL
ADMINISTRATOR OF THE ESTATE OF MUSA MUIKAMBA NGETHE
(DECEASED) 2ND DEFENDANT**

JUDGMENT

Introduction

1. Mary Wambui Gichuru (hereinafter referred to as the Plaintiff) commenced this suit vide a Plaint dated 27th April, 2016 and amended on 8th August, 2016. In the amended Plaint, she avers that she is the legal owner of LR No Naivasha/Maraigushu Block 11/148 (Karai) registered in the name Musa Muikamba Ngethe (deceased) and that the Defendants are sons to Musa Muikamba Ngethe (deceased) and the 2nd defendant a legal administrator to his estate.
2. She further avers that the said LR No Naivasha/ Maraigushu Block 11/148 (Karai) was registered in the name Musa Muikamba Ngethe (deceased) through mistake and fraud. The Plaintiff lists the particulars of fraud and interference as;
 - a. The Plaintiffs husband being member of Karai farm balloted for the land parcel
 - b. Musa Muikamba Ngethe (deceased) being member of Karai farm did not ballot
 - c. Musa Muikamba Ngethe (deceased) being member of Karai farm did not ballot for the suit land.



- d. The farm directors were misled to register the land parcel in the name of Musa Muikamba Ngethe (deceased) or the 1st Defendant.
 - e. The defendants knowing very well that the land parcel did not belong to Musa Muikamba Ngethe (deceased) or their family refused and failed to facilitate the registration of the land parcel to the name of the rightful owner the plaintiff.
 - f. The Defendants on several occasions interfered with Plaintiff's occupation of the land and sought to dispose off the same.
 - g. The Defendants jointly and severally fraudulently procured the registration of the suit land to the name of their deceased father Musa Muikamba Ngethe.
 - h. The 1st Defendant has on several occasions removed a caution placed on the land parcel by the Plaintiff and brought prospective buyers to the suit land in an attempt to dispose off the same.
 - i. The 1st Defendant has on several occasions interfered with the Plaintiff's land parcel by attempting to deposit building materials therein.
 - j. The 2nd Defendant being legal administrator of the estate of Musa Muikamba Ngethe (deceased) and knowing very well that the suit land does not belong to his late father or form part of his late father's estate has refused and failed to facilitate with the registration of the title deed to the name of the rightful owner thereof.
3. The Plaintiff contends that the defendants have since declined to facilitate the registration of the land parcel in the Plaintiff's name knowing very well land parcel belongs to the Plaintiff and that she and the 1st Defendant have attempted to determine the dispute in several forums such as Naivasha Land District Tribunal, Nakuru High Court Judicial Review Case No 379 of 2006 and Nakuru Succession Cause No 609 of 2008 and that she filed Nakuru Succession Cause No 609 of 2008 against the 1st Defendant and the same is yet to be determined and now cannot be determined in the said cause due to jurisdiction and the plaintiff is now compelled to institute this suit due to jurisdiction.
 4. The Plaintiff avers that she filed the succession cause way back in the year 2008 and has obtained substantive orders in the said cause. She further avers that she has incurred great costs in the said succession cause and prays that the same be effectively determined together with this suit. The Plaintiff prays for judgement against the Defendants for:
 - a. An order of cancellation of title deed LR No Naivasha/ Maraigushu Block 11/148 (Karai) registered in the name Musa Muikamba Ngethe (deceased)
 - b. A permanent injunction restraining the defendants jointly and severally from interfering with the plaintiff on her land parcel LR No Naivasha/ Maraigushu Block 11/148 (Karai)
 - c. Costs of the suit and interests
 - d. Any other and or further relief as the Honourable Court may deem fit and just to grant.
 5. The Defendants filed their amended Statement of Defence and Counter Claim dated 11th October, 2017. They deny the Plaintiff's averments in the Plaintiff. The Defendants state that the said property L.R No Naivasha/Maraigushu Block 11/148 (Karai) belongs to the late Musa Muikamba Ng'ethe as per the title deed issued on 12th November, 1999. The Defendants aver that they are the sons of the Late Musa Muikamba Ng'ethe and state that Mr. James Samuel Kinyanjui, the 2nd Defendant was appointed the administrator of the said estate on 3rd August 2012 vide letters of administration issued in succession cause no 609 of 2008 in the matter of the estate of Musa Muikamba Ngethe alias Muikamba Ngethe



The Defendants state that there was no collusion, fraud or illegality in the transfer of the property L.R No Naivasha/ Maraigushu Block 11/148 (Karai) to Musa Muikamba Ng'ethe (Deceased) or the issuance of the title deed in his favour which was lawfully done and its sanctity must be upheld. The Defendants also aver that the Plaintiff's suit is time barred, incurably defective and an abuse of this Honourable court's process.

6. The Defendant's aver that Musa Muikamba Ng'ethe was the bonafide owner of L.R No Naivasha/ Maraigushu Block 11/148 (Karai) having been allocated the said land by Karai Farmers Co-operative Society Limited for valuable consideration and states that the plaintiff has no proprietary rights whatsoever over the land which belongs to the estate of the late Musa Muikamba Ngethe. The Defendants state that the Succession court has no jurisdiction to hear and determine any land dispute under the law and can only direct the plaintiff to take her perceived grievance to the right forum. The two matters remain distinct and cannot be heard together. The Defendants deny that any notice or intention to sue was ever sent to them and avers that the Plaintiff is not entitled to any costs.
7. The Defendants also deny that the Plaintiff is entitled to any of the relief sought by the Plaintiff and avers that the Plaintiff's suit should be dismissed with costs. The Defendant also avers that the Plaintiff's suit is time barred is incurable defective and is an abuse of this honourable courts process and the defendants shall raise a preliminary objection to hearing of this suit at the first hearing.
8. In their counterclaim, the Defendants state that at all material times the late Musa Muikamba Ng'ethe was the true owner and entitled to the possession of the property L.R No Naivasha/ Maraigushu Block 11/148 (Karai). They also state that on or about the 5th day of February, 2012, the defendant wrongfully entered the said property and has wrongfully taken possession of the same, and has thereby trespassed and is still trespassing thereon.
9. The Defendants state the estate of the late Musa Muikamba Ng'ethe has been deprived of the use and distribution of the said property to the beneficiaries of the deceased, and has thereby suffered loss and damage. The Defendant's prays that the Plaintiff's suit be dismissed with cost to the Defendants and judgement be entered for the 2nd Defendant against the Plaintiff for:
 - a. A permanent injunction restraining the plaintiff by herself, her servants or agent or otherwise from trespassing or interfering with defendants' land known as LR No Naivasha/Maraigushu/ Block II/148 (Karai)
 - b. Vacant Possession of the property known as L.R No Naivasha/Maraigushu Block 11/148 (Karai)
 - c. An Eviction order to remove the defendant plaintiff by herself, her servants or agents or otherwise together with all her possessions from L.R No Naivasha/Maraigushu Block 11/148 (Karai).
 - d. The Costs of this counterclaim together with interest thereon.

Factual Background

10. On 18th March 2019, the Plaintiff withdrew her suit against the Defendants and the Court awarded costs to the Defendants. The suit came before the Court on 9th February, 2021 for hearing of the Counterclaim in the presence of Mr. Gaita for the Defendant and Mr. Ochieng for the Plaintiff.



Defendants Evidence

11. The Defendants canvassed their counterclaim first and they called PW1 who was John B Jarug Kinyanjui who testified that he is the 1st Defendant/Claimant in this matter and has recorded a witness statement dated 15th June, 2016 and has filed a bundle of documents which he would like to adopt and rely on as his evidence. PW1 testifies that his father's name was Musa Muikamba Ngethe who is now deceased and the 2nd Defendant is his brother who was issued with letters of administration to represent the estate. It is his testimony that his father was a member of Karai farmers & Company Society Limited and they were supposed to get four shamba's but only got three. PW1 testifies that his father has 1 share and was issued title No Naivasha Muraigushu Block 11/148 (Karai) and as per copy exhibited in the bundle of documents, his brother also had a share and his plot was adjacent to his father's. He testifies that his father was staying at his brother's plot which has a house.
12. PW1 testifies that his father lawfully and validly got allocated the suit land by the society. He testifies that he was a member as per the exhibited register. He testifies that his father was member No 148 Gachara Kigathi whose name appears cancelled Ha plot no 107 as per list at page 13 supplementary bundle of documents.
13. He further testifies that his brother the 2nd Defendant bought a house and was not entitled to ballot as his shamba was adjacent to the house. It is his testimony that the Plaintiff's name was not in the society register and she sued PW1 at the land dispute tribunal as per ruling at page 6 supplementary bundle and the tribunal proceedings were annulled/quashed.
14. PW1 testifies that after his father died on 5th February, 2012, he got information that some people had entered the land and it was the plaintiff who was leasing people. He testifies that on 7th February 2012, he visited the land and reported to the chief who asked to verify the status.
15. It is his testimony that on 14th February, 2012 he again went to the land and found the Plaintiff had allowed people to enter and have remained therein. It is also his testimony that he wishes the Court to order their eviction and they be paid cost of the suit. He further testifies that they are litigating on behalf of the estate.
16. PW1 was cross examined and he testifies that it is their father who was rearing livestock before he died and the Plaintiff is in occupation of the land having entered the land on 5th February, 2012. It is his testimony that he resides in Kikuyu and he recorded his statement and what he stated was correct.
17. It is his testimony that the Chief gave him a letter to be assisted by the village elders and that the Plaintiff was not using the land during his father's lifetime and he reported to the police respecting the incision of our land.
18. PW 1 testifies that in 2003, the Plaintiff had come to Kikuyu where he was residing with officials from Karai Farmers claiming the suit land was hers and she even had police officers. It is his testimony that the police said they wanted either him or his brother Kinyanjui to accompany them and they did not take anyone. He further testifies that in 2012 when he reported to the police they never took any action and his father had shares in the company. It is his testimony that he was not a member of Karai Farmers Co-operative Society and his brother was also not a member.
19. PW1 testifies that the house was sitting on 7 ½ acres and it is his brother who gave money to his father to buy the house and if his father was not a member then his brother would not have bought the house.
20. It is his testimony that his brother was given a plot by Mburu Ngethe who was a stepfather (uncle). Mburu Ngethe was a member of Karai Famers and it was 1 Share and it was about 7 acres and the



land parcel was 147. The house was on parcel 146. It is his testimony that Parcel 148 was in respect of his father's share and he did not know the Plaintiff before 2003 when she came to their home. PW1 testifies that in 2004, the Plaintiff sued him at the tribunal and the tribunal ruled against him but the decision of the tribunal was quashed and he did not take any action all this time as there was no one on the land. It is also his testimony that Karai Cooperative Society was dissolved and all the directors are now deceased and he is not aware how the documentation was processed.

21. He testifies that his father did not ballot for land and since he bought the house and he requested his shamba be next to the house.
22. It is his testimony that although James Kinyajui was not a member, his name was entered in the register after he bought the house and the directors of Karai Farmers Co-operative Society testified before the tribunal. He testifies that after the High Court case, he applied for removal of the caution placed by the Plaintiff.
23. PW1 was re-examined and he testifies that one had to be a shareholder to buy the house. He testifies that the house was being sold independent of the share one had. He testifies that his father remained entitled to his share in the company plot 148 was in respect of his share in the company. He testifies that the Plaintiff filed citation to be able to get a person to prosecute. PW 1 testifies that he obtained the extract of the member's register from the lands office Naivasha and the estate of the deceased seeks the eviction of the plaintiff from the suit land and the caution was procedurally removed. It is his testimony that the Plaintiff has no genuine claim to the land.
24. PW2 was James Samuel Kinyanjui, sworn on 15th July, 2021 and he testifies that he is the 2nd Defendant and the plaintiff in the Counter-claim. It is his testimony that he is the administrator of his late father's estate- Musa Muikamba Ngethe and he made a witness statement and filed a bundle of documents and he relies on the witness statement and filed documents including a grant and copy of the title for the suit land. He testifies that he is aware that he is in court in respect of his late father's land Naivasha/ Maraigushu Block 11/148 (Karai) and his father had bought the land from Karai Farmers Co-operative Society.
25. It is his testimony that he never sold his plot to anyone and he was also a member of the society and was allocated 2 plots parcels 146 and 148. He testifies that the plots were adjacent to each other and parcels 146 belonged to his uncle but he gave it to PW2 and he bought 147 from shareholders.
26. It is also his testimony that there was a milking shed and a house on parcel 146 which the society offered for sale at Ksh 25,000/= and his father did not ballot because he had paid for the house.
27. PW2 testifies that the Plaintiff are in possession of plot No 148 which they invaded in 2012 and have exhibited photographs at page 5 showing a container they have put on parcels 148 and they wish the Plaintiff/Defendant's in the counter claim to be ordered to vacate failing which they be evicted. PW 2 also prayed for costs.
28. PW2 was cross examined and he testifies that it is true that he recorded a witness statement which he relies on. He testifies that he became a member by virtue of buying land and does not hold a share certificate since he bought his land from a member. It is his testimony that he gave his father money to buy a milk shed and a house. He testifies that Daniel Ngethe, was his brother but he died. He testifies that his brother was a member of Karai Farmers Cooperative society and he had a share certificate and his brother Daniel Ngethe gave him his plot. It is also his testimony that he bought land parcel 147 from a member whose names he does not remember and they had no formal agreement. Parcels 146 and 147 belong to him and he gave his father Ksh 25,000/= and he bought parcel 146. He testifies that parcels 148 is in his father's name and his father was allotted the same. His father bought parcel



146 where there was a house, he did not have to ballot for parcel 148 as it had to be conveniently sited in relation to plot 146. He has subdivided and sold his plots parcels 146 and 147 and parcel 148 is occupied by the Plaintiff since 2012 and he does not know whether his father was taking care of plot No 148 for the Plaintiff.

Plaintiff's Evidence

29. The Plaintiff produced the documents attached to his list of documents dated 15th March, 2019
 - a. Grant of letters of administration Ad – Litem
 - b. Death certificate Gordon Gichuru Sipiriono dated 7th October, 1994
 - c. Ballots Karai Farm Co-operative Society Ltd
 - d. Map Naivasha/ Maragushu Block 11/Karai
 - e. Death certificate Musa Muikamba Ngethe
 - f. Search certificate dated 29th January, 2010
 - g. Search certificate dated 14th June, 2010
 - h. Title deed dated 12th November, 1999 in the name Muikamba Ngethe (deceased)
 - i. Proceedings Naivasha SPMCC No 29 of 2005 and Naivasha Land Dispute Tribunal Case No 23 of 2005
 - j. Letter dated 16th January, 2019
 - k. Demand letter from M/s Karanja Mbugua & Co Advocates dated 22nd December, 2009
 - l. Demand letter from M/s Ochieng' Gai & Co Advocates dated 15th January, 2010
 - m. Letter to Naivasha Land Dispute Registrar dated 15th June, 2010
 - n. Certificate of official search dated 30th July, 2007
 - o. Certificate of official search dated 5th July, 2010
30. DWI was Mary Wambui Gichuru and she testifies that she resides in Limuru and she does not work. It is her testimony that her husband who filed the suit is deceased and she has taken out letters of administration. It is her testimony that she has recorded a witness statement which she wishes to adopt and rely on. It is her testimony that the Defendant/ Plaintiff in the counterclaim grabbed her land parcel 148 and her husband (deceased) was a member of Karai Farmers and he balloted and was allocated plot No 5 now parcel 148 and the plot was at Naivasha. It is also her testimony that after balloting they were shown their plots and they took possession. She testifies that she was cultivating the land but she had not built thereon.
31. She further testifies that she does not have the title to her land and one Mburu the son of Muikamba took her title. She testifies that she filed a case before the tribunal at Naivasha, sued the defendant and the tribunal ruled in her favor.
32. It is also DW1's testimony that she filed a list of documents on 15th March, 2019 and a further list on 2nd March, 2022 and wishes to rely on them. She testifies that the documents as per list dated 15th March, 2019 admitted and produced as DEX 1-15 and the documents on the supplementary list dated



- 1st March, 2022 are produced as DEX 16 and 17. She testifies that John Karuga Kinyanjui and James Kinyanjui have never been on the land and she is the one who is on the land doing cultivation.
33. DW1 was cross examined and she testifies that her husband's name was Gordon Gichuru Kamau and he was also known as Sipiriono. She testifies that her husband balloted for the land and she does not remember the year the balloting was done. She testifies that her husband did not get title for the land and the title was taken by Muikamba's son, one Mburu.
34. It is her testimony that she has filed a case at the Tribunal at Naivasha and the tribunal's verdict was quashed by the High Court for want of jurisdiction. DW1 referred to her supplementary list of documents and states that she cannot state where the Registrar abstract came from. The witness testifies that her late husband paid for the plot and she has not produced any exhibit of receipt of payment. She testifies that she knew the late Muikamba and he was residing at Naivasha in his shamba and it is not true that they only started laying claim of the suit land after Muikamba died. She testifies that her husband died in 1994 and Muikamba died in 2008.
35. She testifies that they came to the land around 2003 and she leased the land to somebody who placed a container and she cannot remember the year she leased the land. She also testifies that they have no title to the land and it is Muikamba who has the title.
36. On 3rd March 2022, Kamau Njoroge Magu was sworn and he testifies as DW2. He testifies that he resides in Nyahururu and he is a peasant farmer. He testifies that he recorded a witness statement which he wishes to rely on as his evidence.
37. It is his testimony that he knows that plaintiff as the widow of Gordon Kamau and he knew Muikamba (now deceased) and they bought land through Karai Farmers' Cooperative Society Limited in Nyahururu and Naivasha. He testifies that he had two ballots, one for land in Naivasha and the other for land in Nyahururu. He testifies that the balloting was done in Nyahururu where the society's offices were and the balloting for the Naivasha land was in May 1983 and for Nyahururu farm in 1984. He testifies that Mr. Gordon Kamau balloted for Naivasha and Nyahururu and Mr. Muikamba did not ballot for land in Naivasha but balloted for Nyahururu land.
38. It is his testimony that Mr. Muikamba requested to be given land where there was a cattle diary store and house. He testifies that he was a committee member and they agreed to sell the portion to him for Ksh 25,000/=. He also testifies that it was for that reason that he was not required to ballot. He also testifies that they valued the houses and not the soil and he got 7 acres around the house and diary and he does not remember the plot number the plot was given. It is his testimony that the plot that is in dispute was plot No 5 that was balloted by Gordon Kamau and he does not know the current number of the plot. He testifies that Gordon's widow is the one who is on the land and each member was entitled to one plot per share and the directors have changed variously.
39. Upon cross examination, DW2 testifies that he became a committee member in 1981 but was removed in 1982 following an election of directors. He testifies that there was a members list and after balloting another register showing the members and their plots.
40. He further testifies that the titles were issued on the basis of the records supplied by the company and the land registrar was furnished with the list of members and their plots.
41. It is DW2's testimony that the committee agreed with Muikamba that he would buy the house and he would get his share around the house. He testifies that Muikamba's share was to be given where the house was. He testifies that Gordon Kamau balloted for the Naivasha land and after balloting members were to pursue their titles.



42. Upon reexamination, DW2 testifies that his ballot for Naivasha land was plot 262 and he got 10 acres but the land was rocky and the surveyors were the ones who were showing members their plots.
43. On 6th February, 2023, the liquidator Patrick Nyagah Muita testified that he is currently a retired cooperative officer. He testifies that on 5th March, 2011, he was appointed a liquidator with Karai Farmers' Co-operative Society.
44. He further testifies that he was appointed by the committee of Co-operation under a Gazette notice and he was to wind up the society because it has achieved its purpose.
45. It is his testimony that there were two pieces of land in Nyahururu and Naivasha. He testifies that his task was to collect all the books of the society and take the assets and do liquidation. He testifies that he collected the records from the former director.
46. He further testifies that he completed his work between 2011 and 2016 and the main tasks were to see that the members were settled. He testifies that he facilitated the processing of title with assistance of the former director.
47. He testifies that he received the summons of this court and he enquired and found that there was a dispute from 146, 147 and 148. He testifies that he has the original land register for Karai and he has made certified copies and produced it as Exhibit PNM 1. He testifies that this was the record used to produce the titles.
48. Upon cross examination, he testifies that he was appointed because the society had finished its work and he collected the members register survey documents. He testifies that the land registrar for Karai did not come with the member's register and the registration is available.
49. He testifies that he did not get minute files and they did not have rules but they had by-laws. He testifies that he did not come across any dispute and he does not remember Gordon Gichuru Cyprian Kamau. He also testifies that he has not seen his name in the register and majority the directors are deceased.
50. On 6th February, 2023, Roussos Rittho Mwangi testified that he is the land registrar based in Naivasha and he has records from Karai Farmers Society. He testifies that the records show land allocated to each individual. He testifies that these are the records they used to process title and the documents were bought by Karai Farmers Society. He testifies that he has an extract for 146, 147 and 148.
51. He testifies that parcel number 11/148 Karai was allocated Gachara Kigecha and transferred to Musa Mwikara Ngethe and he has a copy of green card. Upon cross examination, he testifies that he has a copy of the green card and the members register. He testifies that it was used to produce title deeds and the members of Karai Farmers were 657. It is his testimony that there is only one register for members and he does not know why entry number 148 in the member's register was cancelled. He testifies that he knows Musa Mwikamba Ngethe was a member and does not know who signed the cancellation. He testifies that all he knows is that they are members of the society and he does not know Gordon Cyprian Kamau or whether he was issued with title.

Submissions

52. The plaintiff submits that the gist of the plaintiff's claim is that the suit land did not belong to Musa Muikamba Ngethe (deceased) as per the title issued to him. She submits that the said person obtained the title deed fraudulently and that the defence and counter claim should be dismissed with costs.
53. The Plaintiff submits that the witnesses gave evidence that at the time of balloting they balloted together with the deceased Gordon Gichuru Sipiriono Kamau and that Musa Muikamba Ngethe



- (deceased) did not ballot because he bought the dairy house that had already been set aside for purchase and the person purchasing the house was not eligible to ballot because he had already got land where the dairy house stood.
54. The Plaintiff submits that in fact they added that the ballot for the house was ballot No 7 and the same was removed from the ballot box by Co-operative officers. It is her submission that the witnesses say that they were neighbours and knew each other and when the plaintiff's husband died and the plaintiff delayed to process title to the land parcel they were surprised that Musa Muikamba Ngethe had already taken title to the land parcel. It is the Plaintiff's submission that the witness also gave key evidence in court that the cardinal rule of Karai Farm was one share per member.
 55. The Plaintiff submits that at the time of hearing it curiously emerged that 3 plots No 146, 147 and 148 were registered in the names of the family of Musa Muikamba Ngethe (deceased). The Plaintiff submits that Musa Muikamba Ngethe was a member and the rule being one share a member, the said Musa Muikamba Ngethe or his family should not have had 3 plot numbers registered in their names.
 56. The Plaintiff submits that the said record read that Plot No 146 that had been registered in the name Musa Muikamba Ngethe was cancelled and the same written in the names James Samuel Kinyanjui the 2nd Defendant and son to Musa Muikamba Ngethe (deceased).
 57. The Plaintiff submits it is not clear at what point and time and for what reasons the cancellation was made and James Samuel Kinyanjui was not a member of Karai Farm to be entitled to Plot No 146 or any other plot in Karai Farm. It is her submission that Plot No 147 was also registered in the name James Samuel Kinyanjui Plot No 148 initially indicated Mr. Gacahra Kigathi but was cancelled and written Musa Muikamba Ngethe.
 58. The Plaintiff submits that she has proved her case on a balance of convenient as required by law and she has all document pointing to ownership of land parcel LR No Naivasha/ Maraigushu Block 11/148 (Karai).
 59. The Plaintiff also submits that she is in possession of the same since the date of the ballot and there is evidence that Musa Muikamba Ngethe has never been in possession of the plot and being also a member of Karai Farm there is also evidence that he got his entitlement and should not be allowed to get away with the plaintiff's entitlement.
 60. The Plaintiff prayed that the defendants defence and counter-claim be dismissed with costs and the title deed registered in the name of the deceased Musa Muikamba Ngethe be cancelled and orders issued for the same to be registered in the name of the rightful owner Gordon Gichuru Sipiriono Kamau.
 61. The Defendants filed their submissions in respect of both the suit and their counter claim dated 4th July, 2023.
 62. It is also the Defendants submission that in February, 2012 the Plaintiff trespassed upon their late father's property a matter which the family reported to the area Chief. It is the defendant's submission that he stated that his father never sold the property to anyone plied to his death and it remains part of his estate.
 63. The Defendant submits that in sum both witnesses stated that the estate of Muikamba Ngethe was the lawful owner of Naivasha/Maraigushu Block 11/148 (Karai) and they sought the reliefs prayed for in the counterclaim by the 2nd Defendant.
 64. The Defendant submits that two more witnesses were summoned by the Court being the liquidator of Karai Farmers Co-operative Society Limited and the Land Registrar Naivasha and both witnesses



testified and produced documents which confirmed that the late Muikamba Ngethe was the owner of the suit property. The Defendants submit that the register held by the company and the large office was the same one produced by the defendants and both witnesses denied documents presented by the Plaintiff most of which were illegible and they denied that the plaintiff or her late husband were the owners of the suit property.

65. The Defendants submit that the 2nd Defendant has proved his case on a balance of probabilities that his late father is the bona fide owner of the suit property and is entitled to the reliefs sought in the counterclaim and it is unlawful for anyone to violate one's constitutionally granted proprietary rights through trespass and illegal actions and this must be remedied in the interest of justice.
66. The Defendants submit that the 2nd Defendant and his witness proved that the suit property was genuinely acquired by their late father who was a shareholder of Karai Farmers Co-operative Society Limited and lawfully acquired the title deed for the land. It is their submission that sanctity of title requires that the rights of a registered propriety lawfully acquired be upheld and he/she be accorded the constitutionally guaranteed right to property under Article 40 of *the Constitution* and the relevant Land Acts.
67. The Defendants rely on the cases of Migori ELC Appeal No 28 of 2019 Samwel Ambasa & 3 others vs Stella Ingasia [2022] Eklr and Dr Joseph Arap Ngok vs Justice Moiwo Ole Keiwa & 5 others Civil Appeal No CA 60 of 1997.
68. The Defendants submit that this is a proper case for the Honourable Court to do justice for the 2nd Defendant by allowing his counterclaim. The Defendant submits that the Plaintiff withdrew her plaint which constituted her claim on 18th March 2019 and therefore has no claim before the court and no evidence whatsoever was adduced to impeach the title held by the deceased Mr. Muikamba Ngethe.
69. The Defendants submit that this Honourable Court should issue the orders sought in the counterclaim to evict the Plaintiff and her agents from the suit land which they illegally trespassed without any collusion of rights.
70. The Defendants urge that the court to find that the 2nd Defendant has proved his case and they urge this Honourable court to allow all the prayers sought in the counterclaim which they submit have been satisfactorily proved as required by the law.

Analysis And Determination

71. After considering the pleadings, submissions and the testimony of the Plaintiff and the Defendants and their witnesses; the following issues arise for determination:
 - a. Whether the orders sought in the Defendants Counterclaim dated 11th October, 2017 are merited?

A. Whether The Orders Sought In The Defendants Counterclaim Dated 11th October, 2017 Are Merited?

72. The Plaintiff in her witness statement received by the Court on 15th March 2019 states that she is the legal owner of LR No Naivasha/ Maraigushu Block 11/149 (Karai) and she is possession of the same. It is her statement that the said land was registered in the name of Musa Muikamba Ngethe (deceased) through fraud or mistake.
73. In the witness statement of John Muchina Gaichuhie; he states that the balloting for Karai farm plots for the members took place in Nyahururu and he was present at the ballot among with 265 members



- who included Musa Muikamba Ngethe (deceased) and Gordon Gichuru Kamau (deceased). He states that he balloted and picked ballot no 8, Gordon Gichuru Kamau (deceased) balloted and picked No 5 and Musa Muikamba Ngethe (deceased) did not ballot for any plot.
74. He further states that this is because Musa Muikamba Ngethe had expressed interest to purchase the dairy house and others also expressed interest in the dairy house but it was Musa Ngethe (deceased) who had the money. He states that he was sold the dairy house for the sum of about Ksh 25,000/=.
75. He also states that at the time of balloting, they also agreed that Musa Muikamba Ngethe (deceased) shall not ballot and his land should be the land on which the dairy house stood and in fact it was decided further that the ballot for the said land parcel be removed from the ballot box. He states that the ballot was removed by the co-operative officer that was conducting the balloting and it was No 7. He states that after the balloting they were shown their respective land parcels and they entered and took possession of their respective land parcels.
76. The Defendants on the other hand in a witness statement by James Samuel Kinyanjui received by the court on 12th October, 2017 states that Musa Muikamba Ngethe is the bonafide owner of L.R No Naivasha/Maraigushu Block 11/148 (Karai) having been allocated the said land by Karai Farmers' Co-operative Society Limited as his entitlement for shares bought. He states that the Plaintiff has no proprietary rights whatsoever over the land which belongs to the estate of the late Musa Muikamba Ngethe. He states that his late father used to graze his cattle on this land until he died on 13th December, 2003.
77. The 2nd Defendant has buttressed his counter-claim by producing a copy of the title deed for Naivasha/Maraigushu Block 11/148 (Karai) registered in the name of Muikamba Ngethe.
78. Section 24 (a) of the [Land Registration Act](#) 2012 provides that:
- the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
79. The Defendants case is grounded on the foundation that the Musa Muikamba Ngethe is the registered owner of the suit property whereas the Plaintiff contends that the said title deed was obtained fraudulently and the counterclaim should be dismissed with costs.
80. Fraud has been defined in Black's Law Dictionary 11th Edition as “A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.” It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved.
81. The Court of Appeal in the case of *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that:
- It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”



82. In the case of Koinange & 13 others vs Charles Karuga Koinange 1986 KLR at page 23 the court held that:

When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

83. This burden of proof is therefore on the Plaintiff to prove that indeed the title deed adduced in respect of the suit property was fraudulently registered. The crux of the plaintiff’s evidence is that the deceased Musa Muikamba Ngethe did not ballot for the property and thus he could not have acquired the title deed procedurally.

84. Section 107, 108, 109 of the Evidence Act provides that:-

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

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

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

85. During the hearing on 6th February, 2023, the land registrar testified that he had a copy of the green card and he had a member’s register and it was used to produce title deeds. He also testifies that the members of Karai Farmers were 657 and there is only one register for members. He testifies that he does not know why entry number 148 in the member’s register was cancelled. He testifies that he knows Musa Muikamba Ngethe was a member and he does not know who signed the cancellation.

86. Section 26 of the Land Registration Act, 2012 provides that:

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



87. This court is convinced that the title deed issued to Musa Muikamba Ngethe was acquired unprocedurally as the member's register was used to produce the title deeds and there is no explanation given why entry number 148 in the member's register was cancelled. Further the plaintiff has produced in her supplementary list of documents received by the court on 2nd March 2022 a copy of the ballot that shows indeed her deceased husband balloted for the suit property.
88. The upshot of the foregoing is that the Counterclaim dated 11th October, 2017 is unmerited and is dismissed with costs.

JUDGMENT, DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER

O OMBWAYO

JUDGE

