



REPUBLIC OF KENYA



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**Baithibutu v Ekabu & 22 others (Environment & Land Case  
118 of 2008) [2023] KEELC 21126 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21126 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 118 OF 2008  
CK NZILI, J  
OCTOBER 25, 2023**

**BETWEEN**

**GEOFFREY BAITHIBUTU ..... PLAINTIFF**

**AND**

**PETER KALUNGE EKABU ..... 1<sup>ST</sup> DEFENDANT**  
**PETER NJLITHIA LIRIA ..... 2<sup>ND</sup> DEFENDANT**  
**JAMES KABITOLUA LITHUU ..... 3<sup>RD</sup> DEFENDANT**  
**M'MUTHURI M'THINYAI JOHN ..... 4<sup>TH</sup> DEFENDANT**  
**ISAIAH M'LICHORE MBATIA ..... 5<sup>TH</sup> DEFENDANT**  
**STEPHEN M'MAITA M'NKUBITU ..... 6<sup>TH</sup> DEFENDANT**  
**M'MWANGATHIA THARAMBA ..... 7<sup>TH</sup> DEFENDANT**  
**KORONYA LITHUMAI ..... 8<sup>TH</sup> DEFENDANT**  
**JOSEPH KAROBIA KARONGO ..... 9<sup>TH</sup> DEFENDANT**  
**FRANCIS NCEBERE M'ARITHO ..... 10<sup>TH</sup> DEFENDANT**  
**JOSPHAT MAORWE ..... 11<sup>TH</sup> DEFENDANT**  
**M'IBAYA M'BIRITHU M'BIRITHI ..... 12<sup>TH</sup> DEFENDANT**  
**JOHN MWIRABUA ..... 13<sup>TH</sup> DEFENDANT**  
**M'MUNORU M'BIRITHIA ..... 14<sup>TH</sup> DEFENDANT**  
**LIVINGSTONE KIYUU ..... 15<sup>TH</sup> DEFENDANT**  
**WILFRED MAORWE ..... 16<sup>TH</sup> DEFENDANT**  
**STANLEY CHOKERA BARABI ..... 17<sup>TH</sup> DEFENDANT**



ANASTACIA MUTI .....	18 <sup>TH</sup> DEFENDANT
JACOB M'IMANYARA .....	19 <sup>TH</sup> DEFENDANT
RITA NAITA GIKAINE .....	20 <sup>TH</sup> DEFENDANT
NCURUBI M'KORONYA .....	21 <sup>ST</sup> DEFENDANT
CHARLES MURUNGI .....	22 <sup>ND</sup> DEFENDANT
EDWARD GITONGA .....	23 <sup>RD</sup> DEFENDANT

## JUDGMENT

1. The plaintiff approached this court through a plaint dated 17.9.2008. He claimed to be a land owner at Muriri Athinga/Athanja Muthara Adjudication Section held under African customary tenure. The plaintiff averred that land adjudication in the area commenced in 1968 while he was still in school, and given that his father had passed on, he was called upon to gather the land on his own, which he did and left the record with the land adjudication officers at Muriri.
2. The plaintiff averred that during unknown dates up to 2007/2008, the defendants unlawfully and fraudulently colluded with the land adjudication and demarcation officers destroyed the land adjudication records and demarcated his land to themselves as Parcels No. Athinga/Athanja Adjudication No. 4003, 4880, 3988, 4666, 6250, 2871, 3759, 4882, 2566, 5717, 4888-3757(, 5691, (5932-33), 4841, 5482, 3762, 5012, 3651, 4551, 4700, 3609, 4968 and (4823/4765) respectively.
3. The plaintiff averred the said action was fraudulent in that the defendants:
  - i. Colluded amongst themselves and the adjudication officers to take his land.
  - ii. They took advantage of his status as an orphan and helpless
  - iii. Destroyed the record and stole his land
  - iv. Caused him loss and damage
4. He, therefore, prayed for:
  - i. Declaration that the referenced parcels above were his property
  - ii. An order directing that he be registered as the owner in place of the defendants.
5. The plaint was accompanied by a consent issued under section 8 (1) of the *Land Consolidation Act* and 30<sup>th</sup> of the *Land Adjudication Act*, dated 30.7.2008 by the District Land Adjudication and Settlement Officer Meru North District, itemizing the twenty-six parcels of land and their respective recorded holders. The plaint was accompanied by a paginated list of documents dated 30.11.2009, witness statements dated 2.7.2012, issues for determination dated 8.7.2013, and a further list of witnesses dated 12.7.2017. The defendants opposed the suit by a statement of defense dated 16.10.2008, filed by the firm of B.G Kariuki & co-advocates.
6. They denied the contents of the allegations of fraud itemized in paragraphs 3, 4, and 5 of the plaint. The defendants averred that the gathering of the parcels in the area started about 1966 and that the plaintiff's elder brother, Mbaruki Mborona, only gathered 3.28 acres in different places within the adjudication section, and after his death, the land was transferred to the plaintiff.



7. The defendants further averred that at the demarcation stage, the plaintiff only demarcated 0.20 acres of his land at Muriri and other acreage made in the Buringi and Kiamwari areas within the adjudication section. The defendants denied knowledge of an objection during the record of existing or at the arbitration committee stages brought by the plaintiff's deceased brother to challenge any ownership of the said land.
8. Additionally, the defendants acknowledged that the plaintiff filed an objection in 2002 against them, which was correctly dismissed by the adjudication officer.
9. Moreover, the defendants averred that most of them were bonafide purchasers for value of the said lands; hence, the suit was legally misplaced, incompetent, bad in law, and brought without any demand notice to them. A list of documents dated 11.1.2010 accompanied the defense, a list of witnesses dated 7.1.2013, a supplementary list of documents dated 30.1.2018, a list of documents dated 12.10.2018, and witness statement by the 18<sup>th</sup> defendant, a defendants' consolidated list of documents dated 24.5.2022 and a further list of witnesses dated 22.7.2022.
10. By an amended reply to the defense dated 22.1.2009, the plaintiff averred that he was the one who had gathered his ancestral land in Muriri area in 1968 and not in 1966 but registered it in the name of his elder brother, who died later and that the total acreage was 5.5 acres and therefore the defendants were trespassers unlawfully occupying his land. The plaintiff averred that the area in dispute was near a marketplace next to the district headquarters, a prime area that tempted the defendants to grab his land.
11. Following pre-trial and preliminary issues, the court on 8.4.2021 was informed that the 6<sup>th</sup>, 8<sup>th</sup> and 13<sup>th</sup> defendants were deceased. An order was made for the substitution to be undertaken. As of 21.10.2021, none had been done. So, the claims against them abated by the operation of the law. Similarly, the claim against the 8<sup>th</sup>, 11<sup>th</sup>, and 15<sup>th</sup> defendants was marked as withdrawn on 30.7.2018, since they were said to be dead.
12. Geoffrey Baithibutu testified as PW 1 and adopted his statement as his evidence in chief. His evidence was that he inherited the suit land from his late father as a family or ancestral land measuring approximately 5 acres. He told the court that his grandparents initially occupied the land and later came under his cultivation next to Tigania East Sub County District Commissioner's headquarters at Muriri market.
13. PW 1 testified that he discovered entry into the land by the defendants in 1982 and lodged complaints with the Ministry of Lands and settlement as listed in his list of documents dated 25.10.2009, which he produced as P. Exh No's. 1-57 respectively. PW 1 told the court that it took long for his letters to be responded to, but eventually, in 1986, he was allowed to proceed with the objections and succeeded in some of the A/R cases. Since he wanted the intruders to be evicted, PW 1 told the court that he appealed to the Provincial Land Committees, but the defendants vehemently declined to vacate the land and instead allegedly subdivided the parcels of land as per Map Sheet No. 184/4/1/12 to defeat his claim. He produced the map as P. Exh No. 58 (a) & (b). PW1 said his land was on the upper side of Muriri Market, while that of the defendants was on the lower side, separated by Meru-Maua road. He urged the court to order that the defendants vacate all the twenty-six parcels of land.
14. The plaintiff produced an undated covering letter to the Director of Land Adjudication as P. Exh No. (1), letter dated 8.10.1982 to D.O Tigania Division as P. Exh No. (2), letter dated 16.4.1986 to District Land Adjudication and Settlement Officer (DLASO) Tigania Division as P. Exh No. (3), summons dated 8.7.1986 from Land Adjudication Officer Meru as P. Exh No. (4), a letter from DLASO dated 10.7.1986, as P. Exh No. (5), letter to Land Adjudication Officer Embu dated 30.7.1986 as P. Exh No. (6), letter dated 9.9.1986 and 28.10.1986, to the Land Adjudication Officer Embu to DLASO



Meru as P. Exh No. (7) and (8) response from Land Adjudication Officer Meru to the Provincial Land Adjudication Officer Embu as P. Exh No. (9), letter dated 20.6.2002 from DLASO Maua to Land Adjudication Athinga as P. Exh No. (10), letter of complaint by the plaintiff to the Land Adjudication Officer dated 24.6.2002 as P. Exh No. (11), letter dated 8.7.2002 to the Demarcation Officer by DLASO Meru North District as P. Exh No. (12), Plaintiff's letter dated 1.3.2004 to the district officer as P. Exh No. (13), letter dated 4.6.2004 to Francis Nchebere by Demarcation Officer to maintain status quo as P. Exh No. (14), District Officers letter dated 22.7.2004 to Francis Nchebere as P. Exh No. (15), letter by the plaintiff (DLASO) Meru North dated 16.8.2004 over P/N 4880 and 5717 as P. Exh No. (16), letter dated 18.8.2004 to Peter Liria by DLASO Meru North as P. Exh No. (17), letter dated 19.8.2004 by the plaintiff to the P.C Eastern Province as P. Exh No (19), letter dated 15.8.2004 from the P.C. to the D.C Meru North as P. Exh No. (20), complaint letter by the plaintiff to the Land Minister dated 1.9.2004 as P. Exh No. (21), letter dated 14.8.2007 by the plaintiff to the DLASO Maua as P. Exh No. (22), letter dated 16.8.2007 from the Land Adjudication and Settlement director to DLASO Maua as P. Exh No. (23), objections letter dated 18.9.2007 to the Director of Land Adjudication and Settlement by the plaintiff as P. Exh No. (24), letter dated 19.1.2008 by the plaintiff to DLASO Maua as P. Exh No. (25), letters dated 17.2.2008 and 18.7.2008 by the plaintiff to DLASO Tigania North as P. Exh No. (26), consent to sue dated 30.7.2008 as P. Exh No. (27), a statement by the plaintiff as P. Exh No. (28), receipts for proceedings dated 21.7.2008 and 24.7.2008 as P. Exh No. (29) and letter dated 28.7.2008 from the land adjudication and settlement director to DLASO Maua as P. Exh No. (30) stranger agreement dated 10.9.1992 as P. Exh No. (31), transfer by Francis Nchebere dated 25.7.1998 as P. Exh No. (32) and (33), complaint dated 8.8.2008 by the plaintiff to DLASO Meru north as P. Exh No. (34), objection proceedings as P. Exh No's (35-37), summons dated 7.9.2007 as P. Exh No. (38 – 44), summons dated 12.2.2008, 25.3.2008, 12.2.2008, 3.4.2008, 30.7.2007 – 29.4.2008, 22.5.2008, 30.7.2007 as P. Exh No. (45-58) respectively.

15. In cross-examination, PW 1 told the court that his late father, M'Tongorana Baithibutu, passed in 1952 while he was a minor but could not remember the date, month, or year of his birth. In his evidence, his mother and siblings were living away from the suit land, but he was confident that his late father used to live in Muthara market but in a different parcel of land apart from the suit land, which had been demarcated in the name of his late brother who passed on in 1985 as their mother got remarried in 1965. PW 1 told the court that he had not been given any parcel number during the adjudication process.
16. The plaintiff stated that the suit land had been occupied and developed by the defendants. Asked if he had the gathering book, PW 1 said that P. Exh No. (32) did not contain any. He confirmed that he had not filed and produced any gathering book before the court. Regarding his earlier evidence that he was the one who had gathered the land, PW 1 told the court the land was, however, recorded under the name of his late brother in line with Ameru customs, who had left for work in the colonial farms while the plaintiff was around 16 years old.
17. According to his demarcation book, the parcel number issued was 978, and later on, Parcel Number 1138, which he insisted was left with the Land Adjudication Officers before he started complaining in 1982. He could not remember if the land adjudication records reflected the parcel number's size. Asked why he did not file a suit in 1982, PW 1 told the court that he had no consent to sue, which the land adjudication officers had declined to issue.
18. Concerning his mother, PW 1 told the court that although she had remarried, she returned to stay with him by 1986 when he wrote P. Exh No. (6), to the Embu Provincial Land Adjudication and Settlement Officer, who directed that he be allowed to lodge objection proceedings per objection no. 636 regarding Parcel No. 403, Objection No. 936 in P. Exh No. (34), Objection No. 1980 over Parcel



- No.3353, Objection No. 643 over Parcel No. 4842, Objection No.634 over Parcel No.3988, Objection No.633 over Parcel No. 4880, Objection No. 629 over Parcel No. 4666, and lastly, objection No. 630 and 631 over Parcel No.3159 and 4882. He said that most of his objections were dismissed as per pages 110 to 148 of the defendants' paginated bundle of documents.
19. Asked what action he took after his objection was dismissed, PW 1 told the court that he did not prefer any appeals to the Minister, since he complained that his land was unlawfully taken. Even though he succeeded in some of the objections, PW 1 told the court that he had not been issued receipt numbers despite requests, only to be told they were late objections and should await the A/R Objections.
  20. Additionally, PW 1 told the court that despite warnings from the land's office, some of the defendants continued to illegally erect permanent buildings on the suit parcels of land, some of whom had been on the land since 1986. PW 1 told the court that the changes to the suit parcels of land records were orchestrated by the defendants alongside the land adjudication officers. Asked why he did not join the land adjudication officers to the suit, PW 1 stated that his advocates on record advised him against such a cause of action. Regarding some defendants describing themselves as innocent purchases for value, PW 1 told the court they allegedly bought the land from M'Lithumai, who could not sell or dispose it off to them. Regarding the issuance of title deeds for the suit parcels of land, P.W 1 acknowledged that the title deeds for the area came out in 2015, during the pendency of this suit, some of which lacked sheet map reference numbers. His evidence was that none of the parcels of land were under his name or those of his siblings except L.R. No. Athinga/Athanja/3353.
  21. PW 1 confirmed that Francis Nchebere was one of the Land Adjudication Committee members at the time, while M'Toikiluthu Mukubiu was a witness for the 10<sup>th</sup> defendant during the objection proceedings alongside M'Ngatunyi. He termed the committee witnesses as untruthful and liars during the objection proceedings. PW 1 clarified that he was employed as a police officer in 1975 and retired in 2008. He denied allegedly abusing his office or influence to acquire the suit land. Asked about the gathering book, PW 1 insisted that unknown people allegedly stole his land in 1968 but was sure the land adjudication and settlement office held the records. PW 1 said that he lost the objection because of collusion and fraud between the land officers, the defendants, and the witnesses during the objection proceedings.
  22. M'Abuabu M'Athanii testified as PW 2. He adopted his witness statement dated 20.3.2012 as his evidence in chief. As a brother of Francis Nchebere M'Aritho, he confirmed that the land claimed by the plaintiff was ancestral or family land, but the defendants had chased him away from the land while his only brother had passed on. PW 2 could not tell the parcel number and its locality since he had no land in the area. He confirmed that though he was a relative of the plaintiff, he never participated as a witness in the objection proceedings for reasons unknown to him. He could not tell if the plaintiff had been issued with a parcel number during the adjudication process, which, according to him, commenced during the Mau Mau war rebellion. Nevertheless, PW 2 confirmed that third parties had bought lands from the initial registered owners. PW2 told the court that he used to be a Land Adjudication Committee member and was confident that the plaintiff had been allocated a parcel number in the presence of Francis Nchebere, a committee member.
  23. Tharamba Ikunyua testified as PW 3 and adopted his witness statement dated 20.3.2012 as his evidence in chief. As a neighbor of the suit land, PW 3 told the court the land was ancestral in nature and that it had been gathered by M'Mburuki, a brother to the plaintiff, but later on, was invaded and occupied by the defendants. In cross-examination, P.W. 3 told the court that he could not remember the parcel numbers since his land was over a kilometer away from the area, but he was a witness during the A/R objection in favor of the plaintiff. He believed Francis Nchebere belonged to the Baimucharu clan, while his clan was Baikuraru.



24. Further, PW 3 told the court that the plaintiff's mother, Ciomwaine, used to till the land up to the adjudication stage and was allegedly chased away from the land by Francis Nchebere. He could not tell if any police report had been made over the expulsion. PW 3 could not remember the land size in issue but was certain that title deeds were already out in the area. PW 3 clarified that the Land Adjudication Officer and committee members denied the plaintiff his rightful share by not allocating him a parcel number. His evidence was that PW 1 was staying on land some two kilometers away from the disputed parcels belonging to his late father in the Kiongo Kanju area. PW 3 told the court that during the adjudication process, a claimant would be issued a black book; in this case, the plaintiff's late brother was demarcated as the land owner since their late father was dead. PW 3 was specific that Ciomwaine used to till the land.
25. Jacob Mcheni testified as PW 4 and adopted his witness statement dated 19.6.2017 as his evidence in chief. As a resident of Karooni village, some three hundred meters away from the disputed land, PW 4 told the court that his Parcel No. LR No. Athinga/Athanja/245 with a title deed. His evidence was that land adjudication committee members were drawn from about five sub-clans in the area, and he was one of the members representing the Mushiaru sub-clan even though he could not remember the date of his appointment. His evidence was that the plaintiff had gathered the land in 1968 through his late brother. Appearing evasive in answering questions, PW 4 admitted that his witness statement had not mentioned some of the critical details he gave in the open court.
26. Stating that he was familiar with the gathering process, PW 4 told the court that it was impossible to replace a name entered in the adjudication register without a transfer or through letters of administration. He could not tell if the plaintiff had used any of the said processes in replacing the name of his late brother, M'Mborona M'Mburuki, in the adjudication register for the land he had gathered. He could not clarify why he was saying that the land adjudication records were tampered with in favor of the defendants.
27. Still declining to answer questions, PW 4 stated that the defendants knew what they did to the adjudication records but were aware they were tampered with before the A/R objection cases. He could not remember the exact year of the interference, only that he knew this when he visited the land adjudication offices following complaints lodged by the plaintiff. PW 4 told the court that he was unaware that the plaintiff lodged any objection at the committee stages or with the adjudication officer but was certain that he was advised to await the A/R objection stage, in which A/R objections were eventually dismissed.
28. Asked if the plaintiff filed any Minister's appeals, PW 4 told the court that the plaintiff opted to move straight to court following advice from his lawyers on record. PW 4 confirmed that the plaintiff was a beneficiary of only one parcel of land measuring approximately 0.20 acre, which should have been more than this, going by the demarcation record.
29. In re-examination, PW 4 insisted that he was a committee member during the adjudication process when the plaintiff was demarcated to own the suit land, but the records were tampered with before the A/R objection, and the land was given to strangers. He told the court that the adjudication officer was the one who advised and directed that this suit be filed before the court.
30. Joseph Gitonga testified as PW 5 and adopted his witness statement dated 20.3.2012, as his evidence in chief. His evidence was that he initially lived in the Muriri area before he relocated to Lii village as a teenager, where his late father, M'Ilingwa, used to own some parcel of land near the suit land now occupied by the defendants. PW 5 confirmed that he participated as a witness in Objection No.636, on behalf of the plaintiff, where he testified that the plaintiff's family used to live on the suit land but could not tell when they vacated it and for what reason.



31. In re-examination, PW 5 told the court that he could not confirm when the defendants' permanent buildings were erected or if the plaintiff was evicted from his land. PW5 insisted that he was confident that M'Lithumai used to live near the suit land before some defendants came in.
32. Peter Kanungi Ekabu, the 1<sup>st</sup> defendant, testified as D.W. 1 and adopted his witness statement dated 20.12.2012 as his evidence in chief. He told the court that he acquired L.R. No. Athinga/Athanja/4003 from Koronia M'Lithumai, who transferred it to him on 8.12.1997 as per page 16 of the defendants' bundle, for value and took vacant possession with effect from 1997 to date. D.W. 1 testified that his land was developed with shops and some rental houses, already occupied by tenants with no objection from the plaintiff.
33. D.W. 1 told the court that in 2008, the plaintiff filed an objection No.635 against his parcel of land, which was dismissed. The 1<sup>st</sup> defendant produced the bundle of documents as P. Exh No. (11), confirmation of letters of transfer dated 17.11.2007 and 26.9.1997 as D. Exh No. (1-2), together with a receipt for the government fees, objection proceedings appearing from pages 36-147 of his paginated bundle as D. Exh No. (3) letters from the Ministry of Lands appear between pages 148 – 149 as D. Exh No. (4) proceedings in Meru CMCC No. 115 of 1998 on pages 150-167 of the bundle as D. Exh No's (5) and (6), proceedings before the Njuri Ncheke panel of elders dated 21.6.1997 on pages 168, 169 as D. Exh No. (7) letter from the assistant chief dated 12.5.1998 on page 171 of the bundle as D. Exh No. (8), proceedings before Njuri Ncheke dated 16.5.1998 as D. exh No. (9), letter to the adjudication officer by Njuri Ncheke dated 27.2.2008 as D. Exh No. (10), letter to the adjudication officer dated 13.8.2007 as D. Exh No. (11), copies of the title deed appearing on pages 176-179 of the bundle as D. Exh No. (12), adjudication record book for Parcel No. 3657 as D. Exh No. (14), confirmation letters of ownership for parcels No. 4823 and 4765 as D. Exh No. (15) letters of ownership confirmation for parcels No.4551, 4666, 4842, 3759, 5117, 4888 as D. Exh No. (16) – (20), certificates of search for L.R. No. 4882, 4823 as D. Exh No's. 21-22, and a title deed for L.R. No. 4700 as D. Exh No. (23). All these exhibits, starting from D. Exh No's. 12-73, appear on pages 180-191 of the defendants' compiled paginated bundle.
34. In cross-examination, D.W. 1 told the court that the objection brought by the plaintiff was dismissed and that he lawfully acquired the land as per the sale agreement, transfer, and confirmation letters tendered as evidence. He clarified that he only came to know the plaintiff in 2008, and before the suit, no Minister's Appeal had been served against him.
35. Francis Nchebere M'Aritho, the 10<sup>th</sup> defendant, testified as D.W. 2 and adopted the witness statement dated 20.12.2012 as his evidence in chief. He told the court that his parcel numbers were L.R. No's Athinga/Athanja/4117, 4888, and 3757, which he acquired as ancestral land through his late father, who passed on in 1957. His evidence was that the land was gathered by his late brother, Livingstone Kirio, who gave him two acres in 1997. He stated that he subdivided the land and sold the parcels measuring 0.12 acres each to the 10<sup>th</sup> and 23<sup>rd</sup> defendants, who were later issued with title deeds and developed the portions.
36. Further, D.W. 2 told the court that he was sued in the objection proceedings alongside the named defendants, whose objections were dismissed. He denied the alleged fraud or collusion over the acquisition and transfer of the suit parcels. D.W. 2 told the court that he was aware that the 7<sup>th</sup> and 8<sup>th</sup> defendants had passed on and that the 7<sup>th</sup> defendant was the father of the 3<sup>rd</sup> defendant, who also sold their parcels of lands to the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, and 20<sup>th</sup> defendants. D.W. 2 confirmed that the late Mburuki Mborona had gathered some land separate from the disputed land but currently under the plaintiff's use.



37. In cross-examination, D.W. 2 confirmed that he owned LR No's 5717, 4888, and 3757 but not L.R. No.3759 as per D. Exh No. (19), which he termed as erroneous since the land belonged to his uncle, on whose behalf he handled the A/R objection over Parcels No's 3759 and 4882. D.W. 2 denied receiving P. Exh No. (17) to stop any developments on L.R. No. 4880 and 5717. Further, D.W. 2 acknowledged that he sold and transferred 0.50 acre of his land to the 14<sup>th</sup> defendant and was left with a balance of 0.05 acre.
38. Asked about the letter dated 5.8.2007 on page 49 of the defense bundle, D.W. 2 clarified that the plaintiff's cousin had sued him as per D. Exh No. (5) regarding L.R. No. 886, which was not part of the instant suit but was evicted from the land as per pages 158-163 of the said bundle. Again D.W. 2 told the court that the plaintiff was not a party to the Njuri Ncheke proceedings as per D. Exh No's (8), (9), (10), and (11), even though the said M'Irithu was representing the interest of the plaintiff's clan while he was representing the interest of the plaintiff's clan while he was representing his clan. D.W. 2 said that although the plaintiff knew the meetings, he refused to attend. D.W. 2 termed the title deeds as legally and procedurally obtained, though he was yet to obtain them due to a caution registered by the plaintiff.
39. In re-examination, D.W. 2 told the court that Koronya Lithumai, also known as Lithumai Tharamba, was his uncle and owner of L.R. No.4882 while the plaintiff was the owner of L.R. No.3353 as per page 11 of the plaintiff's bundle of records.
40. D.W. 2 clarified that D. Exh No's 5, 6, and 11 referred to a court case between him and a cousin to the plaintiff by the name M'Mirithu over Parcel No. 886, which was dismissed because the parcel number was non-existent. D.W. 2 referring to P. Exh No. 58 (a) said their family was occupying land on both sides of the Maua – Meru tarmac road and that the land parcels on the map's lower part were not disputed. D.W. 2 said the successful in P. Exh No. 17, but Parcel No. 3759 was not his.
41. M'Ibaya M'Mbirithu M'Ibirithi, the 12<sup>th</sup> defendant, testified as D.W. 3. He told the court that he bought his parcel of land as per D. Exh No. (2) lawfully from Kaibi M'Litha and paid Kshs.240/= on 5.11.2007, as per the receipt. He, therefore, said that L.R. No's 5932 and 5933 were lawfully his since the transfer was made in 1997 out of Parcels Nos. 4885 and 829 going by pages 10-13 of the paginated bundle. He denied that he was a party to any A/R objections. D.W. 3 further clarified that his children were the ones on the land.
42. Peter Liria, the 2<sup>nd</sup> defendant, testified as PW 4 and adopted his witness statement dated 22.7.2022 as his evidence in chief. He said that he was the owner L.R. No. 4880 Athinga/Athanja, which had attracted A/R Objection No.6033, decided in his favor as per page 66 of the paginated bundle.
43. D.W. 4 said he was registered and issued a title deed on 28.1.2019 and has extensively developed the land since 2005. He denied that the plaintiff was in occupation of the land by the time he bought the land. In cross-examination, D.W. 4 acknowledged receiving P. Exh No. (17) to stop the construction in 2004, which he dismissed since it was not a court order. He told the court that he bought the land from M'Lithumai Koronya, a subdivision of L.R. No. 824.
44. James Lithuu, the 3<sup>rd</sup> defendant, testified as D.W. 5 and adopted his witness statement dated 20.12.2012 as his evidence in chief. He confirmed that L.R. No. 3988 belonged to him and that in the A/R Objection No.624, he won the case as per page 52 of the paginated bundle. In cross-examination, D.W. 5 said he inherited the land from his late father, measuring 0.30 acres, not 0.33 acres. He denied that the plaintiff's mother used to occupy the suit land. D.W. 5 said he has erected a permanent residential house on his land.



45. Rita Naita Gikaine, the 20<sup>th</sup> defendant, testified as D.W. 6 and adopted his witness statement dated 7.8.2019 as her evidence in chief. She confirmed she owned L.R. No.4700 as per a title deed on page 191 of the paginate bundle. She testified that Objection No.649 brought against her by the plaintiff was unsuccessful. Her evidence was that she validly obtained her title deed, and all her rental house developments on the land were regularly and legally undertaken. In cross-examination, D.W. 6 told the court she bought the land from M'Lithumai in 1996 and became a registered owner.
46. Jacob M'Imanyara, the 19<sup>th</sup> defendant, testified as D.W. 7 and adopted his witness statement dated 20.7.2018 as his evidence in chief. He confirmed that he owned L.R. No.4551, having bought it from M'Chokera Joseph Rukaria 1994 as per pages 35 and 183 of the paginated bundles, a subdivision of Parcel No 361. He told the court that a title deed for the land was issued on 5.7.2018 and has since constructed both residential and commercial rental houses on the land where he runs a medical clinic. In re-examination, D.W. 7 clarified that his wife attended the A/R objections on his behalf since he was away on duty in effect on 2.2.1994.
47. D.W. 8 was Edward Gitonga, the 23<sup>rd</sup> defendant, who adopted his witness statement dated 20.12.2012 as his evidence in chief and confirmed to be the owner of L.R. No.4823 and 4765 as per the confirmation letters and official searches appearing on pages 182 and 189 of the paginated bundle. He said he lawfully acquired the parcels in 1985 from Francis Nchebere M'Aritho, the 10<sup>th</sup> defendant. In cross-examination, D.W. 8 confirmed that he attended the A/R Objection, after which he developed the two parcels of land in 1997 and 2020, respectively.
48. M'Muthuri M'Thinyai John, the 4<sup>th</sup> defendant, testified as D.W. 9 and adopted the witness statement dated 20.12.2012 as his evidence in chief. He confirmed his ownership of L.R. No.4666, which he had bought from M'Lithumai Tharamba and M'Mauta in 1992 and 1994 out of the original parcel number 1013. He said that Objection No. 629 was bought by the plaintiff against him, going by pages 78, 87, and 184 of the defense paginated bundle. He said that he has been utilizing and developing the land since 1994.
49. John Mwirabua, the 13<sup>th</sup> defendant, testified as D.W. 10 and adopted his witness statement dated 24.7.2023 as his evidence in chief. He told the court that he bought L.R. No.5482 in 1997 for Kshs.65,000/= from Francis Nchebere M'Aritho, where he has built a permanent rental structure. He said there was no objection raised against the land by the plaintiff.
50. Isaia M'Lichore Mbatia, the 5<sup>th</sup> defendant, testified as D.W. 11 and adopted his witness statement dated 20.12.2012 as his evidence in chief. He confirmed to be the owner of L.R. No.6250, which he bought from M'Lithumai Tharamba in 1984, and that in 1987, he erected a permanent stone building on his without any objection from the plaintiff. D.W. 11 said the plaintiff's father was his age mate and a colleague in the Mau Mau rebellion. He stated that the plaintiff knew of the sale and occupation and that he successfully defended the A/R objection brought against him. As to the time of the purchase, D.W. 11 told the court that the seller used to live on the land with his children and was confident the initial owner of the land was the seller and not the plaintiff's late father.
51. Wilfred Maorwe, the 16<sup>th</sup> defendant, was the D.W. 12. He confirmed owning L.R. No.5012, bought from the 0.12 acres, took possession of the land in 2001, and erected a building. He denied that he had illegally and unlawfully acquired the land by falsifying the land records. In cross-examination, D.W. 12 confirmed that his wife witnessed the sale agreement. He said that he had not collected the title deed and that his transfer documents were not before the court.
52. At the close of the defense case, parties were directed to put in written submissions by 15.9.2023. The plaintiff relied on written submissions dated 29.8.2023, while the defendants relied on written



- submissions dated 11.9.2023. The plaintiff submitted that his cause of action was that the suit parcel of land originated from Serial No.1138 Folio 978, which his late brother gathered on his behalf but was fraudulently transferred to the defendants. Though clutching on mere title deeds, the plaintiff submitted that the defendants failed to produce any sale agreements under Sections 3 (3) of the *Law of Contract Act*. The plaintiff submitted that the defendants relied on transfer forms that were not specific on the parcels on acreage, were at variance with the certificate of titles issued, and depicted clear evidence of an orchestrated fraud.
53. Relying on *Betty Mukui vs Kennedy Osimba & another* Nrb ELC No.77 of 2015, the plaintiff submitted that mere certificates and transfers were not enough evidence of ownership and are impeachable under Section 26 (1), (b) of the *Land Registration Act* as held in *Elijah Makeri Nyagwara vs Stephen Mungai Njuguna and another* (2013) eKLR, *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR and *Dima Management Ltd vs County Government of Mombasa & 5 others* (Petition 8 of 2021) KESC 30 (KLR) 21<sup>st</sup> April (Judgment).
  54. The plaintiff submitted that the 10<sup>th</sup> defendant could not sell and transfer the land to the other defendants based on the caselaw cited, who were also not bonafide purchasers for value without notice as per *Samuel Kamere vs. Land registrar Kajiado and Funzi Development Ltd & others vs County Council of Kwale Mombasa Civil Appeal No. 252 of 2005* (2014) eKLR cited with approval in *Dina* (supra).
  55. On the circumstance of the suit, the plaintiff submitted that he had met the standard of proof as held in *William Kabogo Gitau vs George Thuo and others* (2010) eKLR 526, and should be granted the reliefs sought, given that he has undergone emotional, personal anguish and distress for close to two decades and bring this diabolical chapter to an end.
  56. On the other hand, the defendants submitted that the suit was based on alleged fraud, yet in all the dismissed objections, no appeals were preferred against the awards to the Minister, paving the way for their registration as first owners of the land parcels and issuance of titles. The defendants submitted that all the A/R objections were lost under the *Land Consolidation Act*, but the plaintiff failed to challenge them through judicial review.
  57. On the gathering, the defendants submitted that the plaintiff was uncertain about who initially had gathered the land, took possession, and became the recorded owner, unlike them, who lawfully gathered or acquired the land and have been in occupation of the suit parcels and have developed the same for over 37 years now.
  58. As to the exhibits produced by the plaintiff as numbers 7-29 and the summons as numbers 36 – 37, the defendants submitted that Objection No. 986 for L.R. No.3945 and 1980 for L.R. No.3353 were not subject to this suit; therefore, the two exhibits were irrelevant. As to the demarcation book produced showing P. No.978 measuring 3.54 acres and another one for Mburuka Borana for 3.74 acres, the defendant submitted that in the latter one, no parcel number was indicated and therefore, the significance of this exhibit before the court and the said land was not demonstrated and so its nexus with this suit.
  59. On PW 2 & 3, the defendants submitted that the first one knew nothing about the dispute while the second one gave two versions of his testimony, leaving one to wonder which one to believe.
  60. On the defense testimony, the defendants submitted that this submission does not relate to the deceased 8<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants who are deceased and the 6<sup>th</sup>, 7<sup>th</sup>, 21<sup>st</sup>, and 22<sup>nd</sup> defendants are not represented. The defendants, therefore, submitted that the 10<sup>th</sup> defendant, who testified as D.W. 2, was clear how he had acquired and transferred the parcels of land in 1977 initially owned by Nderi.



Therefore, the defendants submitted that the origin and history of their titles were clear, genuine, and precise, contrary to the submissions by the plaintiff that the root of the title had not been established. The defendants submitted that each defendant could show how they bought or acquired the land from named sellers as per the letters of transfers addressed to the land adjudication officers under the land adjudication statutes.

61. The defendants submitted that the burden under Sections 108 – 109 of the *Evidence Act* was on the plaintiff to prove any fraud on a balance higher than the ordinary suit going by the case of *RG Patel vs Lalji Makanji (1957) E.A 314*.
62. The defendants, relying on the doctrine of non-departure from pleadings, submitted that the plaintiff could not adduce evidence or any other act of fraud that was not set in his pleadings and that since parties were bound by their pleadings, any departure thereof should not be allowed as held in *John Ogola Nyanjwa vs South Nyanza Sugar Co. Ltd (2017) eKLR*, *Moses Mwangi Karanja vs David Macharia Gakuya 2018 eKLR* and *Gitahi & another vs Mabuko Distributors Ltd and another (2005) 1EA (C.A.R.)*.
63. Moreso, the defendants submitted, as per paragraph 5 of the plaint, that the plaintiff tendered no iota of evidence of collusion to get registration and that since the defendants, except two of them, were purchasers for value from different sellers who were already recorded owners of those parcels of land, who did not even know each other at the respective times and the sizes that they bought the parcels, the plaintiff was unable to prove any collusion against them.
64. On the allegations of taking advantage of the plaintiff, the defendants submitted that no evidence was tendered that their parcels of land belonged to the plaintiff's late father. On the contrary, the plaintiff's evidence was contradictory, inconsistent, and incapable of being believed, and the court should take judicial notice of how gathering used to occur and how the plaintiff made the situation worse by producing a gathering book showing his name and a reference number, yet he had said otherwise in his testimony. Further, the defendants submitted no evidence of a follow-up to the Ministry of Land by either the plaintiff, his elder brother, or his mother, and the attempts to seek sympathy as an orphan in a court of law that was not a court of sympathy was untenable.
65. The defendants submitted that once an area was declared an adjudication section or area, an aggrieved party must set in motion the internal dispute mechanism; otherwise, he should not cry fraud without exhausting the said mechanism under Sections 26 and 29 of the *Land Adjudication Act* (Cap 284) and Section 26 of the *Land Consolidation Act* (Cap 283).
66. On allegations of destroyed land records, since these touch on criminal acts, the defendants submitted that no evidence of criminal complaint was produced against the defendants or the officials of the land department serving at the station at the time and or joinder of the good agencies to the suit made. The defendants submitted that the plaintiff has failed under Section 26 of the *Land Registration Act* to impeach their titles through credible or reliable evidence, and the suit should be dismissed.
67. The court has carefully examined the pleadings, evidence tendered, written submissions, and the law. The court takes this opportunity to appreciate learned counsels Mr. Mwendwa and Mr Murango Mwenda, the lawyers representing the plaintiff and the defendants, respectively, for well-articulated submissions and relevant case law. The issues commending themselves for the court's determination are:-
  - i. If proper parties and pleadings are before the court.
  - ii. Whether the plaintiff should have exhausted the internal mechanism under the statute before filing this suit.



- iii. Whether the failure to amend the plaint after some defendants were reportedly dead before or passed on during the trial has fundamental implications for the issues and the reliefs sought.
  - iv. Whether the plaintiff has proved fraud and collusion in the manner the defendants acquired and were registered as owners of the suit premises.
  - v. If the defendants were purchases for value without notice.
  - vi. Whether the plaintiff is entitled to the reliefs in the plaint.
  - vii. What is the order as to costs?
68. By the plaint dated 17.9.2008, the plaintiff sued twenty-three defendants. In paragraph 3 of the plaint, he averred that he owned an undefined land in the Muriri area, Athinga Athanja Muthara Adjudication Section. In paragraph 5 thereof, the plaintiff averred that between 2007 and 2008, the defendants unlawfully and fraudulently colluded with land adjudication officers and demarcation officers, destroyed land records of the adjudication area, and unlawfully demarcated his land to the defendants as per the names and various parcel numbers itemized therein. In the reliefs sought, the plaintiff asked the court to enter judgment jointly and severally against the defendants, declaring their parcels of land as his property and an order directing the parcels of land to be registered under his name.
69. In paragraph 8 of the plaint, the plaintiff averred that he was issued with a consent to sue by the DLASO Meru North district under Section 8 (1) of the [Land Consolidation Act](#) and 30 of the [Land Adjudication Act](#). Attached to the plaint was the consent indicating the parcel numbers in issue and the twenty three names of the recorded owners.
70. In the proceedings of 3.4.2017, it was brought to the court's and the plaintiff's attention that the 7<sup>th</sup>, 8<sup>th</sup> and 15<sup>th</sup> defendants were dead. Counsel for the plaintiff sought time to confirm this situation and substitute the parties if they had been sued while dead. On 14.6.2017, the plaintiff's counsel confirmed that he had copies of the death certificates of the three parties. On 17.7.2017, counsel for the defendants confirmed that the 11<sup>th</sup> defendant passed on in 2003, the 15<sup>th</sup> defendant in 2002, the 5<sup>th</sup> defendant in 2007, and the 7<sup>th</sup> defendant in 2007, as per death certificates availed to the plaintiff's counsel. The defendants sought time to substitute the 7<sup>th</sup> defendant. On 1.3.2018, counsel for the defendants clarified that the 7<sup>th</sup> defendant had passed on before the suit was filed and, therefore, there was no need to substitute since the suit was a nullity ab initio. The defendants' counsel also repeated this statement when the matter came up on 3.7.2018. Therefore, the plaintiff's counsel sought to withdraw the claim against the 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants, which request was allowed by the court.
71. After withdrawing the claim, the plaintiff did not consider amending his plaint to reflect the changes. In *Viktar Maina Ngunjiri and four others vs. A.G. & others* (2018), the court cited with approval *Pratap Chand Mehta vs Chrisna Devi Meuta A.I.R. (1988) Delhi 267* where the court observed that if a suit was filed against a dead person then it was a nullity and the court could not join any legal representative because it was just as if no suit had been filed. Further, the court said that if a suit had been filed against several persons, one of whom happened to be dead when the proceedings were instituted, the proceedings were null and void, but the court had to strike out the names of those wrongly joined.
72. Order 4 Rule 1 of the Civil Procedure Rules provides an affidavit accompanies the plaint verifying the correctness of the particulars in the plaint. The plaintiff swore a verifying affidavit to his plaint on 17.9.2008. Even after the information was relayed to the plaintiff of the deaths of some defendants, he did not regularize his pleadings under Order 8 of the Civil Procedure Rules. The same case applied after the withdrawal of the claim against the deceased defendants. In *Macfoy vs United Africa Co. Ltd* (1965) E ALL ER 1169, the court observed that if an act was void, it was null in law.



73. Order 24 Rule 4 of the Civil Procedure Rules requires action once a defendant passes on and a cause of action survives him where a suit is filed against a deceased person. The court of appeal in *Geeta Bharat Shah & 4 others vs. Omar Said Mwatayari & another* (2009) eKLR, said the suit was null, and so was the judgment entered against a deceased party. The court declined to allow the administrators to take over the matter as it was filed after he had died. See *Peter Njuguna Gitau vs Daniel Kiprono Kiptum and others* (2022) eKLR, *Juliana Adoyo Ongunga vs Francis Kiberenge Abano Migori C. A No. 119 of 2015*.
74. In *Gladys Njeri Muhura vs Daniel Kairuki Muthigaro* (2018) eKLR, the court said that the general rule was that suits and actions must be prosecuted by and against living parties, and since a deceased person cannot be a party to a legal proceeding, the effect of the death was to suspend the actions as to the deceased until there was substitution.
75. In *Mary Wambui Njuguna vs William Ole Nabala & others* (2018) eKLR, the court said that no rule required a plaint to be amended under Order 24 Rule 4 (3) of the Civil Procedure Rules, where a defendant dies and is substituted with a legal representative. Some defendants passed on during the pendency of the suit, while others died before the suit was filed. The court is called upon to determine issues and evidence touching on all the defendants, yet the plaintiff has failed to amend his pleadings and remain with genuine and bonafide parties to the claim. Parties are bound by their pleadings, and issues flow from them. In *Viktar Maina Ngunjiri and others vs Attorney General (supra)*, the court observed that a suit filed against dead persons was a nullity and void ab initio, which is incurable by Order 1 Rule 10 or Order 6 Rule 17 of the Civil Procedure Rules. In *DT Dobie vs Joseph Mbaria Muchina*, (1980) eKLR, the court said it should not be kept in darkness without the full facts of a case filed before it. See also *Otieno vs Ougo* (1989) E ALLER 468. I find the suit incompetent, incurably defective, and bad in law.
76. The 2<sup>nd</sup> issue on the pleadings is that the suit refers to land falling under an adjudication section, yet title deeds were issued to the defendants in 2015. The *Land Adjudication Act*, in its preamble, states that it is an Act of Parliament to ascertain and record rights and interests in community land and for purposes connected with and incidental thereto. Once the suit parcels of land became titled, the suit land fell outside the purview of the *Land Adjudication Act*. See *David Muithi & others vs Kengen Ltd* (2020) eKLR.
77. In *Chrispus Chengo Masha & 7 others vs Daniel Ricci* (2017) eKLR, the court observed that the remedy that the appellants prayed for, and the evidence that they had adduced at the appellate stage sought to determine the genuineness of the titles or revoke one of them, could not be determined by the court, and that nothing would have been easier than to amend their pleadings to seek the appropriate declarations and consequential orders. Further the court observed that the appellants' claim should have been brought against the company, which was the registered owner of the land, instead of one of its directors whose wrongdoing had not been established to justify liability on it.
78. In this suit, the plaintiff pleaded in paragraphs 4 and 5 of the plaint that the defendants fraudulently and illegally colluded with land adjudication officers and demarcation offices to destroy the land records and, in his place, registered the defendants as owners of the particularized parcels of land between 2007/8. He goes on to give the particulars of fraud against both the defendants and the said land officers. Unfortunately, the said land adjudication and demarcation officers were not joined in this suit, yet they are the necessary parties to the suit, given their statutory duties as custodians of those land records. See *Republic vs District Land Adjudication and Settlement Officer Kilifi Exparte Kilifi Munga Alfred* (2013) eKLR, *Gladys Nduku Nthuki vs Letshego Kenya Ltd* (2022) eKLR and *Francis Muruatetu vs Republic* (2016) eKLR,



79. The next issue is whether the plaintiff should have exhausted the remedies set under the land adjudication laws. In *Speaker of National Assembly vs Karume* (1992) KLR. 21, the court observed that where there was a clear redress of any particular grievance prescribed by *the Constitution* or a statute, such procedure must be strictly followed since there were good reasons for such special procedures.
80. Section 24 of the *Land Adjudication Act* defines the adjudication register as including the demarcation map and the adjudication record, which, once completed, has to be certified by the Adjudication Officer and delivered in duplicate to the director of land adjudication, the original displayed for inspection at a convenient place within the adjudication section and notice given for its inspection by members of the public at that place during a period of 60 days from the date of notice. Under Section 26 thereof parties must file any objection to the register on its inaccuracies or incompleteness.
81. After determination of the objections, Section 26A thereof requires the adjudication officer to prepare a no objection register in respect to any land not subject to an objection and deliver the same to the director of land adjudication who shall certify the duplicate adjudication register as final and forward a copy together with no objection register to Chief Land Registrar for Registration under Sections 28.
82. Under sections 27 thereof, once objections are determined from time to time, the adjudication officer may finalize the adjudication register subject to any pending appeals and, where necessary, alter the duplicate Adjudication register and forward it to the Chief Land Registrar subject to the list of appeals. Under Section 28 thereof, the Chief Land Registrar, upon receiving the duplicate adjudication register under Section 27, shall cause the registration to be effected as per the adjudication register, but where land is subject to an appeal, restrict the parcel under Section 29 thereof until the appeal is heard and determined. Section 29 provides that any aggrieved party to an A/R objection has 60 days to lodge a Minister's Appeal.
83. On the publication of the notice, Section 31 provides that such notices under the Act be in writing and be published at the offices of Provincial Commissioner, District Commissioner, and Barazas throughout the area of adjudication, in such language or ways as would be considered appropriate with the consultation of the adjudication officer. Section 33 (b) of the Act provides that it is a criminal offense for any person without reasonable excuse to neglect, refuse to demarcate his land or assist the demarcation officer in the demarcation of his land or interfere with a boundary to its features to refuse to attend upon summons or to answer any questions or to contravene Section 8 (1) or board. Under Sections 9, 10, 11, and 12, the powers, duties and functions of the adjudication officers are set, while under Sections 15-19, the powers of the demarcating, recording, and survey officers are set. Similarly, under Sections 20-22, the functions and decisions of the committee and arbitration board are set.
84. Regarding the *Land Consolidation Act*, Section 15 thereof provides that in each adjudication section and per the findings of the committee or arbitration board, as the case may be, a record of existing rights shall be prepared to show the names and description of the land owner whose rights have been recognized by the committee or arbitration board including the approximate size of the land and its description, any interest, lease, charge or encumbrance affecting it, a restriction on it or if the party is disabled and once completed the chairperson of the committee and the executive officer have to sign and a notice of completion issued under Section 17. The parties have 60 days to inspect the Register of Existing Rights and raise any objections as to its incompleteness or inaccuracies which shall be determined by the committee and sent to the adjudication officer whose decision shall be final under Section 19. After the expiry of 60 days under Section 20 thereof, the R.E.R. shall be deemed complete in the adjudication section. As regards the adjudication register, Section 25 of the Act provides that once completed, a certificate shall be signed to that effect, and the adjudication register



put for inspection under Sections 26 thereof any aggrieved party has 60 days to raise an objection to the adjudication officer and which the adjudication officer and committee shall consider. Section 26 (3) provides that no appeal is allowed against such a decision and that the adjudication register becomes final after 60 days from the certificate date.

85. In this suit, the consent to sue was issued under Caps 283 and 284. The plaintiff requested it per his letter dated 18.1.2008, where he indicated that his objections were determined on 17.7.2008. P. Exh No. 25 shows that the plaintiff sought the proceedings in all the said objections numbers 636, 633, 634, 629, 641, 632, 630, 631, 637, 647, 639, 646, 635, 638, 643, 642, 640, 650, 651, 649, 648, 653, 652 & 644 against parcel numbers 4003, 4880, 3988, 4666, 6250, 2871, 3759, 4882, 2566, 5717, 4888, 3757, 5691, 5932, 5933, 4842, 5482, 3762, 5012, 3651, 4551, 4700, 3906, 4823, 4765 and 4968 respectively.
86. In his cross-examination, the plaintiff admitted that he never filed any Minister's appeal nor sought orders of judicial review to quash the decisions in the 26 objections alluded to above. In the plaint before the court, the plaintiff failed to disclose his action between 17.7.2008 and 18.9.2008 when he filed this case. The 60 days for filing of the Minister's Appeal were expiring on 17.9.2008. In the plaint before the court, the plaintiff never pleaded that his objections were handled and whether the issues of destruction of land records were raised or determined during the objections or soon after that with the relevant bodies or organs under the statutory law, and if so, the outcomes.
87. The major complaint by the plaintiff is that land records were fraudulently and unlawfully destroyed for the adjudication area, and his land was unlawfully demarcated in favor of the defendants. In *Mohammed, Ahmed Khalid & others vs Director of Land Adjudication and others (2013)*, eKLR Angote J held that since Cap 283 had an elaborate procedure on how complaints arising from the planning, demarcation, and surveying of trust land are supposed to be dealt with, the court cannot be a substitute of such established bodies and a party must exhaust those procedures before moving to court. In *Justus Mugaa M'Impwi vs DLASO Tigania East/West & another (2018)* eKLR, the court said under Section 29 of Cap 283, the most apparent remedy was for the petitioner to lodge a Minister's appeal within the stipulated time instead of taking an escape route through *the Constitution*.
88. In *Reuben M'Itekwia vs Paul Kigea Nabea & 2 others (2019)* eKLR, the court said the available remedies under Cap 283 had to be exhausted. In *Geoffrey Muthinja Kabiru & others vs. Samuel Munga Henry & 1756, others (2015)* eKLR, the court of appeal held the exhaustion doctrine was a sound one to ensure the postponement of judicial considerations of matters in protecting his rights through a mechanism available for dispute resolution outside court. In *Mutanga Tea & Coffee Co. Ltd vs Shikara Ltd & another (2015)* eKLR, the Court of Appeal held that where a specific dispute resolution mechanism was stipulated by either *the Constitution* or a statute, the first port of call should be there as Article 159 (2) (c) of *the Constitution* mandatorily stipulates as such.
89. The issues raised by the plaintiff in this suit were within the minister's jurisdiction to determine, for they touch on the planning, preparation, and ascertainment of interests to land under adjudication. The keeping of records runs throughout the adjudication process, for it is through such records that the end product, the adjudication register, is prepared and forwarded to the titling center. Under the Land Adjudication and Consolidation Acts, the Minister is in charge of the whole process, including the various bodies, organs, and officers undertaking the process. The exhibits produced by the plaintiffs indicate that he had written several letters to the Director of Land Adjudication and Settlement.
90. No single letter has been demonstrated to show that a notice of intention to sue was given to the honorable Attorney General, the minister in charge of land and settlement at the time, and the director of the land adjudication complaining that between 2007 and 2008, land records relating to the suit parcels of land and in particular P. Exh No's. 30, 31, 32, 34 – 59 (a), (b) & 58 were falsified, destroyed,



mutilated and or were forgeries. If the said land records were falsified and, in the same case, the plaintiff relied on them and acquired a title deed, then one wonders why the court should rely on or reject them. As much as the plaintiff has averred on paragraph 7 of the plaint that he gave a notice of intention to sue, none was placed as an exhibit before this court duly dated and received by any of the defendants and the alleged land adjudication and demarcation officers demanding admission of liability for destroying the land records. On that score alone, I find that the suit offends Article 159 2 (c) of *the Constitution* as read together with Section 26 of the *Land Consolidation Act* and Section 29 of the *Land Adjudication Act*.

91. The next issue is whether the plaintiff has proved fraud and illegality in the manner that the defendants were recorded as owners of the suit parcels of land. Order 2 Rule 3 of the Civil Procedure Rules provides that facts and not evidence should be pleaded. Order 2 Rules 4 and 10 Civil Procedure Rules provide fraud, misrepresentation, breach of trust, willful default, undue influence, and fraudulent intention be specifically pleaded.
92. In this suit, the plaintiff pleaded that the defendants, in collusion with land adjudication and demarcation officers, destroyed the records and registered themselves as owners of his parcels of land between 2007 – 2008 on unknown dates. The particulars given were colluding amongst themselves and land officers to take away his land, taking advantage of his helplessness and orphanhood, destroying land records, and stealing it. As indicated above, the powers, duties, functions, and mandate of land adjudication, demarcation, recording, and survey officers are statutory. In undertaking that mandate, the officers mentioned above are expected to observe the principles of public service and the national values and principles. Forgery of official land records is a criminal offense under Section 349 of the Penal Code.
93. The plaintiff alleged the destruction of land records and illegal entries made in the register in favor of the defendants. The onus under Sections 107 – 112 of the *Evidence Act* was on the plaintiff to prove every element or particular of the alleged fraud. It is trite law that fraud must be specifically pleaded and proved on balance higher than the ordinary standard but below proof beyond reasonable doubt. See *Vijay Morjaria vs Darbar and another* (2000) eKLR and *Arthi developers vs West End Butchery Limited & 6 others* (2015) eKLR; the court said any fraudulent conduct must be distinctively alleged and distinctively proved and could not be inferred from the facts.
94. In *Cental Bank of Kenya vs Trust Bank Ltd & 4 others* (1996) eKLR, the court said fraud and conspiracy to defraud were severe allegations, the appellant failed to prove by its vague and general allegations against the respondent.
95. In this suit, the plaintiff never endeavored to secure any adjudication record rights from the start of the adjudication process in 1966 or 1968 for the area to demonstrate when the area was declared an adjudication section, who the officers were and when the adjudication register was certified or otherwise and more importantly it showed that his late brother or himself were demarcated as owners of any land interests in the adjudication area or section and issued with demarcation books. D. Exh No. (32) and (59) were never certified by any land adjudication officers as belonging to the plaintiff when the adjudication register was certified final. It is the procedure that parties during an adjudication process are given parcel numbers in an orderly manner. If the plaintiff believed that P. Exh No. (59) was what was issued to him at the time, nothing stopped him from pleading the said parcel number and seeking a confirmation letter from the land adjudication record.
96. Again, if the entry was made on 16.2.1993 in Folio No. 978/1138 for 3.54 acres and 23.8.88 for 3.74 acres, the simplest thing would have been to call the maker of the documents or any other person who with the plaintiff when the entries were made. Regarding P. Exh No. (32), the court cannot read and decipher the particulars. More importantly, the plaintiff did not tender evidence regarding the date,



parcel number, particulars, or the document's maker. The original to P. Exh No's. (32) and (59) were also not produced before the court. As to the adjudication register and record for the defendants, the onus was on the plaintiff to produce documentary evidence from the land adjudication officers that the R.E.R and or demarcation map and record were reflective of his parcel number before 2007 and 2008 and were altered, destroyed and or mutilated in 2007/2008 to bring on board the defendants as the new parcel number holders. The plaintiff would sought for a notice to produce the original duplicate adjudication records for each of defendant's parcel number right from the inception of the adjudication process in the area. It was not enough for the plaintiff to allege the destruction of land records for the whole area without tangible documentary evidence. No evidence was tendered that the plaintiffs lodged specific complaints for investigations to be mounted against the officers who were demarcating and or recording the parcel numbers between 2007/8

97. In *Kinyanjui Kamau vs George Kamau Njoroge* (2015) eKLR, the court said fraud could not be imputed by merely saying that the records concerning the subject property were missing at the land registry. The plaintiff has laid no basis for the court to find that there was tampering with the land adjudication records.
98. In *Ndolo vs Ndolo* (2008) 1 KLR 742, the court held that forgery or fraud was severe and ought to be proved on balance higher than in ordinary suits. Of crucial purpose is how and when the plaintiff discovered the alleged destruction of public documents and what remedial action he took to safeguard his rights regarding bringing the culprits to answer for severe such charge(s). The land adjudication/ demarcation officers were the ones who kept the land records. They must have had names. The source of the plaintiff's information has not been disclosed. Whether the plaintiff sought copies of the adjudication records apart from the objections proceedings is not clear. Whether there was a forensic audit mounted on the strength of the plaintiff's complaint has not been disclosed.
99. In *James Henry Mundiar T/a Kabarak Development Services vs Trade Wheel (K) Ltd* (1987) eKLR and *Samuel Otieno vs Municipal Council of Malindi & another* (2015) eKLR, the court held that a claimant's case succeeds on the strength of his case but not on the weakness of the opponent's case, save to add that the standard of proof in a case for declaration of title was on a preponderance of evidence. In *Gitwany Investments Ltd vs Tajmal Ltd & 3 others* (2006) eKLR, the court observed that like equity keeps teaching us, the first in time prevails. In his suit, the plaintiff has failed to show that he was first in time to be recorded as the parcel land owner he is claiming as opposed to the defendants. The defendants have produced title deeds and certificates of official search, which in law are to be taken as prima facie evidence as proof of ownership. The title deeds were not impeached on the strength of rival adjudication records in favor of the plaintiff or his late brother. The plaintiff did not bother to investigate the root of those title deeds right from the adjudication register or records. It is not for this court to infer fraud or illegality without tangible evidence. The plaintiff has, therefore, failed to prove fraud, collusion, and illegality against the defendants. The upshot is that I find the suit both incompetent, a nullity ab initio, and lacking merits. The same is dismissed with costs to the defendants.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2023**

In presence of

C.A Kananu

Mr. Mwendwa for the plaintiff

Murango Mwenda for the defendant



HON. CK NZILI  
ELC JUDGE

