



**Estate of Edward Nyongesa Ndeke Represented by Antonina Nekesa
Nyongesa v Ayieko & 2 others (Environment & Land Case 113 of 2014)
[2023] KEELC 21532 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 113 OF 2014
FO NYAGAKA, J
NOVEMBER 16, 2023**

BETWEEN

**ESTATE OF EDWARD NYONGESA NDEKE REPRESENTED BY ANTONINA
NEKESA NYONGESA PLAINTIFF**

AND

SILA AMBATIA AYIEKO 1ST DEFENDANT

B. MUTIMBA 2ND DEFENDANT

TUWAN FARM 3RD DEFENDANT

JUDGMENT

1. Antonina Nekesa Nyongesa, the Plaintiff herein, is the Administratrix of the Estate of Edward Nyongesa Ndeke (hereinafter simply referred to as ‘Mr. Ndeke’ ‘The deceased’ or ‘The Original Plaintiff’).
2. Through an Amended Plaint dated 30/09/2022, verified by the Affidavit of Antonina Nekesa Nyongesa deposed to on a similar date, the Plaintiff sought to reclaim land Plot No. 3955 (hereinafter ‘The Suit Land’) from the 1st Defendant.
3. A brief recount of events will suffice.
4. The suit land was said have been hived off from the larger L.R No. 8813 situate in Kitale Town. It is the Plaintiff’s case that Plot No. L.R No. 8813 was owned by Tuwan Farm Limited, the 3rd Defendant herein and was subsequently shared out among the shareholders.
5. The Plaintiff pleaded that between the year 1989 and 1990, the said land (L.R 8813) was surveyed and the Survey Map, Area List and other related documents handed over to one B. Mutimba, the 2nd Defendant herein, who at the time was working for Municipal Council of Kitale.



6. It was the Plaintiff's case that by a Sale Agreement dated 25/01/1996, the late Kiplagat Koskei, one of the original shareholders of Tuwan Farm Limited, sold his land, Plot No. 3955 (hereinafter 'The Suit Land') to a Mr. Ndeke at a consideration of Kshs.35,000/-. The Plaintiff pleaded that before perfecting the sale, Mr. Ndeke confirmed from the records that indeed the suit land belonged to Kiplagat Koskei.
7. It was the Plaintiff's claim that prior to the sale of the suit land to Mr. Ndeke, the 1st Defendant and his family, with consent of the Kiplagat Koskei were using a pit latrine standing on the suit land. The Plaintiff pleaded further that upon purchase by Mr. Ndeke, the 1st Defendant requested him to continue using the pit latrine, which request he allowed.
8. In the year 2000, Mr. Ndeke sought to develop the suit land, to that end, he completed the development application form, submitted it to the Municipal Council for approval of the plan and inspection and paid the requisite fee of Kshs. 4,290/-.
9. The Plaintiff asserted that before Mr. Ndeke commenced development, the 1st Defendant requested to run water pipes through his plot in order to have water at his Plot No. 3942. It was her further claim that before he commenced the development, the 1st Defendant, at Mr. Ndekes request, pulled down the pit latrine which stood on the suit land.
10. The Plaintiff pleaded that the 1st Defendant requested Mr. Ndeke to allow his family use his pit latrine standing on Plot No. 3954. It is the Plaintiff's case the 1st Defendant used the latrine up to December 2001.
11. The Plaintiff averred that unbeknownst to Mr. Ndeke, in the year 2003, the Defendants herein colluded and fraudulently tampered with the records maintained by the 2nd Defendant in a bid to show that the suit land belonged to the 1st Defendant.
12. The Plaintiff set out the particulars of the fraud by pleading that the defendants substituted the original area list of 1997 that had been signed by the Plot owners with a new area list not signed by the Plot owners.
13. It was her further position that the defendants cancelled the suit land in the original record which indicated that it belonged to Kiplagat Koskei and substituted it with Plot No. 3959. Further, that the cancellation was not signed.
14. The Plaintiff further pleaded that the defendants falsely showed that the suit land belonged to the 1st Defendant yet at no time prior to 2003 did it belong to the said Defendant.
15. The Plaintiff averred that Mr. Ndeke only got to know the records had been tampered with in the year 2006 when he was summoned by the Chief Kitale Municipality and was informed that he was occupying the suit land which allegedly belonged to the 1st Defendant.
16. The Plaintiff posited that the 1st Defendant sought to evict Mr. Ndeke through Kitale Chief Magistrate Civil Case No. 15 of 2007 (Sila Ambati Ayieko -vs- Edward Nyongesa Ndeke) but the said suit was struck out with costs.
17. It was his further case that the 1st Defendant instituted Kitale Chief Magistrate Civil Case No. 104 of 2012 Sila Ambati Ayieko -vs- Edward Nyongesa Ndeke, which is pending determination.
18. The Plaintiff pleaded further that pursuant to the fraud, the 2nd Defendant issued to 1st Defendant with documents that facilitated the issuance of the title for Plot No. 3955 to the 1st Defendant. She pleaded further that the issuance of the title to the 1st Defendant is tainted with fraud on the part of the Defendants and it should be cancelled.



19. On the foregoing, the Plaintiff sought the following reliefs;
 - a. A declaration that the registration of the 1st Defendant as the owner of land comprised in title no, Kitale Municipality Block 2/Tiwan/3955 was obtained through fraud and that the same be cancelled.
 - b. An order that the Register for Kitale municipality Block 2/Tiwan/3955 be rectified by cancelling the 1st Defendant's name as the owner, and substituting the name of the original plaintiff herein as the owner.
 - c. A permanent and temporary injunction.
 - d. Costs
 - e. Interests.

The Oral Evidence

20. The Plaintiff called Leah Chepngetich Koskei, Kiplagat Koskei's wife as PW1. She adopted her witness statement as her evidence in chief and added other evidence orally. It was the testimony of PW1 that they had lived with her husband in Kitale for almost 30 years on Tuwan Farm where her husband had 3 acres. She testified that her husband sold land to both the Plaintiff and the 1st Defendant. She stated that after survey the purchasers were given plot numbers. It was her evidence that the 1st Defendant got 5 ½ plots whereas the original plaintiff got 3 plots.
21. Further, she testified that after the survey, Mr. Ndeke bought another plot and an agreement was written in 1996. She stated on oath that her children were living thereon and there was a toilet on the plot. She testified that at one time the house of the children was demolished but the toilet was left standing.
22. Again, she stated that it was not true that the 1st Defendant built the toilet. She stated that when Mr. Ndeke bought the plot the 1st Defendant did not have a toilet and would with his permission of Kiplagat Koskei use the one built by him and that of Mr. Ndeke.
23. Her further evidence was that before beacons were placed, Mr. Mutimba, an engineer with the Municipal Council would show the owners beacons on the ground. She testified that Mr. Mutimba showed them the plot and originally there was no dispute but the 1st Defendant later claimed the plot. It was her case that Mr. Ndeke developed it as the 1st Defendant watched.
24. Edward Nyongesa Ndeke, the original Plaintiff herein testified as PW2. He too adopted his written statement as his evidence in chief. It was his evidence that he had lived in Tuwan Farm since the year 1988 and knew the 1st and 2nd Defendants.
25. It was his case that he purchased the land from original member, one Kiplagat Koskei, for the first time in 1988, the second time in 1992 and the third time in 1996. He stated that he knew the 1st Defendant herein. It was his case that he bought land in 1990 when the survey had begun but had not reached Kiplagat's land. It was his evidence that after survey he was allocated plots in September 1992 being plot No. 3630, 3631 and 3634 in the 3 plots he had bought.
26. It was his case that subsequently, the surveyors moved to the 1st Defendants 5 and a half plots that were separated from his by a road and was given plot No. 3942, 3939, 3938, 3935 and 3934. He produced sketch map to show this.



27. As regards the suit land herein it was his case that upon being shown by Kiplagat Koskei and confirming that it belonged to him, they entered into The Agreement thereon on 25/01/1996. He produced it as P.EXH1 and the original Area List as 2.PExh3.
28. It was his case that next to the suit land was his other plot No. 3954. He testified that at one time after the purchase he met the 1st Defendant herein and his wife, and Kiplagat Koskei informed them that from that point on, Mr. Ndeke was to authorize their use of the semi-permanent toilet on the suit land.
29. It was his testimony that in the year 2000 when he wanted to develop the suit land, he approached the 2nd Defendant a Municipal Engineer for a Sketch Plan of the House which was marked as PMFI1-2 and after paying a fee to the Municipal Council he was permitted to develop. To that end he produced the Application for development Permission and the receipt dated 25th July 2000 issued after payment as P.Exh 2(a) and (b). It was his evidence that he commenced construction and the 1st Defendant requested him to continue using his toilet on Plot No. 3954. He also allowed 1st Defendant's pipes to pass under his foundation. He produced the valuation report as P.Exh 4.
30. He testified that in the year 2003, the area Chief summoned him on an allegation that someone claimed that he had occupied his land, the suit land herein. It was his evidence that he, in the company of Mr. Koskei's wife went to Mr. Mutimba's office where upon checking the Black Book, produced as P.Exh 4, they found that on the page of Kiplagat Koskei's plot No. 3958 had been cancelled and, in its place, written 3959. It was his case further that Plot No. 3955, the suit land herein, had been cancelled and in its place written 3962.
31. Mr. Ndeke further testified that from the extracts, produced as P.Exh 5, obtained from the 3rd Defendant, the suit land and the plot No. 3958 were marked 'sold' and cancelled from the list. It was his case that the title was issued on 14/12/2011 was in the name of the 1st Defendant. He testified that the suit land and plot No. 3958 were in the list of 28 plots that initially belonged to Koskei. He claimed that the transfer of the suit land to the 1st Defendant was fraudulent.
32. Anne Rono, Kiplagat Koskei's daughter in law testified as PW3. She too adopted her written witness statement. It was her evidence that she and her husband started living in Tuwan Farm in the year 1988. It was her testimony that she knew the original Plaintiff herein. She stated that her father sold some plots to the Plaintiff. It was her evidence that Mr. Ndeke would pay some money to her for the transactions and she would deposit it to her father-in-law's account in post bank. It was her evidence that she received the money from Mr. Ndeke thirteen times. She testified that before 1996, she used the plot for farming and there was no structure thereon. Further that no one else was on the farm when she was using it until the 1st Defendant come onto it when he started using the toilet thereon. It was her evidence that the original Plaintiff started using the plot in 1996 and she, her husband, her father-in-law and mother-in-law moved to Oleguruone.
33. Antonina Nekesa Nyongesa, the wife of the original plaintiff reiterated the evidence of PW1. Having adopted her written witness statement as her evidence in chief, it was her evidence that initially, her husband bought plot No. 3630, 3631 and 3634 then in the year 1996, he bought the suit land herein where she witnessed the agreement dated 25/01/1996. It was her evidence that she knew the 1st Defendant herein who lived not far from their plot. She stated that the 1st Defendant stored his building materials on their land and they provided security. She testified that but that time, in 1990, plot numbers had not been issued. It was her case that the 1st Defendant never lived on the plot, he only used the toilet thereon.



34. She further testified that in the year 2000, her husband was transferred to Nakuru and wanted to develop the suit land and to that end wanted to demolish the toilet. She stated that the 1st Defendant sought time to develop a toilet. It was her case that the 1st Defendant eventually demolished the toilet on the suit land. The testimony of the five witnesses marked the close of the Plaintiff's case.

The 1st Defendant's Case

35. Sila Ambatia Ayieko challenged the Plaint through the amended Defence and Counter Claim 24/10/2017 verified by his affidavit deposed to on a similar date.

36. It was his case that he was the lawful owner of the Plot No. 3955 since the year 1990 whereupon he took possession when it was sold to him by the original owner. The 1st Defendant denied that toilet on the suit land belonged to Kiplagat Koskei. It was his case that by the year 1990 when he took vacant possession, he constructed the toilet as a sign of taking vacant possession thereof.

37. It was his case therefore that if the Plaintiff bought the suit land, he did so in the full knowledge that he had already bought it and was occupation and any development was trespass. The 1st Defendant denied the claim that the 2nd Defendant was ever a Director in Tuwan Farm Limited responsible for keeping records.

38. The 1st Defendant further pleaded that Mr. Ndeke did not have title deed when he was processing the plan for putting up structures and the suit land and that he was supposed to confirm the position of the Plot No. 3955 from the records of Tuwan Farm Ltd before putting up any structure. It was the 1st Defendants case that the act of putting up a permanent house on the water pipes was an act of trespass which he took up with Provincial Administration and Court.

39. Mr Ayieko averred further the destruction of the pit latrine by Mr. Ndeke was done without his consent. The 1st Defendant denied the Plaintiff's claim of fraud in toto.

40. In the Counter claim, the 1st Defendant pleaded that, at all times, he was the registered owner of the Title Deed No. Kitale Municipality Block 2/3955 which was part of the bigger land lawfully purchased by him from one Kiplagat Koskei in the year 1990. It was his case that after survey, it gave rise to six plots of various sizes.

41. He averred that after purchasing the suit land, he took vacant possession by constructing a toilet thereon. He posited that during survey and subdivision of land within Tuwan Farm Limited the portion which the Plaintiff is claiming was given plot No. 3955 which is not comprised in Title No. Kitale Municipality Block 2/3955. The 1st Defendant posited that Mr. Ndeke was illegally on No. Kitale Municipality Block2/3955 and should be ordered to vacate and demolish all structures thereon.

42. Based on the foregoing, the 1st Defendant prayed for the following reliefs;

- a. An Order that the Plaintiff, his agents/servants and all those claiming under him to give vacant possession of land comprised in title deed no. Kitale Municipality Block 2/3955 (suit land) by demolishing the structures constructed by him on it, failure to which O.C.S Kitale Police Station to supervise his eviction and demolition of the structures on the suit land.
- b. A permanent injunction restraining the Plaintiff, his agents/servants and all those claiming under him from re-entering and doing any acts on the suit land.
- c. Costs of the counter-claim
- d. Any other relief that this court may deem for to grant.



The Oral Evidence

43. Sila Ambatia Ayieko, testified as DW1. Having adopted his written statement as his evidence in chief, it was his case that the suit land was now known as Kitale Municipality Block 2/3955 and that its title was registered in his name. He produced the Title as D.Exh 1 and stated that he bought the suit land from Kiplagat Koskei starting with 1st plot on 7/07/1990 measuring one eighth of an acre and 2nd Plot measuring 81 feet by 70 feet and that the two (2) plots were amalgamated. He further produced agreements for sale of land, as D.Exh 2(a) and (b) and D.Exh 3 (a) and (b).
44. In reference to the Green card, which he produced as D.Exh 4, issued on 14/12/2011, the 1st Defendant stated that the suit land is in his name. He produced further the Search of the suit land as D.Exh 5.
45. It was his evidence that he bought the two plots fenced it and dug a pit latrine and brought in piped water. He stated further that when survey was done his parcel of land gave rise to 5 plots and was issued with Tuwani Farm Urban Project Share Certificate No. 1476 Membership No. 3939/42/47. He produced it as D.Exh 6 and the Receipt dated 27/01/2003 for payment of the share certificate produced as D.Exh 7.
46. He stated that the five plot numbers on the Share Certificate were 3942, 3955, 3958, 3938, 3939 and 3935. He produced the receipt for all the Survey Fees as D.Exh 8.
47. It was his case that he was away working in Thika when in the year 2003 he discovered that a house had been erected on his land. He reported this to the area chief and later sued but the cases were struck out. It was his case that he knew the Plaintiff the first time in 1990 when he bought the land since he too had bought land thereon. The 1st Defendant acknowledged that the suit land and plot No. 3942 are separated by a road.
48. It was his evidence that for one to be shown his plot by Mutimba, he had to pay survey fees. He however confirmed not having the receipt for the 1991 transaction. He further acknowledged that he had no sale agreement for plot No. 3955 from Kiplagat Koskei, it was his case that he did not buy the land from him. He stated that the first-time documents (Share Certificate) showed the suit land in his name was 27/01/2003.
49. The witness stated that he did not know that by that time, Tuwani Farm Limited had long ceased to exist for reason of having been struck out of the companies register on 2/04/1976.

The 2nd Defendant's Case

50. B. Mutimba, challenged the Plaint through the Statement of Defence dated 19/08/2014. In it he generally denied the Plaintiff's averments. It was his case that he never colluded with any party or fraudulently tampered with any records over the suit property. He pleaded further that in Kitale CMCC No. 15 of 2007 it was the 1st Defendant who sought the eviction of the Plaintiff from the suit property.
51. The 2nd Defendant denied maintaining any records on behalf of the Plaintiff belonging to the suit land and if the same was done, it was by the Plaintiff in his official capacity as an officer employed by Trans-Nzoia County Council. He then pleaded that the Plaintiff should have sought the instant prayers in Kitale CMCC No. 104 of 2012 which was between Sila Ambatia Ayieko v. Edward Ndeke which was still pending before the court.
52. In the end, the 2nd Defendant submitted that the suit be struck out with costs for being res-judicata, an abuse of court process.



The Oral Evidence

53. In his oral evidence, Mr. Mutimba, DW2, sought to adopt his undated statement filed in Court on 10/05/2022 and the Court adopted it. It was his evidence that at one time when there were plans to upgrade slums in Kenya, Tuwan Farm was identified as one of the areas for upgrade.
54. It was his evidence that a committee was constituted by the Municipal Council and Tuwan Farm Officials comprised 10 members. He represented the interests of the Municipality and Tuwan Farm was represented by 3 members and buyers were represented by 4 members. He stated that original members owned three acres each and they were required to avail to the company the sale agreements where they would verify the acreage of each member from the agreements brought.
55. He testified that each member was allocated the size according to the boundaries after a resurvey was done and that each member was required to contribute 31.7% of their land to the Municipality.
56. He testified that Kiplagat Koskei was an original member who sold his land to the original plaintiff and the 1st Defendant among others. It was his evidence that the Plaintiff's plots comprised 3630, 3631 and 3634 and that the 1st Defendant's plots were plot No. 3938, 3939, 3942, 3958, 3955 and half of 3935. He stated that he was not aware of any agreement between the Plaintiff and Kiplagat Koskei.
57. During cross-examination he stated that Mr. Koskei was allocated approximately 26 plots in the year 1995 and Plot No. 3955 was not among them.
58. Mr. Mutimba claimed that the suit land was allocated to the 1st Defendant in the year 1992 and as such by 1996, if the Plaintiff were to buy it, it would be from the 1st the Defendant. In discrediting the Plaintiff's Application for Approval, that is to say, P.Exh 2(a), the 2nd Defendant stated that it was missing a plan number, was not stamped and that the measurements indicated thereon for the intended plot were not correct. It was his evidence that the measurements read 7 m by 20m and the correct one should be 7m by 21m. It was his case that the acreage on the title deed does not agree with the one on the application form.
59. During cross-examination Mr. Mutimba evidence that if the 1st Defendant availed his resettlement receipt to Court, it would show the plot number he was allocated at the settlement time. He testified that the 1st Defendant was resettled in 1992 and confirmation of his plot was in the year 2006

The 3rd Respondent's Case

60. Tuwan Farm Limited responded to the Plaintiff through Statement of Defence dated 11/08/2014. It was its case that its records were kept by its Directors and they reflected the position on the ground at every time and any other changes that have taken place.
61. It pleaded that plot No. 3955 was part of the land bought by the 1st Defendant from Kiplagat Koskei in the year 1990. It was its case that the 2nd Defendant had never been a director of the 3rd Defendant. It pleaded further that any verification as to the position of its plots was done through its directors and that the Plaintiff had never tried to verify the 3rd Defendant's records on the suit land.
62. The 3rd Defendant denied colluding with the 1st Defendant to alter the records of the 2nd Defendant to show that the suit land belonged to the 1st Defendant.



The Oral Evidence

63. Kennedy Onsongo, a Director of Tuwan Farm Limited testified as DW3. He too adopted his written statement as his evidence in chief. His testimony was that he had the records of the Company that dated back to the year 1995. He admitted that the Company had been struck off the register but was re-registered in the year 2010.
64. He testified that the records in his possession indicate that the title holder of the suit land was the 1st Defendant. He stated that in the year 2011, the 1st Defendant came into the office with a list of documents for ownership of the plot and that upon checking against their records, they confirmed he was the registered owner.
65. He testified further that when one needs to process title, he must first have a Share Certificate which has to be confirmed with the Register. Once that is produced, the Company prepares an area list forwarded to the Land Office together with a transfer form and thereafter assessment of stamp duty is made and if paid, the person gets a title deed registered in his name. He referred to the receipt for payment of survey fees.
66. To that end, his evidence was that the company followed all the processes required including checking the Company Register. He produced as 3rd D. Exh 1 the Company register and 3rd Defendant D.Exh 2 the Area List and the extract of the Black Book as 3rd D. Exh 3. He stated that he Black Book is a critical document it helped the Company to establish if there is an agreement in the size of land before subdivision.
67. He gave evidence that according to the records the Plaintiff, as seen in page 2 of the Book purchased ¹/₈ of an acre and was resettled on 5/10/1992. He conceded that the 1st Defendant's date of settlement was not in the extract. He produced the Area Map as the 3rd D. Exh 4. It indicated the plots of the Plaintiff and those of the Defendant.

Submissions

68. The parties filed their respective submissions. The Plaintiff filed hers on 17/04/2023, the 1st Defendant on 17/04/2023 and the 2nd on 07/11/2023.

The Plaintiff's Submissions

69. In her written submissions dated 14/04/2023, the Plaintiff demonstrated that Mr. Ndeke was legally in occupation of the suit land on the basis of the Sale Agreement signed by both the Vendor and the Purchaser and witnessed by PW1, PW2 and PW3. It was submitted that the 1st Defendant has not been in occupation of the suit land and prior to purchase by Mr. Ndeke, the family of Kiplagat Koskei occupied it.
70. The Plaintiff submitted that it came out in evidence that the 1st Defendant had no toilet in Plot No. 3942 and that no evidence was produced in Court to support the claim that he is the one who dug the toilet. It was submitted that the claim by the 1st Defendant that Mr. Ndeke demolished the toilet has no basis since if that were the case, the 1st Defendant would have taken action, but in that case did nothing.
71. To further demonstrate fraud, the Plaintiff submitted that the first time the 1st Defendant claimed ownership of the suit land was in the year 2006. She pointed out that when Mr. Ndeke constructed a permanent house, the 1st Defendant, a friend and neighbour, was just around.



72. In claiming that Mr. Ndeke was the rightful allottee of the suit land, the Plaintiff made reference to the evidence of PW1 who categorically testified that the land comprising Plot No. 3955 was not part of the one quarter acre block that was sold to the 1st Defendant in 1990 and that possession of the said land was never given to the 1st Defendant.
73. To buttress further the propriety of Mr. Ndeke's title, it was submitted that there was no Sale Agreement between Kiplagat Koskei and the 1st Defendant over the suit land. The Plaintiff further submitted that the failure by the 1st Defendant to avail receipts issued to land owners by the resettlement committee at the time of being shown the plots was deliberate since according to the evidence of DW3 the receipts provided clear proof of the plot allocated to the beneficiary.
74. The Plaintiff found support in Kitale ELC Land Case No. 31 of 2015 James Muigai Thungu -vs- The County Government of Trans-Nzoia and 2 Others where the Court observed that the non-production of an allotment letter by the Plaintiff was because its production would be detrimental to their case.
75. The Plaintiff further submitted that the first time a document showed the 1st Defendant to be the owner was on 26/06/2003 when a share certificate was issued to him. It was submitted that it makes it clear that the receipt of Kshs. 200/- issued to the 1st Defendant did not include Plot No. 3955. The plaintiff pointed out that none of the persons who issued the Share Certificate to the 1st Defendant was called to explain the inclusion of Plot No. 3955 in the share certificate of the 1st Defendant.
76. It was submitted that the share certificate was issued in the year 2003, a period of 10 years since allocation of the plots that happened in the year 1992.
77. The Plaintiff faulted the 1st Defendant for failing to produce material records to show the numbers of plots that were allocated to the 1st Defendant including the resettlement receipts and the document that the 1st Defendant identified as 'his field receipt'.
78. The Plaintiff stated that the 3rd Defendant deliberately failed to avail the register that was maintained by Philip Koech and the 2nd Defendant which showed the number of plots allocated to the members.
79. Based on the foregoing the Plaintiff submitted that she had proved fraud perpetuated by the 1st, 2nd and 3rd Defendants. In reference to Section 26 of [Land Registration Act](#), she urged the Court to impeach the title of the 1st Defendant.

The Defendants' Submissions

80. The 1st, 2nd and 3rd Defendants filed joint written submissions dated 14/04/2023. It was their case that from the evidence tendered in Court by the Plaintiff and his witnesses as well as the Defendants, it came out that what Mr. Ndeke bought from Kiplangat Koskei was equivalent to 5½ acres. They submitted that the 5½ came about as a result of subdivision done between the year 1990 - 1992 and it is out of the said subdivision that the original Plaintiff got 3 plots.
81. It was his submissions that he 1st Defendant's Plots are part of his sale agreements which agree with the Black Book which are reflected in the Member Register, in the Share Certificate, in the Area List and in the Area Map. It was submitted that nowhere in the records of Tuwan Farm Limited is it indicated that Plot No. 3955 belongs to Kiplangat Koskei. Rather the suit land forms part of the larger portion sold to the 1st Defendant and it came out after subdivision.
82. From the foregoing, the Defendants submitted that the said Kiplagat Koskei was selling what he did not own and therefore Mr. Ndeke could not be the owner of the suit land which never belonged to Kiplangat Koskei in the year 1996. Speaking to the legal consequence of the Sale Agreement between



- Kiplagat Koskei and the original Plaintiff, the defendants submitted that it was infirm since the land which Kiplagat Koskei was selling already formed part of the land sold to the 1st Defendant.
83. The Defendants submitted that the hand-written documents purporting to originate from DW2 which includes Plot No. 3955 as belonging to Kiplagat Koskei was an afterthought meant to deprive the 1st Defendant land legally belonging to him. It was their case that the Plaintiff cannot make his own documents for this case.
84. Further, it was submitted that the records of Tuwan Farm does not indicate that plot No. 3955 belongs to Kiplagat Koskei, therefore, the Sale Agreement between the original Plaintiff and Kiplagat Koskei has no legal basis. On the foregoing, the Defendants submitted that the estate of the original plaintiff ought to give vacant possession of the suit land.
85. As to whether the title deed No. Kitale municipality Block 1/3955 should be cancelled, the Defendants submitted that since the land has been the property of the 1st Defendant from the time he purchased it from Kiplagat Koskei and passed through several stages before it was registered in the 1st Defendant's name, it should not be cancelled because the Plaintiff did not prove the case of ownership.
86. The Defendant declined any incidence of fraud. It was their case that the records of Tuwan Farm Limited shows the 1st Defendant's name as the lawful owner before it was officially transferred into his name.
87. In conclusion, the Defendants urged the Court to dismiss the Plaintiff's case with costs.

The 2nd Defendant's Submissions

88. The 2nd Defendant gave the introduction of the submissions by summarizing the prayers in the Plaint, the evidence of the parties and then set out only one issue for determination. It was whether the Plaintiff had established a case of fraud against the 2nd Defendant. He submitted that the Plaintiff had not. He relied on Order 2 Rule 4 of the Civil Procedure Rules which he argued did not allow a party to benefit from certain defences unless specifically pleaded.
89. He also relied on Order 2 Rule 10 of the Civil Procedure Rules regarding what every claim should contain in terms of pleading fraud, breach of contract and the like. Further he relied on Sections 107 and 108 of the *Evidence Act* about proof of facts in a matter before court. he relied on the case of martin f. kangara vs. samuel macharia kimani (2019) eklr which is about pleading specifically on fraud and proving it. also, he relied on the cases of jose estates limited vs. muthumu farm ltd & 2 others [2019] eklr and vijay morjoria vs. nansingh madhusingh darbar & another [2001] eklr (all sic). he submitted that the plaintiff failed to tell the court with precision how the 2nd Defendant committed fraud.

Issues for Determination

90. The foregoing comprehensive reproduction of the respective parties' cases tasks this Court with the sole issue of ascertaining the legal ownership of plot No. 3955, and who to bear the costs of the suit.

Analysis

91. From the outset, it is common ground that both the Plaintiff and the 1st Defendant purchased various pieces of land from Kiplagat Koskei, one of the original owners of land in Tuwan Farm Limited.
92. The foregoing is evidenced by the Plaintiff's Sale Agreement dated 25/01/1996 and the 1st Defendant's Sale Agreements dated 7/06/1990 and 27/06/1990.



93. The Plaintiff's entire case is hinged on fraud and collusion on the part of the Defendants herein that resulted in registration of the suit land in the name of the 1st Defendant.
94. Loss of land by a complaint through acts of fraud is a reason for any court to invalidate title to land, as provided by law.
95. The recognition of the fact of registration of a person as the owner of land is provided for in Section 24(a) of the [Land Registration Act](#) in the following manner;
- “Subject to this Act, 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.”
96. The claw back on the foregoing entitlement resides in Section 26(1) of The [Land Registration Act](#). It gives court the mandate to invalidate title to land in the following terms;
- “The Certificate of Title issued by the Registrar upon registration 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... 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, unprocedural or through a corrupt scheme.”
97. For a claim of fraud to succeed, however, the Plaintiff must do more than simply state that there was fraud. He must prove it by adducing evidence to that effect. I thus agree with the 2nd Defendant's submission on that point that there has to be proof and the burden lay on the Plaintiff to discharge regarding that proof.
98. In *R. G Patel -vs- Lalji Makanji* (1957) EA 314, the Court of Appeal of Eastern Africa cited with approval the decision in ELC No. 32 of 2017 MWK v SKK and 5 Others NRB ELC No. 32 of 2017 [2018] eKLR where the Court made remarks on the standard of proof in cases of fraud. It observed;
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities and it is a question of the Judge to answer”
99. The 2nd Defendant argued that the Plaintiff ought to have proved the allegations of fraud on the part of the Defendant also argued that he should have not benefited from pleadings of fraud not made and proven by him. But as I see it, the Plaintiff pleaded fraud on the part of all the Defendants. He did so in paragraph 15 of the Plaintiff's Complaint. Having so done he was obligated by law to prove the allegations.
100. I have carefully sifted through the Plaintiff's documents namely; The Sale Agreement dated 27/01/1996, the Letter dated 19/06/1995, Report and Valuation, the 1991 Allocation Plots, the Title Deed, extracts of The Black Book, the Application for Inspection and Development permission and the receipt thereon and all the documents produced by the Plaintiff and the Defendants herein in evidence.
101. Save for the Black Book Extracts, produced as 3rd P. Exh 3, and the Agreements produced as P. Exh 2(b), P. Exh. 3(a) and P. Exh 3(b) none of the other documents point to incidences of fraud.



102. The Black Book Extract speaks to tampering of records. It contains Plots said to have been owned by Kiplagat Arap Koskei. Of them, plot Nos. 3958 and 3955, the latter being the suit land herein were cancelled out, and in their place written plot No. 3959 and 3962 respectively. The cancellations were either countersigned nor supported by Minutes of the 3rd Defendant to support the reason for the cancellation and substitution with other plot numbers. Even the dates on when it was done and who did it were not given. This can only be evidence of record tampering to favour a person, and it is fraud. Even the 1st Defendant admitted in cross-examination that he did not know who cancelled the plots as appears on P Exh 4. He admitted that the plot belonged to Kiplagat Arap Koskei. Since he did not have an agreement on the sale of the Plot by Koskei but The Plaintiff had one which was duly stamped by the said Mr. Koskei specifying that he sold the Plot to him (the original Plaintiff) it leaves no doubt in the mind of the Court that the Plaintiff was the one to whom the plot was sold, as supported by the evidence of PW1 and PW2, PW3 and even PW5.
103. I now turn to the oral evidence.
104. Besides testifying as PW5 the Plaintiff called a total of four witnesses. Key among them was the original Plaintiff and Leah Chepng'etich Koskei, the wife of the Kiplagat Koskei. Leah Koskei gave an account of how the suit land changed hands from her husband to Mr. Ndeke. The latter evidence that they with her family resided on the suit land from the year 1964 and that the farm was surveyed between 1989 and 1990. Additionally, she testified that the husband sold only five and half plots to the 1st Defendant but the suit land was not one of them.
105. Her evidence that Mr. Ndeke first acquired 3 plots namely 3630, 3632 and 3634 and then later in on 27/01/1996 acquired the suit land herein was not shaken upon cross-examination. Further, that when Kiplagat Koskei sold plots to the 1st Defendant herein, she, Leah Koskei, was there. She witnessed the transaction. Her evidence was that the 1st Defendant bought and was shown Plot No. 3942, 3939, 3636, 3935 and 3934 and half plot in 3931.
106. The witness was categorical that plot No. 3955, the suit land herein, was not among those shown to the 1st Defendant by her husband. Throughout Leah's cross-examination, her evidence as to the identity of the person who bought the suit land from her husband, being the husband to PW5, remained unshaken.
107. Similar evidence about the said goes for that by Mr. Ndeke, the purchaser of the suit land. That before his death, the 1st Defendant's plots were plot No. 3942, 3939, 3938, 3935 and 3934. That evidence too was not disturbed by cross-examination.
108. I have scrutinized the Sketch Map produced as P.Exh 6. In his evidence, the Plaintiff's (Mr. Ndeke's) description of the configuration of the plots mentioned in regard to the Plaintiff and 1st Defendant tallies with the ones on the Sketch Map which was authored in the year 1990, long before he purchased the land.
109. The Defendants neither disputed nor proffered any other narrative regarding the plots sold to the 1st Defendant nor did they counter the configuration as proved by the Plaintiff as stated above.
110. The evidence by Mr. Ndeke that he owned plot No. 3954 which is next to the suit land was not disputed by the Defendants. Similarly, and furthermore, the 1st Defendant testified in examination in chief that the two plots he bought were adjacent to one another and were amalgamated. Going by this oral testimony, and by virtue of the fact that 1 D.Exh 2(b) and which are the handwritten agreements dated 07/06/1990 and 27/06/1990 each refer in the third line a plot, that is to say "And by virtue, he has agreed to sell a plot measuring..." it is clear to my mind that the 1st Defendant bought plots



that were adjacent to each other, which were amalgamated. Hence the five and half plots could only be alongside or adjacent to each other. It would therefore be inconceivable that the five plots would be far from each other after the survey was done.

111. This court's deductive reasoning, in view of the uncontroverted evidence by the Plaintiff, leads to a finding that the Plaintiff bought plots next to each other just as the Defendant did as, evidenced by the Sketch Map produced by the Plaintiff and undisputed by the Defendant as a true reflection on the positions of the plots on the ground. Simply put, the plots could only remain adjacent hence the other plots would only be adjacent to plot No. 3942 when one follows the sequence of numbering from plot 3934 as shown on PEx. No. 6.
112. Further to the foregoing, this Court notes that in the entire evidence of the 1st Defendant, at no point does it come out that he was in occupation of the suit land. His testimony that he built a toilet on the ground is not supported by any other evidence, documentary or otherwise by an independent witness. On the contrary the evidence of PW1, PW2, PW3 and PW5 is on all fours over the fact that the toilet was built by the Koskei family who used to use it, handed it over to the Plaintiff who permitted the 1st Defendant to be using it until it was pulled down.
113. PW2 continued that from the year 1996 when he claimed to have bought the suit land, he took possession and was in occupation. Further that Koskei and he only allowed the 1st Defendant to use the toilet in their next plot No. 3954. He testified further that to further assert ownership, he, Mr. Ndeke, in presence of the 1st Defendant, commenced construction of a permanent house. That evidence that the 1st Defendant was away in Thika was neither pleaded nor proved.
114. This Court further notes that despite the Defendants conceding to the paramountcy of the resettlement receipt of KShs. 200/- as used to be issued, as proof of the Plot allocated to a beneficiary, such a receipt was not produced as evidence in respect of the 1st Defendant. The 1st Defendant testified that for one to be shown his plot on the ground he had to pay KShs. 200/= to the office and the receipt would indicate which plots the person was to be shown. But he admitted that he did not have one such receipt to show which plots he was shown when he was taken to the ground after survey.
115. Even when the 1st Defendant was stood down to give further testimony some days later, he could not produce even a certified copy of such a receipt. Thus, in terms of the law of evidence, this Court infers that the witness must have known that the contents of the said receipt were detrimental to his evidence in that it must have contained plot numbers which excluded the suit land, No. 3955, from the ones he paid to be shown hence the reason he did not produce it. Further, it was curious and suspect that since the said Defendant had been shown his five and half plots earlier, in 1992 as per his testimony in cross examination, he had to be shown again the same plots fourteen (14) years later, that is to say on 13/01/2006.
116. Moreover, the witness stated in cross-examination that the latter date was of the receipt which had plot numbers including the suit land, plot No. 3955. The witness could not explain why the receipt for that latter date (13/01/2006) was the only one available whereas the one for 1992 when he alleged to have been shown the plots including the suit land, before the Plaintiff built on it, was missing. Although the 3rd Defendant (the company) called a witness, Mr. Onsongo, to testify on its behalf, the 1st Defendant did not call on the 3rd Defendant or its witness to produce a copy of the receipt yet the said company produced other documentary evidence to support the 1st Defendant's claim and defend its case.



117. This Court is persuaded by the holding in *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others* [2012] eKLR where the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

118. The point in time of ownership of the suit land is also of importance to this dispute. The evidence of the 1st Defendant pointed to the fact that the suit land was in documents for the first time in the year 2003 in the Share Certificate. Survey of the Farm land was done in 1991-1992. It is curious that the makers of the Share Certificate were not called as witnesses to shed light on the issue of ownership and allocation.

119. Besides the foregoing, a scrutiny of the 1st Defendant’s Sale Agreements reveal unexplained loopholes that in this Court’s assessment may have been an attempt by 1st Defendant to lay claim to the Plaintiff’s land. While the 1st Defendants testified that the typed agreements dated 07/06/1990 and 27/06/1990 were made the same dates as the handwritten agreements and were a replica of the same, they differed in material particulars. For instance, the handwritten one of 27/06/1990 was not thump printed by the vendor (Mr. Koskei). Additionally, the sizes of the pplot being sold differs greatly. On the handwritten one the size is 82ft by 70ft by 81ft by 79ft but the size is one eighth (1/8) of an acre.

120. Again, it was purported to be stamped by the 3rd Defendant the same date. But of the alleged witnesses to the agreement, only two signed the document purporting to be printed or transcribed the same date. Also in regard to the two typed agreements dated 07/06/1990 and 27/06/1990 which are 20 days apart the ink of the four pens used by the four signatories thereto respectively, being that of the Vendor, the one of the Senior Resident Magistrate (Kitale), and the witnesses, namely, Francis Kenduywa and John Okello Amunga , are all same for each of them respectively. It is too coincidental and practically humanly impossible that four different signatories can each have four different pens but same ones on two different occasions. What I mean is that the vender had the same pen (ink) on 07/06/1990 as on 27/06/1990, the Magistrate a different one for himself but same on the two occasions and in like manner, Francis a different pen for himself but same on the two occasions and lastly, Okello a different one for himself but same for the two occasions.

121. This Court draws an unshakable inference that the two agreements were typed and made the same date hence it was a lie on oath for the 1st Defendant to state that each of them was typed on the same date the handwritten ones were made. One of the two was ‘cooked’! In any event this conclusion explains why the handwritten agreement dated 27/06/1990 was not thump printed by Kiplangat Koskei but the other one was. It also explains why the handwritten one dated 27/06/1990 differed in terms of the specifications of the size of the parcel being sold with the typed one of the same date. These changes were not explained by the 1st Defendant as between the time the handwritten ones were made and when the typing and execution was made.

122. In any event, as can be discerned, both Sale Agreements only make reference to the date of the agreement, the names of the parties transacting, the size of the plot, the purchase price and the



witnesses. Crucially, they do not particularize or identify the plots that were subject of the transaction. But DW1 testified that the first agreement dated 07/06/1990 related two plots whose sizes were 79 feet (ft) by 70ft and 81ft by 70ft and were amalgamated to make one eighth (1/8) of an acre and another one dated 27/06/1990 over two plots measuring 82ft by 70ft and 81ft by 79ft totalling to another one eighth (1/8) of an acre. At one time in cross-examination the 1st Defendant admitted he did not buy plot No. 3955 (the suit land) from Mr. Koskei. He also admitted that on 13/01/2006 he paid KShs 1,000/= to the Tuwani office for Mr. Mutimba to show him his five and half plots. It is telling that the 1st Defendant would pay for and receive the share certificate on 27/01/2003, thirteen years after the purported purchase transactions.

123. That can be contradistinguished with the Plaintiff's Sale Agreement. It is dated 25/01/1996, makes reference to the parties to the agreement, location of the plot, identifies the plot as 3955, the size of the plot, the purchase price and the witnesses.
124. From the foregoing, apart from the Plaintiff's Sale Agreement identifying the suit land as Plot No. 3955, the evidence of the witnesses was seamless in terms of corroborating the sequence of events.
125. Similarly, the documentary evidence points to the fact that Mr. Ndeke was the initial purchaser and despite occupying the land. And that there was a discreet albeit systematic attempt by the Defendants to tamper with the records including registration of the land and issuance of title deed in the name of the 1st Defendant.
126. The foregoing can be distinguished from the 1st Defendant's claim. He pleaded that he had been the lawful owner of the suit land since the year 1990 when he took possession upon acquiring it from Kiplagat Koskei. The 1st Defendant, however, did not identify the Sale Agreement between the one dated 7/06/1990 and the one dated 27/06/1990 that yielded ownership the suit land.
127. The totality of his case, right from the Defence and the Counter-claim to the evidence, both oral and documentary, does not bear him out as having come into ownership of Plot No. 3955 legally, leave alone getting into possession.
128. In view of the failure of the 1st Defendant and Kiplagat Koskei to identify in the two Sale Agreements the Plots that were subject of their transaction, and considering the lack of cogent evidence that established the link between the 1st Defendant's claim and ownership of Plot No. 3955, and also the finding that either of the 1st Defendant's typed agreements dated 27/06/1990 or 07/06/1990 was manufactured to suit the said Defendant's narrative of the purported ownership of the plot, among all the above findings, this Court finds on a balance of probability that the suit land belongs to the original Plaintiff, Mr. Ndeke. It was fraudulently registered in the name of the 1st Defendant.
129. It is not enough for the 1st Defendant to assert proprietorship by simply waving the Title Deed as conclusive proof when in fact evidence speak otherwise. In *Munyu Maina -vs- Hiram Gathiha Maina* [2013] eKLR the Court of Appeal spoke to the importance of a litigant travelling beyond the Title Deed. They observed;

“...when a registered proprietor's root of the title is under challenge, it is not sufficient to dangle the instruments of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.



130. In contrast, the Plaintiff was particular in his pleadings and chain of evidence that the Sale Agreement dated 27/01/1996 is the one that gave him the legal ownership to Plot No. 3955.
131. In the premises, this Court finds that Edward Nyongesa Ndeke was the legal proprietor of Plot No. 3955 also known as Kitale Municipality Block 2/3955 and as such should form part of his estate.
132. Accordingly, the 1st Defendant's Amended Counter claim dated 24/10/2017 is hereby dismissed with costs.
133. The upshot is that the following final orders do hereby issue;
- a. A declaration hereby issues that the registration of land comprised in title No. Kitale Municipality Block 2/ Tuwan/3955 in the name of Sila Ambatia Ayieko, 1st Defendant herein was obtained through fraud.
 - b. An Order hereby issues directing that the Register for Kitale Municipality Block 2/ Tuwan/3955 be rectified by the land registrar by cancelling the 1st Defendant's name as the owner, and substituting it with the name of the original plaintiff herein, being, Edward Nyongesa Ndeke, as the owner.
 - c. A permanent injunction hereby issues restraining the 1st Defendant or any other person or agent acting on his behalf from interfering with the Estate of Mr. Ndeke quiet possession of Kitale municipality Block 2/Tuwan/3955.
 - d. Cost of the Plaint to be borne by the Defendants jointly and severally.
134. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 16TH DAY OF NOVEMBER, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE.

