



REPUBLIC OF KENYA



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**Anyimu v Mukele & another (Environment & Land Case
24 of 2017) [2022] KEELC 3230 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 24 OF 2017**

**AA OMOLLO, J
AUGUST 4, 2022**

BETWEEN

ANTHONE KWENA ANYIMU PLAINTIFF

AND

GABRIEL MUKELE 1ST DEFENDANT

WALANCES WESONGA 2ND DEFENDANT

JUDGMENT

1. Through an amended plaint dated 24th June 2019 and filed in court on 26th June 2019, the plaintiff sought for judgment against the defendants as follows;
 - a. The court to find and declare that the deceased (Anyima Kwena) was the registered owner and proprietor of land parcel No. Marachi/Esikoma/4xx, 11xx and 11xx prior to their illegal and fraudulent sub-division by the defendants.
 - b. That the 1st defendant illegally acquired land parcel numbers Marachi/Esikoma/11xx and 11xx.
 - c. That the 2nd defendant illegally acquired land parcel numbers Marachi/Esikoma/12xx.
 - d. The court to compel the defendants to transfer to the plaintiff land parcel No. Marachi/Esikoma/11xx, 11xx and 12xx.
 - e. General damages for loss of user.
 - f. Costs of this suit.
2. The plaintiff pleaded that at all material times to this suit, Anyima Kwena (the deceased) was the registered and beneficial owner of land parcel numbers Marachi/Esikoma/4xx and 11xx and his father



did not at any point apply for sub-division and transferred portions of the said lands to the defendants. He laid out the particulars of fraud of the 1st defendant as follows;

- i. Causing land parcel number Marachi/Esikoma/4xx to be sub-divided to create Marachi/Esikoma/11xx.
- ii. Causing land parcel number Marachi/Esikoma/11xx to be registered in his name.
- iii. Causing land parcel number Marachi/Esikoma/11xx to be subdivided to create Marachi/Esikoma/11xx.
- iv. Causing land parcel number Marachi/Esikoma/11xx to be registered in his name.
- v. Non-disclosure of material facts regarding the parcels of land in question from the land registry.
- vi. Causing the said parcels of land to be subdivided and registered in his name without obtaining the consent of the Land Control Board sub-division and without the deceased transferring to him.
- vii. Misleading the Land Registry in Busia that he bought the said parcels of land from the deceased.

3. He listed out the particulars of fraud on the part of the 2nd defendant as follows;

- i. Causing land parcel number Marachi/Esikoma/11xx to be subdivided to create Marachi/Esikoma/12xx.
- ii. Causing land parcel number Marachi/Esikoma/12xx to be registered in his name.
- iii. Causing the said parcel of land to be subdivided and registered in his name without obtaining the consent of the Land Control Board subdivision and without the deceased transferring to him.
- iv. Misleading the Land Registry in Busia that he bought the said parcel of land from the deceased.

4. The defendants entered appearance and put in a joint defence filed in court on 13th March 2017. They denied that land titles Marachi/Esikoma/11xx, 11xx and 12xx were acquired illegally or by fraud as alleged by the plaintiff and denied the particulars of fraud as enumerated in the plaint. They averred that the plaint is bad for failure to disclose any reasonable cause of action or when such cause of action arose and that the plaintiff's claim is in every respect barred by limitation of time. They further averred that they acquired the suit titles lawfully having bought the same from Anyimu Kwena (deceased) for valuable consideration about 40 years ago with all due process followed. They prayed that the plaintiff's suit be dismissed with costs.

5. The suit was set down for hearing on 9/12/2017 with the plaintiff, Anthone Kwena Anyimu, testifying as PW1. Through his witness statement dated 3/2/2017, PW1 testified that he is a son and administrator of the estate of Anyimu Kwena, his late father. He stated that in the year of 1980s, his father leased his several parcels of land to 1st Defendant to use it to plant sugar cane. After the death of his father, he started the process of succeeding his estate by conducting an official search at the lands registry Busia. That the searches revealed that some of the parcels of land of his late father were now registered in the names of the defendants. He continued that he proceeded to the Land Registrar to seek for assistance and the registrar confirmed that the said parcels of land were illegally acquired because his office does have the records of the application to subdivide, consent to subdivide and the receipts for the stamp duty, the transfer. He added that in the defendants' list, he had not seen a sale agreement or consent of Land Control Board to subdivide and transfer. He prayed that the said parcels of land



- be transferred to him and be compensated for the loss he incurred. He produced the documents in his list dated 3/2/2017 as PEX 1-8 and 24/6/2019 as PEX 9.
6. During cross-examination by the counsel for the defendant, the plaintiff reiterated that the defendants had leased the parcels although he had not presented documents to prove the lease. He said that L.R. No. Esikoma/11xx was registered in the name of the 1st defendant on 12/5/1975, L.R. No. 1195 registered on 16/10/1978, L.R. No. 12xx was registered in the 2nd defendant's name on October 24, 1981. That in 1975, he was only 4 years old and could not tell if his father had sold the land. He did not know when the defendants started using the land and stated that all his life, he has known it is the defendants who have been using the suit parcels to date. He said that his father never sued the defendants and he died leaving behind six sons and one daughter from three wives. He denied that his father left only two parcels in his name being L.R. No. 3xx and 13xx. He confirmed that he took out succession for L.R. No. 13xx because it was still in his father's name and it where he lives.
 7. PW1 was aware that his brothers did succession in respect of L.R. No. 3xx and also included L.R. No. 13xx. He stated that the administrator in Succession Cause No. 1xx of 1991 is their brother Gabriel Anyimu and he is claiming the suit parcels because it was his share grabbed by the defendants. He said that he was given Succession Cause no. 231 of 2016 for purposes of L.R. Esikoma/13xx. The ad litem, PEX 9 was issued on 16/5/2019 after the suit was filed in 2017. He stated that he wants the suit parcels transferred to him because they were given to him by his father in 1989. He was looking for money to file this suit and that is why it took him 28 years and he was told there was no transfer or consent at the land's office. He added that he wrote to the land's office requesting to be supplied with the Land Control Board consents and transfers but did not produce a copy of that letter.
 8. On re-examination, PW1 said that the issue of leasing he was told by his father and he did not agree the transfers of 1975, 1978 and 1981 were lawful because there was no consent, transfer and stamp duty receipts. He said that it is in 2014 that he discovered the defendants were registered as owners of the suit land. The fact that his brothers are not claiming the land does not stop him from claiming it and he took out a grant in 2019 giving him authority to bring this suit. He reiterated that he has not been shown any sale agreements and he wanted the titles to be cancelled because they were fraudulently obtained.
 9. Nicholas Adobwa Anyimu Kwenathe second witness is the step-brother of the plaintiff and said the 1st defendant is known to him. He said that his father Anyimu Kwena died in 1991 and he had 5 wives known to him and 8 children. Pw2 stated that in 1991, his late father called them together with the 1st defendant who came with his son and told them that he had leased out his land to Gabriel Mukele. It was his evidence that since their father was sickly, their father informed them that they should ensure Gabriel hands over L.R. No. Marachi/Esikoma/4xx to the plaintiff. He continued that his father had two pieces namely L.R. No. Marachi/Esikoma/4xx and 3xx with his brothers and him staying on L.R. No. 3xx whereas the plaintiff and his mother to stay in L.R. No. 4xx.
 10. PW2 stated that L.R. No. Marachi/Esikoma/4xx was given to the 1st defendant to grow sugarcane and was surprised that the 1st defendant bought the said land parcel which is not true. He contended that the 1st defendant never educated any of his father's children and he was being mischievous as the 1st defendant used his connection as a commissioner to fraudulently snatch their brother's inheritance. He said that he knew for fact that land parcel number Marachi/Esikoma/468 belonged to the plaintiff and if the defendants claim to have bought it from his father let them produce the sale agreement, application to land control board since it is an agricultural land, letter of consent and clean transfer forms to proof otherwise.



11. On cross-examination by Mr. Nyikuli advocate, PW2 said that his father called them for a meeting on 30th September 1990 and informed them that he had leased L.R. No. 4xx to the 1st defendant. The lease was made orally and the 1st defendant started farming the land in 1978. The lease period was to end in 1984 and his father passed on in 1991. He admitted that his father never sued the 1st defendant but verbally told him to leave. In the meeting of 30/9/1990, the persons' present were; Gabriel Wanjala, Joseph Mire, Alexander Makokha, his father and himself. There were no minutes recorded from that meeting and they did not invite the 1st defendant because it was a family meeting. After the death of their father, they did succession in respect of L.R. No. 3xx (Succession Cause No. 153 of 1991) but L.R. No. 4xx was not included in the succession cause because it was far and it had its independent number. He denied that L.R. No. 4xx was never sold.
12. On re-examination, PW2 clarified that Gabriel, Joseph and Alexander are all sons of Anyimu Kwena. The 1st defendant was not present during that meeting and L.R. No. 3xx was to be shared amongst 5 people i.e. Gabriel, Joseph, Alexander, Nicholas and Jonai. He stated that Anthony's share is in L.R. 4xx and none of the other brothers have a stake in L.R. No. 4xx.
13. Stanslaus Othieno Ochieng giving evidence as PW3 adopted his statement dated 8/1/2021 as his evidence. He testified that he is the uncle to the plaintiff and in the year of 1980s he used to visit his sister who is the mother to the plaintiff. Pw3 said he was informed by his late sister that an advocate known as Gabriel Mukele (1st defendant) had leased land from his brother-in-law to grow sugarcane. In 1991, he was at home with his late father and his aunt came in the morning and she informed his father that his brother-in-law wanted to talk to him. His in-law invited them at his home to tell them that he was weak and that he had leased his land to Gabriel Mukele to plant sugar cane for extending some little help to the plaintiff. That when the plaintiff becomes of age of majority, Mr. Gabriel was to hand over the leased land to him. He was therefore surprised to hear from the plaintiff that the said land had been subdivided and taken by Gabriel Mukele, which is fraud.
14. During cross-exam by the counsel for the defence, PW3 stated that he accompanied his father to attend the meeting scheduled for February 1991 at Mzee Anyimu's home. The meeting was to discuss the land leased to the 1st defendant and upon expiry of farming, he returns the land to the plaintiff. He said that it was not known when the 1st defendant was to stop farming but he was to give the land when the plaintiff got married and the land was L.R. No. 4xx. He did not know about a new number transferred to the 1st defendant by 1991 and the minutes of that meeting were not recorded. He said that he used to work in Nairobi but he was in communication with the plaintiff and he was aware when the plaintiff decided to file this case.
15. The plaintiff's last witness Benard Wanjah Tarku, the in charge of Registration of Persons in the rank of Registrar Assistant 1. He has worked in that department for 25 years and confirmed that he received a letter from SCCIO Butula dated 1/11/2020. The letter enclosed documents marked A, B, C, D, and E all bearing finger print impressions and they were asked to make comparisons with the finger prints of Anyima in ID No. xxxx. There was also another ID Number quoted i.e. xxxxx which they were asked to provide bearer thereof.
16. PW4 looked at the data base and found that ID No. xxxx is registered in the name of Roge Bonaya Dima. While ID No. 205xxxx was held by Petro Anyimu Kwena-deceased who was issued with first generation card on 22/2/1979. On replacement with a second generation in 1995, Mr. Anyimu did not apply for a replacement ID card. They were able to trace his records which they marked as exhibit X and he made a comparison with the exhibits brought to them (A-E). He found that the print impressions on A, D and E are identical to the left thumb print impression on exhibit X. However, the print on B and C were found to be blurred therefore unsuitable for comparison and identification. The report



- was produced as PEX 10 and ID No. recorded and quoted on D is xxxx. ID No. quoted on E-xxxx. As per their record, the ID No. of Petro Anyimu is 205xxxx and ID No. xxxx is held by Roge Bonaya Dima which was issued in Merti (Isiolo County) on 6/4/1997 with his picture on the document extracted.
17. During cross-examination, PW4 said that his report is based on the ID issued on February 1979 to Anyimu Kwenu and he did not know what sort of ID Anyimu held prior to 1979. The system prior to 1979 was not asked to look at his records. He knew there was a system of registration prior to 1971 so he did not know if Anyimu held a registration card before 1979. PW4 brought an extract of the Register for Petro Anyimu and he confirmed ID No. xxxx was issued on 6/4/1997. He did not know the modalities used to insert the ID No. in exhibit D and E. He confirmed the finger prints on A, D and E belonged to the left thumb print of Anyimu Kwena. B and C were blurred so they could not be compared and the exhibit sent to him did not bear any certification stamps. He stated that he was dealing with the copies not the originals.
 18. On re-examination, PW4 denied knowing if Anyimu held any form of identification and ID numbers on D & E are not the same as the one held by Anyimu. In 1997, Roge was replacing her ID. The oblique number in the old generation only indicated the area where the ID was issued and the ID numbers could only change where there was a duplication. He could not confirm whether prior to 1979 Petro held an ID card and the documents for comparison were forwarded to him by SCCIO Butula.
 19. The defence case proceeded for hearing on 14/2/2022 with Gabriel K. Mukeletestifying as DW1. He testified that he bought three pieces of land where his home is, a village called Imanga in Butula sub county, Busia County. The second piece of land is about 5 kilometres from where his home is and it consists of 5 titles but it looks like one big piece. He first bought what is now Marachi/Esikoma/11xx in 1975 from Anyimu Kwena-deceased and the plaintiff's father. Later, DW1 bought from the same Anyimu Kwena L.R. No. Marachi/Esikoma/11xx and Marachi/Esikoma/12xx in 1978 and 1981 respectively. e bought and registered the last parcel, L.R. No. Marachi/Esikoma/12xx in the name of his son, the 2nd defendant who was then a minor.
 20. The 1st defendant added that he also bought more land from Opiyo Kwena and Musumba hence the 5 titles that appear on the ground as one. He continued in evidence that he has since been using the land as one big single unit and he first grew maize and groundnuts. Later, he planted sugarcane but stopped when Mumias Sugar Company ran into problems. After Anyimu Kwena sold him the last piece, he remained with title No. Marachi/Esikoma/12xx. Anyimu sold part of it to Andrea Obonyo Chembe who took L.R. No. Marachi/Esikoma/12xx leaving Anyimu Kwena with L.R. No. 12xx following subdivision. He said that Anyimu Kwena later sold part of L.R. No. Marachi/Esikoma/12xx to Yohana Ouma Mbashire who took L.R. Marachi/Esikoma/13xx leaving Marachi/Esikoma/13xx also after subdivision.
 21. He added that the plaintiff is entitled to L.R. No. Marachi/Esikoma/13xx but now claims all the titles that he bought and not the ones purchased by the other two buyers. DW1 said that the plaintiff took out letters of administration to succeed L.R. No. Marachi/Esikoma/13xx but not to sue him and his son. He stated that neither the plaintiff nor his late father ever lived on the land that was sold to him and the allegation that he obtained title to the land in question by fraud nearly 40 years ago is ridiculous and calculated to mar his good name in the community. The 1st defendant denied that he never defrauded anyone of land or anything as he has the ability to buy land and the plaintiff's own family members can bear witness that he bought the land in question.
 22. The allegation that he had leased is false and the late Anyimu Kwena had no problem with him. He told the court that he did not have sale agreements as there was a mix up in his office and he unsuccessfully tried to trace the file he put the agreements in. He asserts to making the agreements and during that



- time, it was the Land Registrars who would prepare the transfer documents and parties were only asked to sign. That they appeared before the Nambale Land Control Board and handed the letter of consent to the Registrar who was the one receiving the information and feeding in the transfer. He stated that if someone quoted a wrong ID Number then he was not aware as the transfer was prepared in his presence and that of the seller. He produced the documents in his list dated 10/3/2017 as DEX1-8. He stated that he never attended any meeting at Kwena's home where he agreed to return the land.
23. When put to cross examination, the 1st defendant said he learnt of the loss of the agreement when he was sued and that he had not searched for sale agreements to his other parcels of land. He could not remember the exact purchase price for L.R. No. 11xx but it was approximately Kshs.50,000/= per acre. He stated that the 2nd defendant was registered as owner of L.R. No. 12xx on 24/10/1981 and DW1 signed the documents on his behalf. He could not remember the dates he attended the Land Control Board and he did not produce evidence of attending the Land Control Board meeting. He said that he did not endeavour to procure the documents from Land Control Board because the title is in his name.
24. Jonai Okiya Anyimugave his testimony as DW2. He adopted his witness statement dated 10/3/2017 and said that the plaintiff is his step-brother and the 1st defendant is one of the persons whom his late father sold land among other buyers. DW2 stated that his father had two pieces of land namely L.R. No. Marachi/Esikoma/3xx and 4xx and their main family lived on L.R. No. Marachi/Esikoma/3xx which was bigger than L.R. No. 4xx. His father decided to sell parts of Marachi/Esikoma/4xx to help his large family and pay fees for some of his children and grandchildren. He knew that the 1st defendant bought for and registered one of the parcels in the name of his son, the 2nd defendant who was then, a minor. DW2 stated knowing that the 1st defendant bought more land from their neighbouring relatives and has since been using the land as one big single unit.
25. He maintained that the defendants bought the land and it was not leased to them as claimed by the plaintiff. He stated his father lived long after the sale and transfer of the land in question and had no issue at all with the defendants or even the other buyers. He said that his father left L.R. No. Marachi/Esikoma/13xx for the plaintiff and succession of his father's property was done in Busia Magistrate's Court Succession Cause No. 153 of 1991. The said land left for the plaintiff was not included as he was away hence the reason the plaintiff later filed Busia Magistrate's Succession Cause No. 231 of 2016 to administer the same.
26. During cross-examination by Mr Nyegenye, counsel for the plaintiff, the witness said he knew L.R. No. 4xx which portion was sold to the 1st defendant and the first purchase was in 1975 when he bought portion L.R. No. 4xx. The second and third time he bought in 1976 and all portions sold were comprised in L.R. No. 4xx. He told the court that there was a sale agreement drawn in their home but he did not know how much the purchase price was. He knew that his father attended the Land Control Board but he did not know the year because he was not present and he did not know who else accompanied them to the Land Control Board. He said that it was true the plaintiff was not included in L.R. No. 3xx because he was given a share in L.R. No. 4xx. In re-examination, DW2 stated that L.R. Nos. 4xx and 3xx were owned by his father and the 1st defendant only bought a portion in L.R. No. 4xx. He denied that the 1st defendant's land forms part of the share given to the plaintiff.
27. The last defence witness, Paskalia Kwena Ochieng testified as DW3 and adopted her witness statement dated 10/3/2017 as her evidence. Her evidence was similar to that of DW2.
28. When put to cross-examination by counsel for the plaintiff, she answered that the 1st defendant bought land from her father and she was present and saw the agreement drawn at their home in the presence of the Liguru. She could not remember the purchase price but was aware her father attended the board accompanied by Gabriel. She added that the agreement was prepared by her brother called Anganya



but does not remember how many copies of the agreements were drawn or if her father kept a copy of the same.

29. The parties agreed to exchange written submissions which the plaintiff filed on 23rd March 2022. On the issue of the suit being time barred, he submitted that he discovered the fraud in 2017, the same year he filed the suit. On the issue of fraud, he submitted that the defendants did not produce any sale agreement to confirm that they bought the parcels of land from his father. He stated that all defendants' witnesses including the 1st defendant could not tell the court the purchase price of any parcel of land that he purports to have bought. Further, the 1st defendant did not bother to get the purported minutes of the Land Control Board. He submitted that he had proved his case on a balance of probabilities for this Court to grant the reliefs sought in the plaint. He relied on the case of *Kibiro Wagoro Mukumi v Francis Nduati Macharia & Another* (2018) EKLR. The court held as follows;

“As stated the fact that the 1st Defendant was duly served but did not appear in Court to defend the title to land, the Court is satisfied that unless evidence is given to the contrary the 1st Defendant's actions were fraudulent and therefore he did not obtain a good title. The Plaintiff has stated that he did not transfer his land to the 1st Defendant or anyone and he cannot be guilty of failure to produce any documents relating to the transfer or charge of the 1st Defendant and the 2nd Defendant respectively. He is the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. Section 26 of the Registration of *Land Act* No 6 of 2012 protects Title issued to a purchaser upon the transfer or transmission by the proprietor thereof and not one tainted by fraud and /or illegality. The Plaintiff has proved fraud to the standard required.”

30. The defendants put in their submissions on 23rd March 2022 and submitted that the burden was upon the plaintiff to prove fraud and by the time he had closed his case, the plaintiff had not adduced any serious evidence to support his case. He further submitted that the plaintiff waited 28 years since gaining the age of majority to bring this suit and by dint of the law, he was barred from bringing this suit. He relied on the decision in *Jonah Omoyoma v Bonface Oure & 2 Others* (2021) eKLR, where Matheka J, held as follows;

“The law is clear that, 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

31. From the pleadings, the evidence they adduced and submissions, the issues framed for determination are;
- a. Whether the plaintiff's suit is time barred;
 - b. Whether the plaintiff has proved the particulars of fraud;
 - c. Who should pay the costs of this suit?
32. On the first issue, the defendants have submitted that the plaintiff failed to state when the cause of action arose in both the plaint and his statement and left the same to conjecture. That the suit is time barred for being brought 28 years after the plaintiff gained the age of majority. The plaintiff on his part, argued that he noticed the fraud on the part of the defendants in 2017 when he wanted to



- take out letters of administration in regard to the parcels in question before their subdivisions and therefore the period of limitation started running in the year 2017. When the plaintiff was subjected to re-examination by his counsel, he told the court that he discovered the defendants were registered as owners of the suit land in 2014 when he visited the lands office to do a search.
33. The right to sue the defendants accrued to the plaintiff's father-deceased as the alleged owner of the suit titles and subsequently to the beneficiaries of his estate. The defendants acquired their titles in 1975, 1978, and 1981. The Plaintiff stated that his father died in 1991 so that time difference from 1975, is 16 years, 13 years and 10 years respectively. Pw2 stated that their father called them in the 1990 and told them that he had leased the land to the 1st defendant. Pw2 does not give details the lease but said it was to end in 1984 thus they were made aware of the Defendants' interests/presence on the land. The inference drawn then that time to recover the land started running either from the date of registration of the defendants and or the date they were informed about the lease. So as beneficiaries of the deceased estate, counting time to run from 1990 to the time this suit was filed is a period of 27 years.
 34. Section 7 of the *Limitation of Actions Act* provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. In this instance, the time bar first accrued against the plaintiff's father in respect of L.R.Nos 11xx and 11xx, as well as against the beneficiaries of his estate. Although, the plaintiff stated that he learnt of the fraud in the year 2017 when he wanted to do succession over the properties.
 35. From the documents produced is a certificate of grant of the estate of Anyimu Kwena-deceased issued to Gabriel Anyimu on 30th June 1993. The plaintiff did not elaborate why the administrator so appointed did not bring the suit on behalf of the estate. The statute provides for administration of a deceased person in one file so there was need for the plaintiff to demonstrate that the administrator of the estate in cause number 153 of 1993 was also not aware of the registration of the defendants as the owner of the suit parcels. In countering this, the defence called the evidence of Dw3 –Paskalia Ochieng who confirmed that he was aware the land was sold to the Defendants. Dw3 is one of such beneficiary against whom time would run. The court is saying the suit is time barred because whether or not the plaintiff learnt of the fraud in 2017, his right to sue through the appointed administrators impacted on him just as the knowledge expressed by his witness (PW2). On this limb, the suit ought to be struck out.
 36. The court took note of the evidence of PW1 during cross-exam that it is the defendants who have been using the land and he could not tell from when they started using them. If we pick the date of 1975-1984 as dates when the lease lasted (according to evidence of PW2), it means the defendants continued use of the suit parcels post 1984 was without the consent of the registered owner. The said occupation having been peaceful for a period in excess of 12 years extinguished the rights of the plaintiff
 37. However, proceeding on the premise that the suit is not time barred, has the plaintiff proved the fraud levelled against the defendants and outlined the particulars in paragraph 6 of his plaint. Fraud is a serious allegation that has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The plaintiff contended that the defendants had leased L.R. No. Marachi/Esikoma/11xx, 4xx and 11xx from his father, the late Anyimu Kwena, before they then fraudulently transferred the said land to themselves.
 38. At the time the defendants and his father is alleged to have entered into the lease agreement he was a minor. The plaintiff did not produce any copy lease agreement. PW2 and PW3 corroborated his evidence. PW2 said that the 1st defendant started farming the land in 1978 and the lease was to end in 1984. He denied that L.R. No. 4xx was ever sold explaining that they did not include it in their succession cause because it was far and had its independent number. PW3 stated that he was called to



a meeting in 1991 at the home of the late Anyimu Kwena where he discussed the land leased to the 1st defendant (L.R. No. 4xx). The evidence of lease would hold if there was a document produced to support the claim taking into consideration that the 1st stated that he continued to use the land post 1984. The burden was on the plaintiff to discharge.

39. In attempting to discharge this burden, the Plaintiff called PW4, the Registrar Assistant 1 at Registration of Persons who produced a report dated 22/12/2020 (Pex10) which is a verification of fingerprint impressions following a request from the Director of National Registration Butula. The report stated in part that the ID Number used in the transfer of land forms L.R. Nos. 12xx and 11xx belonged to one Roge Bonaya Dima but the finger print impressions on the said forms were identical to those of the late Anyimu Kwena. The witness said that the thumbprint on the contested document for subdivision were blurred therefore unsuitable for comparison and subsequent identification.
40. The question is whether or not the report proves fraud against the defendant. The plaintiff relies on the difference in the ID numbers entered in the transfer form. No evidence was led to establish who typed the impugned ID number on the transfer form. What was being forged? Forgery is defined as the action of forging a copy or imitation of a document, signature, banknote, work of art. From my interpretation of the meaning of forgery, typing a different number of an ID does not constitute forgery. What is the impression imitated? The thumbprint impression which was alleged to have been forged is confirmed after expert examination that they indeed belonged to the deceased.
41. The subdivision document for L.R. No 4xx undertaken between December 1974 and January 1975 is stated in the report to have been signed by Anyimu Kwenu-deceased. The subdivision document for L.R. No 11xx in May 1978 could not be investigated because thumbprint impression was blurred. It is trite law that fraud cannot be inferred but must be established by facts. The examiner's report produced by the plaintiff did not find any forgery committed by defendants.
42. The other issue that the Plaintiff raised to support the fraud against the defendants was the failure by the defendants to produce copies of the sale agreements and letters of consent to subdivide and consent to transfer. Justice is a double edged sword that cuts both sides equally. The plaintiff's claim is that the suit parcels were leased to the 1st defendant but he did not produce a copy of the lease and wanted the court to believe him but disbelieve the defendants for not producing the copies of the sale agreements. Section 26(1) of the *Land Registration Act* provides that certificate of title is prima facie evidence that the person named in the title is the absolute registered until it is proved that it was obtained by fraud.
43. Consequently, it was not the responsibility of the defendants to defend their title as valid but for the plaintiff to demonstrate that the was acquired illegally. The 1st defendant explained why he was unable to produce the sale agreement to wit, his absence from his office for a period of 15 years while he served as the vice chairman of ECK brought up a mix-up so could not trace the file. To corroborate his evidence that there was a sale between him and the Plaintiff's father, DW2 & DW3 was called who stated that the land was sold, agreement drawn by their brother Anganya and in the presence of another brother called Gabriel. I find that the non-production of the agreements has been sufficiently explained by the Defendants.
44. The second part on the lack of land control consent to subdivide. The subdivision of land is usually taken by the owner of the land. The document marked A in Pex10 which was subdivision form for parcel number 4xx was signed by the owner Anyimu-deceased. The subdivision form for the subsequent number 11xx could not be compared but that does not mean it was signed by the 1st defendant. Since the subdivision of L.R. number 4xx was done by the plaintiff's father hence the responsibility of the deceased to obtain the consent to transfer. Similarly, it was the responsibility of the vendor to give the defendants consent to transfer.



45. The plaintiff shifted the burden of proof on the defendants to produce the relevant consents yet he is the one who was alleging no such consent was obtained. He did not demonstrate that no such meetings took place at the Nambale Land control board by calling evidence on that respect. The 1st defendant gave a history that somehow affirms that Anyimu Kwena indeed undertook the subdivision process. The same is narrated in paragraph 20 (no need to repeat here) of this judgement which shows that the Plaintiff's title Marachi/Esikoma/13xx traces its root to the subdivision the Plaintiff is now challenging.
46. The *Land Registration Act* provides a guideline on how transfer of registered land should be done. Section 37 (2) of the *Land Registration Act* provides that a transfer shall be completed by filing the instrument of transfer followed by registration of the transferee as proprietor of the land. Section 44 of the *Land Registration Act* provides that every instrument shall be executed by each of the parties consenting to it and that the transferee shall in addition to executing the instrument attach copies his identity card or passport, Personal Identification Number certificate, passport size photographs, among other documents. Section 85 (2) of the repealed *Registered Land Act* which was the applicable law in 1975 provided as follows: -
- “The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument”.
47. In the case before court, the transfer was completed going by the transfer document produced and titles issued in the name of the defendants. This court has not been satisfied that the plaintiff has shown that there was fraud in the manner the titles were acquired or that the either of the Defendants was party to the fraud. I find all the particulars of fraud levelled against the defendant as not proved.
48. In conclusion, I hold that the suit is not merited, first for being filed out of time without leave of the court and secondly, for want of proof that the defendants' titles were fraudulently acquired.
49. On the issue of costs, which follow the events, I find no reason to hold otherwise. The plaintiff who is unsuccessful, shall pay the costs of this suit to the defendants.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 4TH DAY OF AUGUST 2022.

A. OMOLLO

JUDGE

