



REPUBLIC OF KENYA



**Kamau & another v Gathecha & another (Environment & Land Case
136 of 2020) [2022] KEELC 15384 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 136 OF 2020**

**MD MWANGI, J
NOVEMBER 28, 2022**

BETWEEN

JUSTUS NDUNGU KAMAU 1ST PLAINTIFF

**JUDY WANJIKU KAMAU KIRURI (ADMINISTRATORS OF THE ESTATE
OF THE LATE LUCY NYAMBURA ALIAS RACHEL NYAMBURA
KAMAU) 2ND PLAINTIFF**

AND

JOSEPH KIMANI GATHECHA 1ST DEFENDANT

GITHUNGURI RANCHING CO LTD 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs are the legal representatives of the estate of the late Lucy Nyambura Kamau alias Rachel Nyambura Kamau (hereinafter referred to as ‘the deceased’. They aver that the deceased bought 20 shares from the 2nd Defendant company on June 4, 1968 thereby becoming a fully paid up member of Githunguri Ranching Company Limited. The deceased was later issued with a share certificate No 2802 by the 2nd Defendant and thereby became entitled to one and quarter (1 ¼) acre of land out of the block known as Ruiru/Kiu Block 2/Githunguri.
2. The Plaintiffs further aver that the deceased Lucy Nyambura Kamau alias Rachel Nyambura Kamau was at first allocated plot No 3401 which plot did not please her. She therefore lodged a complaint and sought an alternative plot from the 2nd Defendant company. It is their case that she was then allocated an alternative plot No 494 which upon survey became Ruiru Kiu Block 2/Githunguri/4268 measuring 0.4944 Ha or thereabouts (hereinafter referred to as ‘the suit property’) which she took immediate and vacant possession of upon issue.
3. The Plaintiffs allege that on or about July 2004, the deceased discovered that the 1st and 2nd Defendants had fraudulently conspired to have the said parcel of land registered in the name of the 1st



- Defendant and the 1st Defendant has since caused himself to be registered as the proprietor to the suit property to the detriment of the Plaintiffs.
4. The Plaintiffs allege that the 1st Defendant thereafter illegally entered upon the suit property and cut down all the trees that were on the land and ferried them to an unknown destination. He further ordered the Plaintiffs' authorized licensee, who was then tilling the land, to vacate the suit property which had hitherto been in their uninterrupted possession since 1986.
 5. In their Amended Complaint, amended on September 3, 2019 and filed on the September 10, 2019, pursuant to leave of the court granted on January 28, 2019, the Plaintiffs prays for;
 - a. An order for permanent injunction restraining the 1st Defendant whether by himself his servants, agent and/or employees from trespassing, dealing, alienating and/or in any other manner committing further acts of waste in Ruiru/Kiu Block 2/4268.
 - b. A declaration that Ruiru/Kiu block 2/4268 belongs to Lucy Nyambura Kamau alias Rachel Nyambura Kamau.
 - c. An order for specific performance compelling the land registrar Thika to cancel the title deed in respect of Ruiru/Kiu Block 2/4268 and issue a new title in the name of Lucy Racheal Nyambura Kamau the Plaintiff.
 - d. Costs of the suit.
 - e. Any other relief deemed fit by this court.

Response by the 1st Defendant

6. The 1st Defendant filed a Statement of Defence dated April 20, 2011 which was subsequently amended on the September 24, 2019.
7. The 1st Defendant averred that the deceased was allocated and actually owned plot number 3401 balloted on 4/6/1985 and whose subsequent land reference number was Ruiru Kiu Block 2/1212. The 1st Defendant alleged that both the deceased Lucy Nyambura and her husband were indeed buried on the said property land reference number was Ruiru Kiu Block 2/1212 upon their demise.
8. The 1st Defendant denied the Plaintiffs' claim against him and the allegations of fraud and argued that the suit property was balloted by one Francis Njenga Gitau on September 28, 1984 and after clearance by the 2nd Defendant he was issued with a title deed on August 5, 1999. The said Francis Njenga Gitau then sold the subject parcel of land to one Kinyanjui Njuguna Ndungu who subsequently sold the same to the 1st Defendant.
9. The 1st Defendant further averred that as per the 2nd Defendant's records, plot number 494 was balloted for in 1984 whereas plot number 3401, owned by the deceased was balloted for in 1985.
10. The 1st Defendant asserts that he is the rightful lawful owner of the suit property LR No Ruiru Kiu Block 2/Githunguri 14268 measuring 0.4944 ha. Further he has had possession of it and is entitled to enjoy and utilize the same. He therefore prays that the Plaintiffs' suit be dismissed with costs.
11. The 2nd Defendant company did not enter appearance nor file any statement of defence despite service.
12. The matter proceeded to hearing on the February 28, 2022.



Evidence Adduced on Behalf of the Plaintiffs.

13. Judy Wanjiku Kamau testified as PW1. She stated that she was a daughter of the deceased. She adopted her witness statement filed on September 10, 2019 as her evidence in chief. She also produced as exhibits, the documents on the Plaintiffs' list and bundle of documents dated November 5, 2012 and the Supplementary List dated May 13, 2013.
14. PW1 testified that she together with her two brothers were issued with a grant of letter of administration on January 30, 2012 which grant was marked as PE 23.
15. It was her testimony that her late brother and her late mother excavated building stones and planted a 'karia-ria' fence and some trees on the suit property without any interference from any person. Further, that her late brother even used to go to the suit property to help her Aunt, Hannah Wanjiru to plant and till the land for a long time and no one ever questioned their ownership of the said piece of land, including the purported seller, one Kinyanjui Njuguna Ndungu.
16. PW1 further stated that the deceased had followed up on the issuance of the title deed of the suit property in the year 2005 after the 2nd Defendant company issued her with a clearance certificate no C45/69/CC/TD/06. However, when she went to collect her title deed, it could not be traced. She thus conducted a search at the lands' registry and found out that the title to the suit property bore the name of the 1st Defendant. She filed a case in Gatundu Law Courts but it never proceeded to hearing. The late Lucy Nyambura withdrew the said case and filed one at the Lands Disputes Tribunal before filing the same again at Thika Law Courts in December 2010. She passed away on April 9, 2011.
17. The Plaintiffs thus took over the matter as Administrators of the Estate of their late mother. PW1 averred that when they conducted a search at Thika Lands Registry they were told that the suit property had been subdivided into ten (10) commercial plots but the Land Registrar refused to give them the Certificate of Official Search.
18. It was also PW1's testimony that the 1st Defendant has since been trying to sell the ten (10) plots to innocent members of the public despite the existence of a court injunction ordering that there be no further transactions and/or activities carried on the suit property pending the determination of the present case.
19. In cross-examination, PW1 stated that she could not tell the exact date when her deceased mother balloted for the land. She further could not explain the meaning of the endorsement stamp on the original share certificate that was produced as PE1, that reads, "Endorsement Withdrawn, Chairman."
20. PW1 agreed with the Advocate for the 1st Defendant that the clearance certificate produced as 'PE 8' was in regard to a ¼ acre plot whereas the suit property measures 1¼ acres. The Plaintiffs confirmed that they had a title to the ¼ acre plot.
21. PW1 further testified that the deceased had filed the Gatundu Magistrate's Court Civil Case 315/2006 which case was withdrawn to give way to the determination of the dispute by the Land Disputes Tribunal. She however did not have any documents from the Land Disputes Tribunal neither was she aware of the outcome of the case before the tribunal.
22. PW1 stated that the fraud that the 1st Defendant committed was purchasing land that was fraudulently acquired from her mother. She could not tell how the 1st Defendant acquired his title to the suit property.
23. PW2, one Hannah Wanjiru Kagichu stated that she was a cousin to the deceased. She adopted her witness statement at page 16 of the Plaintiff's trial bundle. She testified that she too had been a member



- of Githunguri Ranching Company Ltd. She had allegedly accompanied the deceased when she was being shown the suit property in the presence of a Surveyor. The deceased then allowed her for cultivate on it.
24. PW1 alleged that she had been cultivating on the suit property for about 5 years when she was issued with a notice by a person who told her that he was the owner of the land. She informed the deceased once she was served with the notice and that was the reason why they went to the Gatundu court to file a case. As far as PW2 knew, the matter before the Gatundu Court was still pending though the court was burnt down.
 25. PW2 testified that she was not there when the deceased was issued with her documents. She only accompanied the deceased to the suit property when she was being shown the land by the Surveyor.
 26. In cross-examination, PW2 stated that though she was also a member of Githunguri Constituency Company Ltd, she could not remember the ballot number of her land nor that of the deceased. She could however remember the deceased saying that she would return and exchange her initial allotment since the land she was shown was far from where she lived and it had overgrown sisal plants.
 27. PW3 was one Joseph Kimenju whose testimony was to the effect that the suit property neighbours his land. He had seen the deceased come to the suit property and leave behind PW2 to cultivate on the land. He however, could not tell how the deceased had gotten the land; either as a first ballot or an exchange.
 28. In cross-examination, DW3 stated that his land was ballot 503 and LR No 4267. He had been on his land for about 4 months before the deceased came visiting the neighbouring land. The 1st Defendant, according to PW3 came to the suit property one year after allocations had been done claiming ownership.
 29. It was the evidence of PW3 that he does not have a clearance certificate for his land, although it could be issued at any time by the 2nd Defendant company. He knew the chairman of the company as one James Kamau and the Secretary was Francis Karanja. They were the ones who used to sign the clearance certificates.
 30. PW3 acknowledged that there were incidences of double allocation of the Company's land due to corruption particularly in Block 2, where his land was situated. The Company register was the only document that could show who balloted in the first place. After picking a ballot, one was required to sign on the register.
 31. In re-examination, it was PW3's evidence that he did not know how title numbers were being issued. He confirmed that some people exchanged ballots but he did not know where the exchanged ballots were taken. He got his own title after 2 years of getting his ballot.

1st Defendant's Evidence.

32. The 1st Defendant's case was heard on the July 12, 2022. Joseph Kimani Gatheca, the 1st Defendant testified as DW1. He adopted his witness statement dated September 24, 2019 as his evidence in chief. He also produced the documents on the Defendant's list of documents (save for document No 8 – a copy of the register of members of the 2nd Defendant) as Defendant's exhibits in the order in which they are listed.
33. DW1 testified that he bought the suit property from one Kinyanjui Njuguna Ndungu.
34. The suit property was first registered on August 5, 1999 in favour of the Government of Kenya. A transfer to Francis Njenga Gitau was registered on the same date. Title was issued to him accordingly.



35. On March 10, 2003, the title to the suit property was transferred to Kinyanjui Njuguna Ndungu who later sold it to the 1st Defendant. The 1st Defendant acquired the title on November 3, 2005.
36. It was the 1st Defendant's testimony that he had sub-divided the suit property into plots. He produced mutation forms to that effect. Each of the plots had a unique title number. He exhibited the titles to the 10 plots that he still held having sold all the rest to third parties.
37. The 1st Defendant testified that the deceased had sued him earlier on but she withdrew the case at the Gatundu Magistrates' Court. He asserted that he bought the suit property when it already had a title. He did not ballot for it at Githunguri Constituency Ranching Company Ltd. He conducted due diligence before purchasing the suit property.
38. During cross-examination, the 1st Defendant stated that he confirmed that Francis Njenga Gitau had been issued with a certificate by the 2nd Defendant Company.
39. DW2- John Rimui Waweru, was a former director of the 2nd Defendant Company between the year 2003 and 2009. He adopted his witness statement dated March 11, 2022 as his Evidence in – chief. He stated that the ballot number of the suit property was 494. Though he was not present when balloting was conducted, there was however a register in the office.
40. DW2 confirmed that the copy of the register produced in court was certified by the Board Secretary, as a true extract of the original register. He averred that he did not know Lucy Nyambura (the deceased). According to the register, the first person who balloted for the suit property was Francis Njenga Gitau. There had been no complaint in respect of the suit property during his term in office.
41. In cross-examination, DW2 affirmed that certificates were issued by the Secretary of the Board in accordance with the register. DW2 was a vice chairman of the 2nd Defendant Company. The ballot number 494 represented LR Ruiru Kiu Block 2/4268. The company only issued clearance certificates for one to be issued with a title by the Government of Kenya. That the main register was with the then office holders of the 2nd Defendant company. The ballot register does not however, show the Land Reference Numbers issued against the plot numbers given by the company.
42. DW3 was one Francis Kairianja Njoroge who testified that he was a director cum Secretary of the 2nd Defendant between the year 2003 and 2009. He adopted his witness statement dated March 11, 2022 as his evidence in chief with an amendment indicating the ballot number as 494 instead of 492.
43. He further stated that as the Secretary to the Board, he was the custodian of the company's documents including the register of members, share certificates for the members and generally all the documents of the company. The original of the register was currently at the Company's offices. He was the one who had certified the copies of the register as true copies of the original, on the 16/2/2008.
44. The court upheld the objection by the Plaintiff's Counsel to the production of 'copies of the certified copies'.
45. DW3 stated that he was not the one who had issued the clearance certificate dated July 22, 2005 for Ruiru Kiu Block 2/Githunguri 4268 despite being the secretary. Clearance certificates were only issued by the Secretary for the parcels of land that did not have titles. The suit property already had a title. He did not know the deceased, Lucy Nyambura at any given time.
46. During cross-examination, the witness stated that he did not sign the clearance certificate produced by the Plaintiffs dated July 22, 2005. DW3 further stated that it was not possible to exchange ballots as alleged by the Plaintiffs.



Court's Directions

47. Upon the close of the hearing, the court directed parties to file written submissions. Both parties complied and the court has had the opportunity to read the submissions filed.

Plaintiffs' submissions.

48. The Plaintiffs identified three issues for determination:
- i. Whether Lucy Nyambura Kamau alias Rachel Nyambura Kamau is the legitimate owner of the land known as Ruiru/Kiu Block 2/4268.
 - ii. Whether the 1st Defendant acquired a legal title from the transfer of Ruiru/Kiu Block 2/4268 by Kinyanjui Njuguna Ndungu.
 - iii. Who should bear the costs of the suit.
49. On the first issue, the Plaintiffs submit that Lucy Nyambura Kamau bought 20 shares from the 2nd Defendant in 1968 and became a member of the 2nd Defendant Company as evidenced by the receipts dated August 11, 1968 produced as PE 3. She later was issued with a share certificate No 2802 for shares referred as 86839 to 86558 by the 2nd Defendant and therefore became entitled to 1¼ acre of land and another bonus, ¼ acre piece of land. That the deceased balloted for a plot as a member of the 2nd Defendant as shown in exhibit 7.
50. The deceased was subsequently allocated plot number 3401 pursuant to her certificate number 2802. She however, was unhappy with the plot she was shown and sought to be allocated an alternative plot.
51. The Plaintiffs submitted that the 2nd Defendant company agreed to the request by Lucy Nyambura Kamau and issued the deceased plot No 494 as the alternative. They produced a copy of the 'agreement' between the 2nd Defendant company and the deceased Plaintiff dated July 25, 1985. The agreement as the Plaintiffs submit, confirms that the land she had initially been issued reverted back to the 2nd Defendant who issued her with another plot being plot 494 which after survey was renamed LR No Ruiru Kiu Block 2/4268.
52. The Plaintiffs therefore submitted that the suit property belonged to Lucy Nyambura Kamau (the deceased) pursuant to an allocation by the 2nd Defendant company subject to her shares.
53. The Plaintiffs submitted that they had therefore proved the root of their title. The Plaintiffs averred that the 1st Defendant on the other hand did not prove the root of his title as he did not call Kinyanjui Njuguna Ndungu to produce the ballot issued to Francis Njenga or the share certificate issued to him. Therefore, they submitted that, the plot having been allocated to the Plaintiff, it could not be allocated to any other person.
54. The Plaintiffs cited the case of *Republic - Vs- City Council of Nairobi & 3 others* (2014) eKLR where the court held that;
- “once an allottee meets the conditions of the allotment, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is validly and lawfully cancelled by the allotting authority.”
55. On the second issue, the Plaintiffs submitted that the Title Deed issued to Francis Njenga Gitau later to Kinyanjui Njuguna Ndungu and finally to the 1st Defendant in respect to the suit land was



impeachable. They cited the Court of Appeal case of *Munyu Maina Vs Hiram Gathiba Maina*, Civil Appeal No 239 of 2009, where the Court of Appeal stated that: -

“We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”

56. The Plaintiff submitted that no evidence had been tendered by the 1st Defendant to demonstrate that Francis Njenga Gitau was a member of the 2nd Defendant company and that he indeed balloted as a member of the 2nd Defendant company. They averred that Kinyanjui Njuguna did not testify that he indeed bought the land from the Francis Njenga Gitau and sold it to the 1st Defendant. He further never called Gitau’s wife whom he claims to have met and shown him the share certificate. No death certificate for Francis Gitau was adduced. The 1st Defendant therefore did not establish the root of his title.
57. It was the Plaintiffs submissions that it was impossible for Francis Njenga Gitau to obtain a title deed before obtaining a clearance certificate from the 2nd Defendant company and therefore the title obtained by Francis Gitau was obtained illegally. Francis Gitau did not follow the procedure of having a ballot card, a share certificate and a clearance certificate before processing a title.
58. They further submitted that before a Title Deed was processed, a transfer form duly executed by the company, the commissioner of land and a Director of the Company was required. None was adduced by the 1st Defendant. Therefore, the sub-divisions were illegal since they were done while the caution was subsisting.
59. The Plaintiffs submitted that the registration of a person and certificate of title by a person as proprietor of a property is conclusive proof that such person is the owner of the property. The title can however, be impeached under certain conditions subject to section 26(i) of the *Land Registration Act*.
60. Francis Njenga Gitau having acquired the land unprocedurally, could not have passed a good title than he had to any subsequent purchasers. Francis Njenga Gitau obtained his title deed fraudulently hence the title he passed subsequently was equally fraudulent.
61. They therefore urged the court to cancel the 1st Defendant’s title and declare Lucy Nyambura kamau the lawful proprietor of the suit land.
62. On costs, the Plaintiffs submitted that costs follow the event and that the successful party is entitled to costs. The Plaintiffs should therefore be granted costs.

1st Defendants Submissions.

63. The 1st Defendant submitted that the suit property number Ruiru Kiu Block 2/Githunguri/4268 measuring 0.494 Ha was initially registered on the August 5, 1999 in the name of Francis Njenga Gitau. He subsequently sold it to one Kinyanjui Njuguna Ndungu and title issued to him on March 10, 2003. It was Kinyanjui Ndungu who, vide a sale agreement dated June 6, 2015 sold the suit property to the 1st Defendant.
64. The 1st Defendant submitted that there was no connection at all between the 1st Defendant and the 2nd Defendant as at the date of purchase of the suit land by the 1st Defendant, the suit property already



had a title. Further, the initial owners Francis Gitau and Kinyanjui Ndungu were never joined into the proceedings. He submitted that it was upon the Plaintiff to establish that Francis Gitau and Kinyanjui Ndungu did not hold good title to the suit property and that the acquisition of the land was fraudulent to justify the grant of the orders sought.

65. He submitted further that the Plaintiff did not prove any fraud or misrepresentation as against the 1st Defendant. It was not contested that the Plaintiff balloted for Plot No 3401 which she did not like. She did not ballot for the suit property. By the time she was seeking exchange of the plots, the suit property had already been allocated to Francis Gitau.
66. The 1st Defendant submitted that the Plaintiff had not discharged the burden of proof under section 107 of the *Evidence Act*. He cited the case of *Koinange & 13 others -vs- Charles Karuga Koinange* (1986) KLR to support the Submission.
67. On the application of section 26 of the *Land Registration Act* the 1st Defendant submitted that a title can only be impeached once it is proved that the title was procured illegally, unprocedurally or through a corrupt scheme. It must however be proved that the title holder was party to the fraud or misrepresentation. In the instant case, the 1st Defendant submitted that no fraud was proved against him by the Plaintiffs. His title therefore is sacrosanct and must not be interfered with. He therefore prayed that the Plaintiff's case against him be dismissed with cost.

Issues for Determination

68. Having considered the pleadings filed in this case, the evidence adduced and the submissions filed by the parties, the court is of the view that the issues for determination in this matter are: -
 - a. Whether the Plaintiffs have proved fraudulent conspiracy between the 1st Defendant and the 2nd Defendant company to justify cancellation of the 1st Defendant's title to the suit property.
 - b. Whether the Plaintiffs have established a legal claim of right over the suit property LR No Ruiru/Kiu Block 2/4268.
 - c. Who should bear the costs of the suit?

Analysis and Determination.

A. Whether the plaintiffs have proved fraudulent conspiracy between the 1st defendant and the 2nd defendant company to justify cancellation of the 1st defendant's title to the suit property.

69. The Plaintiff's case against the Defendants is based on allegations of fraud. At paragraph 7 of their amended pleadings, the Plaintiffs allege that on or about July 2004, the late Lucy Nyambura Kamau alias Rachel Nyambura Kamau discovered that the 1st and 2nd Defendants had fraudulently conspired to have the suit property registered in the names of the 1st Defendant through fraud and misrepresentation and the 1st Defendant has since caused himself to be registered proprietor of the suit land to the detriment of the Plaintiffs' rights therein and has trespassed, alienated and committed acts of waste.
70. As against the 1st Defendant, the Plaintiffs alleged that: -
 - i. He acquired legal title to the property when he was not an allocate of Ruiru/Kiu Block 2/4268
 - ii. He obtained title to the suit property with the full knowledge that the same belonged to the rightful allottee, the late Lucy Nyambura Kamau alias Rachel Nyambura Kamau.
71. The Plaintiffs therefore sought for Judgment against the Defendants:



- i. For a declaration that the suit property belongs to Lucy Nyambura Kamau.
 - ii. A permanent injunction.
 - iii. An order of specific performance compelling the Land Registrar Thika to cancel the title deed in respect of the suit property.
 - iv. Costs.
72. It is a well settled principle of law as buttressed in the case of *Vijay Morjaria –Vrs- Nansingh madbusingh Darbar & Another* (2001) eKLR where Tunoi J.A stated that: -
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must off course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
73. Regarding the standard of proof of Court of Appeal in the case of *Kinyanjui Kamau –Vrs- George Kamau* (2015) eKLR stated that: -
- “It is trite law that any allegation of fraud must be pleaded and strictly proved. The court made reference to an earlier case in *Ndolo –Vrs- Ndolo* (2008) IKLR (G & F)742- wherein it was stated that.....since the Respondent was making a serious charge of fraud, the standard of proof is required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
74. The Plaintiffs in this matter did not meet the threshold of the burden of proof. Their evidence was more of conjecture and they left it upon the court to infer fraud from the facts.
75. The suit property was first registered in 1999 in the name of Francis Njenga Gitau, who subsequently sold it to Kinyanjui Njuguna Ndung’u. The 1st Defendant bought the suit property from Kinyanjui Njuguna in 2015. The Plaintiffs purport to challenge the title of the 1st Defendant knowing very well that he bought it from Kinyanjui Njau. They did not join to previous owners as parties to this suit.
76. If the title to the suit property was fraudulently acquired, then the fraud if at all would have been committed by the 1st owner not the subsequent owners. The Plaintiffs should have joined the previous owners as parties to the suit which they did not.
77. It is not upon the 1st Defendant as the Plaintiffs insinuate in their submissions to demonstrate that the initial registered owner lawfully obtained the title to the suit property.
78. The 1st Defendant explained how he acquired the title after conducting due diligence on the title to the Land.
79. The court’s finding is that the Plaintiffs have not proved fraud as against the 1st Defendant neither against the 2nd Defendant nor conspiracy between the Defendants which would have been the basis upon which the 1st Defendant’s title to the suit property would be canceled and or nullified.
80. The court further takes note from the evidence adduced by the Plaintiffs and the 1st Defendant that the suit property has already been subdivided into 10 plots. Some of the plots have even been sold and transferred to third parties. Rules of natural justice dictate that such third parties who would be directly



affected by any orders the court would issue be joined into the suit and be afforded an opportunity to present their positions. The Plaintiffs despite being aware of that state of affairs did not join the third parties to these proceedings. The court would not issue any such orders in the absence of such third parties. That however, is an issue overtaken by events in view of the court's above finding.

B. Whether the Plaintiffs have established a legal claim of right over the suit property LR No Ruiru/Kiu Block 2/4268.

81. Notwithstanding the finding on the above issue, the court will proceed to determine the second identified issue.
82. The Plaintiffs' case was that the deceased balloted and was allocated plot number 3401 pursuant to her certificate number 2802. She however, allegedly unhappy with the plot number 3401 and therefore sought an alternative plot.
83. The Plaintiffs submitted that the 2nd Defendant company considered the request by the deceased Lucy Nyambura Kamau and in place of plot number 3401 issued her plot No. 494 as the alternative. They produced a copy of what they termed as an 'agreement' between the 2nd Defendant company and the deceased Plaintiff dated July 25, 1985 as their evidence.
84. The so called 'agreement' does not state that the deceased was allocated plot number 494.
85. Again, this allegation by the Plaintiffs had been countered by the 1st Defendant in his statement of Defence to the effect that the suit property was balloted for by one Francis Njenga Gitau on September 28, 1984 and after clearance by the 2nd Defendant, he was issued with a title deed on August 5, 1999. On the other hand, the deceased was allocated and actually owned plot number 3401 which was balloted for on 4th of June 1985 and whose subsequent land reference number was Ruiru Kiu Block 2/1212. The Plaintiffs' did not in their evidence contradict the 1st Defendant's averment.
86. If I may borrow a leaf from the Plaintiffs' own submissions, a plot once allocated is not available for re-allocation. Plot number 494 having already been balloted for and allocated to Francis Njenga on September 28, 1984 could not have been available for re-allocation to the deceased thereafter unless the earlier allocation was revoked by the allocating authority. The Plaintiffs' did not provide any such evidence of revocation.
87. Another glaring gap in the Plaintiffs' evidence was that could not explain the meaning of the endorsement on the original share certificate which they had produced as 'PE1'. The certificate on its face bears a stamp that reads, "Endorsement Withdrawn, Chairman." In cross-examination, PW1 stated that she could not explain the meaning of that endorsement stamp on the original share certificate. The plain and clear meaning of the words is that whatever endorsement that was on the document had been withdrawn thereby putting into question the validity and legitimacy of the document.
88. The court's finding is that they have not established a valid legal claim of right over the suit property.
89. Before I address the third issue on costs, I must comment on the Plaintiffs' submissions. The Plaintiffs in their submissions went ahead to submit on matters that they had not raised in their pleadings. Case in point is the attempt to challenge the title of the 1st registered owner of the title to the suit property whereas in their plaint their cause of action had merely been stated thus; 'the 1st and 2nd Defendants had fraudulently conspired to have the suit property registered in the names of the 1st Defendant through fraud and misrepresentation.'



90. The Plaintiffs by so doing were attempting to change course and raise a different or fresh case outside their pleadings. That is not allowable. Parties are bound by their pleadings. In an adversarial system like ours, it is the parties themselves who set the agenda for trial by their pleadings and unless an amendment is made, the agenda set in the pleadings must be strictly adhere to. Even the court cannot frame issues outside the pleadings.
91. In the case of the *Independent Electoral and Boundaries Commission –vs- Stephen Mutinda Mule & 3 others* (2014) eKLR, the court cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd –Vs- Nyasulu* (1998) MWSC 3, where the court quoted an article by sir Jacob entitled “*The present importance of pleadings*” published in 1960 where the author had stated that
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any other business” in the sense that points other than those specific may be raised without notice.”
92. The Supreme Court of Nigeria on the other hand in *Adetoun Oladeji (NIG)- Vs- Nigeria Breweries PLC* SC 91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that,
- “In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enable parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”
93. In the case of *Raila Odinga & Another –Vs- IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that
- “It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”
94. The conclusion is that the Plaintiffs have not proved their case on a balance of probabilities. They are not entitled to the orders sought.



C. Who should bear the costs of the suit?

95. The general rule is that costs follow the cause, a rule which should not be departed from without the exercise of good grounds. The Plaintiffs having failed to prove their case against the Defendants shall be condemned to pay the costs of the suit but to the 1st Defendant only.

96. The Plaintiffs' case is hereby dismissed with costs to the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2022

MD. MWANGI

JUDGE

In the virtual presence of:

Mr. Njonjo for the 1st Defendant.

Mr. Lumumba holding brief for Saende for the Plaintiff.

No appearance for the 2nd Defendant.

Court Assistant – Hilda/Yvette.

M.D. MWANGI

JUDGE

