



**Mwai v Kinyua & 3 others; Gatama (Interested Party) (Environment & Land Case 879 of 2012) [2025] KEELC 4304 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4304 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 879 OF 2012**

**OA ANGOTE, J**

**JUNE 9, 2025**

**BETWEEN**

**JOTHAM KANJAH MWAI ..... PLAINTIFF**

**AND**

**MICHAEL NDEGE KINYUA ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND SURVEYOR, THIKA ..... 2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, THIKA ..... 3<sup>RD</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**DANIEL GATAMA ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide a Complaint dated 22<sup>nd</sup> November, 2012, the Plaintiff seeks as against the Defendants, jointly and severally, the following reliefs:
  - a. A declaration by the court that the said alterations to the mutation form by the 1<sup>st</sup> Defendant, the Land Registrar and/or by any other person are unlawful, fraudulent and irregular.
  - b. A declaration by the court that the registration of the said fraudulently altered mutation form by the Land Registrar, 1<sup>st</sup> Defendant and/or any other person was illegal and as such void for all legal purposes.
  - c. A declaration by the court that any survey plans produced by the Director of Surveys subsequent to the said illegal and fraudulent alterations of the mutation form are void and of no legal effect.



- d. A declaration by the court that the purported registration of Michael Ndege Kinyua as the proprietor of the land now comprised in Title Number Ruiru/KIU Block 2(Githunguri) 6996(a portion of number Ruiru/KIU Block 2(Githunguri) 3701 is a nullity ab initio and of no legal effect.
  - e. An order for the annulment of the illegal registration of Michael Ndege Kinyua as a proprietor of Title Number Ruiru/KIU Block 2(Githunguri) 6996 and for cancellation of any title deed issued to him.
  - f. An order of annulment of any and all other unlawful entries in the register of the parcel of land Title Number Ruiru/KIU Block 2(Githunguri)3701 entered by the Land Registrar at Thika.
  - g. Damages for loss suffered due to the Defendant's negligence and/or fraud.
  - h. Costs of this suit.
  - i. Interest on (g) and (h) above at court rates from the date of judgment until payment in full.
2. It is the Plaintiff's case that at all material times, he was the registered proprietor of all that parcel of land known as Title Number Ruiru/Block 2(Githunguri)3701 comprising of 0.5 hectares (hereinafter the suit property) and that he sold 0.5 acres of the parcel aforesaid to his brother Hilton Nguru Kanja, who later sold the same to the 1<sup>st</sup> Defendant.
  3. The Plaintiff averred that on 4<sup>th</sup> December, 2008, he signed the sketch plan appearing on page 2 of the mutation form, serial number 296577 for purposes of the sub-division of the suit property; that the sketch map referenced above showed sub-division A comprising 0.3Ha was to belong to him and sub-division B comprising of 0.2Ha was to belong to the 1<sup>st</sup> Defendant and that this was further reflected in his instructions to the surveyor as evinced by the mutation form, field diagram and observations on site appearing on page 3 of the mutation form.
  4. According to the Plaintiff, in breach of the instructions aforesaid, and without his knowledge and consent, the 1<sup>st</sup> Defendant, with the connivance and co-operation of a private surveyor, one Mr. Mwaura, fraudulently and unlawfully altered the particulars on the 1<sup>st</sup> -3<sup>rd</sup> pages of the mutation form so as to show that portion A was to comprise of 0.2Ha and portion B to comprise of 0.3Ha effectively meaning that he was to own portion B and the 1<sup>st</sup> Defendant portion was A.
  5. He contends that the aforesaid actions constituted fraud by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the particulars of fraud against the 1<sup>st</sup> Defendants being altering the mutation form serial number 296577 showing the parcel sub-divisions of the suit property, unilaterally engaging a surveyor without his knowledge and/or consent, and misrepresenting to the registry officials at Thika District Lands Registry that he had consented to the sub-division as per the altered mutation form.
  6. Other particulars of fraud attributed to the 1<sup>st</sup> Defendant include altering and/or shifting the beacons demarcating the two portions of the suit property, procuring cancellation of the authentic map at the Survey of Kenya offices and procuring sub-division of the suit property without his knowledge.
  7. The Plaintiff asserted that thereafter, the 1<sup>st</sup> Defendant and/or the private surveyor presented the fraudulent mutation form to the 3<sup>rd</sup> Defendant whom, through the 2<sup>nd</sup> Defendant forwarded the same to the Director of Surveys and that on 24<sup>th</sup> November, 2010, the 2<sup>nd</sup> Defendant countersigned the alterations on page 1 of the mutation form before forwarding the same to the Director of Surveys.
  8. It was contended that the 2<sup>nd</sup> Defendant's actions were fraudulent and/or negligent the particulars of which include involving himself/herself in and/or negligently accepting an altered mutation form,



- unlawfully sanctioning the fraudulent alterations on the mutation form and forwarding the same to the Director of Surveys without requiring the countersigning of the said alterations by the Plaintiff or obtaining his written consent and unlawfully registering the fraudulently altered mutation form and requesting the Director of Surveys to amend the Registry Index Map to conform to the altered page 3 of the mutation form.
9. With respect to the 3<sup>rd</sup> Defendant, the Plaintiff stated that he/she, on the basis of the altered mutation form proceeded to cancel the title to the suit property and issue new titles with respect to the subdivisions.
  10. The Plaintiff contended that as a consequence of the Defendants' fraud and/or negligence, he has suffered loss particulars of which include his inability to access portion A of the suit property and develop the same. He contended that despite demands, the Defendants have neglected and/or failed to rectify the situation.
  11. The 1<sup>st</sup> Defendant filed an amended Defence and Counterclaim on the 7<sup>th</sup> October, 2022. Vide the Defence, he denied the assertions as set out in the Plaint stating that on 3<sup>rd</sup> March, 2011, the Plaintiff presented the altered mutation form at the Thika Lands Registry for registration and that further, on 9<sup>th</sup> August, 2011, him and the Plaintiff applied for consent to the Land Control Board for the transfer of the parcel number Ruiru/KIU Block 2/6696 to him which consent was given on the same day.
  12. He asserted that all the legal and proper procedures were followed culminating in his registration as the proprietor of Parcel No Ruiru/KIU Block 2/6696 part of which he thereafter sold to the Interested Party and that the resultant title which was registered in the name of the Interested Party is Ruiru/KIU/Block 2/8755.
  13. Vide the Counterclaim, the 1<sup>st</sup> Defendant states that he has suffered loss as a result of the Plaintiff's interference with the property and seeks for:
    - i. Loss of rent for the house that was in the process of being developed in the suit property since the year 2012 totaling to Kshs 1, 512, 000/=.
    - ii. Destruction of materials on the construction site on the suit parcel which include:
      - a. Sand valued at Kshs 44,000/=
      - b. Block stones valued at Kshs 18,000/=
      - c. Ballast valued at Kshs 40,000/=
      - d. Bricks valued at Kshs 35,000/=
      - e. Treated fencing posts and barbed wires valued at Kshs 25,000/=
    - iii. Damage caused to the erected house on the suit property valued at Kshs 1, 800,000/=.
  14. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Defence dated the 16<sup>th</sup> May, 2013. Vide the Defence, they denied the assertions set out in the Plaint stating that they are not privy to the sale transaction and the subdivisions processes between the Plaintiff and the 1<sup>st</sup> Defendant which were undertaken by a private surveyor. They averred that they are not privy to the allegations of fraud.
  15. They maintained that the 2<sup>nd</sup> Defendant's role was to register the mutation forms presented to it by the Plaintiff as required by the law and that there was no way the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants would have known that the aforesaid mutation forms were fraudulent.



16. It was averred that the 2<sup>nd</sup> Defendant processed the documents and issued them with new title numbers with the 0.3Ha being 6996 and the 0.2Ha being 6997 and that the said documents were accompanied by the proposed sub-division scheme and the LCB consent all signed by the Plaintiff.
17. The Defendants contend that upon receipt of the documents, the same were processed by the 2<sup>nd</sup> Defendant on 24<sup>th</sup> November, 2010; that the Plaintiff and the 1<sup>st</sup> Defendant collected the forms together and the 1<sup>st</sup> Defendant signed for them and that they were advised to take the documents to the 3<sup>rd</sup> Defendant to enable RIM amendment.
18. On the 25<sup>th</sup> November, 2010, it was stated, the 1<sup>st</sup> Defendant and their surveyor, Mwaura, went back to the 2<sup>nd</sup> Defendant's offices and stated that the Plaintiff had changed the ground position and that they were advised to take the mutation form back to Z.M Muritu to countersign after changing the beacons or they amalgamate the portion and re-subdivide afresh.
19. Subsequently, it was averred, on the 29<sup>th</sup> November, 2010, the Plaintiff, the 1<sup>st</sup> Defendant and their surveyor returned the countersigned mutation forms to the office and were directed to the 3<sup>rd</sup> Defendant's office for signature for RIM amendment and that on 30<sup>th</sup> November, 2010, they forwarded the cancelled and countersigned mutation form to the Director of Surveys for amendment.
20. It was averred that later on, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants advised the Plaintiff to buy the amended map from the Surveys of Kenya to enable the 3<sup>rd</sup> Defendant register the new parcels of land which they did on 3<sup>rd</sup> March, 2011 and that the Plaintiff presented the Registrar's copy of the mutation and the amended RIM and surrendered his original title for the registration of the mutation.

### **Hearing and Evidence**

21. The Plaintiff testified as PW1. He adopted his witness statement dated 22<sup>nd</sup> November, 2012 as his evidence in chief and adduced the bundle of documents of an even date as PEXHB1.
22. It was his oral testimony that he is the legitimate owner of the suit property which was initially 0.5Ha. He stated that his brother purchased a portion of the land and although they did not sub-divide the same, they agreed that his brother would take 0.2Ha and that before they could undertake sub-division, his brother sold the ½ acre to the 1<sup>st</sup> Defendant and signed an agreement in that respect. It was his testimony that he had however not yet transferred the property to his brother and as such, his brother and the 1<sup>st</sup> Defendant were to go back to him.
23. According to PW1, the mutation form was filled with the correct measurements; that later on, the demarcations of plot A were changed to read the measurements of plot B and vice versa and that he was unaware of these changes which were not made with his consent and the court should nullify the 1<sup>st</sup> Defendant's title.
24. During cross-examination, he stated that portion A was 0.3Ha and belonged to him; that he signed the mutation form; that him and the 1<sup>st</sup> Defendant collected the original mutation and that he surrendered the title and the land was sub-divided.
25. He stated on re-examination that he signed the mutation form before the changes therein were made and he never agreed to the alterations which were made by the 1<sup>st</sup> Defendant. It was the evidence of PW1 that the lands registry dealt with the registration and they should have confirmed with him that the changes were made with his permission.
26. The 1<sup>st</sup> Defendant testified as DW1. He adopted his witness statement dated 8<sup>th</sup> February, 2013 as his evidence in chief and adduced the documents of an even date as DEXHB1.



27. It was his evidence vide his statement that in October, 2008, the Plaintiff's brother, Hilton Daniel Nguru Kanja, sold to him a parcel of land measuring 0.2Ha which was excised from the suit property and that the said parcel of land was registered in the names of the Plaintiff who held a portion of it in trust for his brother.
28. DW1 stated that he enlisted the services of a private surveyor who drew a sketch map showing that his portion was measuring 0.2Ha while the Plaintiff's measured 0.3Ha. In the sketch map, he stated, his portion was marked as A while the Plaintiff's portion was marked as B and that the Plaintiff applied to the LCB for sub-division of the suit property into the two portions measuring 0.2Ha and 0.3Ha which consent was granted on the 4<sup>th</sup> November, 2008.
29. According to DW1, in March, 2011, the Plaintiff presented the mutation form to the Thika District Lands Registry for registration; that after the registration of the mutation form, the portion which was sold to him was registered as Ruiru/KIU Block 2/6696 and they sought an LCB consent for the transfer which was granted on the 9<sup>th</sup> August, 2011. It was his testimony that he was issued with a title deed at the Thika District Land Registry on 14<sup>th</sup> September, 2011.
30. It was his statement that the Plaintiff's assertions are untrue as the Plaintiff participated in all the processes resulting in the sub-division and subsequent registration of the respective parcels of land. He stated that he never acquired any portion exceeding the 0.2Ha that he purchased from the Plaintiff's brother.
31. It was his evidence on cross-examination that he consulted the Plaintiff before engaging the surveyor and that the mutation was not countersigned after the alterations. DW1 stated that the Plaintiff held the property in trust for his brother and his brother was entitled to 0.2Ha.

### **Submissions**

32. The Plaintiff's Counsel submitted that the Plaintiff established through his evidence that alterations were made to the mutation form which alterations were undertaken without his consent and were fraudulent. Consequently, it was submitted, the 1<sup>st</sup> Defendant's title should be nullified. Reliance in this respect was placed on the case of Chirchir Paul Kipsang (Suing as the personal representative of the estate of Tabsabei –Deceased) vs David Rono [2021] KEELC 4008 (KLR).
33. It was submitted that as held in Republic vs Senior Registrar of Titles, Ex-parte Brookside Court Limited[2012]eKLR, statutorily, the sanctity of title to land is assured and protected under Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 and can be impeached on the grounds of fraud or misrepresentation. Fraud having been established, it was submitted, the Plaintiff was entitled to the orders sought.
34. No submissions were filed by the Defendants as at 20<sup>th</sup> May, 2025.

### **Analysis and Determination**

35. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the issues that arise for determination are:
  - i. Whether or not the mutation form, 296577 was fraudulently altered and if so, the consequences thereof?
  - ii. Whether or not the registration of Michael Ndege Kinyua as the proprietor of Title Number Ruiru/KIU Block 2 (Githunguri) 6996 was unlawful and a nullity ab initio?



- iii. What are the appropriate reliefs to issue?
36. The Plaintiff instituted this suit seeking, inter-alia, declarations that the alterations to the mutation form were fraudulent, the registration of the altered mutation form were fraudulent, null and void, and the survey plans produced by the Director of Surveys, subsequent to the said illegal and fraudulent mutation form is void and of no legal effect.
37. The Plaintiff is also seeking declarations that the registration of the 1<sup>st</sup> Defendant as the proprietor of the land now comprised in Title Number Ruiru/KIU Block 2(Githunguri) 6996 is a nullity ab initio and an order for the annulment of the registration thereof, as well as for the annulment of any, and all other entries in the register of the land parcel Title Number Ruiru/KIU Block 2(Githunguri)3701 entered by the Land Registrar at Thika.
38. According to the Plaintiff, he was the owner of the suit property which measured 0.5Ha. It was his evidence that he sold 0.2Ha thereof to his brother who sold the same to the 1<sup>st</sup> Defendant. Pursuant to the sale aforesaid, he averred that the 1<sup>st</sup> Defendant was entitled to portion B of the property measuring 0.2Ha whereas he was to remain with plot A measuring 0.3Ha. This position, he asserted was clearly set out in the mutation form.
39. The Plaintiff stated that despite the foregoing position, the 1<sup>st</sup> Defendant with the connivance of a private surveyor altered the mutation form without his knowledge interchanging the plots. Plot A was now 0.2Ha and Plot B was 0.3Ha meaning he was to own Plot B rather than A. He opines that as a consequence of the fraudulent change, all other transactions emanating therefrom and leading to the issuance of the title, L.R Ruiru/KIU/Block 2/6996 constitute an illegality.
40. The Plaintiff adduced into evidence a copy of the title deed with respect to L.R No Ruiru/KIU Block 2(Githunguri)3701, the agreement dated 11<sup>th</sup> October, 2008, the form showing the proposed subdivision of parcel no Ruiru/KIU Block 2(Githunguri) 3701, the mutation form serial number 296577 and letters dated 2<sup>nd</sup> November, 2011 and 8<sup>th</sup> November, 2011 to the Director of Surveys and District Land Registrar.
41. He also adduced into evidence official search numbers 1111/11/11 and 1112/11/11 dated 21<sup>st</sup> November, 2011, the demand letter and the notice of intention to sue dated the 24<sup>th</sup> November, 2011.
42. On his part, the 1<sup>st</sup> Defendant denies the assertions as set out in the Plaintiff averring that the registration of L.R Ruiru/KIU Block 2/6996 in his name was undertaken after a lawful process. He denies the contentions by the Plaintiff as regards fraudulent interference with the mutation form contending that the Plaintiff was aware of all processes.
43. The 1<sup>st</sup> Defendant seeks vide the Counterclaim loss of rent for the house that was in the process of being developed on the suit property since 2012 totaling Kshs 1, 512,000, and for the destruction and loss of materials for construction on the suit property.
44. The 1<sup>st</sup> Defendant adduced into evidence the letter of consent serial number 355115 dated the 4<sup>th</sup> November, 2008, the application for registration of mutation dated 3<sup>rd</sup> March, 2011, the copies of the application for registration of mutation, application for consent of the LCB Board and consent dated 9<sup>th</sup> August, 2011 and the Title Deed for L.R Ruiru/KIU Block 2/6996.
45. No evidence was adduced on behalf of the other Defendants.
46. The dispute herein revolves around the parties' competing claims to specific portions of the suit property, with each party asserting entitlement to a distinct portion thereof. As such, each party is



obligated to prove their claim as set out in the evidentiary principle that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act* as follows:

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

47. And Sections 109 and 112 of the same Act which states as follows:

- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

48. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

49. It is also noted that the Plaintiff has set out allegations of fraud. The Black’s Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

50. It is trite law that fraud must not only be pleaded and particularized, but strictly proven. This position was affirmed by the Court of Appeal in *Demutila Nanyama Pururmu vs Salim Mohamed Salim* [2021] eKLR relying on an earlier exposition in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000]eKLR thus:

“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, of course, be set out, and then it should be stated that these acts were done fraudulently. It



is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

51. As regards the standard of proof where fraud is alleged, the Court of Appeal in *Demutila Nanyama Pururmu vs Salim Mohamed Salim* (supra) looked to its earlier decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR wherein it had held as follows:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

52. The court will be so guided.
53. As aforesaid, the Plaintiff asserts that the 1<sup>st</sup> Defendant with the connivance of a private surveyor fraudulently and unlawfully altered the particulars of the mutation form changing the respective parcels that him and the 1<sup>st</sup> Defendant were entitled to, having done so without his knowledge and/or consent. In this respect, the Plaintiff adduced into evidence a form setting out the proposed subdivision of the suit property. The proposal shows that plot A is 0.30Ha and plot B is 0.2Ha.
54. This court has also looked at the mutation form which was made available by the Plaintiff. The mutation form does indicate that the initial measurements of plot A given parcel number 6996 would be 0.3Ha whereas plot B given parcel number 6997 would be 0.20Ha. There are obvious alterations whereby the acreages of parcels A and B have been interchanged. This change is reflected in pages 1, 2 and 3 of the mutation form.
55. The Plaintiff contends that he did not accede to the alterations made to the mutation form and asserts that, although he signed the form, his signature was appended prior to the changes. He points to signatures on page 2, dated 4<sup>th</sup> December 2008, and on page 4, which is undated.
56. On the other hand, the 1<sup>st</sup> Defendant maintains that all procedural steps were duly followed and that the Plaintiff was fully aware of the final form of the document. He however conceded that the Plaintiff did not countersign against the alterations.
57. It is trite that once the boundaries are marked, both the land owner and the surveyor are required to sign three copies of the Mutation form, which are further signed by a more senior surveyor, known as the Licensed Surveyor. The mutation forms, together with the search document, the consent form from the Land Control Board, the PPA1 and the PPA2 forms are then deposited with the district survey office, where a cartographer allocates new plot numbers to the subdivided plots. The same documents are then taken to the respective land county registries to allow the land registrar to open registers and issue titles.
58. The 1<sup>st</sup> Defendant produced the application for registration of the mutation form dated 3<sup>rd</sup> March 2011. Ordinarily, a mutation form is presented to the Registrar for registration by the owner of the property or his agent. Indeed, the application form presented bears the Plaintiff's signature. This has not been impugned by the Plaintiff.



59. The Plaintiff's presentation of the mutation form for registration nearly three years after his initial signature, and well after the alterations were made, demonstrates a degree of involvement inconsistent with the claim of lack of knowledge and/or fraud.
60. By presenting the altered mutation for registration, the Plaintiff affirmed its contents and is thereby estopped from now asserting otherwise. In event, the acreage that the Plaintiff sold to his brother, which is 0.2Ha is the same that was eventually sold to the 1<sup>st</sup> Defendant. Ultimately the plea of fraud in this respect fails.
61. It having been established on a balance of probabilities that the Plaintiff is the one who presented the altered mutation form for registration, claims that its registration was fraudulent is unfounded and fails. Consequently, the claim that the survey plans arising from the impugned mutation are void also fails.
62. The evidence before this court shows that the 1<sup>st</sup> Defendant is the registered owner of parcel number Ruiru/KIU Block 2/6696, registered on 14<sup>th</sup> September, 2011 pursuant to the provisions of the retired Registered Land Act.
63. The rights of a registered proprietor of land were set out in Sections 27(a) and (b) of the Registered Land Act (repealed) as follows:
- “(a) 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;
  - (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”
64. Whereas Section 28 thereof provided:
- “The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”
65. The indefeasibility of title was also provided in Section 143 of the Registered Land Act which stated thus:
- “143.
- (1) Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”
66. As stated above, the Plaintiff did not establish that the registration of the mutation form was fraudulent. Further still, the evidence shows that on 9<sup>th</sup> August, 2011, the Plaintiff sought for and was granted a Land Control Board consent for the transfer of parcel Ruiru/KIU Block 2/6996 to the 1<sup>st</sup>



Defendant. These consents were neither challenged nor impugned by the Plaintiff at any stage of these proceedings.

67. Further still, it is noted from page 1 of the mutation form that Plot A of the property had from the onset been identified to be parcel 6696. It is not alleged otherwise. As such the Plaintiff was or should have been aware that he was transferring ‘his’ plot A measuring 0.2 Ha.
68. In light of the foregoing, the Plaintiff has failed to discharge the burden of proof required to establish fraud and/or illegality in the registration and transfer of parcel Ruiru/KIU Block 2/6996 to the 1<sup>st</sup> Defendant. Accordingly, there exists no legal basis to cancel the 1<sup>st</sup> Defendant’s title.
69. As aforesaid, the Plaintiff has not established his case on a balance of probabilities and the entirety of his claim fails.
70. On his part, the 1<sup>st</sup> Defendant has sought vide the Counterclaim losses of rent arising from the house under construction, damages to the erected house as well as for the destruction of construction materials on the property.
71. Considering the 1<sup>st</sup> Defendant’s counterclaim, it is clear that the nature of the damages he seeks are special damages. The law with respect to this nature of damages is now firmly established that they must not only be specifically pleaded but must also be strictly proved, before they can be awarded by the court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal held as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
72. In the circumstances, no efforts have been made to substantiate the amounts claimed as losses and as such they must fail.
73. In the end, the court makes the following final determination.
  - a. The Plaintiff’s suit is hereby dismissed.
  - b. The 1<sup>st</sup> Defendant’s counterclaim is hereby dismissed.
  - c. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mrs Kimiti for Plaintiff

No appearance for Defendants

Court Assistant: Tracy

ELC NO. 879 OF 2012

JUDGMENT

