



**Ngachulot v Sondang (Environment & Land Case 26 of 2023)
[2025] KEELC 4330 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 26 OF 2023**

CK NZILI, J

JUNE 9, 2025

BETWEEN

JACKSON NGACHULOT PLAINTIFF

AND

MUDANG SONDANG DEFENDANT

JUDGMENT

1. The plaintiff approached the court through a plaint dated 19/5/2023. His claim as the registered owner of Parcel No. West Pokot/Tapach/1027 appearing on RIM Sheet 57, is that by a sale agreement dated 3/5/2016, he bought a portion measuring 12 acres out of land Parcel No. West Pokot/Tapach/1027, then known as Tapach Adjudication Section No. 337 from the defendant for KShs. 2,250,000/=.
2. The plaintiff averred that he paid KShs. 1,150,000/= as deposit took possession, and the balance of KShs. 1,100,000/= was to be cleared by 31/5/2017, as he awaited for the defendant to avail completion documents for him to clear the stamp duty, survey registration and transfer fees. The plaintiff averred that he cleared all the purchase price, and upon adjudication, survey, and subdivision of Tapach Adjudication No. 337, the land was registered in his name on 8/1/2019, and a title deed was issued on 28/1/2019.
3. The plaintiff averred that the title deed, he, later on, realized that there were typographical errors in the description, acreage, and names, to which the defendant made a report to the DCIO Kapenguria claiming that the acquisition of the title deed was fraudulent, showing more acreage than what was bought from him. The plaintiff averred that in May 2023, the defendant, his agents, family, and servants invaded the land, forcefully occupied it, and stole three of his cows on the said land, leading to a report and case at Kapenguria Law Courts.



4. The plaintiff averred that his entitlement was merely 12 acres and that the invasion of his land by the defendant was unjustified and amounted to interfering with quiet possession of the land. Further, the plaintiff averred that the caution placed on the title by the defendant was unjustified.
5. He prayed for:
 - (a) Declaration that he is a lawful registered owner of LR No. West Pokot/Tapach/1027 measuring 12 acres.
 - (b) Removal of the caution.
 - (c) Rectification of the title deed issued on 28/1/2019 to read West Pokot/Tapach/1027.
 - (d) Removal of the approximate area as 12.14 Ha to 12 acres or its equivalent in Hectares.
 - (e) Permanent injunction restraining the defendant, his agents, servants, and his family from entering, remaining, or continuing to occupy the suit land.
6. The defendant opposed the suit through a statement of the defence and counterclaim dated 4/8/2023. He denied that the plaintiff was a lawful registered owner of Parcel No. West Pokot/Tapach/1027. Further, the defendant denied receiving the purchase price of Kshs. 2,250,000/= as alleged or at all, as the same was paid to Joel Kaptoi. The defendant averred that the plaintiff took advantage of his illiteracy and made him sign fraudulent documents in collusion with one Joel Kaptoi and unlawfully acquired title to the land.
7. Again, the defendant blamed the plaintiff for fraudulently, unlawfully, and illegally preparing the Land Control Board and transfer forms for 12.14 Ha, yet he knew that he had only purchased 12 acres, presenting the documents to him in the absence of literate family members in order to conceal their contents, paying Kshs. 2,250,000/= over to Joel Kaptoi instead of him, and lastly, proceeding to collect and keep the title deed for 30.35 acres since January 2019 and continuing to utilize the entire parcel of land to date.
8. The defendant averred that upon establishing the fraud, he made a report to the area chief and at Kapenguria DCIO offices, where he recorded statements, following which the plaintiff and Joel Kaptoi were summoned. The defendant averred that three meetings were held at the chief's office in the presence of elders, and it was established that the plaintiff had never paid any purchase price to him, only for the plaintiff to start causing his sons to be arrested and charged in Kapenguria law courts.
9. The defendant denied that there was any typographical error in indicating 12.14 Ha instead of 12 acres; otherwise, it was intentionally done so as to defraud him of the land. The defendant averred that he was justified in reporting the matter to the police and registering a caution so that the matter could proceed to its logical conclusion. He denied the alleged illegal invasion of the land by his family members.
10. By way of a counterclaim, the defendant reiterated that the title deed to the land held by the plaintiff was fraudulently procured when the plaintiff knew that he never paid him any money, presented documents for transfer reflecting more acreage knowing very well that he could not read, proceeded to acquire a title for the land and kept it until 2023, when he purports to have discovered the error.
11. The defendant prayed for:
 - (a) An order of eviction of the plaintiff, his servants, or agents from Parcel No. West Pokot/Tapach/1027.



- (b) Order directing the Land Registrar West Pokot County to cancel the title deed in the name of the plaintiff for the same to revert to his name.
- (c) Permanent injunction restraining the defendant, his servants, or agents from trespassing upon the land.
12. At the trial, Jackson Ngachulot testified as PW1. He adopted his witness statement dated 19/5/2023 as his evidence-in-chief. PW1 told the court that on 3/4/2016, he entered into a sale agreement with the defendant to purchase a portion of parcel No. 337 Tapachi Adjudication Section measuring 12 acres. PW1 said the 10 acres were sold at Kshs. 195,000/=, while 2 acres were sold at Kshs. 150,000/=, due to the land inclination. Further, PW1 said that on 3/5/2016, the parties visited the firm of Teti & Co. Advocates, where the handwritten agreement was typed and executed afresh before Teti David Advocate.
13. PW1 stated that the terms and conditions of the sale agreement were fully complied with, and on 8/1/2019, he was registered as the owner of the land, subsequent to which a title deed was issued on 28/1/2019. On receipt of the title deed, PW1 told the court that he noticed anomalies in the description of the land, acreage, and his name. PW1 told the court that on 19/1/2022, he entered into a second agreement with the defendant to purchase fencing posts for Kshs. 32,160/=, which he put round the said 12 acres.
14. According to PW1, in April 2023, the defendant and members of his family invaded the land, claiming that he had taken over the entire land, to which he made a report to the police, whereby the perpetrators of the invasion were arrested and charged in Kapenguria Law Courts.
15. The plaintiff relied on the agreements dated 30/4/2016, the title deed issued on 28/1/2019, agreements dated 19/10/2022, 19/11/2022, and 26/12/2020, a certificate of official search dated 25/1/2023 and a notice of caution dated 8/3/2023 as P. Exhibit Nos. (1)-(6) respectively.
16. In cross-examination, PW1 told the court that he only bought 12 acres of land and not 12.14 Ha as indicated in the title deed, which was erroneously indicated as such by the lands office. PW1 said that the sale agreement, the land control board forms, and the transfer form were all signed by the defendant in 2019. He denied any fraud in acquiring more land than he bought in the accompanying documents before the issuance of the title deed.
17. PW1 told the court that he paid Kshs. 2,250,000/= to the defendant at the lawyer's offices. As to the deposit, PW1 said that he paid it in the presence of five witnesses, among them Joel Kaptoi, a nephew of the defendant who used to stay together and the advocate. PW1 said that he was not aware that out of the purchase price, Joel Kaptoi was to buy a plot for the defendant. PW1 said that the deposit and the balance of Kshs. 1,150,000/= were paid at the lawyer's offices; otherwise, the initial handwritten agreements (P. Exhibit No. 1), were drafted by Joel Kaptoi on 3/5/2016 when he paid Kshs. 1,100,000/=.
18. PW1 confirmed the meeting before the area chief and also the DCIO Kapenguria Police Station, where he clarified that he only bought 12 acres of land from the defendant. PW1 said that he only discovered the error on the title deed in 2023. Equally, PW1 said that he lodged a criminal complaint against the defendant's children after they invaded his land. He denied any alleged fraud in acquiring the land title. According to him, the errors were genuine and should be rectified; otherwise, he could have been charged with fraud. Similarly, PW1 said that he filed the suit before the complaint by the defendant was lodged at the DCIO offices.



19. Mudang' Sondang', the defendant, testified as DW1. He relied on a witness statement filed on 4/8/2023 as his evidence in chief. DW1 told the court that he acquired the land situated in the Kamelei Sub-location, Tapach, in 1950 through the elders of those days in the presence of the land committee, married Chemakeu Mudang and Chemaliko and settled on it where they brought up a family. He said he only leased the land for pasture to the plaintiff. In 2016, DW1 said that due to the coldness in the area, he went to live with his nephew Joel Kaptoi at his Makutano home, who also became his trustee. DW1 said that Joel brought the plaintiff to him on 30/4/2016 with Kshs. 1,150,000/= . DW1 said that the money was deposited with someone who was selling a plot in Makutano market and whom he had already paid Kshs. 400,000/= that were proceeds out of his daughter Mama Isaac, who had sold some land through Joel Kaptoi. He said that the payment of Kshs. 1,150,000/= was witnessed by Simon Kodomuk, Kapcherop Chemeltorik, Joel Kaptoi, Dickson Chepkiyo, and the plaintiff on 30/4/2016.
20. DW1 said that the value of his land had not been determined when he obtained the money. He said that the balance was to be bargained and witnessed by his children, the land committee, and the area assistant chief on the completion date in May 2017. DW1 said that in 2016, Joel Kaptoi told him to vacate his homestead, where he decided to move to his daughter's home in the Ortum area. In December 2022, DW1 said that he had not been given any ownership documents for the plot allegedly bought on his behalf by Joel Kaptoi. Upon inquiring from Joel Kaptoi through his children, DW said that Joel Kaptoi declined to hand them over, to which he went to the plaintiff to seek the balance of the purchase price at the completion date of May 2017, who declined to pay. DW1 said that he reported the matter to the area assistant chief on 10/1/2023 and 24/1/2023 in front of the elders, only for the plaintiff to insist that he had paid all the money, yet the purchase price had not been agreed upon and the sale witnessed by his immediate family.
21. Since the plaintiff's lease for the land for pasture had expired, DW1 said that his children drove the plaintiff's cows out of the land in April 2023, with the knowledge of the area assistant chief, but the plaintiff allegedly made a report at the police station on stolen cows. While the criminal case was pending, DW1 said that on 30/5/2023, he was served with the summons to appear before this court. He denied executing any sale agreement with the plaintiff as alleged or at all. DW1 relied on the statement he made at the police, dated 24/7/2022, WhatsApp printout, and police bond as D. Exhibit Nos. 1, 2, and 3(a) and (b), respectively.
22. DW1 denied transferring the land to the plaintiff as alleged or at all. DW1, said that he was yet to subdivide or share his land among the three wives and their children at all family meetings convened for that purpose as alleged or at all. He denied selling the land. Though he received some money from Joel Kaptoi, DW1 denied executing any sale agreement with the plaintiff to sell part of his land. DW1 insisted that the sale agreement was void and lacked signatures from his children for non-agreement on the purchase price or receipt of the entire purchase price.
23. The plaintiff relied on undated written submissions. It is submitted that in paragraph 3 of the statement of defense and counterclaim, the defendant admits receipt of Kshs. 1,150,000/= on 30/4/2016, from the plaintiff. The plaintiff submits that there was no evidence to sustain the allegation that Joel Kaptoi colluded with the plaintiff to acquire title to his land. Equally, it is submitted that the said uncle and trustee were not joined as a party to the suit.
24. Further, the plaintiff submits that fraud, unlawfulness, and illegality were not proved to the required standards as held in *Moses Parantai and Another (Suing as the legal representatives of the estate of Sospster Mukuru Mbeere (deceased) -vs- Stephen Njoroge Macharia [2020] eKLR*. The plaintiff submits that it was a fact that the suit land was purchased while the land was still undergoing the adjudication process in April and May 2016; hence, the Land Control Board Act and the [Land](#)



- Registration Act were inapplicable in unregistered trust land, still undergoing an adjudication process. Reliance was placed on *Tebere Concrete C. Ltd -vs- Gichuhi & Another ELC Case No. 70 of 2017 [2022] KEELC 3021 [KLR]*.
25. As to whether the transaction occurred out of concealment of material facts or in the absence of the defendant's children and close relatives, the plaintiff submitted that the defendant failed to plead particulars and prove the doctrine of non-est factus as held in *Geoffrey Mutie Mutunga -vs- Wilson Mutunga Mbai [2020] eKLR*, citing with approval *Saunders (Executive of the estate of Rose Maude Gallie) -vs- Anglia Building Society [1970] 3 ALL ER 961* and *Gallie -vs- Lee [1969] 2 Ch. 17*.
 26. The plaintiff submitted that the differences, if any, between the plaintiff and his uncle and trustee have no reference to this suit or the sale and was a different cause of action to be adjudicated in a different forum hence any evidence that was inconsequential to the claim.
 27. As to the acquisition of the title deed and use of the entire 30.35 acres, the plaintiff submitted that evidence of any malpractice was not tendered. On the contrary, the plaintiff submitted that upon the discovery of the errors, he was the one who moved to court for the rectification; hence, the allegations are far-fetched and unsubstantiated.
 28. As to whether the reliefs sought are merited, the plaintiff submitted that under Section 80 of the Land Registration Act, the court can order the rectification of the title. In this case, since there is nothing to show that the issuance of the title was not lawful, the caution placed on the register was unjustified, and therefore, the prayers sought should be granted. Reliance was placed on *Mary Ruguru Njoroge -vs- John Samuel Gathura Mbugu [2014] eKLR* as cited in *Manyi Kyule vs Stephen Kalange [2021] eKLR*. The plaintiff submitted that to avert future disputes and interference with the plaintiff's ownership rights, a permanent injunction should be issued together with enforcement mechanisms.
 29. Lastly, the plaintiff submitted also that he should be granted costs of the suit for it was the defendant who caused him to move to court, guided by the case of *Jasbir Singh Rai & Others -vs- Tarlochan Singh Rai & Others [2014] eKLR* and *Little Africa (K) Ltd vs Andrea Mwiti Jason [2014] eKLR*, citing with approval *Judicial Hints on Civil Procedure Act* by Rtd Justice Kuloba, page 94.
 30. The defendant relies on written submissions dated 6/3/2025. It is submitted that the plaintiff is not entitled to the reliefs sought, and his suit should be dismissed with costs and the counterclaim allowed, guided by the caselaw of *Josephine Mwikali Kikenye -vs- Omar Abdallah Kombo & Others [2018] eKLR* on the doctrine of non-est functus.
 31. The issues calling for my determination are:
 - i. If there was a valid sale agreement between the plaintiff and the defendant regarding Parcel No. 337 Tapach Adjudication Section in 2016.
 - ii. What were the terms and conditions of the sale agreement(s)?
 - iii. If there was a valid transfer and registration of the parcel of land.
 - iv. Whether the plaintiff paid the whole purchase price as agreed or at all.
 - v. If the title held by the plaintiff was lawfully, regularly, and procedurally acquired.
 - vi. If the plaintiff was party to any irregularities, illegalities, and unprocedural ways in acquiring the title deed.
 - vii. Whether the title deed should be rectified or canceled on account of the irregularities on its face in terms of name, acreages and description.



- viii. Whether the plaintiff is entitled to the reliefs sought in the plaint.
 - ix. Whether the defendant has proved his counterclaim to the required standards.
 - x. Whether the defendant is entitled to the reliefs sought in the counterclaim.
 - xi. What is the order as to costs?
32. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. In *IEBC -vs- Stephen Mutinda Mule (2014) eKLR*, the court observed that in an adversarial system, it is left to each party to formulate their case in their way, subject to the basic rules of pleadings and cannot be allowed to raise a different or fresh case without due amendments and it is not 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 as raised in the pleadings, with no room for any other business.
 33. In this suit, what the plaintiff has pleaded is that he entered into a sale agreement with the defendant to purchase 12 acres of land that was part of Parcel No. 337 Tapach Adjudication Section, but was issued with a title deed for West Pokot/Tapach/1027, measuring 12.14 Ha instead of 12 acres on 28/1/2019, but discovered the anomalies regarding his name, acreage, and description of title in 2023.
 34. On the other hand, the defendant denies entry into any sale, receipt of the total purchase price for the land, signing, transferring the land to the plaintiff, or participating in the registration of the suit land in the name of the plaintiff as alleged or at all. To the contrary, the defendant, in his counterclaim terms, the sale agreement(s) as procured through collusion, taking advantage of his illiteracy, fraudulent, illegal, unlawful, and irregular, and purporting to pay the alleged purchase price to a party and taking away more land and utilizing it from 2016 to 2023, than the conceded 12 acres.
 35. It is trite law that a counterclaim is an independent suit. It succeeds or fails regardless of the outcome of the main suit guided by Order 7 Rule 13 of the Civil Procedure Rules. See *KBC Ltd -vs- James Karanja [1981] eKLR*. A party served with a counterclaim has to file a defense to it. In *Deacons EA PLC Ltd -vs- Modern Techno Fitness Gym Lab & Another [2021] eKLR*, the court said that there is no procedure for judgment in default of a defense to a counterclaim, and the only remedy is for the defendant to fix his matter for formal proof. The defendant raised issues of fraud, unlawfulness, and illegality against the plaintiff in paragraphs 4-16 of the defense and counterclaim dated 4/8/2023. The plaintiff failed to refute those allegations by way of a reply to the defense and the defense to a counterclaim.
 36. Order 2 Rule 12 of the Civil Procedure Rules provides that where there is no reply to the defense, there is a joinder of issue on that defense, which operates as a denial of every material allegation. Order 2 Rule 3 thereof is specific that there is no joinder of issue on a plaint or counterclaim. In the counterclaim, the defendant raised the issue of non-payment of the consideration, presenting documents for transfer and the land control board, which reflected more land than in the alleged sale agreement(s), fraudulently and illegally procuring a title deed for more land than in the sale agreement(s).
 37. It is trite that where an intention of parties is reduced into writing, extrinsic evidence is not permitted to be introduced to interpret the documents, and a court must derive the meaning from the said documents without reference to anything outside of the documents, such as the circumstances surrounding its writing or history. See *Fidelity Commercial Bank Ltd -vs- Kenya Garage Vehicle Industries Ltd [2017] eKLR*. In *NBK -vs- Pipe Plastic Samkolit (K) Ltd (2003) 2 E.A 503*, the court held that a court of law cannot rewrite a contract between the parties and that parties are bound by the terms and conditions of their contract unless coercion, fraud, or undue influence are pleaded and proved.



38. In *William Kagunga Karisa -vs- Cosmas Angore Enzera* [2006] eKLR, the court held that the basic rule of law of contract is that parties perform their respective obligations in accordance with the terms and conditions of the executed contract by them. In this suit the plaintiff pleaded and testified that he cleared the purchase price. The defendant, on the other hand, denies receipt and acknowledgment of the alleged purchase price. The defendant insists that he never sought any transfer form in favor of the plaintiff to have the land registered under his name.
39. A party cannot run away from the terms and conditions of its agreement. In *Jeremiah Mucheru Ndibui -vs- David Gichuru* [2019] eKLR, it was observed that the court's role is to enforce contracts and not to rewrite them. A bona fide purchaser acquires something for value. Courts are never shy to interfere with or refuse to enforce unfair contracts procured by coercion, fraud, undue influence, illegality, and irregularity if pleaded and proven. See *Pius Kimaiyo Lagat -vs- Co-operative Bank of Kenya Ltd* [2017] eKLR.
40. The burden to prove payment of the purchase price is vested on the plaintiff under Sections 107-109 of the *Evidence Act*. A transfer of the suit land could only be valid, regular, and lawful if the purchase price could be shown to have been paid. Failure to prove payment of Kshs. 2,250,000/= to the defendant could make the transfer ineffectual as it could have been effected without any consideration. It was not enough for the plaintiff to allege that payment was made before independent witnesses, such as a lawyer, without calling them to corroborate his evidence that he paid valuable consideration to acquire the land. Lack of consideration can vitiate a contract and render it null and void.
41. The defendant had pleaded in the counterclaim that any payment of the consideration to a third party by the plaintiff was illegal, for it did not reach him. The plaintiff testified that Joel Kaptoi drafted the initial sale agreement. He also said that he paid monies to the said Joel Kaptoi on behalf of the defendant. The burden was on the plaintiff to call the said Joel Kaptoi to prove that he actually witnessed and took the entire purchase price from the plaintiff on behalf of the defendant.
42. When a title deed is under challenge, it is not enough to dangle the instrument of ownership. A party, as held in *Munyu Maina -vs- Hiram Gathiha Maina* [2013] eKLR, has to go beyond the instrument of title and prove that he acquired the same lawfully, regularly, and procedurally and also avail every paper trail without a break in the chain of the transaction. Fraud in Black's Law Dictionary is defined as a knowing misrepresentation of the truth or concealment of material facts to induce another to act to his or her detriment.
43. The defendant has been consistent that the transfer and registration of the land in the name of the plaintiff was irregular and unprocedural; no wonder the glaring omissions and irregularities in the title showing more acreage, misdescription of the plaintiff, and the locality of the land. The maker of the sale agreement(s) was not called to testify. The witnesses who were present during the transaction(s) were not called to testify or verify the signatures. There is no evidence that the defendant signed any transfer documents on the completion date and gave the plaintiff all the necessary approval, consent, or go-ahead to visit the land adjudication office to effect the transfer. How the land changed from parcel No. 337 to 1027 remains unclear.
44. The plaintiff has submitted that the *Land Registration Act* and the *Land Control Act* were not applicable in this transaction(s) since the *Land Adjudication Act* still governed the land. The *Law of Contract Act* applies to all sale agreements on land regardless of whether it is in respect to registered or unregistered land. Written submissions cannot replace pleadings and or evidence. It was upon the plaintiff to file a defense to the counterclaim to invoke the law and the procedure that he used to have the land transferred under his name. It was upon the plaintiff to tender documents, which he used to transfer the land under his name before the land became registered on 8/1/2019.



45. Section 3 of the *Law of Contract Act*, as read together with Section 38 of the *Land Act*, provides that a land sale agreement must be in writing, signed by the parties, and attested by an independent witness who was present during the execution by the parties. Evidence of full payment of the purchase price is missing. See *Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kagiri* [2014] eKLR. The transfer of land during a land adjudication process must have involved some documentation duly signed by the transferee and the transferor, in the presence of a land adjudication officer. The adjudication register also contains the entries duly signed by the parties. A copy of the sale agreement must also be presented before the land adjudication officer, who is required to endorse the same before effecting the entries to show the newly recorded owner. It is only after the process is effected that the newly recorded owner's name is forwarded to the Director of Land Adjudication and Chief Land Registrar for the registration of the suit property in the name of the purchaser. See *Solomon Meme Muthama -vs- Ntaari Kabutura & Land Adjudication Officer Meru* [2001] eKLR.
46. In *Nkarichia -vs- Magiri & Others* (Environment and Land Case E004 OF 2021 [2024] KEELC 4453 [KLR] (29th May 2024) (Judgment), the court cited *Solomon Meme Muthama -vs- Ntaari Kabutura & Another* [2001] eKLR, that a land transfer process during the adjudication process takes the form of objection proceedings and the endorsement of the reverse side by the Land Adjudication Officer.
47. If the defendant is the one who signed and participated in the alleged objection proceedings during the land adjudication process and authorized the land adjudication officer to effect changes in favor of the plaintiff, was to plead that and avail the adjudication proceedings and or call the land adjudication officer to prove that the defendant indeed signed, appeared and authorized the entries to be effected for 12 acres and not 12.14 Ha. Such documents would also have reflected any consideration paid by the transferee. The adjudication records would also have been produced to show how the irregularities as to the names, acreage, and definition of the land arose without the plaintiff noticing them if at all he appeared to inspect the adjudication register after it was published before a certificate of finality could issue.
48. The plaintiff has submitted that the defendant has tendered no evidence to prove fraud, illegality, and unlawfulness. In *Juneja (Suing as the Legal Representative of the Estate of Hamida Amin Juneja) & another -vs- Meja & another* (Civil Appeal 35 of 2018) [2023] KECA 1241 (KLR) (6 October 2023) (Judgment).
49. The court cited with approval *Purple Rose Trading Company Ltd -vs- Bhano Shaashikant Jai* [2014] eKLR, that once an issue of illegality is raised, a court must investigate the issue and that where one buys an interest in an adjudication parcel of land, the claim has to be recorded with the recording demarcation offices and that the evidence of the adjudication and demarcation would be necessary to determine who had been adjudged the original owner during the adjudication process.
50. I think I have said enough that the title held by the plaintiff had come under attack by the defendant both through the statement of defence and the counterclaim, followed by the evidence in support of DW1. The evidential burden was, therefore, upon the plaintiff to show that his title deed and the process leading to the acquisition was regular, formal, and procedural. *Black's Law Dictionary* 9th Edition defines fraud in contracts as a cause of an error bearing on a material part of the contract created or continued with designs to obtain some unjust advantage to the one party or to cause an inconvenience or loss to the other. It goes on to say that fraud in a court of equity 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, not unconscientious, advantage is taken of another.



51. The defendant had pleaded that the plaintiff took advantage of his illiteracy and gave him papers to sign. The plaintiff has submitted that the doctrine of non-est factum was not pleaded as defined in *Geoffrey Mutei Mutunga -vs- Wilson Mutunga Mbai* [2020] eKLR.
52. I do not think so. In paragraph 4 of the statement of defense and counterclaim, the defendant pleaded the doctrine and gave particulars of fraud, unlawfulness, and illegality. The plaintiff did not counter the pleading by way of a reply to the defense and counterclaim that the defendant was not illiterate or under any incapacity, both of mind and body such that he could not understand or appreciate what he was signing.
53. In *Josephine Mwikali Kakenye -vs- Omar Abdalla Kombo & Another* [2018] eKLR, the court said that there are exceptions to the general rule that a party of full age and understanding is usually bound by his signature to a document, whether he read it or not. The court said that the doctrine of non-est-factum arises when a party has been misled into executing a deed or signing a document that is essentially different from what they intended to execute or sign. In this suit, the defendant simply pleaded that his mind did not accompany his signature, he did not collect any consideration from the plaintiff, he did not sign the transfers and or consent to the registration of 12.14 Ha of his land to the name of the plaintiff or surrender to him 12.14 Ha to occupy. Equally, the defendant pleaded and testified that his immediate family members gave no consent to the transaction.
54. The court in *Josephine Mwikali Kikenye -vs- Omar Abdalla Kombo* (Supra) observed that it was unclear how the loan agreements mutated into a sale agreement, therefore depicting the absence of consensus ad idem between the two and more so, when no valid consideration to support the alleged sale agreement. The court observed that the onus lay on the party relying on non-est-factum to establish its ingredients, namely that there was a difference with regard to the notice of the documents, signed from what he intended to sign, the element of consent was totally lacking, the document was totally and fraudulently different, the signature was procured through fraud.
55. In this suit, the plaintiff does not deny that the defendant had a trustee who drafted the initial agreement in Kiswahili and also collected the deposits. The plaintiff did not dispute that the defendant, who is eighty years old, could neither read nor write at the time of the agreement except to append a thumbprint. The defendant testified to the circumstances under which he entered into the sale agreement(s) and also how, after demanding the balance, the plaintiff insisted that all the money had been paid to Joel Kaptoi. The defendant told the court how the said Joel Kaptoi took away the deposit and, instead of purchasing a plot, refused to surrender its title documents and he demanded that he vacate his homestead to go and stay with his daughter, Maina Isaac.
56. Equally, the defendant testified that he reported the matter to the area assistant chief, the elders, and the DCIO, insisting that no money was paid to him and the only transaction he had with the plaintiff was for pasture, only to find that the plaintiff had registered 12.14 Ha of his land under his name.
57. The plaintiff, on the other hand, failed to produce any evidence of payment of the consideration or perhaps subject the sale agreements to a forensic document examiner to prove that the defendant signed them. Equally, the plaintiff failed to call the eyewitnesses and the makers of the sale agreements to prove that the defendant lawfully and willingly signed them. There are also glaring inconsistencies in the sale agreements. The visible overwriting's or alterations have not been countersigned, especially on P. Exhibit Nos. 2 and 4. For instance, the maker of the handwriting on P. Exhibit No. 2, at the back, presumably a lawyer who wrote that the vendor and the purchaser came to his chamber and agreed that they had fulfilled their obligations as per the agreement with no outstanding debt and the payment breakdown attached was not called to testify. The thumbprint used is also not specified.



58. The upshot is that I find that the plaintiff has failed to prove his suit on a balance of probabilities to be entitled to the reliefs sought. The basis of the glaring errors, omissions, and anomalies in the title deed could only be explained by the Land Registrar or the Land Adjudication Officer and not the plaintiff to establish at what stage they occurred and why. There is no evidence that the defendant accompanied the plaintiff to transfer the land under his name. It is also not clear why the plaintiff took so long to realize that his title deed had more acreage than he was entitled to and failed to report the same to the issuing authority.
59. Before a title deed is issued or land under adjudication is registered, the parties are ordinarily summoned to go and view the adjudication register to establish that the acreage and their particulars before a certificate of finality is issued and the adjudication register is taken to the titling center for registration and issuance of a title deed. It is not clear whether the plaintiff undertook these elementary steps to show that he was not a party to the wrong entries with the intention of defrauding the defendant of his land.
60. All these legal processes, if the documents were availed, would have shown that the plaintiff had no intention to mislead or conceal material facts from the title issuing authority to the detriment of the defendant.
61. I find the counterclaim proved to the required standards. The defendant is entitled to the reliefs sought. The title deed issued to the plaintiff was unprocedurally and irregularly issued. It is hereby invalidated. The Land Registrar is directed to recall and cancel it, for the land reverts to the defendant. The plaintiff is directed to vacate the land within 90 days from the date hereof, in default of which an eviction order shall be issued against him at his costs and expenses. A permanent injunction shall issue stopping the plaintiff, his agents, servants, or employees upon eviction from re-entering the said land. Costs of the suit to the defendant.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 9TH DAY OF JUNE 2025.

In the presence of:

Court Assistant - Laban

Wanyama for the plaintiff present

Lichuma for Arunga for the defendant

HON. C.K. NZILI

JUDGE, ELC KITALE.

Judgment: KITALE ELC NO. 26 OF 2023 - D.O.D.- 09/06/2025	0
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