



**M’Muthamia v District Land Adjudication and Settlement Officer Tigania East & 2 others  
(Environment & Land Case 4 of 2023) [2025] KEELC 4071 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4071 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 4 OF 2023**

**JO MBOYA, J  
MAY 22, 2025**

**BETWEEN**

**ALBERT KIREMA M’MUTHAMIA ..... PLAINTIFF**

**AND**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER TIGANIA  
EAST ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR TIGANIA EAST ..... 2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein has approached the court vide Plaintiff dated 5<sup>th</sup> June 2023 and where in the Plaintiff has sought the following reliefs:
  - i. An order be issued to the 1<sup>st</sup> defendant to give to the plaintiff the balance of 32.42 acres as is reflected on their records.
  - ii. An order be issued to the 2<sup>nd</sup> defendant to cancel the title number Meru/Akaiga/1106 with an approximate area of 0.12 ha and issue a fresh title in the name of the plaintiff herein being 32.42 acres which reflects the correct position as confirmed by the records under prayer (a) above.
  - iii. Costs of the suit.
2. Upon being served with the Plaintiff and summons to enter appearance the Defendants entered appearance and thereafter filed a statement of defence dated 2<sup>nd</sup> September 2024; and wherein the defendants have disputed the claims by and on behalf of the plaintiff. Furthermore, the defendants have averred that the claims by the plaintiff are statutorily prohibited by dint of the provisions of the [Government Proceedings Act](#), Cap 40 Laws of Kenya.



3. The instant matter came up for case conference on 12<sup>th</sup> November 2024; where upon the advocates for the parties confirmed that the matter was ready for hearing. To this end, the court proceeded to and confirmed that the matter was indeed ready for hearing and thereafter proceeded to and fixed same for hearing.
4. The plaintiff's case is premised on the evidence of one witness, namely; Albert Kirema Muthamia. Same testified as PW 1.
5. It was the testimony of the witness that same is the plaintiff in respect of the instant matter. Furthermore, the witness averred that by virtue of being the plaintiff, same is therefore conversant with the facts of the case. In addition, the witness testified that same has since recorded and filed a witness statement dated 5<sup>th</sup> June 2023 and which witness statement the witness sought to adopt and rely on. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
6. The witness also referenced the list and bundle of documents dated 5<sup>th</sup> June 2023, containing 3 documents and which documents the witness sought to tender and produce before the court. However, an objection was taken to the production of document Number three [3] which was not certified in accordance with the provisions of section 80 of the Evidence Act.
7. Arising from the objection, document Number three [3] at the foot of the list and the bundle of documents were marked for identification as PMF I – 3 on behalf of the plaintiff. Nevertheless, documents Numbers 1 and 2 were produced and admitted as exhibits P1 & P2, respectively.
8. Moreover, the witness referenced the Plaint dated 5<sup>th</sup> June 2023 and the verifying affidavit of even date and thereafter sought to adopt and rely on the contents thereof. Furthermore, the witness also implored the court to grant the reliefs highlighted at the foot of the plaint.
9. On cross-examination by learned counsel for the defendants, the witness averred that same is privy to and conversant with the facts of the case. In particular, the witness testified that same bought/ purchased the suit property from one Mr. Kiambi. Besides, the witness averred that same bought/ acquired the suit property between the year[s] 1971 to 1974.
10. While still under cross-examination, the witness averred that the plot/land which same bought was plot No. 1106. Besides, the witness testified that the land in question was gathered and thereafter registered as parcel No. 1106.
11. Regarding document number 1 contained at the foot of the defendant's list and bundle of documents, the witness averred that same is a copy of the register of existing rights [RER]. Furthermore, the witness averred that the register in question relates to plot No. 1106. In addition, the witness testified that the register shows that the said plot was registered in the name of Nathaniel, who is indicated to have been the first owner.
12. It was the further testimony of the witness that same entered into a sale agreement with Mr. Kiambi. Nevertheless, the witness averred that same has neither tendered nor produced a copy of the sale agreement before the court.
13. It was the further testimony of the witness that same visited the suit property before purchasing the land. However, the witness averred that same was not accompanied by a surveyor. Moreover, the witness conceded that the acreage of the suit property was not ascertained and or confirmed before he purchased the suit property.



14. While still under cross examination, the witness averred that even though the land was not surveyed before he purchased the land, same [witness] has evidence concerning the acreage of the land. To this end, the witness referenced his Certificate of title.
15. Furthermore, the witness testified that same inspected the adjudication register before the certificates of titles was issued. In addition, the witness testified that at the time when he inspected the adjudication register there was no discrepancy as pertains to the suit property.
16. Regarding document number. 2 at the foot of the defendant's list and bundle of documents, the witness averred that same is a copy of the register of existing rights in respect of plot No. 2105. Furthermore, the witness testified that the plot in question is indicated/shown in the name of Mr. Paul Kiambi. In any event, it was the testimony of the witness that the land belonging to Mr. Paul Kiambi is not recorded to be measuring 32.42 acres.
17. It was the further testimony of the witness that same filed an objection as pertains to parcel no. 1106. However, it was the testimony of the witness that same has neither tendered nor produced any evidence to show that an objection was ever launched.
18. On re-examination, the witness averred that the size of the land which he bought was 32.42 acres. Furthermore, the witness testified that the defendant's documents refer to plot no. 1106 and that same [documents] confirm that he [witness] is the owner of the said land.
19. While still under re-examination, the witness testified that same has availed evidence of ownership on the suit property. Nevertheless, the witness averred that the discrepancy in terms of acreage works approximately in 32.42 acres.
20. With the foregoing testimony, the plaintiff's case was closed.
21. The Defendant's case is premised on the evidence of one witness, namely; Anthony David Mureithi. Same testified as DW 1.
22. It was the testimony of the witness that same is currently the district land adjudication officer Tigania East and central sub-counties within the county of Meru. To this end, the witness averred that same is therefore conversant with the facts of the case and the disputed land.
23. It was the further testimony of the witness that as pertains to the instant case, same has since recorded and filed a witness statement. In this regard, the witness referenced the witness statement dated 2<sup>nd</sup> September 2024 and thereafter sought to adopt and rely on the contents thereof. Instructively, the witness statement dated 2<sup>nd</sup> September 2024; was thereafter adopted and constituted as the evidence in chief of the witness.
24. The witness also referenced the list and bundle of documents dated 2<sup>nd</sup> September 2024, containing 2 documents and which documents the witness sought to tender and produce in court as exhibits D1 and D2. Suffice it to state that the documents under reference were thereafter admitted and constituted as exhibits on behalf of the defendants.
25. Moreover, the witness referenced the statement of defence dated 2<sup>nd</sup> September 2024 and thereafter sought to adopt and rely on the contents thereof. Suffice it to state that the Witness implored the Court to dismiss the Plaintiff's Claim.
26. On cross-examination by learned counsel for the plaintiff, the witness averred that by virtue of his office, same is privy to and conversant with the facts of the dispute. In particular, the witness testified that same has since recorded a witness statement detailing the circumstances surrounding the suit properties.



27. It was the further testimony of the witness that same has produced copies of the register of existing rights relating to the suit property as well as the adjudication records. In particular, the witness testified that there was no objection that was filed in respect of Parcel No. 1106.
28. While still under cross-examination, the witness testified that if there was any discrepancy, then the plaintiff ought and should have filed an objection in accordance with the provisions of the [Land Consolidation Act](#) or the [Land Adjudication Act](#), respectively. However, the witness reiterated that no objection was ever filed.
29. It was the further testimony of the witness that same has tendered and produced before the court documents concerning plot no's 1106 and 2105, respectively. Nevertheless, the witness clarified that if the plaintiff had discerned any discrepancy in the acreage of the suit property, then the plaintiff should have filed an objection in the manner prescribed under the Law.
30. It was the further testimony of the witness that the plaintiff herein was obligated to inspect the register. In so far as the plaintiff did not object to the process, the witness averred that the suit beforehand is misconceived. Furthermore, the witness averred that same has since tendered and produced the records relating to the size of plot no. 1106, which is registered in the name of the plaintiff.
31. With the foregoing testimony the defendant's case was closed.
32. The advocates for the parties sought for time to file and exchange written submissions. To this end, the court proceeded to and indeed circumscribed the timelines for the filing of the written submissions. The plaintiff thereafter filed written submissions dated 8<sup>th</sup> April 2025, whereas the defendant filed written submissions dated 1<sup>st</sup> April 2025. Both sets of written submissions are on record.
33. Vide the submissions dated 8<sup>th</sup> April 2025, the plaintiff has raised and canvassed two [2] salient issues; namely; that the plaintiff has placed before the court credible evidence to warrant the grant of the reliefs sought; and that the issuance of the certificate of finality by the director of land adjudication does not prohibit extension of time for purposes of lodging objection proceedings.
34. Regarding the first issue, learned counsel for the plaintiff has submitted that the plaintiff herein has tendered and produced before the court credible evidence to demonstrate that same [plaintiff] lawfully purchased the suit property. Furthermore, it has been contended that the property that the plaintiff purchased measured 32.42 acres. In this regard, it was therefore submitted that the plaintiff is entitled to the orders sought.
35. Learned counsel for the plaintiff has submitted that even though the defendants have tendered and produced a copy of the certificate of finality in respect of the suit property, the issuance of the said certificate does not bar and or prohibit a court of law from interrogating the validity of the certificate of title arising from the adjudication process.
36. Further and in any event, the counsel submitted that the provisions of section 80 of the [Land Registration Act](#) allow a court of law to revoke and or cancel any certificate of title that is found to have been improperly obtained.
37. Moreover, the counsel submitted that even the issuance of a certificate of finality does not take away the jurisdiction of the court to extend time for the lodging of objection proceedings. To this end, learned counsel cited and referenced the provisions of Section 59 of the [Interpretation and General Provisions Act](#), Cap. 2, Laws of Kenya.
38. To buttress the submissions that a court of law has the jurisdiction to extend time for lodging an objection pertaining to the adjudication process, learned counsel for the plaintiff cited and relied upon



the holding in the case of Paul Njunge Chege & another vs Mandaine Ene Ripoi Surom & 2 others (2012) eKLR.

39. Arising from the foregoing, learned counsel for the plaintiff therefore implored the court to find and hold that the plaintiff has been able to prove his case on a balance of probabilities. To this end, learned counsel posited that the plaintiff's case was/is meritorious.
40. The defendants filed written submissions dated 1<sup>st</sup> April 2025 and wherein same [defendants] have canvassed and highlighted three [3] salient issues, namely; that the suit beforehand is prohibited by the provisions of *land consolidation act* cap 283 laws of Kenya; the plaintiff did not tender and or produce any credible evidence to prove his case; and that the plea of fraud was neither established nor proven.
41. Regarding the first issue, learned counsel for the defendants has submitted that the suit property which is claimed by the plaintiff, was birthed by the adjudication process. To this end, learned counsel submitted that it was incumbent upon the plaintiff to ensure that same verified and inspected the adjudication record, so as to authenticate that his details as well as the acreage of the land were/are properly captured.
42. Furthermore, it was submitted that if the plaintiff had any question and or dispute pertaining to the acreage of the suit property, such dispute ought to have been raised and dealt with in accordance with provisions of Sections 24 (2) & 26 of the *Land Consolidation Act* Cap 283 Laws of Kenya.
43. Be that as it may, it was submitted that the plaintiff herein neither lodged nor raised any objection to the adjudication record as pertains to the acreage of the suit property. To this end, it was contended that the failure to lodge and or raise an objection pertaining to the acreage of the suit property meant that there was no discrepancy in terms of the details of ownership and acreage.
44. Moreover, it was submitted that the issues now being raised by the plaintiff as pertaining to the acreage of the suit property are prohibited by the provisions of sections 24 (2) & 26 of the *Land Consolidation Act*. Simply put, it was posited that the claims by the plaintiff are legally untenable.
45. As pertains to the second issue, learned counsel for the defendants has submitted that it is the plaintiff who contended that same had bought/purchased the suit property from Mr. Kiambi. Furthermore, it was contended that it is the plaintiff who averred that the suit property measured 32.42 acres.
46. To this end, learned counsel for the defendants submitted that the plaintiff was therefore obligated to tender and place before the court credible/ plausible evidence to show that indeed the suit property measured 32.42 acres.
47. Nevertheless, it was submitted that despite making the averments under reference, the plaintiff herein failed to tender and or produce a copy of the sale agreement to demonstrate the size of the land which was allegedly bought. Furthermore, it was submitted that the plaintiff also conceded that the land in question was not surveyed before same [plaintiff] bought the land.
48. Arising from the foregoing, learned counsel for the defendant has submitted that the plaintiff herein failed to discharge the burden/onus of proof as pertains to the claims before the court. In this regard, learned counsel invited the court to take cognizance of the provisions of sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya.
49. In respect of the third issue, learned counsel for the defendants has submitted that the law as pertains to fraud is now settled. Furthermore, learned counsel submitted that it was incumbent upon the plaintiff to plead and particularize the claim pertaining to fraud. Thereafter, it was contended that the plaintiff was obligated to place before the court plausible, credible and cogent evidence to prove the fraud



- alluded to. Moreover, learned counsel posited that proof of fraud must be done beyond the ordinary burden of balance of probabilities.
50. To buttress the submissions pertaining to proof of fraud, learned counsel for the defendants has cited and referenced various decisions including *Vijay Morjaria vs Nansigh Madhusing Darbar & another* (2000) eKLR; *Kinyanjui Kamau vs George Kamau* (2015) eKLR; *Urmilla W/O Mahendra Shah vs Barclays Bank International & another* (1979) KLR 76 and *Koinange & 13 others vs Charles Karuga Koinange* (1986) eKLR, respectively.
  51. Flowing from the foregoing submissions, learned counsel for the defendants has therefore implored the court to find and hold that the plaintiff herein has failed to discharge the burden of proof. To this end, the court has been invited to dismiss the plaintiff's suit.
  52. Having reviewed the pleadings filed by the parties; having taken into account the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed, I come to the conclusion that the determination of the dispute beforehand turns on three [3] salient issues, namely; whether the claims by the plaintiff are barred by the provisions of sections 24 (2) & 26 of the *Land Consolidation Act* Cap 283 Laws of Kenya or otherwise; whether the plaintiff has established and demonstrated his claims before the court; and whether the plea of fraud was duly proved to the requisite standard or otherwise.
  53. Regarding the first issue, namely; whether the claims by the plaintiff are barred by the provisions of sections 24 (2) & 26 of the *land consolidation act* cap 283 laws of Kenya or otherwise, it is imperative to state and observe from the onset that the suit property was birthed by the adjudication process which was undertaken in accordance with the provisions of the *Land Consolidation Act*; and the *Land Adjudication Act*, respectively.
  54. Furthermore, it is imperative to highlight that the plaintiff, who testified as PW 1 pointed out that same bought the suit property from one Mr. Kiambi, who is said to have gathered the suit property during the adjudication process. In this regard, there is no gainsaying that the plaintiff was obligated to comply with the processes underpinned by the *Land Consolidation Act* and the *Land Adjudication Act*, respectively.
  55. Pertinently, it was the obligation of the plaintiff or the plaintiff's predecessor to inspect the adjudication record/register and to ensure that the details of the owner captured in the register were correct. Furthermore, the plaintiff was also obliged to ensure that the register correctly captured the acreage/size of the land.
  56. Moreover, it is not lost on this court that the plaintiff herein conceded during cross-examination that same inspected the adjudication register before the issuance of the certificate of title. Additionally, the plaintiff also conceded that when same inspected the adjudication register, there was no discrepancy that was noted and or highlighted as pertains to the acreage of the suit property.
  57. Suffice it to underscore, that any registered owner, the plaintiff not excepted, who is affected by the adjudication register published in accordance with the provisions of section 24 (2) of the *land consolidation act* is obligated to inspect the register and to raise any objection to the register within the stipulated/statutory timelines. For good measure, the timelines are capped at 60 days from the date of publication.
  58. Given the importance of the provisions of Sections 24 (2) and 26 of the *Land Consolidation Act* [supra] it is imperative to reproduce same.
  59. To this end and for the ease of appreciation, the same sections are reproduced as hereunder.



#### Section 24. Adjudication Register

- (1) The Committee shall prepare or cause to be prepared in respect of every parcel of land shown on the Demarcation Plan a form containing the particulars set forth in either subsection (2) or subsection (3) of this section.
- (2) The form shall contain in respect of land which has been allocated to landowners—
  - (a) the name and description of the landowner, together with the number of the parcel of land as shown on the Demarcation Plan and its approximate area;
  - (b) any interest, lease, right of occupation, charge or other encumbrance affecting the land, whether by virtue of African customary law or otherwise, together with the name and description of every person entitled to the benefit thereof;
  - (c) any restriction on the power of the landowner or of any such person to deal with the land or his interest, lease, right of occupation, charge or encumbrance;
  - (d) in the case of any landowner or of any such person who is under a disability, whether by reason of age, unsoundness of mind or otherwise, the name of his guardian; and
  - (e) the date on which the form is completed.

#### Section 26. Objection to Adjudication Register

- (1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.
- (2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.
- (3) No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.
- (4) Any compensation awarded by the Adjudication Officer under this section, together with such costs as the Court may award, shall be paid by the Minister.

After the expiration of sixty days from the date of the certificate mentioned in section 25, or on the determination of all objections in accordance with section



26, of this Act, whichever shall be the later, the Adjudication Register shall be final.

60. My reading and understanding of the provisions of section 26 of the *Land Consolidation Act* [supra] drives me to the conclusion that the plaintiff herein ought and should have raised the issues pertaining to the acreage of the suit property during the objection stage. Suffice it to underscore that if the issue was raised, then the land adjudication officer would have been obligated to interrogate the claim and thereafter make a determination in accordance with the provisions of Section 26 (2) or 26 (3) of the *Land Consolidation Act*.
61. However, to the extent that the plaintiff herein did not raise and or canvass any issue and or objection, what comes to the fore is to the effect that the plaintiff was indeed satisfied with the contents of the adjudication register in the manner published by the land adjudication officer.
62. Moreover, it is imperative to highlight that the adjudication process terminates and or is terminated upon the issuance of the certificate of finality. In this case, DW 1 posited that the certificate of finality was issued in the year 2012. Following the issuance of a certificate of finality, it then means that the adjudication process was concluded and terminated and hence no further action can be undertaken/ administered by the land adjudication department or at all.
63. Bearing the foregoing in mind, I come to the conclusion that the reliefs that have been sought by the plaintiff as against the land adjudication officer [1<sup>st</sup> defendant] are therefore prohibited by the provisions of sections 26 of the *Land Consolidation Act*. Simply put, the 1<sup>st</sup> defendant cannot by any stretch of imagination, be ordered to undertake a process that is statutorily prohibited. For good measure, no such order can issue without undermining the express provisions of the *Land Consolidation Act* as well as the *Land Adjudication Act*.
64. In respect of the second issue, namely; whether the plaintiff has proved his claim before the court, it is important to recall and reiterate that it is the plaintiff who filed the instant suit claiming that the suit property measured 32.42 acres and not 0.12 ha [0.296 acres]. To this end, there is no gainsaying that the plaintiff bore the burden of placing before the court plausible, credible and cogent evidence to demonstrate that the suit property which same [plaintiff] bought, indeed measured 32.42 acres at the onset.
65. To start with, the plaintiff's case is premised on the evidence of one witness, namely; the plaintiff himself. Furthermore, it is worthy to recall that the plaintiff herein, who testified as PW 1 only produced 2 documents in support of his case. The documents which were produced by the plaintiff included a copy of the certificate of title of the suit property issued on the 5<sup>th</sup> of December 2017; and a copy of the adjudication register in respect of the suit property.
66. It is instructive to observe that the copy of the adjudication register that was tendered and or produced by the plaintiff did not reflect that the suit property ever measured 32.42 acres or at all. Furthermore, it is also worthy highlighting that the plaintiff herein was indeed issued with a certificate of title on the 5<sup>th</sup> of December 2017 and which title the plaintiff took without any protest and or reservation.
67. Suffice it to state that if the plaintiff had any reservation as pertains to the acreage of the suit property, such reservation ought to have been ventilated at the time when the certificate of title was issued to and in favour of the plaintiff. Clearly, the acceptance of the certificate of title on the 5<sup>th</sup> December 2017, when same was issued, albeit without protest denotes that the plaintiff was at peace with the acreage reflected thereon.



68. Back to the issue beforehand. It is settled law that the burden of proof lies at the doorstep of the claimant. To this end, the claimant, namely; the plaintiff herein, is obligated to place before the court credible evidence to establish and demonstrate his/her case. The standard of proof is on a balance of probabilities.
69. What constitutes a balance of probabilities was highlighted in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] Eklr, where the Court observed thus:

The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

70. The obligation of the claimant to prove his/her own case and the legal implication[s] of the burden of proof was also enunciated by the Court of Appeal in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi (2014) eKLR where the court stated thus;

Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1<sup>st</sup> respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred, was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

71. Moreover, the Supreme Court of Kenya [the apex Court] has also had occasion to elaborate on the incidence of burden and standard of proof. In the case of Gwer & 5 others v Kenya Medical Research



Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) the court stated as hereunder;

Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “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.”

50. This Court in *Raila Odinga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.

72. Did the plaintiff tender credible evidence to demonstrate that the suit property measured 32.42 acres in the manner alleged? The answer to this question is discernible from the testimony of the plaintiff while under cross-examination by learned counsel for the defendants.

73. The plaintiff who testified as PW 1 stated thus;

“I entered into a sale agreement at the time of purchasing the land. The sale agreement has not been availed to the court today. The sale agreement is not before the court. I visited the land before the purchase thereof. I was not accompanied by a surveyor. The acreage was not ascertained.

74. While still under cross examination, PW 1 stated as hereunder;

“I inspected the register before the certificates of titles were issued. I also do wish to state that there was no discrepancy. Referred to document no. 2 at the foot of the defendant’s list of documents, the witness averred that the document was the adjudication register in respect of plot No. 2105. The plot is registered in the name of Paul Kiambi. The land of Paul Kiambi does not refer to 32.42 acres”

75. It is the plaintiff who had contended that same bought the suit property from Mr. Kiambi. Furthermore, it is the plaintiff who posited that the land he bought from Mr. Kiambi measured 32.42 acres. To this end, the plaintiff therefore bore the burden of placing before the court a copy of the sale agreement to demonstrate the size/acreage of the land which was being sold. Sadly, the plaintiff failed to tender and or produce the sale agreement and no reason was offered for the failure.

76. Other than the foregoing, the only other way to demonstrate that the suit property previously measured 32.42 acres was to tender and produce a surveyor’s report [if any] that was undertaken prior



to the purchase of the suit property. However, it is not lost on me that the plaintiff herein conceded that the land that same was buying was not surveyed before execution of [sic] the sale agreement.

77. In the premises, it is impossible to understand the basis upon which the plaintiff herein claims that the suit property previously measured 32.42 acres. Nevertheless, it is worth remembering that a court of law does not act on the basis of speculation, imagination, sympathy and or hypothesis.
78. On the contrary, a court of law is guided by plausible and concrete evidence. Absent evidence, a court of law is enjoined to dismiss the claimant's plea.
79. Regarding the third issue, namely; whether the plaintiff was able to prove the plea of fraud, it is instructive to highlight that fraud is quasi-criminal in nature and hence any person, the plaintiff not excepted, seeking to prove fraud must tender credible evidence to that effect. Furthermore, there is no gainsaying that the standard of proving fraud is slightly beyond the balance of probabilities.
80. The law as it pertains to pleading and proving fraud has been crystallized in a number of decisions. Recently, the Court of Appeal in the case of *Doshi v Chemutut & 7 others* (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment) re-affirmed the position in the following manner;

Apart from the omission to plead fraud, nor particulars of fraud against the named defendants, Mr. & Mrs. Walker, were provided. In the often-cited decision of this Court in the case of *Vijay Morjaria v Nansingh Madhusingh Dabar & Another* [2000] eKLR, Tunoi, JA. 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 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

42. In the same vein, the Court in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR reiterated that: "It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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..."
81. Without belabouring the point, it was incumbent upon the plaintiff to demonstrate how the 1<sup>st</sup> defendant was fraudulent in [sic] reducing the acreage of the suit property in the manner adverted to at the foot of the plaint. Suffice it to state that it was not enough to supply particulars of fraud. The plaintiff bore the burden of strictly and specifically proving the particulars. For coherence, proof of such particulars was not to be assumed.
82. To my mind, the plaintiff herein did not prove the particulars of fraud that were highlighted in the body of the plaint. It was not enough to throw the omnibus/generalized allegations on the face of the court and thereafter imagine that same would suffice.
83. In the circumstances, my answer to issue number three [3] is to the effect that the plaintiff did not establish and or prove fraud.



**Final Disposition:**

84. Flowing from the analysis [details highlighted] in the body of the judgment, it must have become crystal clear that the plaintiff herein did not prove his case. On the contrary, it is apparent that the plaintiff's case is devoid and bereft of merits.
85. In the premises, the final orders that commend themselves to the court are as hereunder;
- i. The Plaintiff's suit be and is hereby dismissed.
  - ii. Costs of the suit be and are hereby awarded to the Defendants.
  - iii. The Costs in terms of clause II shall be agreed upon; and in default same to be taxed in the conventional manner.
86. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**OGUTTU MBOYA, FCIArb, CPM [MTI]**

**JUDGE.**

In the presence of

Mutuma– Court Assistant

Mr. Wambua holding brief for Miss Maina for the Plaintiff

Miss Miranda [Senior Litigation Counsel] for the Defendants

