



Archer Dramond Morgan Limited v Supermind Development Self Help Group (A Registered Self Help Group through its Chairman, Secretary and Treasurer Respectively Namely Francis Kimani, Smith Muturi and Paul Muchiri) & 2 others; Supermind Development Self Help Group (A Registered Self Help Group through its Chairman, Secretary and Treasurer Respectively, Namely Francis Kimani, Smith Muturi and Paul Muchiri) (Plaintiff to the Counterclaim); Archer Dramond Morgan Limited (Defendant to the Counterclaim) (Environment and Land Case Civil Suit 149 of 2010) [2025] KEELC 6135 (KLR) (23 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT 149 OF 2010
AY KOROSS, J
SEPTEMBER 23, 2025**

BETWEEN

ARCHER DRAMOND MORGAN LIMITED PLAINTIFF

AND

SUPERMIND DEVELOPMENT SELF HELP GROUP (A REGISTERED SELF HELP GROUP THROUGH ITS CHAIRMAN, SECRETARY AND TREASURER RESPECTIVELY NAMELY FRANCIS KIMANI, SMITH MUTURI AND PAUL MUCHIRI) 1ST DEFENDANT

MATUMAINI VENTURES LIMITED 2ND DEFENDANT

KENYA COMMERCIAL BANK LIMITED 3RD DEFENDANT

AND

SUPERMIND DEVELOPMENT SELF HELP GROUP (A REGISTERED SELF HELP GROUP THROUGH ITS CHAIRMAN, SECRETARY AND TREASURER RESPECTIVELY, NAMELY FRANCIS KIMANI, SMITH MUTURI AND PAUL MUCHIRI) PLAINTIFF TO THE COUNTERCLAIM

AND

ARCHER DRAMOND MORGAN LIMITED DEFENDANT TO THE COUNTERCLAIM



JUDGMENT

Background

1. This suit was initiated by a plaint dated 27/07/2010 by the plaintiff against the defendants. Subsequently, the plaint was amended by an amended plaint dated 28/11/2018 and further amended by a plaint dated 27/07/2022.
2. It was the plaintiff's case that it is a property development company, and in pursuit of its investment, by an agreement for sale dated 15/10/2005, it acquired the whole of L.R. No. 12867/17 (mother parcel) from the 2nd defendant, who was an agent of the 3rd defendant. However, due to prevailing circumstances, the purchase was later reduced to 2 acres (the disputed portion), which it took immediate possession of and has since erected a permanent office block, site house, and stores thereon. It asserted it had always maintained continuous, peaceful, quiet, and uninterrupted occupation.
3. It stated that the 2nd defendant was in breach of the sale agreement as it also sold various portions of the mother parcel to 3rd parties, leading to court proceedings by the plaintiff, namely Nairobi HCCC No.30 of 2006 against the 2nd and 3rd defendants and a 3rd party. However, the suit was settled through two consent orders, dated 25/08/2005 and 28/08/2006, which were adopted as court judgments.
4. According to it, one of the terms of the consent was that the 2nd defendant was ordered to facilitate and effect the subdivision and transfer of the disputed portion within 30 days in accordance with the agreement for sale dated 28/08/2006. Despite this, the 2nd defendant never complied. Furthermore, it was a further term of one of the consents that the 2nd defendant undertakes to indemnify the 3rd defendant against any claims over the mother parcel.
5. Nevertheless, sometimes in July 2010, the 1st defendant invaded the disputed portion and dumped building materials upon it, claiming entitlement to it. It was argued that this demonstrated the 1st and 2nd defendants had deceitfully entered into an agreement for sale over the mother parcel, dated 24/05/2005, with the approval of the 3rd defendant. To the plaintiff, this agreement was illegal, illegitimate, null, in contempt of court, and void. Accordingly, fraud was alleged and specified against the 2nd and 3rd defendants.
6. It stated that, as it currently stands, the 1st defendant has received approval to subdivide the mother parcel into 82 plots, disregarding the disputed portion, and has threatened to demolish its developments therein. It also averred that it has suffered loss and damage, claiming that the market value of the disputed portion is kshs. 70,000,000/= and it has a lost value of kshs. 2,050,597.50/=.
7. It also asserted that the 1st defendant had, in Nairobi ELC No. 1583 of 2014 (OS), sought to compel the 2nd and 3rd defendants to transfer the mother parcel to it. However, this was dismissed by the court, leading to an appeal in Nairobi Civil Appeal No. 251 of 2016. It averred that the 1st and 3rd defendants compromised the appeal by entering into a consent, thereby paving the way for the transfer of the mother parcel to the 1st defendant, subject to indemnifications. Accordingly, it sought the following reliefs:
 - a. A declaration that the plaintiff is entitled to ownership and possession of 2 acres in the frontal portion of L.R. No. 2867/17 as identified pursuant to the agreement dated 23/08/06 and that any purported sale or transfer of the same to the 1st defendant by the 2nd defendant to the extent



that such sale includes the plaintiff's 2-acre portion is wrongful, illegal, null and void and in violation of the orders issued in Nairobi HCCC NO.30 OF 2006 and in contempt thereof.

- b. An Order of cancellation of any title issued in favour of the 1st defendant or its members concerning L.R. No. 12867/17 or by whatever of its other subsequent descriptions as shall be found to be lying on the plaintiff's said 2-acre portion in L.R. No. 2867/17 and the same be registered in the name of the plaintiff.
 - c. General damages for trespass as against the 1st defendant and for fraud as against the 2nd defendant and 3rd defendants and an order of permanent injunction restraining the 1st defendant whether by its agents, members, servants, employees, officers, work persons, officials or otherwise whomsoever in its name from erecting or constructing a fence or any structures whatsoever, on the plaintiff's property being two acres of demarcated portion of L.R. No. 2867/17 or otherwise howsoever, from barricading and blockading the plaintiff from accessing its office block, stores and site house erected thereon, from depositing and offloading of any construction materials therein, from demolishing the plaintiff's said buildings, from entering, remaining, or otherwise howsoever from trespassing into the said premises or from disposing, letting, charging or mortgaging or dealing with the said property in any manner adverse to the plaintiff's interest whatsoever.
 - d. In the alternative, judgment for the sum of kshs. 72,050,597.50 as against the 2nd and 3rd defendants jointly and severally on account of the value of the 2-acre portion out of the suit premises and the cost of the improvements thereon.
 - e. Costs of the suit and including punitive costs against the 2nd and 3rd defendants.
 - f. Interest on the sums found due above.
8. In response, and except for the 2nd defendant, who did not participate in the proceedings, the 1st and 3rd defendants filed their respective documents. Due to various amendments to the plaint, the 1st defendant submitted its defence and counterclaim on 31/10/2017 and amended it on 26/03/2019, culminating in the further amended defence and counterclaim dated 21/12/2021. The defence comprised denials and required the plaintiff to prove its case.
9. Additionally, it asserted that it was the lawful owner of the mother parcel measuring 8.094 ha, having purchased it through an agreement for sale dated 24/05/2005 for a consideration of Kshs. 13,800,000/- from the 3rd defendant via the 2nd defendant, who acted as its agent. Therefore, it was unencumbered and not available for sale to the plaintiff when it entered into an agreement for sale on 15/10/2005, as that agreement was valid and had not been rescinded. According to it, the latter agreement was fraudulent, illegal, procedurally flawed, corrupt, and tainted with misrepresentation.
10. According to it, the plaintiff forcefully entered the mother parcel and unlawfully occupied the disputed portion, which it considered trespass. Furthermore, the mother parcel was transferred to it on 3/04/2006, and it has since subdivided it among its members, who are in possession, except for the disputed portion. It urged the court to dismiss the plaintiff's case.
11. Turning to the counterclaim, it stated that the plaintiff is a trespasser, as it was the lawful owner of the mother parcel, and that through the act of trespass, it had suffered loss and damage. It also claimed entitlement to mesne profits. In the end, it sought the following orders from this court: -
- a. A declaration does issue that the 1st defendant is the rightful, legal, or equitable owner of a parcel of land situated in Machakos District containing 8.094 hectares by measurement, known as L.R. number 12867/17.



- b. An order restraining the plaintiff from evicting the 1st defendant, selling, dealing with, trespassing, alienating, damaging, constructing or destroying and or howsoever interfering with the 2 acres comprised in the parcel of land situated in Machakos District containing by measurement 8.094 hectares known as L. R. number 12867/17.
 - c. Damages/Mesne profits.
 - d. Costs.
12. As for the 3rd defendant, it filed its statement of defence dated 12/10/2022. It chiefly contended it was a stranger to the averments contained in the plaint. Additionally, it maintained it was not privy to the agreement between the plaintiff and the 2nd defendant and asserted it never instructed the 2nd defendant to dispose of properties on its behalf.
13. It asserted that the 2nd defendant purchased the mother parcel and other properties from it according to a sale agreement dated 31/05/2004, with completion documents duly surrendered through the 2nd defendant's advocates, Ms. Gachiri Kariuki Advocates. It was not a party to any subsequent contracts between the 2nd defendant and other parties. It invited the court to scrutinise these agreements, particularly those between the plaintiff and the 2nd defendant. Therefore, it stated that in the circumstances, it could not be guilty of fraud, deceit, duping, or misrepresentation as alleged, and any loss could only be attributed to the 2nd defendant.
14. It averred that there was another dispute before this court over the mother parcel, namely Machakos ELC No. 58 of 2008, by the 1st defendant against the 2nd defendant and other 3rd parties. It admitted the assertions made by the plaintiff in Nairobi ELC No. 1583 of 2014 (OS) and Nairobi Civil Appeal No. 251 of 2016, but maintained that it was never guilty of connivance in the proceedings before the appellate court.
15. It was of the view that no reasonable cause of action had been disclosed against it, and the reliefs sought against it were misconceived, and stated that it did not have a legally enforceable interest in the suit property. It urged the court to dismiss the plaintiff's suit with costs.

Hearing and evidence

16. The matter eventually proceeded for a hearing on 18/02/2005. The plaintiff's sole witness, John Roko Waithaka, testified as PW1, and reliance was placed on his witness statements, oral testimony, and the documents he produced, which were marked as Pex1-22.
17. In evidence in chief, PW1's testimony was a reiteration of the averments contained in the further amended plaint, and it is unnecessary to repeat them. Furthermore, some of the documents produced by the plaintiff reveal the following: the agreement for sale (Pex . 1) dated 15/10/2005 was between the plaintiff and the 2nd defendant concerning several parcels of land, and it acknowledges the existence of prior agreements for sale between the 2nd defendant and 3rd parties. Pex. 15 shows that an agreement for sale was made between the 1st and 2nd defendants dated 24/05/2005.
18. Moreover, consents were entered into between the plaintiff and the 2nd and 3rd defendants on different dates, 25/08/2005 and 28/08/2006, in Nairobi HCCC No. 30 of 2006 (Pex. 5 & 6). These were adopted as a judgment of the court, with a decree issued thereon on 16/08/2010 (Pex.7). One of the terms included the agreement for sale dated 23/08/2006 (Pex. 4). Additionally, entry no. 5 of the certificate of title indicates that the mother parcel was registered in the 1st defendant's name on 2/04/2006 (Pex. 16). Lastly, a consent was entered into between the 1st and 3rd defendants and was adopted by the Court of Appeal in Nairobi CA No. 251 of 2016 (Pex. 20).



19. On cross-examination, PW1 informed the court that he did not have documents demonstrating that the 2nd defendant was an agent of the 3rd defendant. Furthermore, the 3rd defendant was never a party to the 2 agreements between the plaintiff and the 2nd defendant, and it never consented to the dealings between them but maintained that the 3rd defendant could not distance itself from the agreements as it participated in the consents in Nairobi HCCC No. 30 of 2006 (Pex. 5 & 6) whereby the disputed portion was to be excised out of the mother parcel.
20. He testified that although the mother parcel was in the name of the 3rd defendant, the 2nd defendant was to subdivide and transfer the disputed portion to it. However, he struggled to explain why, instead of having the deputy registrar of the court in Nairobi, HCCC No. 30 of 2006, execute the transfer instruments as ordered in Pex. 7, the plaintiff filed this suit. Furthermore, he admitted that the consent in Nairobi HCCC No. 30 of 2006 relinquished all claims against the 3rd defendant.
21. He further informed the court that there was no agreement between the plaintiff and the 1st defendant, and the plaintiff had not tendered an official search of the mother parcel to the court to substantiate its allegations.
22. On the closure of the plaintiff's case, the 1st defendant's witness, Smith Muturi, took the stand and testified as DW1. He based his testimony on his witness statement, oral evidence, and documents produced as Dex. 1-5. He also reiterated the claims in the further amended defence and counterclaim, and it is unnecessary to repeat them.
23. The documents he produced included an agreement for sale between the 1st and 2nd defendants (see Pex. 15), an acknowledgement from the firm of M/s. Gachiri Kariuki & Kiai Advocates that it had received kshs. 320,000/- towards stamp duty and another sum of Kshs. 800,000/- dated 22/03/2006, and another letter from this same law firm dated 22/03/2006 confirming payment of the full purchase price of kshs. 13,800,000/=. Additionally, there was a letter from Ms. Muriu Mungai & Co. Advocates, handing over the original grant of the mother parcel to the 1st defendant, dated September 2006, a payment of kshs. 41,000/- for plot subdivision to Mavoko Municipal Council, and an approval thereof dated 4/04/2006. The court observed that some of the produced documents were not legible, and PW1 had previously produced some.
24. On cross-examination, DW1 admitted that the witness statement was signed on his behalf with his consent, but he did not produce this consent. He stated that the 1st defendant acquired the mother parcel from the 2nd defendant with instructions from the 3rd defendant, who was its registered owner. He stated the 1st defendant only became aware of the plaintiff's presence in the mother parcel in 2006 during the 1st defendant's subdivision exercise when it noticed a container placed there, which only occupied a small space and not the entire disputed portion. Despite this, other structures were erected by the plaintiff in 2010.
25. He stated that the 2nd defendant affirmed to it that it had not sold the suit property to any party and that the consent in Nairobi HCCC No. 30 of 2006 took place after the 1st defendant had paid the remaining balance of the purchase price. He informed the court that the 1st defendant had learned of the consent in this particular case but abandoned its application for joinder as the 2nd defendant assured it that the transactions between them were proceeding as planned.
26. Additionally, it was his testimony that the transfer recorded in entry no. 5 on the certificate of title was not considered a forgery, but rather, it did not follow proper procedures. He informed the court that the transfer process to the 1st defendant was still ongoing, and the mother parcel remained registered in the name of the 3rd defendant.



27. When he was shown the agreement for sale between the 2nd and 3rd defendants, he stated that the 2nd defendant was never an agent of the 3rd defendant. He told the court that the 1st defendant did not have an agreement with the 3rd defendant, and the basis of the transfer of the certificate of title by the 3rd defendant to the 1st defendant was the consent in Nairobi CA No. 251 of 2016 (Pex. 20).
28. The 3rd witness was Shelmith Wangeci Mulei (DW2), who was the 3rd defendant's witness, and her evidence consisted of her written statement, oral testimony, and documents produced.
29. It was her testimony that in an agreement for sale dated 31/04/2004, the 3rd defendant sold several properties, including the mother parcel, to the 2nd defendant for a consideration of kshs. 110,268,000/-. A 10% deposit of the purchase price, amounting to Kshs. 11,026,800/- was paid, and the balance was fully settled through M/s. Gachiri Kariuki & Kiai Advocates. Subsequently, transfers were executed in favour of the 2nd defendant. However, in light of the consent in Nairobi CA No. 251 of 2016 (Pex. 20), transfers have been executed in the name of the 1st defendant, subject to indemnification.
30. On cross-examination, she stated she was aware of the various consents filed in court, and the 3rd defendant participated in the consent in Nairobi HCCC No. 30 of 2006 because the 2nd defendant informed it that it had sold the mother parcel to the plaintiff. She told the court that, as it currently stands, the 3rd defendant is the registered owner of the mother parcel. Since the 2nd defendant did not call any witnesses, its case was marked as closed.
31. Noteworthy after the conclusion of the hearing, the plaintiff filed a notice of motion dated 20/03/2025 seeking injunctive relief, but this court declined to grant it and reserved it for further directions on 8/05/2025. However, since the matter was ready for reservation for judgment and the plaintiff's counsel was a no-show, this court was of the view that a final judgment would settle all the issues in dispute once and for all, as this matter has been in court for 15 years. As it stands, this motion has been overtaken by events.

Submissions.

32. Despite clear directions from the court, only written submissions from the law firms of Mss. A. I. Onyango & Co. Advocates for the 1st defendant, dated 14/03/2025, and J.K. Kibicho & Co. Advocates for the 3rd defendant, dated 5/06/2025, were received. The court is grateful to the counsels for their invigorating submissions and will consider them in its analysis and determination. If the plaintiff files its written submissions, the court will regard them as having been filed out of time since, at the time of writing this judgment, none have been filed.

Issues for determination, Analysis and Determination

33. Having carefully reviewed the pleadings filed, considered the documentary and oral evidence of the witnesses who testified, along with the 1st and 3rd defendants' written submissions and the plaintiff's statement of agreed issues, this court considers that 4 issues arise for determination: -
 - a. Whether there was privity of contract between the various parties.
 - b. Whether the particulars of fraud were to be addressed in Nairobi HCCC No. 30 of 2006, and if not, whether the plaintiff proved the particulars of fraud to the required standards.
 - c. Was there equality of equities, and if so, which one prevails?
 - d. Whether the plaintiff is a trespasser.And they are hereby addressed sequentially.



Whether there was privity of contract between the various parties.

34. It is now a well-established principle of law that contracts are only effective and enforceable between the parties involved, a principle reflected in the doctrine of “privity of contract,” which is defined in Black’s Law Dictionary, 11th Edition, page 1453, as follows:

“The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.”

35. In this case, several contracts were submitted before this court, and the first group consisted of agreements for sale. The second group included consents entered into by parties during various court proceedings. Regarding the first group, it is now established law that there are exceptions to privity of contract, and this has been clarified by case law and textbooks in the following manner:

In *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] KECA 713 (KLR), when considering whether a beneficiary of a trust contract could sue, the court stated the following: -

“This means that no one can enforce another’s promise unless he has been a party to the contract. As a result, a stranger to a contract cannot sue on it, even if the contract was made for his benefit. Such is the general rule on privity of contract. This rule is however subject to some exceptions; one of which arises in cases of trust.”

Furthermore, in *Karuri Civil Engineering (K) Limited v Equity Bank Limited* [2019] KECA 866 (KLR), the Court of Appeal acknowledged that there are numerous exceptions to privity of contract when it upheld: -

“31. In *Aineah Likuyani Njirah vs. Aga Khan Health Services* [2013] eKLR, this Court expressed that there are now many exceptions to the privity rule, both at common law and in the statute books. One of the exceptions is the need to grant third parties the right to enforce a contract made for their benefit. In our considered view, the doctrine of privity of contract cannot be used to oust responsibility to a third party beneficiary of a performance bond.”

Additionally, in the book by Smyth, Claire-Michelle, and Marcus Gatto, *Contract Law: A Comparison of Civil Law and Common Law Jurisdictions*, Business Expert Press, 2018, at page 162, the authors highlighted that agencies and 3rd parties fell within the exception paradigm by explaining as follows: -

“However, on occasion, contracts may be concluded which involve persons other than those who are present at the bargaining table. Two such instances examined here are those of agency and third-party beneficiaries. Agency pertains to situations where one acts on behalf of another to conclude a contract with a party. Agents themselves do not undertake any obligations or gain any benefit in their own name from the contract which they conclude. Contracts involving third parties comprise a distinct situation, whereby someone other than a party to a contract acquires a right or benefit therein.”

36. This book further, on pages 165-166, recognises that there are instances where a 3rd party to a contract may be liable, such as in cases of assignments, by stating: -

“There are however a few exceptions where a third party will be liable in contract... Assignment provides one such exemption, whereby an individual (an assignor) can assign



to another (the assignee) their rights or liabilities under a contract. The person to whom a party assigns their rights replaces, for all intents and purposes, the assignor. Certain types of covenants (promises) relating to land are enforceable against third parties.”

37. What emerges from this analysis of jurisprudence is that exceptions to privity of contract are not exhaustive, and each case must be examined through the lens of its unique circumstances. Regarding this case, both the plaintiff and the 1st defendant argued that the 3rd defendant was an agent in the contracts dated 15/10/2005 (between the plaintiff and the 2nd defendant), 23/08/2006 (between the plaintiff and the 2nd defendant), and 24/05/2005 (between the 1st and 2nd defendants).
38. In their submissions, the 3rd defendant’s counsel, who argued on the issue of agency, maintained that the question of agency, nominee agreement, co-vendor, or a principal seller of the mother parcel or disputed parcel could not arise, as the plaintiff never presented evidence of direct payments for the mother parcel to the 3rd defendant. To support this, counsel relied on a decision by this court in *Rukaria & 15 others v Matumaini Ventures Limited & 6 others* (Environment and Land Case Civil Suit 58 of 2008) [2023] KEELC 20346 (KLR) (28 September 2023) (Judgment) Neutral citation: [2023] KEELC 20346 (KLR), which involved the 2nd and 3rd defendants and other parties, and concluded that no agency relationship existed between them.
39. In this case, the agreement dated 31/05/2004 was between the vendor (3rd defendant) and the 2nd defendant as the “the purchaser and or nominee which expression shall where the context so admits include its successor in title assigns and/or nominees.” When considering these terms in *Rukaria* (Supra), this court concluded as follows: -

“In the circumstances of this case, there was no express agreement between the 2nd Defendant and the Plaintiffs. The 2nd Defendant was not a party to the agreement between the Plaintiffs and the 1st Defendant and there was no agency or nominee agreement between the 1st and 2nd Defendants. Be that as it may, this court is enjoined to ascertain from the conduct of the parties herein, the pleadings and communication between the parties on the performance of the terms of the contract signed between themselves.”
40. This court concurs with *Rukaria* (Supra) that the agreements dated 31/05/2004, 15/10/2005, 23/08/2006, and 24/05/2005 never explicitly designated the 2nd defendant as an agent of the 3rd defendant. There was no implied conduct indicating that they were to act as such. Additionally, there is no evidence that money was exchanged between the plaintiff and the 3rd defendant as consideration. Based on the evidence, the only contact between the 3rd defendant, the plaintiff, and the 1st defendant was through court proceedings. In conclusion, regarding this first group of contracts, this court determines that the 2nd defendant was never an agent of the 3rd defendant.
41. Reverting to the 2nd group of contracts, Black’s Law Dictionary, 11th Edition, page 1007 defines a consent judgment as “a contract acknowledged in open court and ordered to be recorded, but binds the parties as fully as other judgments.” In this case, several court proceedings took place between the parties, resulting in various consents that the courts adopted.
42. There were consents dated 25/08/2005 and 28/08/2006 in Nairobi HCCC No.30 of 2006 by the plaintiff and the 2nd and 3rd defendants, and another between the 1st and 2nd defendants in Nairobi CA No. 251 of 2016. These proceedings acknowledged the doctrine of privity of contract and proceeded in the parallel manner that they did. It therefore follows that, to the extent of the consents, there was privity of contract between the 3rd defendant and various parties herein.



Whether the particulars of fraud were to be addressed in Nairobi HCCC No. 30 of 2006, and if not, whether the plaintiff proved the particulars of fraud to the required standards.

43. In jurisprudence, it is well established that fraudulent conduct must be specifically alleged and thoroughly proved to a standard higher than a balance of probabilities but below proof beyond a reasonable doubt. It is not permissible to rely on an inference of fraud from the facts alone. See the Court of Appeal decision of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar* (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment).
44. The allegations of fraud require thorough evidence to meet the proof threshold. In the case of *Koinange and 13 others – vs - Koinange* [1986] KLR 23, which has been cited in several court decisions, the court reaffirmed the fundamental principle of the law of evidence—he who alleges must prove. In the case of *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314 and another [1979] KLR, it was determined that fraud relates primarily to an individual’s state of mind and intentions, rather than the results of his/her actions. Additionally, fraud is defined by Black’s Law Dictionary, 11th Edn, at p. 802, as follows: -
- “ 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when conduct is willful) it maybe a crime.)- Also termed intentional fraud...
 2. A reckless misrepresentation made without justified belief in its truth to induce another to act.
 3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment. Additional elements in a claim of fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.
 4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties’ relative positions and resulting in an unconscionable bargain.”
45. The plaintiff pleaded and specified fraud against all the defendants as follows: transferring the mother parcel to the 1st defendant, concealing information, misrepresentation, and deceit in the consent dated 25/08/2005 in Nairobi HCCC No.30 of 2006, failing to comply with court orders in Nairobi HCCC No.30 of 2006, and entering a void, illegal, or fake entry no.5 in the certificate of title.
46. Having considered the particulars of the fraud and the pieces of evidence presented before this court, this court concludes that the allegations of fraud cannot stand for several reasons. Firstly, and bearing in mind the definition of fraud, failure to comply with a court order does not constitute fraud, but rather contempt of court. In any case, the decree, which emanated from Nairobi HCCC No.30 of 2006 and was issued on 23/08/2010, authorised the deputy registrar to execute instruments of subdivision and transfer.
47. Secondly, the allegations of fraud, whose burden to prove lay with the plaintiff, were not substantiated. Regarding the accusations concerning entry no. 5 of the certificate of title, DW1 testified that this entry, which registered the 1st defendant as the owner of the mother parcel, was cancelled, and this was not contested. Furthermore, DW1’s assertion is supported by the decision of Nairobi CA No. 251 of 2016 dated 7/06/2021, which directed the 3rd defendant to transfer the mother parcel to the 1st defendant.



In other words, the claim over entry no. 5 dated 3/04/2005 has been overtaken by events, and a transfer to the 1st defendant is yet to take place.

48. Regarding the other aspects of fraud, the plaintiff alleges misconduct and claims it was shortchanged in the consent dated 25/08/2005 in Nairobi HCCC No.30 of 2006. In such types of contracts, it is well established law that a consent judgment or order can only be rescinded on the same grounds that would justify the rescission of a contract, such as fraud, mistake, or misrepresentation, as affirmed in the Court of Appeal decision of Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] KEHC 11 (KLR).
49. In this case, the plaintiff never made any effort to set aside these consents on the grounds of fraud as specified here. Instead of executing the decree, it promptly approached this court. In the court's view, the allegations of fraud relating to the consent dated 25/08/2005 in Nairobi HCCC No.30 of 2006 are an abuse of process, as they should have been raised in the original case where they were recorded. It is also likely that the decree issued by Nairobi HCCC No.30 of 2006 is now stale. In conclusion, this court finds that the claim of fraud fails.

Was there equality of equities, and if so, which one prevails?

50. This issue has been a contentious matter between the plaintiff and the 1st defendant and must be addressed. However, unexpectedly, neither party has considered the principle of equity that states: where there are equal equities, the first in time prevails. This principle fundamentally concerns the issue of priorities, whereby, in disputes over a property with competing interests, the earliest claim takes precedence.
51. In this case, both the plaintiff and the 1st defendant hold two equitable interests over the mother parcel and/or the disputed portion through various sale agreements they individually entered into with the 2nd defendant, who did not possess any proprietary interest over them. Both parties, who are not the registered owners of the mother parcel and/or the disputed portion, share similar equitable interests, as neither of them has a legal interest by way of registration. This principle of law is discussed in Gitwany Investment Limited v Tajmal Limited & 3 Others [2006] KEHC 2519 (KLR) as follows: -

“46. My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997 (unreported):- is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs J.B. Martin Glass Industries and 3 others C.A. 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel.”



52. This court must not hasten to add that the plaintiff was aware of the prior existing agreements between the 2nd defendant and other parties, including the 1st defendant herein, as evidenced by the sale agreement dated 15/10/2005, which explicitly states in part.

“14. The vendor shall upon execution of this agreement avail copies of all agreements for sale entered into with the original purchasers to the current purchaser advocates with detailed account of all monies paid to the vendor by the said purchasers.”

53. Accordingly, having scrutinised the various sale agreements, this court finds that the sale agreement between the 1st and 2nd defendants, dated 24/05/2005, was the first in time and takes precedence over those by the plaintiff and 2nd defendant on 15/10/2005 and 23/08/2006.

Whether the plaintiff is a trespasser.

54. Turning now to this issue, in the text of Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923, trespass to land is defined as follows: -

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.”

Page 927 of the same text addresses who may sue for trespass, and it states as follows: -

“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

55. The book of Blackstone, William. Commentaries on the Laws of England: Book III: of Private Wrongs, edited by Thomas P. Gallanis, Oxford University Press, 2016, pages 141-142, discusses the test of possession by the owner in the following words: -

“One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.”

56. The common thread running through the definition of trespass as explained by these eminent scholars is that ownership is not a prerequisite for establishing such a claim. Instead, the land owner must be in possession through entry, and there must be an unjustifiable entry into land already in possession of another.

57. It emerged from undisputed evidence that the plaintiff has erected structures on the disputed portion while the 1st defendant had fenced off the entire mother parcel, including the disputed area. Having considered the agreements between the plaintiff and the 2nd defendant dated 15/10/2005 and 23/08/2006, specifically clauses 5 and 6, the plaintiff was to have vacant possession upon completion, which has not yet occurred. Therefore, its entry and possession of the disputed portion were without permission and illegal, and it cannot benefit from such illegality. This court thus finds.

58. It is well established that trespass is actionable per se without proof of actual damage. Also, the court cannot award both mesne profits and damages for trespass, but only one of them, and mesne profits



must be pleaded and proved. In this case, considering the size and location of the disputed area, the court hereby awards the 1st defendant Kshs. 2,000,000/= for general damages.

59. In conclusion, based on the reasons and findings delineated above, this court determines that the plaintiff has not demonstrated its case to the requisite standard, whereas the 1st defendant has succeeded. The court dismisses the plaintiff's claim, with costs awarded to the 1st and 3rd defendants, and allows the counterclaim, for which the plaintiff is liable for costs. Consequently, the following final disposal orders are hereby issued.
- a. The plaintiff's suit is dismissed with costs to the 1st and 3rd defendants.
 - b. A declaration does issue that the 1st defendant is the rightful, legal, or equitable owner of a parcel of land situated in Machakos District containing 8.094 hectares by measurement, known as L.R. number 12867/17.
 - c. An order restraining the plaintiff from evicting the 1st defendant, selling, dealing with, trespassing, alienating, damaging, constructing or destroying and or howsoever interfering with the 2 acres comprised in the parcel of land situated in Machakos District containing by measurement 8.094 hectares known as L. R. number 12867/17.
 - d. General damages in the sum of Kshs. 2,000,000/= is awarded to the 1st defendant to be paid by the plaintiff.
 - e. Within 90 days from the date of service of these orders, the plaintiff shall deliver vacant possession of the 2 acres of land parcel no. L. R. number 12867/17 to the 1st defendant.
 - f. The costs of the counterclaim are awarded to the 1st defendant and shall be borne by the plaintiff.

Judgment accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

23.09.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Wachira for plaintiff.

Mr. Isaac Aloo for 1st defendant.

M/s Cheruiyot for 1st defendant.

N/A for 2nd defendant.

Ms Kanja- Court Assistant.

