



Ethaiba (Suing as a legal representative of Ethaiba M’Tuoroi (Deceased) v Land Adjudication & Settlement Officer Igembe/Tigania West & 20 others (Environment & Land Case 19 of 2021) [2024] KEELC 5292 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 19 OF 2021**

**CK NZILI, J
JULY 10, 2024**

BETWEEN

ABRAHAM MUTHEE ETHAIBA (SUING AS A LEGAL REPRESENTATIVE OF ETHAIBA M’TUOROI (DECEASED) PLAINTIFF

AND

LAND ADJUDICATION & SETTLEMENT OFFICER IGEMBE/TIGANIA WEST 1ST DEFENDANT
LAND REGISTRAR MERU COUNTY 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT
SEKUNDU MURIIRA 4TH DEFENDANT
EDWARD AYUB MBOGORI 5TH DEFENDANT
ROMANO NTONGAI 6TH DEFENDANT
GEOFFREY K. IGWETA 7TH DEFENDANT
JUSTUS GITUMA 8TH DEFENDANT
KALAWA IBAYA 9TH DEFENDANT
BERNARD IBAYA 10TH DEFENDANT
FRANCIS KIRIAKABU 11TH DEFENDANT
JOSPHAT MWITI 12TH DEFENDANT
MWONKARI NKUBIRIA 13TH DEFENDANT
DOREEN KAIRIGO 14TH DEFENDANT
GIDEON GITONGA 15TH DEFENDANT



GORGE MWITI IGWETA	16TH DEFENDANT
COUNTY GOVERNMENT OF MERU	17TH DEFENDANT
JAPHET NTONGAI	18TH DEFENDANT
TITUS WAMBUA	19TH DEFENDANT
ISAAC MUKARIA MUTABARI	20TH DEFENDANT
JESSEE KAUME	21ST DEFENDANT

JUDGMENT

1. The plaintiff, suing as the legal representative of the estate of M'Ethaiba M'Tuoroi, approached this court through a plaint dated 25.5.2021. He claimed that the deceased, his father, was the initial gatherer and demarcated owner of Parcel No. 1056 when the adjudication process started in the area.
2. The plaintiff averred that some disputes arose during the demarcation process, some of which the 1st defendant entered in favour of the rest of the defendants leading Meru ELC JR No. 67 & 68 of 2009, which were never heard on merits but were dismissed on technicalities.
3. Again, the plaintiff averred that in the course of the land adjudication process, the 1st, 4th - 21st defendants conspired and illegally subdivided Parcel No. 1056 more than three times, leading to Parcel No's 325, 840, 885, 3020, and 3021, 3022, 3023, 840, 840, 4986, 4985, 4989, 4991, 5929, 5929, 4988, 4992 without the 1st defendant consulting or notifying him.
4. Similarly, the plaintiff averred that while his referred judicial review application was pending, the 1st & 2nd defendants conspired with the 4th - 21st defendants and registered the L.R No. Nyambene/Uringu 1/4977, 5286, 5180 & 4994 (4th defendant), 4976 & 1991 (5th defendant), 1763 (6th defendant), 4990 & 840 for (7th defendant) 1469, 325, 5849, 4986, 4985, 4989, 4992 & 885 in favour of (8th - 15th defendants), L.R. No. Nyambene/Uringu I/5849, 1916, 4991, 5929, 5973 & 4988 in favour of 16th - 21st defendants respectively.
5. The plaintiff pleaded that the registrations above and issuance of the title deeds were illegal and fraudulent for they were based on wrongful subdivisions, were done behind his back, there were stay orders in place and the J.R. applications were pending before the court.
6. Further, the plaintiff sought the declaration that the title registers and title deeds were fraudulently registered and obtained, the rectification of the names from the register, and the replacement of the 4th - 21st defendants' names with his name vacant possession under mandatory injunction.
7. From the court record, there is no indication if the 1st - 3rd defendants entered an appearance and filed any statement of defence, save for a list of documents and witness statements filed on 28.3.2023 by E.K, principal litigation council on behalf of the 3rd defendant.
8. The 4th, 7th, 10th - 14th, 16th, 18th, 20th and 21st defendants filed a joint statement of defence dated 21.9.2021, terming the plaintiff as lacking the capacity to sue since the limited grant ad litem in his possession had expired by 7.6.2021. It was averred that A/R objections relating to the initial land were heard under the *Land Consolidation Act* (Cap 283) and the *Land Adjudication Act* (Cap 284), to which the plaintiff lost on 6.3.2008 and 5.3.2008, following which he lodged judicial review application No's



- 67 & 68 of 2009 that were dismissed for being time-barred the implication being the A/R award became final under Sections 19 & 26 (3) of Cap 283 since the plaintiff did not appeal to the minister.
9. The defendants averred that the suit was a disguised minister's appeal; hence, the court has no jurisdiction to hear it. Further, the defendants averred that the plaintiff has never occupied or utilized the suit land as averred or at all, unlike them, whose ancestors have been on the land since time immemorial with clear boundaries on the ground, permanent houses, mature assorted trees and crops.
 10. The defendants averred that the subdivisions and registration of the suit parcels of land were legal, following the dismissal of the A/R objections and judicial review proceedings that the plaintiff had unsuccessfully lodged.
 11. Regarding L.R No. Nyambene/Uringu 1/325, the defendants averred that it belonged to the father of the 4th, 9th & 10th defendants and not the 9th defendant as alleged.
 12. Additionally, the 4th, 7th – 16th, 18th, 20th – 21st defendants relied on a preliminary objection dated 9.5.2022, based on lack of capacity to sue, jurisdiction to hear the suit and res adjudicata.
 13. The 5th defendant opposed the suit through a statement of defence dated 29.3.2023. It was averred that the only remedy that the plaintiff had was to file an appeal or review after losing in the Judicial Review No. 68 of 2009, which its appeal period by operation of law had extinguished; hence, he has no cause of action against the 5th defendant.
 14. Through a counterclaim, the 5th defendant averred his title deed was regular, procedural and as an absolute proprietor of L.R No. Nyambene/Uringu/4976 & 1991, the defendant to the counterclaim was illegally and unlawfully occupying it since the dismissal of the A/R objection. He counterclaimed for an eviction order.
 15. The 15th defendant opposed the suit by a statement of defence dated 16.9.2021. He denied the alleged illegalities and or irregularities in subdividing and registering L.R No. Nyambene/Uringu 1/885 out of Parcel No. 1056/Uringu 1 Adjudication Section. The 15th defendant averred that he was neither a party in the Judicial Review Application No's. 67 and 68 of 2009, nor was his parcel of land covered by the said judicial review proceedings.
 16. In addition the 15th defendant averred that during the adjudication process, L.R No. Nyambene/Uringu 1/885 was gathered under the name of his late mother, Ruth Kathiri M'Mwithimbu, who took possession, occupied, utilized and developed it from 1962, until it was recorded under her name in 1967.
 17. The 15th defendant averred that after his mother passed on, his family members consented to have it recorded under his name in 1995, following which he has extensively developed it. He denied that the plaintiff's late father, Ethaiba M'Tuori, ever resided, utilized or occupied the said parcels of land, which were separate or distinct from parcel no. 1056- Uringu 1 Adjudiciaotn section.
 18. Further, the 15th defendant averred that the plaintiff filed objection number 1228 against his parcel number, which was dismissed and that the plaintiff never appealed or challenged the decision through judicial review. The 15th defendant termed the plaintiff's suit as res judicata.
 19. At trial, Abraham Muthee M'Ethaiba testified as PW 1. He adopted his witness statement dated 25.5.2021 as his evidence in chief and relied on a list of documents dated 25.5.2021 and 9.5.2022 namely; limited grant of letters of administration ad litem dated 4.3.2021; an area map; ruling in J.R. No. 68 of 2009 and letter dated 15.7.2018, from the Ministry of Lands as P. Exh No's. 1-5 respectively.



20. In cross-examination, PW 1 admitted that he filed the suit outside the 90 days as required by the limited grant of letters ad litem. Further, PW 1 said that the judicial review case was termed statute-barred by the court and also was filed without letters of grant. He denied that his suit was a disguised appeal after tossing in the judicial review application.
21. Additionally, PW 1 admitted that there were no official search certificates or copies of the title deed produced in support of paragraph 15 of the plaint. He said that the 4th – 21st defendants were not known personally to him, nor was he aware that the 5th defendant passed on in 2004. PW1 also admitted that the 20th defendant passed on on 24.1.2015, as per a death certificate attached to the paginated bundle dated 9.5.2022 on page 23. He further admitted that Parcel No. 325 was not included in the A/R Objection No's. 216 & 721.
22. Regarding Parcel No. 1916, PW 1 said it belonged to the County Government of Meru which was not a party to this suit even though included in paragraph 17 of the plaint. PW 1 said that he had nothing to show that his late father had initially gathered the suit land as alleged in paragraph 8 of his plaint.
23. PW 1 admitted that there was no minister's appeal filed against the award in the A/R objection, nor did he file any restrictions with the director of the land adjudication to forestall any registration of the parcels of land in favour of the defendants. PW 1 similarly admitted that after he lost in Judicial Review No's. 67 & 68 of 2009, he did not appeal to the Court of Appeal, given that title deeds were already out in favour of the 4th -21st defendants.
24. Nonetheless, PW 1 said that he was the one occupying the suit land together with the 4th, 9th, 11th & 15th & 21st defendants. He clarified that the said occupants were only filing his land. PW1 further said that the A/R committee cases were handled between 1967 and 1968, while the defendants were tilling the land. PW1 added that he became aware of the fraudulent activities pleaded in paragraph 14 of his plaint between 2014 and 2015 but filed the suit after six or seven years. Asked if there were stay orders in the judicial review proceedings, PW 1 said that after the A/R objections, nothing was stopping the adjudication officer from implementing the decisions.
25. PW 1, however, said that the land registrar should not have issued any title deed over the suit parcels of land since there was a stay order. Regarding L.R No's 4778, 4982 and 4992 included in the statement of claim, PW 1 said that the same was only appearing in prayer. A and not in the body of the plaint.
26. However, PW 1 was unable to clarify the exact acreage of land he was entitled to. He said that he was entitled to all the land registered in the name of the 4th to 21st defendants who have never been his neighbours save for his genuine ones, namely; Joseph Muna, Kirera and the late Mutabari. He could not remember their parcel numbers.
27. PW 1 admitted that Tigania West and Igembe were separate areas. Similarly, PW 1 said that P. Exh No. 1 had no official stamp or signature. He added that he did not seek leave to file his suit out of time. PW1 admitted that L.R No. Nyambene/Uringu/1991 was in the name of Monica Gathoni and not Edward Mbogori. He insisted that he was the one occupying the said land though registered under Monica Gathoni.
28. PW 1 said that the 6th defendant occupied L.R No. 1763; hence, he was seeking an eviction order. He blamed the relocation of the land adjudication offices from Tigania to Maua town, for the delay in lodging judicial review proceedings after losing the A/R objections in 2007. He said that he discovered the fraud after losing the judicial review cases. According to PW 1, the fraud must have occurred between 2007 – 2014.



29. Asked about Parcel No. 885, PW 1 said that he had no record to show that the said parcel of land was a subdivision of Parcel No. 1056. PW 1 termed the 15th defendant as his cousin whose mother, Ruth Kathiri, had been living on the land since 1960. PW1 admitted that the 15th defendant was brought up in the suit land and that his late father had never filed any claim over the said parcel of land save for Objection No. 1228, which the plaintiff lodged against Ruth Kathiri. He confirmed that the 15th defendant was not a party to Judicial Review No. 67 & 68 of 2009.
30. Again, PW 1 admitted that the 15th defendant had erected a permanent residence on his land where he lived with his family.
31. M'Ithili testified as PW 2, he adopted his witness statement dated 10.5.2022 as his evidence in chief. He said that his late father, M'Ithili Gedion, was among the witnesses in the A/R cases at Miathene. As a neighbour of PW 1, he told the court that the 4th – 21st defendants had been tilling the land but had no permanent houses on the suit parcels of land. PW 2 denied, however, that they have been on the land since 1967/1968. He could not also remember the acreage of or the parcel number of the plaintiff's parcel of land but was confident that it originally belonged to M'Ethaiba. PW 2 told the court that the plaintiff had permanent developments on the suit land composed of timber houses, two stone houses and a kitchen. PW2 denied knowing the owner of L.R No's. 1991 and 4976 but he confirmed that the 1st defendant was a neighbour who had a permanent homestead on his land.
32. Joseph Muna Kanake testified as PW 3 and adopted his witness statement dated 10.5.2022 as his evidence in chief. Although he described himself as a neighbour to PW 1, he could not remember his parcel number or that of the plaintiff. He confirmed that the land the plaintiff was claiming was under used by many people among them the 4th – 21st defendants. PW 3 appeared unaware of the history of the dispute before the court and the actors since he was for many years working outside the locality. He confirmed knowing the 15th defendant and his late mother.
33. Sekundu Muriira Ibaya testified as DW 1. Relying on his witness statement dated 9.5.2022 as his evidence in chief, he told the court that through an authority to appear, plead and testify, the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 18th and 21st defendants had authorized him to testify on their behalf. He produced the authority as D. Exh No. (1) photographs showing the developments made on the suit parcels of land as D. Exh No. (2) (a-b), a chief's letter dated 9.9.2021 as D. Exh No. (3) showing that his late father owned Parcel No. 325 before he passed on in 1988, the death certificate of the 20th defendant dated 30.8.2016 as D. Exh No. (4), A/R proceedings dated 5.3.2008 as D. Exh No. (5), A.R objection proceedings dated 6.3.2008 as D. Exh No. (6).
34. DW 1 said that the A/R objections related to Parcels No. 3020 and 3022. He said that after the A/R objections were dismissed, his uncle shared the suit parcel of land among his siblings. The subdivisions gave rise to L.R No's. Nyambene/Uringu I/1477, 5186, 4994, 4990, 1469, 4986, 4989 and 4992, out of which his late father remained with L.R No. 325.
35. Similarly, DW 1 said that other parcels of land were Parcel No's. 4988, 4977, 4990, 4994, 4978, 1469, 5849, 4986, 4985, 4989, 4992, 5849, all of which have title deeds in favour of the beneficiaries as per D. Exh No's. 9 – 16. DW 1 said that the plaintiff had filed a judicial review to challenge the A/R award unsuccessful. He produced copies of the notice of motion dated 12.10.2009 as D. Exh No. (17), the supporting affidavit as D. Exh No. (18), statement of facts as D. Exh No. (19), verifying affidavit as D. Exh No. (20), replying affidavit as D. Exh No. (21), an amended notice of motion dated as D. Exh No. (22), the 2nd judicial review notice of motion dated 13.10.2009 as D. Exh No. (23), the supporting affidavit as D. Exh No. (24), statement of facts as D. Exh no. (25), verifying affidavit as D. Exh No. (26), replying affidavit as D. Exh No. (27), an amended notice of motion dated 3.5.2012 as D. Exh No. (28).



36. Additionally, DW 1 denied that there was any fraud or irregularity in subdividing, registering and acquiring title deeds for the itemized parcels of land above, since there was no pending suit order or restriction against the adjudication register and the subsequent register for the titles.
37. DW 1 said that the suit land was ancestral land belonging to the 4th – 21st defendants, whose ancestors have occupied it for generations. He said that going by the photographs, the 4th - 21st defendants had extensively developed their parcels of land.
38. DW 1 termed PW 2 & 3 as strangers to the land who were out to mislead the court. In particular, DW 1 termed PW 3 as a liar whose elder brother testified during the A/R objection against the plaintiff. D.W. 1 said that after the 1st – 3rd defendants dismissed the A/R objections, the initial Parcel No. 325 was lawfully and procedurally subdivided among the siblings and cousins. He said that other original numbers at the gathering stage were no. 890 and 1005.
39. DW 1 said that he was born and brought up on Parcel No. 325 and has lived therein until his parent passed on aged around 100 years. He said that what happened is that parcels No's 890 and 1005 were shifted to Parcel No. 1056, then 3720 and 3022, which moves they challenged, and the parcels were returned and shared among the beneficiaries.
40. Geoffrey K. Igweta testified as DW 2 and adopted his witness statement dated 9.5.2022 as his evidence in chief. Associating his testimony with that of DW 1 he clarified, that Parcel No. 890 belonged to his late uncle while Parcel No. 1005 belonged to his late father.
41. Kanaro Ibaya testified as DW 3 and adopted his witness statement dated 9.5.2022 as his evidence in chief. Similarly associated his evidence with that of DW 1 and DW 2. He confirmed that he was the owner of L.R No. 4978, a subdivision of the original land. Parcel No's 890 and 325, where he has lived for over 67 years.
42. Romano Ntongai testified as DW 4. He told the court that he was the owner of L.R. No. Nyambene/ Uringu 1/1763, a title produced as D. Exh No. 29, lawfully acquired from John Kiriabu, totalling 9 acres. He said that Cyrus Mathenge, Sebastiano and Kiriaba witnessed the sale agreement. DW 4 said that he bought the land during the adjudication stage.
43. Gideon Gitonga Mwithimbu testified as DW 5. Relying on his witness statement dated 23.9.2021 as his evidence in chief, DW 5 told the court that his parcel of land was L.R No. 885 as per a title deed he produced as D. Exh No. (30), a certificate of an official search, D. Exh No. (31), an adjudication register as D. Exh No. (32), A/R proceedings and decisions as D. Exh No. (33), area map as D. Exh No. (34) (a) & (b). Further, DW 5 said that P. No. He said that his mother, Ruth Kathiri, initially owned 885 but later on was transferred to him. DW 5 produced a copy of an affidavit as D. Exh No. (35).
44. DW 5 said that he had planted over 2000 macadamia trees, assorted fruit trees, eucalyptus and jacaranda trees on the suit land where he has lived for 62 years as per photographs produced as D. Exh No. (36) & (37) (a) – (c). DW 5 said that his late mother lived on the land since 1962 and was buried on the suit land after she passed on. DW 5 said that M'Ethaiba was his uncle who never claimed the land during her lifetime over the alleged fraud or illegality. Moreso, he told the court that this land initially belonged to his late mother who had gathered it measuring approximately 6-7 acres. His evidence was that his brothers consented to him being registered as the sole owner going by the affidavit aforesaid.
45. In the absence of the 1st – 3rd, 5th and 17th defendants, their statements of defence were marked as closed.
46. With leave of court, parties were directed to file and exchange written submissions by 3.7.2024. The 4th, 7th - 14th, 16th, 18th & 21st defendants relied on written submissions dated 1.7.2024, 25.6.2024



- & 19.6.2024, filed by C.P Mbaabu & Co. Advocates, Kaimenyi Kithinji and Co. Advocates & J.G Gitonga and Co. Advocates respectively.
47. On behalf of the 4th, 14th, 16th, 18th & 21st defendants, four issues were isolated for determination. On the capacity to sue, it was submitted that the plaintiffs filed the suit after the limited grant ad litem had expired by 4.6.2021, contrary to Section 82 of the [Law of Succession Act](#). Reliance was placed on [Troustik Union International & another vs Jane Mbeyu & another \(1993\) KLR 230](#).
 48. Regarding proof of fraud, it was submitted that the burden of proof under Sections 107 – 112 of the [Evidence Act](#) was on the plaintiff who has failed to discharge it to the required standard. The defendants submitted that the plaintiff was seeking to have a second bite of the cherry and had made no report on the fraud or illegality, there was no forensic report on fraud or called the land registrar or land adjudication on the issues. Reliance was placed on [Beatrice Kuri Francis vs Susan Gatiria M'Mukira & others Meru ELCA 81 of 2019](#).
 49. It was submitted that going by D. Exh No. (4), it is apparent that the 20th defendant was sued after his death on 24.1.2015 while regarding L.R No. Nyambene/Uringu 1/135, the land is registered in the name of M'Ibaya Kaimathiri (deceased) as per D. Exh No. (3) hence, no suit or order can be issued against deceased persons. Additionally, it was submitted that given that the owners of Parcels No's. 4978, 4989 and 4992 have not been sued, no order would be issued against non-parties.
 50. The defendants submitted that the plaintiff had failed to exhaust the statutory redress under Section 29 of Cap 284 Section 29. Reliance was placed on [Geoffrey Muthinja and another vs Samuel Muguna Henry & 1756 others \(2015\) eKLR](#), [M'Thuranira M'Mutea vs Land Adjudication and Settlement Officer and another, Bernard M'Muguna & 2 others \(2020\) eKLR](#).
 51. On his part, the 6th defendant submitted that fraud was not proved. Reliance was placed on [Kuria & others vs Sammy Magera \(2018\) eKLR](#), [Kinyanjui Kamau vs George Kamau \(2015\) eKLR](#), [Isaac Adhiambo Okayo vs KWFT \(2016\) eKLR](#), [Jeniffer Nyambura Kamau vs Humphrey Mbaka vs George Thuo & others \(2010\) 1 KLR 526](#) and [Elijah Makeri Nyagwara vs Stephen Mungai Njuguna & others \(2013\) eKLR](#).
 52. The 15th defendant submitted that the plaintiff produced no documentary evidence to prove that Parcel No. 1056 was gathered and recorded in the name of M'Ethaiba M'Tuorori. As to L.R No. Nyambene/Uringu I 885, the 15th defendant, submitted that the plaintiff was unable to prove that it was a subdivision of Parcel No. 1056 or lead evidence that it was fraudulently or illegally obtained. Reliance was placed on [Arthi Highway Developers Ltd vs West End Butchery Ltd & others \(2015\) eKLR](#).
 53. The 15th defendant submitted that the plaintiff failed to exhaust the internal mechanism under Cap 284; hence, the court lacks jurisdiction to entertain the suit. Reliance was placed on [Amarnath suing on behalf of the estate of the late Amarnath Gupta vs Kazungu & others \(2023\) KECA 1280 \(KLR\)](#), [Taki & 35 others vs Sururu & 7 others \(2023\) KEELC 16947 \(KLR\)](#), [Syeliwa Kalala Nzeva & others vs Wilson Nzii Songolo \(2024\) KEELC 739 \(KLR\)](#) and [Moses Ole Kantai vs Charles Mhasio Kinampu \(2024\) KEELC 4357 \(KLR\)](#).
 54. The issues calling for my determination are:
 - i. If the plaintiff has capacity to file this suit.
 - ii. If the plaintiff exhausted the internal dispute mechanism before filing the suit.



- iii. If the suit is incompetent for being filed against some of the parties and owners of the properties who were dead before filing or who have not been joined as parties.
 - iv. If the suit is time-barred on account of fraud and or res judicata.
 - v. Whether the plaintiff has proved his claim to be entitled to the reliefs sought.
 - vi. What is the order as to costs?
55. The plaintiff brings this suit as a legal representative of the estate of Ethaiba M'Ituoroi pursuant to a limited grant of letters of administration ad litem issued on 4.3.2021 Tigania PMCC Misc Succession Cause No. E018 of 2021. The deceased passed on on 4.6.1999. The limited grant states that the grant was for purposes of filing the suit or to defend it limited to 90 days and until the court granted further representation to the plaintiff.
56. The wording of the grant is key. See *Juliana Adoyo Ongango vs Francis Kiberenge C.A No. 119 of 2015*. My interpretation is that the grant was also to subsist until further representation was granted in respect of the estate. There is no evidence that further representation was granted to someone else or that the limited grant ad litem was set aside varied and or vacated. The limited grant, therefore, satisfies the limitations envisaged in Section 82 of The *Law of Succession Act* (Cap 160). In *Rajesh Pranjivan vs Sailesh Pranjivan Chundasama (2014) eKLR*, the court said that lapses in form, as held in *Nicholas Kiptoo Arap Korir Salat vs IEBC & others (2013) eKLR* do not go to the jurisdiction of the court or the root of the dispute.
57. The defendants have not demonstrated what prejudice or miscarriage of justice they have suffered. Section 72 of the Interpretation & General Provisions Act Cap (2) allows this court to find that the delay of five or so days if at all there was any, did not in any way affect the substance of the instrument or document. See in the matter of the estate of *Moraji Bhanji Dhanak (deceased) (2000) eKLR*.
58. As to res judicata again the court has been able to look at the pleadings documents and decisions in the Judicial Review No. 67 and 68 of 2009. The issues raised in this suit were not before the court and or determined to finality. See *IEBC vs Maina Kiai & 5 others (2017) eKLR*. D. Exh No. (7) and (8) dwelt on whether or not the application for judicial review was time-barred or not. The merits of the D. Exh No's. 17.28 were not considered. The issues related to fraud or illegality over subdivisions and registration of titles to land were not prosecuted, defended or determined, and a decree was issued in favour of the defendants herein.
59. The next issue is whether the plaintiff exhausted the internal mechanisms as set under Caps 283 and 284. The plaintiff brings the suit as a legal representative of his late father, who passed on in 1999. He pleaded that his late father was the one who gathered and became the recorded owner of parcel No. 1056. He pleaded further that disputes arose during the adjudication process and were resolved under Cap 284 by the 1st defendant, who ruled in favour of some of the relatives of the 4th – 21st defendants, leading him to file Juridical Review No's. 67 and 68 of 2009 which were dismissed on a technicality.
60. The plaintiff averred that the defendant conspired and illegally subdivided Parcel No. 1056 into several parcels of land, as itemized in paragraph 12 of the plaint, without consulting or involving him, yet he was in occupation or possession of the parcels of land.
61. Further, the plaintiff challenges the resultant registration and issuance of titles deed to the 4th -21st defendants on account of fraud illegality and procedural impropriety. The plaintiff prays for invalidation of the title deeds on account of fraud or illegality. It is trite law that fraud must be specifically pleaded and proved on a balance higher than in an ordinary suit. See *Arithi Highway*



Developers vs West End Butchery (supra), Virjay Morjaria vs Nansingh Madhusing Darbar & another (2000) eKLR.

62. A party relying on fraud must file the suit within three years after discovering the fraud. In this suit, the plaintiff has not pleaded to the date that he discovered the alleged fraud. What, however, is evident from the defendants' pleadings and documents is that the A/R objections were determined on 3.3.2008.
63. In D. Exh No. (6) shows that the decision was made on 6.3.2008. These are the decisions that the plaintiff was challenging through judicial review. After the judicial review, cases were dismissed on 2.11.2017 and 27.11.2017 as per D. Exh No. (7) & (8), there is no evidence that the plaintiff preferred an appeal to the Court of Appeal or obtained any orders to stop the land adjudication process from progressing to the next stage. Cap 283 and 284 have self-executing disputed mechanisms until the land adjudication section is declared complete and the adjudication record transmitted to the chief land registrar through the director of land adjudication for titling and subsequent issuance of title deeds. The onus was on the plaintiff to demonstrate that there were in existence orders of stay or restrictions stopping the process after he lost in 2008.
64. D. Exh No's 9 – 16, 30-31, title deed issued on 12.1.2014, D. Exh No. (33) shows that the award was made in 2009. The 15th defendant says that he was not a party to the judicial review proceedings. Then, it is apparent the plaintiff failed to exhaust the internal mechanisms set under the land adjudication process and awaited till 2021 to challenge the title deeds on account of fraud. Does the law envisage such a cause of action? PW1, in cross-examination, admitted that he became aware of the fraud or illegality between 2008 and 2009. That means time in his claim based on fraud would start running from the date of discovery or knowledge of the illegality or fraud. As of the filing of judicial review proceedings, evidence shows that there were title deeds already issued in respect of Parcel No. 1056 and its resultant subdivisions. On that account, I find the claim statute barred against all the defendants.
65. The defendants have submitted that the plaintiff is trying to have a second bite of the cherry after losing in the judicial review proceedings. They urge the court to find the suit an abuse of the court process. In Amaranth (suing on behalf of the estate of the late Amarnath Gupta) vs Patricia Kazungu & others (supra), the trial court had upheld an objection on account of jurisdiction for failure to comply with Sections 26 – 29 of the Land Adjudicatory Act. The court observed that a party who had failed to challenge the decision of the land adjudication bodies under the Act, could not seek to reopen the case and challenge it through any other process this upheld at the Court of Appeal. I think the plaintiff fits this description. His suit is an abuse of the court process.
66. Lastly, has fraud or illegality been proven to the required standard? Even if the claim had been filed on time still the onus was on the plaintiff to satisfy the court that the subdivisions of Parcel No. 1056 to the resultant parcel's their registration and issuance of title deeds held by the 4- 21 defendants were tainted with fraud or illegality.
67. The plaintiff called no documentary evidence to show that his late father, Ethaiba M'Tuoroi, was a one-time recorded owner of Parcel No. 1056. There is no evidence to show that the plaintiff complained over the alleged fraud to the 1st – 3rd defendants. A forensic audit of the documents held by the 1st – 3rd defendants and issued to the 4th – 21st defendants following investigations out of a complaint by the plaintiff on account of their illegality and or authenticity is missing.
68. Fraud cannot be inferred but must be proved with cogent and tangible evidence. See Njuwanga ltd vs Langata KPA Nairobi & 5 others (2014) eKLR. In Mumbi M'Nabea vs David M. Wachira (2016) eKLR, the Court of Appeal said that a court will assess oral and documentary evidence advanced by each party and decide which case is more probable or on which occurrence of the event was more likely



to have happened than not. See also *Maria Ciabaitaru M'Mairanyi & others vs Blue Shield Insurance Co. Ltd* (2005) 1 E.A 280.

69. In this suit, the plaintiff failed to discharge the burden, especially after the 4th – 21st defendants tendered evidence to show that the process leading to the subdivisions, registration and issuance of title deeds in their favour was above board. See *Karugi & another vs Kabiya & 3 others* (1987) KLR 347.
70. The evidence of DW 1 – 5 that they hold valid title deeds free of any illegalities appears credible. The plaintiff sued parties who were dead before the suit was filed. He also wants the court to determine on ownership of parcels of land to which he has not enjoined the owner. Therefore, the plaintiff swore a verifying affidavit to the plaint dated 25.5.2021 on incorrect facts, making the suit nullity ab initio. See *Macfoy vs United Africa Company Limited* (1961) 3 ALL ER 1169.
71. Similarly, the plaintiff had no basis to enjoin the 15th defendant to the suit since Parcel No. 886 was never a subdivision of Parcel No. 1056. The 5th defendant failed to attend court to ventilate his defence or counterclaim. The same is dismissed with costs.
72. The upshot is that I find the claim incompetent, lacking merits and an abuse of the court process. It is dismissed with costs to the 4th, 7th – 14th, 16th, 18th and 21st defendants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 10TH DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

15th defendant in person

Gitonga for 15th defendant

Mbaikyatta for 1st – 3rd defendants

Kaimenyi for 6th defendant

HON. C K NZILI

JUDGE

