



**Ibui & another v Ibui & 5 others (Environmental and Land Originating Summons
105 of 2016) [2024] KEELC 6606 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 105 OF 2016**

CK NZILI, J

OCTOBER 2, 2024

**IN THE MATTER OF ORDER 37 RULES 1, 16, 17, 18
AND 19 OF THE CIVIL PROCEDURE RULES 2010**

AND

**IN THE MATTER OF LAND TITLE NO'S KIANJAI/
KIANJAI/4690, 8967, 8968, 8969, 8970, 8971, 807, 4120 AND 5989**

BETWEEN

GEORGE MUREGA IBUI 1ST PLAINTIFF

ESTHER WAIRURI MUREBU 2ND PLAINTIFF

AND

TITUS KIREA IBUI 1ST DEFENDANT

MUNGATHIA KIREA 2ND DEFENDANT

STEPHEN KIREMA MBIRITHI 3RD DEFENDANT

GEOFFREY KIRIANKI MBIRITHI 4TH DEFENDANT

JOSEPH LIMUNGI 5TH DEFENDANT

JOHN KAIRITHIA MBIRITHI 6TH DEFENDANT

JUDGMENT

1. What is before the court is the further amended originating summons dated 25.2.2021 and filed on 25.2.2021, brought under Order 37 Rules 1, 16, 17, 18, and 19 of the Civil Procedure Rules, concerning L.R No's Kianjai/Kianjai/4690, 8967, 8968, 8969, 8970, 8971, 807, 4120, and 5989 the suit lands initially said to have belonged to the late M'Ibui M'Baingoni the deceased. It was averred that the deceased at the time of his death was the recorded owner of the suit parcels of land and held



them as a trustee for plaintiffs and his other children, though at the filing of the suit, the parcels of land were showing as registered in the name of defendants.

2. The plaintiffs have asked the court to determine the following questions:
 - i. Whether the plaintiffs and the 1st defendant are close relatives and heirs of the estate of the late M'Ibui M'Baing'oni.
 - ii. Whether M'Baingoni died on 27.6.2006.
 - iii. Whether the titles to L.R No's Kianjai/Kianjai/4690, 807, 4120 and 5989 belonged to and were in the names of M'Ibui M'Baingoni, until his death on 27.06.2006.
 - iv. Whether M'Ibui M'Baing'oni had before his death bequeathed the said parcels of land to the plaintiffs, the 1st plaintiff's mother and the plaintiffs' other siblings who began utilizing them long before he died on 27.6.2006.
 - v. Whether the 1st defendant was given seven acres of land in Kilemi village within the Kianjai Adjudication Section by his late father long before he passed on on 27.6.2006 and the 1st defendant began cultivation thereon to date.
 - vi. Whether the plaintiff's mother, Baicu M'Ibui M'Baingoni, lives on the suit land and has extensively developed the same and depends on them for her livelihood.
 - vii. Whether the 1st defendant fraudulently obtained a title deed in respect of the suit lands in his name, illegally subdivided or caused subdivision of L.R No. 4690, and transferred the resultant subdivisions to himself, the 1st plaintiff's, a brother called Joseph Limungi Ibui and other three defendants (who are a cousin to the plaintiffs and the 1st defendant) as L.R No's 4690, 8967, 8969, 8970 and 8971 respectively, without any form of a grant of letters of administration to his name and without the knowledge or consent of the plaintiffs and other heirs.
 - viii. Whether the registration of the suit lands in the names of the defendants should be canceled and the suit lands registered to the rightful heirs or be reverted to the name of the deceased so that once a succession cause is filed, they can be distributed to the rightful heirs.
 - ix. Whether the defendants have any protectable or justifiable right or interest in the suit lands in view of the fact that the 1st defendant was given 7 acres of land in Kilemi village by the deceased father.
 - x. Whether the plaintiff should be awarded costs plus interest thereon at court rates.
3. The plaintiffs ask this court, after answering the questions, to issue an order canceling the registration of L.R No's Kianjai/Kianjai/4690, 8967, 8968, 8969, 8970, 8971, 807, 4120, and 5989 in the names of the persons currently registered as the owners and registration of the same in the name of the deceased, in order to facilitate sharing of the same to the right heirs through the process of probate and administration.
4. The further amended originating summons was supported by affidavits sworn by George Murega Ibui on 20.7.2016, 22.2.2019 and 25.2.2021, a list of witnesses and witness statements dated 22.2.2019, 15.1.2021, a list of documents dated 22.2.2019 & 13.1.2021, authority to plead and act dated 20.7.2016, case summary and issues for determination dated 13.1.2021, all contained in a paginated bundle dated 18.2.2021. The cumulative facts in the said affidavits and witness statements, as averred by the 1st plaintiff are that he, the 1st and 5th defendants, are siblings born out of two different mothers while the other defendants are paternal cousins.



5. It was averred that their deceased father, died on 27.6.2006 before the issuance of the title deeds in Kianjai Adjudication Section but was the recorded owner of the original parent parcel of land according to the records held from Kianjai Adjudication Section.
6. The plaintiffs averred that L.R No. Kianjai/Kianjai 4690, 807, 4120, and 5998 measure 2 acres, 0.91 acres, 0.30 acres, and 0.51 acres, respectively and were lawfully bequeathed on the ground, before the deceased passed on, who never made any transfers to the beneficiaries. However, the plaintiffs aver that they have been occupying the said parcels of land in accordance with his wishes and directives as follows;

Land Parcel Number Beneficiary

- i. 4690 and 4120 George Ibui and Baicu M'Ibui M'Baigoni
 - ii. 807 Late Alice Mukunga M'ibui
 - iii. 5989 Jeremiah Kaunyangi Ibui
 - iv. Kilemi land measuring 7 acres Titus Kirea Ibui
7. The 1st plaintiff avers that he has, together with his mother, lived on L.R No. 4690 since childhood, where he has erected several permanent structures, while the 1st defendant is a wealthy businessman living in Runda Estate Nairobi and in Nanyuki who was likely to sell the suit land since he does not live there and render them destitute. Additionally, the plaintiffs pleaded that there had been no family meetings after their father passed on for the subdivisions of parcel L.R No. 4690 to occur and the giving of any portions to anybody.
 8. As to the paternal cousins, the plaintiffs pleaded that his paternal uncle had land in the Kithioroka and Kamothe areas, where they lived and cultivated and were compensated for their land in Nchiru; otherwise, L.R No. 4690 exclusively belonged to the deceased father's and never belonged or was never demanded by the late Mbirithi or his children during the late father's lifetime.
 9. As to L.R No. 8967, the 1st plaintiff averred that it was illegally and secretly transferred to him by the 1st defendant without his consent or knowledge, and as a cover-up, no wonder the names used were not the ones he uses as per his ID card. The plaintiffs termed the subdivisions and transfers as illegal, fraudulently, and secretly done without the knowledge or consent of all family members.
 10. Further, the 1st plaintiff averred that in June 2016, he came from his place of work in Nairobi, and upon visiting the adjudication office at Uuru, he discovered that there were fraudulent or illegal subdivisions and transfers over parcel L.R No. 4690, by the 1st defendant, who retained the original number and gave out the resultant subdivisions to him, and his cousins as follows:

Land parcel No. Acreage Beneficiary

- a. 8969 0.36 acres Joshua Kirea Mbirithi
- b. 8970 0.36 acres Stephen Kirema Mbirithi
- c. 8971 0.33 acres Geoffrey Kirainki Mbirithi
- d. 8968 0.38 acres Joseph Limungi Ibui
- e. 8961 0.49 acres George Murega
- f. 4690 0.47 acres Titus Kirea Ibui



11. The plaintiffs averred that the 1st defendant's aforesaid illegal actions were intended to benefit him illegal and the 2nd, -4th defendants while disinheriting the rightful heirs of the parcels mentioned.
12. Further the plaintiffs averred that after his father passed on, the family did not meet and agree to file succession proceedings to formally distribute the suit lands as per the wishes of their late father, save for the limited grant the plaintiffs obtained in 2016 to lodge this suit. Moreover, the plaintiffs averred that the immediate family did not agree to share the parcels with the cousins.
13. The defendants opposed the further amended originating summons by a replying affidavit sworn by Titus Kirea Ibui, the 1st defendant, on 18.4.2017, by Witness statements of Joseph Limungi Ibui dated 12.2.2021 and a list of documents dated 12.2.2021, all contained in a paginated bundle dated 12.2.2021. The 1st defendant denied the allegations leveled against him generally and in particular secretly, fraudulently and illegally transferring to himself, subdividing, transferring, and registering the alleged family parcels of land to his names and those of the defendants and the plaintiffs.
14. The 1st defendant averred that on 10.6.2006, the late father summoned all his sons to share the parcels of land that had remained in his name.
15. Again, the 1st defendant averred that his late father was the one who transferred to him L.R No's. Kianjai/Kianjai/4120 and 4690 before he met his death, and with the knowledge of all family members, parcel No. 4690 was given to him in or about the year 1995. He denied that parcel L.R No's. 4690 and 4120 were at any one time bequeathed to the 1st plaintiff and his mother. The 1st defendant averred that in several family meetings held after the death of his father, it was agreed that L.R No. 4690 be subdivided in favor of his cousins, the 2nd – 4th defendants, and sons of his paternal uncle whom Meru University had displaced.
16. Consequently, the 1st defendant averred that out of the family resolutions, he lawfully shared subdivisions No 8968 (0.38 acres), L.R No. 8967 (0.49 acres) L.R No. 8969 (0.36 acres), L.R No. 8970 (0.36 acres), and L.R No. 8971 (0.33 acres) in favor of Joseph Limungi Ibui, the 1st plaintiff and 2nd, 3rd & 4th defendants, remaining only with parcel L.R No. 4690 measuring (0.47 acres), while L.R No's. Kianjai/Kianjai/807 and 5989 remained in the names of his deceased father.
17. Therefore, the 1st defendant averred that L.R No' 4690 and 4120 were gifts *inter vivos*, bequeathed to him by his late father, and therefore the 1st plaintiff had no business asking the same to be inhibited. The 1st defendant termed the inclusion of the 2nd and 3rd plaintiffs' names in the suit as done without their consent and as fraudulent.

Preliminary directions.

18. From the initial originating summons dated 20.7.2016, the initial plaintiffs were George Murega Ibui, Salome Rigiri, and Twanampiu, while the defendant was Titus Kirea Ibui. The three initial plaintiffs had brought the suit pursuant to a limited grant of letters of administration *ad litem* issued in Meru P.M C. Misc Succession Cause No. 14 of 2016, under section 54 and 5th Schedule to the [*Law of Succession Act*](#) Cap 160) jointly issued to George Murega Ibui, Salome Rigiri Twanampiu and Ester Wairuri Murebu on 15.7.2016, as personal representative for the estate of the deceased limited to filing a suit over specific suit lands L.R No's Kianjai/Kianjai/4690, 807, 4120 and 5989.
19. By a filed affidavit sworn by the 2nd plaintiff, Salome Rigiri Twanaampiu, on 24.4.2017, she denied giving any consent to the 1st plaintiff to file this suit or list her as his co-plaintiff. Similarly, the 2nd plaintiff denied signing any petition for limited letters of administration *ad litem* at Tigania Law Courts. She termed the signatures appearing in the said petition and affidavits as forgeries by the 1st



- plaintiff. Additionally, the 2nd plaintiff denied having given any consent to the 1st plaintiff to execute any pleadings in this suit on her behalf, which suit she termed as a stranger and therefore requested to be struck out of it while leaving an option of mounting criminal charges against the 1st plaintiff for forging her signatures. The 1st plaintiff has to date not refuted those allegations orally or otherwise to set the record straight.
20. By an application dated 31.1.2019, the plaintiffs sought an amendment of the original originating summons to bring on board the 2nd – 4th defendants, following alleged subdivisions of L.R No. 4690 into L.R No's 8969, 8970, and 8171 in their favor by the 1st defendant, facts which they were not aware of at the filing of the initial suit. The initial originating summons amended on 22.2.2019 was eventually filed on 25.2.2019. Through the said amended originating summons, the name of the 2nd plaintiff was silently dropped, though there was no such a prayer in the application nor the draft amended originating summons attached to the application for leave to amend.
 21. The amended originating summons similarly did, for the first time, introduce the prayers for the cancellation and reversal of the subdivisions transfers and registration of L.R No's Kianjai/Kianjai/4690, 8967, 8968, 8969, 8970, 8971, 807, 4120 and 5989. Strangely it was not accompanied by any authority to swear, plead, or act sworn or signed by the remaining co-plaintiff, authorizing the 1st plaintiff to plead or act on her behalf. Equally, it introduced question No. 7 regarding Joseph Limunge Ibui.
 22. By another application dated 19.1.2021, the plaintiffs sought Ciobaibuuri M'Ikanga, Elizabeth Kathimba M'Ikuo, Baicu M'Ibui M'Baingoni, and the 2nd plaintiff to give evidence de bene esse due to their advanced ages.
 23. From the court record, it appears that when the application came up for hearing on 3.2.2021, consent was recorded by the parties for Eric Mungania Kirea, John Karianku Mbirithi, and John Limungi as 5th, 6th, and 7th defendants. The 5th - 7th defendants eventually appeared before the court on 22.2.2021. Evidence of any responses to the plaintiff's claim on their part is equally not on record. Counsel for the plaintiffs, however, made an undertaking to amend the amended originating summons later to reflect the changes.
 24. At the hearing, Elizabeth Kathimba M'Ikiara testified as PW 1. Relying on her witness statement dated 22.2.2019 as her evidence in chief, PW 1 told the court that she was the widow of Ezekiah M'Kiumba, maternal cousin to the deceased who had left his family under the care of her husband who in early 2005 had told him how he had shared his parcels of land on the ground.
 25. PW 1 said that before her husband passed on, he summoned all the sons of the deceased and reminded them to respect the wishes of their late father regarding the parcels of land as he had done during his lifetime.
 26. PW 1 confirmed to the court that the deceased left parcels L.R No 4690, 807, 4120, and 5989 under his name as per the adjudication records, which the deceased's sons and daughters had at all times occupied as per the pleadings of the plaintiffs before the court. PW 1 said that it came to her as a surprise if the 1st defendant had caused changes to the land record and shared out some parcels for himself and the 2nd -4th defendants, which the court ought to reverse. Again, PW 1 told the court that she was not privy to any family meeting that was allegedly held to authorize the subdivisions and transfers after the deceased had died.



27. In cross-examination, PW 1 told the court that she could not recall when her husband passed on, nor could she recall when the deceased summoned him to relay to him the information on how he had shared out his parcels of land among his children.
28. PW 1 stated that she relocated to the Miathene area in 1997 – 1998. She insisted that it was her late husband who disclosed to her how the deceased had informed him about the land sharing among his children. She could not tell if it was the deceased who transferred the parcels to the 1st defendant; otherwise, she had not come across any documents to that effect. Even though the deceased had pointed out to each son where to put up their homestead, PW 1 told the court that he never formally subdivided and transferred the said portions to his children during his lifetime.
29. Ciobaibuuri M’Kaunga testified as PW 2. She adopted a witness statement dated 22.2.2019 as her evidence in chief. Her evidence was that in 1996, the deceased called her and indicted on how he had shared his parcels of land on the ground among his children, giving the 1st plaintiff parcel L.R No. 4690, L.R No. 807 to Alice Mukunga, Parcel L.R No. 4120 to the 1st plaintiff, Parcel L.R No. 5989 to Jeremiah Kaunyangi Ibui and the 1st defendant the land at Kilemi.
30. PW 2 expressed much surprise to learn about the changes to the said parcels at the instance of the 1st defendant in favor of himself and his cousins, the 2nd – 4th defendants. PW 2 urged the court to reverse the entries. As a neighbor, PW 2 told the court that he never heard of the deceased transferring these parcels to the children, especially the 1st defendant or all the children had filed succession causes to facilitate the transmission of the said parcels of their names. Additionally, PW 2 said that she never learned of a meeting by the said children for subdividing the said parcels of land among themselves.
31. In cross-examination, PW 2 stated that it was not always a must for her to become aware when the deceased had called out a family meeting. Similarly, that the deceased had never told her about the subdivision; otherwise, it was not a must for the deceased to inform her about the family meeting resolutions, especially on land sharing. As to where each of the sons was to occupy, PW 2 said that she was aware of the localities since the deceased had mentioned it to her. Similarly, PW 2 said that the 1st defendant did not show her any documents where his late father transferred some of his parcels to him.
32. At this juncture, the court, by an order dated 22.2.2021, directed the amended originating summons to be further amended and served by the plaintiffs to capture the additional defendants and to remove those deceased within 30 days. This resulted in the further amended originating summons dated 25.2.2021 and filed on 25.2.2021. It was filed accompanied with the initial consent or authority which was filed with the original motion. The accompanying supporting affidavit sworn by the 1st plaintiff did not allude to any authority or consent to act, plead, and prosecute the suit for and on behalf of Ester Wairuri Murebu, the 2nd plaintiff, nor did it refer to the limited grant ad litem.
33. In compliance with Order 18 Rule 8 (1) of the Civil Procedure Rules, parties herein agreed that this court proceed with the hearing of the case from where my predecessor left it. Consequently, the court directed that the proceedings be typed for further hearing of the plaintiff’s case on 27.1.2022.
34. George Murega Ibui testified as PW 3. He told the court that the 2nd plaintiff was very sick and may not be able to testify. He described the 1st defendant as his stepbrother, the 2nd, 3rd, & 4th defendants as his cousins, while the 5th and 6th defendants were a stepbrother and a brother to his cousin’s wife, respectively. The 1st plaintiff relied on his witness statements dated 22.2.2019 and 28.7.2021 as his evidence in chief. Similarly, PW 3 relied on a list of documents appearing on pages 8-29 of his paginated bundle of documents dated 22.2.2019, namely a certificate of death, limited grant of administration



ad litem, photographs, transfer forms, map, and a title deed for L.R No. Kianjai/Kianjai/8967 as P. Exh No. 1, 2, 3 (a) (b) (c), 5, 6 & 7 respectively.

35. Further, PW 3 relied on a further list of documents containing a copy of adjudication records for parcel No's 4690, 807, 4120, 5989, 8967, 8968, 8969, 8970, and 8979 produced as P. Exh No. 8-15, respectively, being subdivisions out of the deceased's property. According to PW 3, the said subdivisions were fraudulently done by the 1st defendant, who never involved the plaintiffs through a succession cause since the recorded owner had died on 27.6.2006, at the time the changes were effected going by P. Exh No. (1).
36. Additionally, PW 3 said that in P. Exh No. (4), the 1st defendant was seeking the subdivisions and transfer as Parcel No. 4690. He insisted that the document had no date and failed to disclose if the land belonged to a deceased person; there were no letters of administration in existence, and it did not involve all the sixteen children of the recorded owner, save for the 5th defendant and Joseph Kaunyangi.
37. PW 3 told the court that the request in P. Exh No. (4) was prejudicial to him since the subject parcel had been bequeathed to him by the deceased since 1996 when he had constructed his permanent homestead, yet he was neither consulted nor involved, only to be given a small portion of the land. In addition, PW 3 said that since he was not involved, his title deed did not reflect his correct name as per the ID card. He added that this title deed must be with the 1st defendants; otherwise, he came to know about the changes to the register when he saw his cousins tilling his land and erecting new fences to it, prompting him to visit the land's office to establish the truth. PW 3 said that from P. Exh No. (4) it was not clear if his late father was the one who made the transfer, and neither has the 1st defendant explained how he had acquired the land.
38. Similarly, PW 3 told the court that his late father had four wives, two of whom were alive at his death in 2006, yet none of them was included or involved in P. Exh No. 4 as beneficiaries of the suit parcels of land. Regarding P. Exh No. (5) and (7), PW 3 told the court that the map had no date or source point, neither were the crossings and reasons to include the name of the 1st defendant in place of the deceased indicted or authenticated with his father's signature thumbprint and or an official stamp.
39. Further, PW 3 stated that P. Exh No. (7) was submitted to the land adjudication officer by the 1st defendant alleged on 11.12.2007, long after his late father had passed on as an objection. PW 3 told the court that during the lifetime of his late father, there were no objection proceedings brought against any of his parcels of land; otherwise, any such objections filed by the 1st defendant were fraudulent.
40. PW 3 said that if P. Exh No. (7) was ever lodged on 24.1.2001, the deceased father would have signed or thumb printed it, and one wondered why, from 2000, it had not been processed until 2007. Similarly, PW 3 said the said document had no name of the land adjudication officer.
41. Commenting on P. Exh No. 8-15 PW 3 told the court that the adjudication record was tampered with by the 1st defendant regarding parcel L.R No's. 807, 4120 & 8971 and were lacking vital details such as the signatures of the late father and the land adjudication officer, the dates of submission, nature of the transaction, reasons for the transaction, and date, and was also doubtful whether the late father indeed undertook it.
42. Again, PW 3 said that the common denominator in all these transactions was the 1st defendant, either as the author of the document or the one who allegedly submitted them to the land adjudication officer without the presence of the deceased father or the involvement of other beneficiaries in the parcels of land. PW 3 denied that his late father, whom he termed as very transparent, transferred any of his parcels of land to any of his sons during his lifetime other than what he had indicated on the ground where each of them was entitled to develop until he passed on on 27.6.2006.



43. PW 3 said that looking at P. Exh No. 7-15, some of the transfers for the parcels of land happened after 27.6.2006, at the instance of the 1st defendant, yet he had no letters of administration, consent, or approval from the beneficiaries to undertake such changes. PW 3 denied that his late father could have appended his signatures on the exhibits as alleged or approved the alleged transfers before and after his demise. Similarly, PW 3 further told the court that the 1st defendant never explained to him how the changes to the land records were done or capable of being undertaken without the knowledge of the rest of the beneficiaries of the estate after 2006, in the absence of letters of grant.
44. PW 3 told the court that he was not aware of, notified, invited, or involved in the alleged family meetings captured in the minutes forming part of the 1st defendant's bundle of documents. Similarly, PW 3 said he was not privy to the letter dated 18.9.1995 addressed to the land adjudication office; otherwise, there were no pending objection proceedings over the parcels of land with the 1st defendant at the time. Regarding minutes of 18.8.2009, PW 3 denied that such a meeting took place and insisted that no succession proceedings had been filed; otherwise, his mother, who was alive at the time, was never involved in the said meetings, yet her presence was critical as the only surviving wife of the deceased. Further, PW 3 said that it was evident in the exhibits that all the alleged meetings took place in the absence of other critical members of the family; hence, its resolutions could not be binding at all.
45. Regarding the letter dated 11.9.2010 by the 1st defendant to the District Land and Settlement Officer (DLASO), PW 3 said that the deceased father could not have executed the transfers during his lifetime without his knowledge as alleged and for the transfer to succeed without letters of grant before and after 2006. As to the brief history report, PW 3 told the court that the same was not necessary to be forwarded to the DLASO alongside the letter dated 11.9.2010 if, at all, the late father had already transferred the suit parcels of land to the 1st defendant before he passed on.
46. In cross-examination by the defendants, PW 3 stated that it was his late father who had directed parcel L.R No. 4690 to belong to him but, unfortunately, had now been subdivided. He admitted that the said parcel had approximately five homesteads, including that of the 1st defendant, his mother, and his late father, which his children were currently occupying.
47. PW 3 said that all the five homesteads were in existence during the lifetime of the late father. Similarly, PW 3 admitted that his cousins and sons of the late uncle, Mr. Mbirithi, initially used to live in parcel No. 4690 before they moved to Nchiru land which land was taken up by Meru University in 2000.
48. Moreso, PW 3 said that the 2nd plaintiff's late husband was living in the Kaongo area, which was part of the ancestral land, before he passed on. He said that he had no problem with the said allocation. According to PW3, the 2nd plaintiff was demanding nothing from the defendants since the house her late husband had on Parcel No. 4690 had been surrendered to him (PW 3). Further, PW 3 said that he had no problem with the allocation of seven acres at Kilemi to the 1st defendant.
49. PW 3 said that there was some parcels of land in the Thau area still under his late father's name, occupied by Salome Ringiri, Joseph Limungi Jeremia Thingo, and James Mbiti which he was not objecting to. Regarding parcel L.R No. 4120, PW 3 said that he was not aware of who was occupying the land on the ground. As to parcel L.R No. 807, PW 3 said that the title deed was showing the 1st defendant as the owner but it was he who was utilizing the land alongside the daughter of his late sister Alice Mukunga.
50. PW 3 denied that the subject parcels of land belonged to his late grandfather and that is why his cousins were entitled to a share. According to the 1st plaintiff, the lands belonged to his late father meaning the cousins could not stake any claim to them. Again, PW 3 stated that the late Mbirithi was the owner of



- land in Kamuthe and Kithioroka. PW 3 denied that after the university (Meru) took up the cousin's land, the late father directed that the cousins moved back to the ancestral land and, therefore, became entitled to part of parcel L.R No. 4690. He insisted that the 1st defendant and his cousins had no right to any part of L.R No. 4690.
51. PW 3 admitted that the late father did not involve him in the land adjudication processes since he was very young during the adjudication period in the area. He denied that the 1st defendant was involved in the demarcation process for Parcel L.R No's 4690, 807, 5989, and 4120; otherwise, his late father would have notified him. PW 3 said that it was irregular for the 1st defendant to solely own four title deeds for the disputed parcels of land.
 52. PW 3 said that he did not sue the government agencies who assisted or colluded with the 1st defendant to register, subdivide and transfer, title deeds irregularly or illegally. He said that there was no justification to do so to cater to his cousins by giving out three portions to them in alleged compliance with the wishes of his late father.
 53. Nevertheless, PW 3 admitted that by creating the new titles, the three "houses" of his late father and that of his uncle were catered for. PW 3 said that in the said arrangement, the late Rimungi represented the 1st family, the 1st defendant the 2nd family and him the 3rd family.
 54. PW 3 confirmed that P. Exh No. Seven had details of the transferee and the transferor and the date of submission as 24.11.2000. He said that despite the discrepancies highlighted in his evidence in chief in P. Exh No's. 7-15, he had not listed any witnesses from the land's office to attend court to substantiate his allegations of tampering with the official land records by the 1st defendant.
 55. As to P. Exh No's. 8, 9 & 10, PW 3 said that though they were made during the lifetime of his late father, he wasn't agreeable that the 1st defendant lawfully became the owner of the parcels of land.
 56. Similarly, PW 3 stated that he was not aware that the 1st defendant had shared part of his Kilemi land with the cousins, only to retain 1.5 acres as the balance. PW 3 confirmed that out of the parcels of land before the court, the 1st defendant's share remained 0.47 acres only the rest going to different people including himself.
 57. PW 3 also testified that the 1st defendant's conduct was fraudulent in that he illegally subdivided, obtained title, transferred, and registered portions of parcel L.R No. 4690 to his cousins, leaving him with little land with nowhere else to go, unlike him, who had alternative residences and the cousins who had acquired the Kilemi land.
 58. PW 3 admitted that the 1st, 2nd, and 3rd family (house) had eight four and four children, while his uncle had three wives with many children. PW 3 said that the basis of his claim was the meeting of 1999, during which his late father shared out his parcels of land as per his wishes and in which he was bequeathed the entire parcel L.R No. 4690.
 59. According to PW 3, the late father's wishes were not recorded anywhere. He denied that the said wishes dramatically changed after the Meru University displaced his uncle's children in the Nchiru area, hence the need to resettle them. PW 3 insisted that the government ably compensated the cousins; hence, they were not entitled to any ancestral parcels of land under the names of his late father and, in particular, in parcel L.R No. 4690.
 60. PW 3 insisted that all the late father's parcels of land ought to be subjected to the succession court process, including the two parcels of land remaining under the deceased's name, one situated in the Thau area.



61. Further, PW 3 said that he was not aware that if all the parcels were subjected to the said process as suggested all the 16 children would end up getting a share of Thau land and parcel L.R No. 4690. He termed the alleged registration of the four parcels of land in the names of the 1st defendant as fraudulent, hence the request for cancellation of the six title deeds including that belonging to him.
62. PW 3 said that he was not aware that between 2000 and 2014 before the title deeds came out, he had a right that he did not exercise to object to the adjudication register. PW 3 said that the only action that he took was to visit the land adjudication office in Uuru in 2010 to demand the documents leading to the subdivisions, including the adjudication maps.
63. Following his complaint at the land adjudication office, the 1st defendant was summoned, and eventually, he was directed to move to court. He said that he had no document to show that he had made a complaint in 2010. PW 3 said that, to his utter shock, the title deeds came out in 2014 and, therefore was unaware that the result was because the whole process of land adjudication was over.
64. Again PW 3 said that his complaints before the land adjudication office were not handled or determined before he came to court; otherwise, by 2010, he was already aware of the replacement of the names of his late father with those of the 1st defendant in the adjudication register.
65. For clarity, from his lawyers, PW 3 reiterated that P. Exh No. (4) related to the transfers and came to his knowledge in 2010, that the title deed came out six years down the line; PW 3 said that he was visiting the land adjudication office seeking a way forward and that after the 1st defendant was summoned, he maintained that the changes were procedurally effected and so was the view of the land adjudication officers.
66. PW 3 said that he was advised at the Uuru offices that, if aggrieved by the changes to the adjudication register, to move to court; otherwise, the officers appeared as compromised by the 1st defendant. PW 3 said that he never escalated his complaint elsewhere other than in court including to the Department of Investigations Criminal Investments or Ethics & Anti-corruptions Corruption Commission (EACC). PW 3 insisted that he equally did not object to the position that was given to him as per P. Exh No. (4), and therefore, he eventually collected his title deed and continued utilizing the land, even though he still objected to the subdivisions, the transfers, and the issuance of the six title deeds.
67. In re-examination, PW 3 said that all the subject parcels of land before the court were gathered and initially recorded under his late father's name as per the land adjudication records; otherwise, there was no record before the court that the said parcels of land ever belonged to his grandfather as alleged by the defendants.
68. PW 3 insisted that his late uncle John Mbirithi only gathered lands in the Kamuthe, Kithioroka, and Nchiru areas, which were never ancestral land, hence the reasons that he has not included them in the suit. PW 3 admitted that the said cousins used to live on parcel L.R No. 4690 before they moved out to the Nchiru area in 1974. He insisted that his uncle never demanded a share of parcel L.R No 4690 from his late father since he demolished all his houses in 1974 and left the land.
69. Additionally, PW 3 said that before his uncle passed on, he made no demands for a share of parcel L.R No. 4690 as ancestral land from his late father. Similarly, PW 3 said that before his late father passed on, none of the cousins had ever demanded or lodged a claim over parcel L.R No. 4690 as their ancestral land during the land adjudication process or until his late father passed on.
70. PW 3 added that none of the defendants have counterclaimed for a share in the suit land. Additionally, PW 3 said that none of the cousins have been utilizing part of parcel L.R No. 4690 since 1974. PW 3 said that despite the existence of five homesteads in parcel L.R No. 4690, there were no visible



- boundaries on the ground for the alleged subdivisions brought by the 1st defendant; otherwise, he was the one utilizing the entire parcel. Similarly, PW 3 said that none of the beneficiaries had demanded that he vacate or cease utilizing the entire parcel of land.
71. PW 3 said he only became aware of his title deed in June 2016 when he visited the lands office at Uuru. PW 3 said that he orally registered his complaints at the said office only for the officers after a week to summon him and the 1st defendant for a meeting.
 72. Given the status going by P. Exh No. (6), which was issued on 28.11.2014, PW 3 said that there was nothing that he could have done at the land adjudication office for title deeds were already out. As per P. Exh No. (4), PW 3 admitted that it did not indicate when the transfers were effected to the 1st defendant.
 73. Similarly, PW 3 said that the letter written to the land adjudication office by the 1st defendant had omitted vital details belonging to them. He also said that P. Exh No. (11) shows that Joseph Limungi was the one who signed the same on his behalf. He termed P. Exh No. (4) as a forgery for his father had already passed on. Similarly, PW 3 denied submitting P. Exh No. (11) otherwise he was then at his place of work. He insisted that P. Exh No's. (7 -1 5) had many errors, omissions, and misrepresentations.
 74. PW 3 told the court that he had no complaint against other parcels of land belonging to his late father situated in Thau, Kaongo, Uthiru, and Kilemi, which ought to go through the succession process. PW 3 stated that he objected to items 11, 12, & 13 of P. Exh No. 7-15 since they were illegal entries while regarding P. Exh No. (8, 9 & 10), the names of his late father on the reverse side were canceled to benefit the 1st defendant. PW 3 said that Mr. Muchai advised him not to lodge any complaints with either the CID or the EACC since they did not deal with land matters. Again, PW 3 said that he did not do so since the 1st defendant is his stepbrother.
 75. Titus Kirea Ibu EGH testified as DW 1. He told the court that he was a retired civil servant and a businessman born on 27.9.1952 in Parcel L.R No. 4690 Kianjai village to the deceased, whose mother was Maria Ntangi M'Ibui. DW 1 said that his grandfather was M'Baigoni, who had two sons and one daughter his uncle was John Mbirithu. DW 1 said that he never came across his late grandfather but met his grandmother, who died around 1955/1956.
 76. DW 1 said that his father had three wives, and his mother belonged to the 2nd house. He said that his grandmother used to live on parcel L.R No. 4690 as part of ancestral land where both were buried. DW 1 told the court that land adjudication in the locality started in 1966 under the *Land Consolidation Act* (Cap 283), involving gathering, demarcation, adjudication, and consolidation. DW 1 said that families would identify family land from where the grandparents were living, and therefore, parcel L.R No. 4690 was part of that process.
 77. Further, DW 1 said that his late father was suffering from tuberculosis and was in and out of hospital during the adjudication process; all his parcels of land were claimed by other people, including L.R No's. 4690, 4120, 5989, and his land parcel L.R No. 556, occasioning many objection cases that took time to be solved up to 2010, when the first title deeds for land in the area were issued following the completion of the adjudication process in 2010.
 78. DW 1, therefore, said that, as a matter of fact, he was deeply involved in the adjudication process soon after he finished college in 1978 and that his late uncle moved out of Kianjai, where their grandmother was buried, after the family grew big. DW 1 also stated that between 1959 and 1960, it was his late father who would pay poll and hut tax for his uncle, and it was around that time that the two brothers agreed on how to share the ancestral land, with his uncle taking up 60 acres in the Nchiru area.



79. Further DW 1 added that after deciding on how to share the lands, where, and how much acreage, the last member left parcel L.R No. 4690 in 1974. For those reasons, DW1 said that Parcel L.R No. 4690 was an ancestral land belonging to their grandparents. DW 1 said that later on, his late father, on his own gathered other land in Kaongo Kithioroka and Kamuthe. DW 1 confirmed that all their homes were on parcel No. 4690 as the grandfather's homestead as ancestral land.
80. DW 1 said that after several objections over parcel L.R No 4690, his late father acquired it under Nthenge oath while his late uncle was walking behind him.
81. DW 1 said that out of 32 children belonging to his late father and uncle, he was the only one lucky at the time to go to university, and that is why, in 1978, he had to assist his late father in the land cases for he trusted him very much.
82. DW 1 said that after the objection proceedings or cases were over, his father told him that "since we had hunted well and brought the carcass home," they had to share the parcels of land with his siblings. DW 1 said that those directives to date were a burden that he has to carry over his shoulders.
83. DW 1 said that when Meru University took over land belonging to his uncle, the family decided to share parcel L.R No. 4690; hence, the six subdivisions to accommodate his cousins and hence the reason why in effecting the subdivisions on parcel L.R No 4690, the 1st plaintiff's parcel L.R No. 8969 was placed exactly where the 1st plaintiff's house is situated.
84. DW 1 said that his late father inherited L.R No. 807 after a widow whom his late father had inherited, though not ancestral per se but came out of taking care of great grand aunties.
85. DW 1 confirmed that parcel L.R No. 807 was also acquired through the Nthenge oath. Similarly, he said that parcel L.R No. 4120 was his father's land but not ancestral. He added that after completing university, he took up several responsibilities from his late father, including the land cases, and that is why most of the documents or summons bore his address or were sent to his father through him, for they kept going for the objection proceedings together.
86. Again, DW 1 said that in 1995, his late father decided to transfer his parcels of land to him to hold in trust and that he has lived to that word that by virtue of the land being under his name, it does not mean that he exclusively owns them.
87. DW 1 stated that the process of the transfers were done in two ways: writing a letter or appearing before the adjudication committee, issuing minutes, and issuing summons or dealing with the issue. He said that most of the summons for his father were being addressed to him. DW 1 said that he was doing all this in the spirit of trust, as can be seen on page 9 of the paginated bundle on summons dated 18.9.1995, in relation to parcel L.R No. 807.
88. He said that most of the documents alluded to by the 1st plaintiff were a clear testimony that his late father had bestowed upon him a heavy responsibility of handling the land disputes on his behalf, which fact the land adjudication officers were aware of.
89. DW 1 said that as the 1st born son of the 2nd house and Justus Murefu as the 1st born son of the 1st house, they were bequeathed some parcels of land, all of which were documented by the land adjudication officers, so he said that was the context and the capacity in which Justus Murefu and himself acquired some parcels of land direct from their late father.
90. Regarding parcels L.R No's. 807 and 5989, DW 1 explained that the former was surveyed alone while the latter was shifted four kilometers away from parcel L.R No. 807 and hence as a first registration parcel L.R No. 807 came under his name, and after a meeting in 2009, a letter was written to bequeath



it to the 1st plaintiff's mother, currently under the use of the 1st plaintiff, though the title belongs to the 1st defendant. DW 1 said that he surrendered the title to the family chair, but the 1st plaintiff refused to take it, saying that it was fake.

91. DW 1 said that when the title deeds came out, he was the one who collected them on behalf of his late father. He insisted that the parcel of land could not revert to the names of his late father post-registration, for all the transfers occurred during the land adjudication process.
92. Regarding parcel L.R No. 5989, the 1st defendant said that though the title deed came under his name, it belongs to the 3rd house, and from the 2009 meeting, the 1st plaintiff was aware that it was their entitlement. DW 1 said that the attendees to the meetings were about 150 including the 1st plaintiff's mother and a brother. Therefore, DW1 said that parcels L.R No's. 807 and 5989 belong to the 3rd house, and all these facts were known to all family members by the time the title deeds came out in 2014; therefore, all that was required was a matter of transferring the titles from his name of the respective owners or beneficiaries of those parcels including parcel L.R No. 4120, whose beneficiary is the 1st plaintiff's nephew.
93. DW 1 said that the 1st house has their parcels of land, which have not been affected by this suit save for parcels No's 8968 and 8971, which are ancestral land which the 1st house, Justin Murefu, on its behalf has 18 acres of land at Kaongo.
94. As to the 2nd house, DW 1 said that in 1966, his late father registered 7.5 acres of land in Kilemi under his name on behalf of his siblings according to Tigania traditions, out of which 3 acres which land he surrendered to his cousin and 2 acres to his nephews so that the cousins would not raise the issue of ancestral land against Murefu's land. Therefore, DW 1 said that he sacrificed his share for the sake of his family and DW 1 that P. Exh No. (4) was his letter to DLASO following a family meeting where the 1st house, through Joseph Limungi, acquired L.R No. 8968, 3rd house acquired parcel no. 8967, while his cousins acquired L.R No's. 8968, 8970, and 8971, respectively.
95. DW 1 said that the basis of the six parcels of land that his father had seven sons and eleven daughters, so they divided as per each mother's house, and since his late father was buried in his elder son's house, he had indicated where to be buried next to his 1st wife who died in 1982 and so had he had also indicted where the 1st defendant's mother should be buried.
96. DW 1 said that since parcel No. 8968 was given to the 1st house, where the three parents had been buried (in a proxy) and given that he buried his late mother in Nanyuki, a ceremony had to be done to carry the soil from her grave in Nanyuki to bury it next to his late father's grave in order to avoid a curse hence the burial in proxy.
97. DW 1 said that parcel L.R No. 4690 was ancestral land for all his cousins who were born and grew up there from 1952 until 1975. Similarly, DW 1 said that his grandparents had been living there since 1920, before the land adjudication process started, DW 1 said that they knew what land was ancestral and what was individual land.
98. DW 1 said that they were all living there as brothers and sisters until circumcision time in 1964; hence, the reason that all the families had to be represented in the subdivisions, going by the wishes of his late father before he passed on, more so after their cousins land was taken up by the university in 2000, otherwise as per traditions after one ancestral land was taken, the cousins were entitled to compensation with another ancestral land.
99. DW 1 insisted that parcels L.R No's 807, 4120, and 5986 were not ancestral land and, therefore, his late father would deal with them as it pleased him. Similarly, DW 1 said that his late father had other



- parcels of land in Muthiru and Kianjai measuring 11 and 14 acres, which have been shared with Joseph Limungi on behalf of the 1st house and Mbiti, the 1st plaintiff's mother (four acres) and 4 acres to the 1st plaintiff's brother now deceased whose son was also given parcel L.R No. 4120.
100. DW 1 said that after declining the 4 acres, PW 3 exchanged it with his brother to take parcel L.R No. 807. DW 1 confirmed that succession proceedings were yet to be done on the estate of his late father over the two parcels of land under his name to go to the beneficiaries for none of the parties was contesting the same. Further, DW 1 said that his late father had land in the Machegene Mbeu location measuring 15 acres, but the title deed is not yet out.
 101. However, DW 1 said that as a family, they agreed that the said land be shared among the ten sisters, including Salome Ringari, who was bequeathed 4 acres of land in Muthiru to ameliorate their suffering.
 102. DW 1 also said that regarding P. Exh No. (5), a land surveyor was involved who took exact measurements as per the sketch map going by what was on the ground. He, therefore, said that his late parents are buried on parcel L.R No. 8968 on land held by Joseph Limungi; his permanent house (home) was on parcel L.R No. 4690; the house he had built for his late father sits on parcel L.R No. 8967 while the house of the 1st plaintiff's mother was on parcel L.R No. 8970. DW 1 said that the 1st plaintiff has been living in a house the 1st defendant had built for his parents in 1980 on parcel L.R No. 8967 but has now erected another one. DW 1 said that Justis Murefu's house was on parcel L.R No. 8968, which was unoccupied.
 103. Given the preceding, further denied that his late father bequeathed parcel L.R No. 4690 to the 1st plaintiff as alleged or at all; otherwise, he was mistaken to think so since, as per traditions, the land was ancestral in nature and since his late father, after the displacement of his cousins, uttered the words that "everybody knew where his mother came from, "the logic being that each of the families had a share to the land, after all the late father never treated parcel L.R No. 4690 as exclusively his individual or personal property.
 104. DW 1 said that his late father had expressly instructed him to be a trustee for the whole family, and given that his late father and uncle were very close, especially during the Nthenge oath, unfairly taking the land away would bespeak of a curse.
 105. Regarding P. Exh No. (7-15) DW 1 denied making any cancellations on the documents. As to D. Exh No (4), DW 1 said that after the meeting, the letter was written leading to an Objection No. 4464 and the subdivision in P. Exh No. (7). He denied forging the documents; otherwise, he was not a party to the work done on the documents by the land adjudication officers. DW 1 said that any questions regarding P. Exh No's. (7-15) were supposed to be answered by the makers of the documents; otherwise, all that he knows is that he holds the title deed in trust for the rightful beneficiaries.
 106. DW 1 said that anyone aggrieved by the adjudication process had a right to complain up to the minister's level and in court. In this instance, DW 1 said everybody in his family was satisfied with the work that he did openly and would disclose the progress during family meetings, which were duly attended by all except the 1st plaintiff.
 107. Additionally, DW 1 stated that the 1st plaintiff was an adult during the objection stages of the land adjudication process, which he did for and on behalf of his siblings, for God had endowed him with the ability to do so. DW 1 said that he was not a fraudster and, therefore, he did not engage in any irregularities or perhaps in any way to derive any personal benefit out of the process; if anything, DW 1 said that he gave out his share, he equally used many resources to subdivide the parcels and make follow-ups, defended the family rights during the adjudication objection proceeding/cases and therefore since



- his ancestral land was in Kianjai, he had emotional attachment to the ancestral land parcel L.R No. 4690 which he has reserved for his son courtesy of his late mother as an inheritance from his parents.
108. Again, DW 1 testified that he had no intention to steal and keep any land to himself. Further, DW 1 said that if all the titles were to be canceled, all his cousins would now demand a share of all these parcels, a total mess to the family and the 1st plaintiff would lose more. DW 1 said that the 2nd & 3rd plaintiffs had to withdraw from the suit after realizing that it was not a succession cause. DW 1 added that the 2nd plaintiff lived on the 11 acres, which she was likely to lose if the cancellations were made.
109. DW 1 said that he could not imagine the 1st plaintiff suing him after what he had done to his mother and himself since 1978 when his stepmother was estranged and brought him back in 1982 and then educated the 1st plaintiff, contributed 50% during his wedding day and accommodated him in his house.
110. DW 1 said that the hostility his brother has on him is not understandable, yet he has done nothing wrong to him. DW 1 said that his heart was clear and all that he did was for the good of the larger family, and if necessary he sought forgiveness from PW 3 to maintain the family relationship and DW 1 that he had no reason to harm the 3rd family.
111. In cross-examination, DW 1 told the court that as of 1966, all adjudication records for parcels L.R No's. 4690, 807, 4120, and 5989 were in the names of his late father, even though the same originated from his late grandfather. DW 1 told the court that the family meetings were held thrice in the absence of the 1st plaintiff since he was away at work.
112. He clarified that all that was required at an adjudication stage in transferring land was only a transfer letter, usually written by the recorded owner to the land adjudication officer. Even though his late father was semi-illiterate, DW 1 told the court that he was capable of writing down his name. Further, DW 1 said that he was the one who wrote the transfer forms on behalf of his late father for the transferred four parcels of land in 1995. DW 1 similarly said that the transfers were effected in different years, including in 1999 and 2000
113. Subsequently, DW 1 stated that everyone in the family knew him as the custodian of the family properties. DW 1 insisted that his cousins were not adequately compensated after Meru University took up the Nchiru land. DW 1 told the court that the subdivisions were effected on L.R 4690 land adjudication officers visited the locus in quo on a date and month, he could not remember to effect the boundaries or changes on the ground in the presence of family members.
114. DW 1 similarly told the court that ten days before his late father passed on, he had called for a family meeting over land sharing.
115. On re-examination, DW 1 said that L.R No. 807 was in the name of the 1st plaintiff, while L.R No. 4120 was in the name of his nephew. Similarly, DW 1 told the court that the 1st plaintiff was the beneficial owner of parcel L.R No. 5989, a subdivision from parcel L.R No. 807 and told the court that the plaintiff was equally the owner of parcel L.R No. 8967.
116. In essence, therefore, DW 1 said that out of the six parcels of land that the plaintiffs were seeking to be canceled, four of them were in the names of the 1st plaintiff, or he was the beneficial owner, yet he had even declined to accept the title deeds for L.R No's. 807, 5989 and 4420.
117. DW 1 told the court that ancestral land was composed of parcels of land that emanated from where one's ancestors had been buried. As to land arising out of the settlement scheme, DW 1 told the court that in 1971, he attended the balloting alongside his brother for the land situated in the Thau area



- measuring 15 acres, registered under the name of his late father. Similarly, DW 1 said that the other parcel of land was Machegene in Mbeu which was about 10-15 acres.
118. DW 1 wondered why the decision of his late father over L.R No. 4690 was being questioned while his decision over the sharing of all the other parcels of land indicated above was not being challenged by the 1st plaintiff. DW 1 said that the deceased decisions or acts regarding parcel L.R No. 4690 were consistent with the decision he had made with the rest of his parcel of land.
 119. Limungi J.M Ibui testified as DW 2. He told the court that he was a retired teacher currently living in the Thau location on a property belonging to his late father namely L.R No. Kianjai/Kianjai/1/10. He told the court that he was the owner of parcel L.R No. 8968, a subdivision of parcel L.R No. 4690 following a meeting by the family members, which resolved that each house acquires a portion of the ancestral land as directed by the deceased father before he passed on and to cater for the evictees of Nchiru land.
 120. DW 2 said that he was the one who, in good faith, signed for the 1st plaintiff at the land adjudication office, while Joshua Kirea signed on behalf of Stephen Kirea so that the subdivision could take place.
 121. After the subdivision, DW 2 told the court that most of the beneficiaries took possession of their shares save for some whom the 1st plaintiff had blocked them from utilizing their respective portions.
 122. DW 2 clarified that he was the one who wrote the document named “A Brief History of Our Ancestral Land”. He termed the decision to subdivide l. No. 4690 was in line with the late father’s wishes as fair. He confirmed that there was nothing in the adjudication register indicating that the late father was holding Parcel L.R No. 4260 in trust for the children of John Mbirithi.
 123. Similarly, DW 2 said that he was the one who had invited the 1st plaintiff to the meeting for the three meetings, including the one on 15.8.2009, but he declined the invitation. DW 2 denied there was a Meru customary practice for the last-born son to take up his mother’s homestead. DW 2 further confirmed that both the 1st plaintiff and 1st defendant had a homestead on parcel L.R No. 4690. DW 2 said that after an issue was raised, the DLASO advised them to settle the issues amicably hence, the meeting called for 11.9.2010. He said that the DLASO letter was dated 23.8.2020. DW 2 added that the failure to involve the stepmother in the three meetings was not deliberate.
 124. DW 2 clarified that even though their late father left three parcels of land in Thau, Kianjai and Machegene under his names, he had orally shared all of them during his lifetime, and all that was remaining was a formal succession process to subdivide them among the known beneficiaries.
 125. Further, DW 2 stated that he was among the signatories of some of P. Exh No. 7 – 15, which contained errors or omissions he would highly regret the same; otherwise, he had no intention to commit an irregularity.
 126. DW 2 said that the family had scheduled an annual meeting every second week of August each year. Similarly, DW 2 said that they attended the adjudication office Uuru after they were summoned following a complaint by the 1st plaintiff. Further, DW 2 said that after he was dissatisfied with the advice of the DLASO, the 1st plaintiff made another report at the district commissioner’s office, who, upon seeing the minutes and listening to the complaint, ordered that the status quo be maintained otherwise any aggrieved party would move to court.
 127. At the close of the defence, parties were directed to file and exchange written submissions. The plaintiffs relied on written submissions dated 13.7.2024, isolating three issues for determination. On whether the 1st defendant procured illegal and unprocedural transfer of the suit lands while the recorded owner was dead and without letters of administration, the plaintiffs submitted that going by the evidence of



- PW 1, 2 & 3, the deceased left behind parcel L.R No's. 4690, 807, 4120, and 5989 in his names as per the adjudication records, which evidence was corroborative and was not cross-examined on that aspect.
128. The plaintiffs submitted that going by P. Exh No's. (7-10), the entries to the names of the 1st defendant occurred on 11.12.2007, 2.1.2015, 11.11.2010, and 16.9.2014 long after the deceased had passed on on 26.7.2006, as per the death certificate.
 129. In addition, the plaintiffs submitted that the signatures or thumbprint of the land owner and signature, name, and address of the witness were lacking on items numbers 9 & 10 of P. Exh No's. (7-10).
 130. Similarly, the plaintiffs submitted that the adjudication record, namely (P. Exh No's. 11 to 15), shows that the subdivision and transfers were done in May 2018 without a certificate of confirmation of grant and also was the issuance of a title deed to the 1st plaintiff produced as P. Exh No. (6).
 131. The plaintiffs submitted that DW 1 & DW 2 failed to produce any transfer letters of the suit land by the deceased, conveyancing the suit parcel of land to the 1st defendant at the adjudication stage.
 132. The plaintiffs submitted that the transfers were contrary to Sections 45 & 55 of the Law of Succession Act. Reliance was placed on Joseph Kibet Inwei vs. LJIT & another (2014) eKLR Ester Matoke Mogaka vs Richard Ondieki Makori & another (2022) eKLR, Munyu Maina vs Hiram Gathiha Maina, Sections 26 (1) (b) & 80 (1) of the Land Registration Act and Article 40 (6) of the Constitution.
 133. On whether or not the suit land and the resultant subdivisions should revert to the names of the deceased for purposes of succession, the plaintiffs submitted that given the subdivisions, transfers and registrations as demonstrated above were irregular, the only option was to make the reversal so that the parcel of land are subjected to the process of succession.
 134. The defendants relied on written submissions dated 30.8.2024, isolating six issues for the court's determination. On the first issue, the defendants submitted that in paragraph 3 of the further amended originating summons dated 25.2.2021, the plaintiffs implicitly affirmed that when the deceased died on 27.6.2006, parcel L.R No's. 4690, 807, 4120, and 5989 fell under the Land Adjudication Act (Cap 284).
 135. In P. Exh No. (7-15), the defendants submitted that the adjudication records were clear that between 1999 to 2000, the interest in the said parcels of land was transferred from the deceased to the 1st defendant, which evidence was corroborated by DW 1, who explained the circumstances surrounding the transfers which evidence was not controverted. Therefore, the defendants submitted that it was not true that the suit properties were in the name of the 1st defendant as of 27.6.2006, save for L.R No. Kianjai/Thau/10 and 374.
 136. Given the evidence tendered that the 1st plaintiff was a beneficiary of 4 acres out of L.R Kianjai/Thau/110, which he exchanged with his brother Jeremia Kaunyangi to take over parcel L.R No's. 807 and 5989, it goes without saying that the 2nd and 3rd plaintiffs had no claims, more so when Salome Rigiri was a beneficial owner of 4 acres in L.R Kianjai/Thau/374.
 137. On whether the deceased gave or bequeathed parcel L.R No. 4690 to the 1st plaintiff, the defendants submitted that the real motive of the suit was not to cancel the titles of the suit properties but for the 1st plaintiff to secure parcel L.R No. 4690 to himself. Whereas the 1st plaintiff, PW 1 and 2 testified to secure the said position, the defendants submitted that the evidence offered to sustain the claim was not credible, for it stood in conflict with the pleadings that the titles emanating from parcel L.R No. 4690 be canceled for succession proceedings to share them with their rightful beneficiaries.



138. The defendants submitted that the court cannot make a finding that parcel L.R No. 4696 was given or bequeathed to the 1st plaintiff by his late father, and since he died intestate, the heirs to the land would have to be determined by a probate and administration court.
139. The defendants submitted that if the court were to cancel the titles, it meant that the land parcel would revert to the names of the 1st defendant, making the plaintiff's claim to parcel L.R No. 4690 factually and legally untenable.
140. The defendants submitted that the plaintiff's suit was precipitated by an apparent selfish strike by the 1st plaintiff to try and impeach the titles arising out of parcel no. 4690 in the vain hope that the probate and administration court would order the same be bequeathed to him. The defendants termed the suit as terribly unreasonable and prejudicial to another family member who, except the 1st plaintiff had no genuine dispute over other suit properties; the distribution of the suit properties alongside other parcels of land in Thau took into account the consensus and negotiations of all family members; succession proceedings would occasion a miscarriage of justice on the cousins who were evicted from the ancestral land in Nchiru making Salome Rigiri lose too.
141. On whether parcel L.R No. 4690 was ancestral land, the defendants submitted that all the evidence produced by the plaintiffs to sustain the claim that it was not ancestral land was not credible at all or it ran counter to their pleadings and exhibits. Relying on Section 23, 2(a) & (b) of the [Land Adjudication Act](#), the defendants submitted that Meru customary law was the basis upon which the deceased sought to secure title under Cap 284, which basis DW 1 advanced in his uncontroverted testimony, tracing the family history of his grandparents, uncles and aunts since 1920's at present and their migratory trend making a compelling case for this court to find and hold that parcel L.R No. 4690 was the ancestral land of the family of M'Baingoni.
142. The defendants submitted that the said testimony by DW 1 was corroborated by the evidence of DW 2 including his handwritten document dated 14.2.2011, explaining the history of parcel L.R No. 4690 as ancestral, and lastly, because the plaintiffs were unable to prove a contrary position.
143. As to fraud, the defendants submitted that other than posing a question on paragraph 7 of the further amended originating summons, the plaintiffs did not seek such a declaration or relief for such a finding, which omission leaves the court with no option but not to make such a finding.
144. Further to this, the defendants submitted that Order 2 Rules 4 & 10 of the Civil Procedure Rules required the plaintiffs to plead particulars of fraud, which they omitted to do specifically.
145. The defendants submitted that the plaintiffs have failed to prove any alleged fraud on the 1st defendants' transfer subdivision and registration of the suit parcels of land since P. Exh No's. (7-15) were all filled by government officials and the parties to this suit.
146. The defendants submitted that to prove fraud, it was incumbent upon the plaintiffs to demonstrate or prove that the 1st defendant conspired or colluded to commit fraud with the relevant government officials, which they failed to do.
147. Moreso, the defendants submitted that the plaintiff failed to demonstrate how the 1st defendant had any fraudulent intention in respect of the suit properties. On the contrary, the defendants submitted that the evidence on record showed that the 1st defendant acted honorably and with utmost good faith in accordance with the wishes of his late father to ensure that the best interest of the larger family was secured.



148. The defendants submitted that clearly, the 1st defendant is a noble citizen who should be commended rather than castigated for these efforts and personal sacrifices to the extent of sacrificing his inheritance in order to support the livelihoods of distressed family members who were evicted from land they believed belonged to them in order to pave the way for a public university to be built. Reliance was placed on Black Laws Dictionary on Fraud *Gichinga Kibutha vs Caroline Nduku* (2018 eKLR, ICEA vs AG & others HCCC No. 135 of 1996 and *Arthi Highway Developers Ltd vs West End Butchery Ltd & others* (2015).
149. Similarly, the defendants submitted that the plaintiffs did not tender any proof that the 1st defendant made a false representation of an existing fact that was relied on by the land adjudication officer to their detriment.
150. It was further submitted by the defendants that going by Section 107 of the *Evidence Act*, the plaintiffs did not satisfy the evidential burden espoused to it by specifically adducing incontrovertible evidence beyond a balance of probabilities illustrating fraudulent acts for the 1st defendant in acquiring the suit properties in collusion with the land adjudication officers in an unlawful scheme to defeat the deceased interests. Reliance was placed on *Eunice Grace Njambi Kamau & another vs AG & others ELC Civil Suit No. 976 of 2012*.
151. On whether there is a legal basis or justification for the titles to the suit properties to be canceled and to revert to the deceased name, the defendants submitted that besides the fact that the plaintiff has not demonstrated why compounded prayers should be granted, the said prayers could not be granted. Reliance was placed on *Eunice Lamba vs NSSF & another* (2023) KECA 124 (KLR), that without proof of fraud, such an order cannot be issued.
152. Further, submitted that there was no justification to direct the suit properties to revert to the name of the deceased. The defendants submitted that the procedure used by the plaintiffs was not appropriate, generally where allegations of fraud and misrepresentation form the core of the dispute and, in particular, when particulars of fraud are lacking.
153. It was submitted that upon directions by the court to hear the originating summons viva voce, the plaintiffs failed to comply with Order 37 Rules 18 & 19 of the Civil Procedure Rules to plead particulars of fraud, which would have made the land adjudication officer a necessary party to the suit whose absence in the suit, the court cannot make the substantive prayer sought by the plaintiffs.
154. The defendants submitted that there was a jurisdictional issue since Cap 284 had an elaborate mechanism for handling disputes arising during the demarcation and adjudication process. Reliance was placed on *Maragret Mukomugaa vs Samuel Kingirwa Amuru & others* (2021) eKLR.
155. The court has carefully gone through the court record, the pleadings in this matter from inception to the present, the evidence tendered, issues framed by the parties, written submissions, and the law. The issues calling for my determination are the following:
- i. If the 1st plaintiff can bring or sustain these proceedings on behalf of the estate of the late, in the absence of the co-plaintiffs.
 - ii. If the plaintiffs failed to exhaust internal mechanisms under the law before coming to court.
 - iii. If the court has jurisdiction to determine all or some of the issues raised in the further amended originating summons.
 - iv. If the cause of action regarding fraud is time-barred.



- v. If the plaintiffs have pleaded and proved any irregularities, illegalities and fraud against the 1st defendant in the manner he obtained the recording, demarcation, subdivisions, transfers and registration of the suit parcels of land under his names.
 - vi. If the plaintiffs have pleaded and proved any irregularities, or illegalities and fraud in the manner the 2nd - 7th defendants became recorded or registered owners of the suit parcels of land.
 - vii. Whether the plaintiffs are entitled to the reliefs sought.
 - viii. Costs
156. It is trite law that parties are bound by their pleadings, and issues for the court's determination are derived from those pleadings unless some issues have been framed for the court determination. See *Raila Amolo Odinga & others vs. IEBC & others* (2017) eKLR. The purpose of clarity in pleadings is to ensure there is no trial by ambush, for the opposite party to know what issues are there to answer to, and for the court to know what is before it for determination and whether its jurisdiction is correctly invoked, since jurisdiction is everything and without it, a court of the law down its tools. See *Owners of Motor vessel Lillian "S" vs. Caltex Oil (K) Ltd* (1989) eKLR.
157. Pleadings equally help parties to narrow down the issues to diminish expenses and delays during the trial. Each party, therefore, has time to admit or deny every material allegation made against him. See *Raghibir Singh Chatte vs NBK Ltd* (1996) eKLR. Pleadings are the bedrock upon which a party makes or defends their claim or defense. The evidence adduced by parties must, therefore, be in support or in denial of the averments in the pleadings. See *IEBC & others vs Mutinda Mule* (2014) eKLR.
158. In *Raila Amollo Odinga & others vs IEBC* (supra), it was observed that parties are, therefore, not permitted to travel beyond their pleadings and are bound to take or plead all the necessary and material facts in support of the case that they have set up. Through pleadings, the court is also able to decide whether it has jurisdiction to determine the issues raised in the pleadings.
159. In this suit, the plaintiffs invoked the jurisdiction of this court under Order 37 of the Civil Procedure Rules pursuant to a limited grant ad litem issued to them under Section 54 of the [*Law of Succession Act*](#). The limited grant was jointly issued to three persons. Soon after the suit was filed, the then 2nd plaintiff disowned the document and sought to withdraw her name from these proceedings. She swore an affidavit to that effect, which the rest of the plaintiffs have never refuted its contents or addressed the court of its legal implications.
160. From the court record, the name of the initial 2nd plaintiff was silently dropped from the proceedings through an amendment. That notwithstanding, the limited grant ad litem and the authority to sue and plead, the remaining plaintiffs rely upon, was jointly issued to prosecute this suit.
161. The question is, what would be the legal implications of the withdrawal of the initial 2nd plaintiff to the capacity of the remaining plaintiffs to sustain the suit, yet they remain as co-joined by the two vital documents determining their capacity to sue and be sued for and on behalf of an estate of the deceased? What about the 2nd plaintiff, who brings the suit as a widow of her late husband and who has remained silent throughout these proceedings?
162. Section 72 of the [*Interpretation and General Provisions Act*](#) provides that save as if otherwise expressly provided, whenever any written law prescribes any form, an instrument or document which purports to be in that form shall not be void by reasons of any deviation from there which does not affect the substance of the instrument or document and which is not calculated to mislead.



163. A limited grant ad litem is issued and governed by the [Law of Succession Act](#) in the 5th Schedule paragraphs 11-16 and Rule 70 of the Probate and Administration Rules. The initial 2nd plaintiff had raised issues on the manner in which the 1st plaintiff obtained the limited grant by concealing material facts and misleading her into filing this suit.
164. The 1st plaintiff has not challenged the contents of the affidavit sworn by Salome Ringiri before this court, whose issues were also advanced in the evidence of DW 1. The defendants has also submitted on the manner in which the 1st plaintiff, misled the 2nd plaintiff and Salome Ringiri to join in filing this suit. The 1st plaintiff, in his pleadings and during evidence in chief, was silent on the issue of legal capacity to advance his claim alongside the 2nd plaintiff and the initial 2nd plaintiff, when the substance of the documents he relies on to have capacity before this court is under attack from a co-legal administrator. As indicated above, parties are bound by their pleadings and the capacity to sue goes to the jurisdiction of the court. A party without the capacity to sue is like a car without an engine to run. It grinds to a halt.
165. In Re-estate of Helena Wangechi Njoroge (deceased) (2015) eKLR, the court held that a limited grant ad litem is limited to the purpose of filing a suit to preserve the assets of the estate and that the suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case or an interlocutory application, within a probate or succession cause, but rather a civil suit to protect or defend the estate against third parties.
166. Though the former 2nd plaintiff did not formally move the probate court that issued the grant ad litem under Section 74 of the [Law of Succession Act](#) to revoke or amend it on account of fraud, defect in substance or misrepresentation, or untrue allegations of fact, the questions remain if the 1st plaintiff can still use the document to clothe him with the capacity to prosecute the claim on behalf of the estate solely.
167. In Alexander Mbaka vs Rayford Muriki Rauni & others (2016) eKLR, the court observed that the court cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such a right has not yet crystallized. The 1st plaintiff failed to go back to the probate court to seek an amendment or a rectification of the limited grant. The 1st plaintiff unilaterally dropped the 2nd plaintiff from the proceedings without leave of court but left the soul of the initial 2nd plaintiff hanging around the court, using the joint ticket of the grant.
168. Once the 2nd plaintiff was withdrawn from the proceedings before this court, the capacity to sue using the same documents for clothing PW3 with powers or duties to advance the interests of the plaintiffs to the estate of the deceased estate against co-beneficiaries to the estate became unsustainable, a nullity and inconsequential in fact and law. The issue of capacity to sue became even more complicated when the other co-legal administrator and the 2nd plaintiff did not participate in these proceedings by way of giving evidence even after she was given an opportunity to offer de bene esse evidence.
169. Sections 82(a) of the [Law of Succession Act](#) (Cap 160) provides that a personal representative subject to any limitation imposed by the grant can enforce by suit or otherwise, all causes of action which by virtue of any law survive or arise out of his death. In Alfred Njau & others vs City Council NRB (1982-1988), 1 KLR 229 locus standi was defined as one cannot be heard and even whether or not he has a case worthy of listening. In Troustik Union International & another vs Jane Mbeyu (1993) 1 KLR (9& 5) 730, the court said that to determine how one may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to Section 82 (a) of the [Law of Succession Act](#), which confers that power on personal representatives and them alone.



170. In *Virgina Edith Wamboi Otieno vs Joash Ochieng Ougo & another (1982-1999)* 1 KAR the court said that locus standi was a primary point of law almost similar to that of the lack of jurisdiction since lack of capacity to sue renders the suit incompetent for it goes to the root of the suit.
171. The capacity to sue, which was given to the plaintiffs, was joint. Along the way to court and in court, the then 2nd plaintiff withdrew her support to the 1st plaintiff. The remaining co-plaintiff has not been active before the court. Order 1 Rule 13 of the Civil Procedure Rules provides that where there are two or more plaintiffs, one may be authorized by any other to appear, plead or act. The authority shall be in writing, signed by the party giving it and shall be filed in the case. The initial 2nd plaintiff did not file a formal application to have her name struck out as a plaintiff save for the affidavits she filed before the court disowning the originating summons and the authority to sue.
172. A fresh authority to appear, plead and act from the 2nd plaintiff who remained was never filed alongside the amended originating summons and the further amended originating summons a part from the initial one dated 20.7.2016. Similarly, the limited grant ad litem initially filed covering the three plaintiffs was not amended to reflect the two remaining plaintiffs as the ones with the capacity under Section 82 of the *Law of Succession Act* to advance or prosecute the cause of action for the estate of the deceased for withdrawal of the authority vide an affidavit sworn on 24.4.2017 rendered the initial one void.
173. The defendants have submitted that the 1st plaintiff is a lone ranger who is not acting in the best interests of the estate and its beneficiaries. The prayers sought by the plaintiffs are on behalf of the estate. This is the context upon which the issue of capacity to sue has to be interrogated. Can the 1st plaintiff continue to prosecute this suit commenced on the strength of a joint limited grant ad litem separate from his co-administrator? Sections 54 and 82 of the *Law of Succession Act* expect co-administrators to collaborate at all times such that an administrator cannot act alone in the absence of the other on matters touching on the estate.
174. The rationale behind this is that the three as granted capacity in the lower court grant ad litem, is that they swore to faithfully act on behalf of the estate and not on their behalf. The authority to act is derived from the court courtesy of a statute as they hold a limited grant ad litem.
175. The administrators have to act in unison with no choice to act otherwise. In the event that they part ways along the way, then they must formally do so by going back to the appointing authority to seek a fresh mandate or rectify the grant by withdrawing the name of Salome Ringiri was not enough.
176. In *Simon Kamau Muhindi suing as the legal administrator of the estate of Esther Nyokabi Muhindi (deceased) vs. Monica Wambui Ngugi & another HCC No. 207 of 2013*, the court said that the capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators, duly appointed by the court who must collaborate at all times for one administrator out of the others cannot bind the estate or any of the administrators or file a suit alone on behalf of the estate.
177. The plaintiffs have used that capacity as legal representatives to invoke Order 37 of the Civil Procedure Rules and seek profound reliefs on behalf of the estate of the deceased. It can only be a bonafide administrator of the deceased person under any deed or instrument, who can take out an originating summons.
178. The plaintiffs have not brought the suit in their individual or separate capacities. The questions posed and the relief by the plaintiffs in the further amended originating summons speak to the estate of the deceased and so, do the plaintiffs still have the capacity to prosecute the claim for and on behalf of the



- estate in view of the preceding? The answer is no. It would have been different if the plaintiffs were solely coming in as heirs on questions affecting their rights or interests of the property of the deceased.
179. My finding, therefore, is that in so far as the plaintiffs are seeking reliefs for and on behalf of the estate of the deceased, they ought to act in unison. One of them cannot have or possess the legal capacity to do so.
180. Consequently, I find the claim brought by the two remaining plaintiffs incompetent, defective and unsustainable in so far as the 1st plaintiff prosecuted it without the authority to plead, act and represent the co-legal administrators of the estate of the deceased after the initial 2nd plaintiff was dropped from the suit.
181. The next question is whether the court has jurisdiction to hear and determine the cause of action and, by extension, the issues raised in the further amended originating summons. A cause of action is conduct or acts on the part of the defendant that give a plaintiff the reason to complain or lodge a claim. See D.T Dobie and Co- vs Muchina C.A No. 37 of 1978.
182. The plaintiffs contend that the suit parcels of land were in the names of the deceased as per the adjudication records for the Kianaji Adjudication Section on or before 27.6.2006. It was pleaded that the 1st defendant fraudulently obtained the title deeds in respect of the suit lands under his name which were illegally subdivided or caused the subdivisions of parcel L.R No. 4690 and transferred the resultant subdivisions to himself, the 1st plaintiff, a brother called Joseph Limungi Ibuti, and three other cousins as parcel L.R No's. 4690, 8967, 8969, 8970, and 8971, without any grant of letters of administration to his name without the knowledge or consent of the plaintiffs and other heirs. The plaintiffs, therefore, urge the court to cancel the registration of L.R No's. Kianjai/Kianjai/4690, 8967, 8968, 8969, 8970, 8971, 807, 4120, and 5989 in the names of the persons currently registered as the owners and registration of the same in the name of the deceased in order to facilitate sharing of the same to rightful heirs.
183. The plaintiffs have relied on P. Exh's No. (7-15) as the basis of their claim on when the illegal and fraudulent transfers occurred and on P. Exh No. (4) & (5) to show that it was the 1st defendant who undertook the subdivisions and transfers in respect to parcel No. 4690 subsequent to which registration of titles came out as per L.R P. Exh No. (4), which was issued by the land registrar dated 28.11.2014. Other than P. Exh No. (6) the plaintiffs have not brought before this court any copies of the record or official letters of the search for the rest of the registered titles, which they urge the court to cancel or nullify.
184. Exh No's. 7-15 were not produced by their makers. All of them are indicated as original adjudication records. How, when and from whom they were retrieved at the land adjudication office is not clear. The officers who issued and certified them as true copies of the originals did not initial their names, rank and capacity. The exhibits are not dated and signed by the Director of Land Adjudication. The makers were not called to testify or produce them. That notwithstanding and for purposes of establishing when the cause of action arose, the documents show that the transfers occurred or took place during the adjudication stage between 1999 and 2000, while the subdivisions of parcel L.R No. 4690 occurred in 2009.
185. The family of the deceased held family meetings on 15.8.2009, 7.8.2010 and 23.8.2010. A letter dated 11.9.2010 by the 1st defendant to the DLASO was sent communicating the resolutions, following a complaint by the 1st plaintiff, who had issued summons for 23.8.2010 to the defendants after the 1st plaintiff had lodged a complaint to him over the irregularities.



186. PW 3 did not object to the production of a letter dated 11.9.2010. He admitted in his testimony that it was confirmed that he had attended a meeting at the land adjudication office on 23.8.2010, in the presence of the 1st defendant and was given two weeks to help settle the matter and bring a report concerning parcels L.R No. 4690 and 4120. From that evidence, therefore, it cannot be accurate, as pleaded by the 1st plaintiff in paragraph 4 of the affidavit sworn on 20.7.2017, that the 1st plaintiff became aware of the changes in June 2016, when it is alleged that he recently went to Uuru Lands office, to check the position of family properties record and established the fraud by the 1st defendant
187. Subsequently, DW 1 and DW 2 confirmed to this court that a meeting took place on 23.8.2010 at the land's office in Uuru after they were summoned there by Mr. Muchai. PW 3 testified that his complaint at the land adjudication officers was not determined and that the officers seemed compromised by DW 1. PW 3 also told the court that he complained to the district commissioner, who again did not assist him. Asked in cross-examination whether he lodged any complaint in writing, PW 3 said his complaints were orally made.
188. Section 7 of the Limitation of Action Act (Cap 22) provides that a suit for recovery of land may not be brought after 12 years. A claim based on fraud may not be brought after three years of adjudication after the occurrence of it or after three years from the date the plaintiff, in the exercise of due diligence, became aware of the fraud. In *Ogenga (suing as the Legal Representative of the estate of Turufena Kemunto Ogaga (Deceased) vs Ogaga & others Civil Appeal No. 45 of 2018 (2022) KECA 1422 9 (KLR) 16th December (2022) (Judgment)*, a claim had been brought on parcels of land allegedly fraudulently transferred at the land adjudication stage and subsequently a title issued.
189. At issue on appeal was whether the suit was time-barred. The adjudication and titling had occurred in 1986 and the suit was being filed in 2016. Discovery of the entries had occurred 11 years after registration of the land. The court of appeal looked at the adjudication records and noted that the buyer had filed an objection that was allowed, and the new owners entered into the adjudication record.
190. The court held that it was disingenuous for the appellant to lodge a claim 30 years later, alleging fraud on the part of his siblings and the buyer. The court termed the claim as deceitful and mischievous and brought in a court without jurisdiction. The court said that any person aggrieved by a land adjudication officer decision under Section 26 of Cap 284 has to file a Minister's appeal on the decision and that in the absence of exhaustion of the process set under Cap 284, a party could not 30 years later file a suit seeking to reverse the decision of a land adjudication officer, made with respect in an objection properly lodged and determined during the lifetime of the deceased.
191. On fraud, the court said that since the claim was that the respondent's names were fraudulently inserted in the adjudication register, time with respect to fraud does not run until the plaintiff discovers the fraud as held in *Kenya Ports Authority vs Timberland (K) Ltd (2007) eKLR*. The court emphasized that the appellant ought to have exhausted the parameters of Section 29 of the *Land Adjudication Act*. In the absence of an explanation for not filing the suit or for a delay of 30 years after the entry in the adjudication record, the trial court was correct in upholding the preliminary objection on time limitation.
192. In this suit, there is enough evidence that the 1st plaintiff visited the land adjudication offices Uuru in 2010, which led to a meeting on 23.8.2010 in the presence of DW 1 and DW 2. PW 3 told the court that the 1st defendant became adamant at that meeting that he was lawfully the recorded owner of the suit parcels, particularly parcel L.R No 4690. Evidence on record is that by the time, the suit parcels of land were still falling under Cap 284.



193. The plaintiffs want the court to believe that they discovered the fraud in June 2016. I find it incredible for the 1st plaintiff to deny apparent facts that are contained in an official letter from the land adjudication officer who handled his complaints and issued summons to DW1 and DW 2. The 1st plaintiff became aware of the entries in August 2010 and not June 2016, as per the evidence before the court. Had he exercised due diligence, then, he would have discovered the entries. My finding, therefore, is that the claim against the defendants based on fraudulent entries into the land adjudication registers came to the knowledge of the plaintiffs on or about 23.8.2010. Therefore, the claim based on fraud became statute-barred on 23.8.2013. By the time the suit was filed on 20.7.2016, it was already statute-barred.
194. The next issue is whether the plaintiffs exhausted the internal dispute mechanisms under Cap 284. There is already evidence that the plaintiffs were aware of the changes to the adjudication register by 23.8.2010. Asked whether he lodged any objection against the adjudication register, PW 3 told the court that the land was already titled. That is further from the truth. The adjudication register and title for L.R No. Kianjai/Kianjai/8967, belonging to the 1st plaintiff, was opened on 28.11.2014, the same day as L.R No. Kianjai/Kianjai/8969.
195. Section 19 of the *Land Adjudication Act* provides that the recording officers shall consider all claims and prepare in duplicate, as per Section 23 thereof, a form in respect of every parcel of land shown on the demarcation map to rectify the form. Section 23 relates to the preparation of an adjudication record, which includes the form prepared by the recording officer under Section 19.
196. The recognized customary law guides the recording officer under Section 23 of the Act to exercise rights in or over the land which should be recognized as ownership to determine who is the owner of the land. Each of the forms that comprise the adjudication record must contain the number of the parcel, a record of the name and description of the owner, particulars of such right and the date when the form is completed. When completed, the form has to be signed by the chairman and the executive officer and after it is completed and signed by the owner, it shall not be altered except as per Sections 27 (1) or 29 (3) of the Act.
197. Further, Section 24 provides that the demarcation map and the adjudication record are the ones collectively known as the adjudication register. Section 25 thereof provides that once the adjudication register is completed, it is certified by the adjudication officer and the demarcation officer and shall then deliver the duplicate adjudication record to the director of the land adjudication, display the original adjudication register for an inspection and give notice that the adjudication register has been completed and may be inspected for a period of 60 days from the date of the notice.
198. Section 26 thereof provides that any person named in or affected by the adjudication register considering it incorrect or incomplete may object to the adjudication officer in writing, giving the reasons which shall be considered and determined.
199. Section 26 A provides that after the lapse of 60 days, the adjudication officers shall prepare an objection register for the land not subject to objection and deliver the same to the Director of the Land Adjudication, certifying the duplicate adjudication register as final and forward the no objection register for purposes of registration under Section 28 thereof.
200. Section 27 provides that when all objections have been determined and time for appeal under Section 29 has expired, the adjudication officer shall alter the duplicate adjudication register accordingly, certify the adjudication register and on the duplicate adjudication register that has become final and forward the adjudication register to the Chief Land Registrar.



201. Section 28 thereof provides that upon receiving the adjudication register, the Chief Land Registrar shall cause registration to be effected in accordance with the adjudication register save for that affected by an appeal under Section 29 where a restriction has to be registered.
202. The burden of proof in a suit lies on that person who would fail if no evidence is offered at all on either side. Whoever desires a court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove those facts exist. In this suit, it is the plaintiffs who want the court to find that there was an alteration of adjudication records by the 1st defendant that led to the registration of the suit parcels of land to his name and the subsequent subdivisions of parcel L.R No.4690 into six parcels of land.
203. The plaintiffs want the court to believe that the changes took place after 27.6.2006. He who asserts must prove. The plaintiffs want the court to further believe that they discovered the entries after the adjudication register had become complete and the title deed registered for the adjudication section. P. Exh L.R No's. (7-15) failed the test set by Section 80 of the *Evidence Act*. The custodian of the documents who issued them and certified the copies is not indicated. The law, as indicated above is that a duplicate copy is the one forwarded to the Director of Land Adjudication for titling.
204. The plaintiffs did not seek or obtain the duplicate copy, which was sent to the Director of Land Adjudication for comparison purposes with P. Exh No's. (7-15). Similarly, it is the plaintiffs who want the court to further believe that they had no option of invoking the internal dispute mechanism under Cap 284 by way of A/R objection so that the burden was on the plaintiffs to prove when the adjudication register was declared final, and the window for appeals against the adjudication register closed.
205. The rationale behind the exhaustion doctrine is for a party to be vigilant and diligent in protecting their rights. Had the plaintiffs been vigilant, they would have discovered the irregularities on time and raised their objections within the parameters set under Cap 284. In *Paragon Finance vs DB Thakeirar & Co (1999) 1 ALLER 400*, the court observed that the question is not whether the plaintiffs should have discovered the fraud sooner but whether they could, with reasonable diligence, have done so. The plaintiffs have been silent on whether they lodged any objection to the adjudication register or filed a minister appeal if aggrieved by the non-action of the land adjudication officer or complained to the Director of Land Adjudication, over the irregularities committed against them in the adjudication register.
206. Between 2010 and 2016, when the plaintiffs came to court there was no explanation given for a delay of six years to object to the entries. At what stage of the adjudication process concerning the suit land, it was in 2010, has not been clarified by the plaintiffs. That information was available to the plaintiffs, but they chose not to follow it between 2010 and 2014 when the section was registered. It is the plaintiffs who want the court to believe that the only recourse they had was to move the court to nullify entries that were made between 2009/2010, during the adjudication process. The manner to object to the said entries is governed by specific statute(s).
207. The plaintiffs had not told the court when the adjudication section was declared complete, the register was published and parties invited to lodge A/R objections. The plaintiffs were silent on when the members of the public were invited to view the adjudication register.
208. The plaintiffs were unable to tell the court when the adjudication records were forwarded to the Chief Land Registrar for titling. Without this information, the inference is that the plaintiffs were not vigilant at all; otherwise, they would have known or exhausted the internal dispute mechanism set under the *Land Adjudication Act*. See *Speaker of National Assembly vs Karume (1992) KLR 425*.



209. The next question, which is also tied to the immediate issue, is whether the court has jurisdiction to hear and determine this suit. The defendants have raised a jurisdictional issue in their written submissions that the court lacks jurisdiction to hear and entertain the claims essentially seeking to re-open an adjudication process. In *Daniel Musili Nyeki & others vs C.S Lands & Settlement & another Bernard; Malonza Musya & others (IP) (2021) eKLR*, the court cited *Mohamed Ahmed Khalid & others vs Director Land Adjudication & another (2013) eKLR* that Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveys of trust land are supposed to be dealt with and therefore a court cannot substitute the established bodies which are supposed to deal with these complaints.
210. The court further cited *Justa Mugaa M’Impwi vs DLASO Tigania East (2018) eKLR*, that due to the failure to file a minister appeal, a party could not seek an escape route through *the Constitution*. See also *Reuben M’Itelekwa vs. Paul Kigea (2019) eKLR*. The court observed that in *Geoffrey Muthinja Kibiru & others vs Munga Henry & others (2015) eKLR*, the court observed that the exhaustion doctrine was sound and served the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent of his interest within the mechanism set outside the courts. See also *Mutanga Tea and Coffee Co. Ltd vs Shikara Ltd & another (2015) eKLR*.
211. In *Bhaijee & another vs Nondi & another Civil Appeal No. 139 of 2019 (2022) KECA 119 (KLR) (18th February 2023) (Judgment)*, the court said that the rationale behind Section 30 of Cap 284 is that there is an elaborate process that is laid down by the act on how to determine which persons are and the extent to which, they are entitled to an interest in the land under adjudication.
212. The *Land Adjudication Act* provides a mechanism through which the right and interest in trust land can be ascertained and recorded. Such rights can either be individual or group rights such as of a clan or family. The defendants submit that some of the issues raised by the plaintiffs require the court to act as a probate and administration court; hence, lacking jurisdiction. The jurisdiction of this court is defined by Article 162 2 (b) of *the Constitution* as read together with sections 13 of the *Environment and Land Court Act*. The jurisdiction of the probate and administration court is derived from Sections 2 & 76 of the *Law of Succession Act* in intestate and testate succession to estates of deceased persons.
213. The primary duty of a probate court is to distribute the estate. See *Re-estate of G.K.K (2017) eKLR*. There is, therefore, a clear demarcation of jurisdiction between the two courts. The court has, however, to analyze the facts to determine jurisdiction. In *Susanne Achieng Butler & others vs Redhill Height Investment Ltd & another (2016) eKLR*, the court said that when faced with controversy about whether a particular case is a dispute about land or not, courts should utilize the predominant purpose test.
214. The defendants submitted that the issues raised by the plaintiffs are not within the jurisdiction of this court. A probate and administration court has no jurisdiction to determine issues of ownership of property. See *Re-estate of Mbai Wainaina (2015) eKLR* Rule 41 (3) of Probate & Administration Rules provides that where a question arises as to identity, share of estate of any persons, the court may set aside that particular share until the Environment and Land Court determines the issue.
215. In *Re-estate of Mumbu Mutua (deceased) (2017) eKLR*, the court said the *Law of Succession Act* confers jurisdiction to a probate court to determine the assets of the deceased, the survivors of the deceased the persons with beneficial interests and finally to distribute the assets amongst the survivors. In the *Re-estate of Julius Ndubi Javan (deceased) (2018) eKLR*, the court observed that where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed as provided by Rule 4 1 (3) of the Probate and Administration Rules.



216. In *Kabebia vs Mbiti* (2024) KEELC 1746 (KLR) (14th February 2024) (Ruling), the court held that the issues raised in the appeal were post-transmission issues of the suitland to the appellant; hence it lacked jurisdiction to entertain an appeal from a succession cause.
217. In this suit, the defendants submitted that the filing of the originating summons may not have been the most appropriate route given the summary nature of proceedings through originating summons. The question I need to answer is whether what is before me is about the environment and the use and occupation of and title to land. The singular question before me and which falls under the jurisdiction of this court is who was the owner of the suit properties as of 27.6.2006, between the deceased and the defendants. In other words, it is within the jurisdiction of this court to track the suit properties ownership before 27.6.2006.
218. Matters to do with who is the heir or beneficiary of the estate of the deceased and who was bequeathed what property during the lifetime of the deceased fall under the jurisdiction of the probate and administration court.
219. In a ruling of this court, the court stated that the scope of what can be determined by an originating summons is limited to the matters outlined therein. Jurisdiction cannot be expanded by consent of the parties. In *KCB vs Osebe* (1982) eKLR, the court said that Order 37 of the Civil Procedure Rules, a procedure, was intended for simple matters to be settled by the court without the expense of bringing an action in the usual way. In *Kibutiri vs Kibutiri* (1983) eKLR, the court said the scope is not to deal with the contested case was very limited, and when it becomes evident that the issues raised are complex and contentious questions of facts and law, a judge should discuss the summons and leave the parties to pursue their claims by ordinary facts.
220. In *Kenya Hotels Ltd vs Oriental Commercial Bank Ltd* (2019), eKLR, the court said that an originating summons cannot be defeated merely because a dispute is highly contentious and complex or involves severe questions of law. In *Shadrak Bungel* (suing as the administrator of the estate of Joseph Kipkering (deceased) vs. Selina Jerotich (sued as the administrator of Mary Jepkosgei Kiswai (deceased)) (2021) eKLR, the court disagreed with the trial court's finding that an originating summons was an unsuitable vehicle to take the dispute to court given such an origination summons could be converted into a plaint if the circumstances allow. In this suit, the court issued directives under Order 37 Rules 17, 18 & 19 Civil Procedure Rules. I find the objection on account of the appropriateness of the procedure used by the plaintiffs unmerited.
221. As to proof of the issues regarding fraud and illegality, if the court were to find the plaintiffs with capacity and the claim as filed within time, fraud must be specifically pleaded and proved on balance higher than in ordinary suits. See *Arithi Development vs West End* (supra) and *Vijay Morjaria vs Nansigh Madhusing Darbar & another* (2000) eKLR.
222. The further amended originating summons lacked particulars of fraud or fraudulent conduct on the part of the defendants. It did not comply with Orders 2 Rules 3, 4(1) & 10 of the Civil Procedure Rules. The particulars of when the alleged took place, who was involved, manner, how and value of involvement of each of the defendants were missing. The circumstances leading to the reasonable inference that fraud, illegalities, and irregularities were not stated either in the body of the originating summons in the affidavits or witness statements or during the testimony of PW 1 – PW 3. The source of the documents used as P. Exh No. 7-15 to prove fraud were not authored by the 1st defendant.
223. Fraudulent conduct must be distinctly alleged and distinctly pleaded. Fraud cannot be left to the inferred from the facts. An allegation of dishonesty must be pleaded clearly and with particularity. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742. In *Moses Parantai K & Peris Wanjiku Mukuru*



- suing as the Legal Representatives of the Estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia (2020) eKLR, the court observed that the appellants needed to not only plead and particularize the fraud but also lay basis by way of credible evidence upon which the court would make a finding that there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet to the respondents.
224. In *Central Bank of (K) Ltd vs Trust Bank Ltd (1996) eKLR*, the court observed that the appellant had made vague and very general allegations of fraud and that fraud and conspiracy were grave allegations bordering on criminality.
 225. In this suit, P. Exh's No. (7 – 15) were not produced by the makers. They were not subjected to any forensic examination, and a report was produced to show that the 1st defendant authored them. Evidence to show that the signatures appearing there were not made by the deceased but were authored by the 1st defendant was missing. The court has already observed that the exhibits by the plaintiffs do not comply with Section 80 of the *Evidence Act*. Evidence was not tendered from the land adjudication department to confirm their authenticity. Further, no copies of records, title deeds and official searches were produced to confirm that the five title deeds sought to be canceled belong to the defendants.
 226. There is no evidence of when the suit parcels of land were registered and title deeds issued. There are no confirmation letters issued by the land adjudication officers to show that as of 27.6.2006, the suit parcels of land were under the names of the deceased and, therefore, changes to the adjudication register occurred after the death of the deceased and not during his lifetime.
 227. In *Baithibutu vs Ekabu & others (2023) KEELC 21126 (KLR) (25th October 2023) (Judgment)*, the court held that land adjudication and demarcation officers have statutory duties and are the custodians of land records who ideally were necessary parties to the suit. The plaintiffs failed to call the officers who processed and effected the entries under Sections 8, 9, 10, 11, 12 & 19 of Cap 284.
 228. The demarcation maps that must accompany the adjudication records were to be availed before the court. Impeachment of title on account of illegality, fraud or issuance through procedural improprieties, must be through cogent and tangible evidence. The plaintiffs had the onus to prove fraud on the part of the defendants as wrongdoers who should not keep the titles. See *A. Kamau vs Muchoki (1984) KLR 353*.
 229. In *Shadrack Bungei vs Selina Jerotich (2021) eKLR*. The issue of time limitation had been raised under Order 37 Civil Procedure Rules. A jurisdictional issue was raised on appeal that the suit had been brought as an administrative suit though it was on the determination of ownership and not administration of the deceased estate.
 230. The gist of this claim was founded on fraud. The court further said that where fraud is pleaded, the onus lay on the party pleading not only to set out the particulars of fraud but also strictly prove the same. The court observed that the list of shareholders had not been verified as a true copy of the record signed and stamped. The court said that the probative value and the integrity of the documents were in doubt and could not per se establish the appellant's claim. The court held that the title held by the respondent was proof enough of ownership and could not be defeated by the appellant's unsubstantiated allegations of fraud.
 231. The court disagreed with the trial court that Order 37 of the Civil Procedure Rules was an unsuitable vehicle for the dispute, for the court under Order 37 Rule 19 of the Civil Procedure Rules can convert it into a plaint, if circumstances allow, which parties had done and agreed to proceed viva voce.



232. In this suit, parties agreed to convert the originating summons to a typical plaint and to proceed viva voce. Parties equally were allowed to file and exchange responses including dispositions for potential witnesses.
233. The plaintiffs had ample time to call the land adjudication officer(s) and the land registrar to tender evidence to sustain their claim on fraud, illegalities and irregularities. The 1st plaintiff, when asked if he reported fraud, said that he was advised against reporting it to the CID or the EACC. He told the court that the 1st defendant is his brother, and so are the cousins as to the reliefs sought by the plaintiffs.
234. In *Wambui vs Mwangi & others* (Civil Appeal 465 of 2019 (2021) KECA 144 (KLR) (19th November 2021) (Judgment), the court cited Black Law Dictionary 9th Edition Page 131 that fraud knew misrepresentation of the truth or concealment of a material fact to induce another to act to their detriment. The court further cited *R.G. Patel vs Lalji Makanji* 1957 E.A 314 on the threshold for proof of fraud. The court said that under Section 80 of the [Land Registration Act](#), it may order cancellations of the register if satisfied that any registration was obtained, made, or admitted by fraud or mistake as proved under Sections 26(1) thereof. The court said that it would not sanction as valid a title acquired illegally, procedurally, or through a corrupt scheme.
235. The court said that it was satisfied with the fraudulent factors presented in the facts pointing at fraud. The court also held that a claim to the title cannot be conducted as a standalone issue, and the court has to interrogate the root of the appellant's title and the events leading to the acquisition. Further, it was held that a court of law should not sanction and pass as valid any title to property founded on fraud, deceitfulness, illegality, nullity, irregularity, unprocedural, or otherwise a product of a corrupt scheme.
236. Applying the threshold set to the facts, the evidence to sustain fraud, even if it had been specifically pleaded missing. The explanation given by DW 1 and DW 2 on the history of the family, manner of and circumstances leading to the gathering, demarcation, recording of interests and rights transfer and registration during the lifetime of the deceased family meetings prior to and after the death of the deceased and attendance at the land adjudication office, after the 1st plaintiff raised a complaint on 23.8.2010 and the subsequent registration the titles and their issuance and how there was consensus among family members on how to amicably share the suit parcels, even before filing a succession cause, rule out any intention to defraud, misrepresent, conceal information, mislead and or register or obtain titles to the suit land using pretenses on the part of the 1st defendant. There is also evidence that the 1st plaintiff and the 2nd plaintiffs were beneficiaries of the resultant titles who have not lodged a complaint or returned the titles to the land registrar for cancellation.
237. If there was any fraud committed, there is no evidence that the plaintiffs and other beneficiaries of the estate had made a formal report for investigations both against the defendants and the land officials allegedly involved in the scheme. From the evidence tendered and the pleadings by the plaintiffs, I do agree with the submissions by the defendants that the 1st plaintiff's actual motive is not to have the cancellations of the suit titles but to ring-fence parcel L.R. No. 4690 to himself, with incredible evidence. He has no legal capacity to seek to shoot himself in the foot. Regarding inheritance, this court has no mandate to determine who are the rightful heirs or who is entitled to what after the death of the deceased.
238. Similarly, the 2nd plaintiff has been silent to the claim and did not see it fit to corroborate the evidence of PW 1, 2, and 3. The evidence lacks credibility and reliability, juxtaposed with that of the 1st defendant, who appeared to have electronic memory on the history of the suit parcels of land until the death of his late father. The 1st plaintiff was unable to offer a contrary view or evidence that parcel L.R. No. 4690 was not ancestral land and that the manner in which it was subdivided was illogical, illegal, unconscionable,



fraudulent and unlawful. Collusion among the defendants to defeat the rights of the 1st plaintiff to parcel L.R No. 4690 was not proved at all.

239. The legal implication of the wholesale cancellation of the suit parcels of land, especially without evidence that, as of 27.6.2006, formed part of the free property of the deceased, was not addressed by the plaintiffs.
240. In *John Kamunya & another vs. John Nginyi Muchiri & others* (2015) eKLR, the court said that it could only issue orders within the pleadings and could only grant the reliefs sought by the parties.
241. The issue of fraud was not specifically pleaded and proved if it was found to have been adequately pleaded and proved. The consequence is that the reliefs sought lacks merits. The further supporting origination summons is therefore dismissed with costs to the defendants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 2ND DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Parties

Miss Lagat holding brief for Kibe Mungai for the defendant

Mr. Mawira for C.P Mbaabu for the plaintiff

HON. C K NZILI

JUDGE

