



**Mwamba & another v Mutwiri (Suing as the Legal Representative and Administratrix of the Estate of Mutea Imanyara (Deceased)) (Environment and Land Appeal E019 of 2024) [2024] KEELC 6754 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6754 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E019 OF 2024  
CK NZILI, J  
OCTOBER 9, 2024**

**BETWEEN**

**SILVESTER KINYUA MWAMBA ..... 1<sup>ST</sup> APPELLANT**

**GITONGA KANAMPIU KARERE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DELFINA KAROKI MUTWIRI ..... RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE  
ESTATE OF MUTEA IMANYARA (DECEASED)**

*(Being an appeal against the judgment of E.M Ayuka  
delivered on 19.10.2023 on Nkubu PM ELC No. E002 of 2020)*

**JUDGMENT**

1. The appellants, who were the defendants at the lower court, had been sued by the respondent as the plaintiff and legal representative of the estate of Imanyara - deceased as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for a breach of trust regarding her father's L.R No's. Abogeta – L. Kithangari/318, and Abogeta/U-Kiringa/304 herein after the suit premises.
2. The respondent had averred that her late father gathered the suit premises in 1967 and members of his family lived and occupied the said land.
3. It was averred that the appellants, alongside Robert Mwebia Kirianki as the 1<sup>st</sup> defendant, had no blood relationships.
4. Again the respondent averred that in 2019 or thereabout her father while conducting the status of her late father's land with a view of filing a succession cause, established that the appellants had



- been fraudulently and in breach of trust registered owners of the suit premises without the family's knowledge, consent, approval and or disclosing how they became the registered owners.
5. The respondent averred that the said registration was in breach of trust and or tainted with fraud and illegalities in that:
    - i. The land had not been sold, or if it was sold, the prior approval of the ultimate beneficiaries had not been sought or obtained.
    - ii. They had been in occupation of the land.
    - iii. Failed to comply with the fiduciary obligations to transfer the land.
    - iv. Failing to disclose how they obtained the land.
    - v. Obtaining the suit premises without consideration.
    - vi. Secretly appearing before the land control board.
    - vii. Misleading government officers that the land belonged to them.
    - viii. Relying on unauthentic documents to obtain registrations.
    - ix. Refusing to re-transfer the land.
  6. The respondent sought for:
    - a. A declaration that the suit parcels of land are held in trust for her by the appellants.
    - b. That the registration was fraudulently and in breach of trust and the same should be cancelled.
    - c. Re-transfer of the suit parcels of land to the estate of the deceased.
  7. Additionally, the appellants opposed the claim through a statement of defense dated 28.10.2020. They averred that they were strangers to the allegations leveled against them by the respondent regarding breach of trust or fraud. On the contrary, the appellants averred that they were absolute and bonafide owners of the suit parcels of land, having purchased them for value.
  8. The appellants averred that the suit was time-barred, having acquired their titles in 2000. Further, the appellants averred that in the succession cause for the estate of Mutea Mangara letters of administration were issued to Stephen Mutwiri on 17.7.1999 and confirmed on 2.8.2000; hence, the respondent has no locus standi to constitute these proceedings.
  9. In reply to the defense, the respondent averred that she discovered the fraud in 2019 after exercising due diligence; hence, her suit was not statute-barred. As to the alleged succession cause, the respondent termed it as fraudulently done with concealment of material facts relating to the estate of the deceased; hence, the proceedings were defective in substance and fact.
  10. At the trial, Delfina Karoki Mutwiri testified as PW 1. Relying on her witness statement dated 31.8.2000, she told the court that she was the daughter of Mutea Imanyara, who died on 10.7.1967 and left behind the following children; Agnes Karimi Douglas, herself and Stephen Mutwiri. Further, she said that her parents left behind L.R No. Abogeta/L-Kithangari/318, L.R No. Abogeta/U-Kiringa/304 & 517 and Abogeta/L-Kiringa/71 as ancestral land, registered in the name of her late father, which she had not transferred to any member of the family or third party to death.
  11. PW 1 told the court that all family members believed the parcels were intact until 2019 when they conducted an official search at the Meru Lands Registry and found that the 1<sup>st</sup> defendant, 2<sup>nd</sup> appellant,



and 3<sup>rd</sup> appellant were the owners of L.R No. Abogeta/L-Kithangari/318, Abogeta/U-Kiringa/517 and 304 respectively.

12. PW 1 said that they reported the matter to the chief and also established the L.R No. Abogeta/L-Kiringa/71 remained under their father's name. PW 1 told the court that the family was not aware of both the Meru Succession Cause No. 266/97 and the changes to the estate of the deceased; otherwise, it was fraudulently done and in breach of the trust, hence the reliefs sought in the plaint. In support of the claim, PW 1 produced a copy of a letter from the civil registration, temporary grant, letters from the area chief dated 13.8.2020, 10.1.2020 & 22.1.2020 official searches for the parcel, and copies of the register as P. Exh No. 1-9 respectively.
13. PW 1 said that none of the siblings consented to the land being taken away by the appellant. Similarly, PW 1 said that apart from the 1<sup>st</sup> appellant, none of the two defendants had sale agreements. They termed the sales, transfers, and occupation as irregular and fraudulent.
14. In cross-examination PW 1 stated that the family has five members and that the land was ancestral to a Mburago or bought by her late father. PW 1 said that if their brother applied for the grant, he did not involve them at all. She said that the appellants were yet to develop the suit parcels for land and were not sure if they had transferred them to third parties. PW 1 said that when she filed for a grant in Nkubu Law Courts, she wasn't aware of an existing confirmed grant issued to her brother in 1997.
15. Ambrose Kimathi Mugira and Joseph Kinyuru testified as PW 2 and 3, respectively. PW 2, as a retired assistant chief, told the court that he knew the respondent's family very well, composed of two sons and two daughters, and was surprised at how the land changed hands to the appellants who were not relatives of the deceased.
16. He said that as an assistant chief between 1967 to 2016 he wasn't involved in writing an introductory letter to identify the family of the deceased before the succession case was filed. PW 2 added that the certificate of confirmation of the grant had a strange person who was not a family member of the deceased. He said that it had excluded the respondent and her sister. PW 3, on his part as a neighbor, told the court that the 2<sup>nd</sup> appellant was not a relative of the deceased, though he had obtained title to one of the parcels of land. PW 3 told the court that Stephen Mutwiri lived on his other land.
17. Robert Mwebia Kiriangi testified as D.W. 1. He had not written any witness statement. His evidence, nevertheless, was that he bought the land from Stephen Mutwiri and his late mother, whose name he could not remember, and was eventually brought a title deed by the said Stephen Mutwiri. He insisted that he was an innocent purchaser. Further, DW 1 said that he knew the five children of the deceased, who were all present when he bought the land which he termed as ancestral or family in nature. He produced the agreement dated 30.7.1980 signed by Stephen Mutwiri and himself only.
18. D.W. 1 admitted that the other siblings and the wife of the registered owner did not sign the agreement. He could not tell the person who drew the agreement. Similarly, he admitted that the agreement did not specify the parcel number, nor was the land in the seller's name then. Further, DW 1 said that there was no succession cause in court at the time until 1997.
19. DW 2 was Silvester Kinyua Mwamba. He told the court, as per his witness statement dated 3.10.2021, that in 2000, his friend Gitonga Karese informed him about land on sale by the son of the deceased, who was the legal administrator following H.C Succession Case No. 266 of 1997, DW 2 said that the son gave him a chiefs letter gazette notice and grant from the High Court discussed on 17.7.1977 which he son told him the family had finalized at the High Court, though he needed money to do so.



20. Similarly, DW 2 testified that they agreed on a purchase price for 0.81 ha, and he paid in full, to which a confirmation of grant application was filed on 7.6.2000 and issued a 31.7.2000. D. 2 added that L.R No. 517 was jointly registered in his name and Stephen Mutwiri M'Mutea and a title deed were issued.
21. DW 2 said that in November 2001, the said son again sold his share to him by an agreement of sale dated 17.11.2001, and a transfer was later effected. DW 2 said that they followed due process in obtaining the title, took vacant possession, and had fully developed the land for over 19 years without interference from anybody, including the respondent. D.W. 2 produced a copy of the grant dated 17.7.1989, gazette notice dated 9.1.1998; confirmed grant dated 2.8.2000 and a sale agreement dated 17.11.2001 as D. Exh No's. 2 – 5 respectively.
22. In cross-examination DW 2 explained that he bought the land when Mutwiri was not the owner, for he had no confirmed grant, which later on came out indicating him as a beneficiary. He said that he had no sale agreement for the first portion. DW 2 said that he was aware that the deceased had other children and a wife whose names were not in the same agreement or involved in the transaction. As to the status of the suit parcel, DW 2 said that they did seek advice from the area chief to know the status of the land who he had unfortunately not listed as a witness.
23. DW 2 said that he had been in occupation of the land since 2000 for the first portion and with effect 2001 for the 2<sup>nd</sup> portion. DW 2 said that he bought the land from a son of the deceased, who had only an identity card and a temporary grant. He said that the deceased wife was aware of the sale and took possession of the 1<sup>st</sup> portion during her lifetime.
24. Gitonga Kanampiu Kurere testified as DW 3. Relying on his witness statement dated 3.10.2021, he told the court that in 2000, Stephen M'Mutea approached him with a view to sell some land, and after perusing the papers they agreed on a purchase price for L.R No. 304, and he paid in full. Later, DW 3 said that his son wanted to sell him another portion, which he declined and introduced him to DW 2. He said that after the grant was confirmed, a title deed was issued to him, took vacant possession in 2000 and developed the land with no objection or protest from anybody including the respondent who was all along aware of his occupation.
25. In cross-examination, DW 3 admitted that the sale took place when the land was in the name of a deceased person in 2000. He said that he had misplaced his sale agreement drawn by D. Mbaya advocate, who he was not calling as a witness. D.W. 3 added that he knew the deceased had married daughters who, unfortunately, were not witnesses to his sale agreement. D.W. 3 said that his name was included as a beneficiary in the confirmed grant, though he was not a member of the deceased family.
26. Again, DW3 admitted that his witness statement had not disclosed the consideration he paid for the land he paid to Stephen Mutwiri. DW 3 admitted that he bought the land before the grant was confirmed, while the suit property was in the name of the deceased. Following the close of the defense, the trial court allowed the respondent's claim.
27. The two appellants have appealed to this court about the verdict of the trial court by a memorandum of appeal dated 19.3.2024 on seven grounds.
28. That the trial court erred in law and, in fact, in:
  - i. Holding that the transfers to them were done on breach of trust and was fraudulent yet no evidence was offered in support of the allegations.
  - ii. Not finding that the respondent could not file the suit yet, it had previously revoked it in Nkubu PM Succession No. 132 of 2019.



- iii. Ignoring the certificate of confirmation of grant issued at the High Court that confirmed title to the appellant, effectively overturning the order of the High Court.
  - iv. Misdirecting himself in law and in fact in holding that the High Court succession cause was filed secretly without involving members of the deceased family, yet the issue was not in consideration before him.
  - v. Ordering the cancellation of the two titles when they had been conferred to them by a superior court, hence contradicting the judgment and orders of a superior court.
  - vi. Not holding that the appropriate court for seeking redress was in H.C. Succession Cause No. 266 of 1997.
29. In line with Order 42 Rule 18 of the Civil Procedure Rules, this appeal was canvassed by way of written submissions. The appellants relied on written submissions dated 2.8.2024. It was submitted that no evidence of breach of trust or fraud was availed before the trial court yet the burden of proof under Section 109 of the *Evidence Act* was on the respondent. R reliance was placed on Susan Gacheru Mugambi vs Maureen Florence Kagwiria & others (2016) eKLR, Felista Muthoni Nyaga vs Peter Kayo Mugo (2016) eKLR and Isack M'Inanga Kiebia vs Isaya Theuri M'Lintari & another (2018) eKLR, on the elements to found trust as a question of fact.
30. In this instance, the appellants submitted that they were not members of the deceased's family, bought the land from a bonafide legal administrator of the estate, and were included in the distribution of the estate by the legal administrator who was not joined in this suit yet he had the mandate to deal with the estate.
31. The appellants submitted that the *Law of Succession Act* does not envisage a situation where a person who benefits directly from the estate in a confirmed grant is said to hold the land in trust for others unless there were minors involved; otherwise, the person listed in the grant as confirmed were entitled to their respective shares to be distributed by the legal administrator. In this case, the appellants submitted that it would be stretching the imagination too far to hold that there was trust in favor of the respondent and to hold them liable for breach of trust since there was no obligation to transfer the parcels to the respondent as they had acquired their interest from the legal administrator. The appellants termed the particulars of trust and its breach as holding no water.
32. In addition, the appellants submitted that it was fatal for the respondent's case not to join his brother in the suit who was the only person who should have been holding the land in trust for her. The appellants submitted that they could not be held accountable or faulted for the acts of a person who was legally mandated to deal with the estate, since also the succession issue was not filed in secrecy as alleged.
33. Again, the appellants submitted that trust could only be maintained against the legal administrator, and in the absence of joining him as a party, the respondent's claim or suit was fatal or unsustainable against them and being direct beneficiaries from the confirmed grant, any challenge to their titles to land could only be by challenging the orders of the distributing of the estate to them in the probate court.
34. On fraud, the appellants submitted that it has to be specifically pleaded and proved on balance higher than in ordinary suits as held in Kuria Kiarie & others vs Sammy Magera (2018) eKLR. Though the fraud particulars were contained in paragraph 12 of the plaint, the appellants submitted that the contents of the sale agreements were not challenged, the legal administrator was not joined or called as a witness to dispute the sale, and the capacity to transact; there was no witness to show that the appellants used unauthentic documents on transfer and therefore, given that they dwelt with an authorized legal



representative for the estate, they could not be liable for fraud especially where the certificate of the confirmed grant has not been challenged, hence fraud was not proved.

35. The appellants submitted that given there was a substantive succession cause that followed all the processes, another grant could not be issued to another person over the same estate, for there cannot be two administrators for the same estate. In this case, upon revocation of the grant in Nkubu PM succession case No. 132 of 2019, it was submitted that the respondent ceased to have the capacity to sue for the estate and hence could not obtain any judgment in her favor based on a nullity. Reliance was placed on Black Laws Dictionary 9<sup>th</sup> Edition, Alfred Njau and others vs City council of Nairobi (1982) KLR, Patrick Kieki Mutisya (suing as the Personal Representative of the estate of Nomo Mutisya (deceased) vs K.B Shangani & Sons Ltd (2012) eKLR.
36. As to the evaluation and interference with the decision of a superior court, the appellant submitted that they acquired title deeds based on a confirmed certificate of confirmation of grant dated 2.8.2000, from a higher court, and any aggrieved party should have applied for review of the said orders. Reliance was placed on the Re-estate of Prisca Onyango Nande (deceased (2020) eKLR, they submitted that the acts of the trial court amounted to undermining the authority of a superior court and violation of the sanctity of the hierarchy of court in Kenya.
37. Relying on Kenya Hotels Properties Lt vs A.G. & others (2018) eKLR, the appellants submitted that the subordinate court had no jurisdiction to interfere with the orders of the H.C and the certificate of confirmation of grant that conferred title to the suit and to the appellants otherwise to do so amounted to sitting on appeal or review of the orders of a superior court hence undermining the authority of the superior court as inferior to it.
38. The appellants submitted that the issue of the propriety of Meru High Court Succession Cause No. 266 of 1997 could only be raised in the said cause or court and not before an E.L.C. court. The appellants further submitted that once the questions arise on the content of the certificate of confirmation of grant and who was entitled to benefit from the estate only the probate and administration court could deal with the matter. Further, the appellants submitted that since the question of who were the rightful beneficiaries of the estate of the deceased and whether the grant was obtained fraudulently, the same could only be dealt with by the succession court in respect of the said estate.
39. As to whether the Meru H.C Succession Cause was filed secretly and with non-involvement of members of the deceased family was an issue before the trial court, the appellants submitted that parties are bound by their pleadings and a court can only wonder issues raised by the parties in their pleadings. Reliance was placed on Peter Gichuki Kinguru vs IEBC & others (2013) eKLR. In this instance, the appellants submitted that the respondent had not pleaded the issue as to whether Meru H.C succession 266 of 1997 was filed secretly; it was not listed in the particulars of fraud, issues for determination, and in the final submission; hence the trial court had no basis for determining it.
40. The appellants submitted that the trial court failed to hold that the appropriate relief in view of the existence of High Court Meru 216 of 1997 was the probate and administration court to deal with the administration and distribution of the estate since, from the pleadings, the respondent was actually challenging the distribution of the estate of the deceased since they were not the beneficiaries of the estate and were not entitled to any share of the estate of the deceased.
41. In this instance, the appellants submitted that what was before the trial court was a question of who and who was not entitled to benefit from the estate and whether the appellants could benefit from the estate of the deceased. The appellants submitted that under Section 76 of the *Law of Succession Act* (Cap 160), the judgment to revoke on annual a grant, whether confirmed or not confirmed, for reasons



- including what the respondents alleged and proved that the proceedings were defective in substance, the grant was fraudulent by making false statements or misrepresentations and further the protective powers to safeguard the estate of a deceased person vested with the probate and administrative court. Therefore, the remedy available for an aggrieved party such as the respondent herein was to appeal for review or appeal under Order 48 Civil Procedure Rules to the court that had passed a decree or order as those one which conferred the titles to them or prefer an appeal to the Court of Appeal under Article 164 (3) of *the Constitution*, the *Appellate Jurisdiction Act* and Section 66 of the *Civil Procedure Act*. Reliance was placed on in Re-estate of Mutugi Mbutii (deceased) (2018) eKLR.
42. The respondent relied on written submissions dated 9.9.2024. It was submitted that evidence was tendered that the suit parcel was ancestral or family land inherited from the clan or family whose registration was subject to trust as per Section 28 of the *Land Registration Act*, which Stephen Mutwiri M'Mutea was supposed to hold in trust for the rest of the family and had no right to sell or dispose without the consent of other beneficiaries. Reliance was placed on M'Inoti vs. Naomi Karegi M'Imanyara (2014) eKLR, Felista Muthoni Nyaga vs Peter Kago Mugo (supra) & Beatrice Ciamuta Rugamba vs Fredrick N. Mutegi and others (2016) eKLR, on the proposition that the registration of a person as a proprietor of land does not defeat a claim of trust nor does it relieve of his obligation as a trustee. In this instance, the certificate of confirmation of grant omitted the names of the rest of the children of the deceased, contrary to Section 29 of the *Law of Succession Act*.
43. The respondent submitted that the sale to the appellants was without the consent of all the beneficiaries to the same, and in this case, he tendered evidence that he was not listed in the grant or her consent consultation and information obtained to the transaction. The respondent relied on Samuel Wafula Wasike vs Hudson Simiyu Wafula C. A No. 161 of 1993, on the proposition that a grant obtained on the strength of false claim without obtaining the consent of a person who had prior right to the grant and on the basis of facts concealed from the court was liable to revocation. See also in the Matter of the Estate of Ngari Gatumbi alias James Ngari Gatumbi (deceased) N.R.B. H.C Succession Cause No. 783 of 1993, Sections 45 and 71 (2) of the *Law of Succession Act* and Rule 40 (4) of Probate and Administration Rules and Gladys Nkirote M'Itunga vs Julius Majau M'Itunga (2016) eKLR
44. The respondent submitted that she proved fraudulent acts against the appellants, who had no chief's letter and produced no sale agreements excess of the one by the 1<sup>st</sup> appellant; there were no stamp duty or registration fees, receipts, or proof of the consideration paid.
45. As to fraud, the respondent submitted that the appellants had sought to buy the land when it was in the name of a deceased person, conducted no due diligence, and their action contravened Section 82 (2) of the *Law of Succession Act*, which outlaws selling of an estate of a deceased person before confirmation of the grant.
46. In this instance, the respondent submitted that in her witness statements of the appellants, they admitted that they knew that the suit parcels of land were subject to a succession cause, failed to consult the rightful heirs of the deceased, and secretly aided the unlawful and fraudulent transfer of the deceased properties to their names which was a clear violation of Section 38 of Cap 160, section 26 of the *Land Registration Act*. The respondent submitted that the proper court to institute the suit was the Environment and Land Court.
47. On capacity to sue, the respondent submitted that no evidence was tendered that her temporary grant was revoked as alleged and that the lower court did not seek to overturn the High Court Succession Cause No. 266 of 1997 as the matter before the trial court was between the appellants and the respondent, since the former were not beneficiaries to the estate, but strangers thereto.



48. The role of this court is stipulated by Section 78 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules. The mandate is to re-evaluate and re-assess the evidence before the court of the first instance and, at the same time, keep in mind the fact that the trial court interacted firsthand with the parties. See *Selle vs Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Gitobu Imanyara & others vs AG* (2016) eKLR.
49. The court has carefully studied the lower court file; the pleadings evidence tendered grounds of appeal, and written submissions. The issues calling for my determination are:
- i. If the appellants pleaded and proved the issue of lack of capacity to sue by the respondent.
  - ii. If the appellants pleaded lack of jurisdiction of the court and raised it in limine.
  - iii. If the respondent's suit or claim was statute-barred.
  - iv. If the trial court had jurisdiction to hear and determine the claim.
  - v. If the respondents pleaded and proved the existence of trust and its breach thereof against the appellants.
  - vi. If the respondent pleaded and proved fraud, illegalities and procedural improprieties in the manner that the appellants obtained titles to the suit parcels of land.
  - vii. If the appellants were bonafide purchasers for value without notice of the rights of the respondent.
  - viii. If the respondent was entitled to the reliefs sought in the plaint.
  - ix. If the trial court's judgment was an affront to the doctrine of precedents.
  - x. Whether the appeal has merits.
  - xi. Whether this court has jurisdiction to grant appropriate reliefs in view of a decision by a court of concurrent jurisdiction.
  - xii. What is the order as to costs?
50. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from those pleadings. In *Peter Gichuki Kingara vs IEBC* (supra) it was held that a court cannot pronounce itself on an issue that is not in the pleadings of the parties or such issues as framed by the parties for the court's determination.
51. The purpose of pleading is to bring clarity to the issue(s) at hand, avoid trial by ambush, save the court's time and resources, and ensure that there is also expeditious disposal of cases. It is through pleadings also that the court can determine if the issue raised falls under its jurisdiction or elsewhere.
52. The primary pleadings before the trial court were the plaint, statement of defense, and the reply dated 31.8.2020, 28.10.2020, and 21.4.2021. The respondent had described herself as a daughter and a legal representative of the estate of her late father, Mutea Imanyara, a sister and brother as Agnes Karimi Douglas, and Stephen Mutwiri. The respondent had pleaded that the suit parcels of land were a family or ancestral land, to which she had an interest and was entitled to a share as a daughter of the deceased that had not been sold or transferred at the time the deceased passed on on 10.7.1967.
53. Similarly, the respondent pleaded that the initial suit parcel of land was held in trust by her late father until his death, and thereafter, the trust continued to exist even after the appellants allegedly obtained registration for them in a fraudulent, irregular, and unprocedural manner which was in breach of the



said trust, fraud, breach or irregularity. She averred that the appellants discovered in 2019 and where after obtained a temporary agreement in Nkubu PM succession cause No. 132 of 2019 on 24.1.2020 to prefer the suit.

54. A cause of action refers to an act on the part of the defendant that gives rise to a reason to complain on the part of the plaintiff. See *D.T Dobie Company Limited vs Joseph Mbaria Muchina* (1980) KECA 3 KLR. The respondent's claim was based on trust by virtue of her right as a daughter of the initially registered owner of the suit parcels of land who, by virtue of the *Law of Succession Act*, was a beneficiary to the estate of the deceased. The respondent averred that her discovery of the changes in the copy of the records of the suit parcels of land occurred when she visited the land registry and obtained an official search dated 7.6.2019, copies of the register signed on 30.9.2019, a chief's letter dated 10.1.2020 and a temporary grant dated 24.1.2020, subsequent to which she filed the suit on 29.9.2020.
55. Locus standi refers to a right to appear or to be heard in court or other proceedings. See *Ibrahim vs Hassan & Charles Kimeng Macharia* (2009) eKLR. In the *Re-estate of G.K.K. (deceased)* (2017) eKLR and *Re-estate of Alice Mumbua Mutua (deceased)* (2017) KEHC 8289 KLR, the court observed that the primary duty of a probate court is the distribution of the estate of a dead person.
56. Section 29 of the *Law of Succession Act* defines who are the beneficiaries of the estate and the dependant of the deceased. The respondent defined her capacity as a daughter of the deceased, who was entitled to be listed as a dependent in the confirmed grant of letters of administration and whose overriding rights to ownership of land were violated by the appellants.
57. In a claim based on trust, a claimant is not required in law to seek and obtain a grant of letters of administration as a condition precedent to filing a suit. Therefore, the respondent was competent to sue or bring a claim against the appellants seeking for declaration for overriding rights.
58. The respondent had pleaded that her late father was a trustee of the land as of 2.5.1967 when it came under his registration. The appellants have submitted that her temporary grant was revoked. The date of revocation was not pleaded in the statement of defense. This court has not come across any order of the trial court revoking the said grant. He who avers must prove.
59. A party is bound by his pleading. To impeach the temporary grant, one needed to produce a court order to show that such a fact exists as a matter of law. There was no evidence tendered to show that the appellants moved the court in the succession cause where the temporary grant was issued for its annulment revocation and or setting aside in view of *Meru H.C.C. Succession Cause No. 266 of 1997*.
60. Equally, time does not start to run until the fraud has been discovered with the use of due diligence from the date the discovery was made by the claimant as provided under Section 26 of the *Limitation of Actions Act*. See *Justus Tureti Obara vs Peter Koipeitai* (2014) eKLR.
61. The next issue is whether the trial court had jurisdiction to handle the claim, given the appellants' titles was decreed by a superior court, and whether the respondent if she had any complaint, as a beneficiary or as a child of the deceased, should have moved to the probate and administration court to revoke the certificate of confirmation of the grant and the distribution thereto.
62. From the copy of the records produced for the suit land, it showed that the suit parcels of land came under the name of the deceased on 2.5.1967 in the name of Stephen M'Mutea on 21.8.2000 and that of the 1<sup>st</sup> appellant on 21.12.2001 and 2<sup>nd</sup> appellant on 18.8.2000.
63. The *Re-estate of Atibu Uronje Asioma (deceased)* Succession Case No. 312 of 2000 (2022) KEHC 1146 (K.L.R.) (24<sup>th</sup> July 2022) (ruling), at issue was whether the High Court in probate proceedings could entertain a suit or an application for a declaration of trust whether the High Court can determine



- a dispute on the ownership of assets of a deceased person the nature of creditors and the nature of a continuous trust in the context of the Law of Succession Act. The court said that jurisdiction was a preliminary issue that should be raised at the earliest opportunity, for a court should entertain a matter only where it has jurisdiction.
64. The court held that the central issues of concern for a probate and administration court were the dead person and his free property. The court said a probate and administration court only distributes assets that are undisputedly owned by the deceased, while those disputed are not available for distribution until the encumbrances are removed or ownership disputes are resolved. The court said that the design of the Law Succession Act was that a probate and administration court is limited to the distribution of the assets, and where a dispute arises on ownership of any asset, then the said issue be placed as per Rule 41 Probate & Administration Rules in a court with jurisdiction.
  65. The court cited in Re-estate of Kimani Kimithia (2008) eKLR that succession proceedings were not the appropriate way of challenging the title of the deceased assets, including a claim based on trust, where a party should prove the trust and, after that, seek revocation of the title or participation by way of declaratory orders of the existence of a trust. The court said that a probate court had no jurisdiction to determine the claim based on trust or handle a dispute on ownership, where the claimant was neither a beneficiary nor a dependant of the deceased. See also in a Re-estate of Richard Karanja Javan (2014) eKLR and Re-estate of Henry Njau Ngotho (deceased) (2020) eKLR.
  66. The court said that under Article 165 (5) of the Constitution, it is in precise terms that the High Court has no jurisdiction on matters contemplated under Article 162 (2)(b) of the Constitution, and the court with jurisdiction is identified under Sections 2 & 150 of the Land Act and sections 2 & 101 of the Land Registration Act and the E.L.C. Act as the E.L.C. court. The court said that Sections 47 & 66 of the Law of Succession Act do not provide an elastic jurisdiction to the High Court to handle disputes and applications not provided for in the Act or which do not fall under its part (8).
  67. Concerning claims of trust, the court said that the only trust contemplated by Cap 160 was a continuing trust, that is to say to the life interest enjoyed by a surviving spouse (s) and minors below the age of 18 years under Sections 3, 41, 75A, 83 (g), and 84 of the Act. The court said that for any other trust, the trust must be established against the personal representative in proceedings commenced elsewhere than in a probate and administration court.
  68. In this appeal, there is no evidence that the appellants, other than being listed as beneficiaries in the certificate of confirmation of grant, were parties to the probate cause as objectors and or creditors to the estate. The copy of records makes it clear that the suit parcels of land were initially registered in the name of Stephen M'Mutea and, after that, transferred to the appellants. The respondent pleaded that she was not aware of the succession proceedings when she filed the suit.
  69. The interests or rights of the appellants as heirs to or beneficiaries of the estate of the deceased were not captured in the copy of the records for the suit parcels of land to support the assertion by the appellants that the High Court was the one that decreed their title deeds. As indicated above, the High Court has no jurisdiction to handle matters regarding third parties to the estate who are neither beneficiaries, heirs, or dependants to the estate. The certificate of confirmed grant had listed the appellants as heirs to the estate. The appellants represented themselves to the High Court and assumed such title as heirs when they knew or ought to have known that the statement was false, misleading, and erroneous.
  70. A court cannot sanction an illegality. A court cannot be a party to an illegality. A party who conceals material facts and obtains a right through illegality cannot use and be heard to ask the court to sanction such an illegality. See Mukula International Ltd vs His Eminence Cardinal Ncubuga Anor (1982) H.C.B II, as cited in Board of Trustees NSSF vs Michael Mwaloi (2015) eKLR.



71. The appellants have also attacked the suit for non-joinder of Stephen M'Mutea, who had the capacity to sell and transfer the suit parcels to them. In law, a third party is joined to the suit at the instance of the defendant under Order 1 Rule 15 of the Civil Procedure Rules. The appellants averred that they derived their rights to land from a third party who they say was liable for the breach of trust and or fraud if any. The question as to the role of each party to the fraud or breach arising between the appellants and a third party ought to have been brought by the appellants and not the respondent. See *John Wambua vs Muthui Makau Mwololo & another* (2020) eKLR.
72. The respondent had no obligation in law to join the brother as a third party, for the persons who falsely obtained title as heirs were the appellants. The breach of trust, illegality, and fraud had been pleaded by the respondent against the appellants. If they wanted the question of liability and innocent purchase for value to be determined between them and the person who had sold to them the suit parcels they had the opportunity to do so and cannot be heard to claim that the claim against them was not sustainable without the third party. My finding, therefore, is that the court had jurisdiction to hear and determine the suit.
73. As to whether the respondent pleaded and proved trust and illegality, trust is a matter of fact. The respondent pleaded and tendered evidence on how the suit lands came to be as a clan, family, or ancestral land. Evidence was tendered that the respondent belonged to that family. Evidence was led by the respondent and her witnesses, placing her proximity to the deceased initial owner and Stephen M'Mutea who failed to include her brothers in the estate of the deceased. Evidence was led to the circumstances of the change as a beneficiary of the land register without her involvement or any of the other beneficiaries to the estate apart from the brother. D.W. 1, 2 & 3 confirmed that they knew the deceased had children and a widow who did not feature in the sale agreements or the succession cause. Customary trust is proved through evidence. See *M'Inoti vs Naomi Karegi* (supra), *Felista Muthoni Nyaga vs Peter Kago Mugo* (supra), *Beatrice Ciamauta Rugamba vs Fredrick Nkari Mutegi & others* (supra), *Kiebia vs M'Lintari* (supra).
74. The appellants failed to shake the evidence tendered by the respondent as pointing at a trust against the predecessors in title and the successors in title. Instead, the appellants admitted that though they knew the existence of the children and widow of the deceased, they did not involve or consult them during and after the sale and transfer. Similarly, the appellants were privy to and participated in the succession cause. The appellants admitted that they knew of the widow of the deceased. Equally, they knew that she did not feature in the certificate of confirmation of the grant or sign the sale agreement. In that case, the appellants cannot feign ignorance and insist that they conducted due diligence to rule out any overriding interests in favour of the immediate family, dependents, or beneficiaries of the deceased's estate.
75. DW 1, 2 & 3 admitted that they bought the land before a confirmed grant was issued. They opted to deal with a deceased's property before confirmation of the grant, contrary to Section 82 of Cap 160. The appellants assumed the risk of entering into an illegal transaction. In *NBK vs Pipeplastick Samkolit (K) & another* (2001) eKLR, the court said that equity's function is not to allow a party to escape from a bad bargain. Courts do not re-write contracts.
76. In *Kenya Airways vs Satwant Singh Flora*, the court said it was not bound to enforce a contract once known to be illegal, and where a statute prohibits such a contract, it was unenforceable whether the parties meant to break the law or not. Further, the court held that if a party is implicated in an illegality, the court ought not to assist him.



77. Fraud must be pleaded and proved with tangible evidence on a balance higher than in an ordinary suit. See *Arithi Developments Ltd vs West End Butchery*. In this appeal, the appellants had admitted that they were indicated as heirs of the estate of the deceased in the certificate of confirmation of the grant.
78. The appellants represented themselves in the High Court as beneficiaries of the estate of the deceased, a fact that they knew was false. Fraud in *Black Laws Dictionary* 11<sup>th</sup> Edition Page 803 is defined as misleading or giving false material or statements with the intention of inducing another to act to their detriment. The appellants misled the High Court by describing themselves as heirs of the estate so as to procure the registration of the land in their names. There is a court of law and a court of equity. Equity shall suffer no wrong without a remedy. No man shall benefit from his wrongdoing, and equity detests unjust enrichment. See *Macharia Mwangi & 87 others vs Davidson Mwangi* (2014) eKLR.
79. The High Court did not give any title deeds to the appellants. The appellants misled the court that they were heirs to the estate and they are not even remorseful for obtaining a court decree on false pretenses.
80. A party seeking protection of Sections 25, 26 & 28 of the *Land Registration Act* and Article 40(6) of *the Constitution* must show that he regularly, procedurally and lawfully obtained the title deed. See *Alice Chemutai Too vs N.K Korir & others* (2015) eKLR.
81. In *Wambui vs. Mwangi & others (civil appeal) 465 of 2019* (2021) KECA 144 (K.L.R.) (19<sup>th</sup> November) (2021) Judgment, the court cited *Lauren Mukiri vs A.G. & others* (2013) eKLR on bonafide purchaser as one among other things who is not party to the fraud and who followed due process to obtain the title. All the paper trail used by the appellants to obtain title was not availed before the trial court. See *Dr. Ngok vs Ole Keiwua & 4 others* (1997) KECA 1 (KLR). The appellant relied on a certificate of confirmed grant listing them as heirs, which was and is false. A nullity is a nullity, and anything premised on nullity cannot accrue legitimacy or legality. See *Macfoy vs United Africa Co. Ltd* (1961) 3 ALL ER 1169 PC.
82. The sanctity of title is not intended to be a vehicle for fraud illegalities or an avenue of unjust enrichment. A court of law, as held in *Wambui vs Mwangi Njuguna* (supra), cannot protect a title that has been illegally obtained. The doctrine of innocent purchaser without notice can be defeated by equitable and legal interests such as those of the respondent. The appellants did nothing to ascertain or rule out any adverse interests, such as customary trusts, which do not feature in a copy of the register, but in the the registration.
83. The easiest thing the appellants would have done was to involve the known immediate family of the deceased in the transaction. A court under Sections 80 (1) and 26(1) of the *Land Registration Act* can intervene and issue appropriate orders, including canceling a title. In *Wambui vs Mwangi* (supra); the court said it could not sanction and pass as valid any title founded on fraud, illegality, a contrived decree, nullity, irregularity or otherwise a product of a corrupt scheme.
84. I think the trial court was correct to reach the finding it did. The High Court could not handle the issue of fraud illegality and breach of trust, for it had no jurisdiction to do so. By granting the reliefs sought, the trial court cannot be said to have overturned a superior court's decree or order. It merely pronounced the law as it is. The respondent did not need to go to the High Court. Her claim was independent of the succession cause. The upshot is that I find the appeal lacking merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024**

In presence of



C.A Kananu

Ngumato for Mwenda for the 1<sup>st</sup> & 2<sup>nd</sup> appellant

Mrs. Otieno for Kiogora Arithi for the respondents

**HON. C.K NZILI**

**JUDGE**

