



**Gitonga (Suing as the legal representative of the Estate of the Late M'Ithinji M'Mwambia
alias Fredrick M'Ithinji – Deceased) v Nkirote & another (Environment & Land
Case 172 of 2016) [2023] KEELC 20482 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 172 OF 2016
CK NZILI, J
OCTOBER 4, 2023**

BETWEEN

**JOSEPH KITHINJI GITONGA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF THE LATE M'ITHINJI M'MWAMBIA ALIAS FREDRICK
M'ITHINJI – DECEASED) PLAINTIFF**

AND

**JENIFFER NKIROTE 1ST DEFENDANT
JULIUS KIAMBATI M'MBURA 2ND DEFENDANT**

JUDGMENT

1. By an amended plaint dated 14.1.2019, the plaintiff, as the legal representative of the estate of the late M'Ithinji M'Mwamba alias Fredrick M'Ithinji and owner of ½ share of LR No. Meru Municipality Block 11/51 sued the defendants, claiming that they fraudulently and illegally caused transfers of the deceased's half share of the suit land to themselves, acquired ownership, use and enjoyment to the detriment of the deceased's estate. He sought the invalidation of the transfer, registration and issuance of title to the defendants, reversion of the land to the names of the deceased and the remission of the rents accruing from there with effect from July 2017. The amended plaint was accompanied by witness statements, a list of documents dated 2.12.2016 and 28.9.2018, and a further list of documents dated 21.6.2020. The defendants entered an appearance through Ms. Leonard Ondari & Co. advocates
2. By an amended defence dated 12.10.2020, the 1st defendant denied the contents of the amended plaint. She termed the grant of letters of administration issued to the plaintiff as fraudulent, secretly, through undue influence, obtained and without the consent of all the family members. Further, the 1st defendant averred that the transfer of ½ share of the suit land was lawfully executed long before the deceased passed on in front of a witness; hence, the land did not call for any letters of administration since the same was done alongside other parcels of land to other children including the 1st defendant



- and that it was only the plaintiff who did not believe that his sisters could inherit land from their late father. Witness statements and documents dated 14.10.2016, a further list of documents dated 14.2.2017, a witness statement dated 23.4.2018 and an additional list of witness statements dated 21.2.2019 were filed alongside the 1st defendant's defence.
3. The 2nd defendant, by an amended statement of defence dated 3.12.2019 denied that the plaintiff had legal capacity to sue on behalf of the estate of one M'Ithinji M'Mwamba alias Fredrick M'Ithinji as alleged or at all. He denied knowledge of paragraph 4 of the amended plaint. The 2nd defendant averred that the deceased had, before his death, transferred his interest in the suit land to the 1st defendant, who subsequently lawfully sold it to him on a willing seller willing buyer basis. He termed himself a bona fide purchaser for value without notice and a beneficiary of an instrument drawn by the deceased before his death.
 4. Additionally, the 2nd defendant denied the alleged fraud, illegality, collusion, undue influence, loss, damage or breach of a court order in remitting any accrued rent following the eviction order of the tenants in 2018. The amended defence was accompanied by a notice of preliminary objection dated 28.11.2016 on locus standi, a list of documents dated 14.10.2016, issues for determination, a list of witnesses and exhibits dated 4.4.2018, a further list of witnesses and exhibits dated 12.4.2018, list of witness statements, case summary and exhibits contained in a paginated bundle dated 17.12.2018. By a reply to the defence dated 24.1.2020 and 1.2.2020, the plaintiff denied the contents of the amended defences by the defendants.
 5. Following directions, this court proceeded with the matter from where the previous presiding court had reached, having taken the evidence of DW1 de benne esse, at the request of the 1st defendant.
 6. At the trial, Joseph Kithinji Gitonga, the plaintiff, testified as PW 1 and adopted his witness statements dated 28.9.2018 and 21.1.2020 as his evidence in chief. His evidence was that his father passed on 14.7.2017 and co-owned LR Meru Municipality Block 1/51 with Joseph Kirigia Aburi, DW1, in half shares, as shown in the copy of records as registered under his name at the time of his demise. He said that on 18.8.2016, the 1st defendant, his sister, caused the property to be transferred to her name fraudulently, without letters of administration or consent from the family, and seven days after that, she transferred the land to the 2nd defendant. He termed the transfers as fraudulent, unlawful, based on collusion, and or forgeries. The plaintiff produced a copy of the green card as P. Exh No. (1), certificate of official search as P. Exh No. (2), limited grant of letters of administration ad litem as P. Exh No. (3), demand letter as P. Exh No. (4), chief's letter as P. Exh No. (5), death certificate as P. Exh No. (6), proceeding in Meru CMC Misc. Succession case No.117 of 2016 as P. Exh No. (7), a limited grant under Sections 54 & 57th Schedule *Law of Succession Act* as P. Exh No. (8), statement of A/C No. 1007130000281 as P. Exh No. (9), letter dated 15.8.2018 as P. Exh No. (10) letter dated 15.8.2018 as P. Exh No. (11).
 7. In cross-examination, PW 1 said his father who died due to old age had transferred some of his properties to his children, save for the instant one, including himself, where he acquired LR No. Abogeta Lower Chure/441, Nkuene/Kathera/657, while the 1st defendant had obtained LR No. 209/117373/100 NRB and LR No. Nkuene/Lower Mikumbune/1446 or 1448 alongside his sister Isabella Ncheri. PW 1 was categorical that though his father would openly share his properties among his children during his lifetime, he never disclosed to him about the transfer of the suit land to the 1st defendant, which he co-owned with one Joseph Kiriaria. He termed his father as literate and capable of signing documents over his transactions. The plaintiff could not recall such transactions happening on either 4th or 5th January 2016. Further, PW 1 admitted that he had no handwriting expert report to confirm the allegations that the transfer documents were forgeries of his late father's signatures.



8. Further, PW 1 confirmed that he made no report regarding the alleged documents to the police or perhaps sued the Land Registrar for the alleged illegal transfers. Similarly, PW 1 clarified that none of his siblings had filed witness statements supporting his claim. He stated that the transfer documents had been presented to the lands offices on 18.8.2016, over six months after their signatures had expired. He denied that his late father had executed them since he had expressed willingness to transfer to him the same portion, which had not been objected to by any of his siblings.
9. PW 1 denied that he was discriminatory by denying his sisters their inheritance rights. Similarly, the plaintiff objected that any family meeting occurred on 1.1.2016, where his late father expressed his wish to transfer Plot No. 51B to the 1st defendant in the presence of Josephat Kirigia.
10. Cross-examined by the 2nd defendant, PW 1 told the court that entry No. 5 in P. Exh No. (1) showed that as of 18.8.2016, the registered owners of the suit land were the two defendants, only that he was interested in the share owned by the 1st defendant at the time, which she eventually transferred to the 2nd defendant as per entry No. (7). He termed P. Exh No. (10) as relating to a tenant who had remained on the suit land after the eviction, which had taken place following a court order on 5.4.2018.
11. In re-examination, PW 1 told the court that the 1st defendant was a beneficiary of some property in Pangani area Nairobi, so it was not true that he was against his sisters inheriting his late father's property. He said he came to court after obtaining letters of administration through an ongoing succession cause where the suit land was listed among the estate's properties. PW 1 testified that he moved to court since the 2nd defendant was about to use the suit land as collateral for a bank loan.
12. Joseph Kiriaria Aburi testified de bene esse as DW 1 on 20.2.2020. He told the court that the late Fredrick M'Ithinji was his confidant and a close business partner with whom they co-owned the suit land in equal shares. His evidence was that the deceased had left his share with the 1st defendant. DW 1 told the court that the deceased had intimated that he would transfer his half-share to the 1st defendant as a gift before he passed on 14.7.2016. Though the transfer was effected on 18.8.2016, DW 1 said he had assumed that the transfer was effected before the deceased had passed on since he was the one who had taken the documents to the land office together with the 1st defendant. He denied that the transfers were illegal since they had been prepared by a lawyer on 4.1.2016, and none of the deceased children objected.
13. Jeniffer Nkirote M'Ithinji, the 1st defendant, testified as DW 2. She adopted her witness statement dated 17.10.2016 as her evidence in chief. Her evidence was that her father owned many plots, including half of the Meru Municipality Block II/51 and 42, respectively. She stated that he had expressed his wish to transfer half share of the co-owned land in the presence of DW 1 to her, while the plaintiff was to acquire the other half share in Plot No. 42, which transfers he had effected before he passed on 14.7.2016.
14. DW 2 told the court that his late father accompanied her to Mr. Wamache advocate on 5.1.2016, who prepared a transfer form, collected passport-size photographs, copies of pin certificates and identity cards and charged them Kshs.15,000/= for the work. The 1st defendant testified that his father appended his signatures in the lawyer's presence, which were eventually submitted to the lands office. DW 2 stated that she lawfully transferred her share to the 2nd defendant. She denied any fraud, collusion or illegality in how she acquired the land and transferred the same to the 2nd defendant, since the plaintiff was aware of the wishes of his late father and that at the time of his demise, the suit land was not part of the estate of his father. She said that she did not require letters of administration to effect the transfers as alleged by her brother, who ought to swallow his pride and accept that she was entitled to a share of her late father's land, just like any other child of the deceased. In addition, DW 2



produced a copy of the transfer form and its annexures as D. Exh No. (1) (a), the certificate of lease as D. Exh No. (2), a receipt for Kshs.15,000/= as D. Exh No. (3) consent to transfer dated 4.1.2016 from the County Government of Meru as D. Exh No. (4) and lastly, a consent dated 19.8.2016 from the County Government of Meru as D. Exh No. (5). She denied any fraud in dealing with the land since her late father had also transferred other parcels to her sister Isabella Njeri and the plaintiff, who acquired several acres. DW 2 termed her transfer normal since none of her siblings had objected, including the plaintiff's Plot No. 42 Meru Town or the rest of the transfers. DW 1 stated that the transfers were openly made by the deceased during the many family gatherings, the last one having taken place in December 2015, in the presence of DW 1 and all her siblings. Therefore, DW 2 testified that the transfer on 5.1.2016 was a direct follow-up of the family meeting while the deceased was in good health and had a clear frame of mind to sign such a transfer before a lawyer.

15. Cross-examined by the 2nd defendant, DW 2 told the court that the deceased lawfully obtained D. Exh No. (5), to transfer the land to her and willingly attended the offices of Mr. Wamache advocate to sign the transfer forms to them.
16. Answering questions from the plaintiff's counsel, DW 2 told the court that she sold the land on 11.8.2016 to the 2nd defendant long after his late father had submitted the transfer forms to the land's office on 5.1.2016, soon after they left the offices Wamache & Associates. Even though there was no entry on the land registrar, a stamp receiving the said documents, or copies of the said documents, DW 2 reiterated that his late father paid stamp duty and registration fees on 6.1.2016.
17. Asked why the receipt number on the letter of consent dated 4.1.2016 had a similar number as the one for 19.8.2016, DW 2 could not explain the anomaly. She clarified, however, that when she sold the land to the 2nd defendant, the land was already under her name; hence there was no need to take out letters of administration to transfer the land to the 2nd defendant or herself. Her view was that the consent was valid up to 31.12.2016; therefore, as of 14.7.2016, when the land came under her name, the transfer was lawfully done. Regarding the 2nd consent dated 19.8.2016, DW 2 said that the rates clearance receipt was for the entire year; hence, the same receipt number appeared in the two land control board consents, even though the rates clearance certificates produced as P. Exh No. 4 & 5 were separately issued. DW 2 clarified that entry number (3) to P. Exh No. (1) on 10.8.2016 was that of Joseph Kirigia's signature since that of her late father was unnecessary, and so were entries numbers. 1 and 2 of the said exhibits. DW 2 testified that she signed on the entry in P. Exh (1) dated 18.8.2016, on the strength of the transfer made on 6.1.2016; hence, no fraud was committed. Asked why it took her so long to transfer the land to her name, DW 2 said that she became sick and was admitted to various hospitals.
18. Julius Kiambati M'Mbura, the 2nd defendant, testified as DW 3 and adopted his witness statement dated 17.12.2018 as his evidence in chief. He told the court that he was the owner of Meru Municipality Block 11/51 measuring approximately 0.0627 ha according to a certificate of lease issued on 25.8.2016, previously jointly owned in half shares with the 1st defendant who had acquired from her late father, M'Ithinji M'Mwamba. DW 3 testified that he purchased the stake from the 1st defendant through a sale agreement dated 22.8.2016 but previously acquired the other share of the same land from Josephat Kirigia Aburi, the joint owner with the 1st defendant's late father. He stated that he had dutifully searched the lands registry over the ownership and established that the 1st defendant was the registered owner since her name appeared on the register with no caveat. His view was that he was an innocent purchaser for value without notice. When he bought the property, DW 3 told the court that it was in a deplorable condition. Confusion ensued with tenants who declined to pay any rent since the plaintiff was interfering with them, causing him huge losses, yet he was servicing the loan that he had taken to purchase the property, intending to put up a commercial premise for income generation. He



- produced a copy of the green card as D. Exh No. (6), certificate of lease as D. Exh (7), copy of the sale from as D. Exh No. (9) and a letter of consent dated 19.8.2016 from the County Government of Meru as D. Exh No. (10). He was emphatic that the 1st defendant was the registered owner at the time of the sale, going by entry number (9) on D. Exh No. (6) since there was no restriction on the parcel register.
19. In cross-examination by the 1st defendant, DW 3 clarified that he did not establish from the 1st defendant how she had acquired the land other than conducting an official search, but was able to confirm from Joseph Kirigia, DW1 that initially he co-owned the property with the late father to the 1st defendant, going by D. Exh No's 5.1 (a) – (4). DW 3 confirmed that he was never summoned by the land registrar or the police, alone or with the 1st defendant, regarding any fraud or illegality in the manner that he had acquired the suit land. Similarly, he denied receiving any demand letter from the plaintiff before being sued in court.
 20. Cross-examined by the plaintiff, DW 3 told the court that entry number. 3 in D. exh No. (6) was dated 10.8.2016 and bore the names of Julius Kiambati and M'Ithinji M'Mwamba, and before the entry, the land was in the joint names of M'Ithinji M'Mwamba and Kirigia M'Amburi. DW 3 said that after acquiring a share from Josephat Kirigia, he replaced him and was left co-owning the land with M'Ithinji M'Mwamba. However, he was not aware that his co-owner was already dead at the time he transferred the land on 10.8.2016, since his interest was in Plot 51A and not Plot No. 51B, but eventually, the plot became known as Plot No. 51. DW 3 further told the court that there was no need for the presence of M'Ithinji M'Mwamba while acquiring the share from Josephat Kirigia, but he could remember that it was the 1st defendant who attended the board. DW 3 confessed that he was unaware by 14.7.2016 that M'Ithinji M'Mwamba had passed on. He said that the 1st defendant became the registered owner on 18.8.2016, so the lease came under their two names since there was no previous lease. Asked about the disclaimer appearing as clause number. (12) in D. Exh No. (8), DW 3 told the court it was because of the family feud and the tenants at the time.
 21. In re-examination, DW 3 told the court that he was purchasing a share owned by Josephat Kirigia as Plot No. 51A, so he did not require the presence of the co-owner, but the 1st defendant signed for him the lease immediately she became a co-owner on 5.1.2016, going by D. Exh No. (1) for she was the one collecting rent since January 2016. DW 3 stated that he included an indemnity clause number 12 in the sale agreement, out of an abundance of caution. Regarding rental income, DW 3 testified that some rent as ordered by the court on 6.4.2017, was deposited in the account but could no longer deposit more rent following the eviction of the tenants on 5.4.2018 by a court order.
 22. At the close of the defence, parties were directed to file written submissions by 5.6.2023. The plaintiff, by written submissions dated 30.5.2023, took the view that the suit land was a tenancy in common with defined shares going by the proprietorship section of the certificate of lease produced before the court. Given that the co-tenant, M'Ithinji M'Mwamba, passed on on 14.7.2016 as per the death certificate, between the death and the transfer of his share to the 1st defendant on 18.8.2016, since no letters of grant were available, any transfer on 10.8.2016 could only be illegal, fraudulent and contrary to Section 91 (6) of the [Land Registration Act](#), since no valid consent had been issued to alienate a deceased's share.
 23. Regarding the narrative that the transfer was executed by the deceased during his lifetime and was lodged with the land registrar by the deceased, the plaintiff submitted that the registered transfer form before the death was not availed before the court, other than the unregistered transfer, and one would wonder where the original copy went to or has not been availed to the court.
 24. With these glaring illegalities and fraud, the plaintiff submitted that the defendants had no good title. Reliance was placed on Isabel Chelagat vs Samuel Tiro Rotich (2012) eKLR, Mongeri Mirieri Nyanga nyeria vs District Land Registrar Thika & Others (2018) eKLR, Daudi Kiptugen vs Commissioner



- of Lands & others (2015) eKLR and Albert Mae Gacii vs AG & others (2006) eKLR. Lastly, the plaintiff submitted that despite an order to deposit rental income in the joint account of the advocates of the plaintiff and the 2nd defendant, the only deposit made was for Kshs.503,818/= up to 27.9.2019 and no other payment has been made; hence, the 2nd defendant was illegally enjoying the proceeds to the detriment of the estate of the deceased and should be ordered to reimburse it. The plaintiff urged the court to reinstate the property and proceeds thereof, to the estate of the deceased so that the beneficiaries can deal with the same through the probate and administration court.
25. The 1st defendant, by written submissions dated 30.5.2023, isolated four issues for the court's determination. On whether or not there was fraud in transferring the suit land, relying on Black's Laws Dictionary 9th Edition page 731, he said that fraud was a knowing misrepresentation of the truth or concealment of material facts to induce another to act to his detriment and that the burden was on the plaintiff under Sections 107-112 of *Evidence Act*, to prove the allegations contained in paragraph (6), (7) and 9 B of the amended plaint and on a balance higher than a balance of probabilities as held in Beatrice Kuri Francis vs Susan Gatiria M'Mukira & 4 others (2021) eKLR, which the plaintiff has miserably failed to discharge.
 26. The 1st defendant submitted that as pleaded in the amended defence in paragraphs 5 & 5A, the deceased consciously, deliberately, intentionally, freely and willingly executed a transfer of the plot to the 1st defendant as a gift on 5.1.2016 long before he passed on on 14.7.2016, which intention had been expressed to DW 1 during his lifetime.
 27. The 1st defendant submitted that D. Exh No. 1 (a), (b), (c), (d), (e), 2, 3, 4 & 5 were produced without any objection from the plaintiff. The 1st defendant submitted that the date of the transfer/registration in favour of the 1st defendant was legally immaterial since it was handed over for registration long before his death. Reliance was placed on Registered Trustees of ACK Mbeere Diocese vs. David Waweru Njoroge (2007) eKLR, Twalib Hatayan & another vs. Said Saggat Ahmed Alheidy & others (2015) eKLR, Prabhagauri Shashikant Maru vs Martha Kalova Nzivo (2018) eKLR and Sonza Figuerido & Company Limited vs Mooring Hotel Co. Ltd (1960) E.A 926. The 1st defendant submitted that the gift was consummated in absolute terms when the transfer was executed and surrendered for registration as held in Beatrice Kuri Francis (supra)
 28. On fraud, the 1st defendant submitted that none was proved, exhibits were not objected to, no complaint was lodged with the land registrar or the police; the land registrar or Mr. Wamache advocate were not called to testify; the exhibits were not subjected to forensic examination and that no medical report was produced to show that the deceased was mentally incapable of executing the transfers going by paragraphs 83-123 in Beatrice Kuri Francis (supra).
 29. On whether or not the 1st defendant required letters of grant to deal with the half share of the plot, the 1st defendant submitted that the deceased executed the transfer on 5.1.2016 and handed it over for registration but died much later on 14.7.2016, so a grant was not required to effect the transfers in favour of both the 1st and 2nd defendants, for the deceased had transferred other parcels to the other siblings, who were not objecting to the suit land unlike the plaintiff. Lastly, the 1st defendant urged the court to find no basis in granting the plaintiff's relief sought.
 30. The 2nd defendant, by written submissions dated 5.6.2023, submitted that he lawfully bought half share of the suit land, which had been legally bequeathed and transferred to the 1st defendant through a sale agreement dated 22.8.2016 and a subsequent certificate of lease dated 25.8.2016. It was submitted that the plaintiff called no evidence to support his claim that the 1st defendant committed illegalities



- or fraud in transferring the said property, more so when he admitted that no report or complaint was made to the police or the land registrar.
31. The 2nd defendant submitted that the 1st defendant was lawfully transferred the land before he bought it, as per the exhibits or paper trail over the gift completed on 5.1.2016. Reliance was placed on Registered Trustees of ACK (supra).
 32. The 2nd defendant submitted that he was a bonafide purchaser for value without notice, being held hostage in the crossfire between siblings, which he was not a party to and was not privy to before he bought the property on 22.8.2016 since no caution, inhibition or restriction could have given notice of any claims or anyone, from anybody including the plaintiff. The 2nd defendant submitted that he followed the due process of the law in acquiring his title as per D. Exh No. 9 & 10, which sufficiently explained the root of his title. Reliance was placed on Black Laws Dictionary 8th Edition and Mohammed vs Duba & another (2022) KECA (KLR) 1st March 2022.
 33. As to the rent claimed in paragraph 9B of the amended plaint, while it was confirmed that an order was made on 6.4.2017, the 2nd defendant submitted that it was not possible due to the failure by the tenants to pay rent, leading to an order of eviction granted on 5.4.2018, followed by the renovation of the suit premises. The 2nd defendant submitted that the claim for Kshs.450,000/= per month was not supported by any evidence to back up the figures, perhaps by lease agreements or payment receipts. The 2nd defendant urged the court to take notice of the covid 19 pandemic and the harsh economic times; hence, his evidence that the monthly rent collected did not exceed Kshs.43,000/=. In any event, the 2nd defendant, the legal owner of the suit property, submitted that he was also entitled to the rent proceeds, unlike the plaintiff.
 34. The issues commending themselves for the court's determination are:-
 - i. If the plaintiff has proved that the process of acquisition of the suit land by the 1st defendant from the initial owner to herself and subsequent transfer and registration in favour of the 2nd defendant was unlawful, illegal, null and void ab initio.
 - ii. If the 1st defendant required any letters of administration to effect the transfer of the half share of the deceased's land.
 - iii. Whether the transfer of the half share of the property held in tenancy in common complied with the law.
 - iv. If the 2nd defendant was a bona fide purchaser for value without notice.
 - v. Whether the title held by the 2nd defendant is valid in law.
 - vi. If the plaintiff is entitled to the reliefs sought.
 - vii. What is the order as to costs?
 35. The plaintiff averred that LR Meru Municipality Block II/51 was a tenancy in common with defined shares, owned by the deceased and Joseph Kirigia Aburi, which the 1st defendant dealt with without a grant of representation, yet the deceased had died on 14.7.2016. Therefore, the plaintiff pleaded and testified that as of 18.8.2016, when the transfer occurred in the name of the 1st defendant, no administration of the deceased's estate had taken place. Similarly, he pleaded and testified that the subsequent transfer to the 2nd defendant was equally illegal and fraudulent. He urged the court to find that the whole transaction offended Section 91 (6) of the Land Registration Act and, therefore, the 1st defendant was wrong to alienate the deceased's share without the co-owner's consent. In support of



- his averments, the plaintiff produced a copy of the green card as P. Exh No. (1) which the 1st defendant also produced as D. Exh No. (6), an official search as P. Exh No. (2) a copy of the death certificate as P. Exh No. (6) and a limited grant ad litem as P. Exh No. (8).
36. There is no dispute that the register for LR Meru Municipality Block II/51 was opened on 16.9.2015, with the lessor being the County Government of Meru and the Lessees being M'Ithinji M'Mwamba and Josephat Kirigia Aburi. The measurement of the land was indicated to be 0.0627 acres. The property was described as a leasehold. The property section, entry number 1, showed that the lessees held equal shares. A certificate of lease was issued to them on 16.8.2015. Number. 3 showed that the 2nd defendant replaced the name of the 1st lessee and became a co-owner with M'Ithinji M'Mwamba on 10.8.2016, and a title deed was issued to that effect as per entry number 4, on 10.8.2016. Going by entry number 5, the 1st defendant replaced the names of M'Ithinji M'Mwamba and became a co-owner with the 2nd defendant. A lease certificate was issued on 16.8.2016 to two persons, each with half of the property. Entry number 7 indicated that on 25.8.2016, the 2nd defendant became the sole owner of the suit property and was issued a lease certificate on the same day. Entries number 9 and 10 thereof showed that the plaintiff placed a caution claiming a beneficial interest, followed by an inhibition order issued by this court dated 22.9.2016.
 37. The 1st defendant's defence was that her late father executed a transfer of ½ share of the suit land during his lifetime; letters of administration were unnecessary before the execution; the deceased had notified the whole family of his wish the same way he had transferred the entries of LR No. Meru Municipality Block II/42 to the plaintiff and given her sister Isabella Ncheri other parcels of land, including some property in Nairobi.
 38. On the other hand, the 2nd defendant, on his amended defence, supported the 1st defendant in so far as the transfer of the suit land to her was concerned, which she subsequently sold to him on a willing-seller, willing-buyer basis, as a bonafide purchaser for value without notice and a beneficiary of an instrument drawn by the deceased during his lifetime on 5.1.2016, extinguishing his interests, which sale and transfer was lawful, valid and unimpeachable. In support of her defence, the 1st defendant produced a transfer of lease dated 5.1.2016 as D. Exh No. 1 (a), copy of the ID card as D. Exh No. 1 (b) & (c), pin certificates ad D. Exh 1 (d) & (e), a certificate of lease dated 25.8.2016 as D. Exh No. (2).
 39. D. Exh No (6) was in the name of the 2nd defendant. The property section showed the lessees as M'Ithinji M'Mwamba and Josephat Kirigia Aburi, while D. Exh No. 3 as the transfer fees issued by Wamache & Associates, the deceased, whereas D. Exh No. (4) and (5) were the letter of consent issued by the County Government of Meru the head lessor.
 40. D. Exh No. (4) did not indicate when the application for the consent was made. It lacked the seal of the County Government of Meru, unlike D. Exh No. 5.
 41. In *NNK vs JNK (2020) eKLR*, the court observed that tenants in common had equal rights and interest over the property, and unless severed, the parties had to consult each other before any dealings with the suit property. The court held that under Section 91 of the *Land Registration Act*, a co-owner could not deal with the property without the consent of the other party, as no one co-owner had a better right than the other.
 42. In *Isabel Chelangat vs Samwel Tiro Rotich (supra)*, the court observed that in a tenancy in common, each had a separate interest only that it remained undivided, and the share was not affected by the death of a co-owner through the doctrine of survivorship, but devolved to the estate of the deceased. In the case of *Kurshed Begum Mirza vs. Jackton Kaibunga (2017) eKLR*, the court said that the central characteristic of a tenancy in common was that each tenant was deemed to own by himself a physically



- undivided part of the entire parcel. See also *Yogendra Purshottam Patel vs Pascale Mireile Baksh Bandi & others* (2006) eKLR.
43. Transactions regarding common tenancy are covered under Sections 37,43,44,45, 61,88 and 91- 96 of the *Land Registration Act*. Section 61 thereof states that; if a proprietor in common dies, the proprietor's legal representative shall, on application to the registrar in the prescribed form and on the production to the registrar of the grant, be entitled to be registered by transmission as proprietor in place of the deceased with the addition after the representative's name of the word "as executor of the will of.....". Or as an administrator of the estate of the deceased.
 44. Sub-rule (2) thereof provides that upon confirmation of a grant and on the production of the grant, the registrar may, without requiring the personal representative to be registered by transmission, (a) any transfer by the personal representative and (b) any surrender of a lease of discharge of charge by the personal representative Under Sub-rule (3), grant means the grant of probate of the will, the grant of letters of administration of the estate or grant of summary administration of the estate in favour of or issued by the public trustee as the case may be of the deceased proprietor.
 45. Section 62 thereof provides that the registration of a person as provided under Section 61 shall relate to and take effect from the date of the death of the proprietor, while Sub-Section (1) thereof provides that the personal representative or the person beneficially entitled to the death of the deceased proprietor shall hold the land, lease or charge with all the rights conferred by the Act.
 46. Section 91 (6) of the *Land Registration Act* provides that no tenant in common shall deal with their undivided share in favour of any person other than another tenant in common except with the consent in writing of the remaining tenants, but such consent shall not be unreasonably withheld.
 47. In *Satima Peak Farmers Ltd vs Onesmus Weru (deceased) & others* (2013) eKLR, the court of appeal cited with approval in *Re Hilton* (1090) 2 Ch 548 that the legal estate was vested in all co-owners they must act unanimously and that one or two co-owners cannot act to sell the land to the exclusion of the other and none of the co-owners had the power to sell, unless such power was exercised unanimously by all the registered owners since they all had a unity of possession.
 48. From the copy of the records produced as P. Exh No. 1 and D. Exh No. (6), as of 14.7.2016, when the deceased passed on, the last entry in P. Exh No. (1) was that on 16.9.2015, when a certificate of lease was issued in favour of DW 1 and the late M'Ithinji M'Mwamba. No instrument was brought before this court as registered, to show that DW 1 consented in writing and allowed the co-owner to transfer his half-share to the 1st defendant before 14.7.2016. Similarly, there is no entry that DW 1 was authorized by his co-owner in writing to transfer his half-share to the 2nd defendant on 10.8.2016.
 49. Sections 44,45,61,91 and 92 of the *Land Registration Act* refers to an instrument in writing from a co-tenant, not the head lessor, which must be dully executed by each of the parties consenting to it and verified by a credible witness. As much as the defendants have produced D. Exh's No's. 5 and 6, the two documents fall short of strict compliance with the above-cited sections of the law. For instance, they do not contain the names of the co-owners, their identity card numbers, PIN numbers, passport-size photographs, signatures, dates of execution and verification by a credible witness. There is nothing showing that DW1 consented to the deceased transferring his share to the 1st defendant and the deceased or his legal representative subsequently consenting to the transfer of DW1's share to the 2nd defendant.
 50. In *Wanyororo Farmers Co. Ltd vs Nakuru Kiamunyeke Co. Ltd* (2017) eKLR, the court cited with approval *Arthi Highway Developers Ltd & West End Butchery & others* (2015) eKLR, that fraud consisted of some deceitful practice or willful device resorted to with the intention of depriving another



of his right or in some manner to do him an injury or obtain unjust advantage or cause inconvenience or loss to the other, or, all acts of omission, commission and or concealment which involve a breach of legal or equitable duty, trust or confidence justly reposed and are injurious to another or by which an undue and unconscientious advantage is taken of another. Sections 94 and 96 of the [Land Registration Act](#) further provide for severance of a common tenancy through partitioning or sale, but only with the consent to subdivide the land through an application to the registrar in a prescribed form.

51. The 1st defendant has submitted that the gift was consummated in 5th January 2016; therefore, she became the legal owner of the half share during the deceased's lifetime. This submission, unfortunately, flies against Section 37 of the [Land Registration Act](#) which provides that a transfer shall be completed by filing the instrument and the registration of the transferee as the proprietor. In *Muhuri Muchiri vs. Hannah Nyamunya* (2015) eKLR, the court said that where tenants in common were unable to agree on the terms and conditions of sale, an application could be made to the court to order a sale or partition. The court said that a mere agreement could not override a clear statement in the documents of title over the shares of the respective parties. In *PME & Another vs PNE* (2019) eKLR, the court observed that a co-owner was entitled to three essentials of ownership: the right to possession, the right to use, and the right to dispose of his share.
52. So, having established that as of 14.7.2016, the copy of records held at the lands registry reflected that the suit land was held in common, in the names of DW 1 and the deceased, the next issue is whether the entry of the names of the 2nd defendant and the deceased on 10.8.2016 was in compliance with the law. DW 1 testified that it was the 1st defendant who signed the consent for him to transfer his share to the 2nd defendant. He testified that entry number 3 of P. Exh No. (1), as well as D. Exh No. (6) was signed by the 1st defendant since she had already acquired ownership rights following the transfer form produced as D Exh No. 1 (a). The said exhibit does not show the date it was lodged with the land's office. On top of the transfer form, there is usually some space to indicate when the form was presented to and received by the land registrar. It also shows the date and the amount assessed as registration fee and the stamp duty, the receipt number for the payments, initials of the receiving officer, the date, signature and a stamp. D. Exh No. 1 (a) does not contain those details. It lacks the official seal of the registry for this court to receive it in evidence as provided under Section 11 of the [Land Registration Act](#).
53. It is trite law that he who alleges must prove. The 1st and 2nd defendants in the amended defence averred that the half share of the deceased extinguished on the signing of the instrument of transfer on 5.1.2016 and that the 1st defendant's interest came into existence, thus the subsequent transfer to the 2nd defendant was lawful. Due to the irregularities in D. Exh No. 1 (a) and non-compliance with the law on registration, these averments cannot stand at all.
54. Section 61 of the [Land Registration Act](#) cited above provides how land held in common is to be dealt with once a co-tenant passes on. It provides that the personal representative shall sign the consent under Section 91 (6) thereof. Additionally, Section 39 of the [Law of Succession Act](#) provides the hierarchy of persons entitled to the estate of a deceased person. The 1st priority goes to the widow of the deceased, followed by brothers and sisters.
55. In this suit, there is evidence that the deceased had a surviving spouse as of 14.7.2016. She has not featured in this suit. The 1st defendant did not plead that she had letters of administration on 10.8.2016 when she consented to DW 1 to transfer his half share to the 2nd defendant. Similarly, she did not plead that she possessed such letters of administration when she consented to entry numbers 5 and 6 in D. Exh No. (6).
56. There is no dispute that the deceased died intestate. The defendants pleaded and testified that the 1st defendant was gifted the land on 5.1.2016 and was consummated immediately upon the execution of



the transfer form. Mr. Mbaabu, learned counsel for the 1st defendant, has submitted that it was a gift *intervivos*; the intention to gift was known to the plaintiff and DW 1 during the deceased's lifetime, a consent to transfer produced as D. Exh No. (4) was executed on 4.1.2016, and the date of transfer in favour of the 1st defendant was legally immaterial, given that the deceased handed over the documents for registration long before his death. Counsel relied on Registered Trustees ACK, Mbeere Diocese (*supra*). In the said caselaw, there was no contestation that an application for the transfer had been lodged at the Embu District Land Registry and all the required formalities completed. The only reason for the lack of registration was an existing caution. The court cited with approval *Macedo vs Beatrice Stround* (1922) AC 330, where a father, three months before his death, had executed a transfer form in favour of his daughter as a gift and had decreed to a solicitor to keep it and not register it. The lawyer had kept it until the donor died. The privy council held the transfer was an imperfect gift that transferred no estate or interest in law or equity. The court also cited with approval *Sell's Equity* 29th ED on page 122 (3), that a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled after that even though the donee has not yet been registered as a proprietor and that an unregistered transfer can operate as a contract between the parties with the result that beneficial interest in the property as opposed to legal title is passed to the transferee. See Section 36 of the [Land Registration Act](#)

57. The missing link in the 1st defendant's case is that there is no evidence that D. Exh No. 1 (a) was lodged within three months from the date of its execution as provided under Section 36 of the [Land Registration Act](#) and, if so, when, and whether it was duly received, stamped and registered by the land registrar? The second missing evidence is whether all the statutory formalities as per the cited sections of the law were followed or not, to effectuate the gift or transfer the interest so soon after 5.1.2016 and before the deceased passed on on 14.7.2016. The 1st defendant had listed Mr. Wamache, the lawyer who had prepared and witnessed the transfer forms and received monies for the registration of the documents to testify and clarify the position.
58. D. Exh No's 1 (a), (b), (c), (d), (e) and (3) were produced as prepared by Mr. Wamache advocate. D. Exh No. (3) was not a statutory receipt from the land office to prove that Mr. Wamache lodged the said documents with the land registrar. The said exhibits do not contain any receiving and dated stamps from the land registry. There were no stamp duty payment receipts indicating that the documents were presented and paid for and that all remained was for the land registrar to process the instrument of transfer. The counsel who prepared and said to have lodged the documents was not called to testify.
59. Similarly, the 1st defendant did not see it fit to call the land registrar as the custodian of the records to come and clarify when its office received the transfers and registered the same for the half share to pass to the 1st defendant. None of the original documents save for copies were presented before this court. It is one thing to produce exhibits and another to prove their authenticity and probative value. Documents are proved when the court puts its mind on their relevance, probative value and authenticity. See *Kenneth Nyaga Mwingi vs Austin Kiguta & 2 others* (2015) eKLR
60. Counsels for the defendants would like the court to construe Sections, 36, 37, 44, 45, 60, 61, 62 and 91-96 of the [Land Registration Act](#) as legally immaterial. That would lead to an absurd situation, yet the statute is clear on how property held in common must be dealt with. This court cannot ignore the statute and [the Constitution](#) and follow the path of self-help and disorder. Even if the 1st defendant had been gifted the half share, she still had the duty to ensure that the gift was effectuated in compliance with the law on common tenancy. The 1st defendant averred and testified that her late father had informed all his children, including the plaintiff and DW 1, about the intention, which he eventually perfected by signing the transfer forms. Counsel for the 1st defendant has submitted that this was a gift *intervivos*, which became effective on 5.1.2016. If this was an oral will, the law under Section 9



- of the [Law of Succession Act](#) would require that it be witnessed by two persons and the testator to die within three months after making the will. See *Re-Estate of Evanson Mbugua Thong'ote (deceased)* (2016) eKLR.
61. Section 42 thereof relates to gifts *inter vivos* made and settled during the lifetime of a deceased person. It has to be transferred and settled for the beneficiary during the deceased's lifetime for it to be isolated from forming part of the deceased's estate. It has to be settled through a deed or an instrument in writing by delivery. Sections 42-46 of the [Land Registration Act](#) must be complied with. It has to pass for it to be valid. See Halsburry Laws of England 4th Edition Volume 20 (1) at page 67 and Odunga's Digest on Civil Case Law and Procedure Vol. II page 2417 at paragraph 5484 (2)
 62. Evidence in the suit indicates that the suit property remained in the name of the deceased up to his death on 14.7.2016. Any changes on the register which on 10.8.2016 happened when the deceased was no more and therefore by dint of Section 2 of the [Law of Succession Act](#), the half share still belonged to his estate and thus was available for distribution among his surviving spouse and children or dependants. See *Re-estate of the late Gideon Manthi Nzioka (deceased)* (2015) eKLR and *Re-estate of Chesimbili Sindani (deceased)* (2021) eKLR.
 63. The court has not been given evidence that the deceased's spouse and the surviving children had consented to the 1st defendant to undertake the process of signing the changes to the register in line with Section 91 (6) of the [Land Registration Act](#) in favour of DW 1 and DW 3 for the entries made on 10.8.2016 and 25.8.2016. In my view, in the absence of a perfection of the gift before death, the suit property remained the free property of the deceased, available to be dealt with by the probate court.
 64. There is no evidence that the 1st defendant had taken over the half share during the deceased's lifetime and perhaps started collecting rental income by 6.1.2016 to the exclusion of not only the plaintiff but also the widow of the deceased. See *Re. Chesimbili Sindani (supra), Mary Muthoni vs Francis Mwangi Muthara* (2016) eKLR.
 65. In this suit, the onus was on the 1st defendant to produce evidence that the gift had passed during the deceased's lifetime. It is the 1st defendant who asserted that all legal formalities had been satisfied to pass the gift. A party deliberately withholding relevant evidence, especially that which ought to be in its possession, logically invites the court to infer that, if such evidence were presented, perhaps it would be adverse to such a party as provided under Section 119 of the [Evidence Act](#). See *Peter Gachuki Kingara vs IEBC* (2013) eKLR.
 66. The receipts for payment at the lands office for the transfer and stamp duty were made in favour of the 1st defendant by either the deceased or Mr. Wamache advocates. It is the 1st defendant who insisted that the documents were lodged at the land registry immediately after they were signed by the deceased in 5.1.2016 and not after the death of the deceased. If that is what happened, as the common cause of natural events, human conduct, and public business, the evidence of Mr. Wamache advocate was so crucial to the 1st defendant that the failure to call him to establish the said facts, left it unsubstantiated, and so was her amended defence.
 67. Similarly, by not calling the evidence of the land registrar to establish when the transfers were lodged and effected in favour of the 1st defendant that there was no irregularity in the transfer, her evidence remained unsubstantiated, given the precise dates on when the transfers were effected, a month after the deceased had passed on without letters of administration in favour of the 1st defendant, to represent the deceased's estate. See *Sylee Matheka vs Alfred Nthiwa Mitheka & 3 others* (2019) eKLR.
 68. In the *Re-estate of Gachau Njoroge (deceased)* (2019), eKLR, for an *inter vivos* gift, there must have been the actual transfer of the land. Section 35 and 38 of the [Law of Succession Act](#) relates to equity in



- distribution. It was not enough for the 1st defendant to allege discrimination and lack of complaints from the rest of the dependants on this parcel of land. The law had to be followed to perfect the gift and shield it from the deceased's net estate, if at all that was his intention.
69. Article 27 of *the Constitution* provides that every person is equal before the law, men and women included. The same way the 1st defendant alleges that the plaintiff unfairly targeted her is the same way one would look at the 1st defendant's conduct when she arrogated herself the power to sign consents and transfers for the entries made on 10.8.2016 and after that, without first seeking the capacity from the probate court to be clothed with powers of a personal representative for the estate. No minutes were availed for the family meeting allegedly held by the deceased on 1.1.2016, during which the 1st defendant was bequeathed the suit land among other properties belonging to the deceased.
70. Similarly, Section 45 of the *Law of Succession Act* provides that without authorization through a grant of letters of administration, no person shall for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person. The free property of a deceased is that which the dead person was legally competent to dispose off during his lifetime, freely and whose interest did not terminate with his death. See *Bahola Mkalindi vs. Michael Seth Kaseme & others* (2013) eKLR.
71. Section 55 of the said act provides that no grant, whether limited or not, shall confer power to distribute any capital assets or make any division of property unless and until the grant has been confirmed as provided by Section 71 of the *Law of Succession Act*.
72. From the documents presented before the court, it is clear that the transfer of the half share by the deceased was given to and processed by the lands office, and a transfer in favour of the 1st defendant was not effected before 14.7.2016. If so, the copy of the record would have shown an entry to that effect and the official search reflecting the tenancy in common in the names of the 1st defendant and DW 1 before 10.8.2016.
73. Entry number 4 of D. Exh No. (6 shows the names of the deceased and the 2nd defendant as holding the parcels of land in equal shares. If there had been an earlier entry in favour of the 1st defendant, this entry would not have reflected the names of the deceased when he was no more and or had already extinguished his interests on the land. So, even if the 2nd defendant had been transferred the half share jointly owned with the deceased, the law still required that the deceased's consent be sought and obtained. If the deceased had passed on 14.7.2016, one would wonder who signed the authorization to approve DW 1 to transfer such half share to the 2nd defendant? DW 1 told this court that it was DW 2 who attended the lands office and appended her signature. The question is with which authority did the 1st defendant sign and or authorize the transfers in the absence of letters of administration, a power of attorney, or an authorization from the estate of the deceased?
74. Section 26 of the *Land Registration Act* provides that a certificate of title held by a person may be challenged on account of fraud, or misrepresentation if acquired illegally, unprocedurally or through a corrupt scheme. In *Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna and another* (2013) eKLR, the court observed that this section protects the actual title holders from being deprived of their titles by subsequent transactions. In *Joyce Nyanchama Kalya & another vs David Malakwen Terer & another* (2017) eKLR, the court held that a transfer without grant of letters of administration was unprocedural and illegal for it amounts to intermeddling with the estate of the deceased contrary to Section 45 of the *Law of Succession Act*.
75. In *Amos Odhiambo Olang & others vs Joseph Otiende Othula & others* (2017) eKLR, the court declared titles obtained without a grant of letters of administration as irregular, unlawful and therefore null and void. In *Alice Chemutai Too vs Nickson Kipkurui Koriri & 2 others* (2015) eKLR, the



- court observed that where one intends to impeach a title on the basis that the title was procured through fraud and misrepresentation, he needs to prove that the title holder was a party to the fraud or misrepresentation.
76. In *Margaret Ngonge Gachoka vs Stephen Gachanja & others* (2022) eKLR, the court cited with approval *Katende vs Haridar & Co. Ltd* (2008) 2 E A 173, that for one to qualify as a bonafide purchaser, he has to hold a certificate of title; how he purchased the land in good faith, he did not know about fraud; the vendor had an apparent valid title; bought without any notice of any fraud, bought for valuable consideration and lastly, that he was not a party to any fraud.
77. In *Re-Estate of Mukhabi Namounga (deceased)* (2020) eKLR, the court observed that any leave of court to dispose of a property of a deceased before representation, if confirmed, must proceed by the making of a grant and that no survivor of a deceased, whether as spouse or child has a right to transact over estate assets until representation has been granted, otherwise to do so was an offence under Section 45 of the Act. The court termed any transaction entered into without representation and that any such contracts to dispose of the deceased person's property unlawful and an unenforceable in law by dint of Section 82 of the *Law of Succession Act*.
78. In *Re estate of Veronica Njoki Wakagoto* (2013), eKLR Musyoka J held that the authority to deal with the property of the deceased emanates from a grant of representation, and any person who handles the estate without authority, was guilty of intermeddling. Similarly, in *Peter Kim Baker & 2 others vs. Sidi Katana Bongo & another* (2019) eKLR, the advocate who had prepared the documents had not been called to testify as to attesting a thumbprint in the transfer when the deceased was no longer alive. The court said that since there was evidence that the deceased had long died, he could not have done the signatures or attended the land transaction from the grave. The court found the transaction as fraudulent. The court said that without letters of administration, any sale and or transfer was void ab initio.
79. In *Dima Management Ltd vs County Government of Mombasa & 5 others* Petition (8) (E010) of 2021 (2022 KESC 30 (KLR) 21st April 2023 (Judgment), the court cited with approval *Samuel Kamere vs Land Registrar Kajiado* (2015) eKLR, that a bonafide purchaser must among other things, to establish that he had carried due diligence to determine the lawful owner from whom he acquired a legitimate title. Further, the court cited with approval *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR, that when a title is under challenge, it was not enough to dangle the instrument of title as proof of ownership. However, one must go beyond title and show that the acquisition was legal formal and free from any encumbrances, including interest which would not be noted in the register. The court held that based merely on the indefeasibility of title, it cannot sanction illegalities in the allocation of public land. The court said it was not enough for a party to state that he has a lease or title to the property. Further, the court cited with approval *Funzi Development Ltd & others vs County Council of Kwale* (2014) eKLR, that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legally proper, regular and that a court of law cannot based on indefeasibility of title, sanction illegality or an irregularly obtained title. The court lastly said that a title or a lease was an end product of a process, and if the process followed prior to the title's issuance did not comply with the law, then such a title would not be held as indefeasible. Additionally, the court emphasized that Article 40 (6) of *the Constitution* does not extend to any property found to have been unlawfully acquired.
80. In *Torino Enterprises Ltd vs AG* Petition 5 E006 of 2022 (September 2023) (Judgment), the court observed that it was the act of registration that conferred title to the registered proprietor and not the possession of an allotment letter which registration perfected the allotment letter. The court went further than in *Dima Management* (supra) to hold that an innocent purchaser for value would also



- denote one who was aware of what he was purchasing by inspecting and establishing who was in the occupation of the land, which would sound like a warning of buyer beware to him.
81. In this suit, the 2nd defendant has pleaded that he was an innocent purchaser for value without notice of the claims or allegations of fraud being raised by the plaintiff and who is being held hostage in the crossfire between siblings to which he was not a party. The 2nd defendant relied on D. Exh No. (8) after he bought the land from the registered owner, the 1st defendant on 22.8.2016 when there was no restriction, caution or inhibition giving any notice of any claim. The 2nd defendant pleaded that he followed the due process of law in obtaining the lease certificate and subsequent possession. He produced D. Exh No. (9), the transfer form, and D. exh No. (10) the consent to transfer from the County Government of Meru, which sufficiently explained the root of his title. The 2nd defendant relied on *Mohamed vs Duba* (supra) that he was an honest purchaser who did not wish to acquire the land wrongly, with an absolute, unqualified and answerable defence against the claim of any prior equitable owner, which property should not be liable for cancellation on account of Sections 24, 25, 26 & 80 of the [Land Registration Act](#).
 82. In paragraph 4 A of the 2nd defendant's amended defence, he admitted that the deceased owned half share of the suit land, which he had before his death, bequeathed and transferred his interest to the 1st defendant, who subsequently sold it to him. The 2nd defendant denied personal knowledge of the 1st defendant purporting to create documents after the deceased death to justify the transfer, preparing fake documents, lodging them at the lands registry, thereby effecting the transfer, transferring the suit land to herself while the owner was the deceased, without a grant of letters of administration and transferring the land to him on 25.8.2016 in a deceitful, fraudulent and illegally manner.
 83. Further, the 2nd defendant denied that he colluded with the 1st defendant to defraud the estate by lodging fake documents, transferring the land, while the deceased was dead, misleading the lands officials, with fake documents to transfer the land, dealing with the 1st defendant when she was not the legal administrator or the only heir of the estate, failing to follow the law and making the estate suffer loss or damage in terms of unremitted rental income, despite a valid court order.
 84. To prove his innocence, the 2nd defendant produced D. Exh No. (6), a copy of the records, a certificate of the lease as D. Exh No. (7) and D. Exh 8, the sale agreement dated 22.8.2016.
 85. D. Exh No. 8 related to LR No. Meru Municipality Block 11/51 B, described as registered in the name of the 1st defendant as of 22.8.2016. It revoked a sale agreement dated 15.8.2016. In clause number 12 there was an indemnity in favour of the 2nd defendant against all claims, whether from any vendors, sibling's family members or any other person claiming through the vendor. The vendor guaranteed that no ownership claim would arise from any of her family members from the land sale. It did not mention the acreage of the interest bought or sold. The only consideration paid was Kshs.9,000,000 per transfer number 187 dated 22.8.2016.
 86. D. Exh No. (9) showed that the transfer was received at the land's office on 25.8.2016 and paid for by receipt number 4485753. It related to Meru Municipality Block 11/51B. The signature and the designation of the person certifying the document was not indicated on the first page.
 87. The 2nd defendant called none of the lawyers who witnessed D. Exh's No. (8) and (9). Other than D. Exh No. (10), which was a consent from the County Government of Meru, no evidence was produced to show that the 1st defendant consented to the sale of the half share in line with Section 91 (6) of the [Land Registration Act](#).



88. In the 2nd defendant's witness statement dated 17.12.2016, he admitted that he knew how the 1st defendant had acquired the stake from his father, the late M'Ithinji M'Mwamba. D. Exh No. 1 (a) did not mention the shares of the tenants in common, for the entry therein was left blank. The date when the land registrar registered it was blank on its page (2). The signature of the land registrar at the back was missing. D. Exh No. (2) contained M'Ithinji M'Mwamba and Josephat Kirigia Aburi, as the owners at the date of issuance of the lease certificate on 25.8.2016. This was in line with entry number 7 & 8 of D. Exh No. (6).
89. The 2nd defendant did not produce any official search certificate as of 22.8.2016 showing the registered owner as the 1st defendant to be described as such in clause 2 (d) of the sale agreement.
90. The 2nd defendant averred and testified that he undertook due diligence and established that the 1st defendant was validly and legally entitled to deal with the land of the deceased. The 2nd defendant knew the history of the suit land, for he had acquired the other half share from the co-tenant. So, if the 2nd defendant had purchased the other half share from DW 1 and the total parcel of land was measuring 0.0627 acres, he could only have been buying half of the acreage in the sale agreement dated 22.8.2016 and not the whole block.
91. The sale agreement does not, consequently tally with D. Exh No. (7), which related to Meru Municipality Block 11/51, measuring 0.627 acres. The same case applies to D. Exh No. (2), whose acreage does not tally with what was in the copy of the records. The names of the deceased also continued to appear as a lessee with the 2nd defendant. The defendants did not explain all these irregularities and misrepresentations.
92. More importantly, DW 3 told the court that he bought the suit land from DW 1 and the 1st defendant. The 2nd defendant did not produce any sale agreement and or transfer form to show when and for how much he acquired the half share from DW 1. No single transfer form, stamp duty payment, registration receipts or accompanying documents were produced save for the consent form from the County Government of Meru.
93. In cross-examination by Mr. Mwanzia counsel for the plaintiff, DW 3 told the court that he was left with the late M'Ithinji M'Mwamba as the title owner but was unaware that he had passed on while transferring the land on 10.8.2016. His evidence was that Plot No. 51A and plot number 51B eventually became Plot No. 51. No documentary evidence was, however produced to substantiate that evidence of the existence of Plot No. 51A and plot 51B.
94. Additionally, in cross-examination, DW 3 was categorical that it was the 1st defendant who attended all the transactions and not the co-tenant. DW 3 said that it was DW 1 who authenticated that the 1st defendant was the true owner of the half share.
95. The question that begs answers then is what due diligence the 2nd defendant undertook to ensure that he was dealing with a real legal owner of the suit land before he entered into the sale agreement on 22.8.2016. In his evidence, DW 3 told the court that initially, there was no certificate of lease and that he was the one who looked for it.
96. In *Gichinga Kibutha vs. Caroline Nduku* (2018) eKLR, the court held that concerning a contract, fraud includes the suggestion as a fact which he does not believe to be true, the active concealment of a fact by one having knowledge or belief of the fact, a promise made without the intention of performing it, any other fact-filled to deceive and any such act or omission or the law declares to be fraudulent. In *Mohmed Shahanaz Butt & others vs Kenya Revenue Authority & 2 others* (2020) eKLR, the court



- held that the plaintiff ought to have done due diligence before purchasing the property, and by failing to do so, they were the authors of their misfortune.
97. The duty was upon the 2nd defendant to ascertain the true ownership of the suit land before purchasing the half share. It is apparent from the disclaimer to the sale agreement that the 2nd defendant knew of and was privy to the simmering family dispute. There is no evidence that the 2nd defendant utilized the concept of buyer beware to verify how profound the family dispute over the land was and the likelihood of it fundamentally affecting the transaction, then and in the future.
 98. The 2nd defendant assumed the risk even when there were glaring red flags. There is no evidence that other than relying on DW 1, the 2nd defendant went ahead to ascertain the nature and the magnitude of the rivalry between the 1st defendant and her siblings, including reaching out to the widow of the deceased.
 99. Given the disclaimer, it is pretty apparent that the 2nd defendant was aware that the registered owner of the half share was dead. Instead of insisting on being provided with a confirmed grant as proof of capacity to represent the estate of the deceased, the 2nd defendant opted to transact with the 1st defendant. To that extent, my view under the circumstances is that the 2nd defendant cannot be described as an innocent purchaser for value without notice going by the caselaw from the Supreme Court. See also *Henry Muthee Kathurima vs Commissioner of Lands & another* (2015) eKLR and *Mpagizihe & another vs Nchumisi* (1992-1993) HC 148.
 100. In *Wambui Mwangi & another Civil appeal 465 of (2019) (2021) KECA 144 (KLR)* (19th November 2021) (Judgment), the court held that since the title stemmed from events within the knowledge of, the respondent instead of waiting the conclusion of the CID investigations, went ahead and vested the property in his name without clearance from the police and subsequently disposed it off to the appellant, the court could not be faulted for finding the title tainted.
 101. In this suit, the court has found that the 1st defendant had no good title to pass to the 2nd defendant. The 2nd defendant was also aware of the family rivalry, and instead of awaiting its conclusion, he purported to overburden the 1st defendant, to guarantee him a clean title and/or indemnify him in clause number 12 of the sale agreement dated 22.8.2016. He thought that was enough regardless of the law.
 102. The 2nd defendant assumed the risk and went into a sale and transfer of a land belonging to a deceased person. He cannot, therefore, be heard to invoke the doctrines of equity, for he who comes to equity must come with clean hands and show equity. See *Sachin Shaha vs. Jagat Mahendra Kumar Shah & another* (2020) eKLR and *Kihuba Holdings Ltd vs. Charo Karisa Ngulu* (2021) eKLR.
 103. On the claim for the remission of all rent collected from July 2017 to date at the rate of Kshs.450,000/=, special damages must be specifically pleaded and proved with tangible evidence. The plaintiff had applied to the taking of accounts, no evidence was led to substantiate the claim. The names of the existing tenants were not produced and verified. There was no evidence that rent payable was Kshs.450,000/= per month. No rent book or income returns were availed to establish that the 2nd defendant has collected a figure equivalent to Kshs.450,000/= per month.
 104. The upshot is that I declare that the transfer of the half share of LR Meru Municipality Block II/51 to the name of the 1st defendant and later to the name of the 2nd defendant as irregular, unlawful, null and void ab initio.
 105. The court, under Section 80 of the *Land Registration Act*, cancels any entries made after 14.7.2016, and the land registrar is directed to revert the title to its original state as of 14.7.2016 for the portion of half share belonging to the late M'Ithinji M'Mwamba to be dealt with under the *Law of Succession Act*.



106. Cost to the plaintiff.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 4TH DAY OF OCTOBER 2023**

In presence of

All parties

Mwanzia for plaintiff

Carl Peters Mbaabu for defendants

HON. CK NZILI

ELC JUDGE

