



Mwangi & 3 others v Kiu-Kenda Co. Ltd & 4 others (Suing Through Samuel Kariuki (Chairman), Samuel Njoroge Mutua Thuku (Secretary), and Joram Kagombe (Treasurer) (Environment & Land Case 196 & 120 of 2014 (Consolidated)) [2023] KEELC 20789 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 196 & 120 OF 2014 (CONSOLIDATED)**

AA OMOLLO, J

OCTOBER 12, 2023

BETWEEN

**FRANCIS NDEGWA MWANGI 1ST PLAINTIFF
MARGARET MUTHONI MWANGI 2ND PLAINTIFF
ERUSTUS KARIUKI WAWERU 3RD PLAINTIFF**

AND

**KIU-KENDA CO. LTD 1ST DEFENDANT
WAVERLEY ESTATE LTD 2ND DEFENDANT
IBRAHIM MUNGARA KAMAU 3RD DEFENDANT
KIU KENDA SOCIETY 4TH DEFENDANT
SING THROUGH SAMUEL KARIUKI (CHAIRMAN), SAMUEL NJOROGE
MUTUA THUKU (SECRETARY), AND JORAM KAGOMBE (TREASURER**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 120 OF 2014**

BETWEEN

IBRAHIM MUNGARA KAMAU PLAINTIFF

AND

FRANCIS NDEGWA MWANGI DEFENDANT



JUDGMENT

1. This matter was instituted by the three plaintiffs namely; Francis Ndegwa Mwangi, Margaret Muthoni Mwangi and Erastus Kariuki Waweru against the four Defendants vide a plaint in ELC 196 dated 20th February 2014 which sought for the following orders;
 - a. A declaration that the 2nd Plaintiff was entitled to one acre parcel to be carved from LR No88/5
 - b. A declaration that the 2nd Plaintiff was allocated to one acre parcel from LR N0.88/5.
 - c. A declaration that the 2nd Plaintiff sold half acre to the Plaintiff
 - d. A declaration that the 1st Plaintiff rightfully and lawfully bought the suit property and acquired a good title to one acre.
 - e. A declaration that the 3rd Defendant has trespassed onto the suit property.
 - f. An order that the defendants do issue to the 1st Plaintiff a title deed in respect of a half-acre purchased by him.
 - g. An order that the half acre do include LR No Kamiti/Amner/Block 4/138.
 - h. Damage for trespass.
 - i. General damages.
 - j. Costs of the suit plus interest.
2. In ELC No 120 of 2014 Mr Ibrahim Mungara Kamau sued Francis Ndegwa Mwangi (who is the 1st Plaintiff in 196 of 2014) vide amended plaint on 6th May 2015 and sought for the following reliefs;
 - a. permanent injunction restraining entry, excavation, digging, building, wasting or interference with all that piece of land known as LR Number Kamiti/Anmer Block 4/139,
 - b. orders compelling the defendant in this suit to remove the building/structure erected on Kamiti/Anmer Block 4/139 and Kamiti/Anmer Block 4/140,
 - c. restitution of Kamiti/Anmer Block 4/139 and Kamiti/Anmer Block 4/140 to original state before encroachment,
 - d. an order to evict the Defendant from the Plaintiff's land as well as general damages for trespass.
3. The two suits were consolidated and proceeded to be heard together with ELC 196 of 1996 elected as the lead file. Hence there will be one judgement for both suits. Secondly, the Plaintiffs in ELC 196 OF 2014 are hereinafter referred to the plaintiffs in the body of this judgement while the Plaintiff in ELC 120 of 2014 referred to as the 3rd Defendant.
4. The Plaintiffs averred that the 4th Defendant was formed for the purpose of buying a coffee farm LR No 88/5 which was 272 acres and subdividing it amongst its members for use as a residential estate upon each member paying Kshs 500,000/- for one acre. The property was registered under the 2nd Defendant's name which the 4th Defendant bought through purchase of all the shares in the 2nd Defendant.



5. The Plaintiff affirmed that some members of the 4th Defendant were unable to raise the Kshs 500,000 fee and in the circumstances, the 4th Defendant amended its By-laws in 2004, allowing joint membership of two people who would receive one acre and divide it between themselves equally thus each joint shareholder to pay Kshs 250,000 and receive a half an acre plot.
6. They affirmed that between early 2005 and May 2005, the property was subdivided into one acre and half acre parcels and the 4th Defendant caused a map of the half an acre and one-acre plots to be posted on a notice board outside its offices located in the property.
7. The Plaintiffs pleaded that on 13th June 2006, the 2nd Plaintiff, 3rd Plaintiff, 2nd Defendant and the 4th Defendant entered into a contract titled “irrevocable undertaking on purchase of Waverly Estate Ltd” where they agreed would abide by the rules of the 4th Defendant and that the one (1) acre they were to get would not be subdivided into portions less than half acre and they were to pay Kshs 501,000 for the same.
8. The Plaintiffs stated that it was on that basis that the 2nd Plaintiff invited her brother, the 3rd Plaintiff to become a joint share owner. That on 30th June 2007, balloting took place and Plot No103 measuring half an acre curved from the property was allocated to the 2nd Plaintiff acquiring a right to be issued with a title which right she later passed to the 1st Plaintiff when he purchased her membership of the 4th Defendant on 26th May 2009 and plot in February 2009.
9. The Plaintiffs further stated that the 1st Plaintiff is the registered proprietor of LR No Kamiti/Amner/Block 4/138 and a portion of LR No Kamiti/Amner/Block 4/139 which is wrongly registered in the name of the 3rd Defendant which two plots constitute a half acre parcel of land which he bought from the 2nd Plaintiff.
10. The Plaintiffs contended that between 30th June 2007 and May 2009, the 1st, 2nd and 4th Defendants fraudulently purported to alter the contract of membership entered into by a member with the 4th Defendant. That they purported to replace the survey upon which balloting was done so that members who had joint share would get less than the half acre. As a result of this act, the 1st Plaintiff was issued with a title deed in respect of a plot LR No Kamiti/Amner/Block 4/138 whose acreage is 0.135 Ha instead of 0.2Ha.
11. The Plaintiff particularized the fraud against the 4th Defendant inter alia; undertaking a secret resurvey of the property and breaching the contract of membership, ignoring the resolutions passed and irrevocable undertaking given that each member would get at least half an acre, abandoning the map upon which the allocation of plots had been allocated and causing title deeds in respect of plots smaller than ½ acre to be issued.
12. It is pleaded further that upon completion of purchase of the membership of the 2nd Plaintiff, the 1st Plaintiff took possession of the Plot No103, fenced it and started constructing a residential house in August 2010. The 1st Plaintiff stated that in June 2013 when the residential house was virtually complete, he was served with an order issued in Nairobi ELC Civil Suit No 755 of 2013: Ibrahim Mung’ara Kamau v Francis Ndegwa Mwangi restraining him from trespassing onto, constructing and continuing construction of any house or anything on the plot known as LR Kamiti/Amner/Block 4/139.
13. It is the Plaintiffs contention that the said order was fraudulently obtained by the 3rd Defendant and particularized the fraud as ignoring that each of the 4th Defendant’s members were entitled to half acre and one acre. That the 2nd Plaintiff is entitled to half acre; and obtaining an injunction whilst he knew that the portion of the land he claimed to have been encroached on belongs to the 1st Plaintiff.



Defence

14. The 1st, 2nd and 4th Defendants filed a joint statement of Defence dated 31st March 2014 and amended on 2nd April 2014. The 3rd Defendant filed a statement of defence dated 4th April 2014 denying the Plaintiffs' averments in the plaint.
15. The 1st, 2nd and 4th Defendants contended that Margaret Muthoni Mwangi was not entitled to half an acre of land for reasons explained to all members in an Annual General Meeting (AGM) held on 29th November 2008 which meeting the 2nd Plaintiff attended. They plead that the meeting resolved that all plots would be slightly smaller for reasons first that the land sold to the 4th Defendant was on paper 272 acres but on the ground it turned out to be 262 acres, 10 acres less. Secondly, that provision had to be made for roads and other public and/or communal facilities. Thirdly, at the request of the members, one acre each was allocated to the Catholic Church, PCEA and Deliverance Church.
16. Further, the 1st, 2nd and 4th Defendants pleaded that the transfer of Lease executed in favour of the 1st Plaintiff on 23rd October 2008 and registered on 11th February 2009 was for parcel No Kamiti/Anmer Block 4/138. Subsequently, the 1st Plaintiff collected the certificate of lease which he signed for on 5th September 2009. That Plot 103 was the number used for balloting purposes only and at no point did they cause Plot No103 which does not exist in the context of the present dispute, to be sub divided and a portion thereof transferred to the 3rd Defendant. It is their defence That the plot numbers are numerically logical as per the original and final sub-division done by their Surveyor.
17. The 1st, 2nd and 4th Defendants denied the particulars of fraud enumerated by the Plaintiffs stating that it is the 1st Plaintiff who encroached on the 3rd Defendant's plot despite having been shown the beacons of her plot on 30th June 2007. They contended that the 1st Plaintiff purchased the 2nd Plaintiff's half share on 26th May 2009, long after the Certificates of Lease had been issued and he was therefore bound to all previous decisions, resolutions and limitations regarding plot sizes which previously bound the 2nd Plaintiff. They urged the court to dismiss the plaintiff's suit.
18. The 3rd Defendant contended that he is the registered owner of LR No Kamiti/Anmer Block 4/139 measuring 0.156 ha and LR No Kamiti/Anmer Block 4/140 and he was issued with a Certificate of Lease on 22nd April, 2009 after purchasing the same through the 4th Defendant. He pleaded that he did not occupy his land instantly as there were coffee bushes which the 4th Defendant was still harvesting on his behalf since he did not intend to develop the same immediately.
19. The 3rd Defendant stated that sometime in April 2013, he received information that the 1st Plaintiff had encroached on LR No Kamiti/Anmer Block 4/139 and fenced a greater portion of the same claiming it belonged to him. That he wrote to the 1st Plaintiff through his lawyers, and demanded that the 1st Plaintiff cease encroaching or trespassing on the said plot.
20. The 3rd Defendant particularized the 1st Plaintiff's act of trespass in his amended plaint and also the particulars of his loss and damage as a result of the said trespass. He explained that he reported the matter to Kiamumbi Police Station and thereafter sought court intervention by filing High Court Civil No 755 of 2013 which he later withdrew and filed ELC No120 of 2014.
21. Further the 3rd Defendant asserted that at the time the 1st Plaintiff bought the land from the 2nd Plaintiff, the acreage was clearly shown on the title and cannot claim that he was buying a portion of land greater than that the agreement for sale and Certificate of lease showed. The plaintiff filed a defence to counter the 3rd Defendant's claim.



Evidence

22. In support of their case, the plaintiffs called 2 witnesses with the 2nd Plaintiff testifying as PW1. She adopted her witness statement in ELC 196/2014 recorded on 20/2/2014 as her evidence in chief. She stated that she became a member of the 4th Defendant in 2004 but was not able to raise Kshs 500,000 and invited the 3rd Plaintiff to have a joint share and in return they would each get ½ acre. Consequently, they were allocated Plot No 103 which was measuring ½ acre and they were shown beacons. She produced the Plaintiff's consolidated bundle of documents filed on 14/6/2018 as PExh1.
23. PW1 posited that she sold her plot on 11/2/2009 to the 1st Plaintiff vide an agreement of sale found at page 54 of PExh1. On cross examination she confirmed that the 4th Defendant held a meeting on 29/11/2008 and minute 9/11/2008 indicated that the Chairman of the 4th Defendant explained that the plots would reduce by 30%. She testified that there was a surveyor present when she was shown plot 103 but she does not know the dimensions of the said plot.
24. PW1 testified that she paid Ksh1,530 for the lease and in that lease she noticed that the area was 0.1350 Ha. She confirmed signing the transfer of the said plot to 1st Plaintiff herein. The 2nd Plaintiff further stated that she had not seen the title which was issued on 15/10/2010 when entering the sale agreement dated 11/2/2009. She added that she sold the property and left the 2nd Plaintiff to follow up on the title. It is her evidence that she did not sign any agreement or document agreeing to reduce the size of Plot No103.
25. The 1st Plaintiff gave evidence as PW2 and adopted his witness statement at page 17 of the Plaintiffs' documents as his evidence in chief. He testified that the land he bought from the 2nd Plaintiff at Kshs 1,800,000 was described as LR No Kamiti/Anmer Block 4/138 and which was shown to him by the 2nd Plaintiff and Mr Stephen Njenga who was the manager. He later, got a surveyor who showed him the beacons for a plot that measured ½ acre.
26. PW2 further stated the 2nd Plaintiff did not tell him her share of the land was less than ½ acre neither did she share any minutes of the 4th Defendant. He added that he has put up a house on the land fenced which measures 0.201 ha (½ acre) although in his certificate of lease the area is given as 0.135 Ha.
27. On cross examination, PW2 confirmed that he was not issued with a share by the 4th Defendant but that he was given ballot by the 2nd Plaintiff and the irrevocable undertaking signed on 13th June, 2007. He testified that the plot was known as at the time they entered in the sale agreement with the 2nd Plaintiff. He added that at the time he was fencing it he had been shown the boundaries by the Manager of the 4th Defendant. On cross examination by the court, PW2 stated that he purchased the suit property at Kshs 1,800,000 but on the transfer instrument the value was indicated as Kshs 1,000,000. This marked the close of the Plaintiff's case.
28. Philip Juma Luvala DW1, who stated that he is a registered practicing surveyor since 1985 opened the evidence for the Defendants. He testified that he was instructed by the 3rd Defendant to establish the boundary of LR No Kamiti/Anmer Block 4/139 and 140 with his assignment being to establish the beacons defining the two plots. He stated that he carried out the instructions and filed a report found at pages 108 and 110 of the 3rd Defendant's bundle of documents.
29. DW 1 explained that on the plan, Plot No138 measured 0.1350 Ha, Plot No 139 measures 0.1560 Ha and Plot No140 is 0.560 Ha. However, on the ground, they measure 0.2148, 0.078 Ha and 0.1558 Ha respectively. That Plot No138 has encroached on Plot No 139 with the exact difference on the ground and that on the plan and that Plot No140 as defined by beacons F, E, D and C, beacon C is inside a wall.



30. On cross examination, DW1 stated that the Plots subdivided had different measurement but the 3rd Defendant did not tell him about the resolutions that determined the said sizes.
31. On (date) The 3rd Defendant gave his testimony as DW2 and proceeded to adopt his 3 written statements dated 6/5/2015, 24/2/2017 and 4/4/2014 as evidence in chief. He also produced his bundle of documents filed on 27/10/2017 as DExh2. DW2 stated that he does not live in the property and had not visited the same in the years 2010, 2011 and 2012. That he saw the 1st Plaintiff's fence for the first time in 2013, and immediately raised alarm by sending a demand letter through his advocate and also later on undertook a search to confirm the existence of his plots.
32. Ibrahim Mungara Kamau (DW2) continued in his evidence that he attended the meeting held by the 4th Defendant and which the 2nd Plaintiff also attended. During the meeting it was explained that their plots would reduce in size and there were no objections raised.
33. Jorum Kimenju Kagombe who gave evidence as DW3 introduced himself as the treasurer of the 1st Defendant and he adopted his witness statement dated 10th November 2022 as his evidence in chief and produced the list of documents dated 30/5/2018 as exhibits Numbers 1-16. DW 3 testified that the 1st Plaintiff bought property from the 2nd Plaintiff but he is not a member to the 1st, 2nd or 4th Defendants. He testified that during the Annual General meeting of 2008, 202 members attended with the 2nd Plaintiff appearing as member No 72. DW3 asserted that it was this meeting that altered the previous undertaking given to the members.

Submissions

34. The Plaintiffs filed submissions dated 21st March 2023 and outlined the history of the suit noting that the 1st Defendant is a company incorporated by the 4th Defendant for purposes of acquiring property for its members. They submitted that once title deeds are issued to individual members they could sell or alienate them as they choose. They also stated that pending the issuance of title deeds the member of a co-operative society may assign his or her rights. That the relationship between a member and other members and society is a contractual one like that between a shareholder, fellow shareholder and the company whose terms are contained in the memorandum and articles of association as explained in the famous company law case, of *Borland's Trustee v Steel* (1901) 1 Ch 279.
35. The Plaintiffs submitted that this court has jurisdiction to hear and determine the dispute because it involves a dispute over ownership of suit the property. They further submitted on the heading whether the Defendants acted fraudulently in surveying the suit property to the detriment of the Plaintiffs without consent, whether the doctrine of proprietary estoppel applies, and whether they are entitled to a portion of LR No Kamiti/Anmer/Block 4/139.
36. The Plaintiffs submitted that that having met the required conditions to join the 1st and 4th Defendants, they were considered to have entered into a contract with the said Defendants. In support they cited the case of *Siokwei Tarita Ltd v Dr Charles Walekwa* [2012] eKLR, where court held that; Articles of Association only bind the members inter se and the members and the company and further, they are a contract between the members inter se and between the company and its members and therefore as between the company and a person who is not a member, the Articles do not in any circumstances constitute a contract of which that person may take advantage. That this reasoning applies to contracts of membership under by- laws of co-operative societies like the 4th defendant.
37. They also relied on *Halsbury's Laws of England*, 4th Edn. Volume 6 paragraph 220 at page 64 which states that, the rules form part of the contract between the members in the case of a members' club, and between the members on the one hand and the proprietor on the other hand in the case of a proprietary



- club. They also cited the case of *William Charles Fryda v Lance P Nadeau & another* [2015] eKLR, court held that; a member of the public who voluntarily joins and/or subscribes to a society is bound by its rules and regulations and a court will only come in to exercise its jurisdiction if such a society oversteps its mandate under those rules which such a member has subscribed to.
38. It is the Plaintiff's contention that by virtue of the membership of the 2nd and 3rd Plaintiffs with the 1st and 4th Defendants, they executed numerous irrevocable undertakings on 13th June, 2006 and 30th June, 2007 to ensure that they would not subdivide their property into not less than half acre plots. However, the 1st, 2nd and 4th Defendants purported to vary the terms of that undertaking by subdividing the plots into portions of less than half acres.
 39. Further, they stated that in the minutes of the meeting of 29th November, 2008, the Chairman of the 4th Defendant was asked the exact share the members who purchased would get and, his response was that there would be reductions of 20% - 30% to cater for developments like roads. However, in the minutes of that meeting, under the reconciliation of plots, it is indicated that the entire property was 272 acres but, on the ground, it ended up being 260 acres. Out of those acres, 210 acres had been taken up by members and roads consumed 18 acres while the Society plots (including those under Trustee registration and those that were unballotted) added up to 32 acres.
 40. Therefore, it is not clear why the allocated acreage for roads was not utilised and instead, the 1st, 2nd and 4th Defendants opted to reduce the portion sizes of its members unilaterally and that the map used for the balloting was subsequently unilaterally varied by the 1st, 2nd and 4th Defendants who handled the survey and registration of leases and issuance of the title deeds which the Plaintiffs are now challenging due to the area occupied on the ground.
 41. The Plaintiffs further submitted that a company can only act through resolution of its members in a general meeting and that dispossession of property without notice of the intention to dispossess is presumed to amount to arbitrary deprivation. They relied on the case of *Hellen Wachuka Njoroge v Attorney General and another* [2016] eKLR, which position was reiterated by the Court of Appeal in *James N. Wa Wambu v Republic and 7 others* [1995] eKLR in declaring that prerogative orders are a nullity and for quashing where interested parties not enjoined in the suit would be affected by the same.
 42. It is also submitted for the plaintiffs that a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract as was held by the High Court in *Cimalu Estates Ltd & 4 others v International Finance Corporation and another* [2006] eKLR and also cited Court of Appeal in *Kenya Breweries Limited v Kiambu General Transport Agency Limited* which held that; a variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties.
 43. It is further argued for the Plaintiffs that the map used during the balloting process was re-surveyed, plots of land reduced in portion by 20% - 30% secretly and without any resolution or variation of agreement amongst the members, the deed plans of the re-surveyed subdivisions were issued which led to issuance of title deeds with smaller portions and movement of the beacons which had been previously shown. Therefore, the 1st Plaintiff now suffers damage as there is a threat that half of his home is to be demolished or owned by the 3rd Defendant.
 44. They assert that they relied on the undertakings of the 1st, 2nd and 4th Defendants that the subdivisions would be of half acre and that the 2nd Plaintiff sold her share to the 1st Plaintiff who further relied on that assurance. Subsequently, the 1st Plaintiff upon identification of the half acre on the ground by the 2nd and 3rd Plaintiffs and a surveyor from the 4th Defendant, built a barbed wire fence and a perimeter



wall. Hence, the doctrine of estoppel should be applied and they cited the holding in *P K A v H S A and another* [2017] eKLR.

45. The 1st, 2nd and 4th Defendants filed their submissions dated 14th June 2023, stating inter alia that the Plaintiffs have presented a sale agreement for land parcel number Kamiti/ANMER Block 4/138 dated 11th February 2009 which shows that the size of the land purchased by the 1st plaintiff was 0.135 ha, a position which is also reflected in the transfer dated 23rd October 2008 and registered on 18th February 2008.
46. The 1st, 2nd and 4th Defendants submitted that the 1st Plaintiff was not their member and added that the document referred to as the irrevocable undertaking was a document signed by the members of the 4th Defendant outlining conditions for ownership of the plots, a binding document solely for the members drafted in form of an affidavit for the irrevocable conditions for development. Thus, the 1st Plaintiff never swore any such oath, and cannot claim to derive any benefits from the contents of the irrevocable undertaking. In support of this argument, they cited *Chidhya (Kenya) Limited v Africa Equipment & Engineering Power S.A (AEE Power S.A)* [2020] eKLR.
47. The 1st, 2nd and 4th Defendants submitted that the irrevocable undertaking and the irrevocable conditions were documents binding the members to the conditions indicated in the said documents and not binding to them noting that the documents do not bear anywhere the signature of their officials.
48. The 1st, 2nd and 4th Defendants also stated that in a meeting was held on 29th November 2008 the members were informed that there would be a 20-30% reductions on the sizes of the plots to cater for utilities such as roads and other public utilities and none of the members including the 2nd Plaintiff who was present objected. The 1st, 2nd and 4th Defendants submitted that Plaintiffs' suit is based on fraud which has not been proved. That the allegation of resurvey is unfounded, no map was presented to show the alleged original survey and as such this specific allegation of fraud was never proven.
49. The 3rd Defendants in ELC 196 of 2014 and who is the Plaintiff in ELC 120 of 2014 filed his submissions dated 25th May 2023. He outlined the brief facts of the case and evidence relied on by the parties, submitting that the dispute between the parties is principally about the extent of the boundaries of LR Nos Kamiti/Anmer/Block 4/139 measuring 0.156ha and LR No Kamiti/Anmer/Block 4/140 measuring 0.156ha both registered in his name on one hand and LR No Kamiti/Anmer/Block 4/138 registered in 1st Plaintiff's name on the other hand.
50. That these suit properties were resultant of a sub-division of original property owned by Waverley Estate Limited (2nd Defendant) and later acquired by Kiu Kenda Company Limited (1st Defendant) through the decision of members of Kiu Kenda Society (4th Defendant). The members were allocated plots through a random and secret balloting process which was held on or about 30th June 2007. He submitted that the 1st Plaintiff was never a member of the 4th Defendant and that his interest was defined by and confined within his agreement with the 2nd Plaintiff dated 11th February 2009 in which at Kshs 1,800,000/= he specifically purchased the interest contained in the plot LR No Kamiti/Anmer Block 4/138.
51. Further, that the agreement executed by 1st Plaintiff stated that the purchaser had notice of the physical situation and condition of the property and the improvements or buildings thereon and the Vendor shall not be called upon to improve the same in any way whatsoever. The 3rd Defendant avers that the 1st Plaintiff has no locus standi in purporting to claim that he purchased precisely 0.5 acres of land from the 2nd Plaintiff based on the said agreement.



52. The 3rd Defendant submits that as derived from *Cheshire, Fifoot & Furmston's Law of Contract*, 17th Ed., pages 630-64, the 1st Plaintiff's assigned rights and obligations are only circumscribed within LR No Kamiti/Anmer Block 4/138 and do not extend to the 2nd Plaintiff's shareholding and membership in 1st and 4th Defendant as no acquisition and transfer of shareholding/membership took place.
53. The 3rd Defendant submitted that the 1st Plaintiff acquired upon transfer/assignment as comprised in LR No Kamiti/Anmer Block 4/138 measuring 0.135 Ha (0.3336 acres), and its boundaries as delineated by the relevant Registry Index Map (R.I.M) and no more pursuant to the then applicable section 18 of the *Registered Land Act*, Cap 300 (repealed), now under transition to cadastral maps as provided under Section 15 of the *Land Registration Act*, Act No 3 of 2012. He further submitted that the 1st Plaintiff not having acquired membership to the 4th Defendant has no legal standing whatsoever in laying a claim on the basis of the said affidavit of irrevocable conditions.
54. He also submitted that the 1st Plaintiff confirmed that he deliberately occupies an area more than what is comprised in his plot title No Kamiti/Anmer Block 4/138 of 0.135 Ha, thus overlapping into LR No Kamiti/Anmer Block 4/139 and Kamiti/Anmer Block 4/140. The 3rd Defendant concluded that the 1st Plaintiff has in doubt trespassed on his land and that this makes his claim as contained in ELC 120 of 2014 to be merited.

Analysis

55. I have considered the pleadings filed in the two suits, considered the evidence tendered by all the parties to the suits and also read the submissions rendered. The 4th Defendant purchased main property LR No 88/5 from the 2nd Defendant through the 1st Defendant for its members. The 4th Defendant had charged membership fee of Shs.500,000 under which the member would own one share equivalent to 1 acre of the property LR No 88/5. On failing to raise the full membership fee and upon 4th Defendant amending its laws, the 2nd Plaintiff invited the 3rd Plaintiff to join hands and acquire one plot with each getting half a share equivalent to half acre of the property.
56. The members of the 4th Defendant were also required to sign an undertaking not to divide the plots obtained into less than half an acre of which the 2nd and 3rd Plaintiffs swore on 13th June 2006. Subsequently the 2nd Plaintiff after a ballot held on 30th June 2007 was allotted Plot 103 and which after registration and issuance of the lease became LR No Kamiti/Anmer Block 4/138. Before issuance of titles to the suit plot, the 2nd Plaintiff entered into an agreement dated 11th February 2009 with the 1st Plaintiff for sale of LR No Kamiti/Anmer Block 4/138. The 1st Plaintiff took possession of the property and thereafter collected the title issued under his name pursuant to a transfer signed by the 2nd plaintiff.
57. The 4th Defendant explained that it held an annual general meeting on 29th November 2008 which the 2nd Plaintiff attended and in which meeting members were informed that there would be a 20-30% reductions in the plot sizes. The reason for the reduction was explained to cover for provision for utilities, inter alia roads and other public utilities and due to the fact that the purchased property was less in size on the ground by about 10 acres. Further, the Defendants contended that they were not privy to the sale agreement between the 1st and 2nd Plaintiff, arguing that the 1st Plaintiff was not privy to the signed undertakings because he was not a member of the 4th Defendant. it is on this background that I frame the following issues for determination;
- What rights and interest were passed to the 1st Plaintiff by the 2nd Plaintiff
 - Whether the Defendants fraudulently reduced the size of the 1st Plaintiff's plot?



- c. Whether the 1st Plaintiff has trespassed on the 3rd Defendant's land?
- d. Who pays the cost of the two suits?

a. Whether there were any rights and interests received by the 1st Plaintiff from the 4th Defendant:

- 58. The 1st Plaintiff intimated that he is a member of the 4th Defendant by dint of the sale entered on 11th February 2009 with the 2nd Plaintiff and therefore all her rights in the 4th Defendant were transferred to him. The 4th Defendant objected contending that the said sale agreement was limited to rights over Land Title No Kamiti/ Anmer Block 4/138 and not transfer of membership to 4th Defendant.
- 59. The 4th Defendant further stated that the 1st Plaintiff does not possess any membership number or shareholder certificate to evidence his membership. Under the doctrine of privity of contract, for the 2nd plaintiff to transfer their membership in the 4th Defendant, the 4th Defendant had to approve.
- 60. The Court of Appeal deliberated on the doctrine of privity at length in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* (2015) eKLR where it rendered itself that,

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principles thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation v Lendetia Ltd* (Supra), *Kenya National Capital corporation Ltd v Albert Mario Cordeiro & another* and *William Muthee Muthami v Bank of Baroda*.

Thus in *Agricultural Finance Corporation v Lendetia Ltd*, quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus, in *Shanklin Pier v Detel Products Ltd* (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the



plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In *Darlington Borough Council v Wiltshire Northern Ltd* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.’

61. In this instant case, the agreement entered between the 1st Plaintiff and 2nd Plaintiff was plainly for the sale of a plot which was in no way beneficial to the 4th Defendant. The *Constitution* of the 4th Defendant (produced at page 58 of Pex.1) also provided that their membership was open to persons 18 years and above subject to payment of membership fee of Kshs 1,000. The 1st Plaintiff made no mention of paying the stated entry fees and the annual subscriptions. The 2nd Plaintiff did not also present evidence that she had resigned from the 4th Defendant in favour of the 1st Plaintiff.
62. In light of this position, any breach of rights in so far as the size of plot no Block 4/138 is concerned can only accrue if proved to the 2nd Plaintiff. I am saying in other words that the 1st Plaintiff has no claim as against the 1st 2nd and 4th Defendants. The court will therefore consider under the next question/ heading if the 1st 2nd and 4th Defendants illegally reduced the size of plot 103 now registered as Block 4/138.

b. Whether the Defendants fraudulently reduced the size of the 2nd Plaintiff’s plot?

63. The 1st Plaintiff stated that the 1st, 2nd and 4th Defendants reduced the size of LR No Kamiti / Anmer Block 4/138 from what he purchased from the 2nd Plaintiff and which was shown to him on the ground. It is not contested that the sale agreement dated 11th February 2009 for the plot was between the 1st Plaintiff and the 2nd Plaintiff. Paragraph 2 of the said agreement states thus;

“The Vendor is entitled to be registered as the beneficial owner of all that property known as Title No Kamiti/Anmer Block 4/138 (“the property”).”



64. The question for determination is whether the reduction in the size of the plot allotted to the 2nd Plaintiff was fraudulently reduced in size. The party alleging fraud carries the heavy burden of proving it past the standard of balance of probability. Sections 109 of the Evidence Act Cap 80 provides that:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
65. As regards the standard of proof, the Court of Appeal in the case of Kinyanjui Kamau v George Kamau [2015] eKLR expressed itself as follows; -
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
66. The Plaintiffs in their evidence argued that the 1st -2nd and 4th Defendants changed the original survey map which had surveyed the plots and instead re-survey the land again whose result was reduction of the plot sizes. They produced several documents issued by the 1st, 2nd and 4th Defendants which indicated that one share translated to one-acre plot comprised in LR No 88/5. For instance, there is an affidavit drawn pursuant to the 4th Defendant’s AGM held on 17th February 2007 and signed the 2nd Plaintiff on 13TH June 2007. At the introduction, the document states thus;
- “... do hereby make oath and bind myself to strictly abide by the following conditions of development unanimously agreed upon and adopted during the Society’s general meeting held on 17.02.2007.
1. That I shall not cause to be subdivided any one share which translates to one (1) acre into any smaller share less than ½ share which translates to ½ an acre.”
67. This undertaking was made before balloting for plots which from the evidence adduced, balloting took place on 30th June 2007. Before balloting, there is mention of survey plans already circulating in government offices as at September 2005. This contained in a communication to the 2nd Plaintiff by the chair of the management Committee of the 4th Defendant (found at pages 49-50 of Pex.1). At page 50, the letter reiterates that, “the management committee decided that each member with one share (one acre) should pay Kshs 25,000 and those with half share (0.5 acre) to pay Kshs 15,000 as soon as possible to fasten the process.”
68. There is no dispute brought to the knowledge of the court that the 2nd Plaintiff did not make all the required payments. The 1st, 2nd and 4th Defendants do not deny the membership of the 2nd Plaintiff which in turn means that she was entitled to the ½ share (0.5 acre) plot from the original land 88/5. The Defendants have explained that the change in size was communicated to the members during the AGM held on 29th November, 2008. The 1st, 2nd and 4th Defendants produced the minutes of that AGM and stated that indeed the 2nd Plaintiff was in attendance.
69. I have perused the minutes of the AGM of the 4th Defendant of November 2008 and in particular minute 9/11/08 matters arising from the minutes of the AGM held on 17/2/2007. Under paragraph



- a), a member asked whether one share still translated to one acre. It is recorded that the Chairman explained to the members that in the process of subdividing the land, several factors affected the plot sizes reducing each parcel by between 20%-30%. These included the loss of the lands to the roads network, public utility plots, the reserved members community plots etc.
70. The 2nd Plaintiff admits she attended this meeting and so was aware the discussion on the size of plot came up during the meeting. She went ahead to produce in her evidence, the chairman's report. At page 13 of that report (found at page 75 of Pex1), there is a sub-heading on reconciliation of plots. The 2nd Plaintiff was thus made aware on the reduction that would take place. The plot size as initially passed in the AGM of 17/2/2007 and revised in the AGM of 29/11/2008. This court concludes that if the 2nd Plaintiff was unhappy with the discussion on the reduction of sizes of members' plots as explained in the chairman's report, she ought to have registered her objection in that meeting or as provided for under the Constitution of the 4th Defendant and the same put to vote.
71. In my opinion, the doctrine of estoppel submitted by the Plaintiffs can only arise if the resolutions of the AGM of 17/2/2007 had not been revised by a subsequent company resolution passed in an AGM. Further, the 2nd Plaintiff argument that the changes were effected without her knowledge or consent are not true by virtue of her attendance at the AGM which adopted the Chairman's report that discussed the variation. The Plaintiffs have not presented what they deemed as original maps that were subsequently altered in committing the fraud.
72. The 1st Plaintiff stated that before purchasing the suit property, he was shown beacons of the plot on the ground. There is no evidence presented that indeed the 2nd Plaintiff verified the beacons of the land he was purchasing to confirm that it was indeed 0.2ha. Neither does the 1st Plaintiff state that the boundaries of the plot shown to her were interfered with. What they have produced at page 53 of their bundle is a sketch made by Map Link Systems dated 5th September 2013 which indicate that the area enclosed by the stone wall was approx. 0.209ha. The document is after the purchase already took place and it does not refer to identification of the beacons for plot 138.
73. Having acquired what was allotted to the 2nd Plaintiff and the 1st Plaintiff, cannot therefore come to this court and infer fraud on the part of the Defendants for a parcel of land he procedurally and legally purchased from the 2nd Plaintiff. If the 2nd Plaintiff did not disclose to him the resolutions of the AGM held on 29/11/2008, he cannot shift any blame on the Defendants. It was noteworthy that the size of the property was not indicated in the agreement.
74. However, the 1st Plaintiff wants this court to interpret his rights based on what he was told by the 2nd Plaintiff that the plot was half an acre. At no given time does the 1st Plaintiff mention that he visited the offices of the 1st 2nd and 4th Defendants to confirm the size of the plot he was buying. It is the 1st Plaintiff who should be estopped from imposing expectations on the Defendants on a matter they were not made parties to. All the transactions on purchase and possession were undertaken purely between the Plaintiffs.
75. The sale agreement executed between the Plaintiffs was specific to what was being sold described as LR No Kamiti/Anmer Block 4/138 (found at pages 54-56 of Pex.1). A copy of the certificate of lease was also produced (pages 32-35 of Pex.1) It gives the size of the land as 0.135ha which in my plain reading of the agreement is what the 1st Plaintiff bought. In National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”



76. Further, in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

77. It is therefore my view that that this court will also be tied by the knots of the written contract. The 1st Plaintiff purchased Title No Kamiti/Anmer Block 4/138 which already had been allocated to the 2nd Plaintiff by the 4th Defendant. In fact, she was aware of the exact size at the time of signing the sale agreement but failed to disclose that information to the 1st Plaintiff. My answer to this question is that the alleged fraud has not been proved.

c) Whether the 1st Plaintiff is in trespass?

78. Having established that LR No Kamiti / Anmer Block 4/138 is of 0.1350 Ha but the 1st Plaintiff has fenced a size of 0.209 Ha, it is obvious that his fence has encroached on the neighbouring plots owned by the 3rd Defendant.

Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

79. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership without reasonable excuse. In this case, the 1st Plaintiff contended that he was told by the 2nd Plaintiff that the parcel purchased was half an acre. It was his evidence that before he purchased LR No Kamiti / Anmer Block 4/138, it was shown to him by the 2nd Plaintiff and Mr Stephen Njenga who was the manager to the 4th Defendant. He stated that the place had coffee bushes but since he wanted to be shown the beacons, he engaged a surveyor who identified the beacons to a plot that measured ½ acre.

80. As I have stated hereinabove, the 1st Plaintiff did not call as his witness the surveyor who identified the beacons or produce his report to corroborate his evidence on due diligence. He does not state that Stephen Njenga showed him the beacons and most probably, the manager just confirmed the location of the 2nd Plaintiff's plot. There is no mention that he asked the 4th Defendants for documents concerning the plot (search) which were denied.

81. In essence, the 1st Plaintiff fenced his plot with the measurement of half acre wholly relying on the word of the 2nd Plaintiff. He still believed the 2nd Plaintiff's word even after receipt of a demand letter from the 3rd Defendant in the year 2013 based on his decision to bring this suit seeking to recover what they considered the lost portion of their land. He should have become aware of trespassing on the 3rd Defendant's land as soon as he was given a certificate of lease that was less in size to the ground position he fenced. As long as they extended their size of the plot without the consent of the 3rd Defendant, they were in trespass. The 2nd Plaintiff (PW1) in his evidence stated that none of the Society members were involved in the subdivision of the original land 88/5. She was also not aware of any member who took a portion of her plot.

82. In my view, the 1st Plaintiff ought to have fenced off only the size indicated on the title and then claim for more land as against the 1st 2nd and 4th Defendants. In the circumstances of this case, the



justification provided by the 1st Plaintiff for occupying more than 0.135ha of land belonging to the 3rd Defendant was without merit; particularly after the 3rd Defendant put him on notice. Consequently, he is ordered to pay general damages to the 3rd Defendant assessed at Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000).

83. In conclusion, I find that there is contention over the ownership of the 1st Plaintiff title Block 4/138 measuring 0.135. However, this court finds that the Plaintiffs failed to prove the elements of fraud that alleged caused the size of the plot balloted and allocated to the 2nd and 3rd Plaintiffs to be reduced. Consequently, there is no basis for this court to grant the prayers sought by the Plaintiffs in this court. Their claim is dismissed.

d) Cost

84. Section 27 (1) of the *Civil Procedure Act*, costs should follow the event unless the court orders otherwise. Justice (Retired) Richard Kuloba, *Judicial Hints on Civil Procedure*, 2nd Edition, page 99 states as follows: -

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus, the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”

85. In the final analysis, I entered judgement for the 3rd Defendant who is the Plaintiff in ELC 120 of 2014 (consolidate) on the following terms;
- a. An order of permanent injunction is issued restraining entry, excavation, digging, building, wasting or interference with all that piece of land known as LR Number Kamiti/Anmer Block 4/139,
 - b. An order is compelling the defendant in this suit to remove the building/structure erected on Kamiti/Anmer Block 4/139 and Kamiti/Anmer Block 4/140, and restitution of Kamiti/Anmer Block 4/139 and Kamiti/Anmer Block 4/140 to original state before encroachment,
 - c. An order to evict the Defendant from the Plaintiff's land
 - d. General damages of Kshs 250000 is awarded as compensation for the trespass.
 - e. Costs of the two suits awarded to the 3rd Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE

In the Presence of

Kuria for the 1st 2nd and 4th Defendants



Mugambi Mungari for the 3rd Defendant
Mwenda h/b for Dr Kuria for the Plaintiffs

