



Tapasian v Chief Lands Registrar & 4 others; Kaaria & another (Interested Parties) (Environment & Land Case 521 of 2018) [2023] KEELC 20425 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 521 OF 2018
JO MBOYA, J
OCTOBER 5, 2023
(FORMARLY NAIROBI HCC NO. 934 OF 2003)
AND
(FORMALY KAJIADO ELC NO. 706 OF 2017)**

BETWEEN

SALAASH MOKOPE OLE TAPASIAN PLAINTIFF

AND

CHIEF LANDS REGISTRAR 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

**BEATRICE WACUKA MWANGI (SUED IN HER CAPACITY AS THE
PERSONAL REPRESENTATIVE OF THE ESTATE OF JAPHETH ARTHUR
MWANGI KIURIRE) 4TH DEFENDANT**

DIRECTOR OF SURVEYS 5TH DEFENDANT

AND

GEORGE MWIRIGI KAARIA INTERESTED PARTY

KENYA BROADCASTING CORPORATION INTERESTED PARTY

JUDGMENT

1. The suit herein was filed and/or commenced vide Complaint dated the 5th September 2003, and thereafter the original Complaint was amended on the 9th July 2013, wherein the Plaintiffs, who were hitherto two



in number sought for various reliefs touching on and/or concerning L.R No. 1161 (Parcel Number 304 – Maasai Land Enclosure).

2. Subsequently the Plaintiffs filed a Further amended Plaint dated the 18th December 2020; and in respect of which Single Plaintiff re-organized the claims and thereafter impleaded the following reliefs;
 - i. A declaration that he is the absolute and indefeasible owner of Land Described as L.R 1161/2 measuring 26.4 Acres being the remainder of Land known as L.R No. 1161 (also referred to as Land Parcel Nairobi Area(Ngong) L.R 1161 Parcel 304- Maasai Land Enclosure-Ngong Division 2 Scheme 2) out of which a portion referred to as LR 1161/1 was excised and compulsorily acquired by the government in the year 1966.
 - ii. A declaration be and is hereby issued that the Indenture on LR. No. 1161/2 measuring 26.4 acres situate in the city of Nairobi, dated 2nd December 1970, purportedly made between John Lionel Bretherton Liewellin, Lucy Gabb, Marian Johnstone as personal representatives of the estate of Isabel Mary Liewellin (deceased) of the one part, and Japheth Mwangi Kiurire, in consideration of the sum of Kenya Shillings Twenty-Two Thousand (Kshs. 22,000) was obtained or made by fraud and is a false document that is illegal, null and void.
 - iii. A declaration be and is hereby issued that the 4th Defendant, by himself, through his servants, or agents, is a trespasser on the parcel of land known as the parcel of land known as LR. 1161/2 measuring 26.4 acres or thereabouts, being the remainder of the original parcel of land known as LR. 1161 (also referred to as Land Parcel Nairobi Area (Ngong) LR, 1161 Parcel 304 - Maasai Land Enclosure - Ngong Division 2 Scheme 2), out of which a portion referred to as LR. 1161/1 was excised and compulsorily acquired by the government in the year 1966.
 - iv. An order of Judicial Review, in the nature of mandamus, be and is hereby issued compelling the Chief Land Registrar to issue a title deed in the name of Salaash Mokope Ole Tapasian for LR. 1161/2, measuring 26.4 acres or thereabouts, being the remainder of the original parcel of land known as LR. 1161 (also referred to as Land Parcel Nairobi (Ngong - LR. 1161 - Parcel 304 - Maasai Land Enclosure. Ngong Division - Scheme 2) out of which the portion referred to as LR. 1161/1 was excised and compulsorily acquired by the government in the year 1966.
 - v. An order of judicial review, in the nature of mandamus, be and is hereby issued compelling the 1st Defendant (Chief Land Registrar), the 2nd Defendant (National Land Commission), the 5th Defendant (Director of Surveyors), the 2nd Interested Party (Kenya Broadcasting Corporation) to avail to the Plaintiff all title deeds, mutation forms, survey plans, deed plans correspondence and any other document or details relating to the compulsory acquisition of the parcels of land known as LR, 1161 and LR 192/3 by the Government in 1966, details of all parcels of land compulsorily acquired by the government in 1966, details of the beneficiaries of the compulsory acquisition, details of the remainder parcels, as well as the owners of the remainder parcels, and the current ownership details of the remainder parcels.
 - vi. Mesne profits actually receivable or that would, with ordinary diligence, have been received by the Plaintiff, on account of the 4th Defendant's wrongful possession of the parcel of land known as LR. No. 1161/2,"with effect from 2nd December 1970 when the 4th Defendant fraudulently gained title, possession and use of LR. 1161/2, up to the time when the Plaintiff regains title, possession and use of the parcel of land or until possession is delivered to the Plaintiff
 - vii. Permanent Injunction, restraining the 4th Defendant acting by himself, servants or agents from trespassing, entering upon, occupying and/or in any other manner interfering with the



parcel of land known as LR. 1161/2, measuring 13.40 hectares or thereabouts, being the remainder of the original parcel of land known as LR, 1161 (also referred to as Land Parcel Nairobi (Ngong - LR. 1161 - Parcel 304 - Maasai Land Enclosure, Ngong Division - Scheme 2) out of which the portion referred to as LR, 1161/1 was excised and compulsorily acquired by the government in the year 1966.

- viii. General and Exemplary Damages for Trespass.
- ix. Costs of this suit.
3. Upon being served with the amended Plaintiff, the 1st, 2nd and 5th Defendants duly entered appearance and thereafter filed a Statement of Defense, wherein same denied the allegations contained at the foot of the amended Plaintiff. However, when the Plaintiff was further amended; the 1st, 2nd, 3rd and 5th Defendants did not file any Statement of Defense in respect of the further amended Plaintiff.
4. Instructively and for good measure, it was therefore taken that the 1st, 2nd, 3rd and 5th Defendants shall rely on the Statement of Defense that had hitherto been filed in response to the Further amended Plaintiff.
5. On the other hand, the 4th Defendant also entered appearance and thereafter filed a Statement of Defense; as well as various documents in opposition to the Further amended Plaintiff filed by and on behalf of the Plaintiff.
6. Be that as it may, it is important to point out and to underscore that even though the original Plaintiff was filed by and on behalf of two Plaintiffs, the 1st Plaintiff, namely, Mokohe Ole Tapasian, died during the pendency of the proceedings herein and thus the current suit has been prosecuted by and on behalf of the 2nd Plaintiff. For good measure, the only Plaintiff who remains in respect of the instant matter is Salaash Mokohe Ole Tapasian.
7. Additionally, it is imperative to state that even though the suit herein was filed in the year 2003, more than two decades ago, the hearing in respect of the dispute only commenced on the 15th February 2022; when the Plaintiff herein testified and tendered his evidence before the court.

Parties' Evidence:

a. Plaintiff's Case

8. The Plaintiff's case gravitates and revolves around the Evidence tendered by two witnesses, namely, Salaash Mokohe Ole Tapasian and Frank Juma Enock, who testified as PW1 and PW2, respectively.
9. It was the evidence of PW1, that Mokohe Ole Tapasian was the registered owner and/or proprietor of L.R No. 1161, situate within the city of Nairobi. Furthermore, the witness averred that L.R No. 1161/1, which belonged to and was owned by the said Mokohe Ole Tapasian, now deceased, was the subject of compulsory acquisition by the Government, which culminated into the said parcel of land being split/ sub-divided into two portions.
10. Additionally, the witness testified that arising from the process of compulsory acquisition, Mokohe Ole Tapasian, now deceased, was ultimately compensated by the Government in respect of one portion of the said L.R No. 1161, but the other portion, namely, 1161/2 remained available and therefore ought to have been transferred to and registered in the name of Mokohe Ole Tapasian, now deceased.
11. Nevertheless, the witness has averred that despite the fact that L.R No. 1161/2, ought to have been transferred and registered in the name of Mokohe Ole Tapasian, same was fraudulently registered in



the name of John Lionel Brethertorn Llewelin, Lucy Gabb and Marian Johnstone, respectively, as the Personal Representatives of one Issabel Llewelin, now Deceased.

12. On the other hand, the witness also testified that the fraudulent transfer of L.R No. 1161/2, which formed the remainder portion of what had hitherto been compulsorily acquired by the Government was thereafter transferred to and registered in the name of the 4th Defendant. In any event, the witness contended that the fraudulent transfer and registration in favor of the 4th Defendant was discovered in the year 2002.
13. It was the further testimony of the witness, that following the discovery of the fraudulent transfer and registration of the suit property in favor of the 4th Defendant, Mokope Ole Tapasian, now deceased, proceeded to and filed a Complaint with the Land Dispute Tribunal at Kajiado, wherein same sought to impugn the 4th Defendant's title to and in respect of the suit property.
14. On the other hand, the witness also testified that the 4th Defendant herein also proceeded to and filed Civil proceedings vide Nairobi HCC No. 692 of 2002, wherein the 4th Defendant contended that the witness herein and his late Father had trespassed onto the suit property allegedly belonging to the 4th Defendant.
15. Be that as it may, the witness averred that the suit by and on behalf of the 4th Defendant was terminated vide a Ruling rendered Honourable Justice J.B Ojwan'g; Judge, (as he then was) dated the 8th July 2004; and wherein it is contended that the learned Judge directed that the Parties endeavor to settle and resolve the matter by undertaking survey and ultimately, the preparation of cadastral map.
16. Notwithstanding the foregoing, the witness has averred that despite the various efforts, the dispute herein was not resolved and thus culminating into the current proceedings, wherein the witness seeks to have the 4th Defendant's title to and in respect of L.R No. 1161/2; to be cancelled and/or revoked. Further and in any event, the witness avers that the 4th Defendant has deprived him (witness) of his rightful share of the suit property as a true Dependant of (sic) his late father, namely, Mokope Ole Tapasian.
17. Other than the foregoing, the witness alluded to his witness statement dated the 18th December 2020; and implored the court to adopt same as his further evidence in Chief. In this regard, the witness statement dated the 18th December 2020; was duly adopted and admitted as the witness's further evidence in chief.
18. On the other hand, the witness also alluded to the List and Bundle of document dated the 18th December 2020; containing a total of 32 documents and same sought to adopt and rely on the named documents. There being no objection to the admission of the various documents enumerated at the foot of the List of Documents dated the 18th December 2020, same were duly admitted and marked as Exhibits P1 to P32, respectively.
19. On cross examination by counsel for the 4th Defendant, the witness herein stated that though same has his land, he however does not remember the details of the title number. Nevertheless, the witness added that he has produced all his documents as Exhibits before the Honourable court.
20. Furthermore, it was the testimony of the witness that same inherited the land in question from his late Father, namely, Mokope Ole tapasian. Further and in any event, the witness also averred that same has adduced and tendered before the court evidence to show that he inherited the land in question from his Father.



21. Whilst under further cross examination, the witness averred that his late Father, namely, Mokoje Ole Tapasian, was allocated the land in question by Kerarapul Group Ranch. In addition, the witness added that the land in question measures 26 acres.
22. It was the further testimony of the witness that a portion of the land, namely, the suit property was sold to Kenya Broadcasting Corporation and what remained was measured 26 acres, which ought to have been registered in the name of Mokoje Ole Tapasian.
23. Additionally, the witness averred that though a portion of the land which remained after the sale to and in favor of Kenya Broadcasting Corporation, ought to have been registered in the name of the deceased, same however, has never procured nor obtained a title to and in respect of the said portion of land.
24. Other than the foregoing, the witness also testified that same has since been issued with a title relating to L.R No Ngong/Ngong/15398, which the witness admitted to constitute the remainder portion of land after the sale of the other portion to Kenya Broadcasting Corporation.
25. However, whilst under further cross examination, the witness made another about-turn and stated that the title deed in respect of L.R No. Ngong/Ngong/15398, which same has brought before the court and produced are not lawful. At any rate, the witness has also contended that the Mutation Form, which he has produced before the court as part of his Exhibits are also illegal.
26. Other than the foregoing, the witness averred that same discovered that the 4th Defendant was claiming ownership to and in respect of the suit property, when the 4th Defendant caused him (witness) to be arrested and charged vide a criminal case pertaining to the question of trespass.
27. Finally, the witness averred that the suit property does not belong to the 4th Defendant. For good measure, the witness added that the 4th Defendant's title to and in respect of the suit property is fraudulent.
28. The Second witness who testified on behalf of the Plaintiff is one Frank Juma Enock. Same testified as PW2.
29. It was the testimony of the witness that same is a registered and licensed surveyor and thus knowledgeable on matters pertaining to Land Survey.
30. Additionally, the witness testified that as pertains to the subject matter, same was retained and/or engaged by the Plaintiff herein to undertake an exercise with a view to interrogating the background relating to and concerning L.R No. 1161/2, which is the suit property. Furthermore, the witness averred that upon being instructed and/or engaged by the Plaintiff, same was availed assorted documents by the Plaintiff and on the other hand, same also procured and obtained other relevant documents from the Land Registry.
31. Subsequently, the witness testified that same was able to undertake the designated exercise/ assignment, culminating into him preparing a Report, wherein same analyzed the circumstances surrounding and pertaining to the suit property.
32. Other than the foregoing, the witness also pointed out that same was able to record a witness statement dated the 30th October 2020; and which witness statement the witness sought to adopt as his Evidence in chief.
33. For coherence, the witness statement dated the 30th October 2020; was thereafter admitted as the Evidence in chief on behalf of the witness herein.



34. On cross examination, the witness admitted that though same was availed various documents by the Plaintiff; same was however, not given a copy of a Title deed belonging to the Plaintiff. Besides, the witness added that same did not come across any title document relating to L.R No 1161/2, bearing the name of Mokohe Ole Tapasian.
35. Other than the foregoing, the witness testified that same came across a copy of Kenya Gazette Notice which alluded to compulsory acquisition of various parcel of lands. However, the witnesses clarified that the gazette notice did not contain the names of the owners of the parcels of land, which were the subject of compulsory acquisition.
36. Whilst under further cross examination, the witness testified that same was not aware whether the Plaintiff herein ever obtained the certificate of title of the land in respect of the portion of land that belonged to him (Plaintiff).
37. Nevertheless, when shown a copy of title in respect of L.R No. Ngong/Ngong/15398, bearing the name of the Plaintiff, the witness herein stated that he was not made aware that the Plaintiff had procured and obtained a title deed relating to the remainder portion of the land which was being claimed by the Plaintiff after compulsory acquisition.
38. Furthermore, the witness herein pointed out that according to land registration procedures, it is not possible for one piece/parcel of land to be registered under two separate and distinct registration regimes.
39. With the foregoing testimony the Plaintiff's case was duly closed.

b. 1st, 3rd and 5th Defendants' Case:

40. The case for the named Defendants revolves around the Evidence of one witness, namely, Ms. Gildine Karani, who testified as DW1. Notably, the witness herein intimated to the court that same is a Principal Land Registration officer, currently attached to the office of the Chief Land Registrar.
41. It was the further testimony of the witness herein that same has worked as a Land Registration Officer for a duration of over 15 years. In this regard, the witness pointed out that same was therefore conversant with and knowledgeable of the facts pertaining to the subject dispute.
42. Other than the foregoing, the witness also intimated to the court that same had recorded a witness statement dated the 12th July 2022; and which witness statement, the witness sought to adopt and to rely on. For completeness, the witness statement dated the 12th July 2022, was duly admitted as the evidence in chief of the witness.
43. Additionally, the witness averred that from the records obtaining at the Land Registry L.R No. 1161/1 was hitherto registered in the name of Isabel Mary Llewelin. Furthermore, the witness added that L.R No. 1161/2 is registered in the name of one Japheth Arthur Mwangi Kiurire and not the Plaintiff herein.
44. Other than the foregoing, it was also the testimony of the witness that L.R No. Ngong/Ngong304; was registered in the name of Mokohe Ole tapasian, now deceased. However, the witness clarified that the registration of L.R No. Ngong/Ngong/304, was latter on discovered to have been a double registration and in particular, that the former Title was superimposed on L.R No. 1161/2, which was an existing title.
45. Furthermore, the witness averred that the error leading to the superimposition and double registration relating to L.R No. Ngong/Ngong/304, was caused as a result of the application of the [Land](#)



Adjudication Act in the area in question, oblivious of the fact that the land in question was crown land and had already been titled.

46. Be that as it may, the witness pointed out that when the error was discovered, the Commissioner of Land addressed and remedied the error and Mokohe Ole Tapasian, now deceased, was duly compensated on account of the double registration. In this regard, the witness maintained that the claim by and/or on behalf of Mokohe ole Tapasian, over and in respect of the ground constituting L.R No. 1161/2, therefore ceased upon due compensation by the Commissioner of land.
47. On cross examination by the 4th Defendant, the witness herein pointed out that from the records obtaining at the office of the Chief Land Registrar, there is an Indenture of Conveyance relating to L.R No. 1161/1; which was duly registered in the name of Isabel Mariam Llewelin and that the indenture dates back to the year 1909.
48. On the other hand, the witness also stated that the indenture of Conveyance, which is available of the offices of Chief Land Registrar, provides the historical background to the suit property. In any event, the witness intimated to the court that neither Mokohe Ole Tapasian nor the current Plaintiff herein, have ever owned L.R No. 1161/1 or 1161/2.
49. On cross examination by counsel for the Plaintiff, the witness herein pointed out that the dispute which had been raised by Mokohe Ole Tapasian touch on and/or concern double registration affecting the suit property. In this respect, the witness clarified that the double registration arose when Land Adjudication Act was applied on land, which fell within the crown land; and thereafter causing L.R No. Ngong/Ngong/304; to be superimposed on L.R No. 1161/1, which was already in existence.
50. Whilst under further cross examination, the witness herein averred that the indenture of Conveyance relating to L.R No. 1161/1, which upon sub-division gave rise to inter-alia L.R No. 1161/2, was registered in the year 1936. Furthermore, the witness averred that the indenture showed that the land was registered in the name of Isabel Mary Llewelin who passed on in the year 1949.
51. Other than the foregoing, it was also the testimony of the witness that after the compulsory acquisition a portion of L.R No. 1161, namely, LR. No. 1161/1, was transferred and registered in the name of Kenya Broadcasting Corporation, while the remainder portion was registered in the name of Isabel Mary Llewelin.
52. With the foregoing testimony, the case for the 1st, 3rd and 5th Defendants was duly closed.

c. The 4th Defendant's Case:

53. The 4th Defendants case revolves around the Evidence of three (3) witness, namely, Beatrice Wacuka Mwangi, David Mwangi Gikubu and Mwangi Muhiu Maina, who testified as DW2, DW3 and DW4, respectively.
54. It was the testimony of DW2 that same is currently the 4th Defendant, after being substituted in place of Japheth Arthur Mwangi Kiurire, now deceased, who was hitherto the 4th Defendant.
55. Furthermore, the witness herein has averred that following the death of the original 4th Defendant, same procured and obtained Grant of Letters of administration and hence she (witness) was duly constituted as the Legal Administratrix of the Estate of the original 4th Defendant.
56. On the other hand, the witness herein intimated to the court that the 4th Defendant, now deceased, bought and acquired title to and in respect of L.R No. 1161/2; in the year 1970 and thereafter,



- same entered upon and took possession thereof. In any event, the witness added that same is still in occupation of a portion of L.R No. 1161/2, which portion is better known as LR. No 1161/4.
57. Additionally, the witness herein pointed out that as pertains to the subject matter, same has recorded a witness statement dated the 10th November 2021; which she proposes to adopt as her Evidence in chief.
 58. At the request and instance of the witness, the witness statement dated the 10th November 2021, was duly adopted and admitted as the Evidence in chief of the witness herein.
 59. On the other hand, the witness also alluded to a List and Bundle of documents dated the 10th November 2021, containing a total of 26 documents, which the witness sought to adopt and rely on.
 60. For coherence, there being no objection to the admission of the named documents, same were duly constituted and admitted as Defence Exhibits D2 to D28, respectively, on behalf of the Fourth Defendant.
 61. Instructively, the witness herein was neither cross examined by Learned counsel for the Plaintiff nor counsel for the 1st, 3rd and 5th Defendants, respectively.
 62. The other witness who testified on behalf of the 4th Defendant, was David Mwangi Gikubu. For good measure, same testified as DW3.
 63. It was the testimony of the witness herein that same is a registered and licensed surveyor and thus same is mandated to practice as such.
 64. Furthermore, the witness averred that as pertains to the subject dispute, same was duly retained and engaged by the 4th Defendant to undertake some exercise/ assignment with a view to ascertaining the validity and/or propriety of the Plaintiff's claim to and in respect of the suit property, namely, L.R No. 1161/2.
 65. It was the testimony of the witness that upon receipt of the instructions from the 4th Defendant, same proceeded to and carried out investigations concerning the Plaintiff's claim and thereafter same prepared and affidavit sworn on the 10th November 2021. In this regard, the witness sought to adopt and rely on the contents of the affidavit sworn on the 10th November 2021.
 66. Additionally, the witness also stated that other than swearing the affidavit in question; same also prepared a Report dated the 10th November 2021, which the witness sought to produce and tender as an Exhibit before the court.
 67. In the absence of any objection from the Parties, the Report dated the 10th November 2021; prepared by M/s Epitome Survey Ltd, was duly admitted as Exhibit D28.
 68. On cross examination by counsel for the Plaintiff, the witness herein stated that prior to and or before preparing his report (Exhibit D28), same perused various documents, including copies of indentures of Conveyance held/kept by the office of Chief Land Registrar.
 69. The last witness who testified on behalf of the 4th Defendant was one Mwangi Muhiu Maina. Same testified as DW4.
 70. It was the testimony of the said witness that same is an Advocate of the High Court of Kenya; and further that same is conversant with the facts pertaining to the subject matter.
 71. Other than the foregoing, the witness intimated to the court that same had recorded a witness statement dated the 10th November 2021; and which witness statement, the witness sought to adopt



as his Evidence in chief. In this regard, the witness statement under reference, was duly admitted and adopted as the Evidence in chief of the witness.

72. Additionally, the witness herein reiterated that the contents of the witness statement are correct and reflect the true position as pertains to ownership of the suit property, namely, L.R No. 1161/2, which in any event has since been sub-divided and thus giving rise to L.R No's 1161/3 and 1161/4, respectively.
73. With the foregoing testimony, the 4th Defendant's case was duly closed.

Parties' Submissions:

74. Upon the close of the 4th Defendant's case, the advocates for the respective Parties covenanted to file and exchange written submissions. Consequently and in this regard, the Honourable court thereafter proceeded to and circumscribed the timelines for the filing and exchange of written submissions.
75. Arising from the directions of the court, the Plaintiff herein filed written submissions dated the 14th September 2023; whilst the 1st, 3rd and 5th Defendants filed written submissions dated the 1st September 2023.
76. Additionally, the 4th Defendant also filed written submissions dated the 29th August 2023. Notably, the three (3) sets of written submissions, whose details have been enumerated herein before form part of the record of the court; and shall be considered in the course of the Judgment, where appropriate.

Issues for Determination:

77. Having reviewed the Pleadings filed by and on behalf of the Parties and upon taking into account the evidence tendered (both oral and documentary); and on consideration of the written submissions filed by and on behalf of the respective Parties; the following issues do emerge and are thus worthy of determination;
 - i. Whether the Plaintiff's suit discloses any reasonable cause of action as against the Defendants herein or otherwise.
 - ii. Whether the 4th Defendant procured and obtained title to and in respect of L.R No. 1161/2 through fraud or otherwise.
 - iii. Whether the Plaintiff is entitled to the reliefs sought at the foot of the Further amended Plaintiff or at all.

Analysis and Determination

Issue Number 1 - Whether the Plaintiff's suit discloses any reasonable cause of action as against the Defendants herein or otherwise.

78. Before venturing to address and resolve the issues herein before mentioned, it is important to point out and underscore that the original suit was filed by two Plaintiffs' namely, Mokoje Oletapasian, now deceased; and Salaash Mokoje Oletapasian, respectively.
79. Be that as it may, during the pendency of the suit, Mokoje Ole Tapasian, who was the 1st Plaintiff passed on and the remaining Plaintiff, Salaash Mokoje Oletapasian, proceeded and filed a Further amended Plaintiff dated the 18th December 2020.
80. Instructively, the Further amended Plaintiff only reflects the name of Salaash Mokoje Ole Tapasian as the only Plaintiff. Consequently and in this regard, the discernment of whether or not the suit



beforehand discloses a cause of action shall revolve around whether or not the current Plaintiff was ever the registered proprietor of the suit property, namely, L.R No. 1161/2, so as to be able to originate and/or maintain the instant suit in his personal capacity.

81. On the other hand, this court will also endeavor to and interrogate whether the current Plaintiff ever procured and/or obtained Grant of Letters of administration, either upon the death of Mokohe Oletapasian or otherwise, to be able to propagate any claim as a dependant/heir of the late Mokohe Ole Tapasian.
82. To start with, it is the Plaintiff's case that one Mokohe Ole Tapasian, now deceased, was hitherto the proprietor/owner of L.R No. 1161 (Parcel number 304)- Masaai Land Enlosure, situate within Ngong Division, Scheme No. 2. Furthermore, the Plaintiff has also contended that on or about the year 1966, the Government of the Republic of Kenya sought to and indeed acquired a portion of L.R No. 1161, for and on behalf of Kenya Broadcast Corporation.
83. Besides, the Plaintiff herein has also contended that as a result of the compulsory acquisition, L.R No. 1161; was sub-divided into two portions with one portion, namely, L.R No. 1161/1, being transferred to Kenya Broadcasting Corporation (the 2nd Interested Party); whilst the remainder portion, namely, L.R No. 1161/2 ought to have been transferred to and registered in the name of Mokohe Ole Tapasian, now deceased.
84. However, the Plaintiff herein has testified that despite the fact that Mokohe Ole Tapasian was entitled to the remainder portion out of L.R No. 1161, after compulsory acquisition, the said remainder portion was never transferred to and registered in the name of the said Mokohe Ole Tapasian, now Deceased.
85. On the contrary, the Plaintiff herein has contended that the remainder portion after the compulsory acquisition and which is better known as L.R No. 1161/2, was fraudulently and illegally transferred to the Estate of Isabel Mary Llewelin, now deceased; and thereafter same was eventually transferred and registered in the name of Japheth Mwangi Kiurire.
86. According to the Plaintiff, the impugned transactions touching on and effecting the suit property, namely, L.R No. 1161/2, were fraudulent and were aimed at depriving Mokohe Oletapasian, now deceased, of his rights to and in respect of the suit property.
87. Based on the foregoing, the Plaintiff herein now contends at the foot of paragraph 35 of his witness statement, which was adopted as his Evidence in chief that the 4th Defendant is determined to ensure that he (4th Defendant) deprives the Plaintiff of what is rightfully his as a dependant of the late Mokohe Ole Tapasian, now deceased.
88. My understanding of the position taken by the Plaintiff herein is to the effect that he (Plaintiff) is laying a claim to the suit property on account of being a lawful dependant/ heir of Mokohe Ole Tapasian, now deceased.
89. To the extent that the Plaintiff herein is not staking a personal claim to and in respect of the suit property, but a representative claim, on behalf of the Estate of Mokohe Ole Tapasian; it was incumbent upon the Plaintiff to procure and obtain Grant of Letters of administration so as to enable same to propagate his claim on the basis of being a dependant.
90. Furthermore, it is trite and established position of the law that a dependant and/or beneficiary of the deceased, the Plaintiff not excepted, cannot mount and/or maintain a suit prior to and/or obtaining Grant of letters of administration. See Section 82 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya.



91. Additionally, it is also worthy to take cognizance of the holding in the case of Rajesh Pranjivan Chudasama versus Sailesh Pranjivan Chudasama [2014] eKLR, where the court of Appeal stated and observed as hereunder;

“As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased’s estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this Court differently constituted rendered itself thus:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

92. Whereas the current Plaintiff was a co-Plaintiff alongside Mokope Oletapasian, now deceased, from the onset, it is not lost on the court that the current Plaintiff was merely a passenger in the suit. For good measure, the person who had a direct interest and thus legitimate cause of action worthy of ventilation before the court was Mokope Ole Tapasian, who is now deceased; who had himself claimed that the suit property ought to have been registered in his name.

93. Instructively, during the lifetime of Mokope Oletapasian, now deceased, the current Plaintiff could flirt together with the deceased as a Co- Plaintiff, but there is no doubt, that his flirting with the deceased Plaintiff, would not vest and/or confer any locus standi on him or at all.

94. First forward, if the current Plaintiff was keen to propagate the claim for and on behalf of the Estate of Mokope Ole Tapasian, now deceased, then it was incumbent upon the current Plaintiff to procure and obtain the requisite Grant of Letters of administration; and thereafter invoke the provisions of Order 24 of the Civil Procedure Rules 2010, to be substituted in place of the deceased, albeit in a representative capacity.

95. Secondly, it must have become crystal clear that the current Plaintiff herein has no direct and/or personal claim to the suit property. Absent personal claim and/or stake to the suit property, there is no gainsaying that the Plaintiff herein, cannot by any figment of imagination, purport to espouse a cause of action known to law.

96. To my mind, the current Plaintiff is devoid and or divested of the requisite locus standi to maintain the current suit, touching on and/or concerning ownership of the suit property or otherwise. Suffice it to point out that locus standi is a threshold question and where same is found to be missing, then the court is obligated to down its tools.

97. For good measure, the position of the law as pertains to the importance of locus standi was articulated in the case of *Alfred Njau & Others v City Council of Nairobi* [1982-88] IKAR 229 where the Court stated as hereunder;

“Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...”



The court proceeded to state:

“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

98. From the foregoing discourse, I come to the conclusion that the current Plaintiff herein has neither disclosed nor espoused any reasonable cause of action as against the Defendants, capable of being ventilated and/or interrogated by a court of law as pertains to and in respect of ownership of the suit property.

Issue Number 2 - Whether the 4th Defendant procured and obtained title to and in respect of L.R No. 1161/2 through fraud or otherwise.

99. The Plaintiff herein contended that the title to and in respect of the suit property, namely, L.R No. 1161/2 was purportedly transferred and registered in the name of Isabel Mary Llewelin, now deceased; and thereafter passed on to John Lionel Brethaton Llewelin, Lucy Gabb and Marian Johnstone, as the Legal administrators of the Estate; who subsequently transferred the suit property to one, Japheth Mwangi Kiurire.
100. Furthermore, the Plaintiff contended that the transactions touching on and/or concerning the suit property, culminating into the transfer and registration of same in favor of the 4th Defendant was therefore fraudulent.
101. Nevertheless, despite the contention by the Plaintiff that the transfer and registration of the suit property in favor of the 4th Defendant was fraudulent, DW1, namely, Gildine Karani, testified that L.R No. 1161/1, belonged to and was registered in the name of Isabel Mary Llewelin, now deceased.
102. Additionally, DW1 further testified that from the records obtaining at the office of the Chief Land Registrar, L.R No. 1161/1 was the subject of compulsory acquisition culminating into the subdivision thereof into two portions, namely, L.R 1161/1 and 1161/2, the latter which was transferred to and registered in the name of Isabel Mary Llewelin, now deceased.
103. On the other hand, the same witness, herself a Principal Land Registration officer; further averred that the suit property was ultimately transferred to and registered in the name of Japheth Arthur Mwangi Kiurire, now deceased and who was the original 4th Defendant.
104. From the testimony tendered by DW1 and which testimony was not controverted, there is clear evidence showing how the suit property was transferred from the Legal representatives of Isabel Mary Llewelin, now deceased to Japheth Arthur Mwangi Kiurire.
105. To my mind, the process leading to the transfer and ultimate registration of the suit property to and in favor of the 4th, now deceased, was lawful, legitimate and procedural. Quiet clearly, there is no scintilla of fraud which touches on and/or affects the named transaction.
106. Furthermore, it is not lost on this court that whoever impleads fraud must not only avail and/or supply particulars thereof, but same must venture forward and supply plausible and cogent evidence to prove the fraud to the requisite standard of proof. Instructively, proof of fraud, which is a Quasi- criminal offence, must done to the requisite standard, which is the intermediate standard of roof.



107. Unfortunately, in respect of the instant matter, the Plaintiff has colored the body of the Further amended Plaint with numerous particulars of fraud, but same has failed to establish and or demonstrate the fraud alluded to or at all.
108. Significantly, it was incumbent upon the Plaintiff to prove his case to the requisite standard. However, same has failed to discharge the burden of proof and in this regard, his claim must no doubt, fail. See the provisions of Sections 107,108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya.
109. As concerns the manner of pleading fraud and the requisite standard of proof required, it is appropriate to cite and adopt the dictum in the case of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR, where the Court of Appeal held thus;

25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs 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 vs 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; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

110. Lastly and before departing from the question of fraud, it is not lost on this court that the Plaintiff herein who has adverted to the plea of fraud, has never owned the suit property. Consequently, the question that does arise is whether a person who has no lawful rights to a property, whether remotely or otherwise, can espouse and maintain a cause of action founded on fraud.
111. Suffice it to point out that one must have a direct stake or interest in the subject matter and in this respect, in the suit Property, before same can ventilate a cause of action of fraud. Surely, a busybody cannot cannot raise and/ or be heard to complain as pertains to a property in respect of which, same has no Rights and/ or Interest over.
112. In a nutshell, I am afraid that the allegations pertaining to fraud, which have been impleaded by the plaintiff herein, have however, not been proven. Conversely, there is no gainsaying that the 4th Defendant has been able to demonstrate that the suit property was lawfully transferred and registered in her name.



113. Simply put, my answer to issue Number two is to the effect that the transfer and registration of the suit property, which in any event, has since been subdivided culminating into the creation of L.R No's 1161/3 and 1161/4, was lawful and not otherwise.

Issue Number 3 - Whether the Plaintiff is entitled to the reliefs sought at the foot of the Further amended Plaintiff or at all.

114. Other than the question of fraud, which has been discussed in the preceding paragraphs, it is important to point out that the Plaintiff herein has sought for a plethora of reliefs at the foot of the Further amended Plaintiff dated the 18th December 2020.

115. Instructively, the Plaintiff herein has sought for a Declaratory order to the effect that same is the absolute and indefeasible owner of the suit property. However, despite the contention by the Plaintiff that same is the absolute and indefeasible owner of the suit property, it is worthy to recall that the Plaintiff did not tender any iota or scintilla of evidence to show that the suit property was ever registered in his name or at all.

116. Additionally, the Plaintiff has also implored the Honourable court to find and hold that the transfer and registration of the suit property in the name of the 4th Defendant, now deceased, was fraudulent. However, in this respect there is no gainsaying that the court has since found and held that the transfer in favor of the 4th Defendant, now deceased, was procedural, valid, lawful and legitimate.

117. Thirdly, the Plaintiff has sought for an order of Permanent Injunction to restrain the 4th Defendant from entering upon and/or otherwise dealing with the suit property. Nevertheless, it is appropriate to underscore that an order of Permanent injunction cannot issue against the lawful and registered owner of the suit property. Certainly, no such Order can issue and/ or be granted as against the Fourth Defendant herein. See the Provisions of Sections 24 and 25 of the [Land Registration Act, 2012](#).

118. For the avoidance of doubt, it is instructive to adopt and reiterate the holding in the case *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal stated as hereunder;

“It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. “

119. Furthermore, the Plaintiff herein has also curiously impleaded orders of Judicial Review in the nature of Mandamus to be issued as against the 1st, 2nd and 5th Defendants respectively; and in particular, to compel the named Defendants to issue Certificate of Title pertaining to and concerning the suit property, namely, LR. No 1161/2, to the Plaintiff.

120. I am afraid that an order of Judicial Review cannot issue and/or be granted vide an ordinary suit, commenced by way of Plaintiff. Surely, the provisions of Sections 8 and 9 of the Law Reforms Act, Chapter 26 Laws of Kenya; as read together with the Provisions of Order 53 of the Civil Procedure Rules, 2010, are explicit and devoid of ambiguity.

121. Notably, if the Plaintiff herein was convinced that the circumstances underlying the suit beforehand merited orders of Judicial Review, (which I doubt), then same ought to have complied with the established law, which undergird the filing of Judicial Review Proceedings.

122. Other than the foregoing, it is also worthy to mention that the Plaintiff has also sought for payment of Mesne Profits. However, despite seeking for mesne profits, it is worthy to recall that there are no



pleadings capable of anchoring such a claim. Furthermore, no particulars pertaining to the quantum of loss and/or damage suffered has been supplied.

123. Simply put, the claim for Mesne Profits, which has been adverted to for the very first time in the reliefs, is premature, misconceived and in any event stillborn. Instructively, any claimant seeking to implead a claim for mesne profits ought to comply with the established position of the law as enunciated in the case of Christine Nyanhama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR.

Final Disposition:

124. From the discourse alluded to and particularized in the preceding paragraphs, it must have become crystal clear that the suit by and on behalf of the Plaintiff herein is indeed pre-mature, misconceived and Legally untenable.
125. Additionally, it is also worthy to point out that the Further amended Plaintiff dated the 18th December 2020, which is the operative pleading driving the Plaintiff suit was never verified by the requisite verifying affidavit. In this respect, there is no gainsaying that the Further amended Plaintiff offends the provisions of Order 4 Rule 1(2) of the Civil Procedure Rules, 2010.
126. In the premises, I come to the conclusion that other than the fundamental defects that inflict the Further amended Plaintiff; the Plaintiff's suit is devoid of merits. Consequently same be and is hereby dismissed with costs to the Defendants.
127. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. Kerubo h/b for Mr. Kibungei for the Plaintiff.

Mr. Motari for the 1st, 3rd and 5th Defendants.

Ms. Irungu for the 4th Defendant.

N/A for the 2nd Defendant.

N/A for the 1st and 2nd Interested Parties.

