



REPUBLIC OF KENYA



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**Wambua v Syengo & 3 others (Environment & Land Case 33 of 2021)  
[2022] KEELC 14729 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14729 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE 33 OF 2021**

**LG KIMANI, J**

**NOVEMBER 8, 2022**

**BETWEEN**

**GREGORY SEMBEI WAMBUA ..... PLAINTIFF**

**AND**

**GEORGE MUEMA SYENGO ..... 1<sup>ST</sup> DEFENDANT**

**ANJELINE MWENDE NJERU ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KITUI ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit through the Amended Plaint dated 6<sup>th</sup> October 2014 and amended on 8<sup>th</sup> March 2019 seeking the following orders;
  1. A mandatory injunction directing the County Land Registrar Kitui County or the Land Registrar designated and acting in the capacity of Land Registrar Kitui County to rectify the register involving land parcels title numbers Kyangwithya/Nduumoni/542, Kyangwithya/Nduumoni/543, Kyangwithya/Nduumoni/532, Kyangwithya/Nduumoni/533 and Kyangwithya/Nduumoni/534 by cancelling the registrations.
  2. A mandatory injunction directing the County Land Registrar, Kitui County or the officer designated and acting in the capacity of Land Registrar, Kitui County to combine all the parcels resultant from the subdivisions of LR Kyangwithya/Nduumoni/520, close the registers relating to them and open a new register for the parcel resulting from the combination in the name of the plaintiffs.



3. A permanent injunction restraining the defendants themselves or their legal representatives from interfering in any manner adverse to the plaintiff's proprietary rights with the parcel of land, or any portion thereof resulting from the combination of the parcels or subdivision of Parcel Number Kyangwithya/Nduumoni/520.
4. General damages.
2. The initial suit filed herein included the current Plaintiff and the 2<sup>nd</sup> Plaintiff Peter Ngenge Wambua. By an order of the court dated 5<sup>th</sup> March 2019 the 2<sup>nd</sup> Plaintiff who is a brother to the Plaintiff was removed as a party to the suit and the Plaintiff was accordingly amended.
3. The Plaintiff claims to be a son of Wambua Nzula (Deceased) and Nyula Wambua (Deceased). One of the properties of the Estate of his Deceased father Kyangwithya/Nduumoni/520 is the subject matter of this suit. The land was distributed jointly to his mother Mrs. Nyula Wambua Nyula (now deceased), the Plaintiff Gregory S. Wambua, his brother Mwaniki Wambua (now deceased), and other brother Peter Ngenge Wambua. The Plaintiff claims that they made an application to the District Land Registrar Kitui, on or about 22.5.2003 for severance of the joint proprietorship of the said land. As a result their respective shares became Nyula Wambua Nyula – 1.0 Ha, Gregory Sembei Wambua 1.49 Ha, Mwaniki Wambua 3.0 Ha and Peter Wambua 4.0 Ha. That they apportioned their respective parcels on the ground and they all took possession and use of their shares. Sometime in February 2013 the 2<sup>nd</sup> Plaintiff (though no longer a party to the suit) planted food crops on his portion of land. That on 28<sup>th</sup> May 2013 the 1<sup>st</sup> Plaintiff was arrested and charged at the Chief Magistrates court at Kitui with the offence of forcible detainer of LR Kyangwithya/Nduumoni/1542 the property of Anjelina Mwendu Njeru the 2<sup>nd</sup> Defendant herein.
4. The Plaintiff avers that he conducted a search and confirmed that Land Parcel Kyangwithya/Nduumoni/520 had been sub-divided into four parcels of land registered in different names Kyangwithya/Nduumoni/531- Peter Ngenge Wambua, 532-Nyula Wambua Nyula, 533- Mwaniki Wambua and 534- George Mwema Syengo (1<sup>st</sup> Defendant herein). That he obtained the mutation form used to effect the said subdivision. The plaintiff claims further that Kyangwithya/Nduumoni/532 was further mutated into Kyangwithya/Nduumoni/542 and Kyangwithya/Nduumoni/543 with parcel number 542 being registered in the name of Anjeline Mwendu Njeru, the 2<sup>nd</sup> Defendant while 543 was registered in his name. It is the Plaintiff's claim that the subdivision and/or mutation of land parcel Kyangwithya/Nduumoni/520 and registration of the resultant titles was illegal, unlawful, and fraudulent as it was done by the Defendants without his knowledge, permission, information, authority and/or consent.
5. The Plaintiff further claims that the 2<sup>nd</sup> Defendant illegally charged Kyangwithya/Nduumoni/542 as security for a loan of Kshs 1,125,000.00 in favour of the 3<sup>rd</sup> Defendant. He claims that the acts of the Defendants amounted to fraud and are null and void ab initio and he proceeded to enumerate the particulars of fraud as;
  - i. Mutating land parcel Kyangwithya/Nduumoni/520 without the consent, authority, permission, participation and/or information of the Plaintiffs and other beneficiaries.
  - ii. Preparing a mutation form without consent, participation, information and/or authority from the Plaintiffs and other beneficiaries.
  - iii. Registering the 1<sup>st</sup> Defendant George Mwema Syengo as owner of a portion of LR Kyangwithya/Nduumoni/520.
  - iv. Depriving the 1<sup>st</sup> plaintiff of his share of Kyangwithya/Nduumoni/520.



- v. Mutating LR Kyangwithya/Nduumoni/531 and registering the 2<sup>nd</sup> defendant as proprietor of one of the resultant parcels.
  - vi. Charging LR Kyangwithya/Nduumoni/542 and registering the charge.
  - vii. *Res ipsa loquitur*
6. In their defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied any fraudulent acts and averred that the 1<sup>st</sup> Defendant is the bona fide registered proprietor of L.R Kyangwithya/Nduumoni/534 and the 2<sup>nd</sup> Defendant is the bona fide registered proprietor of Kyangwithya/Nduumoni/542 and that the registration of 534 and 542 was legal, procedural and with the knowledge, authority and consent of the Plaintiff and all beneficiaries of the land.
  7. The 3<sup>rd</sup> Defendant stated in its statement of Defence that the 2<sup>nd</sup> Defendant is the registered proprietor of Kyangwithya/Nduumoni/542 and was their customer. That she was granted a credit facility of Ksh.1.500, 000 secured by a First Legal Charge over the said parcel which she cleared and undertook a further facility of Ksh.3, 000,000 also secured by a Charge over Kyangwithya/Nduumoni/542.

### Summary of Evidence

8. Hearing of the Plaintiffs suit commenced on the 17<sup>th</sup> of March 2022 when PW 1 Gregory Sembei Wambua, the Plaintiff herein adopted his witness written statement dated 6<sup>th</sup> October, 2014 as evidence and produced his bundle of documents as exhibits. The said statement reiterated his claim to land parcel Kyangwithya/Nduumoni/520 as contained in the plaint and as summarized above.
9. He stated that their mother Nyula Wambua Nyula died on 23<sup>rd</sup> December 2003 while his brother Mwaniki Wambua died in June 2006 and that at the time of their respective deaths they had not subdivided the parcel of land nor surveyed it. The plaintiff claimed that on 28<sup>th</sup> May, 2013 he was arrested on allegations of having cultivated on the land of Anjeline Mwendu Njeru, the 2<sup>nd</sup> Defendant which his brother Peter Ngenge Wambua was alleged to have sold to the said Anjeline Mwendu. The plaintiff was charged in Kitui CM Criminal Case No. 255 of 2013 where he was eventually acquitted.
10. The plaintiff claimed that upon investigation he found that land parcel Kyangwithya/Nduumoni/542 was first registered in the name of Peter Ngenge Wambua on 30<sup>th</sup> June, 2005 while Angelina Mwendu Njeru was registered as owner on 9<sup>th</sup> October, 2006. That on 7<sup>th</sup> August, 2013 a charge in favour of Equity Bank was registered against the title to secure a loan of Kshs. 1,125,000.00. Upon further investigation, it was discovered that register for LR. Kyangwithya/Nduumoni/520 was closed on 27<sup>th</sup> July, 2004 to produce 4 new titles; 531, 532, 533 and 534 in the names of Peter Ngenge Wambua, Nyula Wambua Nyula, Mwaniki Wambua and George Mwema Syengo respectively.
11. The plaintiff claims that his last known transaction was filing of an application for severance of LR. Kyangwithya/Nduumoni/520 on 22<sup>nd</sup> May, 2003 and that all subsequent transactions were carried out fraudulently, unlawfully, illegally and without his participation and that as a result he suffered loss and damage. He further claimed that registration of George Mwema Syengo as proprietor of LR 534 deprived him of his share of the estate as distributed in his father's Succession cause. He further complained that the sub-division of the land was done using short cuts and without having taken out a grant of letters of administration to the estate of his mother Nyula Wambua.
12. The plaintiff denied signing any agreement of sale to the 1<sup>st</sup> defendant George Syengo Muema or receiving any money for sale of the land. He claims that he uses the land that was initially 520 but stopped using 542 since 2013 when he was stopped by the court.



13. On cross-examination, the plaintiff confirmed that he initially commenced this suit in joint names with his brother Peter Ngege Wambua but he later removed his name since he took sides with the defendants. He confirmed that when he presented to Lands Office the severance document dated 2<sup>nd</sup> May, 2003 for LR 520, all documents were presented but no subdivision of the land was carried out. He confirmed having sold to 1<sup>st</sup> defendant land parcel Kyangwithya/Nduumoni/516 but not his portion of 520. With regard to the 3<sup>rd</sup> defendant, the plaintiff confirmed that he was not aware that the charge registered against title 542 had been discharged or whether the title deed had been returned to the 2<sup>nd</sup> defendant.
14. PW2, Gabriel Nzusi Wambua testified that he was the Senior Assistant Chief and adopted his witness statement dated 12<sup>th</sup> October, 2020. He was not aware if Kyangwithya/Nduumoni/520 was subdivided but he stated that he had always known it was still registered in the name of four people.
15. PW3 Anna Kusewa Kitonga adopted her witness statement filed in court on 19<sup>th</sup> October, 2020. She stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not buy land from the plaintiff because the Chief and Sub-chief were not aware, there were no witnesses to the agreement for sale and the purchase price from the 1<sup>st</sup> defendant was received by Peter Ngege Wambua and not by the plaintiff. She further claimed the alleged sub-division of the land 520 was done without succession being done for the estate of Nyula Wambua (Deceased). She claims to have been utilizing the suit land and categorically states that the 2<sup>nd</sup> Defendant did not purchase the land from Peter Ngege Wambua. She had leased land from plaintiff but 2<sup>nd</sup> defendant came and told them to stop grazing as they destroyed crops. The Plaintiff was arrested and charged over this offence.

#### **Defence Case**

16. The Defence case proceeded for hearing on 7<sup>th</sup> July, 2022 and the DW 1, the 1<sup>st</sup> defendant; George Muema Syengo adopted his written statement dated 18<sup>th</sup> December, 2014 and produced documents on his lists of documents as exhibits He stated that in 2003 he bought land measuring 1.49 Ha from the plaintiff Gregory Sembei Wambua at a price of Kshs. 40,000.00 and another portion from Mwaniki Wambua (deceased) measuring 1.91 Ha at a price of Kshs. 50,000.00 The said land was combined as a portion of land parcel Kyangwithya/Nduumoni/520. Making him a beneficial owner of part of parcel No. 520 which he claims was with the authority and consent of Gregory Sembei, Nyula Wambua, Peter Ngege and Mwaniki Wambua. He paid the entire purchase price in instalments and the same was acknowledged.
17. Thereafter, the land was subdivided into four portions and he got his portion being LR Kyangwithya/Nduumoni/534. He stated that Gregory and Peter Ngege participated in the sale, subdivision and transfer of the interest comprised in LR Kyangwithya/Nduumoni/520.
18. He denied that the process of mutation of LR 520, closure of register and registration of resultant titles; 531, 532, 533 and 534 was illegal or criminal. The 1<sup>st</sup> defendant claims he purchased the land from the Plaintiff through an agreement dated 19<sup>th</sup> September, 2003 where it was confirmed that he had completed purchasing of LR Kyangwithya/Nduumoni/516 and was commencing purchase of portion of 520. The 1<sup>st</sup> defendant explained that the other family members realized that the plaintiff had included himself as part of LR 520 while had already had another parcel of land. They agreed to sell the plaintiff's portion in the land 520 and share the money. That as part of the purchase price, he paid to one Anne Kitheka money which her husband had paid to purchase part of the land from Nyula Wambua the plaintiff's mother.



19. The 1<sup>st</sup> defendant produced in court exhibits 2 – 10 petty cash vouchers that were to prove payment part of the purchase price where each family member was collecting his own share. He further showed an agreement for purchase of land from Mwaniki Wambua measuring 1.91 Ha.
20. The 1<sup>st</sup> defendant further produced an acknowledgement dated 15<sup>th</sup> September, 2004 where the Plaintiff acknowledged the sale and receipt of sale price paid to Peter Wambua and Nyula Wambua. He confirmed payment of Kshs. 11,000.00 to Anne Kitheka. He confirmed transfer of the portion of LR 520 and he had no further claim and confirmed the position with new portions.
21. The 1<sup>st</sup> Defendant stated that after the purchase all family members took him to lands office where the portion of 3.0 Ha was transferred to him and the plaintiff was removed as a share owner in LR 520. He further claimed that the plaintiff was present and helped during partitioning of the land.
22. DW2 – Peter Ngenge Wambua adopted his witness statement and further stated that as a family including the plaintiff, their mother Nyula Wambua, brother Mwaniki Wambua and himself, they subdivided LR 520 and all beneficiaries were involved. He confirmed that registration of 1<sup>st</sup> defendant as owner of LR 534 was done lawfully and procedurally with consent of all beneficiaries on the estate of their father Wambua Nzula. Further that he sold and transferred LR 542 to the 2<sup>nd</sup> defendant and the sale and transfer was not fraudulent or unlawful. That they followed up the matter until new title deeds were issued. He stated that the plaintiff included him as a party to this suit without his knowledge. He does not claim any land from the defendants. He confirmed that he together with the other family members attended Land Control Board and Lands offices to effect transfer of the portion of land to the defendant when their mother Nyula and brother Mwaniki were alive.
23. DW3 Angelina Mwende Njeru the 2<sup>nd</sup> defendant adopted her witness statement dated 18<sup>th</sup> December, 2014. She stated that on 25<sup>th</sup> November, 2004 she purchased from Peter Ngenge Wambua a portion of LR Kyangwithya/Nduumoni/531 at a price of Kshs. 120,000.00 and signed a written agreement before Kilonzi & Co. Advocates. The vendor obtained consent of Land Board and after subdivision transferred a portion of LR 531 which was LR No. Kyangwithya/Nduumoni/542. She stated that the sale was regular and with the knowledge of the owner. She confirmed having charged the land to Equity Bank and she had repaid the entire loan and collected her title deed from them and was in the process of registering the discharge of charge.
24. DW 4 Ann Kitheka adopted her witness statement dated 8<sup>th</sup> October 2021. She confirmed knowing the plaintiff and Peter Ngenge Wambua (DW2) as she is married to their Uncle. She stated that her husband Jonathan Kitheka Mbuvi had bought a portion of land from Nyula Wambua Nyula and she used to cultivate the land. That at some point the plaintiff instructed her to collect a refund of the deposit paid by her husband from the 1<sup>st</sup> defendant. She collected the money through an agreement dated 27<sup>th</sup> November, 2003.
25. DW 5 Josephat Nyaga Ngari on behalf of the 3<sup>rd</sup> defendant adopted his written witness statements dated 19<sup>th</sup> December, 2014 – produced documents as Exhibits 3<sup>rd</sup> defendant’s exhibits 1 – 13. He confirmed that the 2<sup>nd</sup> defendant was a customer of the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> Defendant offered her a loan of Kshs. 1, 500,000 and a second one of 3,000,000. Before the loan was given, a search was carried out and change document prepared over LR 542, registered in favour of the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant repaid both loans and the title deed was released to her.
26. He confirmed that the 3<sup>rd</sup> defendant has no interest in the land and it was now the 2<sup>nd</sup> defendant’s duty to discharge the property. The loan was cleared in 2013 but at the time of filing the suit and hearing of the suit, the property was still charged.



### **The Plaintiff's Written submissions**

27. The Plaintiff submitted that from the onset, the resultant sub-divisions of the land known as Kyangwithya/Nduumoni/520, the transfers and the resultant sub-divided titles and the charging of Kyangwithya/Nduumoni/542 was done through fraud, illegality or through a corrupt scheme and as such Section 26 of the [Land Registration Act](#) cannot stand as a title deed being evidence of ownership of land.
28. Counsel for the Plaintiff reiterated that entries were made on the register after the death of their mother Nyula Wambua to replace the Plaintiff with George Muema Syengo. He submitted that the Plaintiff did not attend any institution including the Land Control Board and neither did he sign or execute any documents including the mutation and transfer forms. They relied on the cases of [Samuel Odhiambo Oludhe & 2 others vs Jubilee Jumbo Hardware Limited & Another](#) (2018)eKLR and [Alice Chemutai Too-vs-Nickson Kiprui Korir & 2 others](#) (2015)eKLR.
29. According to the Plaintiff, the alleged sale agreements confirmed that only one co-owner was involved as a vendor leaving the other joint owners. The Plaintiff also pointed out that the 2<sup>nd</sup> Defendant produced a sale agreement dated 25/11/2004 which indicated that she had purchased the whole of Land Parcel No. Kyangwithya Nduumoni/531 from Peter Ngenge Wambua, however the certificate of search produced showed that the vendor was registered as the proprietor of 542 instead and that the search and agreement do not match. The Plaintiff therefore submits that this was illegal.
30. The Plaintiff invoked Section 80 of the [Land Registration Act](#) 2012 for the Court to direct that any registration be cancelled or amended if it is satisfied that any registration was obtained, made, or omitted by fraud or mistake and nullify the transactions as they relied on the holding in [George Tsuma Kanundu vs Benson Safari Mwatete](#) (2013) eKLR and the case of [Alice Chemutai Too-vs-Nickson Kipkurui Korir & 2 others](#) (2015) eKLR.
31. Regarding the 3<sup>rd</sup> Defendant, the Plaintiff submitted that hit is a proper party in these proceedings as they had charged Land Parcel No. Kyangwithya Nduumoni/542 at the time of institution of this suit and a discharge of charge is yet to be executed up to now and their participation in these proceedings is vital.

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' written submissions**

32. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the mutation of Land Parcel No. Kyangwithya Nduumoni/520 was done with the knowledge, permission and/or consent of the Plaintiff and his co-proprietors at the time and noted that the Plaintiff and all the family members made an application for severance of joint proprietorship as well as the fact that their mother, Nyula Wambua, was alive at the material time.
33. It was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submission that vide Sale Agreement dated 19/09/2003, the Plaintiff agreed to sell to the 1<sup>st</sup> Defendant his share of Kyangwithya Nduumoni/520 measuring 1.49 Ha and according to 1<sup>st</sup> and 2<sup>nd</sup> Defendant's exhibit 19, the Plaintiff acknowledged receipt of the entire purchase price and also relinquished any claim over his share.
34. They submitted that no evidence had been placed before the Court to show any irregularity surrounding the issuance of the resultant titles and that it is a cardinal principle of the law that the one who alleges must prove.



### 3<sup>rd</sup> Defendant's written submissions

35. The 3<sup>rd</sup> Defendant submitted that due process of charging the said parcel of land was followed as explained by the cases of *Priscillah Wanja Kibui & Another* (2014) eKLR and *Micheal Oringo Alusi & 2 others vs Jobson Salano Mulanda* (2016) eKLR as they submitted that prior to the signing of the Charge, the 3<sup>rd</sup> Defendant acted diligently by undertaking a search at the Land Registry and it established that it was registered in the 2<sup>nd</sup> Defendants name.
36. The 3<sup>rd</sup> Defendant submitted that upon due registration of the charge, the same became legally binding as spelt out under Section 56(1) and (3) which automatically confers statutory compliance. The 3<sup>rd</sup> Defendant pointed out that the Chargee upon registration only obtains interests on the charged land and does not transfer any interest or right to itself in the charged land as they quoted from Section 80(1) of the *Land Act*. It is the 3<sup>rd</sup> Defendant's submission that the Plaintiff has failed in its duty to discharge the burden of proving that the 3<sup>rd</sup> Defendant committed any fraud and/or illegality under section 107 and 109 of the *Evidence Act* as they pointed out that the title to LR 542 is indeed in the 2<sup>nd</sup> Defendant's name and was obtained in 2010 while the property was charged in 2013, therefore it was not involved in the registration of the title documents whatsoever. They relied on the holding in *Micheal Oringo Alusi & 2 others vs Jobson Salando Mulanda* (2016) eKLR and concluded that the Plaintiff has no claim against the 3<sup>rd</sup> Defendant and prays that the suit be dismissed against it.

### Analysis and Determination

37. I have considered the pleadings in this case, evidence adduced by the parties and the documents produced in court. I have also considered the written submissions by Counsel for all the parties and the authorities cited. The suit herein arises out of dealings in land parcel No. Kyangwithya/Nduumoni/520. Counsel for all the parties have drawn what they deem to be issues arising for determination in this suit and I propose to combine them and deal with them as hereunder;
- A. Whether registration of the 1st and 2<sup>nd</sup> Defendants as owners of portions of land parcel L. R. Kyangwithya/Nduumoni/520, subdivision of the said land and issuance of new title deeds was carried out fraudulently, illegally, unprocedurally or through a corrupt scheme.
  - B. Whether joinder of the 3<sup>rd</sup> Defendant as a party to this suit was proper and if so whether the charge registered in respect of land parcel Kyangwithya/Nduumoni/542 in favour of the 3<sup>rd</sup> Defendant is legal and or sustainable
  - C. Is the Plaintiff entitled to the orders sought therein the Amended Plaintiff?

#### **A. Whether registration of the 1st and 2<sup>nd</sup> Defendants as owners of portions of land parcel L. R. Kyangwithya/Nduumoni/520, subdivision of the said land and issuance of new title deeds was carried out fraudulently, illegally, unprocedurally or through a corrupt scheme.**

38. Section 26 of the *Land Registration Act* No. 3 of 2012 provides that a Certificate of title is to be held as prima facie evidence of absolute and indefeasible proprietorship. It states that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

39. In this case it is an admitted fact whose details are borne by the abstract of title (green card) produced in evidence by the Plaintiff that land parcel No. L. R Kyangwithya/Nduumoni/520 was first registered in the joint names of Nyula Wambua Nyula, Gregory Sembei Wambua, Mwaniki Wambua and Peter Wambua on 20<sup>th</sup> July 1999 and a title deed issued on 27<sup>th</sup> July 1999. It is also admitted that on 23<sup>rd</sup> May 2003 a form for severance of proprietorship was registered against the title and ownership of the land was changed from joint proprietorship to one where the shares of the owners were defined as follows: Nyula Wambua Nyula, 1.0 Ha, Gregory Sembei Wambua, 1.49 Ha, Mwaniki Wambua, 3.0 Ha and Peter Wambua, 4.0 Ha.
40. The same extract of title shows entry No. 3 dated 9<sup>th</sup> October, 2003 that the proprietorship of the said land was changed and the name of the Plaintiff Gregory Sembei Wambua, was removed entirely and the acreage owned by Mwaniki Wambua was reduced from 3.0 Ha to 1.91 Ha. The change also introduced the new name of the 1<sup>st</sup> Defendant George Muema Syengo as owner of 3.0 Ha a combination of the Plaintiffs share of 1.49 Ha and Mwaniki Wambua’s share of 1.1 Ha. It is this change that the Plaintiff states was carried out fraudulently, illegally and without his participation or that of his mother Nyula Wambua. He claims that the last act he participated in with regard to the title deed was the application for the severance of proprietorship.
41. In answer to this claim the 1<sup>st</sup> Defendant testified that by an Agreement for sale dated 19<sup>th</sup> September 2003 between the Plaintiff and himself, he purchased the Plaintiff’s share of Kyangwithya/Nduumoni/520 measuring 1.49 Ha and payment of the same was made in installments. The 1<sup>st</sup> Defendant produced in evidence payment vouchers showing monies received from him.
42. Having gone through the entire evidence I am inclined to believe that the 1<sup>st</sup> Defendant has satisfactorily shown that the Plaintiff did indeed sell to him his portion of land measuring 1.49 Ha out of land parcel No. Kyangwithya/Nduumoni/520 through the agreement dated 19<sup>th</sup> September 2003. This is on the basis of the evidence adduced in that. In his evidence the Plaintiff accepted that as shown on the first part of the agreement he indeed had sold to the 1<sup>st</sup> Defendant land parcel Kyangwithya/Nduumoni/516. On the second part of the agreement the Plaintiff is said to have agreed to sell to the 1<sup>st</sup> Defendant his share of the suit land for a sum of Kshs 40,000/= . He further confirmed receiving some money himself or through Nyula Wambua and Peter Wambua while some of the money was to be paid to Anna Kitheka DW4. The 1<sup>st</sup> defendant further produced an acknowledgement dated 15<sup>th</sup> September, 2004 where the Plaintiff acknowledges the sale of his portion of Kyangwithya/Nduumoni/520 and receipt of sale price paid to Peter Wambua and Nyula Wambua. He confirmed receipt of the final payment of Kshs. 3,000.00 and payment of Ksh.11, 000.00 owed to Annah Kitheka. He further confirmed transfer of the said portion of land and that he had no further claim and confirmed the position with new portions.
43. The Plaintiff on his part denied knowledge of and signing the agreements of sale and the acknowledgement. He further challenged payments made and evidenced by petty cash vouchers on the ground that the payments were made to Peter Ngeenge and not to himself and further that the 1<sup>st</sup> agreement was on 19<sup>th</sup> September 2003 and yet payments started on 6<sup>th</sup> May 2003. The courts view of this is that these agreement and acknowledgements were produced in court as exhibits without objection from the Plaintiff and have been part of the court record since the time the same were filed by



the 1<sup>st</sup> Defendant through his list of documents dated 19<sup>th</sup> December 2014 and supplementary list of documents dated 8<sup>th</sup> October 2021. The Plaintiff had the opportunity to have a forensic examination carried out on the documents to show that he did not execute them and that the signatures that appear on them are not his signatures. Merely denying knowledge of the documents and denying receiving the purchase price in my view is not enough especially for a claim based on fraud. The said sale was also confirmed by the evidence of the Plaintiffs brother Peter Wambua DW4 which evidence I have no reason to doubt.

44. Further in answer to the issue of whether the other co-owners of the land did not sign the sale agreement, it is my view that by the time the purchase of the portion of the land by the 1<sup>st</sup> Defendant commenced the co-owners knew the specific portions that belonged to each individual and thus the signature of the other co-owners was not required to validate the agreement of sale of a portion.
45. The Plaintiff further claims that registration of the 1<sup>st</sup> Defendant as a part owner of the suit land was illegal and carried out through fraud. He further claims that the mutation and/or subdivision of land parcel Kyangwithya/Nduumoni/520 into four parcels, issuance of new title deeds to the owners as Peter Ngenge Wambua, Kyangwithya/Nduumoni/531, Nyula Wambua Nyula Kyangwithya/Nduumoni/532, Mwaniki Wambua Kyangwithya/Nduumoni/533 and George Mwema Syengo Kyangwithya/Nduumoni/534 was carried out fraudulently, illegally and through a corrupt scheme for failure to obtain his participation and that of the other co-owners. He further stated that the said mutation did not go through the relevant offices for consent and approvals and that the said registration and mutation were carried out after the death of Nyula Wambua Nyula on 23<sup>rd</sup> December 2003 and in the absence of a legal representative of her estate.
46. I have considered this challenge by the Plaintiff and noted from the extract from the register of the suit land parcel No. 520 that registration of the 1<sup>st</sup> Defendant was effected through a form of transfer of undivided shares form RL 6 on 9<sup>th</sup> October 2003. This form clearly registered before the death of the two deceased co-proprietors Nyula Wambua Nyula who died on 23<sup>rd</sup> December 2003 and Mwaniki Wambua who is said to have died in 2006. It is further noted that registration of the said form was endorsed and signed by the Land Registrar as shown on the extract of the register.
47. It was submitted by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which submission I agree with that Section 37 of the repealed [Registered Land Act](#) CAP 300 which is similar to Section 35 of the [Land Registration Act](#) supports reliance by this court on the entries in the extract of register which have been signed by the Registrar. The section provides that;
  - (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed until the contrary is proved.
  - (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document
  - (3) Every entry or note in or on any register, registry map or filed plan shall, subject to sections 142 and 143, be received in all proceedings as conclusive evidence of the matter or transaction which it records
  - (4) No process for compelling the production of the register, or of the registry map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which leave shall not be granted if a certified copy or extract will suffice, and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court



48. It is the courts view that signing of the extract of title by the Registrar is prima facie evidence of registration of the transfer of the Plaintiffs share of the suit land into the names of the 1<sup>st</sup> Defendant. The Plaintiff did not adduce evidence to show that the form RL 6 presented to the Registrar either was not genuine, did not contain his signature, or his signature was forged or was not supported by the relevant documents. The Plaintiff's claim that the said transfer was not endorsed by other beneficiaries of the land is not supported by any evidence and the claim is indeed denied by the only surviving beneficiary Peter Ngege Wambua who stated that subdivided LR 520 as a family including the plaintiff, their mother, brother and himself. He confirmed that registration of 1<sup>st</sup> defendant as owner of LR 534 was done lawfully and procedurally with consent of all beneficiaries and that they followed up the matter until new title deeds were issued. It is noted that the other two beneficiaries are deceased and the Plaintiff does not claim to be the legal representative of their estates in seeking cancellation of their registration as owners of portions of the resultant titles to the suit land. It is further shown that registration of the 1<sup>st</sup> Defendant as co-owner of the land was done in their lifetime and in my view it has not been proved that the said registration was done without their knowledge, participation and/or consent. Further, the prayers sought in the plaint seek to rectify registers of land and cancel titles to parcels of land whose registered owners are not party to this suit and combination of titles whose owners have not complained.
49. Further, I am satisfied that the form RL 6 used to effect the transfer of land was available to the Plaintiff under Section 34 of the [Land Registration Act](#) No 3 of 2012 if indeed he wished to show to the Court that the said form was a forgery. The said section provides for searches and states that;
- “A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.”
50. Having found that the Plaintiff was lawfully removed as a co-owner of land parcel Kyangwithya/ Nduumoni/520 on 9<sup>th</sup> October 2003, I find that he had no further interest in the suit land and his participation in the mutation and/or subdivision of the land was subsequently not required. The 1<sup>st</sup> Defendant produced in evidence a copy of the mutation form showing that the said form was registered and approved and the land subdivided accordingly and new title deeds issued.
51. In the end I do find that the Plaintiff has not proved that the sale and transfer of his share of land parcel 520, mutation and issuance of new titles and registration of new owners was fraudulent, illegal or obtained through a corrupt scheme as claimed. The burden of proof was on the Plaintiff as provided under Section 107 (1) of the [Evidence Act](#) and in my view the Plaintiff did not discharge that burden. The said section provides that;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
- Sub-section (2) provides that
- “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



52. Order 2 Rule 10(a) of the *Civil Procedure Rules (2010)* provides that particulars of misrepresentation, fraud, breach of trust, willful default or undue influence must be listed. It was held by the Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR that:

“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 Order 2 Rule 10(a) of the *Civil Procedure Rules (2010)* provides that particulars of misrepresentation, fraud, breach of trust, willful default or undue influence must be listed. It was held by the Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR that:

“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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489.”

53. Further to this, the courts have held that allegations of fraud are subject to a higher standard of proof. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR the court held that:

“Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations.”

54. Having lawfully purchased the land in question, the 2<sup>nd</sup> Defendant acquired good title and it has not been proved that there was fraud in the said acquisition. While holding that the acquisition of the suit property was lawful, the Court in the case of *Eunice Grace Njambi Kamau & another v Attorney General & 5 others* [2013] eKLR held that:

“In the present petition no evidence of fraud or any misrepresentation has been tendered to link the petitioners with any fraud or misrepresentation in regard to the acquisition of the subject title. Equally no evidence has been put forward to suggest that acquisition of the title was illegally procured. It is my view that the Respondents would need to demonstrate and establish the acts by the petitioners that would constitute illegality in the acquisition of the title. The petitioners claim they are bonafide purchasers of the suit property without any notice of any defect in title. The petitioners have cited the case of *FLECTCHER VS. PECK* 10 U.S 87 (1810) to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said *FLETCHER VS. PECK* case Supra Marshall J had this to say:-

“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles which according to every legal test,



are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe.”

55. As discussed above, the burden of proof lay on the Plaintiff to prove his claim against the Defendants. Having found that the Plaintiff did not prove fraud in mutation of the title Kyangwithya/Nduumoni/520 I do find that the 2<sup>nd</sup> Defendant’s purchase of land parcel Kyangwithya/Nduumoni/542 a subdivision of Kyangwithya/Nduumoni/531 was lawful. The 2<sup>nd</sup> Defendant produced an Agreement of sale dated 25<sup>th</sup> November 2004 between herself and Peter Ngege Wambua for the consideration of Ksh.120, 000. Peter Ngege Wambua was one of the proprietors of Kyangwithya/Nduumoni/520 who later got resultant title Kyangwithya/Nduumoni/531. He confirmed that the subdivision of the mother title was lawful and the sale to the 2<sup>nd</sup> Defendant was also lawful and he had no claim against any of the defendants.
56. The 2<sup>nd</sup> Defendant also produced a Search on Kyangwithya/Nduumoni/542 that indicates that the land is registered in her name. Section 26(1) of the [Land Registration Act](#) gives her prima facie rights that as the person named as proprietor of the land the 2<sup>nd</sup> Defendant is the absolute and indefeasible owner thereof. The challenge mounted to the title on the ground of fraud has not been proved let alone the claim that the 2<sup>nd</sup> Defendant was a party to the alleged fraud in the subdivision of the land as claimed by the Plaintiff. Further, it has not been proved that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme

**B. Whether joinder of the 3<sup>rd</sup> Defendant as a party to this suit was proper and if so whether the charge registered in respect of land parcel Kyangwithya/Nduumoni/542 in favour of the 3<sup>rd</sup> Defendant is legal and or sustainable**

57. As a consequence of the courts finding that the 2<sup>nd</sup> Defendant was the lawful owner of Kyangwithya/Nduumoni/542, I do find that the 3<sup>rd</sup> Defendant was not wrong in offering the 2<sup>nd</sup> Defendant a loan facility secured by a legal charge over the said land. Evidence adduced by the 3<sup>rd</sup> Defendant shows that it carried out due diligence before advancing the loans to the 2<sup>nd</sup> Defendant and found that the title held was valid. Section 24 of the [Land Registration Act](#) provides that;

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

58. However, the Plaintiff in this suit was challenging the validity of that title and I do find that before the court’s determination of the validity of the title held by the 2<sup>nd</sup> Defendant, the Plaintiff was within his right to join the 3<sup>rd</sup> Defendant as a party to this suit for the reason that at the time when the suit was filed the title deed was encumbered by the charge registered in favour of the 3<sup>rd</sup> Defendant. If the orders sought in the plaint were to be granted the 3<sup>rd</sup> defendant’s rights would have been affected negatively without having been heard.

59. Order 1 Rule 3 of the [Civil Procedure Rules](#) provides for persons who may be joined as defendants in a suit and states that;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”



Rule 9 provides for the consequences of misjoinder and non-joinder of parties and it is clear that the court is at liberty to address the issues at hand and the parties before it notwithstanding misjoinder or non-joinder of parties. The same states that;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”

60. It is the courts view that arising out of the finding that the 2<sup>nd</sup> Defendants title to land parcel Kyangwithya/Nduumoni/542 was valid, the registration of the charge is also found to have been lawful and conferred the 3<sup>rd</sup> Defendant with rights as envisaged by the law. Section 56 of the Land Registration Act provides for the right to register a charge while section 56 (5) provides for the effect of such a registration of a charge and states that;

“A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money’s worth, or the fulfillment of a condition and, unless the chargee’s remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal.

(5) A charge shall have effect as a security only and shall not operate as a transfer.”

61. . Arising from the foregoing conclusions on the issues for determination, I do find that the Plaintiff has failed to prove on a balance of probabilities that mutation and/or subdivision of land parcel Kyangwithya/Nduumoni/520, and issuance of new title deeds and registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as owners of land parcels Kyangwithya/Nduumoni/534 and Kyangwithya/Nduumoni/542 respectively, was carried out fraudulently, illegally, unprocedurally or through a corrupt scheme. I have further found that the Plaintiff was within his right to join the 3<sup>rd</sup> Defendant as a party to this suit. However, the charge registered in favour of the 3<sup>rd</sup> Defendant against land title Kyangwithya/Nduumoni/542 was properly registered since the 2<sup>nd</sup> Defendant held a valid title to the said land. I therefore find that the Plaintiff is not entitled to the orders sought in the Amended Plaintiff dated 6<sup>th</sup> October 2014 and amended on 8<sup>th</sup> March 2019 and consequently the suit is dismissed with costs to the Defendants.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT**

Judgement read in open court in the presence of-

Musyoki Court Assistant

Mr. Kyalo for the Plaintiff

Mr. Kaluu for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Atonga holding brief for Mr. Oregu for the 3<sup>rd</sup> Defendant

