



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mmbeye v Mwangi & another (Environment & Land Case
1020 of 2012) [2025] KEELC 3918 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1020 OF 2012**

OA ANGOTE, J

MAY 15, 2025

BETWEEN

AGGREY ODERA MMBEYE PLAINTIFF

AND

GLADYS MUTHONI MWANGI 1ST DEFENDANT

BARCLAYS OF BANK OF KENYA LIMITED 2ND DEFENDANT

JUDGMENT

1. Vide a Complaint dated 14th December, 2012, the Plaintiff seeks as against the 1st and 2nd Defendants the following reliefs:
 - i. Rectification of the Land Register of L.R No Ngong/Ngong/30651 by the cancellation of the 1st Defendant's name therefrom.
 - ii. Rectification of the Land Register of L.R No Ngong/Ngong/30651 by cancellation of the encumbrances registered in favour of the 2nd Defendant.
 - iii. The 1st and 2nd Defendants be ordered to surrender to the Plaintiff the Original Title Deed for L.R No Ngong/Ngong/30651.
 - iv. The costs of this suit.
2. The Plaintiff has averred in the Complaint that in 1991, he and the 1st Defendant entered into a relationship that did not amount to marriage, which resulted in the birth of a child on the 14th March, 1992. He asserts that he later purchased L.R No. Ngong/Ngong/30651, measuring 0.404 hectares and situated in Kerarapon, Kajiado County from John Kariuki Kimani, and that the necessary consent from the Land Control Board was obtained, and the transfer was duly registered in his name on the 27th August, 2003.



3. According to the Plaintiff, on the 12th December, 2005, the 1st Defendant, through unconscionable trickery and manipulation, coerced him into celebrating a marriage with her during a mass wedding ceremony at All Saints Cathedral, and that she achieved this by denying him access to his child and using HCCC 15 of 2004 and Divorce Cause No. 9 of 2004 as tools of manipulation.
4. According to the Plaintiff, the 1st Defendant also allegedly promised to relinquish her claims over the properties Nairobi/Block 72/1321, North Maragoli/Mbale/1414, and the suit property in exchange for his compliance.
5. The Plaintiff stated in the Plaintiff that he filed divorce proceedings against the 1st Defendant in CMCC Divorce Cause No. E259 of 2009, resulting in the issuance of a decree nisi on the 15th November, 2011, which was made absolute on the 18th September, 2012, thereby dissolving the marriage. He further asserted that in October 2005, he agreed to the 1st Defendant's request to guarantee the loan of Kshs 2,000,000 obtained from the 2nd Defendant.
6. However, he stated, he later discovered that in 2010, the 1st Defendant had fraudulently procured and registered an instrument of transfer against the suit property, falsely purporting to be a co-proprietor.
7. The Plaintiff contended that this registration was obtained through fraud and illegality, citing the following particulars: he never executed an instrument of transfer in favor of himself and the 1st Defendant as joint or common owners; he never applied for, or executed any consent from the Land Control Board to facilitate the 1st Defendant's registration as a co-proprietor; he never attended any Land Control Board meeting for such a purpose, and he is entirely unaware of the transactions leading to the registration of Entry No. 4, dated the 12th August, 2005.
8. Furthermore, he stated, the 1st Defendant failed to provide any form of consideration that would warrant her registration as a co-proprietor of the suit property. He contended that the registration of the 1st Defendant as a co-proprietor formed part of a broader fraudulent scheme orchestrated by the 1st Defendant to unlawfully lay claim to the suit property. This, he asserted, was a scheme not only evident in the present instance but also manifested in the filing of HCC No. 25 of 2005 (O.S.), where the 1st Defendant equally, fraudulently lay claim to the suit property.
9. According to the Plaintiff, in the year 2010, he discovered that the 1st and 2nd Defendants had caused a charge to be registered against the suit property. He contends that the aforesaid registration was fraudulent as evinced by the facts that the instrument of charge does not bear the date when he purportedly attended before Gertrude Matata Advocate; that he never appeared before the aforesaid Advocate to execute the instrument of charge and that the special acknowledgment required by Section 74 of the Registered *Land Act* and attributed to him is a falsehood.
10. Equally, he asserted, he never applied for, nor attended the Land Control Board to obtain a consent to charge the suit property to the 2nd Defendant and that the 1st and 2nd Defendants failed to pay due regard to part VI of the Registered *Land Act*.
11. He noted that apart from the present suit, there has been Nairobi HCC No 15 of 2005, filed and unprosecuted by the 1st Defendant who sought declarations under Section 12 and 17 of the Married Women Property Act, 1882; Nairobi CMCC Divorce Cause 9 of 2004, filed and unprosecuted by the 1st Defendant and Nairobi CMCC Divorce No 259 of 2009 filed and prosecuted by himself.
12. The 1st Defendant filed a Defence and Counterclaim on the 11th February, 2013. Vide the Defence, she denied all the assertions as set out in the Plaintiff stating that her and the Plaintiff got married on 25th December, 1992 under Luhya customary law; that on 19th January, 2004, she filed Nairobi CMCC No



- 9 of 2004, seeking for the dissolution of the customary marriage aforesaid and that on 9th May, 2005, she filed HCC 15 of 2005(O.S) under Sections 12 and 17 of the Married Properties Act, 1882 seeking declarations that the property acquired during the course of the marriage was matrimonial property.
13. She stated that on 12th December, 2005, her and the Plaintiff celebrated a marriage under the African Christian Marriage and Divorce Act at All Saints Cathedral Church; that consequently, she withdrew Nairobi CMCC No 9 of 2004 and HCC 15 of 2005 and that she was the one who purchased the suit property, which was registered in the Plaintiff's name to hold it in trust for her.
 14. Additionally, she maintained that, by virtue of their marriage, she had a rightful claim to all properties acquired during its subsistence. She further stated that the development of the suit property was funded through a loan she obtained from her employer, with the Plaintiff acting as her guarantor.
 15. According to the 1st Defendant, the Plaintiff voluntarily executed the instrument of transfer, consent of the Land Control Board, and the transactions that led to the registration of a charge in favour of the 2nd Defendant in order to secure funding for additional development. She noted that not only did she contribute to the purchase of the suit property and solely developed the same, the same constitutes matrimonial property and the Plaintiff's claim of want of consideration on her part is unmerited.
 16. The 1st Defendant contended that the Plaintiff has not laid out any basis for the rectification of the register as sought and merely seeks to unjustly enrich himself; that apart from the suit property, there are other properties jointly acquired by the Plaintiff and herself in particular, N/Maragoli/Mbale/1414 and NBI Block 72/1321. She seeks vide the Counterclaim:
 - i. A declaration that the properties L.R No Ngong/Ngong/30651, N/Maragoli/Mbale 1414 and Nairobi Block 72/1321 along with all buildings and improvements thereon are matrimonial property.
 - ii. A declaration that the 1st Defendant is entitled to an equal share in the properties L.R No Ngong/Ngong/30651, N/Maragoli/Mbale/1414 and Nairobi Block 72/1321.
 - iii. Costs of the suit.
 17. The 2nd Defendant filed a Statement of Defence, categorically denying all the allegations set out in the Plaint. It asserted that the Plaintiff voluntarily guaranteed the 1st Defendant in respect of a loan facility from it and that this guarantee was executed lawfully and within the confines of the law.
 18. The 2nd Defendant further maintained that any securities perfected against the suit property were done in compliance with the legal requirements and in good faith. It contended that the Plaintiff had not approached the court with clean hands and was, therefore, undeserving of the reliefs sought. Additionally, the 2nd Defendant argued that the suit was frivolous, amounted to an abuse of the court process, and failed to disclose any reasonable cause of action against it.
 19. In his Defence to the 1st Defendant's Counterclaim dated 28th January, 2013, the Plaintiff denied the assertions as set out therein contending that whereas parcel N/Maragoli/Mbale/1414 is registered in their joint names, the 1st Defendant did not contribute to the same.

Hearing and Evidence

20. The Plaintiff, as PW1, adopted his witness statement and supplementary witness statement dated 14th December, 2012 and 3rd April, 2013 respectively as his evidence in chief and produced the documents dated 14th December, 2012 as PEXHB1-22.



21. PW1 testified that the 1st Defendant is his ex-wife; that after completing his education, he was employed as a clerical staff member at Barclays Bank in 1986, where he worked until 30th January, 2003 and that during his tenure at the bank, he acquired several properties, including a house in the Civil Servants Estate in Langata, a property in Mbale, Vihiga County, and two parcels of land in the Kerarapon area of Ngong one of which is the subject of this suit.
22. He stated that when he purchased the Mbale property, he was not in a relationship with the 1st Defendant; that by the time he acquired the Langata property and the suit property, they were in a relationship, though they were not married and that the 1st Defendant did not contribute in any way toward the purchase of the suit property, which he purchased from John Kariuki, now deceased.
23. PW1 testified that the application for consent was allegedly made on 30th June 2006, and the letter of consent was issued the following day, on the 1st July, 2006; that the two letters of consent were not given on the same day but the serial numbers follow each other being 51295 and 51296; that the 1st Defendant's name does not appear on either the application for, nor the letter of consent from the land control board and that he initiated this suit after realizing that the title to the suit property was missing.
24. Upon inquiring about the title from the 1st Defendant, he testified, the 1st Defendant was uncooperative; that she later informed him that the title was in the bank, where it had been used as security for a loan he had guaranteed and that he signed the guarantee under the impression that the loan was intended to fund the construction of the suit property.
25. PW1 stated that he did not sign the guarantee before an Advocate but did so at his house; that he signed the charge document at home, unaware that the property had been charged under joint ownership; that he never appeared before the Advocate who purportedly witnessed the signing of the charge and that he never signed any transfer documents.
26. Furthermore, he asserted that no consent was ever obtained to authorize the transfer of the property to the 1st Defendant; that a decree absolute had been issued, officially dissolving his marriage to the 1st Defendant and that following this, his counsel wrote to the bank requesting the termination of the guarantee.
27. In cross-examination, PW1 confirmed that him and the 1st Defendant were married, with their first marriage taking place on the 25th December 1992. He acknowledged signing a statutory declaration and noted that they initially lived in Langata but moved to the suit property where their matrimonial home was, which home was jointly developed by both him and the 1st Defendant.
28. He testified that he contributed Kshs. 2,000,000 toward the construction of the matrimonial home but did not have receipts to substantiate this claim. Additionally, he admitted that he did not possess a sale agreement for the purchase of the suit property nor any proof of payment for the purchase price which was paid partly through cash and cheque.
29. PW1 stated that he did not report the alleged fraud by the 1st Defendant to the police, nor did he obtain a forensic report to substantiate his claims of forgery. He explained that he included the 1st Defendant's name on the title to the Maragoli property to secure his daughters' interests.
30. PW1 also clarified that he did not acquire the Langata property before his marriage to the 1st Defendant. Additionally, he acknowledged that there was a vehicle in Langata registered in both their names, as well as the Ngong property, and that there was an ongoing suit in the High Court concerning these properties which has never been prosecuted. PW1 admitted that in his Petition for divorce, he had recognized the 1st Defendant as a co-owner of the suit property.



31. PW2 was Anthony Kinyua Mwangi, a Land Registrar from the Kajiado Lands Registry. He testified that he had records from the Ngong Registry, Kajiado. He noted that according to the documents in his possession, there was a consent from the Land Control Board dated 1st July, 2003, between the Plaintiff and John Kariuki, for which he had a copy.
32. PW2 confirmed that he was in possession of the application for consent and the transfer document from John Kariuki to the Plaintiff; that there was no record available to explain how the land was registered in the joint names of the parties and that he had been unable to trace the consent and transfer documents but had the charge documents.
33. The 1st Defendant testified as DW1. She adopted her witness statement filed on 22nd October, 2013 as her evidence-in-chief and produced the documents dated on 11th February, 2013 as DEXHB1. She testified that the Plaintiff is her ex-husband; that they formally divorced in court; that the property in question is registered in their joint names and that they jointly own the property and had charged it to Absa Bank.
34. She further testified that in 2005, she was in the process of purchasing land in Mlolongo; that she agreed with the Plaintiff that she would develop the suit property on the condition that they would live together; that the property was charged for a loan of Kshs. 2,000,000, which was meant for constructing a house thereon and that it is the Plaintiff who undertook the registration process, and their matrimonial home was built on the suit property.
35. During cross-examination, she stated that she cohabited with the Plaintiff from 1990 until 2005, when they formalized their marriage; that before the property was transferred into their joint names, it was registered in the Plaintiff's name and that there was no court declaration confirming that the suit property, along with other properties, constituted matrimonial property.
36. In re-examination, DW1 reiterated that the Ngong, Langata, and Mbale properties were acquired during their marriage; that she gave relevant documents to her Advocate but did not know why they were not presented in court and that both her and the Plaintiff went to the Advocate's office to sign the charge, which required witnessing.
37. DW2 was Samuel Njuguna, a legal officer in the Credit Department of Absa Bank (formerly Barclays Bank). He adopted his witness statement dated 5th September, 2023 as his evidence-in-chief and produced the documents filed on 2nd March, 2015 as 2DEXHB1.
38. In his testimony, he stated that at all material times, the 1st Defendant was an employee of the 2nd Defendant at its Queensway Branch and applied for a staff housing loan facility of Kshs. 2,000,000; that the loan was to be repaid in 264 equal installments of Kshs. 16,412 inclusive of interest and that the loan facility was secured by a legal charge over the suit property, registered in the names of both the Plaintiff and the 1st Defendant, along with a deed of guarantee by the Plaintiff for the sum of Kshs. 2,000,000.
39. DW2 stated that the 2nd Defendant approved the loan facility only after conducting due diligence on the suit property and verifying that it was jointly owned by the Plaintiff and the 1st Defendant.
40. Mr. Njuguna denied that the 2nd Defendant had any involvement in or knowledge of fraud, as alleged by the Plaintiff. He asserted that the 2nd Defendant acted in good faith and only after confirming the authenticity of the title documents presented by the 1st Defendant. DW2 maintained that the 2nd Defendant is an innocent chargee for value without notice of any irregularities.



41. In cross-examination, DW2 confirmed that a charge had been registered over the Ngong property and that the loan had been fully repaid. He stated that while a discharge had been executed, the property had not yet been formally discharged. He confirmed that there had been no default in loan repayments.

Submissions

42. The Plaintiff's counsel filed submissions on 18th June, 2024. Counsel submitted that whereas the 1st Defendant adduced into evidence the title to the suit property registered in the joint names of the Plaintiff and the 1st Defendant, there was no evidence of the purported transfer leading to that registration.
43. Similarly, it was submitted, there was no letter of consent for the aforesaid transfer contrary to Section 6(1) of the Land Control Act rendering the same void. Reliance in this regard was placed on the case of *Mwangi v Anor*(1986)KLR 328 and *Gatimu Kiguru v Muya Gatahji*(1976)KLR 252.
44. Counsel argued that while the 1st Defendant asserts the property is matrimonial, she did not produce any judgment or decree to support this claim. Furthermore, it was submitted, the Defendant cannot simultaneously assert that the property is matrimonial while also alleging that the Plaintiff transferred it to both of them jointly.
45. In any case, it was submitted, the Plaintiff purchased the property in 2003, prior to his marriage to the 1st Defendant in 2005 and that the Defendants have failed to discharge the evidential burden required under the Evidence Act and her Counterclaim lacks merit and is for dismissal.
46. The 1st Defendant's counsel submitted that under Section 107(1) of the Evidence Act and discussed in *Ahmed Mohammed Noor v Abdi Aziz Osma*[2019]eKLR, it is a well-established principle that he who alleges must prove and the legal burden of proof in a case is always static and rests on the claimant.
47. As regards claims of fraud, Counsel noted, the same must be specifically pleaded and proved and the standard of proof is more than a mere balance of probabilities. In the circumstances, he contended, the Plaintiff did not meet the burden placed upon him. In support, he referenced the cases of *Glady's Wanjiru Ngaache v Teresa Chepseat & 4 Others*[2013]eKLR and *Hebron Orucho Gisebe & 2 Others v Joseph Ombura Gisebe & Another*[2022]eKLR.
48. Counsel submitted that, likewise, the Plaintiff has failed to establish ownership of the suit property and even admitted as much during cross-examination. In contrast, it was submitted, the 1st Defendant demonstrated that she purchased the suit property, with its registration in the Plaintiff's name being merely in trust for her. As the Counterclaim was not challenged, he asserted, it should be deemed meritorious.
49. The 2nd Defendant's Counsel submitted that it is a principle of law that he who comes to equity must come with clean hands; that the Plaintiff is unjustly claiming to be the sole owner of the property whereas the facts shows the property is jointly owned by the Plaintiff and the 1st Defendant and that they jointly executed a legal charge in favour of the 2nd Defendant as per the Staff Housing Loan Facility Agreement.
50. Counsel submitted that having come to court with unclean hands, the Plaintiff is not entitled to any reliefs. Reliance was placed on the cases of *John Njue Nyaga v Nicholas Njiru Nyaga & Another*[2013]eKLR, *Caliph Properties Limited v Barbel Sharma & Another* [2015]eKLR and *Francis J.K Ichatha v Housing Finance Company of Kenya*, Civil Application Bo 108 of 2005.



51. Counsel submitted that as expressed in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Anor*[2001]eKLR, a court of law cannot rewrite a contract between the parties. On matters fraud, it was submitted, as stated by the Court of Appeal in *Emfil Limited v Registrar of Titles*[2014]eKLR, the same must be specifically pleaded and proved.
52. It was submitted by the 2nd Defendant's counsel that in this case, the Plaintiff having pleaded fraud was obligated to prove the same and having failed to do so is not entitled to the orders sought.

Analysis and Determination

53. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are:
 - i. Whether the registration of the 1st Defendant as a co-owner of Ngong/Ngong/30651 was fraudulent?
 - ii. Whether the charge registered over Ngong/Ngong/30651 in favour of the 2nd Defendant was lawfully created?
 - iii. Whether the 1st Defendant has any beneficial interest in parcels Ngong/Ngong/30651, Nairobi/Block/72/1321 and N/Maragoli/Mbale/1414?
 - iv. What are the appropriate reliefs to issue?
54. Vide the present suit, the Plaintiff seeks, inter-alia, a rectification of the register in respect of L.R Ngong/Ngong/30651 by the cancellation of the 1st Defendant's name therefrom, cancellation of encumbrances registered in her favour and an order directing the 1st and 2nd Defendants to surrender to him the original title deed in respect of the suit property.
55. It is the Plaintiff's case that he is the sole legitimate owner of the suit property. He contends that sometime in late 2010, he discovered his title to Ngong/Ngong/30651 missing and later realized that the 1st Defendant had caused an instrument of transfer to be registered against the said property showing that she was a co-owner thereof.
56. Pursuant to the foregoing, he alleges, the 1st Defendant fraudulently charged the suit property to the 2nd Defendant. He asserts that the aforesaid transfer and registration of the suit property in the joint names of himself and the 1st Defendant, and the subsequent charge, was fraudulent.
57. The Plaintiff adduced into evidence pleadings in respect of Nairobi HCCC 15 of 2005, Divorce cause No 9 of 2004 and Divorce cause no 259 of 2009; ID card and funeral notice for John Kariuki Kimani; letter of consent dated the 1st July, 2003, application for LCB consent to transfer L.R Ngong/Ngong/30651 to himself and the letter of consent dated 1st July, 2003 in respect thereof; transfer of land form dated 26th August, 2003 from John Kariuki to himself; marriage certificate dated 12th December, 2005 and a certified copy of the green card dated 14th July, 2008.
58. The Plaintiff also adduced into evidence correspondence between his Counsel and Barclays bank, emails between Barclays bank and himself, correspondence between himself and the Land Registrar, Kajjado, the letter of guarantee and indemnity, the charge dated the 13th October, 2005 and demand letters.
59. On her part, the 1st Defendant vide the Counterclaim seeks a declaration that the parcels Ngong/Ngong/30651, together with L.R Nairobi Block 72/1321 and N/Maragoli/Mbale/1414 are matrimonial properties and a further declaration that she is entitled to an equal share thereof.



60. It is her case that she purchased Ngong/Ngong/30651 and the same was registered in the Plaintiff's name to hold in trust. Further, that she solely developed the suit property from funds borrowed from her employer, the 2nd Defendant. The 1st Defendant further claims that the suit property constitutes matrimonial property and that she is a co-owner by virtue thereof.
61. The Plaintiff adduced into evidence statutory declarations filed by herself and the Plaintiff on 8th July, 1997; guarantee and indemnity to Barclays Bank; applications for owner occupier house allowance and staff loan; Kenya Bankers Co-operative Savings and Credit Society Limited members loan application; electricity bills; receipt from CIC Insurance; application for consent of the LCB Board; letter of consent and renewal notice of domestic package.
62. She also adduced copies of the title deed of Ngong/Ngong/30651; stamp duty declarations; department of lands receipt for charge; official search for Ngong/Ngong/30651; staff loans application form; staff housing loan facility; marriage certificate; vehicle sale agreement and invoice from Loita Motors limited; statements for account 6064858; pleadings in CMCC No 9 of 2004; HCC No 15 of 25003(O.S) and a Replying Affidavit sworn on 15th June, 2005.
63. The 2nd Defendant maintains that it duly issued a loan facility to the 1st Defendant which was guaranteed by the Plaintiff as well as a charge over the suit property. The 2nd Defendant maintains that prior to the issuance of the loan, it conducted due diligence which affirmed that the property was jointly owned by the Plaintiff and the 1st Defendant.
64. The 2nd Defendant adduced into evidence a copy of the staff housing loan facility dated 5th October, 2005; certificate of official search and title over Ngong/Ngong/30651; charge over the suit property and a copy of the guarantee and indemnity.
65. From the foregoing narration, it is apparent that there is a dispute between the Plaintiff and the 1st Defendant in respect to the aforementioned properties. In determining the matter, the court remains mindful of the legal and evidentiary burden each party must discharge to substantiate their claim. This position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:
- “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
66. Sections 109 and 112 of the same Act states:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



67. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

68. The Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 held as follows:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

69. The majority decision of the Supreme Court in *Presidential Election Petition No. 1 of 2017 - Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR had the following to say on the evidential burden of proof:

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

70. Beginning with the contention as regards *Ngong/Ngong/30651*, the evidence adduced in this court shows that the Plaintiff and the 1st Defendant are the joint registered owners thereof having being so registered on the 12th August, 2005 pursuant to the provisions of the Registered *Land Act*, Cap 300 (now repealed).

71. The rights of a registered proprietor of land were set out in Sections 27(a) and (b) of the Registered *Land Act* as follows:

- “(a) 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;
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

72. Whereas Section 28 thereof provided:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with



all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

73. Section 143 of the repealed Act provided the circumstances under which a title could be challenged, and rectified.

“ 143.

- (1) Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”

74. The Court of Appeal, in Denis Noel Mukhulo Ochwada & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR discussing the above provision noted:

“The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

75. The registration seeking to be impugned was not a first registration and the court will consider whether the Plaintiff has established fraud at the behest of the 1st Defendant as alleged.

76. The Black’s Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other...”

77. The prevailing jurisprudence on fraud is that any allegations thereof must be pleaded and strictly proved. As expressed by the Court of Appeal in case of Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR;

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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.”



78. As regards the standard of proof, the Court of Appeal 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, observed as follows:
- “...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.”
79. According to the Plaintiff, the particulars of fraud as against the 1st Defendant include the fact that he did not execute any transfer in favour of himself and the 1st Defendant; that he did not execute any application for the land control board for the aforesaid transaction nor attend any meeting and that the 1st Defendant did not furnish any consideration for the transfer.
80. The court has keenly considered the evidence. The same shows that the initial owner of the suit property was John Kariuki who transferred the property to the Plaintiff on 28th August, 2003. On 12th August, 2005, there was a transfer from the Plaintiff into the joint names of himself and the 1st Defendant. Despite contending that she, rather than the Plaintiff, purchased this property, no evidence was adduced in this regard by the 1st Defendant.
81. Whereas the 1st Defendant has maintained that the transfer of the suit property into joint ownership with the Plaintiff was done lawfully and with the full knowledge and intention of the Plaintiff, she conceded that she did not possess a copy of the alleged transfer document to support this position. PW2, the Land Registrar also testified as to the absence of the transfer from the documents held by his office and the LCB consent in respect to this transaction.
82. Moreover, it is not in dispute that the suit property is agricultural land and therefore falls within the purview of the *Land Control Act*, Cap. 302 of the Laws of Kenya. Section 6 of the Act expressly provides that a valid transfer of agricultural land requires the prior consent of the Land Control Board (LCB).
83. In this case, no evidence has been presented by the 1st Defendant to demonstrate that the requisite LCB consent was sought and obtained in respect of the alleged transfer from the Plaintiff into their joint names. The burden of producing the duly executed transfer and the consent of the Board was on the 1st Defendant.
84. It was only upon producing the said documents by the 1st Defendant, which she failed to do, would the evidentiary burden shift to the Plaintiff to show that he never signed the said documents.
85. The cumulative effect of the evidence, being the Plaintiff’s assertion that he neither participated in nor authorized the transaction, leads the court to the conclusion that the registration of the suit property in the joint names of the Plaintiff and the 1st Defendant was fraudulently procured. Fraud, therefore, has been distinctly pleaded, specifically proved, and conclusively established against the 1st Defendant.
86. The Plaintiff contends that the charge registered in favour of the 2nd Defendant was unlawfully created, asserting that he neither appeared before the Advocate, Gertrude Matata, to execute the charge instrument, nor applied for or attended before the Land Control Board to obtain the requisite consent to charge the property.
87. He further asserts that the charge instrument lacks the date on which he allegedly executed it before Advocate Gertrude Matata. In response, the 1st Defendant maintains that the Plaintiff did in fact



execute the charge and consented to the transaction, relying on the application for consent and the letter of consent dated 2nd August 2005, both of which bear the Plaintiff's signature.

88. Additionally, it was argued, the charge document itself, produced by DW2, bears the Plaintiff's signature. Although the Plaintiff denies signing these documents, and there is indeed no date indicating when he appeared before Counsel to execute the charge, he has not adduced expert evidence or otherwise demonstrated that the signatures are not his. To the contrary, he admitted having signed the charge, not before the advocate as alleged, but in his house.
89. Nonetheless, the said charge was created over a title that has already been found to have been fraudulently obtained and is thus null and void ab initio. I say so because it is a settled principle in law that a charge cannot confer rights or create a valid interest over a defective or invalid title. As succinctly expressed in *Siringi v Makori & 5 others* (Environment and Land Case Civil Suit 691 of 2016) [2023] KEELC 595 (KLR) (9 February 2023) (Judgment):

“A charge over an invalid title cannot create a valid interest in land. The title held by the 2nd and 3rd defendants was invalid the same having been tainted with the 1st defendant's fraudulent activities. An invalid title is a nullity. A charge cannot be created over a null and void title.”

90. The court therefore finds that the charge registered in favour of the 2nd Defendant, having been premised on a void title, is similarly invalid and incapable of conferring any legal or equitable rights.
91. The next issue for determination is whether the 1st Defendant has any interest in the parcels Ngong/Ngong/30651, Nairobi Block/72/1321 and N/Maragoli/Mbale/1414 and in particular whether the same constitute matrimonial property.
92. Historically, the legal framework that governed the distribution of matrimonial property in Kenya was the Married Women's Property Act, 1882. This statute of general application consolidated and amended the Acts relating to the Property of Married Women.
93. The Married Women's Property Act, 1882 has since been repealed and replaced by the [Matrimonial Property Act](#), 2013, an Act of Parliament enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. The new law came into force on 16th January 2014.
94. As at the time the counterclaim in the present case was filed, the [Matrimonial Property Act](#), 2013 had not yet come into operation. The said Act does not contain any express provision suggesting retrospective application. Accordingly, the applicable law governing the 1st Defendant's claim remains the Married Women's Property Act, 1882.
95. As expressed by the Apex Court in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another* (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023):

“.....for legislation to have retrospective effect, the intention must be clear and unambiguous from the words of such statute or legislation. Having perused the act in contention and considered the submissions by parties as well as the law as expressed above, we have come to the conclusion that there is no retrospective application of the [Matrimonial Property Act](#) and hold that the applicable law to claims filed before the commencement of that act is the Married Womens Property Act, 1882.”



96. Section 17 of the Married Women's Property Act allowed a party to apply by summons or otherwise in a summary way to a judge of the High Court of Justice for determination of any question between husband and wife as to the title to or possession of property.
97. The jurisdiction of this court does not include the determination of whether the suit properties form part of matrimonial property, and if so, how the same should be shared amongst the parties herein. That is the preserve of the High Court. All that that his court can determine, which it has already done, is the lawfulness of the transfer and charge of the suit property.
98. To that extent, the court declines to entertain the 1st Defendant's counter claim on the question of whether the properties enumerated therein form part of the matrimonial property, and how the same should be shared between the Plaintiff and the 1st Defendant who have since divorced.
99. In conclusion, having found that the transfer of the suit property into the joint names of the Plaintiff and the 1st Defendant was procured through fraud, and that the subsequent charge in favour of the 2nd Defendant was thereby rendered invalid, the Plaintiff's prayers in this respect are well-founded.
100. On the other hand, the court has found that it has no jurisdiction to deal with the 1st Defendant's Counterclaim. In the end, the Court makes the following final orders and determination:
 - a. An order does hereby issue for the rectification of the Land Register of parcel number Ngong/Ngong/30651 by cancellation of the 1st Defendant's name therefrom.
 - b. An order does hereby issue for the rectification of the Land Register of parcel number Ngong/Ngong/30651 by cancellation of the encumbrance registered in favour of the 2nd Defendant.
 - c. The 1st and 2nd Defendants are hereby ordered to surrender to the Chief Land Registrar the original Title Deed for parcel of land number Ngong/Ngong/30651 for cancellation.
 - d. The Chief Land Registrar to issue a Title Deed for parcel of land number Ngong/Ngong/30651 in the name of the Plaintiff and free of any encumbrance.
 - e. The 1st Defendant to pay the Plaintiff the costs of the suit.
 - f. The 1st Defendant's Counterclaim is struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MAY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Amollo for Plaintiff

Mr. Njuguna for 1st Defendant

Mr. Mutua for 2nd Defendant

Court Assistant: Tracy

