



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**HCCC NO. 1995 OF 1998**

MERCY WANJIRU IGOGO.....1<sup>ST</sup> PLAINTIFF  
GEORGE MUNYINYI IGOGO.....2<sup>ND</sup> PLAINTIFF  
PAULINE NJOKI IGOGO.....3<sup>RD</sup> PLAINTIFF  
ROSEMARY WAMBUL.....4<sup>TH</sup> PLAINTIFF  
HANNAH NJAMBI NDIRO.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

FRANCIS THUKU GAKUMO.....1<sup>ST</sup> DEFENDANT  
STEPHENSON KARUGI KAGO.....2<sup>ND</sup> DEFENDANT  
NJOKI JUMA.....3<sup>RD</sup> DEFENDANT  
MICHAEL NDUNGI.....4<sup>TH</sup> DEFENDANT  
ROBERT WANGENDO NDIRO.....5<sup>TH</sup> DEFENDANT  
JOSEPH GITAU NJOKI.....INTENDED INTERESTED PARTY

**JUDGEMENT**

1. By a plaint dated 1<sup>st</sup> March 2005 and amended on 24<sup>th</sup> March 2005 the plaintiffs pray for judgment against the defendants jointly and severally for:-

*(a) The plaintiffs be declared beneficiaries in respect of LR Kiambaa/Ruaka/610, LR Kiambaa/Ruaka/611, L.R Kiambaa/Ruaka 1075 and LR Kiambaa/Ruaka/1076.*

*(b) The defendant be declared trustees of the plaintiffs in respect of LR Kiambaa/Ruaka/610, LR Kiambaa/Ruaka/611, L.R Kiambaa/Ruaka 1075 and LR Kiambaa/Ruaka/1076.*

*(c) The first, second, third and fourth defendants be restrained from evicting the applicants from LR Kiambaa/Ruaka/610, LR Kiambaa/Ruaka/611, L.R Kiambaa/Ruaka 1075 and LR Kiambaa/Ruaka/1076.*

*(d) The 1<sup>st</sup> – 4<sup>th</sup> defendants be restrained from selling or disposing LR Kiambaa/Ruaka/610, LR Kiambaa/Ruaka/611, L.R Kiambaa/Ruaka 1075 and LR Kiambaa/Ruaka/1076 until this suit is heard and determined.*

*(e) The first, second, third and fourth defendants' titles in respect of LR Kiambaa/Ruaka/610, LR Kiambaa/Ruaka/611, L.R Kiambaa/Ruaka 1075 and LR Kiambaa/Ruaka be revoked/nullified and the suit property be shared equally between the applicants and the respondents.*

***(f) The first defendant do compensate the applicants for the destruction of the plaintiff's crops worth Kshs.60,000/- occasioned on 18<sup>th</sup> August 1998 by the first defendant and his agents or servants.***

***(g) The plaintiffs be allowed to continue cultivating and living on the suit property until this is heard and determined.***

***(h) A declaration that the subdivision of LR No. Kiambaa/Ruaka/530 is null and void.***

***(i) An order for rectification of the register through cancellation of all registrations in respect of LR Kiambaa/Ruaka/529 and 530 effected after 16<sup>th</sup> September 1974 and restoration of Njongwa s/o Munyinyi as the registered owner of Kiambaa/Ruaka/529 and 530.***

***(j) The defendant do pay the costs of this suit.***

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a statement of defence dated 8<sup>th</sup> March 2005 and amended on 13<sup>th</sup> April 2005 and amended on 13<sup>th</sup> April 2005 denying each and every allegation in the plaint. In answer to paragraphs 4 to 15 of the plaint (both inclusive) the 1<sup>st</sup> and the 2<sup>nd</sup> defendant aver:-

***(a) The suit herein is bad in law and untenable in the circumstances herein obtained.***

***(b) They are innocent purchasers of the suit premises herein, to wit LR No. Kiambaa/Ruaka/220 for value and without any notice of defece in title.***

***(c) The purchase of the suit land in paragraph 3(b) above was vide a public auction which sale has never been set aside.***

***(d) They are strangers to the allegations and particulars of fraud set out in paragraph 12 of the plaint and put the plaintiffs to stick proof of all the averments therein.***

***(e) All issues relating to the purchase and auction in paragraph 3 (b) (c) above were fully heard and determined in Nairobi HCCC number 5191 of 1991. To date there is no appeal or review application pending against the decree issued therein. And the 1<sup>st</sup> and 2<sup>nd</sup> defendants will at the hearing hereof crave for this honourable court leave to refer to the aforesaid suits proceedings and decree their full tenor, effect and purport thereof.***

***(f) The plaintiffs claim to land reference number Kiambaa/ruaka/220 and Kiambaa/Ruaka/611 and Kiambaa/Ruaka/1076 together the subdivisions thereof are misconceived and/or statute barred.***

***(g) The suit herein is incompetent for misjoinder and/or non joinder.***

***(h) They are strangers to the matters set out in paragraph 15 of the plaint and in any event the claim (if any) thereof is already time barred.***

***(i) The plaintiffs reliefs lie elsewhere and/or are obtainable elsewhere exclusively.***

3. I have gone through the court record and I am unable to confirm if the 3<sup>rd</sup> defendant filed a statement of defence. However I note that she filed a witness statement dated 24<sup>th</sup> January 2012. I will endeavour to rely on it. It is also noted that she has since passed on and substituted by her son, Munyinyi Juma.

4. The 4<sup>th</sup> defendant has filed a statement of defence dated 27<sup>th</sup> August 2014. I am also unable to confirm from the court record whether the 5<sup>th</sup> defendant filed his statement of defence.

5. The facts of this case are that the plaintiffs and the 3<sup>rd</sup>-5<sup>th</sup> defendants are beneficiaries of the estate of the late Njung'wa Munyinyi who died on 30<sup>th</sup> May 1982. He was the registered owner of Land Parcel No. Kiambaa/Ruaka/220 which in 1974 had been subdivided into Land Parcel No. Kiambaa/Ruaka/529 and 530. The plaintiff contends that Land Parcel No. Kiambaa/Ruaka/220 is their and the 3<sup>rd</sup> – 5<sup>th</sup> defendants. It is ancestral land and that Njung'wa Munyinyi held the land in trust for them within the meaning of section 280 of the Registered Land Act (now repealed).

6. PW1, Pauline Njoki Igogo, the 3<sup>rd</sup> plaintiff adopted her witness statement dated 25<sup>th</sup> May 2011. She told the court that she is the daughter of the late Njung'wa Munyinyi and the 1<sup>st</sup> plaintiff. That the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs are her siblings and the 5<sup>th</sup> plaintiff is her sister in law by virtue of being her brother, Fredrick Ndiro Wangendo's wife, who (was the 5<sup>th</sup> defendant). She told the court that she has lived on the suit property since birth and her co-plaintiffs also live on the said land. She stated that she believed the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently purchased the suit property from a bank from which her late brother (5<sup>th</sup> defendant) had taken a loan. The 3<sup>rd</sup> defendant is her step mother and is the registered proprietor of part of the land that belonged to her father. The 4<sup>th</sup> defendant is her brother and also a registered proprietor of part of the land.

7. She stated that on 31<sup>st</sup> October 1974 the 5<sup>th</sup> defendant, fraudulently and without consent and/or knowledge of Njung'wa Munyinyi (deceased) caused his name to be entered as proprietor of LR No. Kiambaa/Ruaka/529 by purporting to have paid Kshs.18,000. Upon

realising this Njung'wa Munyinyi (deceased) registered a caution on the said land on 31<sup>st</sup> October 1974. The 5<sup>th</sup> defendant charged the said land to Nation Wide Finance Co. Limited to secure Kshs.307,000/- despite the fact that the bigger portion of the said parcel was occupied by the 3<sup>rd</sup> defendant. On 29<sup>th</sup> May 1982 barely twenty four hours before the death of Njung'wa Munyinyi, the 3<sup>rd</sup> and 5<sup>th</sup> defendants fraudulently subdivided LR No. Kiambaa/Ruaka/530 and caused themselves to be registered as proprietors of LR No. Kiambaa/Ruaka/611 and LR No. Kiambaa/Ruaka/610 respectively. The registration of the 3<sup>rd</sup> – 5<sup>th</sup> defendants as proprietors of LR No. Kiambaa/Ruaka 529, 610 and 611 did not relieve them of their duty or obligations as trustees of the beneficiaries of the said land. Due to the failure of the 5<sup>th</sup> defendant to repay the loan a public auction was held on 8<sup>th</sup> November 1990, in which the 1<sup>st</sup> and 2<sup>nd</sup> defendants purchased LR No. Kiambaa/Ruaka/529. On 17<sup>th</sup> November 1994 they caused LR No. Kiambaa/Ruaka/529 to be subdivided into LR No. 1075 and 1076 respectively. On 28<sup>th</sup> October 1994 they exchanged 1076 with the 3<sup>rd</sup> defendant for LR No. Kiambaa/Ruaka/611. She contended that the exchange was fraudulent in that it was a result of collusion to defeat the rights and interests of the beneficiaries living and cultivating on LR No. Kiambaa/Ruaka/529. All the subdivisions and transactions in respect of Kiambaa/Ruaka 529 and 530 are fraudulent and should be cancelled and rectified. That the subdivision LR No. Kiambaa/Ruaka/530 was void ab initio in that it was effected contrary to section 25 of the Registered Land Act and in furtherance of fraud on the part of the 3<sup>rd</sup> and 4<sup>th</sup> defendants thus the resultant title Kiambaa Ruaka/610 and 611 were void ab initio.

8. PW2 Hanna Njambi Ndiro (the 5<sup>th</sup> plaintiff) adopted her witness statement dated 28<sup>th</sup> September 2014. She also stated that she was relying on the list of documents dated 18<sup>th</sup> June 2009. She told the court that Njung'wa Munyinyi realized there was a mix up on the portions and decided that he was not going to transfer the title. He stated that the land be reinstated to the original position and be subdivided a fresh. That during this time Njung'wa Munyinyi was ill and he made the pronouncement while he was bed ridden. Later on, the 4<sup>th</sup> defendant, took him (deceased) to the lands office so that he could transfer the land to his (4<sup>th</sup> defendant's) name. The said Njung'wa Munyinyi died the same day he affixed his thumb print in the transfer. She stated that he could not have done so consciously as he was very ill and not in control of his senses. She further stated that upon (deceased's) death she and the co-plaintiffs were chased away by the 1<sup>st</sup> and 2<sup>nd</sup> defendants but they later obtained court orders which allowed them back into the suit property. She stated that her late husband (5<sup>th</sup> defendant) did not buy land from his father and neither did the 4<sup>th</sup> defendant.

9. DW1 Micheal Ndungi (the 4<sup>th</sup> defendant) told the court that he was adopting his witness statement undated and filed on 3<sup>rd</sup> July 2013. He told the court the deceased Njung'wa Munyinyi was the owner of LR No. Kiambaa/Ruaka/220, that he (deceased) subdivided the land and transferred to Kiambaa/Ruaka/529 to Fredrick Wangendo (the 5<sup>th</sup> defendant). He then subdivided Kiambaa/Ruaka/530 into 610 and 611 respectively and transferred 610 to the 4<sup>th</sup> defendant and 611 to the 3<sup>rd</sup> defendant LR No. Kiambaa/Ruaka/530 then ceased to exist. The 2<sup>nd</sup> plaintiff has already had his share of 4 acres which he was given during land demarcation. The 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were married and living with their husbands each having four grown up children living and working in Britain. He further stated that the plaintiff knew of the subdivisions of Kiambaa/Ruaka/220 into 529 and 530 respectively. That in 1991, the 1<sup>st</sup> plaintiffs and the 3<sup>rd</sup> plaintiff instituted a case in Kiambu wanting to have a share of his (4<sup>th</sup> plaintiff) eleven years after the death of his father (Njung'wa Munyinyi). The case was dismissed. In 1993, he subdivided his portion into small plots which he intended to transfer to his grown up children. The land control board approved the subdivisions. That all the years before and after the death of his father the 3<sup>rd</sup> defendant tilled the land which the 5<sup>th</sup> defendant at the time held, while he was occupying No. 611. Upon subdivision of Kiambaa/Ruaka/530 the 5<sup>th</sup> defendant exchanged his title with the 3<sup>rd</sup> defendant. No land was registered in trust of anybody and that all transactions were above board. Further that Njung'wa Munyinyi did not die intestate as he had divided his whole estate and title No. Kiambaa/Ruaka 220 did not exist when he died in 1982.

10. DW2, James Munyinyi Njung'wa, the son of the 3<sup>rd</sup> defendant told the court that he is the legal representative of her estate. He relied on his witness statement dated 24<sup>th</sup> January 2012 and filed in court on 25<sup>th</sup> January 2012. He stated that the 3<sup>rd</sup> defendant was the registered owner of Kiambaa/Ruaka/611 and the 5<sup>th</sup> defendant was her neighbor at 529, that the 3<sup>rd</sup> defendant mistakenly built her house on 529. After 529 was sold by the bank for non repayment of the loan, she was faced with eviction. Local elders intervened and convinced the 1<sup>st</sup> and 2<sup>nd</sup> defendants to agree to exchange the parcels of land. As LR Kiambaa/Ruaka/529 was bigger than 611 they agreed to subdivide 529 so as to create a parcel equal in size to 611 and therefore created 1075 and 1076. She then became the owner of 1076 and the 1<sup>st</sup> defendant, 611 and 1075. LR 611 was a subdivision in favor of the 3<sup>rd</sup> defendant by her late husband from 530 in 1980. She got the title in 1982. The other portion 610 was given to the 4<sup>th</sup> defendant. She did hold the land in trust for the plaintiffs.

11. DW3, Francis Thuku Gakumo, the 1<sup>st</sup> defendant adopted his witness statement dated 29<sup>th</sup> April 2011 and list of documents dated 23<sup>rd</sup> June 2009. He told the court that he bought the suit property jointly with the 2<sup>nd</sup> defendant at an auction. That the suit property was in the name of Fredrick Ndiro Wangendo and Nation Wide Finance Co. Ltd. Ndiro Wangendo (5<sup>th</sup> defendant) was alive at the time of the auction. Nobody challenged the sale. He got a decree vide HCCC 591 of 1991 to effect transfer in their names. The decree has not been challenged. He went to the ground and found the 3<sup>rd</sup> defendant was occupying the land. They agreed to exchange the suit properties as the 3<sup>rd</sup> defendant had constructed a house on 529. They agreed No. 529 was the subdivision into 1075 and 1076. They then took 611 and 1075 in order to have a total of 3.5 acres.

12. The 5<sup>th</sup> defendant, did not file any witness and or list of documents. He however participated on the proceedings. His case was therefore closed.

13. At the close of the testimonies parties tendered written submissions.

14. The plaintiff's submissions are dated 24<sup>th</sup> January 2020 and filed on 29<sup>th</sup> January 2020. They have raised three issues for determination. The original Kiambaa/Ruaka/220 from which the suit properties are subdivisions thereof was the ancestral land of all the plaintiffs and the 3<sup>rd</sup> – 5<sup>th</sup> defendants and therefore within the meaning of Section 28 of the Registered Land Act. Njung'wa Munyinyi was their trustee with respect to LR No. Kiambaa/Ruaka/529 and 530. His intention was as confirmed by the evidence of the parties herein was to have the same shared between the two households that comprise of the 1<sup>st</sup> plaintiff and 3<sup>rd</sup> defendant to cater for the two houses in accordance with Kikuyu

traditions Customary rights now constitute one of the overriding interest espoused by Section 30 of the Registered Land Act as held by the Supreme Court of Kenya in the case of **Isack M’Inanga Kiebia vs Isaaya Theuri M’Lintari and Another [2018] eKLR**. The plaintiffs evidence has been corroborated that the 5<sup>th</sup> defendants fraudulently and without consent and knowledge of Njung’wa Munyinyi (deceased) caused his name to be entered as the registered proprietor of LR Kiambaa/Ruaka/529 for a purported consideration of Kshs.18,000/-. The deceased therefore registered a caution which the 5<sup>th</sup> defendant, caused to be removed five months after his death and charged the property to Nation Wide Finance Co. Limited. The 5<sup>th</sup> defendant intended to disinherit the plaintiffs’ of their rightful claim knowing that the same had been intended for the second house of Njoki Njuma.

15. On 29<sup>th</sup> May 1982 the 3<sup>rd</sup> and 4<sup>th</sup> defenants fraudulently subdivided Kiambaa/Ruaka/530 and caused themselves to be registered as proprietors of 610 and 611 respectively. The defendants did no tender evidence that the (deceased) Munyinyi ever made an application to subdivide Kiambaa/Ruaka/530. The purported payment of Kshs.20,000 by the said defendants as consideration for the transfer was denied by the 4<sup>th</sup> defendant in cross examination. The exchange of land between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 3<sup>rd</sup> defendant was fraudulent as it was as a result of collusion to defeat the rights and interests of the plaintiffs living and cultivating LR No. Kiambaa/Ruaka/529. All subdivisions and transactions in respect of Kiambaa/Ruaka/529 and 530 are fraudulent and should be cancelled and rectified through restoration of titles showing Njung’wa Munyinyi as the registered proprietor. No good title was held by the 3<sup>rd</sup> – 5<sup>th</sup> defendants from Kiambaa/Ruaka/611, 610 and 529 so as to pass on to third parties under the guise of innocent purchasers. They relied on the case of **Alice Chemutai Too vs Nelson Kipkirui Korir & 2 Others [2015] eKLR**.

16. The 1<sup>st</sup> and 2<sup>nd</sup> defendant submissions are dated 21<sup>st</sup> January 2020 and filed on 31<sup>st</sup> January 2020. They have outlined five issues for determination. The plaintiffs’ suit is a non starter and ought to be dismissed with costs. They have filed a suit seeking properties of deceased person who had no properties to be inherited. They have no letters of administration to legally file a suit on behalf of the deceased person. The 1<sup>st</sup> and 2<sup>nd</sup> defendants purchased the suit property at a public auction which to date is not challenged hence the court should uphold their ownership. The court thereafter issued a decree which is unchallenged. The suit property was sold for a non payment of a loan and the 1<sup>st</sup> and 2<sup>nd</sup> defendants bought it for a consideration and the plaintiffs have no claim over it.

17. The plaintiff’s have alleged fraud but have not tendered in court evidence to prove any actionable fraud or collusion between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The suit premises were registered in the names of living persons hence the plaintiffs cannot purport to inherit them. They have put forward the case of **Fredrick Wachira Ndegwa (substituting Ndegwa Wachira (deceased ) vs Richarda Wanjiku Ndanjeru & Another [1997] eKLR and Isaiya Masira Momanyi vs Daniel Omwoyo & Another [2017] eKLR**.

18. The 3<sup>rd</sup> and 4<sup>th</sup> defendants submissions are dated 17<sup>th</sup> December 2019 and are filed on 19<sup>th</sup> December 2019. The plaintiffs have no locus standi to sue in this case as at the time Njung’wa Munyinyi died on 30<sup>th</sup> May 1982 the properties in question had been registered to the 3<sup>rd</sup> and 4<sup>th</sup> defendants who continue to occupy the properties with no restriction or inhibition. If a party is desirous of laying claim to property on grounds of beneficiary or trusteeship, authority to confer trusteeship must be obtained. The plaintiffs have not provided any authority indicating that the deceased was trustee of the suit lands and also trusteeship of the 3<sup>rd</sup> and 4<sup>th</sup> defendants as per section 27, 28 and 30 of the Registered Land Act.

19. In this case Njung’wa Munyinyi exercised his right as a proprietor by distributing his properties in tandem with Kikuyu customary law, the two wives and adult children were given portions of the land. The daughters cannot claim from the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are beneficiaries. The deceased distributed his estate voluntarily during his life time. All parties were aware of the subdivision and there was no objection. There were no irregularities proved on the exchange of land between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 3<sup>rd</sup> defendant. They have put forward the case of Supreme Court of Kenya case of **Isaack M’Inanga Kiebia vs Isaaiya Theuri M’Lintari & Another [2018] Eklr; Samuel Odhiambo Oludhe & 2 Others vs Jubilee Jumbo Hardware Ltd & Another [2018] ekLR**.

20. The 5<sup>th</sup> defendant’s submissions are undated and filed on 10<sup>th</sup> February 2020. He is the son of the 5<sup>th</sup> defendant, the late (Fredrick Wangendo Ndiro). That the fact that his father fraudulently transferred LR No. Kiambaa/Ruaka/529 to himself was suspicious since he was not the first born son. His mother and step mother were both alive and according to Kikuyu customs, a man shared land with his wives who in turn will share with their children. Only the 3<sup>rd</sup> – 5<sup>th</sup> defendants got the land to the exclusion of other family members. He submitted that based on the fraudulent transaction the land should be handed back to the family.

21. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

*(i) Whether the suit property LR No. Kiambaa/Ruaka/220 and as further subdivided into LR NO. Kiambaa/Ruaka/529 and 530 was held in trust for the plaintiffs by the late Njung’wa Munyinyi and consequently by the later transferees.*

*(ii) Whether the late Njung’wa Munyinyi (deceased) had any land available for distribution? If so whether he had subdivided and distributed the land during his life time to his wives and children.*

*(iii) Does the suit property as it exists as an estate of the deceased.*

*(iv) Whether the transfers of LR Kiambaa/Ruaka/529 and 530 from Njung’wa Munyinyi to the defendants herein and then further subdivisions were fraudulent.*

*(v) Whether the sale by public auction can be challenged.*

*(vi) Who should bear costs of the suit?*

22. It is the plaintiff's case that LR No. Kiambaa/Ruaka/220 was ancestral land of all plaintiffs and the 3<sup>rd</sup> – 5<sup>th</sup> defendants. That the late Njung'wa Munyinyi held the land in trust for all of them. There is evidence on record that the deceased exercised his right as a proprietor by distributing his properties to his beneficiaries in accordance with the Kikuyu customs. His two wives and their adult children were given portions of the land. There was no objection then by the plaintiffs as to the mode of distribution. The evidence of the 4<sup>th</sup> defendant (DW2) is detailed and self explanatory on how the late Njung'wa Munyinyi distributed his land. This evidence was not rebutted by the plaintiffs. The plaintiffs did not arise any objection in 1980. The deceased died in 1982.

23. No evidence has been adduced by the plaintiffs to show that the land Njung'wa Munyinyi was not capable of distributing his property. It is the plaintiff's case that the portions to the 3<sup>rd</sup> and 4<sup>th</sup> defendants were transferred a day before he died. There is no evidence to confirm that he was incapable of effecting the said transfers.

24. I find that the plaintiffs have not shown what special circumstances or intervening circumstances prevented them from being registered alongside the deceased owner Njung'wa Munyinyi or the subsequent beneficiaries. In the instant case the issue of trust does not arise.

25. As stated earlier the deceased Njung'wa Munyinyi distributed his portion of land as he wished among the two wives and their adult children. He did so voluntarily. It is not in dispute that Land Parcel No. Kiambaa/Ruaka/220 is no longer exists in the name of Njung'wa Munyinyi hence there is no land that the plaintiffs can claim from the defendants. The land registrar in the ruling delivered on 6<sup>th</sup> December 1991 was clear that the allegation of fraud, trust and unprocedural dealings with the parcels of land could not be proved.

26. In the case of **Denis Noel Mukhulo Ochwada & Another vs Elizabeth Mungari Njoroge & Another [2018] eKLR** the Court of Appeal held as follows:-

“As regards the standard of proof of fraud, the law is quite clear. In R. G. Patel vs Lalji Makanji (supra) the former Court of Appeal for Eastern Africa stated as thus:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”

Similarly in the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi JA** stated that:-

***“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The act 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”***

I find that in the instant case no fraud as set out by the plaintiffs has been proved and their case must fail.

27. It is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> defendants purchased LR No. Kiambaa/Ruaka/529 at a public auction pursuant to an auction conducted by M/S C. B. Mistri Auctioneers on 8<sup>th</sup> November 1990. The said sale has not been challenged. The court further issued a decree in HCCC 5191 of 1991 sanctioning the said sale. The said sale still stands. The 5<sup>th</sup> defendant Fredrick Ndiro Wangendo borrowed money from Nation Wide Finance Co. Ltd and gave the title as collateral. This fact has not been challenged. PW2, the 5<sup>th</sup> plaintiff confirmed so in her evidence.

28. The 1<sup>st</sup> defendant (DW3) went ahead to explain in detail what led to the exchange of parcel numbers between them and the 3<sup>rd</sup> defendant. The said evidence was not challenged. I believe what he told the court is the true account of what transpired. The plaintiffs have failed to prove there was any fraud or collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 3<sup>rd</sup> defendant. It is on record that the plaintiffs and other family members were aware of the exchange of the said parcels.

29. I agree with the defendants' submissions that the plaintiffs lack the locus stand to institute this suit on behalf of the estate of the deceased. In the case of **Isaiya Masira Momanyi (suing on behalf of the late Masira Onsase vs Daniel Omwoyo & Another [2017] eKLR** it was held thus:

“it is trite law that the estate of the deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued with grant of letters of administration has a capacity to represent the estate of deceased person.....”

The plaintiffs herein have not demonstrated that they have been issued with such letters of administration hence the suit must fail.

30. All in all I find that the plaintiffs have failed to prove their case as against the defendants on a balance of probabilities. The suit is hereby dismissed with costs to the defendants.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 11<sup>TH</sup> day of JUNE 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiffs

No appearance for the defendants

Kajuju – Court Assistant