



Mulinge & another (Suing as the Administrator of the Estate of Sadique Makewa - Deceased) v Nthiwa & 3 others; Muthama (Intended Interested Party) (Environment and Land Case 256 of 2017) [2025] KEELC 6928 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 256 OF 2017
TW MURIGI, J
SEPTEMBER 30, 2025**

BETWEEN

**ELIZABETH WAYUA MULINGE 1ST PLAINTIFF
BOSCO MWISYA 2ND PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF SADIQUE MAKEWA -
DECEASED**

AND

**PATRICK NTHIWA 1ST DEFENDANT
SOPHIA MASOA 2ND DEFENDANT
WAMBUA MUTHAMA 3RD DEFENDANT
LOISE NDUKU 4TH DEFENDANT**

AND

DUNCAN MULI MUTHAMA INTENDED INTERESTED PARTY

JUDGMENT

1. The Plaintiffs instituted this suit vide a Plaint dated 17th December 2014 seeking the following orders:
 - a. A declaration that the Defendants and or their agents, servants, relatives, employees and or any other person or persons acting for and on behalf of the Defendants are trespassers ab initio on the properties known as Makueni/Kinyambu/216, Makueni/Kinyambu/293, Makueni/Kinyambu/350, Makueni/Kinyambu/3140, and Makueni/ Kinyambu/3144, measuring approximately 34.08 hectares, 37.32 hectares, 36.58 hectares, 7.84 hectares and 33.46 hectares respectively situated within Kibwezi Sub-County of Makueni County.



- b. An order of injunction to restrain the Defendants, their agents, servants, relatives, employees and or any person or persons acting on behalf of and for the benefit of the Defendants from alienating, wasting, damaging, trespassing, transferring or in any other manner dealing with all those properties known as Makueni/Kinyambu/216, Makueni/ Kinyambu/293, Makueni/ Kinyambu/350, Makueni/Kinyambu/3140, and Makueni/ Kinyambu/3144 measuring approximately 34.08 hectares, 37.32 hectares, 36.58 hectares, 7.84 hectares and 33.46 hectares respectively situated within Kibwezi Sub County of Makueni County.
 - c. General damages for trespass.
 - d. Costs of this suit plus interest.
2. The 1st Defendant filed an amended statement of defence and counterclaim dated 25th February 2015, seeking the following orders:
 - a. A declaration that the title deed over land reference number Makueni/Kinyambu/3144 issued in favour of Sadique Makewa Mulei (deceased) was fraudulently and illegally issued and charged in favour of the defunct Daima Bank Limited and therefore null and void ab initio.
 - b. A declaration that the 1st Defendant has acquired title by adverse possession to the suit property known as Makueni/Kinyambu/3144.
 - c. That the registration of Sadique Makewa Mulei as proprietor of land reference number Makueni/Kinyambu/3144 be cancelled and the land registrar Makueni do rectify the register to enter the name of the 1st Defendant as the registered proprietor thereof free of any encumbrance.
 - d. A permanent injunction restraining the Plaintiffs, their servants, agents and or assigns from interfering with the 1st Defendant's occupation of the property known as Makueni/ Kinyambu/3144.
 - e. Costs of this suit and the counterclaim.
3. The 2nd and 3rd Defendant filed a statement of defence dated 25th February 2015 seeking the following orders:
 - a. A declaration that the 2nd Defendant is the legal owner of all those properties known as Makueni/Kinyambu/350, and the register should reflect the same.
 - b. A declaration that the 3rd Defendant is the legal owner of all those properties known as Makueni/Kinyambu/216, Makueni/Kinyambu/ 293, and Makueni/Kinyambu/ 3140, and the register should reflect the same.
 - c. Costs of the suit plus interest.
4. The 2nd Defendant filed an amended statement of defence and counterclaim on 9th September 2018, denying the Plaintiffs' claim. In the counterclaim, the 2nd Defendant seeks the following orders:
 - a. A declaration that the title deed over Makueni /Kinyambu/350 issued in favour of the late Sadique Makewa Mulei was fraudulently and illegally issued and charged in favour of the defunct Daima Bank Ltd, and therefore null and void ab initio, and that the 2nd Defendant is the legal owner of the property and ought to be registered as such at the lands registry Makueni, and a title deed issued in her favour.
 - b. Costs of this suit plus interest.



5. The 4th Defendant filed a document titled ‘Interested Party’s claim against the Plaintiffs’ dated 29th August 2019 seeking the following orders:-
 - a. A declaration that the title deed issued over Makueni/Kinyambu/293 in favour of the late Sadique Makewa Mulei was fraudulently and illegally issued and charged in favour of the defunct Daima Bank Ltd and is therefore is null and void ab initio, and that the Interested Party is the legal owner of the property, being the administrator and the Legal Representative of the Estate of the late Luka Muthama Kanyau, deceased and ought to be registered as such in the land registry of Makueni and the title deed issued in her favour.
 - b. An order cancelling the title illegally issued in favour of the Estate of Sadique Makewa Mulei over Makueni/Kinyambu/293.
6. The Plaintiffs filed a reply to the amended defence and defence to the counterclaim by the 1st, 2nd, 3rd, and 4th Defendants dated 15th September 2020, reply to the statement of defence and counterclaim in which they denied the Defendants' claims and reiterated the contents of the Plaint.
7. On 23rd February 2022, the Plaintiffs withdrew the suit against the 3rd Defendant.

Plaintiffs’case

8. The Plaintiffs called three witnesses in support of their case.

The 1st Plaintiff, Elizabeth Wayua Mulinge, testified as PW1. She adopted her witness statement dated 13th November 2019 as her evidence in chief. She also produced the documents in her list dated 15th September 2020 as PEX 1 – 22. She told the court that she was one of the administrators of her late husband, Sadique Makewa Mulei’s estate.
9. PW1 testified that land parcels Nos. Makueni/Kinyambu/216, 293, 350, 3140, and 3144 (the suit properties herein), are part of her late husband's estate.
10. She further testified that following the demise of her husband, certain families leased land parcel Nos. Makeuni/Kinyambu/350 and Makueni/Kinyambu/3144, but subsequently asserted ownership rights over the same.
11. She went on to state that the dispute over the suit properties was heard by County Commissioner Kibwezi, who instructed the parties to submit evidence supporting their ownership claims. That she submitted documents proving her deceased husband's ownership of the properties, whereas the Defendants failed to provide any evidence of their ownership.
12. She further testified that Machakos Case No. 300 of 1990, between her late husband and the Defendants’ parents, over parcels Nos. 3140 and 350, was determined in her husband’s favour.
13. She told the court that from 1990 to 2013, they engaged in farming activities on the suit properties and had not heard from the two families until the death of her husband.
14. Concluding her evidence, she urged the court to grant the orders sought in the Plaint.
15. On cross-examination by Mr King’oo, she testified that she did not have a letter of allotment for parcel No. Makueni/Kinyambu/3144, but had a sale agreement dated 10th December 1990 for parcels Nos. 3144 and 350. She confirmed that the sale agreement did not specify the suit property because it was executed before the demarcation exercise. She further testified that Wilson Mutunga was the original allottee of parcel No. 3144 and that he sold it to her late husband.



16. She acknowledged that her father, General Mulinge, had previously served as the Minister of Lands during the Moi era.
17. She also confirmed that there was a dispute between Wilson Mutunga and Peter Ndala over ownership of the suit property .
18. She went on to state that the letter dated 15th August 1991 indicates that the suit property was initially allocated to Peter Ndala and Peter Muindi on condition that they develop it. She further testified that the suit property was allocated to Wilson Mutunga in 1995 under the same conditions. She told the court that she could not confirm whether Peter Ndala had constructed on the suit land. She maintained that no house was built on the suit land between 1992 and 2013.
19. She went on to state that the letter dated 22nd October 1991 shows that the District Officer issued a judgment in Case No. 300 of 1991 between Peter Masoa Muindi and Wilson Mutunga, though she could not confirm whether the court upheld the judgment. She confirmed that the District Officer had sought an eviction order against Peter Mutua Ndala and Peter Masoa Muindi.
20. It was her testimony that the title deed for Parcel No. 3144 was issued on 29th January 1999 and was encumbered on the same day with a charge of Kshs 8 million in favour of Daima Bank, which remains outstanding to this date.
21. On cross-examination by Mr. Nzavi, she reiterated that her late husband purchased parcels Nos. 350 and 3144 from Wilson Mutunga. She explained to the court that she did not produce the sale agreement for parcel No. 293 because it was not in dispute. She further testified that she joined Wambua Muthama to the suit because he had sold 15 acres to her late husband from parcel No. 293.
22. She reiterated that the suit land had not been demarcated at the time of sale, and thus the land was not assigned a number or title. She testified that Wilson Mutunga did not have a letter of allotment when he sold the properties to her late husband.
23. She further testified that her late husband was not involved in case No. 34 of 1991 and that he had already acquired the suit land when the dispute was being filed.
24. She testified that Wilson Mutunga was cultivating the disputed land but had not constructed any structure. She also noted that allottees were given six months to develop the land.
25. She denied the allegations that Peter Masoa was conducting large-scale farming on parcel No. 350. She explained that there were no government notices to repossess the disputed lands nor any minutes showing that the Committee had repossessed them.
26. She denied the allegation that her late husband encumbered the suit land to defeat the titles. She asserted that the titles for the suit land were issued after her father left the Ministry of Lands.
27. In re-examination, she reiterated her evidence as stated above.
28. PW2- Wilson Masoa Mutunga adopted his witness statement dated 15th September 2020 as his evidence in chief. He further testified that he was the original owner of land parcels Nos. Makueni/Kinyambu/350 and Makueni/Kinyambu/3144, which he acquired in 1980, and later sold to Sadique Mulei vide a sale agreement dated 10th December 1990. He denied the allegations that Peter Ndala and Peter Masoa had been allocated the suit parcels.
29. He went on to state that Peter Masoa instituted Machakos Case No. 300 of 1991 against him after he sold the land to Sadique Mulei, which was ultimately decided in his favour, even though he did not have the judgment or verdict from the District Officer.



30. He further stated that the Defendants have never settled or engaged in any activities on the suit lands.
31. On cross-examination by Mr. Kingoo, he reiterated that he was the first allottee of the suit properties. He further testified that the elders allocated him the land in 1980 and allowed him to sell it. He confirmed that he had sold the suit property to Sadique Mulei for Kshs 350,000/= vide a sale agreement, but did not specify the parcel numbers involved.
32. He explained that he would not know whether Peter Ndala and Peter Masoa had been issued eviction notices.
33. He explained that the letter dated 15th August, 1991 from the District Officer shows that the land was allocated to Peter Mutua Ndala and Peter Masoa in 1972, and that they engaged in activities; however, the land was later repossessed and reallocated to him because they did not develop it.
34. He further explained that certain oral conditions had to be met before land could be allocated. He claimed that the suit land was reallocated in 1985 through local arrangement between the government and elders, although there are no documented minutes in this regard. He acknowledged that he did not settle or develop the land from 1985 to 1990, but used it for grazing.
35. Concluding his evidence, he testified that Sadique Mulei was engaged in extensive farming across the entire land and that he had built a residence thereon.
36. On cross-examination by Mr. Nzavi, he reiterated that his evidence as above. He testified that he was not aware of how Sadique Mulei acquired parcel No. 293.
37. He further testified that he did not settle on the land but sold it within a month of allocation. He explained that one of the conditions for land allocation was that the recipient was to settle and build a house within one month. He denied the allegations that the sale agreement was a forgery or that he exploited his position as a Councillor to dispossess the Defendants of their land.
38. He confirmed that he did not apply to be allocated the suit properties. He maintained that he sold the suit properties because he received a warning that the land would be repossessed from him.
39. In re-examination, he testified that he was not aware whether the land was allocated to Peter Masoa and Peter Ndala in 1972.
40. He stated that he was allocated the suit properties by the council of elders in 1985, after which he cleared the bush, built a house, and began cultivating the area. Additionally, he stated that the suit properties were invaded after Sadique Makewa's death.
41. PW3 Bosco Mwisya Mulei testified that he is the brother of the late Sadique Makewa Mulei. He adopted his witness statement dated 15th September 2020 as his evidence in chief.
42. It was his testimony that land parcels Nos. Makueni/Kinyambu/216, 293, 350, 3140, and 3144 belong to the estate of his late brother. He further testified that his late brother purchased parcels No. 350 and 3144 from Wilson Mutunga and was subsequently registered as the owner.
43. He told the court that his late brother relocated to Kinyambu Settlement Scheme in the 1980s and acquired parcels of land where he engaged in agricultural activities without any dispute.
44. He stated that he was not aware whether land parcel Nos. 350 and 3144 had previously been allocated to Peter Masoa and Peter Ndala. He further stated that he had never seen the Defendants on the suit land.



45. On cross-examination by Mr. Kingoo, he confirmed that he did not witness the sale agreement for parcels Nos. 350 and 3144. He also confirmed that the D.O. had resolved the dispute over the suit property, although he did not have the proceedings or the verdict. He explained that his late brother initiated case No. 300 of 1990 regarding the destruction of crops, but he did not have the court proceedings.
46. He asserted that parcels Nos. 350 and 3144 were initially allocated to Sadique Mulei, not to Peter Ndala and Peter Masoa. He also denied the allegations that Peter Masoa and Peter Ndala had used the suit land or that he, along with PW2, had destroyed the houses on the suit property.
47. On further cross-examination by Mr. Nzavi, he stated that he does not know how his late brother acquired parcel No. 293.
48. He asserted that the Defendants are trespassers on the suit property. He maintained that the suit properties were surveyed in 1998 and that the title deeds were issued in 1999.
49. In re-examination, he reiterated that he was not aware whether Peter Ndala and Peter Masoa had been allocated parcel Nos. 350 and 3144 before his late brother, or any dispute existed between his brother and Peter Masoa and Peter Ndala.
50. He maintained that no evidence was presented to suggest that his late brother, a former senior officer in the Ministry of Energy, or the late General Mulinge, a former Minister of Lands, used their positions to influence the acquisition of titles for the suit properties.

The Defendants' Case

51. DW1 Mumbua Mulei Kilonzo adopted her witness statement dated 9th September 2018 as her evidence in chief. She testified that she migrated to Mbooni in 1972 with her husband, parents, and immediate neighbors, namely Joyce Ndeto, Muthama Kanyau, Mutua, and Ndala. It was her testimony that they were allocated land at Kinyambu Settlement Scheme by the Government, with the process supervised by the sub Chiefs, Chiefs, and the headmen.
52. She further testified that Muthama, Mutua Ndala, and Masoa never abandoned their parcels of land and confirmed that the suit properties belong to them and not to the Plaintiff. She confirmed that Sadique Makewa never occupied, utilized, or claimed any proprietary interest in Peter Masoa's land.
53. On cross-examination by Mr. Loki, she testified that Muthama showed her documents confirming their ownership of Plot No. 293.
54. She further testified that Peter Masoa introduced Sadique Makewa to Kinyambu Settlement Scheme. She confirmed that she was present when Sadique purchased 5 acres from Francis Kimani.
55. She testified that Sadique was cultivating on Luka Muthama's farm.
56. She testified that after Peter Masoa, Peter Ndala, and Muthama's family began pursuing their land, they submitted their documentation to the District Officer, who instructed Sadique Makewa to vacate the land. She refuted the allegations that the District Officer asserted that the land belonged to Sadique Makewa.
57. In re-examination, she reiterated that the suit properties belong to Luka Kanyau, Peter Ndala, and Peter Masoa and that they are adjacent to each other. She also stated that Peter Masoa and Muthama have occupied the suit land since 1972.



58. DW2 Emmanuel Mutua Muinde adopted his witness statements dated 24th February 2015 and 9th September 2018 as his evidence in chief.
59. It was his testimony that they migrated to Kinyambu Settlement Scheme in 1971. He told the court that in February 1984, Peter Masoa introduced Sadique Makewa to the Kinyambu Settlement Scheme, where he acquired a five-acre parcel of land and began farming.
60. He testified that Sadique Makewa neither occupied nor utilized land belonging to Peter Masoa. He further testified that during an arbitration proceeding before the Deputy County Commissioner, Kibwezi, he was shocked to learn that Sadique Makewa had unlawfully acquired land belonging to Peter Mutua, Peter Masoa, and Muthama Kangui.
61. He asserted that the suit properties were fraudulently surveyed and registered under the name of Sadique Mulei, as the respective families had been continuously occupying the land. He expressed his shock upon discovering that Mr. Sadique Makewa had obtained title deeds for the lands despite the ongoing adjudication process.
62. On cross-examination by Mr. Loki, he testified that Sadique Makewa purchased 2 acres from Kimani and part of Muthama's land, but he could not specify the size of the acreage.
63. He further testified that Peter Mutua and Peter Masoa had always lived on the suit parcels but could not identify who demolished their homes in 2014.
64. He told the court that he attended the proceedings before the District Commissioner, where they were informed that a court order had evicted Peter Masoa and others. He further testified that he grazes his cattle on Peter Masoa's land and that Sadique had never cultivated that land. Additionally, he testified that Wilson Mutunga had never been his neighbor and that he was not aware whether Wilson had sold any portions of the suit property.
65. On further cross-examination by Mr. Nzavi, he testified that Mutua, Masoa, and Muthama never sold their land to the late Sadique Makewa.
66. In re-examination, he reiterated his evidence as above.
67. DW3 Philip Munyao Kimeu adopted his witness statements dated 9th September 2018 and 24th February 2015 as his evidence in chief.
68. He testified that he migrated to Salama in 1972, where he found Peter Masoa and Peter Mutua settled on their respective parcels of land. He further testified that Peter Masoa employed him as a farm manager on his land. He stated that both Peter Mutua and Peter Masoa cultivated their parcels from 1971 until their deaths. He also mentioned that Sadique Makewa never claimed their lands during his lifetime. Additionally, he stated that in 1984, Sadique Makewa purchased land from Francis Kimani.
69. On cross-examination by Mr. Loki, he reiterated his evidence as above.
70. He asserted that Sadique Makewa only had five acres, which he had acquired and was farming. He reiterated that they were not issued with allotment documents, but instead, these details would be recorded in a small book.
71. He testified that Mutua, Masoa, and Muthama are his neighbors and share a common boundary with his land.
72. He further testified that the Defendants were evicted from their land in 2014 by Sadique Makewa's people and that they reported the matter to the police. He confirmed attending the proceedings before



the Deputy County Commissioner, where he was surprised to learn that Sadique Makewahad been issued with title deeds for the suit land. He further testified that they were evicted from the suit land in accordance with a court order. He stated that Wilson Mutunga has never been his neighbour.

73. In re-examination, he reiterated his evidence as above.

The 1st Defendant's Case

74. The 1st Defendant, Patrick Nthiwa Mutua, testified as DW4. He adopted his witness statement dated 25th February 2015 as his evidence in chief. He also produced the documents in his list dated 25th January 2015 as DEX 1 - 4 and the list dated 20th April 2018 as DEX 5.

75. DW1 testified that in 1971, his late father, Peter Mutua Ndala, acquired land parcel No. Makueni/Kinyambu/3144 within the Kinyambu Settlement Scheme. He stated that the government allocated the land through the local administration and that the adjudication process was still ongoing.

76. He further testified that from 1971 to 2014, they engaged in farming and grazing on the suit land, and no disputes arose during that time. He also stated that in 1984, Peter Masoa Muindi introduced Sadique Makewa Mulei to Kinyambu Settlement Scheme, where he purchased land from Muthama Kanyau and started farming there.

77. In October 2014, he established that PW1 was claiming ownership of the suit property, prompting his advocate to write a letter demanding that she vacates the property. He stated that during a meeting held on 3rd November, 2014, at the Deputy County Commissioner's Office, he was shocked to learn that Sadique Makewa had not only fraudulently acquired the title to the suit property and the land belonging to Peter Masoa and Muthama Kanyau, but had also charged the titles in favor of Daima Bank.

78. He maintained that they had possessed the suit land from the time it was allocated to them. He asserted that Sadique had never occupied the suit property during his lifetime and added that his father never sold his land to him. He further testified that Sadique was occupying land parcel No. 3140, but did not use it as collateral to secure a loan, unlike the other titles. It was his testimony that Wilson Mutunga never occupied the suit land, and the allegation that the land was allocated to him is unfounded.

79. On cross-examination by Mr. Loki, he reiterated that his father relocated to Kinyambu in 1971. He further testified that his father did not possess ownership documents, as they were obtained fraudulently by Sadique Mulei.

80. He also testified that Sadique obtained the title for the suit property in 1999, while the letter of allotment was issued in 2007, which he found illogical. He maintained that the letter dated 15th August 1991 confirmed that his father was cultivating and grazing on the suit land prior to it being taken away from him and allocated to Wilson Mutunga.

81. He explained that he discovered the allocation of the suit property after Mutunga stated he had a dispute with Peter Masoa Muindi.

82. On further cross-examination by Mr. Nzavi, he explained that parcel No. 293 belongs to Luka Kanyau, while Peter Masoa owns parcel No. 350. He further stated that they had constructed structures on their respective parcels, which remained until 2014 when they were demolished.

83. In re-examination, he stated that he was not aware of the nature of the dispute and judgment in Case No. 300 of 1991, or whether the verdict had been forwarded to the court for confirmation.



84. He further testified that he became aware that his father's land was reallocated to Wilson Mutunga in 2014, as he had not made any claim to the land.

The 2nd Defendant's Case

85. The 2nd Defendant, Sophia Masoa, testified as DW5. She adopted her witness statement filed in court on 17th September 2018, as her evidence in chief. She also produced the documents in her list dated 30th November 2021 as DEX 1 - 6.
86. DW5 informed the court that the late Peter Masoa Muindi was her husband. She testified that in 1971, the Government allocated land to her late husband in Kinyambu Settlement Scheme, now known as Parcel No. 350, where he constructed a building and engaged in agricultural activities.
87. She further testified that in 1984, her husband introduced Sadique Makewa Mulei to Kinyambu Settlement Scheme, where he purchased a parcel of land from Francis Kimani. She further testified that in 1991, her late husband fell out with Sadique Makewa over a boundary dispute, which led to criminal case No. 4357 of 1991. She maintained that they had been in possession of the suit property since 1971 and had not relinquished it.
88. She further testified that she discovered that Sadique had unlawfully obtained the title for the suit property, and had used it to secure a loan from Daima Bank after they were summoned for a meeting by the Assistant Commissioner over the suit property. She also emphasized that Sadique Makewa had never occupied the suit property and urged the court to allow her counterclaim as prayed.
89. On cross-examination by Mr. Loki, she testified that land parcel No. 350 was allocated to her and her late husband, as evidenced by her documents. She further stated that she did not receive any compensation for the land.
90. Upon being shown a lease agreement between Peter Masoa and Rapji Patel, she stated that her ownership was limited to only one farm in Kinyambu Settlement Scheme.
91. She denied the allegations that the court had recommended their eviction from the suit property.
92. On cross-examination by Mr. Kingoo, she testified that she was not aware of Machakos Case No. 300 of 1991 or of any eviction order issued against her husband and Peter Ndala.
93. She further testified that the letter by the District Officer confirms that Peter Masoa and Peter Ndala were allocated the suit lands. She explained that during the allocation process, the land allocated would be recorded in a book. She denied the allegations that the suit property was allocated to Wilson Mutunga and maintained that they have possessed the land since 1972.
94. She testified that Peter Ndala was her neighbor and that he used his land for cattle rearing. She also testified that his son Patrick had built on his father's land and was utilizing the same.
95. DW6 Alex Makali Mwangangi, a retired army officer, adopted his witness statements dated 9th September 2018 and 29th September 2019 as his evidence in chief.
96. He told the court that he settled in Kinyambu Settlement Scheme in 1973/74, where he met Masoa, Mutua, and Muthama, who had already established their residences and assisted him in acquiring a parcel of land.
97. He testified that Francis Kimani sold a parcel of land adjacent to the Athi River to Sadique Makewa and confirmed that he had seen the sale agreement. He further stated that he was unaware whether



- Muthama, Masoa, and Mutua had sold their land to Sadique Mulei. He also testified that he could not verify if the Defendants had letters of allotment.
98. On cross-examination by Mr. Kingoo, he testified that he was not aware whether Sadique was claiming land occupied by Peter Mutua and Peter Masoa. He further testified that he would not know if the allocation of land was conditional or if anyone had been dispossessed of their land for failure to develop it. He asserted that letters of allotment were issued prior to the issuance of the title deed.
 99. In re-examination, he testified that Masoa, Mutua, and Muthama owned their land in 1994 when the survey was conducted.
 100. The 4th Defendant, Loise Nduku Muinde, adopted her witness statement dated August 29, 2019, as her evidence-in-chief. She told the court that she is the daughter of the late Luka Muthama Kanyau and the legal administrator of his estate. She testified that her late father was allocated a parcel of land by the government in 1971, which was fraudulently registered as parcel No. Makueni/Kinyambu/293 in the name of Sadique Makewa Mulei.
 101. She further testified that, after her late father acquired the suit land, he took possession and even allocated a portion to her and her husband, where they built structures and engaged in agricultural activities. She also testified that she knew Sadique Makewa had purchased a parcel of land from Francis Kimani, where he farmed. Furthermore, she stated that they coexisted peacefully with Sadique Makewa and emphasized that they had not relinquished their rights to the land since 1971. She went on to state that she met the Plaintiff for the first time at a meeting held on 3rd November, 2014, and was shocked to discover that their land was registered in the name of Sadique Makewa. She maintained that they have been in possession of the suit property.
 102. On cross-examination by Mr. Loki, she testified that her father was deceased at the time the survey was carried out. She further testified that she was present during the survey but was not given any document because there was a dispute over the suit property. She asserted that Sadique Makewa held a title to the suit land before the survey was carried out.
 103. She further testified that her father had a letter of allotment, but they could not trace it after he passed away. She maintained that parcel No. 293 does not belong to the late Sadique Makewa.
 104. On cross-examination by Mr. Kingoo, she testified that she was present during the land allocation exercise conducted by the elders, who set specific conditions. She further stated that Peter Mutua owned land within the Kinyambu Settlement Scheme, where he had constructed a structure and was utilizing the land. She further testified that she had never seen Wilson Mutunga on Peter Ndala's land and confirmed that they had met the conditions set by the committee, as they were actively utilizing the land.

The Plaintiffs' Submissions

105. The Plaintiffs filed their submissions on 21st June 2023.
106. On behalf of the Plaintiffs, Counsel gave a factual background of the matter spanning from the regime when Europeans occupied the white highlands, the laws in operation at that time, to the time when Kenya gained independence and the entry of the Registered Lands Act, which enabled land to be adjudicated and registered in the names of Kenyans of African descent.
107. Counsel submitted that many Kenyans remained landless and there was a growing demand for the return of lands seized by the colonial government. Consequently, the British Government and the independent Kenyan government established settlement schemes to transfer lands previously owned



- by European settlers to Africans, resettle displaced persons, and support families without land for various reasons. These settlement programs were also seen as a way to boost agricultural productivity and promote rural development.
108. Counsel submitted that Kinyambu Settlement Scheme was one such scheme where people were allocated land from the early 1970s. It was submitted that there were rules and regulations whereby violations could lead to repossession. That in the early 1990s, the land was subjected to survey processes to determine the plot sizes. Around the year 1998, allotment letters were issued, and thereafter, the processing of title deeds began.
 109. Counsel relied on the evidence on record to submit that the Plaintiff had proved that the disputed properties are registered in the names of Sadique Makewa Mulei.
 110. Counsel relied on the provisions on Sections 24(a) and 26(1) of the [Land Registration Act](#) as well as decisions in the cases of *Elijah Makeri Nyangrwa vs Stephen Mungai Njuguna & Another* [2013] eKLR, *Arthi Highway Developers Limited vs West end Butchery Limited and Others* (civil Appeal No 246 of 2013 and *Munyu Maina vs Hiram Gathiha Maina* Civil Appeal No 239 of 2009 to submit that the Plaintiffs had adduced evidence of ownership of the suit properties, that due process was followed and title deeds issued thereby discharging their burden of proof.
 111. Counsel submitted that the Defendants failed to produce any legal document to prove their claim of ownership over the disputed land or any evidence supporting the allegations of fraud which were made against the Plaintiffs.
 112. Counsel urged the court to examine the circumstances surrounding the Defendants' invasion of the land in 2014, shortly after the death of Sadique Makewa Mulei. It was argued that the Defendants recognized substantial tracts of land available for acquisition, and that Sadique Mulei's death provided them with an opportunity to claim additional land. Counsel urged the court to acknowledge the validity of their case, which had not been contested, and subsequently dismiss the Defendants' cases with costs to the Plaintiffs.
 113. The Plaintiffs filed further submissions dated 1st September 2023.
 114. On their behalf, Counsel addressed the issue of adverse possession raised by the 1st Defendant. Counsel cited Sections 7, 13, and 38 of the [Limitation of Actions Act](#), Order 37 of the Civil Procedure Rules, Article 162(2) of [the Constitution](#) of Kenya 2010 and Section 13 of the [Environment and Land Court Act](#) to submit that the 1st Defendant's claim for adverse possession fails ab initio as it has not been brought through an Originating Summons.
 115. It was submitted that if the 1st Defendant was interested in pursuing adverse possession, he should have filed a separate suit in the form of an originating summons, and the two suits would have been consolidated and heard together.
 116. Regarding the claim by the 1st Defendant that they have occupied plot No. 3144 since the 1970s, the Plaintiffs cited paragraph 2 of the letter dated 15th August 1991, to argue that the letter states the property had not been developed since its initial allocation in 1972.
 117. Counsel further submitted that the 1st Defendant's claim that they had occupied the land since the 1970s was false because they failed to produce any photographs of any structures on the disputed land. It was submitted that the Defendants are not currently occupying the land, since such occupation would violate the court orders restraining the Defendants from trespassing on the said land. Counsel maintained that the rights under adverse possession have not yet crystallized.



1st Defendant's SubmissionS

118. The 1st Defendant filed his submissions dated 15th August 2023.
119. On his behalf, Counsel outlined the following issues for the court's determination:
1. Whether the title to land reference number Makueni/ Kinyambu/ 3144 issued in favour of Sadique Makewa Mullei(deceased) was acquired regularly and legally.
 2. Whether the 1st Defendant has acquired title by adverse possession to the property known as land reference number Makueni/ Kinyambu/ 3144.
 3. Whether the registration of Sadique Makewa Mullei as proprietor of land reference number Makueni/ Kinyambu/ 3144 should be cancelled and the register rectified to enter the name of the 1st Defendant as the registered proprietor thereof.
 4. Who is liable for the costs of the suit and the counterclaims?
120. Counsel relied on Section 26 of the *Land Registration Act* to submit that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land. The same section provides that the title can be challenged if it was acquired illegally, unprocedurally, or through a corrupt scheme. Counsel relied on the case of *Alice Chemutai too vs Nickson Kipkorir Korir & 2 Others [2015]eKLR* to buttress the argument that the law is extremely protective of title and that this protection can be removed and title impeached where (1) the title was obtained by fraud of misrepresentation to which the person must be proved to be a party and (2) the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
121. Counsel reproduced the contents of the 1st Defendant's statement of defence, where he gave particulars /details of how Sadique Makewa Mulei connived and colluded with the settlement fund trustees of Kinyambu Settlement Scheme to defraud him and his late father, Peter Mutua Ndala, of land reference number Makueni/ Kinyambu/ 3144, which he lawfully acquired and occupied for over 40 years.
122. It was submitted that the 1st Defendant is the son and legal representative of the estate of Peter Mutua Ndala, who acquired land reference number Makueni/ Kinyambu/ 3144 in the year 1971. Counsel further submitted that the letter dated 15th August 1991 by the District Officer Kibwezi confirmed that land reference number Makueni/ Kinyambu/ 3144 was initially allocated to Peter Mutua Ndala and Peter Masoa.
123. Counsel contended that Wilson Mutunga did not prove that he was the first allottee of the land or produce documents to prove the alleged repossession/reallocation of the suit land from the original allottees. It was submitted that Wilson Mutunga confirmed to the court that he did not develop or settle on the land within one month as required in the conditions. Counsel argued that Sadique Makewa Mulei did not file any suit against Peter Mutua and Peter Masoa for eviction. He also highlighted the fact that it was admitted that Sadique Makewa Mullei was a senior government officer, while General Mulinge (PW1's father) was a senior government officer and, at one point, the Minister for Lands.
124. Counsel submitted that no warning or eviction orders were issued to Peter Mutua and Peter Masoa, leading to their reallocation to Wilson Mutunga.



125. Counsel further submitted that there was no evidence to show that the allocation of the land to Peter Mutua and Peter Masoa was legally cancelled before it was allegedly reallocated to Wilson Mutunga. To buttress this point, reliance was placed on the case of *Ali Gadaffi & Another vs Francis Muhia Mutungu & 2 others* [2017] eKLR, where it was held that where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.
126. Counsel further submitted that it was intentional and suspected that PW1 testified that she had an allotment letter for land reference number Makueni/Kinyambu/3144, but she did not produce it as an exhibit. Counsel questioned how Sadique Makewa Mulei was issued a title deed in the year 1999, while the alleged allotment letter was issued years later in 2002. It was submitted that, legally, a title deed could only be issued after the allotment letter.
127. To this end, Counsel relied on the case of *Joseph N.K Arap Ngok vs Moiyo Ole Keiwua & 4 others* Nairobi Civil Appeal No 60 of 1997 (Unreported) where it was held that title to landed property normally comes into existence after issuance of a letter allotment, meeting the conditions stated in such a letter and actual issuance thereafter of the title document pursuant to provisions held. Counsel further submitted that it was not proved that Sadique Makewa Mulei satisfied the conditions set out in the letter of allotment as a first step towards becoming the registered proprietor of the suit property.
128. Counsel pointed out that Sadique Makewa Mulei was issued the title deed to land reference number Makueni/ Kinyambu/ 3144 on 29th January 1999, and on the same day, it was charged in favour of Daima Bank Limited to secure a loan of KShs 8 million with other lands, which had not been repaid.
129. Counsel argued that it was clear from the evidence presented that the process of acquiring parcel No. Makueni/Kinyambu/3144 by Sadique Makewa Mulei and the entire transaction reeked of fraud. Counsel urged the court not to overlook these illegalities. It was submitted that the title issued to Sadique Makewa Mulei was under challenge, and it was the Plaintiffs' responsibility to explain and prove the origin of that title and how it was acquired, which they failed to do. To support this point, reliance was placed on the case of *Kenya National Highways Authority vs Shalien Masood Mughai & 5 others* [2017] eKLR, and *Daudi Kiptugen vs Commissioner for Land & 4 others* [2015] eKLR.
130. Counsel argued that the 1st Defendant has proved that Sadique Makewa Mulei obtained the title No. Makueni/ Kinyambu/ 3144 through fraud, illegality, and misrepresentation.
131. Regarding the second issue, Counsel submitted that the 1st Defendant has lived on the suit land continuously for a period of over 50 years. He cited the decision in the case of *Kweyu vs Omutut* [1990] KLR 709, where the court of appeal explained the meaning of the doctrine of adverse possession, while the decision in the case of *Gabriel Mbui vs Mukinda Maranya* [1993] eKLR was used to outline the elements to be proved in the case of adverse possession.
132. Counsel submitted that the 1st Defendant had proved that he and his late father had been in open, continuous, uninterrupted, and unbroken possession of land reference number Makueni/ Kinyambu/ 3144 for over 40 years since its acquisition in 1971, that Sadique Makewa Mulei never put up a home or any development on that land. Counsel argued that the only development that the late Sadique Makewa put up was on land reference number Makueni/ Kinyambu/ 3140, which was not charged to Daima Bank Limited.
133. It was further submitted that Sadique Makewa never occupied the land belonging to Peter Mutua and Peter Masoa during his lifetime who in any event were never dispossessed or relinquished their possession or lost their right over the suit properties.



134. Counsel relied on Section 80 of the *Land Registration Act* and the case of *Funzi Island Development Limited & 2 Others vs County Council of Kwale & 2 Others* [2014] eKLR to submit that the title in the name of Sadique Makewa Mulei should be cancelled and the register rectified to enter the name of the 1st Defendant.
135. Finally, on costs, Counsel urged the court to find that the Plaintiffs had failed to prove their case to the required standard of proof, and dismiss the same with costs and allow the counterclaim with costs.
136. Counsel cited the case of *Munyu Maina vs Hiram Gathiha Maina* (Civil Appeal No 239 of 2009) and Section 26 of the *Land Registration Act* to argue that, apart from dangling title deeds, the Plaintiffs did not provide any documents to show the root of the title and due process in acquiring them. Counsel relied on Section 80 of the *Land Registration Act* to argue that they had proved that the Plaintiffs' title deeds issued to Sadique Makewa Mulei were invalidly/illegally/corruptly issued and that the same ought to be cancelled and fresh ones issued to them. To support this argument, reliance was placed on the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* Petition No 8 (E010 of 2021 to argue that the court should dismiss the Plaintiffs' case with costs and grant the Defendants' counterclaims with costs.

The 2nd and 4th Defendants Submissions

137. The 2nd and 4th Defendants filed their submissions dated 13th July 2023.
138. Counsel submitted that Makueni/Kinyambu/350 was allocated to Peter Masoa, who took possession and occupied the said land, where they farmed, contrary to the allegations by the Plaintiffs that the land was repossessed and allocated to Sadique Makewa Mulei.
139. Counsel relied on the evidence presented by Alex Makali Mwangangi, who confirmed that he knew Peter Masoa owned Makueni/Kinyambu/350, while the late Muthama Kanyau owned Makueni/Kinyambu/293, and that the Plaintiffs did not challenge this evidence.
140. Counsel gave a summary of the evidence presented to the court and argued that the Defendants neither sold the suit properties to Sadique Makewa Mulei, nor reallocated them to him. Counsel maintained that while Sadique Makewa Mulei held title deeds issued on 29th January 1999, no other title deeds had been issued in that area at that time since the titles were issued during President Kenyatta's regime, as confirmed by the Defendants' witnesses. Counsel further submitted that the said title deeds were charged to the defunct Daima Bank Limited to secure a loan of Kshs.8 million on the same day they were issued, and not a single cent of that loan has been repaid.
141. Counsel argued that if due process was followed, any bank worth its salt would not accept to charge the title deed on the same date it was issued, since they would have required time to carry out due diligence before giving out a loan secured by those title deeds. Counsel urged the court to recognize that there was an ill motive intended to defeat the 2nd and 4th Defendants' rights to those properties and fraudulently dispossess them through unorthodox means.
142. Counsel further submitted that the late Sadique Makewa Mulei and the 1st Plaintiff's late father Jackson Mulinge were powerful officers in Moi's government, and that undue influence must have been used to have the title deeds issued without following due process and procedure.

Analysis And Determination

143. Having considered the pleadings, the evidence on record, and the submissions by the parties, the following issues fall for determination:



- a) Whether the Plaintiff is entitled to the orders sought in the Plaintiff?
- b) Whether the Defendants are entitled to the orders sought in the counterclaim?
144. It is not in dispute that the suit properties are registered in the name of Sadique Makewa Mulei, deceased. It is also not in dispute that the suit properties are charged in favour of Daima Bank. The Plaintiffs are seeking a declaration that the Defendants are trespassers on the suit properties. In this regard, they sought a permanent injunction restraining the Defendants from interfering with the suit property and damages for trespass.
145. This court is called upon to determine whether the Defendants are trespassers on the suit property. Black's Law Dictionary, 10th Edition, defines trespass to land as follows;
- “A person's unlawful entry on another's land that is visibly enclosed.”
146. In the case of *Municipal Council of Eldoret vs Titus Gatitu Njau* (2020) eKLR, the Court of Appeal cited the case of *M'Mukanya Vs M'Mbijiwe* (1984) KLR 761, where the ingredients of the tort of trespass were stated as follows;
- “Trespass is a violation of the right to possession, and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership, see *Thomson v Ward* (1953) 2 QB 153.”
147. To establish trespass, the Plaintiffs must prove that they were either lawfully in possession of the property or were the owners thereof and that the Defendants entered the property without any justifiable cause.
148. In the case of *Gitwany Investments Limited vs Tajmal Limited & 3 Others* [2006] eKLR, the Court held that title to land carries with it legal possession. This means that even if one does not have actual possession of the land, so long as they have a title to the land, it is deemed to be possession for the purposes of trespass.
149. In the matter at hand, PW1 produced titles and certificates of search for the suit properties, which show that they are registered in the name of Sadique Makewa Mulei, deceased. She also produced a grant of letters of administration to show that they are the administrators of the estate of Sadique Makewa Mulei, deceased.
150. PW1 testified that in 2014, the Defendants trespassed on the suit properties without her permission.
151. She told the court that her late husband purchased parcel Nos. Makueni/Kinyambu/350 and 3144 from Wilson Mutunga. In this regard, she produced a sale agreement dated 10th December 1990 between her late husband and Wilson Mutunga. The agreement shows that the subject of the sale is land in Athi Masaku Ndoko measuring 150 acres. The purchase price is indicated as KShs. 350,000/=.
152. She explained that the sale agreement did not specify the parcel numbers because the land had not been adjudicated.
153. PW2 asserted that he was the first allottee of the suit properties. He confirmed that he had sold the suit properties to the late Sadique Makewa Mulei vide a sale agreement dated 10th December 1990.
154. The 1st Defendant stated that his father was the first allottee of parcel No. 3144, while the 2nd Defendant claimed that parcel No. 350 was allocated to her deceased husband. The 4th Defendant insisted that



- her late father was allocated parcel No. 293. The Defendants maintained that the suit properties were transferred fraudulently to the late Sadique Makewa Mulei.
- 155 To support their allegations of fraud, the 1st Defendant relied on the particulars of fraud outlined in paragraph 5 of his amended defence, while the 2nd Defendant relied on the particulars set out at paragraph 14. The 4th Defendant relied on paragraphs 5 and 6 of her claim.
156. It is trite law that allegations of fraud must be specifically pleaded and proven.
157. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No 106 of 2000), Tunoi JA stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
158. Similarly, in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the Court of Appeal held that:
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”
159. Although the standard of proof is not beyond a reasonable doubt, it is higher than proof on a balance of probabilities. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides that:-
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.
160. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.
161. It is not in dispute that the suit properties are located within Kinyambu Settlement Scheme. Both the Defendants and PW2 claim to have been the first allottees of parcel Nos. Makueni/Kinyambu/350 and 3144.
161. At this juncture, this court is called upon to determine who was the first allottee of the suit property. The Defendants asserted that land parcels Nos. Makueni/Kinyambu/350, 3144, and 293 were allocated to Peter Mutua Ndala, Peter Masoa Muindi, and Muthama Kanyau in 1971.



162. They relied on the letter dated 15th August 1991, which indicates that Peter Mutua and Peter Masoa were allocated the suit properties in 1972. According to the letter, Peter Mutua Ndala and Peter Masoa were allocated the suit properties on condition that they develop the properties. PW2 stated that he was allocated Parcel Nos. 350 and 3144 in 1980 by the elders after Peter Masoa and Peter Muindi failed to develop the respective properties. He further stated that he disposed of the properties within one month of the allocation, citing a warning that the land would be repossessed due to lack of development.
163. It was his testimony that Peter Masoa sued him after he had sold the suit properties to Sadique Makewa Mulei. According to the letter dated 15th August, 1991, the land dispute between Wilson Mutunga (PW2), Peter Mutua Ndala, and Peter Masoa Muindi was heard by the District Officer on 13th July, 1991. The D.O. confirmed that the land in question was allocated to Peter Mutua Ndala and Peter Masoa Muindi on condition that they develop it. It was also confirmed that they were farming and keeping animals on the land. The letter clearly indicates that the dispute had been settled by the chief, assistant chief, and the D.O.'s office.
164. Having confirmed that the suit properties were allocated to Peter Mutua Ndala and Peter Masoa Muinde, this court is called upon to determine whether they were repossessed and reallocated to PW2. From the evidence before me, it is clear that a person offered land in Kinyambu Settlement Scheme was required to develop the land by engaging in farming and constructing a structure. It is also clear that the allocation Committee issued conditions that were not documented. PW2 testified that upon allocation, the allottee was required to develop the land within a month. The Defendants informed the court that they were given parcel numbers, which were recorded in a book. PW2 testified that he was allocated the suit properties because Peter Ndala and Peter Masoa did not develop the land. He confirmed that there were no minutes indicating that he was allocated the suit properties.
166. PW2 testified that after he was allocated the land, Peter Masoa filed a suit against him. PW1 produced a letter dated 22nd October, 1991 (PEX21) from the District Officer, Kibwezi regarding Civil Case No. 300 of 1991. According to the letter, the case involved Peter Mutua Ndala and Peter Masoa Muindi versus Wilson Mutunga. The letter also indicates that the case was heard by the D.O. on July 12, 1991, and a verdict was issued. However, it does not specify the nature of the dispute. The D.O. confirmed that the verdict had not been forwarded to the court for confirmation and recommended that the court do issue an eviction order against Peter Mutua Ndala and Peter Masoa Muindi for occupying the land without any lawful order since 1991. The Plaintiffs did not produce copies of the proceedings and judgment by the District Officer regarding that case. There was no evidence to show that Peter Ndala and Peter Masoa were evicted from the suit properties pursuant to a court order. PW2 confirmed on cross-examination that he did not know why the District Officer wanted Peter Mutua and Peter Masoa evicted from the suit property.
167. The letter dated 15th August 1991 indicates that the suit properties were repossessed on 5th September 1985. The letter states as follows in part:-

To my knowledge it is clear that Peter Mutua Ndala and Peter Masoa Muindi knew the terms and conditions that they were to develop the land but overlooked the terms and this necessitated the same panel of elders to re-allocate the same land to Wilson Mutunga on 5/9/85 of which they gave him the same conditions. Evidence of this information is the attached photocopy letter written in Kikamba language having the signatories of the same panel of elders.



It goes on to state that the land was reallocated to Wilson because the land had been abandoned and had become a haven of wild animals.

168. . The procedure for repossession of land in a Settlement Scheme starts with the issuance of a notice to the defaulter. The Plaintiffs did not tender any evidence to show that Peter Mutua and Peter Masoa had been notified that their plots would be repossessed, whether they had been served with a notice to rectify breach, whether they were informed that the allocation had been cancelled and was available for reallocation.
170. PW2 confirmed that he did not apply to be allocated the suit properties. There are no minutes to show how the panel of elders allocated him the suit properties. His evidence that he was allocated the suit property in 1980 was contradicted by the letter dated 15th August 1991, which indicates that he was allocated the land on 5/9/1985. Similarly, there are no minutes or proceedings indicating that the panel of elders repossessed the land from Peter Mutua Ndala and Peter Masoa Muindi or that such action was approved. There is nothing on record to show that the correct procedure for repossession was followed. From the foregoing, I find that PW2 failed to demonstrate how he was allocated the suit properties, if at all.

Turning to the sale agreement, PW2 testified that he was allocated the suit properties in 1980. He informed the court that he had sold the suit property to Sadique Makewa Mulei within a month of its allocation, citing a warning that the land would be repossessed due to his failure to develop it. He again told the court that he sold the suit property on the date indicated on the sale agreement. If indeed he sold the suit properties within one month of allocation, the sale agreement should have been executed within the same year, i.e, in 1980. His evidence was contradicted by the sale agreement, which shows that it was executed on 10th December 1990. This discrepancy raises doubts about the actual date of execution of the agreement.

171. The 1st Defendant expressed concerns that Sadique Makewa was issued with a letter of allocation subsequent to the to the issuance of the title which in his view appears illogical.
172. The title for parcel No. Makueni/Kinyambu/3144 shows that it was registered in the name of Sadique Makewa on 29th January 1999. The letter of offer for the suit property is dated 31st July 2002 and states as follows in part:-

“The Settlement Fund Trustees has offered you Plot No. 31444 of approximately 33.46 hectares at Kinyambu Settlement Scheme in Makueni District.....This offer is valid for 90 days from the date of this letter. Within this period you should pay 10% deposit for the plot and be documented accordingly failure to which will lead to cancellation of the offer without further notice.”

As correctly observed by the 1st Defendant, the letter of offer should have preceded the issuance of the title.

171. It is trite law that in order for an allotment letter to become operative, the allottee is required to comply with the conditions set out therein. PW1 produced a letter of offer for parcel No. 350 dated 12th January 1999, issued to the late Sadique Makewa Mulei. The offer was valid for 90 days on condition that he pays 10% deposit for the plot, failure to which the offer would be cancelled without further notice. It is therefore incumbent on the Plaintiffs to satisfy this court that the late Sadique Makewa Mulei accepted the offer and made payment within the specified period.
172. The Plaintiffs did not produce any evidence to demonstrate that the late Sadique Makewa Mulei made a written acceptance of the offer and/or made payment within 90 days from the date of the offer letter.



Interestingly, the Plaintiff produced the title, which was issued on 29th January 1999, 17 days after the letter of offer.

PW2 appeared to be an untruthful witness. At one point, he told the court that he sold the suit land one month after it was allocated to him. Similarly, he claimed that he was allocated the suit land in 1980, yet the record clearly shows that he was allocated the land in 1985. It is evident that he did not develop the suit land. Based on the evidence on record, his allocation of the suit properties is marred with illegalities. Based on the evidence on record, this court finds and holds that Peter Mutua Ndala and Peter Masoa Muindi, both deceased, are the rightful owners of land parcel Nos. Makueni/Kinyambu/350 and 3144.

171. Regarding land parcel No. Makueni/Kinyambu/293, the 4th Defendant, stated that the plot was allocated to her late father. She informed the court that they could not locate the letter of allotment after his death. She did not adduce any evidence to show how her late father acquired the suit property. Similarly, the 4th Defendant failed to prove that the late Sadique Makewa Mulei fraudulently obtained title for land parcel No. Makueni/Kinyambu/293. In the circumstances, this court finds and holds that the 4th Defendant failed to prove her claim against the Plaintiffs and is therefore not entitled to the orders sought. Having confirmed that she is in occupation of the suit land, I find that she is a trespasser.
172. It is not in dispute that land parcel Nos. Makueni/Kinyambu/3140 and 216 are registered in the name of the late Sadique Makewa Mulei. The Plaintiffs did not adduce any evidence to show that the Defendants had trespassed on the said parcels. PW2 confirmed that the only parcels in dispute were Nos. Makueni/Kinyambu/35 and 3144.
173. Section 26 of the [Land Registration Act](#) provides 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.”

171. In the case of *Munyu v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009, where the court held that:-

“...the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrances, including any and all legal interests which would not have been noted in the register.”

171. Based on the evidence on record, I find that the titles for land parcels Nos. Makueni/Kinyambu/350 and Makueni/Kinyambu/3144 were illegally issued to the late Sadique Makewa Mulei since they belonged to Peter Mutua Ndala and Peter Masoa Muindi. Based on the foregoing, this court finds and holds that the 1st and 2nd Defendants are not trespassers on the suit properties.
172. The 1st Defendant is seeking a declaration that he is entitled to the suit property by way of adverse possession and seeks to be registered as the proprietor thereof.



173. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act*, which stipulates that:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.”

171. Further, Section 13 provides that:

1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under Section 9, 10, 11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

171. Section 38 gives guidelines on the procedure to be followed by a person claiming adverse possession.

172. The ingredients of the doctrine of adverse possession were discussed in the case of *Wambugu Vs Njuguna (1983) KLR 173*, where the Court of Appeal held that: -

“Adverse possession contemplates two concepts: Possession and discontinuance of possession. It further held that the proper way of assessing proof of Adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

171. The ingredients were reaffirmed by the Court of Appeal in the case of *Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) eKLR* where it was held that:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya of 12 years. The process springs into action essentially by default or inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor stealth nor under licence of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner.”

171. It is well settled that a party claiming adverse possession ought to prove that his possession was peaceful, open, and continuous. The possession should not have been obtained through force, in secrecy, or without the authority or permission of the owner.



172. For the 1st Defendant to be entitled to the suit property by way of adverse possession, he must demonstrate that he has been in continuous, uninterrupted occupation for a period of not less than 12 years.

173. In *Mombasa Teachers Co-operative Savings and Credit Society Limited Vs Robert Muhambi Katana & 15 Others* [2018] eKLR, the Court of Appeal stated that: -

“Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim *nec vi nec clam nec precario*.”

171. The 1st Defendant contended that he has been in continuous and uninterrupted occupation of the suit property for a period spanning over 40 years where he carries out farming activities.

172. As to the nature of occupation or possession, the 1st Defendant testified that his father acquired the suit property in 1972 and took possession thereof.

173. The record shows that the subject property was the subject of a dispute from the early 1990s until 2014.

174. By the computation of the above sequence of events, the 1st Defendant has clearly never been in possession of the suit property for a continuous period of 12 years without interruption by the Plaintiff. The evidence adduced by both the Plaintiff and the 1st Defendant shows that the parties herein have been asserting their claim of ownership of the suit property at various levels, ranging from the Area Assistant Chief, the Chief, and the D.O. up to the time when the suit herein was filed.

175. That notwithstanding, Section 37 of the *Limitation of Actions Act* provides that adverse possession can only apply where the land is registered. In my view, adverse possession can only run against the title of a registered proprietor. In the case of *Titus Kigoro Munyi Vs Peter Mburu Kimani* (2015) eKLR, the Court of Appeal held that the limitation period for purposes of adverse possession starts running after the registration of the land in the name of the Plaintiff. In the matter at hand, the time can be computed from 29th January 1999, when Sadique Makewa was issued with a title for the suit property.

176. From the foregoing, I find that the 1st Defendant has demonstrated to the satisfaction of this court that he is entitled to the suit property by way of adverse possession.

177. The Defendants have sought the cancellation of the titles and reversion of the registration in their names.

178. Section 80(1) of the *Land Registration Act* provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

171. Having established that the certificates of title for land parcels No. Makueni/Kinyambu/350 and Makueni/Kinyambu/3144 were obtained illegally, and are therefore considered null and void, they are impeachable and should be cancelled.

172. In the end, I find that the Plaintiffs have not proved their case on a balance of probabilities regarding parcels Nos. Makueni/Kinyambu/350, Makueni/Kinyambu/3144, Makueni/Kinyambu/216 and Makueni/Kinyambu/3140. Accordingly, the Plaintiffs' suit is dismissed in that regard. I also find that the 4th Defendant has not proved her claim against the Plaintiffs as required by the law. Consequently,



her claim against the Plaintiffs is hereby dismissed. I find that the 1st and 2nd Defendants' counterclaim succeeds partially against the Plaintiffs.

173. The upshot of the foregoing is that I enter judgment as follows:-

- a) A declaration is hereby issued that the 4th Defendant is not the legal owner of land parcel No. Makueni/Kinyambu/293.
- b) A declaration is hereby issued that the title deed for land parcel No. Makueni/Kinyambu/3144 issued in favor of Sadique Makewa Mulei, deceased, was illegally issued.
- c) The registration of Sadique Makewa Mulei as the proprietor of land reference number Makueni/Kinyambu/3144 is hereby cancelled, and the land registrar shall rectify the register to enter the name of the estate of Peter Mutua Ndala as the registered proprietor thereof.
- d) A permanent injunction restraining the Plaintiffs, their servants, agents, and or assigns from interfering with the 1st Defendant's occupation of the property known as Makueni/Kinyambu/3144.
- e) A declaration is hereby issued that the title deed issued for Makueni/Kinyambu/350 issued in favour of the late Sadique Makewa Mulei was illegally issued and the same be registered in the name of the estate of Peter Masoa Muindi.
- f) Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF SEPTEMBER. 2025.

IN THE PRESENCE OF: -

Ms. Kwama holding brief for Mulwa for the Plaintiffs

King'oo for the 1st Defendant

Muli holding brief for Nzavi for the 2nd and 4th Defendants

Ahmed – Court Assistant

