

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC NO. 1 OF 2024

[FORMERLY MERU ELC CASE NO. 29 OF 2021].

ELIZABETH NKATHA OMUSE1ST
PLAINTIFF

SAMUEL GIKUNDI M'RIMBERIA2ND PLAINTIFF

ANDREW KAI KARANJA3RD PLAINTIFF

GEOFFREY MARITI M'IKURU4TH PLAINTIFF

JOSHUA MIRITI ROMAN5TH
PLAINTIFF

ROBERT GITONGA MUGAMBI6TH PLAINTIFF

TIMOTHY BUNDI7TH PLANTIFF

JOSPHAT KINOTI MURIIRA8TH PLAINTIFF

FREDRICK GATOBU9TH PLAINTIFF

MARTIN WANYORO GATONYE10TH
PLAINTIFF

SARAH KANYUA MURONGA11TH PLAINTIFF

JACOB MURIIRA BUNDI12TH PLAINTIFF

NICHOLAS KOOME MUGAMBI13TH PLAINTIFF

MICHAEL KOBIA MUCHIRI14TH
PLAINTIFF

BONIFACE KATHURIMA MUTUA15TH
PLAINTIFF

LUCY MWONJIRU MUKETHA16TH
PLAINTIFF

JOYCE KANARIO17TH
PLAINTIFF

STEPHEN IBAYA IBURI18TH PLAINTIFF

PAUL TARATISIO THAMBURA19TH PLAINTIFF

ANDREW MURIMI MACHARIA20TH PLAINTIFF

PETER KANGI21ST PLAINTIFF

DORCUS WAKANYI22ND PLAINTIFF

VERSUS

KENYA LINEN DRAPERS LTD1ST
DEFENDANT

COUNTY EXECUTIVE COMMITTEE MEMBER LANDS ISIOLO
COUNTY GOVERNMENT OF ISIOLO2ND
DEFENDANT

ATTORNEY GENERAL3RD DEFENDANT

AND

KENYA LINEN DRAPERS LTDCOUNTERCLAIMER

VERSUS

ELIZABETH NKATHA OMUSE & 21 OTHERSDEFENDANTS
TO THE COUNTERCLAIM

JUDGMENT

1. The Plaintiffs approached the court *vide* **Plaint** dated **27th July 2020**; and wherein same sought diverse reliefs. The **Plaint** under reference was subsequently amended, resting with the amended **Plaint** dated **30th January 2024**. The reliefs sought at the foot of the said amended **Plaint** are as hereunder;

- (i) *Cancellation of the letter of allotment referred to as No. 31560/Ix or any title that may have been issued to the 1st defendant in respect of land parcel No. Isiolo Township Block 5/70/FR NO. 508/98 referred in PDP NO. ISL/117/65/07-19.*
- (ii) *Any other or such better relief the Hon. Court may grant.*
- (iii) *Costs of the suit.*

2. The 1st defendant duly entered an appearance and filed a statement of defence dated 29th January 2021. Subsequently, the statement of defence under reference was duly amended, resting with the amended statement of defence and counterclaim dated 16th March 2022; and wherein the 1st defendant sought the following reliefs:

- (a) *The dismissal of the Plaintiff's suit with costs.*
- (b) *An order of Eviction against the plaintiffs to vacate the 1st defendants plot NO. Isiolo township block 5/70 and the O.C.S Isiolo Police Station be ordered to evict plaintiffs from the plot.*
- (c) *General damages for trespass to land.*

(d) Costs and interests at court rates.

3. The 2nd defendant entered appearance and filed a statement of defence. For coherence, the 2nd defendant denied the claims at the foot of the amended pleadings. In particular, the 2nd defendant denied that same was involved in the fraudulent allocation of the suit plot to the 1st defendant.
4. The Hon. Attorney General [the 3rd defendant] entered an appearance and filed a statement of defence. Similarly, the 3rd defendant denied the claims on behalf of the plaintiff.
5. The subject matter came up for hearing on 2nd April 2025, whereupon the advocates for the parties proposed to forego the plenary herein. In particular, the advocates for the parties sought to adopt and rely on the pleadings; the witness statements; and the list and bundle of documents that had been filed by the respective parties. Furthermore, the parties also agreed to forego cross-examination of the witnesses.
6. At the instance and request of the parties, the court proceeded to and recorded the following consent:
 - (i) *The plaintiffs herein do hereby adopt and rely on the witness statements filed by and on behalf of the plaintiffs and the said witness statements be and are hereby constituted as the evidence in chief of the plaintiffs and the witnesses.*
 - (ii) *The documents at the foot of the list and bundle of documents filed by and on behalf of the plaintiffs be and are*

hereby admitted and produced as exhibits on behalf of the plaintiffs.

- (iii) The defendants do hereby agree to forfeit the right of cross-examination.*
- (iv) The plaintiff's case be and is hereby closed upon the adoption of the witness statement and the production of the bundle of documents in terms of clause (i) & (ii) hereof.*
- (v) The 1st defendant herein adopts and relies on the statement of defence; the counterclaim and the witness statements filed on its behalf and the same be and are hereby constituted as the evidence in chief of the witnesses.*
- (vi) Furthermore, the documents at the foot of the list and bundle of documents filed by and on behalf of the 1st defendant be and are hereby admitted as exhibits before the court.*
- (vii) The plaintiffs herein hereby agree to forfeit the right of cross-examination of the defendants.*
- (viii) The 1st defendant's case be and is hereby closed upon the adoption of the witness statement as the evidence in chief and production of the documents in terms of the preceding clauses.*
- (ix) The 2nd defendant hereby adopts and relies on the statement of defence and the witness statements and same be and are hereby constituted as the evidence in chief on behalf of the 2nd defendant.*
- (x) Furthermore, the documents at the foot of the list and bundle of documents filed by the 2nd defendant be and are hereby admitted and constituted as exhibits on behalf of the 2nd defendant.*

- (xi) *The plaintiffs and the rest of the defendant hereby agree to and do forfeit the right of cross-examination.*
- (xii) *The 2nd defendant's case be and is hereby closed upon the adoption of the witness statements as the evidence in chief and production of the documents as exhibits in terms of the preceding clauses.*
- (xiii) *The 3rd defendant hereby adopts and relies on the statement of defence and reiterates the contents thereof.*
- (xiv) *The 3rd defendant also adopts and relies on the contents of the land registrar's report that was filed by and on behalf of the 2nd defendant, and which has already been admitted as an exhibit.*
- (xv) *The plaintiff and the rest of the defendant hereby agree to forego and forfeit the right of cross-examination.*
- (xvi) *The 3rd defendant's case be and is hereby closed, subject to the adoption of the land registrar's report.*

7. In addition, the advocates for the parties thereafter sought time to file and exchange written submissions. Suffice it to state that the consent by the parties [who are the owners of the case] was duly adopted and constituted as an order of the court. Moreover, the court ventured forward and circumscribed the timelines for the filing and exchange of written submissions.

8. The plaintiffs filed written submissions dated 24th June 2025 and wherein the plaintiff has highlighted three [3] key issues for consideration. The issues highlighted by the plaintiff are, *namely*; what is the effect of a consent on the production of documents; whether the registrar has powers

to cancel the title; and whether the court can issue orders cancelling title documents.

9. Regarding the first issue, learned counsel for the plaintiffs has submitted that the parties herein entered into a consent, whereby same agreed to have the documents that had been filed by the respective parties adopted and admitted as exhibits. To this end, learned counsel for the plaintiff has posited that by entering into the consent, the 1st defendant bound itself and hence same cannot now dispute the contents of the documents that were filed. In addition, it has been contended that once documents/evidence have been tendered before the court, the court is enjoined to take cognizance of the said evidence.

10. Flowing from the foregoing, learned counsel for the Plaintiffs has submitted that the court ought to be guided by the evidence tendered on behalf of the plaintiffs. Moreover, learned counsel has cited and referenced the decisions in the case of **Dakianga Distributors Ltd vs Kenya Seed Co. Ltd (2015) eKLR and Florah N. wasike vs Destimo Wamboko (1988) eKLR;** to anchor the contention that a consent order is binding on the parties and has contractual implications.

11. The second issue that has been highlighted by counsel for the plaintiffs touches on and concerns whether the land registrar has the power to cancel the title documents. To this end, it has been submitted that the land registrars are divested of the powers to cancel titles. Furthermore, it has been contended that the power to cancel a certificate of title inheres in

a court of law by dint of the provisions of section 80 of the Land Registration Act, 2012.

12. Turning to the third issue, learned counsel for the plaintiffs has submitted that the certificate of title that was issued to and which is being held by the 1st defendant was procured and obtained unprocedurally, irregularly and illegally. Furthermore, it has been submitted that where a certificate of title is procured contrary to the law, it is incumbent upon a court of law to cancel and nullify the certificate of title.

13. Additionally, it has been submitted that the 2nd and 3rd defendants have confirmed/indicated that the certificate of title in favour of the 1st defendant was procured by misrepresentation[s]. In this regard, learned counsel for the plaintiffs has referenced the report of the task force chaired by the land registrar and wherein it is stated that the 1st defendant's certificate of title was procured and obtained by misrepresentation and thus same does not vest in the 1st defendant any lawful rights and or interests.

14. Arising from the foregoing, learned counsel for the plaintiffs has implored the court to find and hold that the plaintiffs have indeed proved and established that the 1st defendant's title is illegal and invalid. To this end, the court has been invited to grant the reliefs sought at the foot of the amended plaint.

15. The 1st defendant filed written submissions dated 3rd July 2025; and wherein same has highlighted four [4] issues. The issues highlighted by the 1st defendant are *namely*; the plaintiffs have failed to prove their claim to the suit property; the 1st defendant procured and obtained the certificate

of title lawfully upon allotment of same; the plaintiffs have not demonstrated any fraud as against the 1st defendant; and that the report by the land registrar purporting to cancel the 1st defendant's title is contrary to the provisions of article 40 of the Constitution 2010.

16. Regarding the first issue, learned counsel for the 1st defendant has submitted that the burden of proof lies on the plaintiffs to demonstrate that same are the lawful and legitimate owners of the suit property. However, it has been submitted that the plaintiffs failed to tender and or produce before the court any credible evidence to demonstrate their entitlement to the suit property. In addition, it has been submitted that various plaintiffs trace their claim to their parents and relatives, who are deceased. Nevertheless, it has been posited that the claims beforehand have been filed without the requisite grant of letters of administration.

17. In respect of the second issue, learned counsel for the 1st defendant has submitted that the 1st defendant duly applied for and was thereafter allocated the suit property on the basis of a letter of allotment dated 26th February 1993. Moreover, learned counsel for the 1st defendant has also submitted that the allotment of the suit property to the 1st defendant was also predicated upon an approved part development plan No. ISL/117/65/07-10.

18. Learned counsel further submitted that the 1st defendant complied with the terms of the letter of allotment and same was subsequently issued with a certificate of lease dated 23rd July 2019. In this regard, counsel has submitted that the 1st defendant is therefore the lawful and registered

proprietor of the suit property. Moreover, learned counsel has posited that by virtue of being the registered proprietor of the suit property, the 1st defendant is therefore entitled to partake of and benefit from ownership of the suit property. For good measure, learned counsel has cited and referenced the provisions of sections 24 and 25 of the Land Registration Act 2012; and article 40 of the Constitution 2010.

19. Turning to the third issue, learned counsel for the 1st defendant has submitted that it was incumbent upon the plaintiffs to tender and produce before the court credible evidence to demonstrate the plea of fraud. Furthermore, it has been contended that no evidence was tendered and or adduced to show fraud.

20. As pertains to the fourth issue, learned counsel for the 1st defendant has submitted that though it was purported that a letter was sent to the 1st defendant inviting same for ADR, the said letter was addressed to (sic) Anthony Kinywa Anchore, who is not known to the 1st defendant. To this end, it has been submitted that the 1st defendant was neither privy to nor involved in the work of the task force that was chaired by the land registrar.

21. On the other hand, it has been submitted that the report by the land registrar, which purported to rectify and revoke the certificate of title held by the 1st defendant is illegal, unlawful and thus invalid. In this regard, it has been submitted that the land registrar is not seized of the requisite jurisdiction and or mandate to cancel a certificate of title. The provisions of section 80 of the Land Registration Act 2012 have thereafter been invoked and referenced.

22. In view of the foregoing, learned counsel for the 1st defendant has submitted that the plaintiffs have failed to establish and prove their claim to the requisite standard. On the contrary, it has been contended that the 1st defendant holds a valid and good title to the suit property. To this end, the court has been invited to grant the relief[s] sought at the foot of the counterclaim.

23. The 2nd defendant filed written submissions dated 14th July 2025; and wherein same has highlighted and canvassed two [2] key issues, *namely*; whether there was fraud proved against the 2nd defendant; and whether the certificate of lease held by the 1st defendant is a clean title.

24. Regarding the first issue, learned counsel for the 2nd defendant has submitted that it was incumbent upon the plaintiffs to tender and produce before the court credible evidence to demonstrate that the 2nd defendant committed fraud as alleged. To this end, learned counsel has submitted that the plaintiffs ought to have tendered the minutes [if any] of the county council of Isiolo [now defunct] showing that the council [now the county] was involved in the allocation of the plot.

25. Nevertheless, it has been submitted that the plaintiffs have neither tendered the minutes or any evidence to show that the 2nd defendant was involved in the allocation of the suit property. In any event, it has been submitted that the letter of allotment in favour of the 1st defendant shows that same was issued and executed by the commissioner of lands [now defunct] and not by the 2nd defendant.

26. Turning to the second issue, learned counsel for the 2nd defendant has submitted that the certificate of title held by the 1st defendant is neither lawful nor clean. In particular, it has been submitted that the 1st defendant tendered evidence and demonstrated that the part development plan was prepared subsequent to and after the letter of allotment dated 26th January 1993. In this regard, it has been submitted that the impugned letter of allotment and the consequential certificate of lease are therefore illegal and unlawful.

27. To buttress the submissions that the letter of allotment and the certificate of title held by the 1st defendant are illegal, learned counsel for the 2nd defendant has cited and referenced the holding in the case of **Nelson Kazungu Chai & 9 others vs Pwani University (2014) eKLR and Dina Management vs The County Government of Mombasa & 5 others (2023) KESC 30.**

28. Finally, learned counsel for the 2nd defendant has submitted that the report that was prepared by the task force chaired by the land registrar remains in existence. For good measure, it has been submitted that the said report has neither been challenged nor quashed. To this end, the court has been invited to find and hold that the contents of the said report are lawful and thus same ought to be taken into account.

29. Premised on the foregoing, learned counsel for the 2nd defendant has implored the court to find and hold that the certificate of lease in favour of the 1st defendant was procured by misrepresentation[s] and thus same is illegal.

30. The Honourable attorney general [3rd defendant] filed written submissions dated 28th July 2025 and wherein same has highlighted four issues, *namely*; the statutory powers of the land registrar to rectify the register; indefeasibility of title does not sanction illegality or fraud; compelling evidence of procedural flaws and misrepresentation; and the legal position in respect to occupiers.
31. Regarding the first issue, learned counsel for the 3rd defendant has submitted that the land registrar is seized of the requisite jurisdiction and mandate to rectify the register of land. To this end, learned counsel has cited and referenced the provisions of Section 79 of the Land Registration Act, 2012. In particular, it has been submitted that the land registrar was within his statutory mandate in ordering and or directing the revocation of the certificate of title in terms of the report dated 21st June 2021.
32. The next issue that has been raised and highlighted by the 3rd defendant is to the effect that the mere possession of a certificate of title/lease does not by and of itself sanction illegality and fraud. In this respect, it has been submitted that where a certificate of title has been procured and obtained illegally, such a certificate of title cannot suffice. In this regard, learned counsel has cited and referenced the decision of the Supreme Court in the case of **Dina Management Ltd vs County Government of Mombasa & 5 others (2023) KESC**.
33. The 3rd defendant has also submitted that there exists compelling evidence that the part development plan [PDP] held by the 1st defendant was prepared and issued long after the letter of allotment. In this respect, learned counsel has invited the court to take cognizance of the evidence of the 1st defendant's witness namely Anthony Kinyua Anjuri.
34. To the extent that the part development plan is indicated to have been prepared and issued long after the letter of allotment, the 3rd defendant

has posited that the title to the suit property is therefore illegal. Furthermore, learned counsel has invited the court to take into account the report of the task force chaired by the land registrar dated **21st June 2021**.

35. Finally, learned counsel for the 3rd defendant has submitted that the process pertaining to allocation of public land entails ascertainment of whether the land [subject of intended allocation] is subject to occupation of third parties or otherwise. Moreover, it has been submitted that it was incumbent upon the commissioner of land to ensure that the land that was being allocated was clear of occupation.

36. Based on the foregoing, learned counsel for the 3rd defendant has submitted that there exists clear, credible and compelling evidence to the effect that the certificate of title held by the 1st defendant was procured on the basis of misrepresentation. Additionally, it has been contended that the report by the task force dated 21st June 2021; has highlighted various irregularities, which /impugn the validity of the certificate of title held by the 1st defendant.

37. Having reviewed the pleadings filed by/on behalf of the parties; having taken into account the evidence tendered; the contents of the documents; and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject matter turns on three [3] key issues, *namely*; whether the plaintiffs have established and proved their claim to the suit land; whether the plaintiffs have established and proved fraud as against the defendants and in particular, the 1st defendant or otherwise; and whether the 1st defendant has proved its counterclaim pertaining to ownership of the suit property.

38. Before venturing to address the issues that have been highlighted in the preceding paragraph, it is important to address one preliminary issue which has been adverted to by both the 2nd and 3rd defendants. The issue herein touches on the legality of the report by the land registrar dated 21st June 2021 and which sought to cancel/nullify/rectify the certificate of title held by the 1st defendant. It is instructive that the nullification and or rectification of a certificate of title can only be undertaken by a court of law. **[See the provisions of section 80 of the Land Registration Act 2012].**

39. To the extent that it is only a court of law that is seized of the jurisdiction to cancel or nullify a certificate of title, it is common ground that any report, the one dated 21st June 2021 not excepted, which seeks to nullify a certificate of title is a nullity ab initio. Suffice it to state that the land registrar could not arrogate unto himself the power to determine whether or not the certificate of title held by the 1st defendant was illegal and or unlawful. In addition, the land registrar could not also purport to cancel the certificate of title in favour of the 1st defendant.

40. Simply put, the actions by the land registrar at the foot of the report dated 21st June 2021, were *ultra vires* and thus invalid. **[Macfoy vs United Africa Ltd (1961) 3 ALL ER 1172].**

41. Back to the issues that were highlighted for determination. In respect of the first issue, it is imperative to underscore that the subject suit was mounted by the plaintiffs. It is the plaintiffs who approached the court, contending that what constitutes the suit property lawfully belongs to them [plaintiffs] on the basis of longevity of occupation. Furthermore, the plaintiffs contended that what constitutes the suit property was

occupied by their parents, guardians and or relatives. In addition, the plaintiffs posited that same have equally developed their respective portions of their suit property.

42.It was the further position by the plaintiffs that same have also been paying rates to the county government of Isiolo. To this end, the plaintiffs therefore invited the court to find and hold that same are the lawful owners of the suit property and thus entitled to the orders sought at the foot of the amended Plaint.

43.To the extent that it is the plaintiffs who came to court making the foregoing assertions, it is common ground that the burden of proof laid on the shoulders of the plaintiffs. For good measure, the plaintiffs were obliged to tender and place before the court plausible evidence to demonstrate that same are indeed entitled to the suit property. **[See the provisions of Sections 107;108; and 109 of the Evidence Act, Chapter 80, Laws of Kenya]**

44.Nevertheless, it is not lost on me that the plaintiffs herein by virtue of entering into the consent and thereafter foregoing the right to explain their case to the court threw away their chance to discharge the burden of proof. If anything, the court was left with inter-alia the photographs, which were not accompanied by the requisite electronic certificate in accordance with the provisions of section 106B of the Evidence Act Cap 80 Laws of Kenya. Suffice it to state that the said photographs were intended to demonstrate [sic] occupation; possession; and use.

45.However, in the absence of the requisite Electronic Certificate in accordance with the Law, the documents under reference are inadmissible; and in any event, devoid of probative value.

46.Other than the foregoing, it is worthy to recall that a number of the plaintiffs stake their claim on the basis of occupation and rights of their

parents, relatives and or predecessors, who are said to have passed on. There is no gainsaying that where a claim is made on behalf of a deceased person, then the claimant must first and foremost obtain the requisite grant of letters of administration. [See Section 82 of the Law of Succession Act Cap 160, Laws of Kenya]. [See also **Rajesh Pranjivan Chundasama vs Sailesh Pranjivan Chundasama (2014) eKLR**; and **Edith Virginia Wambui Otieno vs Ougo & another (1987) eKLR**, respectively.

47. Additionally, even though the plaintiffs have laid a claim to the suit property on the basis of longevity of occupation, it is important to point out that the plaintiffs needed to show and demonstrate whether what constitutes the suit property was ancestral land or otherwise. Moreover, ownership of what constitutes ancestral land is ordinarily subject to land consolidation and land adjudication, respectively. [See the provisions of **the Land Consolidation Act, Chapter 283; and Land Adjudication Act, Chapter 284, Laws of Kenya**]

48. It is evident that the plaintiffs did not tender any evidence to connect what now constitutes the suit property to ancestry. To this end, the claim by the plaintiffs on the basis of [sic] longevity of occupation; and possession falls by the wayside.

49. The other aspect that merits consideration touches on the contention that the plaintiffs have been paying rates to the county government of Isiolo. I want to believe that by paying rates to the county government of Isiolo,

the plaintiffs herein seem to concede and acknowledge that what constitutes the suit property was/is part of trust land prior to its allocation.

50. The question that does arise is whether the plaintiffs herein can stake a claim to ownership of what was trust land on the basis of occupation, possession and use. I am afraid that trust land [formed part of government land] and was therefore incapable of being acquired by way of prescription, longevity of occupation or adverse possession. [**See the provisions of section 41 of the Limitations of Actions Act Cap 22 Laws of Kenya**].

51. If the plaintiffs herein acknowledge and concede that what constitutes the suit property was previously trust land, then it behooved the plaintiffs or their predecessors to make the requisite applications to the county council of Isiolo [now defunct] or the county government of Isiolo. However, the plaintiffs herein cannot merely approach a court of law and stake a claim to ownership of the suit property without documentation or at all.

52. In view of the foregoing observations, and taking into account the fact that the plaintiffs bore the burden of proof, I am unable to find and hold that the plaintiffs have proved their case. On the contrary, what is apparent is that no evidence has been tendered by the plaintiffs and the court was left to grope in darkness in endeavouring to discern/ ascertain the basis of the plaintiffs' claim.

53. Before concluding on this issue, it suffices to reference the decision of the Court of Appeal in the case of ***Mucheru vs the National Bank of Kenya Ltd (2019) eKLR***, where the court discussed at length the burden and

standard of proof. Furthermore, the court also highlighted the obligation of the claimant to tender plausible; compelling; and quality evidence in proving the claim beforehand.

54. For coherence, the court stated thus;

15. Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party's version of the story is more believable. In this regard, we are inclined to agree with the findings of the two courts below. We have no plausible reason to interfere with the findings above. The respondent submitted that the appellant demonstrated to the bank his capability to repay the credit sum applied for and tendered his Passport No. A147451. Further, the passport bore the appellant's photograph and it is on the basis of that the bank official who received his application verified that indeed the appellant was in person at the time. The appellant's denial to have appended his signature, in our view, does not seem well grounded. This ground then fails.

16. Secondly is the issue of burden of proof. The appellant contended that the trial magistrate shifted the burden to him to prove that indeed he was not the one who signed the application and that he ought to have brought an expert in handwriting to aid his case. On the other hand, it was the respondent's argument that the burden of proving that the signature was not his rested upon the appellant as he was the one who alleged that the signature was not his.

*17. On matters evidence, Madan, JA (as he then was) in **CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103** stated: ?"Proof is*

the foundation of evidence. As stated in the definition of "evidence" in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...."

18. The Evidence Act is clear enough upon whom the burden of proof lies. **Section 107** provides as follows:

"1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person."

Section 109 of the same Act further provides:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lies on any particular person."

19. In **Karugi & Another v Kabiya & 3 Others** [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.[**See also Daniel Toroitich Arap Moi versus Mwangi Stephen Mureithi** [2014] eKLR]

55. Turning to the second issue, *namely*; whether the plaintiffs have proven the plea of fraud as against the defendants; and in particular, the 1st defendant. It is important to recall and reiterate that the gist of the plaintiff's case was to the effect that the suit property belongs to same, but was illegally allocated to; and thereafter after registered in the name of the 1st defendant. Moreover, the plaintiffs contended that the allocation and the ultimate registration of the suit property were fraudulent.

56. It is also worthy to note that the plaintiffs ventured forward and particularized the fraud at the foot of paragraph 15 of the amended Plaint. The particulars of fraud as pleaded are as hereunder;

- (i) *Purporting to acquire land that was not open for allotment.*
- (ii) *Disregarding the interests of the plaintiffs who are in occupation and possession of the land.*
- (iii) *Colluding with the 2nd defendant to acquire the plaintiffs' land illegally.*

57. While discussing issue number one [1], I have found and held that the plaintiffs herein have neither demonstrated nor proved that same had any lawful rights to and in respect of the suit property. Absent legal rights to the suit property, the plaintiffs cannot be heard to contend that their interests were [sic] disregarded.

58. Additionally, the plaintiffs have also contended that the allocation and acquisition of the suit property was undertaken in collusion with the 2nd defendant. Nevertheless, it is not lost on me that the process of allocation of what previously constituted government land was vested in the president of the Republic of Kenya and the commissioner of lands. [See

Sections 3, 6, 7, 8 & 9 of the Government Land Act, Cap 280 Laws of Kenya now repealed].

59. I beg to state that the allocation having been undertaken by the commissioner in exercise of his delegated authority, the validity of the letter of allotment could only have been impeached by joining/impleading National Land Commission. In any event, even taking into account that there was [sic] collusion with the 2nd defendant, it behooved the plaintiffs to place before the court evidence to that effect.

60. The other aspect of fraud that has been adverted to relates to the fact that the land in question was not open for allotment. Regarding this contention, I beg to state that the 1st defendant has placed before the court a duly approved part development plan underpinning the letter of allotment. In addition, the 1st defendant has also tendered evidence pertaining to the ultimate survey of the suit property; the issuance of the beacon certificate; the issuance of the indent and the certificate of lease.

61. To my mind, no evidence has been tendered and or placed before the court to demonstrate that what now constitutes the suit property was not open for allotment. In any event, nothing has been tendered to demonstrate that the plaintiffs had prior letters of allotment attaching to and concerning the suit property.

62. It is the plaintiffs who had impleaded fraud. It was therefore incumbent upon them to place before the court the evidence to discharge the burden of proof. Moreover, it is common ground that proof of fraud requires

clear, plausible and compelling evidence. In addition, the standard of proof is slightly higher than the balance of probabilities.

63. In the case of *Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR)* the Court of Appeal stated as hereunder;

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

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

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

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR* expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We

start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

64. The law pertaining to proof of fraud was recently re-stated in the case of *Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)*.

65. For coherence, the court stated thus:-

*In the same vein, the Court in the case of *Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR* reiterated that: “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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...”*

66. Flowing from the foregoing, I am afraid that the totality of the evidence on record does not demonstrate/prove fraud. Moreover, there is no gainsaying that the plaintiffs were enjoined to demonstrate the allegations to the requisite standard.

67. Next is the issue as to whether the 1st defendant has established that same is the registered and lawful owner of the suit property or otherwise. To start with, the 1st defendant has placed before the court a copy of the letter of allotment; the part development plan; the consent letter; letter of no objection from the county council of Isiolo [*now defunct*]; the beacon certificate; the indent and the certificate of lease.

68. The totality of the documents that were tendered by the 1st defendant were neither challenged or impugned. Furthermore, it is worthy to recall that the documents were produced by consent. In this regard, the court is called upon to take cognizance thereof, subject only to the applicable law.

69. I have looked at the documents tendered and I have not discerned any irregularity and or illegality. Furthermore, I have since held that the report dated 21st June 2021 by the land registrar was made *ultra vires*. The said report was *void and invalid*.

70. From the foregoing, I am constrained to and do hereby find that the 1st defendant has indeed established its claim to and in respect of the suit property. To this end, there is no gainsaying that the 1st defendant is entitled to partake of and benefit from the ownership rights attaching to the suit property. Such rights include the right to exclusive possession; occupation; and use. [See Sections 24 and 25 of the Land Registration Act 2012]. [See also the decision in **Moya Drift Farm Ltd vs Theuri (1973) E.A; Mohanson Kenya Ltd vs Land Registrar Kajiado (2017) eKLR and Waas Enterprises Ltd vs Nairobi City Council (2014) eKLR.**]

FINAL DISPOSITION.

71. Having analysed the thematic issues that were captured in the body of the Judgment, it must have become apparent that the plaintiffs herein have failed to establish and or prove their claim to the suit property. For good measure, it suffices to underscore that longevity of occupation cannot confer ownership rights to and in respect of land that previously fell within purview of the Trust Land Act, Chapter 288, Laws of Kenya.

72. On the other hand, it is also apparent that the documentation that was placed before the court on behalf of the 1st defendant have confirmed allocation and ultimate registration of the suit property in favour of the named defendant.

73. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

- (a) The Plaintiffs' suit be and is hereby dismissed.**
- (b) Costs of the suit be and are hereby awarded to the 1st Defendant only.**
- (c) The Counterclaim by the 1st Defendant be and is hereby allowed on the following terms;**
 - (i) A declaration be and is hereby issued that the 1st defendant/counter-claimer is the registered and lawful owner of L.R No. Isiolo Township/Block 5/70.**
 - (ii) The Plaintiffs/defendants to the counterclaim be and are hereby ordered to vacate and hand over vacant possession of the suit property to the 1st defendant within 120 days.**

- (iii) In default by the plaintiffs/defendants to the counterclaim to vacate the suit property in terms of clause (ii) hereof; the counter-claimer shall be at liberty to levy eviction and in this regard, an Eviction order is hereby issued.
- (iv) In the event of Eviction being undertaken by the counter claimer, the costs/expenses incurred shall be certified by the Deputy Registrar and thereafter same shall be borne by the plaintiffs.
- (v) Costs of the counter-claim are awarded to the counter claimer.
- (vi) The Costs in terms of clause [v] shall be borne by the defendants to the counterclaim/Plaintiffs in the main suit.
- (d) Any relief[s] not expressly granted is declined.

74.It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 3RD DAY OF OCTOBER 2025.

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].
JUDGE**

In the presence of:

Mukami/Hussein – Court Assistants

Karanja, Kaume & Joshua Mwiti for the Plaintiffs

Ms.Bett for the 1st Defendant

Mr. Koome Murithi for the 2nd Defendant

Mr. Benjamin Kimathi [Principal Litigation Counsel] for the 3rd defendant