

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. E087 of 2022

**NAISULA ENE STEPHEN KASHIRO (Suing as a Legal
Representative of the Estate of STEPHEN SILETA OLE
KASHIRO..... PLAINTIFF**

VERSUS

LOUIS KIBATHI MUTHARIA.....1ST

DEFENDANT

OLOIKA KENYA LIMITED.....2ND

DEFENDANT

MAPARASHA CO. LIMITED.....3RD

DEFENDANT

JOSEPH GITHUA MUTIGA.....4TH

DEFENDANT

GRACE LILIAN MURUGI MUTIGA.....5TH

DEFENDANT

ALICE WANJIRU MUTIGA.....6TH

DEFENDANT

JUDGEMENT

1. By the Plaint dated 24th October 2022, the Plaintiff claims that her husband, the late Stephen Sileta Ole Kashiro, (herein after referred to as “the Deceased”) was the lawful owner of land known as Kajiado/Osilalei/139 which was illegally and fraudulently transferred to the defendants. It is her case that the 1st defendant fraudulently transferred Kajiado/Osilalei/146 into his name and then subdivided it into parcels Kajiado/Osilalei/1934, 1935, 1936, 1937, 1938, 1939 and 1940 respectively and sold it to the 3rd, 4th, 5th and 6th Defendants. The 2nd defendant is sued for illegally transferring parcel Kajiado/Osilalei/147 into its name.
2. **The plaintiff gave the particulars of fraud as; failing to enter into a sale agreement with her late husband; failing to pay consideration for the parcels; failing to execute any conveyance documents; duping her late husband into believing that there was a joint venture to be undertaken.**
3. She therefore sought the following reliefs;

- a. **Rectification of the register by deleting all fraudulent entries and restoring Kajiado/Osilalei/147, and Kajiado/Osilalei/1934-1940 in the name of Stephen Sileta Ole Kashiro or revocation of titles no. Kajiado/Osilalei/147, and Kajiado/Osilalei/1934-1940 and the same be registered in the names Stephen Sileta Ole Kashiro (deceased).**
- b. **The Deputy Registrar be empowered to sign any transfer documents relating to these proeprties to transfer the land to the Plaintiff or her husband.**
- c. **The Land Registrar Kajiado to dispense with the production or gazettment of titles Kajiado/Osilalei/147, and Kajiado/Osilalei/1934-1940.**
- d. **Costs of the suit.**

4. The **1st Defendant** in his Statement of defence contested the plaintiff's claim on the grounds that it was the Deceased who legally and procedurally subdivided his

parcel Kajiado/Osilalei/99 which gave rise to parcel Kajiado/Osilalei/139, and later to Kajiado/Osilalei/146 and 147 and transferred parcel 146 to him for valuable consideration. It is his case that he has been in physical possession of the said parcel since the purchase and it was only until 2022 that is twelve (12) years later when the plaintiff filed this suit. He urged the court to dismiss the suit with costs.

5. The **2nd defendant** in its statement of defence denied that it acquired Kajiado/Osilalei / 147 fraudulently stating that the Deceased caused parcel known as Kajiado/Osilalei/139 to be subdivided on 8th November 2005; resulting to parcels Kajiado/Osilalei/ 146 and 147 respectively. It is stated that prior to this subdivision, the 2nd defendant had intention of purchasing the land and DW 2 started making payments for the same from 5th May 2003. The transfer of Kajiado/Osilalei/ 147 in its favour was duly undertaken by the Deceased after obtaining consent to subdivide and transfer the same. It is also its case that it has been in possession and occupation of the suit property from 8th November 2005 and at no time did

the Plaintiff challenge their occupation. It is their contention that seeking redress seventeen (17) years later was bad in law under the statute of limitation. As such, the suit should be dismissed with costs.

6. The **3rd defendant** denied the claim by the Plaintiff stating that on 16th May 2016, it purchased parcels; Kajiado/Osilalei/ 1934, 1935, 1939 and 1940 respectively from the 1st defendant for a valuable consideration. This was undertaken due diligence and confirming that the suit properties were registered in the 1st defendant's name. All consents and relevant documents were obtained before the suit properties were transferred. It urged the court to dismiss the suit with costs.
7. The Plaintiff in her reply to these defences reiterated that any transaction in respect to the Deceased's property was done fraudulently and any subsequent Titles ought to be cancelled.

Evidence of the Plaintiffs

8. **PW1, Margaret Naisula Ene Stephen Kashiro**, the plaintiff herein, adopted her witness statement as her

evidence in chief and produced her bundle of documents which was marked as exhibits in this case.

9. **On cross examination** she stated that she knew the 1st defendant as a friend of her late husband. It was her testimony that about nine (9) years ago she saw him around their land in company of a foreigner ('*mzungu*'). She stated that her husband informed her that the visit was in respect to a conservation company that they wanted to register. She stated that it was her son who showed her documents in relation to the alleged sale. She stated that upon the discovery, she ought to have reported it to the Land Registrar or the Director of Criminal Investigations but she did not. She however applied for a caution to be registered against the suit properties on 13th June 2016. She admitted that while her husband passed away in 2011, she filed this suit in 2022 because she did not have all the necessary documents.

10. On **re-examination** she stated that she knew Hellen Nkaisery and Kenneth Kasaine but denied that they purchased the suit property. She also stated that she did

not know who the people in the photographs were or when those photographs were taken.

Evidence of the Defendants

11. **DW1 Louis Kibathi Mutharia** the 1st defendant adopted his witness statement as his evidence in chief and produced the bundle of documents which was marked as exhibits. It was his testimony that the Deceased was a friend and a former classmate of his father in-law. It was also his testimony that the plaintiff was a neighbour to his friend the late Joseph Nkaissery. He further stated that it was the late Nkaissery who informed him that the Deceased wanted to sell a portion of his land. They visited the land and he decided to purchase a portion of it. The Deceased then caused the subdivision of the land, apportioned some of it to his children and sold another portion to him.

12. **On cross examination** he stated that he was informed about the sale by the late Joseph Nkaissery. He also stated that when he decided to relocate to Loitoktok in 2016, he sold the said parcel to Nkaissery. He admitted that the 2nd defendant was also his company and that

there were sale agreements for the purchase although they had not been produced in court. He further stated that he purchased the land for Kshs. 800,000 which was paid over a period of time. The Deceased acknowledged receipt of payments in the presence of one, Jacob Ole Kipury. He also paid the surveyors fees for the subdivision. He stated that it was after completion of payment of the purchase price that the land was transferred to him. He later subdivided the land and sold it to three other people, one of them being the 3rd defendant. He stated that he sold it for Kshs. 17,000,000 after procuring all the necessary documents for the sale and transfer.

13. When he was recalled for further cross examination, he stated that the Plaintiff was aware of the transaction because the discussions were held in her presence although she was not party to the sale agreements. On the issue, that some documents not witnessed, he stated that it was the Advocate's responsibility to ensure that all the documents were duly executed. He confirmed that as per the documents produced, the consent was granted on 2nd November 2005. He could not confirm whether his title

was issued in the year 2003. It was also his testimony that he paid Kshs. 850,000 for the suit property and he confirmed that the stamp duty assessment indicated that the stamp duty was assessed at Kshs. 1,000,000. He further stated that once he acquired the suit property, he subdivided it into three parcels and sold one to Maparasha Limited.

14. **On re-examination** he reiterated that he met the Deceased severally and paid the full purchase price. He also stated that they formed the 2nd defendant to enable one of the director's who was a foreigner, to own land. The 2nd defendant- Alfred Zeal then paid for the twenty five (25) acres of land. He further stated that the transfer documents were drawn by the advocate, and the surveyor, one Mr. Mugo was to follow up on the subdivision obtain the consents on their behalf. He confirmed that he prepared the schedule of payment as a record for the benefit of DW2 who was sending money to him for the purchase.
15. **DW2 Alfred Zaal**, the Director of the 2nd defendant, adopted his witness statement as his evidence in chief

and produced his bundle of documents which was marked as D. Exhibit 1 to 15 respectively. He stated that he knew the Plaintiff because he met her at her home when he visited the Deceased. He also met her sons.

16. **On cross examination** he stated that the sale agreement between him and the Deceased was not produced in Court. He stated that surveyor who undertook the subdivision was instructed by the Deceased but he (DW2) paid part of the surveyor's fees. When asked about the transfer documents, he stated that the Deceased may not have known the names of the directors. He admitted that the 1st defendant was his Co-director and they had the intention of constructing a hotel. He also stated that the Deceased received the full purchase price.

17. **On re-examination** he stated that there was a small guest house and a caretaker's house on the suit property. Further that he stays in the guest house whenever he is around. It was his testimony that the subdivision was undertaken with consent of the Deceased and all documents duly executed. He stated that he would send money to DW1, who would then pay the Deceased in cash

and the Deceased would acknowledge the payment. He reiterated that he had witnesses who could confirm that the Deceased received the purchase price.

18. **DW3 Joseph Ngahu mugo**, a land surveyor adopted his witness statement as his evidence in chief as his evidence in chief. He stated that he knew the Deceased who was a driver at the Kajiado County Council as their offices were close to each other. He stated that in 1997, he subdivided the Deceased's parcel Kajiado/Osilalei/19 into parcels 99 and 100 and that parcel 99 was later subdivided into four portions; parcels 135, 136, 137, 138 and 139 respectively. Upon the subdivision, it was the Deceased's intention to sell parcel 139 which was about 100 acres. He confirmed that he is the one filled the stamp duty declaration form and took the transfer document for stamp duty assessment. It was his testimony that it would not be possible for a valuation of incomplete documents to be undertaken, and the Land Registrar would equally not register incomplete documents. He stated as per the documents on record, the consent, subdivision and transfer had the same date.

He stated that this happens hence does not invalidate the documents.

19. **On cross examination** he confirmed that the subdivision and consent should not be on the same date although the Land Control Board could give a special consent and back date. He stated that he had known the Deceased for a long time. He was the one who issued the instructions for subdivision, he was paid by the 2nd defendant although he did not have proof of the payment. He further stated that the Deceased informed him that he was selling parcel 139 to the 1st and 2nd defendants and parcel 139 was later subdivided to parcels 146 and 147 respectively.

20. **On re-examination** he reiterated that the date of the consent and the transfer being the same, does not invalidate the transaction. He confirmed that the Mr. Fred Zaal, paid Kshs. 95,000 for the transfer of Kajido/Osilalei/147 to the 2nd defendant.

21. **DW4, Elijah Lerionka Ole Lente** adopted his witness statement as his evidence in chief. He stated that the Deceased was his friend. He also knew his wife. He

stated that the Deceased informed him of the plans to sell a portion of his land to the 1st and 2nd defendants and he later sold parcel 139.

22. **On cross examination** he stated that the record showed that title for parcel 147 was issued on 8th November 2005, after Kshs.1740 was paid. He further stated that he did not witness the Deceased receive the money. He also stated that the Deceased sold his land without involving his wife.

23. **On re-examination** he stated that he negotiated for the sale of parcel 139. He stated that he did not know how consents are obtained from the Land Control Board. It was also his testimony that the sale of parcel 139 was to his brother in law, the 1st Defendant.

24. **DW 5 Kenneth Mumaita Kasaine** a director of the 3rd defendant adopted his witness statement as his evidence in chief and produced his bundle of documents marked as exhibits. They were marked as D. Exhibit 1 to 14 respectively.

25. On **cross examination** he confirmed that he purchased the parcels from the 1st defendant in the year

2016 after undertaking due diligence. He also admitted that Mr. Nkaisery was his relative.

26. On **re-examination** he stated that he was not privy to the transaction between the Deceased and the 1st Defendant.

27. **DW1 Louis Kibathi** when recalled, stated that Jacob Ole Kipury was his friend since 1987 although they had not been in communication since this matter was filed in Court. It was his testimony that when the dispute arose, he informed Mr. Kipury of and asked him if he could be his witness. However, Mr. Kipury declined since he was the Plaintiff's brother in law. He stated that the sale agreement between him and the Deceased was handwritten by the said Mr. Kipury. He stated that whenever he came from Tanzania, he would stay at Bull's Eye Resort which is owned by Mr. Kipury. He also knew the manager, one Joseph Kilonzo, who witnessed payments of the purchase price to the Deceased. The said Kilonzo had recorded a witness statement but had also declined to attend court as a witness he was still Mr. Kipury's employee.

28. On **cross examination** he stated that he paid Kshs. 900,000 but could not tell how much the 2nd defendant paid. He admitted that in his witness statement he had stated that the payment was made over a period of three years. He also admitted that he did not state that the Plaintiff had threatened Mr. Kilonzo.

29. At the close of the oral testimonies, parties tendered final written submissions.

Submissions of the Plaintiff

30. Counsel for the Plaintiff submitted that the alleged transfer of parcel 139 was done illegally and fraudulently without a sale agreement, payment of purchase price, forged consent and transfer documents, as well as incomplete documents. It was submitted that with these inconsistencies, the defendants acquired neither a legal nor an equitable interest in the suit property as held in **Leo Investment Ltd v Estuarine Estate Ltd (2017) eKLR**. It was also argued that transfer forms not properly executed were invalid as per **Section 43(1) and (2)** of the **Land Registration Act**.

31. It was also submitted that it was not possible for a consent to transfer land and the title deed to be issued on the same day which is what happened as per the documents produced by the Defendants. Counsel also highlighted that the surveyor indicated that the consent to transfer was backdated showing that there were clear irregularities in the said transaction. It was also on record that the Land Control Board that gave consent to subdivide could not give consent to transfer. And that the consent application form was not properly executed because it made no reference to the directors and that one of them was a foreigner bolstering the fact the transaction was illegal. Reference was made to Sunpalm Ltd Vs Mohamed Siaka Ali & 3 others (2020) KECA 90G KLR on the issue that one of directors was a foreigner.
32. As such, the entire transaction was illegal and should be invalidated as sought.

Submissions of the 1st and 2nd Defendants

33. On whether the 1st Defendant and the deceased Stephen Sileta Ole Kashiro entered into a valid agreement for the sale of the suit properties, They submitted that the agreement for the sale of land was made in 1999 between the deceased and the 1st Defendant, initially orally and later reduced into a handwritten form by one Jacob Kipury although the handwritten copy could not be found and was not adduced in Court. The Defendants relied on **Section 3(7) of the Law of Contract Act**, which exempts contracts made before 2003 from the requirement of being in writing citing **Peter Mbiru Michuki v Samuel Mugo Michuki [2014] KECA 342 (KLR)** and **Macere (Suing as the legal representative of the Estate of Peter Macere Kamundo (Deceased) v Kirinyaga County Government & another; Mwangi (Interested Party) [2023] KEELC 21698 (KLR)**. It was submitted that while the Plaintiff claimed not to have been aware of the sale, there was photographic evidence of the late Kashiro with the 1st and 2nd defendants and the plaintiff also confirmed to having seen them at her home in discussions with her husband and this was corroborated

by other witnesses. Equally, the subdivision of the original parcel- Kajiado/Osilalei/139 into parcels Kajiado/Osilalei/146 and 147 was undertaken by the deceased himself after receiving full payment, and that subsequent occupation and use by the defendants were uninterrupted for over two decades confirming the legality of the transaction.

34. On whether the Plaintiff had discharged the evidential burden of proof that the 1st and 2nd Defendants acquired the suit properties fraudulently, illegally, or through misrepresentation, it was submitted that evidence of fraud was not proved as required under **Section 107 of the Evidence Act**. It was submitted that the defendants had been in actual possession of the suit property for over 14 years before this suit was filed. It was also contested that the plaintiff could neither recall the year her husband passed away nor did she produce a death certificate. Her *locus standi* was also questioned because she did not produce Grant of letters of administration showing her authority to represent the deceased's estate beyond a limited grant ad litem. Counsel argued that there was

evidentiary proof that the properties were acquired legally following due process, and fraud was not proved. Reference was made to **Stephen Gachau Githaiga v Margaret Wambui Weru & Attorney General 2015 (eKLR)** and **Alice Wanjiru Ruhiu Vs Messaic Assembly of Yahweh [2021] eKLR**. The caution placed by the Office of the County Commissioner in 2016 was also questioned on the interest the author had on property 147.

35. As such, the 1st and 2nd defendants were the legal owners of the suit properties and were protected by Section 26 of the Land Registration Act and the suit should be dismissed with costs.

Submissions of the 3rd Defendant

36. On whether the 3rd Defendant acquired good title to parcel numbers Kajiado/Osilalei/1934, 1935, 1939 & 1940, it was submitted that the 3rd defendant purchased the said parcels from the 1st defendant through a Sale agreement dated 16th May 2016. The 1st Defendant then obtained all the necessary consents and transferred ownership the parcels to him therefore acquiring good title over the said

properties. Counsel went on to submit that while **Section 80 of the Land Registration Act** gave the Court the mandate to cancel titles illegally acquired, the 3rd defendant purchased the said parcels in good faith without notice of fraud, if any.

37. On whether the Plaintiff had proved her case on a balance of probabilities, it was submitted that **Section 26 of the Land Registration Act** protected titles unless they were obtained through fraud, illegality or a corrupt scheme which had not been established by the Plaintiff as espoused by **Section 107, 109 and 112 of the Evidence Act**. Reference was made to the cases of **Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & Another (2013) eKLR**, **Emfil Limited v Registrar of Titles Mombasa & 2 others [2014]**, **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, and **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** among others.

38. As such, fraud had not been proved and the suit should be dismissed with costs to the 3rd defendant.

Analysis and Determination

39. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited and find that the issues for determination are:

- i. Whether the Plaintiff has proved that parcel known as Kajiado/Osilalei/139 was fraudulently subdivided and sold to the 1st and 2nd defendants;***
- ii. Whether the 3rd defendant acquired good title of parcels known as Kajiado/Osilalei/1934, 1935, 1939 and 1940 respectively;***
- iii. Whether the Plaintiff is entitled to the reliefs sought;***
- iv. Who should bear costs of the suit?***

40. The Plaintiff states that she is the wife of the late Stephen Sileta Ole Kashiro who was the legal and registered owner of parcel known as Kajiado/Osilalei/139 which was subdivided to parcels 146 and 147. She claimed that the 1st and 2nd defendants illegally and fraudulently caused the said parcels to be transferred into their names without knowledge and or consent of the Deceased and

without paying due consideration. In her testimony she stated that her husband passed away in the year 2019 and it was until the year 2020 when she discovered this illegal transaction and applied for a caution to be placed against the said titles. She stated that she filed the suit in 2022 after getting all the documents.

41. To support her case she produced copy of green card which shows that parcel 146 was registered in favour of the Deceased on 8th November 2005 and Title registered in favour of Louis Kibathi (1st Defendant) on 24th April 2008. It was then closed on subdivision to give rise to Kajjado/Osilalei/ 1934 to 1940 respectively on 27th February 2013. Kajjado/Osilalei/ 147 was registered in favour of the Deceased on 8th November 2005, then a Title deed issued in favour of Oloika Kenya Limited (2nd Defendant) on the same day. A restriction was placed on her behalf on 13th June 2016 by the Deputy County Commissioner.

42. The 1st and 2nd defendants contested this claim stating that the Plaintiff was aware of the transactions as she was always present when they visited the homestead.

They stated that they purchased the suit property for valuable consideration and that the negotiations began in the year 1999. It was their case that they had been in possession of the property for more than twelve (12) years. That DW2 had developed his portion of the land. They dismissed it as false the plaintiff's claim that she was not aware of their possession of the suit properties.

43. To support their claim that the 1st and 2nd defendants legally and procedurally acquired, Kajiado/Osilalei/146 and 147 respectively from the Deceased, the following documents were presented:

A Mutation form for parcel Kajiado/Osilalei/99 to parcels 135, 136, 137, 138 and 139 dated 16th June 2003; Mutation form for parcel 139 is dated 8th November 2005; The undated application for consent from the Land Control Board; The letter of consent for subdivision of parcel 139 is dated 2nd November 2005. The letter of consent for the transfer of parcel 147 is also dated 2nd November 2005.

44. From the evidence on record it is clear that the negotiations between the 1st Defendant and the Deceased

were oral. They started in 1999 culminating in an agreement. The 1st Defendant (DW1) told the court the said agreement was later reduced into writing by his friend Jacob Ole Kipury then a Registrar of the Judiciary. He stated that because of the time it had taken he was not able to trace it hence it was not produced before this court.

45. **Section 3 (3) of the Law of Contract Act, (Cap 23 Laws of Kenya)** provides that;

“No suit shall be brought upon a contract for disposition of an interest in land unless - (a) the contract upon which the suit is founded - (i) is in writing; (ii) is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

Section 3(7) of the said Act provides that;

“The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.”

46. From the evidence tendered the Plaintiff knew the 1st Defendant, who she said visited her home twice. He was a friend of her late husband. She also admitted that the 1st Defendant visited her home in company of a foreigner (DW2) Fred Zaal. DW2 is a director of the 2nd Defendant. She admitted that the Deceased negotiated with them over sale of land through she was not part of the negotiations.

From the evidence on record the plaintiff was aware the Deceased desired to sell part of the land.

47. In the case of **Peter Mbiri Michuki Vs. Samuel Mugo (2014)KECA 342 KLR** the Court of Appeal stated thus;

“We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-

evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open ,uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991.It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3(3) of the Law of Contract act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3(3) of the Act came into force. The proviso to Section 3(3) of the Law of Contract Act applies in this case and we hold that the sale agreement between he appellant and the plaintiff did not violate or offend the provision of the Law of Contract Act.”

48. The 1st and 2nd Defendants procedurally acquired their titles after the Deceased sub-divided his parcel Kajiado/Osilale/139 into 146 and 147 respectively.

Upon completion of payment of the purchase price the 1st and 2nd defendants took possession. DW2 has a guest house on the land to date.

DW3 Joseph Mugo, the surveyor confirmed that the Deceased is the one who initiated the process of subdivision of Kajiado/Osilalei/139 into 146 and 147 respectively. The mutations were signed by the Deceased. His evidence was not rebutted or shaken in any way.

49. I am satisfied that the oral agreement took place and was validated by the events that took place thereafter. Payment of the purchase price and transfers upon which the 1st and 2nd defendants were granted possession. They remained in possession for more than 12 years.

50. It was incumbent upon the plaintiff to prove that the 1st and 2nd defendants acquired titles fraudulently. In the case of **Alice Wanjiru Ruhiu Vs. Messaic Assembly of Yahweh (2021)eKLR** the court held thus;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the

conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantial of that particular allegation is an essential of his case. They're may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given

by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”

51. In the case of **Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another (2000) eKLR 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 pleadings. 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.”

52. Similarly in the case of **Teleposta Pensions Scheme Registered Trustees Vs. Inter Counties Importers And Exporters Limited & 4 Others (2016) eKLR** the court held as follows;

“It is trite law that whoever alleges fraud must prove. It was therefore incumbent upon the Plaintiff to prove fraud allegations against the Defendants to the requisite standard. The standard of proof in fraud cases is higher than in ordinary civil cases, it is higher than on a balance of probability.....”

53. From the foregoing I find that the Plaintiff did not discharge the said burden. She failed to prove fraud against the 1st and the 2nd defendants. The 1st and 2nd defendants produced all the documents to show how they acquired their respective parcels.

In **Steadman Vs. Steadman (1976) AC 536 540** Lord Reid stated;

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

54. It should be noted that the deceased never raised any issue before his demise. The 1st and 2nd Defendants

were on his land. The plaintiff's claim that he was misled into thinking it was a joint business venture is a figment of her own imagination.

55. Having stated that fraud has not been proved then the restriction placed against the 2nd Defendant's title cannot stand and ought to be removed forthwith.

56. The 2nd Defendant has been in possession of the land for over twenty (20) years. There is no reason to interfere with their occupation of the land.

57. The 1st Defendant told the court that he disposed part of his land to the 3rd Defendant. Having stated that he acquired good title from the Deceased, it goes without saying that he passed good title to the 3rd Defendant.

58. The 3rd Defendant acquired good title from the 1st Defendant parcel No. Kajiado/Osilalei/1934 to 1940 respectively and it should allowed to utilize them.

59. In conclusion I find that the plaintiff failed to prove her case as against the Defendants on a balance of probabilities. The suit is hereby dismissed with costs to the 1st, 2nd, 3rd Defendants.

**Dated, Signed and Delivered virtually at Kajiado
this 23rd day of October 2025.**

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Itaya for the Plaintiff.

Mr. Githinji for Mrs. P. Mureithi for the 1st and 2nd Defendants.

Mr. Mukeli for the 3rd Defendant.

N/A for the 4th – 6th Defendants.

Court Assistant – Peter.