

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ELCC No. E007 OF 2023**

**JUSTUS NYACHOTI MENGE .....**  
**PLAINTIFF**

**VERSUS**

**JACKSON MENGE ORORI .....**  
**1<sup>ST</sup> DEFENDANT**

**NYAMIRA LAND REGISTRAR .....**  
**2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL .....**  
**3<sup>RD</sup> DEFENDANT**

**DICKSON NYAMORO MENGE .....**  
**4<sup>TH</sup> DEFENDANT**

**PETERSON ANGWENYI MENGE .....**  
**5<sup>TH</sup> DEFENDANT**

**JOHNSTONE NYANYUKI MENGE ..... 6<sup>TH</sup>**  
**DEFENDANT**

**ESTATE OF ESTHER KERUBO MENGE .....**  
**7<sup>TH</sup> DEFENDANT**

**DORCA NYANGOKA MENGE ..... 8<sup>TH</sup>**  
**DEFENDANT**

**JUDGMENT**

1. The Plaintiff moved the Court through Plaint dated 22<sup>nd</sup> May 2023 wherein he averred that Esther Kerubo Menge (deceased) was the registered proprietor of the parcel of land known as West Mugirango/East Bosamaro/130, hereinafter the “suit property,” prior to its subdivision. He further averred that the deceased was his mother and mother to the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants herein.

2. The Plaintiff also averred that on 14<sup>th</sup> April 2013, the 1<sup>st</sup> and 4<sup>th</sup> Defendants misled the deceased into subdividing the suit property into 12 parcels and that following the subdivision, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants caused him “to be issued with” West Mugirango/Bosamaro East/1418. He went on to aver that he constructed his house on West Mugirango/Bosamaro East/1422 in 1987 while the deceased was the registered proprietor of the said parcel and that he resided on the parcel for 36 years. That, however, the title for West Mugirango/Bosamaro East/1422 is in the name of the 1<sup>st</sup> Defendant.
3. The Plaintiff further averred that the subdivision was irregular since no consent was granted by the Land Control Board and that the resultant titles were irregular, un-procedural and fraudulent. Consequently, the Plaintiff prayed for judgment against the Defendants for:
  1. *Damages against the 4<sup>th</sup> Defendant for the destruction of the Plaintiff’s property.*
  2. *A finding and declaration that Esther Kerubo Menge (deceased) had conferred title upon the Plaintiff pending formalities.*
  3. *An order cancelling the subdivision of LR West Mugirango/East Bosamaro/130 and the resultant title deeds.*

4. *An order compelling the 2<sup>nd</sup> Defendant to revert LR West Mugirango/East Bosamaro/130 in the name of Esther Kerubo Menge.*

*In the alternative*

5. *A declaration that the registration of LR West Mugirango/Bosamaro East/1422 in the name of the 1<sup>st</sup> Defendant was irregular.*

6. *A rectification order does issue as against the 2<sup>nd</sup> Defendant ordering him to rectify the Nyamira lands register to reflect that the 1<sup>st</sup> Plaintiff is the registered owner of LR West Mugirango/Bosamaro East/1422.*

7. *The title deeds resulting from the impugned subdivision be cancelled and the matter be referred to succession subject to recognition of the Plaintiff's title.*

8. *Costs of the suit and interest thereon.*

9. *Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.*

4. The 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Defendants filed Statement of Defence dated 14<sup>th</sup> August 2023 wherein they averred that at some point prior to subdivision, all the brothers lived on the portion that later became known as West Mugirango/East Bosamaro/1422 and that the portion was given to the 1<sup>st</sup> Defendant upon partition by the deceased. That the Plaintiff

constructed his house on the said portion without the deceased's approval as the then registered proprietor. They also averred that they obtained their titles procedurally and lawfully from the deceased who distributed her land to her children and that the children including the Plaintiff accepted their portions. They therefore prayed that the Plaintiff's suit be dismissed with costs.

5. The 6<sup>th</sup> Defendant filed Statement of Defence dated 26<sup>th</sup> September 2023 and averred that the Plaintiff constructed a house on the deceased's parcel of land without following the law of succession. He also averred that the title deeds that resulted from the suit property should be nullified since he was completely disinherited and that succession should be undertaken.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants equally filed Statement of Defence dated 20<sup>th</sup> February 2024 and stated that if at all any registration, removal and/or cancellation, subdivisions and transfers were made on the suit property, the same was lawful regular, procedural and in furtherance of the 2<sup>nd</sup> Defendant's statutory duties. They further averred that the Plaintiff's suit is substantially a succession dispute over the distribution of the deceased's estate and did not disclose any reasonable cause of action against them. They prayed that the suit against them be dismissed with costs.

7. The 1<sup>st</sup> Defendant filed Amended Statement of Defence amended on 21<sup>st</sup> February 2024. He denied that he misled the deceased into subdividing the suit property and added that the subdivision was done by the deceased after a series of meetings which were chaired by the Plaintiff. That it was the Plaintiff who took the deceased to the Land Control Board, arranged for the surveyor to demarcate the suit property and collected the resulting title deeds from Nyamira Land Registry. He stated that the Plaintiff was issued with his shares of land being LR West Mugirango/Bosamaro East/1418 and 1427.
8. The 1<sup>st</sup> Defendant also averred that the subdivisions were done lawfully and the Plaintiff had no colour of right to wait for ten years after the subdivision and eight years after the deceased's death to bring this matter and that the suit is consequently barred by limitation of action. He prayed that the Plaintiff's suit against him be dismissed with costs.
9. The Plaintiff filed a reply to defence dated 13<sup>th</sup> March 2024 and reiterated that the subdivision was illegal and fraudulent. He averred that at the time of subdivision in the year 2013, the deceased was very old and sickly. He added that he constructed his house in the year 1987 when the suit property was registered in the deceased's name. He further denied that he accepted the two portions allocated to him after the subdivision.

10. The Plaintiff withdrew the claim against the 7<sup>th</sup> Defendant on 24<sup>th</sup> February 2025.

11. Hearing of the matter commenced on 18<sup>th</sup> March 2024. The Plaintiff testified as PW1, adopted his witness statement dated 22<sup>nd</sup> May 2023 and produced copies of the documents in his lists of documents dated 22<sup>nd</sup> May 2023 and 13<sup>th</sup> March 2024 as his exhibits. He stated that the Defendants are his brothers and sisters and that he constructed a home in the suit property in 1987. That the land measuring approximately 1¼ acres was given to him by his mother (the deceased) who later died in the year 2015.

12. PW1 further testified that between 2021 and 2022, the 4<sup>th</sup> Defendant who is his younger brother went to the land, occupied part of it and cut down his trees, bananas as well as avocados, and demanded that PW1 be evicted from the land. He added that all the titles were subdivisions of the suit property and that he got parcel numbers West Mugirango/Bosamaro East/1418 and 1427 registered in his name. That parcel number West Mugirango/Bosamaro East/1422 was registered in the name of the 1<sup>st</sup> Defendant and that the Defendants wanted to transfer him to parcel numbers West Mugirango/Bosamaro East/1418 and 1427 yet he had no interest in the said parcels.

13. PW1 went on to testify that succession proceedings were yet to be filed in respect of the deceased's estate and that all the

Defendants received their parcels except the 6<sup>th</sup> Defendant who was occupying the subdivision that was registered in the deceased's name. That the Title Deeds were concealed until after the deceased's death and that the 1<sup>st</sup> Defendant had not erected any house on West Mugirango/Bosamaro East/1422. He also stated that he would like to remain on West Mugirango/Bosamaro East/1422 and that he did not need West Mugirango/Bosamaro East/1427 as long as the acreage in West Mugirango/Bosamaro East/1422 is enough. That before she passed on, the deceased was 102 years, very sick and did not have a sound memory. Lastly, he stated that he was the first one to start erecting a permanent building on the family land.

14. The Plaintiff's case was then closed.

15. Alfred Menge (DW1) stated that the 1<sup>st</sup> Defendant is his father while the Plaintiff is his uncle and that the 1<sup>st</sup> Defendant donated to him a power of attorney. That as of the date of his testimony the 1<sup>st</sup> Defendant was away in the USA for treatment. He adopted his witness statement which was filed on 23<sup>rd</sup> February 2024 and added that his father lived in the suit property since 1972 in a semi-permanent house. That by then the deceased was the proprietor of the suit property and that it 'was changed' in April 2013 and became West Mugirango/Bosamaro East/1422. He further stated that he built a permanent house in November 2020 having been permitted by the 1<sup>st</sup> Defendant and that the Plaintiff had built his house by then.

16.DW1 went on to testify that the deceased distributed the suit property to all her sons and that the Plaintiff was utilizing West Mugirango/Bosamaro East/1427 where he had planted trees and West Mugirango/Bosamaro East/1418 where he had planted maize, cabbages, and onions. He further stated that all the sons had their own title deeds except the 6<sup>th</sup> Defendant whose portion was West Mugirango/Bosamaro East/1417 which remained in the deceased's name.

17.When the matter next came up for further defence hearing, the Plaintiff's counsel sought and was allowed to recall PW1. PW1 adopted his supplementary witness statement dated 17<sup>th</sup> May 2024 and stated that the land was given to him by the deceased in 1987 and that at that time his siblings had not been given land. He added that he had never seen a surveyor on the suit property and that he did not know where the title deed for West Mugirango/Bosamaro East/1422 in the name of the 1<sup>st</sup> Defendant emanated from. That the subdivision was done and all titles issued when the deceased was still alive and that she did not need to consult him.

18.Defence hearing then resumed.

19.Dorcas Nyakerario Nyangoka (DW2) adopted her witness statement which she signed on 6<sup>th</sup> May 2024 and stated that the Plaintiff is her elder brother while the 6<sup>th</sup> Defendant is her eldest sibling. That the deceased distributed the suit property to her children when she was of sound mind and that the

Plaintiff and the 4<sup>th</sup> Defendant were assigned to go and procure the consent of the Land Control Board and titles at the land registry in 2012. She also stated that West Mugirango/Bosamaro East/1417 belongs to the 6<sup>th</sup> Defendant.

20.DW2 further testified that she was in a meeting held in July 2012 at which the deceased sent the Plaintiff and the 6<sup>th</sup> Defendant to the Land Control Board. She could not however confirm whether the two took the deceased to the Land Control Board. She added that they signed the minutes of the meeting dated 13<sup>th</sup> to 14<sup>th</sup> July 2012.

21.George Kariuki (DW3) stated that he had been the Land Registrar Nyamira since September 2021. He produced the register, mutation and presentation book in respect of the suit property and stated that the register was opened on 28<sup>th</sup> September 1976, the deceased was registered as proprietor and a title deed was issued to her on 24<sup>th</sup> September 2007. He further stated that the last entry in the register was dated 4<sup>th</sup> April 2013 and was a closure of the register upon subdivision of the suit property to create parcel numbers 1416 to 1427. He also stated that the registry did not receive any complaint regarding the transactions.

22.DW3 further testified that all the required procedures were not followed in the subdivision process and that among others, there was no entry in the presentation book. He also did not

have any documents in support of the transfers and there is no entry in the presentation book in support of the transfers.

23. He stated that for a transfer to be lawful, the Transferor or Transferee must produce an instrument of transfer, receipt for stamp duty, identification documents for the parties and letter of consent which are then examined by the registry staff to ensure that they are authentic. That the registry then gives a booking form in triplicate but in this case there was no booking form, no transfer forms, no consent and no evidence of payment of stamp duty. That in such a case there was no valid transfer. He also stated that documents could be misplaced at the registry.

24. Next to testify was Nelson Kinyua (DW4), the Assistant County Commissioner Nyamira Division who stated that he was the chairperson of the Nyamira Land Control Board as of the date of his testimony. He stated that his duties included chairing Land Control Board meetings and added that an application for consent that was made in respect of the suit property was approved by the board on 7<sup>th</sup> February 2013 and that on 4<sup>th</sup> April 2013 consents were given for the transfer of parcels numbers 1416 to 1427. He produced the consents and added that they were for subdivision and transfer.

25. Dickson Nyamoro Menge (DW5) adopted his witness statement dated 14<sup>th</sup> July 2023 and produced copies of documents listed as item numbers 1 and in 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Defendants' list of

documents dated 14<sup>th</sup> August 2023 as well as copies of documents listed as item numbers 1 to 11 in 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Defendants' further list of documents dated 2<sup>nd</sup> October 2024. He stated that the suit property belonged to the deceased who was their mother. That the deceased subdivided it to her children and everybody occupied their portion. That the deceased obtained Land Control Board consent in respect of the transfers to her children and later passed away on 14<sup>th</sup> February 2015, some three years after the transfers.

26. DW5 went on to testify that none of the children had any issue with the transfers during the lifetime of the deceased. That the 6<sup>th</sup> Defendant did not have a title because he was invited twice by the deceased to go home during the distribution, but he refused to go. DW5 added that he did not have any land to give the Plaintiff since each of them received their equal portions and everyone occupied the portion given by the deceased. That they were all building everywhere before the land was subdivided and that when it eventually was, they were told to move to their portions.

27. DW5 further stated that transfer forms were filed but they went missing from the lands office. He also stated that he was present at the meeting of 13<sup>th</sup> to 14<sup>th</sup> July 2012 when they discussed subdivision of the suit property and that the deceased chaired the meeting. That the Plaintiff typed the minutes but deliberately omitted his own name and that the Plaintiff later inserted his name by hand.

28.DW5 also testified that he called the surveyor at the instructions of the deceased and that the Plaintiff was present when the suit property was subdivided but did not complain that his house was on a different plot from that which he got at that time.

29.Lastly, the 6<sup>th</sup> Defendant, Johnstone Nyanyuki Menge (DW6) stated that he was not present when the suit property was shared and that he only became aware of the distribution when this case was filed. He added that as a sibling, he was entitled to a share of the suit property and that as of the date of his testimony, he was cultivating West Mugirango/Bosamaro East/1417 which is registered in the deceased's name. That he started using the portion before the deceased passed away and that all his siblings are using portions which they were shown by the deceased. He further stated that the deceased could not attend Land Control Board due to being immobile and that succession had not been conducted in respect of the deceased's estate.

30.All defence cases having been closed, directions were given for filing and exchange of written submissions. The Plaintiff filed submissions and supplementary submissions dated 10<sup>th</sup> July 2025 and 11<sup>th</sup> October 2025, respectively. The 6<sup>th</sup> Defendant filed submissions dated 15<sup>th</sup> August 2025. The 1<sup>st</sup> Defendant filed submissions erroneously dated 21<sup>st</sup> September 2024 while the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Defendants filed submissions dated 30<sup>th</sup> September 2025. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not

file any submissions. Instead, their counsel stated that they rely entirely on the evidence on record.

31. On the issue of whether the Plaintiff is the beneficial owner of West Mugirango/Bosamaro East/1422, the Plaintiff submitted that his occupation is both lawful and protected under equitable doctrines of proprietary estoppel and constructive trust. That in or around 1987, he received express permission from the deceased to construct a permanent house on the said property and that the permission, coupled with the long-standing occupation panning over 36 years, gave rise to a beneficial interest in equity.

32. The 1<sup>st</sup> Defendant on the other hand submitted that that this is a clear case of a perfect gift *inter vivos*. He relied on the case of **Mugambi & 2 others v M'Mugambi (Civil Appeal 274 of 2019) [2025] KECA 1235 (KLR)** and went on to submit that in order for the plaintiff to challenge this gift, he had to sue the estate of the deceased.

33. Equally the 4<sup>th</sup> 5<sup>th</sup> and 8<sup>th</sup> Defendants submitted that the 1<sup>st</sup> Defendant is the registered owner of land parcel number West Mugirango/Bosamaro/ 1422 acquired through a transfer from the deceased who was the registered owner of the suit property. That the deceased's estate had not legally challenged or placed the creation of the resultant parcels to question and that in any event no personal representative had been appointed to administer the estate of the late deceased

pursuant to the law of succession act. The Plaintiff had no locus standi on matters touching on land parcel No. West Mugirango/Bosamaro East/130, 1417 and 1425.

34. The 6<sup>th</sup> Defendant submitted that the Plaintiff had lived on the suit property from the year 1987 and built his house with the consent of the entire family without objection. That he had no objection towards the Plaintiff's continued occupation of West Mugirango/Bosamaro East/1422 despite the subdivision having been done without his participation.

35. On the issue of whether the Plaintiff was involved in the subdivision process, the Plaintiff contended that he was not involved and that there was no family meeting convened to discuss the subdivision. He further submitted that no title or portion of land from the alleged subdivision had ever been handed over or processed in his name voluntarily with his participation.

36. The 1<sup>st</sup> Defendant on this issue contended that of the twelve parcels that were created following subdivision of the suit property, the Plaintiff got two parcels and that the Plaintiff is just unhappy with the position of the parcels that he got. That instead, the Plaintiff craves for the 1<sup>st</sup> Defendant's parcel number West Mugirango/Bosamaro East/1422 where his house is situated.

37. The 4<sup>th</sup> 5<sup>th</sup> and 8<sup>th</sup> Defendants on this issue contended that the 1<sup>st</sup> Defendant is the registered owner of West

Mugirango/Bosamaro East/1422 acquired through transfer from the deceased who was the registered owner of the suit property. That the fact that the Plaintiff was in occupation of the portion prior to the subdivision did not confer any right over the same after change of ownership since all the beneficiaries were affected and had to move from their previously occupied portions to their actual portions upon subdivision of the suit property.

38. On the issue of whether due process was followed in subdividing the suit property, the Plaintiff contended that in line with the evidence adduced by the Land Registrar, due process was not followed in the subdivision of the suit property since there were no succession proceedings, absence of family consensus, and failure to secure consents of the Land Control Board. That, consequently, the subdivision was rendered procedurally defective and incapable of passing valid title in respect of the newly created parcels. The Plaintiff further urged that he was neither invited nor was he aware of the arrival of the surveyor on the material dates.

39. The 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Defendants in rebuttal submitted that the Plaintiff was urging the Court to impeach and nullify titles arising from the suit property whose beneficiary is the Plaintiff himself who is the registered owner of land parcel numbers West Mugirango/Bosamaro East/1418 and 1427 after signing all documents necessary for effecting transfer to himself. That

the Plaintiff wanted to condemn the estate of the deceased unheard.

40. The Plaintiff in his supplementary submissions argued that the minutes of the family meeting exhibited inconsistencies that raised serious concerns regarding transparency and proper formalization. That his name was handwritten while others were typed, and the survey fees recorded showed conflicting figures.

41. He contended that the testimony of the Land Registrar revealed critical procedural anomalies and that the register of the suit property was closed upon subdivision without proper documentation being entered in the presentation book. He added that although the Land Registrar admitted that some documents may have been misplaced, it is unlikely official records would simply go missing while in custody of the lands office.

42. I have carefully considered the pleadings, the evidence, and the submissions. The issues that emerge for determination are whether the Plaintiff is the beneficial owner of parcel number West Mugirango/Bosamaro East/1422, whether due process was followed in the process of subdivision of the suit property, and whether the reliefs sought should issue.

43. Save for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the parties to this suit are all children of Esther Kerubo Menge (deceased). There is no dispute that the deceased, who passed away on 15<sup>th</sup> February

2015, was the registered proprietor of the parcel of land known as West Mugirango/East Bosamaro/130, the suit property. According to the copy of the register in respect of the suit property, the deceased was registered as proprietor on 28<sup>th</sup> September 1976 and remained the proprietor until 4<sup>th</sup> April 2013 when the register was closed upon subdivision of the suit property into parcel numbers West Mugirango/Bosamaro East/1416 to 1427.

44. It is not disputed that the subdivision was done by the deceased during her lifetime. She died almost 2 years after the subdivision. From the materials on record, it is apparent that all the resultant parcels were initially registered in the name of the deceased and that she immediately transferred them to the parties herein save for parcel number West Mugirango/Bosamaro East/1417 which remains registered in her name. No succession proceedings have been filed in respect of the deceased's estate.

45. The rights of a registered proprietor of land are elaborately spelt out in the law. Such a proprietor is entitled to the rights, privileges, and benefits specified under **Article 40** of the **Constitution** which secures protection of right to property and **Sections 24** and **26** of the **Land Registration Act**. Pursuant to **Section 26** of the **Land Registration Act**, the Court is obligated to accept the proprietor's certificates of title as *prima facie* evidence of proprietorship, unless the provisos under **Section 26 (1) (a)** or **(b)** are established.

46. **Section 24** of the **Land Registration Act** provides as follows:

***Subject to this Act—***

***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

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

47. The Plaintiff has laid claim to parcel number West Mugirango/Bosamaro East/1422 on grounds of beneficial ownership. He has further cited long-standing occupation spanning over 36 years which he contends is lawful and protected under equitable doctrines of proprietary estoppel and constructive trust.

48. A party who alleges existence of trust must prove it. See **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**. In **Dorcas Indombi Wasike v Benson**

**Wamalwa Khisa & another [2010] eKLR** the Court of Appeal stated:

***The appellant’s counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular Mbothu & 8 Others vs Waitimu & 11 Others [1986] KLR 171, are clear that: -***

***“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”***

49.As to the nature and prerequisites of establishing constructive trust, there is ample guidance in the decision of the Supreme Court in **Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)** where the apex Court held thus:

***[68] Halsbury’s Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts:***

***“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate. ...***

***Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.***

***[74] Vide Section 3(1) of the Judicature Act, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. ...***

***[78] The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transactions. ...***

***[87] We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.***

50. The registered proprietor of parcel number West Mugirango/Bosamaro East/1422 is the 1<sup>st</sup> Defendant. Title was conferred on him by the deceased. The Plaintiff has not shown that the 1<sup>st</sup> Defendant conducted himself inequitably in receiving the parcel from the deceased. Equally, there is no evidence of any common intention between the Plaintiff and the 1<sup>st</sup> Defendant that both or the Plaintiff alone would have a beneficial interest in the parcel or that the 1<sup>st</sup> Defendant led the Plaintiff to act to his detriment regarding the parcel. On the contrary, the Plaintiff contends that he constructed on the portion that later became West Mugirango/Bosamaro East/1422 with the deceased's permission. If that be the case, the deceased's estate and not the 1<sup>st</sup> Defendant would have to answer.

51. It seems to me that the Plaintiff has attempted to fault the deceased regarding the manner in which the suit property was subdivided and titles registered. He would not have complained if he got West Mugirango/Bosamaro East/1422 where his house stands. Among other grouses, he considers that the deceased should have involved him when the surveyor came to the site.

52. Any attempt to fault the deceased and her actions in the manner in which she subdivided the suit property and transferred the ensuing parcels must be done lawfully. This suit was filed on 23<sup>rd</sup> May 2023. The deceased was dead by then.

53. Did the Plaintiff join the estate of the deceased in this case? I answer firmly in the negative. Even though the 7<sup>th</sup> Defendant in the Plaintiff herein was pleaded as “the estate of Esther Kerubo Menge,” the claim against the said Defendant was withdrawn on 24<sup>th</sup> February 2025. Even if it had not been withdrawn, there would be no valid party known as “the estate of Esther Kerubo Menge” and capable of litigating in that name.

54. The law is that a cause of action vested in or against the estate of a deceased person can only be validly agitated by or against the personal representative of the estate. See **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR** and **CKM v ENM & another (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR) (8 March 2024) (Judgment)**. The term “legal representative” is defined at **Section 2** of the **Civil Procedure Act** as meaning “*a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.*”

55. There is a long line of authorities to the effect that legal representative means executor or administrator of a deceased person duly appointed under the **Law of Succession Act**. There is as yet no executor or administrator duly appointed by a succession court in respect of the deceased’s estate.

56. In **Rugiri v Kinuthia & 3 others [2024] KECA 1601 (KLR)**, the Court of Appeal held as follows regarding the consequence of filing a case in respect of a deceased's estate without a grant of representation:

***Decided cases are in agreement that where a suit is filed relating to a deceased's estate without a grant of representation, the proceedings are null and void for want of locus standi. (See Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another [1982-88] 1 KAR and Trouistik Union International & Another vs. Jane Mbeyu & Another Civil Appeal No. 145 of 1990). It follows, therefore, that for a party to have locus standi to institute or defend a case for and on behalf of a deceased person, he or she must first obtain a grant of letters of administration empowering him or her to administer the deceased's estate or a limited grant limited for the purpose of filing or defending the suit.***

57. The Plaintiff cannot lawfully litigate against the deceased's estate in the absence of a legal representative in respect of the said estate. His clamour to question the deceased's actions regarding subdivision of the suit property and transfer the resultant parcels through this suit is of no consequence. Simply put, he is attempting to steal a match on the

deceased's estate by litigating behind its back. The law does not allow that.

58. In view of the foregoing, I answer the first issue for determination, as to whether the Plaintiff is the beneficial owner of parcel number West Mugirango/Bosamaro East/1422, in the negative. The Plaintiff is not the beneficial owner of the said parcel.

59. The second issue for determination is whether due process was followed in the subdivision of the suit property. This issue, too, is affected by the failure to properly sue the deceased's estate by joining the legal representative of the estate. It is the deceased who subdivided the suit property and transferred the parcels. Some of the allegations on shortcomings could perhaps be easily answered by the deceased if she was still alive. In her absence, the legal representative of her estate is the property person to answer on her behalf.

60. The Plaintiff's case is that the 1<sup>st</sup> and 4<sup>th</sup> Defendants misled the deceased into subdividing the suit property and that the subdivision was irregular for want of consent of the Land Control Board. He contends that the resultant titles are therefore irregular, un-procedural and fraudulent. Among other reliefs, the Plaintiff is seeking cancellation of the subdivision of the suit property as well as cancellation of the resultant titles.

61. The law relating to cancellation of titles is found at **Section 26 (1)** of the **Land Registration Act** provides as follows:

***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.***

62. The Plaintiff has centred his case on want of procedure and illegality concerning the subdivision of the suit property on the theory that no consent of the Land Control Board was obtained and that crucial documents such as transfer forms are not available. For starters, those are questions that have to be directed at the deceased. She is the one who subdivided her property, registered herself as proprietor of the subdivisions then transferred all of them to the Defendants, save for one parcel.

63. In any case, I note that DW4 who was the chairperson of the Nyamira Land Control Board testified that applications for consent to subdivide the suit property and to transfer the subdivisions were made and that consents were given by the board. He produced copies of the consents. As regards the other documents such as transfers, the Land Registrar admitted that documents get misplaced at the registry. If the legal representative of the deceased's estate was joined, the estate may have an occasion to state whether the documents were submitted to the registry.

64. Regarding the allegation of fraud, it is crucial to restate that fraud is a serious allegation and that the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**.

65. The foregoing was emphasised by the Court of Appeal in **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others** (supra) thus:

***The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities... Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. It would be foolhardy for the appellant to dismiss allegations carrying such far reaching consequences as merely procedural. In Emfil Ltd vs. Registrar of Titles Mombasa (supra), this Court pronounced itself as follows on the issue:-***

***“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”***

66. Beyond mentioning fraud in passing at paragraph 15 of the Plaintiff, the Plaintiff neither pleaded particulars of fraud nor proved it to the required standard. All that he has done is to

invite the Court to infer fraud, a recourse that is not allowed. Thus, the Plaintiff has failed to demonstrate that due process was not followed during subdivision of the suit property and registration of parcel number West Mugirango/Bosamaro East/1422 in the 1<sup>st</sup> Defendant's name.

67.The Plaintiff has not proved his case. It follows that the reliefs sought are not available.

68.In view of the foregoing discourse, I find no merit in the Plaintiff's case and I therefore dismiss it. Considering the family relationship between the parties, I make no order as to costs.

**Dated, signed, and delivered at Nyamira, this 26<sup>th</sup> day of November 2025.**

**D. O. OHUNGO  
JUDGE**

Delivered in the presence of:

Mr Macharia for the Plaintiff

Mr Meroka for the 1<sup>st</sup> Defendant

Mr Rana for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Ms Nyaenya for the 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> Defendants

No appearance for the 6<sup>th</sup> Defendant

No appearance for the 7<sup>th</sup> Defendant

Court Assistant: B Kerubo