

**THE REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**  
**ELC APPEAL NO. E033 OF 2024**

MARY NEKESA KIBIRITI.....1<sup>ST</sup>  
APPELLANT  
SULEIMAN MAMBUI. ....2<sup>ND</sup>  
APPELLANT  
JOSHUA MUNGAME .....3<sup>RD</sup>  
APPELLANT  
ANDREW NAIBEI. ....4<sup>TH</sup>  
APPELLANT  
TIMOTHY NAIBEI .....5<sup>TH</sup>  
APPELLANT  
ISIAH NAIBEI .....6<sup>TH</sup>  
APPELLANT  
MESHACK KISO NAIBEI .....7<sup>TH</sup>  
APPELLANT

VERSUS

EVALYNE NASIPWONDI NAMANGANGA.....  
RESPONDENT

(Being an appeal from the judgment by Hon. T.M. OLANDO (PM) in Bungoma CM-ELC NO. E031 of 2024 delivered on 05/07/2024)

**JUDGMENT.**

**1.** The Appellants herein were Defendants before the trial court wherein the Respondent had sued them vide an amended plaint dated 05/04/2023. In the said Amended Plaint, the Respondent had sought orders for *inter alia* eviction and a permanent injunction against the Appellants. It was the Respondent’s contention that she was the registered owner of land parcel no. N.Malakasi/S.Sasuri/1878 measuring 4.83 Ha (hereinafter referred to as “*the suit land*”), the same having been transferred

to her by her brother Juluis Sikuku Naibei. That the Appellants invaded the suit land and chased her away and started constructing thereon without her permission or any colour of right.

**2.** The Appellants in their statement of defence dated 04/08/2023 averred that the Respondent's registration as the owner of the suit land was marred with fraud. They went ahead and set out particulars of fraud against the Respondent and averred that the Respondent cannot be accorded the protection of the law under the circumstances. They filed a counter-claim against the Respondent where they alleged fraud against the Respondent and sought *inter alia* for a declaration that the Respondent's title was obtained fraudulently and an order for cancellation of the same and a rectification restoring the name of Julius Sikuku Naibei in the Register.

**3.** When the former suit came up for directions, the parties agreed with the hearing by way of viva voce evidence.

**4.** PW1 Everline Nasipwondi Namang'ang'a adopted her witness statement dated 03/05/2023 and 18/09/2023 as her evidence-in-chief. She produced as P-Exhibit 1 a copy of title of the suit land, P-Exhibit 12 copy of search, P-Exhibit 4 death certificate of Julius Shikuku-Dcd and P-Exhibit 5-copy of green card. She testified that the Deceased was her husband who died in 29/08 2021 and that together they were blessed with 15

children. That the 1<sup>st</sup> Appellant had been utilizing one acre of the suit land and that she obtained her title a month after the demise of her deceased husband who transferred the land to her after they followed all the legal procedures. She testified that majority of the Appellants entered the suit land between the year 2022 and 2023 and chased her away. That during the lifetime of her deceased husband, none of them disturbed her occupation.

**5.** PW2 Rodah Chemeta Shikuku adopted her witness statement dated 03/05/2023 as her evidence-in-chief. She testified that the deceased was also her husband and had about 6 parcels of land. That he shared his land to all his children and that the suit land was transferred to the Respondent before his death. That the 1<sup>st</sup> Appellant was also given a share of his estate.

**6.** PW3 Francis Ndeti adopted his witness statement dated 18/09/2023 as his evidence-in-chief. He testified that he sold the suit land to the Respondent's husband (deceased) in 1993 and that the 1<sup>st</sup> Appellant and the Respondent were using the said land but the land had been purchased for the Respondent.

**7.** PW4 Noah Munani adopted his witness statement dated 18/09/2023 as his evidence-in-chief. He testified that he is the son of the PW2 and that the 1<sup>st</sup> Appellant and Respondent were his step-mothers while the other Appellants were his brothers. It

was his evidence that prior to the demise of their father, he (deceased) had called his children and shared his properties including land to them. That the Respondent resided in the land but was chased away and her house brought down.

**8.** DW1 Mary Nekesa Kiberiti adopted her witness statement dated 04/08/2023 as her evidence-in-chief. She produced into evidence a copy of death certificate and green card as D-Exhibit 1 and 2. She testified that she is using two out of seven parcels of land that belonged to the deceased. That both her and the Respondent were utilizing the suit land.<sup>9</sup>.

**9.** John Mngare Naibei (DW2) and Suleiman Mugane Naibei (DW3) adopted their witness statement dated 04/08/2023 as their evidence-in-chief. They testified that as sons of the deceased, they are entitle to a portion of the suit land. They further testified that the Respondent obtained the suit land after the death of his father fraudulently.

**10.** DW4 Meshack Kiso Mngare adopted his witness statement dated 04/08/2023 as her evidence-in-chief. He testified that he is a retired chief and a brother to the deceased. He produced minutes of a meeting held on 13/09/2021 as D-Exhibit 1 and added that during the said meeting, the Respondent did not state that the deceased had given her the suit land. He testified that the Respondent's name is not in the list of attendees and

neither did she sign the minutes and further that the deceased had 5 parcels of land and not 7 as stated in the minutes.

**11.** DW5 David Chepkech Mungoma adopted his witness statement dated 04/08/2023 as her evidence-in-chief. He testified that the deceased was his brother. He denied the assertion that the deceased had given land to the Respondent.

**12.** DW6 Meshack Kimigwa Mabanga adopted his witness statement dated 04/08/2023 as her evidence-in-chief. He reiterated the evidence as stated by DW4.

**13.** Upon analysing and determining the suit before it, the trial court found that the defendant lacked locus standi to institute the suit and went ahead and added that even if they did, they did not prove fraud against the Respondent. The Respondents case was therefore allowed and the Appellants counter-claim dismissed with costs. The Appellants' were aggrieved with the impugned decision and preferred the present Appeal on the following grounds;

- a) The Learned Magistrate erred in fact and in law by failing to appreciate that the Respondent acquired title to North Malakisi/West Sasuri/1878 fraudulently and after the death of Julius Sikuku Naibei- the then registered owner.**

- b) The Learned Magistrate erred in fact and in law in failing to appreciate that the evidence of the Plaintiff was contradictory with the documents produced as exhibits as regards to when she acquired title to suit land.**
- c) The Learned Magistrate erred in fact and in law in failing to appreciate that once a title has been challenged to have been acquired fraudulently, it is not enough for the title holder to dangle the title as proof that it was acquired legally.**
- d) The Learned Magistrate erred in fact and in law in failing to appreciate that the Respondent acquired title to North Malakisi/West Sasuri/1878 after the registered owner's death and without doing succession or involving the administrators of his estate.**
- e) The learned magistrate erred in fact and in law in misapprehending the evidence of the Plaintiff- that she was given title deed by the deceased during his lifetime when the documentary evidence points otherwise.**
- f) The learned Magistrate erred in fact and in law in failing to appreciate the evidence of the Plaintiff that the Deceased never took her to land control board for consent and the implications thereof.**

- g) The learned Magistrate erred in fact and in law in not considering the evidence of the Plaintiff which disowned the signature on the application for land control board-20 application and the import thereof.**
- h) The Learned Magistrate erred in fact and in law in failing to appreciate the fact that the Defendants proved that the Plaintiff acquired title fraudulently.**
- i) The Learned Magistrate erred in fact and in law in failing to appreciate that with fraud having been proved against the Plaintiff, the orders sought by the Plaintiff could not thus be issued as it amounts to the Court aiding illegality and fraudulent actions of the Plaintiff.**
- j) The learned Magistrate erred in fact and in law in failing to appreciate that the 1s to 6th Defendants- by virtue of being wife and sons to the deceased- Julius Sikuku Naibei and by virtue of being in possession and usage of the suit land- had locus standi to file counterclaim.**
- k) The learned Magistrate erred in fact and in law in failing to appreciate that the 1st to 6<sup>th</sup> Defendants- had proved their counterclaim as required by law.**
- l) The Learned Magistrate erred in fact and in law in relying on extraneous factors and disregarding material factors thereby arriving at a wrong decision that is unsupported in law.**

**m) The Learned Magistrate erred in fact and in law in failing to appreciate the gist of the evidence adduced and the dispute therein between the parties thereby reaching a decision that is unsupported by the evidence on record.**

**n)The Learned Magistrate erred in fact and in law in failing to appreciate that the dispute herein involved family members and thus an award of costs could not thus be granted.**

**14.**The Appellants sought to have the appeal allowed, the judgment of the trial court set aside and substituted with an order dismissing the Respondents claim and allowing the Appellants' counter-claim and for costs of both the lower court and this courts proceedings.

**15.**When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellant filed submissions through the firm of M/S Anwar & Company Advocates dated 29/10/2025 while the Respondent through the firm of M/S Omundi Bw' Onchiri Advocates filed submissions dated 28/10/2025 which I have considered carefully.

**Analysis and determination.**

**16.** I have considered the record of appeal as set out above. First, I will start with addressing the grounds of appeal as outlined above. It will be observed that the grounds of appeal more or less challenge the title of the Respondent. This court is of the view that the instant appeal can be determined by answering the following questions;

**a) Whether or not the Respondent herein is the lawful and legitimate proprietor of the suit land.**

**b) Whether the counter-claim has been substantiated.**

**17.** The legal framework on legitimacy of title documents is governed by **Sections 24, 25 and 26 of the Land Registration Act. Section 24(a)** thereof recognizes the registered owner as the absolute owner of land. This absolute right is limited by **Section 25** which provides that land shall be held by the registered proprietor together with all other privileges appurtenant thereto but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in **Section 28. Section 26** states courts shall *prima facie* deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

**18.** However, it is trite that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the very

instrument of title as proof of ownership. See **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR and Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & Another [2013] eKLR**. These authorities underscore that registration does not cure illegality, and a registered proprietor must, when the root of title is questioned, demonstrate that the title was acquired procedurally, lawfully, and free of fraud or misrepresentation.

**19.** The Respondent explained in her testimony that she obtained her title from her deceased husband namely Julius Sikuku Naibei prior to his demise. From the evidence presented, the said title was issued on 01/12/2020(P-Exhibit 5) while the deceased died on 29/08/2021(D-Exhibit 1). It was her contention that she has been residing in the suit land with her husband utilizing the larger portion of the land while the 1<sup>st</sup> Appellant was in use of 1 acre. It was further her evidence that the other Appellants only came to occupy the land after the demise of her husband (deceased) and chased her away.

**20.** The Appellants who pleaded fraud against the Respondent alleged that she became the registered owner of the suit land after the death of the deceased and as such, her registration was marred with irregularities. They also argued that as the beneficiaries of the deceased, they are entitled to a share in the suit land. The 1<sup>st</sup> Appellant testified that she had been allocated another piece of land by the deceased while the other Appellant denied being allocated shares of the estate. It is trite law that

fraud must not only be specifically pleaded, but the particulars thereof must be distinctly proved. (see **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi JA**)

**21.** The Appellants contended that the Respondent falsified the transfer instruments and unlawfully caused the suit property to be registered in her name. In support of this allegation, they produced an application to the Land Control Board, the letter of consent, the transfer application, and a stamp duty payment receipt, marked as D-Exhibits 4, 5, 6 and 7 respectively. However, beyond the bare assertion that these documents were falsified, the Appellants tendered no cogent evidence to substantiate such grave allegations. Allegations of fraud are of a serious and quasi-criminal nature, and the law demands that they be strictly pleaded and strictly proved to a standard above a balance of probabilities, though not as high as beyond reasonable doubt.

**22.** This principle was clearly articulated in **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR**, where the Court of Appeal held that fraud must be “distinctly alleged and distinctly proved,” and further in **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, where the Court reiterated that the evidentiary burden in claims of fraud requires evidence that is “more than a mere balance of probabilities.”

**23.** In the present case, the Appellants did not, for instance, call any expert witness such as a document examiner to demonstrate that the signatures on the impugned transfer documents were forged. They did not also summon any official from the Land Control Board to impugn the authenticity of the letter of consent by either producing minutes of the alleged date the consent was issued nor did they adduce evidence from the Lands Registry to rebut the Respondent's documents or demonstrate procedural irregularities in the registration process. Further, no witness was called from the Kenya Revenue Authority or the bank to challenge the stamp duty receipt or payment trail. In the absence of such evidence, the Appellants failed to meet the legal threshold for proving fraud as required under Sections 107-109 of the Evidence Act, which place the burden of proof on the party alleging fraud. Consequently, the allegations remained unsubstantiated, and this court is bound to disregard them as of no evidentiary value.

**24.** As a matter of fact, the evidence tendered by the Appellants not only failed to establish their allegations of fraud but, conversely, reinforced the Respondent's narrative on the lawful acquisition of her title. The very documents they produced i.e. D-Exhibits 4, 5, 6 and 7 corroborated the Respondent's position that the transfer process followed the requisite statutory procedures under the Land Control Act and the Land Registration Act. These documents, on their face value demonstrated compliance with mandatory formalities such as

obtaining the LCB consent, execution of appropriate transfer instruments, and payment of stamp duty prior to registration. In effect, instead of casting doubt on the propriety of the Respondent's title, the Appellants' own exhibits affirmed that the Respondent underwent the procedural steps ordinarily attendant to a lawful conveyancing and registration process. In the absence of credible evidence impeaching the authenticity of these documents or the integrity of the registration process, the Appellants' case inadvertently buttressed the Respondent's claim of having acquired good and valid title to the suit property.

**25.** The Court further observes that the mere fact that the transfer form was undated is not, in itself, a fatal irregularity. The critical dates for purposes of determining the validity of the transfer are clearly endorsed on the face of the instrument, which shows that the documents were duly presented to the Lands Office on 29/09/2021 and registered on the very same date. Moreover, the Land Control Board letter of consent produced in evidence indicates that consent to transfer was granted on 10/05/2021. This chronology demonstrates that the statutory processes were initiated and substantially undertaken while the late Julius Sikuku Naibei was still alive. This is as corroborated by the evidence of PW2 who testified that the deceased informed her that he had transferred the suit land to the Respondent. Taken cumulatively, and upon a holistic appraisal of the evidence before this Court, no element of impropriety, manipulation, or foul play attributable to the

Respondent has been established. Instead, the documents and circumstances collectively point to a procedurally regular and legally sound transfer process.

**26.** Consequently, this Court is satisfied that the trial court properly directed itself on the law and arrived at a sound and well-reasoned determination. Accordingly, this appeal is hereby dismissed in its entirety. Due to the degree of relations of the parties, this court considers it appropriate to direct that each party bears their own costs.

**27.** It is so ordered.

**DATED, SIGNED and DELIVERED** at **BUNGOMA** this 11<sup>th</sup> day of December, 2025.

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;

1. Mr. Anwar for the Appellants.
2. Respondent/Advocate-absent.
3. Bett C/A.