

NDUKU	KYUNGU.....	6TH
DEFENDANT		
LAWRENCE	MUSYOKI KYUNGU.....	7TH
DEFENDANT		
MATHEW	M. MUTOMBI.....	8TH
DEFENDANT		
FRANCISCA	KIMANI	9TH
DEFENDANT		
AGNES	MUMBUA.....	10TH
DEFENDANT		
ABEDNEGO	MUTUA MAITHYA.....	11TH
DEFENDANT		

JUDGMENT

Background of the case

1. To put the case in context, the parties are relatives, with the first defendant being part of their shared clan. The dispute involves land parcels nos. **LR Kibwezi/Kitengei “A”/444, Kibwezi/Kitengei “B”/455, Kibwezi/Kitengei “B”/456, and Kibwezi/Kitengei “A”/457 (“suit properties”)**, situated within the Kitengei “A” squatter settlement scheme. It was contended that these parcels were demarcated and surveyed in the name of Gregory Kyungu Mwololo (“deceased”), who passed away on 19/04/2002 and left behind three widows: Philomena Mwikali Kyungu (**“Philomena”**), who is deceased and mother to the 6th and 7th defendants;

Lydia Nduku Kyungu (**“Lydia”**), also deceased and mother to the plaintiffs and the 10th defendant. Both Philomena and Lydia died after the deceased, and the only surviving widow is the 10th defendant.

2. Upon his death, Philemona and her late son Sylvester Mwangangi Kyungu were appointed as the legal administrators of the deceased’s estate on 17/03/2003 in **Nairobi HCSC No. 2068 of 2002**, but it appears they have never been substituted.
3. The plaintiffs’ main grievance in their plaint dated 24/02/2015 and amended on 10/04/2018 is that the defendants trespassed onto the suit properties on 17/06/2014 and 02/10/2014, allegedly subdivided and beaconsed them, which they considered unlawful, and interfered with their peaceful and exclusive occupation, also causing them loss. They therefore sought the following reliefs from this court:

a. A declaration that the plaintiffs are the owners of the suit properties and are entitled to exclusive and unimpeded right of possession and occupation.

b. A declaration that the defendants, whether by themselves or their servants or agents or otherwise howsoever, wrongfully trespassed on the suit properties on 2/10/2014.

- c. A declaration that the defendants, whether by themselves or their servants or agents or otherwise howsoever, have no right whatsoever to enter onto the suit properties.***
- d. A permanent injunction restraining the defendants, whether by themselves or their servants or agents or otherwise howsoever, from entering onto the suit properties.***
- e. Vacant possession of the suit properties.***
- f. General damages for trespass.***
- g. Costs of the suit together with interest thereon at such rate and such period of time as this honourable court may deem fit to grant.***
- h. Any such other or further relief as this honourable court may deem fit to grant.***

4. On being served, and although all parties entered an appearance, only the 6th and 7th defendants filed a defence and counterclaim dated 6/04/2018. In their defence, they denied some of the assertions and required the plaintiffs to prove their claims. They stated they were strangers to certain aspects and claimed they entered the suit properties at the behest of some of the defendants. They admitted the subdivision of the suit properties but argued it was not unlawful. According to them, the administrators of the deceased's estate have not yet been substituted; therefore, confirmation of the grant is still pending. They also argued that the plaintiffs had obtained title documents fraudulently,

irregularly, illegally, and without a confirmed grant. Hence, they sought the following reliefs from this court.

- a. A declaration that the suit properties form part of the deceased's estate.***
- b. A declaration that the registration of the suit properties' title documents was irregular and the title documents thereof should be cancelled and the register rectified.***
- c. A declaration that the 6th and 7th defendants are entitled to a portion of the suit properties since they are dependants of the deceased within the meaning of Section 29 of the Law of Succession Act.***
- d. Costs of the suit and interests thereon at such rate and for such period of time as this honourable court may deem fit to grant.***
- e. Any such other or further relief as this honourable court may deem appropriate.***

Issues for determination

5. Having considered the pleadings and the evidence presented by the parties during the hearing on the merits and issues as outlined in the filed submissions, the following issues for determination arise: -

a) Whether the claim of fraud, illegality and irregularly over the suit properties was specifically pleaded and proved.

b) Whether the defendants are trespassers.

6. Having outlined the issues to be decided, this court will now summarise the parties' evidence related to these issues as identified.

Hearing and evidence

7. The matter ultimately proceeded to a hearing on 2/11/2020, during which the 2nd, 3rd, 4th, and 5th plaintiffs testified. Aside from the 2nd plaintiff, the other plaintiffs' witnesses merely adopted their witness statements as their evidence in chief and fully aligned themselves with the 2nd plaintiff's testimony. Following this, the defendants' counsel saw no need to cross-examine the 3rd, 4th, and 5th plaintiffs. Collectively, their evidence consisted of witness statements, oral testimonies, and several documents produced, which were marked as **PExh. 1-10**.
8. In her testimony and while explaining the origin of their claim to the suit properties, she stated that since the adjudication register reflected Lydia's name, which was entered during the deceased's lifetime and on Lydia's death, she and the 1st plaintiff obtained letters of administration over her estate and were issued a certificate of confirmation of grant dated 30/11/2009 (**PExh.1**). Armed with this, they visited the

Kibwezi Lands Office, whereafter four letters of offer were made to them on 24/12/2012 regarding the respective parcels **(PEXh.2(a)-(d))**.

9. Following this, they accepted the offer as per the letters dated 18/11/2013 **(Pex. 4(a)-(d))**, and a certificate of ownership was issued to the plaintiffs by the letter dated 7/11/2014 from the District Land Adjudication Officer - Kibwezi Sub County **(PEXh. 5)**. Thereafter, title deeds were issued to the plaintiffs **(PEXh. 3(a)-(d))**. She testified that at a meeting attended by the clan and the defendants on 17/06/2014, the clan divided the suit properties among the households of the deceased and also allocated a portion to their uncle, the 4th defendant. According to her, the clan distributed the suit properties as follows: plot no. 444 to Lydiah, 455 to the 10th defendant, 456 to the 4th defendant, and 457 to Philomena Mwikali Kyungu.
10. She asserted that afterwards, the clan and their stepsiblings divided the suit properties and wrote a letter to the adjudication and settlement officer instructing it to implement the clan's directives **(PEXh. 6)**. During cross-examination, she struggled to explain why the plaintiffs' names appeared in the adjudication register on 7/08/2009, which was prior to the confirmation of the grant over Lydia's estate. When shown the register, she stated she did not know the deceased's names had been recorded, and when the entry of the deceased's name was pointed out to her as the first registered owner, she said she had no comment on the register.

11. At the conclusion of the plaintiff's case, the cases of the 6th and 7th defendants proceeded. Their evidence was provided by Mary Maina (**DW1**), a land adjudication and settlement officer from Kibwezi, whom the court had summoned, Stella Mwendu Kyungu (**DW2**), and the 4th defendant. Their evidence comprised oral, written, and documentary evidence, with the latter being marked as **DExh. 1-7**.
12. **DW1** adopted her report dated 12/01/2023, which gave a history of the suit properties. It indicated that initially, the property was demarcated and recorded in the deceased's name. Upon his death, Lydia submitted a letter dated 25/11/2003 requesting the transfer of the suit properties into her name.
13. As a result, the settlement scheme records were amended: the deceased's name was removed, and Lydia's was inserted. Later, after Lydia's death, her name was cancelled, and the plaintiffs' names were added. By the time Sylvester Mwangangi Kyungu objected, the documents had already been forwarded for registration. She stated that the settlement scheme discharge of charge documents were issued to facilitate the issuance of title deeds. She also stated that since the deceased had three wives, the mode of transfer to Lydia was unprocedural because probate proceedings should have been undertaken.

14. Regarding **DW2**, she testified that they sought for the clan to subdivide the suit properties, as it was part of the deceased's estate. **DW3** confirmed DW2's evidence and further stated that, as a purchaser from the 10th defendant and DW2, he participated in the clan meeting and acquired his purchased portion.

Submissions

15. After the hearing concluded, and at the request of the parties, the parties argued their respective cases through written submissions. The court sincerely appreciates the well-argued submissions received from the law firms of **Ms. Kithuka & Nafula Advocates** representing the plaintiffs, dated 25/06/2025, and from **Ms. A.M.Mbindyo & Co. Advocates** for the defendants, dated 10/07/2025. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the rival submissions, along with the relevant law and judicial precedents cited.

Analysis and determination

16. The issues previously identified will be addressed jointly.

17. On the first limb, it is well-established law that fraudulent, illegal, and irregular conduct must be specifically pleaded as required by **Order 2 Rule 4** of the **Civil Procedure Rules**

and proved with a standard of proof higher than the balance of probabilities but less than proof beyond a reasonable doubt. Furthermore, relying solely on inference from the facts to establish fraud, illegality, or irregularity is not allowed. **See the Court of Appeal decision in Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) 1 December 2000 (Judgment).**

18. Furthermore, in the case of **Koinange and 13 others - v - Koinange [1986] KLR 23**, which has been cited in several court decisions, the court reaffirmed the fundamental principle of the law of evidence that he who alleges must prove. In the case of **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314 and another [1979] KLR**, it was established that fraud primarily concerns an individual's state of mind and intentions, rather than the outcomes of their actions.
19. Additionally, fraud is defined by **Black's Law Dictionary, 11th Edn, at p. 802**, as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Thus, having considered the defence and counterclaim, particularly *paragraph 27* thereof and the definition of fraud, this court is not satisfied that fraud was particularised.
20. To this court's mind, the only plea that meets the legal threshold is the one of irregular and illegal registration of the

suit properties without a certificate of confirmation of grant. Notably, the plaintiffs' submissions focused on the issue of double allocation of public land, supported by the decision of **Waterfront Holdings Limited v Kandie & 2 others [2023] KECA 1223 (KLR)**, whereas the defence urged this court to scrutinise the legality of the acceptance by the plaintiffs after the lapse of the offers. Respectfully, the issue of double allocation of the suit properties and the issue of illegality in the acceptance of the letters of offer by the plaintiffs were never pleaded or raised as issues for determination. Hence, this court declines such an invite.

21. Reverting to the issue at hand, the evidence clearly demonstrated that the suit properties are parcels of land within a settlement scheme. Before the enactment of the **Land Act 2012**, the laws governing the creation of a settlement scheme were the **repealed Agriculture Act**, the **repealed Registered Land Act**, and the **Regulations** made under them. The **Settlement Fund Trustees**, now known as the **Land Settlement Fund**, was established by **Agriculture Regulations 1963 LD No. 352/1963** under the **repealed Agriculture Act**. The procedure for land allocation under the settlement scheme was thoroughly explained in the decision of **Kide & another v Sawe & 3 others [2025] KEELC 2908 (KLR)**.

22. Since the plaintiffs are the holders of the title, the onus was on them to elucidate the origin of the title, particularly whether

Lydia required a confirmation of grant regarding the deceased's estate prior to engaging with the suit properties. The legal principle stipulates that when a title deed is in question, a party bears the obligation to demonstrate the chain of acquisition, including all the steps and procedures involved. It is insufficient to merely waive a title deed and assert that it is indefeasible and that one is an absolute proprietor. This court associates itself with the Court of Appeal decision of **Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] KECA 882 (KLR)** that stated: -

“a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

See also Sections 24, 25 and 26 of the Land Registration Act regarding circumstances under which a title deed can be challenged.

23. In this case, the 2nd plaintiff was evasive about how Lydia acquired the suit properties or whether the deceased was initially recorded as the owner. However, consistent evidence, especially from the land settlement officer, indicated that the deceased was the original owner. This court believes her

evidence, as she is the custodian of records on the settlement scheme. Although the second plaintiff testified that Lydia was registered as the owner during the deceased's lifetime, consistent evidence contradicted this, showing that on 25/11/2003, Lydia wrote to the land adjudication officer requesting a change from the deceased to herself, and she was categorical on this by stating that: -

"I am changing the names after the death of Mr. Gregory Kyungu Mwololo who is my husband as per attached death certificate."

24. The plaintiffs did not contest Lydia's signature as contained in the letter. The records in the demarcation book indicate that the land was demarcated and surveyed in the name of the deceased. This implies that the deceased had qualified for land allocation upon applying to the Chairperson of the District Selection Settlement Committee for the relevant area, or had directly applied to the Director in Nairobi for such allocation and was successful.
25. As the letters of offer were issued posthumously, it implies that at the time of the deceased's death, the committee responsible for verifying the application, after which they would give a letter of offer, had yet to sit. In such circumstances and on his death, the suit properties became the free property of the deceased, which is usually the property that the deceased was legally competent to dispose

of freely during her lifetime, and in respect of which his death had not ended his interest. ***[See the definition from the interpretation section of the LSA.]***

26. When Lidya was conducting her transactions, the court had already appointed administrators, and neither she nor the administrators, for that matter, were permitted to interfere with the deceased's estate, including engaging in illegal and irregular dealings with the suit properties contrary to **Section 45(1)** of the **Law of Succession Act**. This court relies on several court pronouncements on this issue: -

The Court of Appeal decision in **Nairobi Civil Appeal No. 140 of 2017, between Beth Mueni v. John Kinyanjui Gakunga & Another**, stated:

“There is the final issue as to whether the sale of the estate property by beneficiaries without a grant could pass interest capable of protection under the Act. A person can only lawfully deal with the estate of a deceased person pursuant to a confirmed grant. Section 45 of the Act prohibits intermeddling with property of a deceased person. It follows, therefore, that the transactions entered into before receipt of the letters of administration were issued and confirmed, were invalid as they offended Sections 45 and 82 of the Act. The trial court in

holding that the appellant was not an interested party as provided under Section 76 of the Act, was, in our view, not in error in fact or law, as it has been established that the sale transaction was void for want of consent from the Land Control Board; and also that the transactions were void as the same were done by the beneficiaries before the Letters of Administration were issued and confirmed. Indeed, the appellant would be at liberty to seek refund of the purchase price already paid from the respective beneficiaries.”

In *Morris Mwiti Mburungu v. Denis Kimathi M’Mburungu (2016) (cited in re Estate of the late Epharus Nyambura Nduati (Deceased) (2021) eKLR)*, the court stated: -

“Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of section 45 and 82 of the Act that is intermeddling, is unlawful and cannot be protected by the Court. The transaction is subject to be nullified and set aside at the instance of innocent beneficiaries who may have been affected by the act but were not involved in the same.”

27. As held in the Supreme Court decision of **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, the title or lease is the end product of a process. If the process followed before the issuance of the titles to the plaintiffs did not comply with the law, then such titles cannot be regarded as indefeasible. Since Lydia illegally and irregularly transferred the suit properties to herself without a confirmed grant or involving all the beneficiaries of the deceased's estate, neither she nor her estate held a valid legal interest that could pass to the plaintiffs.

28. Accordingly, guided by the law and judicial precedents, this court finds that in the absence of a confirmed grant, Lydia could not deal with the suit properties. It finds that the plaintiffs do not hold valid title documents. It determines that the suit properties form part of the estate of the deceased. Based on these findings and for reasons, most of the defendants, who entered the suit properties, did so with the permission of certain beneficiaries of the deceased's estate who are also defendants; this court finds that the claim of trespass fails.

29. In conclusion, based on the reasons and findings articulated hereinabove, this court determines that the plaintiffs have not demonstrated their case to the required standard of proof; however, the 6th and 7th defendants have met this standard. Therefore, this court dismisses the plaintiffs' suit and allows

the counterclaims of the 6th and 7th defendants. Due to the special circumstances of this case, in which all parties are relatives, each party shall bear their own costs associated with the suit and counterclaim. Consequently, the following final disposal orders are hereby issued: -

- a. A declaration is hereby made that land parcel nos. LR Kibwezi/Kitengei "A"/444, Kibwezi/Kitengei "B"/455, Kibwezi/Kitengei "B"/456 and Kibwezi/Kitengei "A"/457 form part of Gregory Kyungu Mwololo's estate.***
- b. A declaration that the registration of the title deeds in the names of Christine Kanini Kyungi, Janet Nzilani Kyungu, Caroline Mukonyo Kyungu, Irene Muthey Kyungu, and Kelvin Mwololo Kyungu was illegal and irregular.***
- c. An order for the cancellation of the title deeds for land parcel nos. LR Kibwezi/Kitengei "A"/444, Kibwezi/Kitengei "B"/455, Kibwezi/Kitengei "B"/456, and Kibwezi/Kitengei "A"/457, and their registration in the names of Gregory Kyungu Mwololo, is hereby issued.***
- d. Each party shall bear their respective costs of this suit and counterclaim.***

Judgment accordingly.

**Delivered and Dated at Machakos this 8th day of
December, 2025.**

**HON. A. Y. KOROSS
JUDGE
8.12.2025**

**Ruling delivered virtually through Microsoft Teams Video
Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr Mbindyo for defendants.

Mr. Kithuka for plaintiffs.