



REPUBLIC OF KENYA



**Khamala v Weluywa aka Elizabeth Kimasi Wanyonyi & 4 others (Environment and Land Case 84 of 2010) [2026] KEELC 279 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 84 OF 2010**

**CK NZILI, J**

**JANUARY 28, 2026**

**BETWEEN**

**ISAAC WEPUKHULU KHAMALA ..... PLAINTIFF**

**AND**

**ELIZABETH SIMIYU WELUYWA AKA ELIZABETH KIMASI  
WANYONYI ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY SURVEYOR - TRANS NZOIA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**THE COUNTY LAND REGISTRY - TRANS NZOIA  
COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**WEONIA FARMERS CO-OPERATIVE SOCIETY LTD ..... 4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Through an amended plaint dated 17/7/2023, the plaintiff seeks:
  - (aa) Declaration that the 1<sup>st</sup> defendant holds Title No. Saboti/Sikhendu Block 8/Weonia/476 measuring 0.4 Ha (the suit land), in trust for him, and an order cancelling the said title and registration in his favour by the Land Registrar.
  - (bi) Eviction and the 1<sup>st</sup> defendant is ordered to vacate the land.
  - (bii) Permanent injunction does issue restraining the defendants from entering the suit land, transferring, wasting, damaging, or processing titles or transfers in favour of any other person, mutilating the register, or doing any other acts in furtherance of their illegalities, and or acting in any other manner contrary to the interest of the plaintiff in the suit land.



2. The plaintiff avers that he is among the pioneers and original members of Weonia Farm, having bought a share in 1972, at the inception of Weonia Farmers' Co-operative Society, to which he took possession of the share of his land as pointed out to him by the first directors of the 4<sup>th</sup> defendant.
3. The plaintiff avers that on or about 1988, he allowed one of his relatives, now deceased, and the 1<sup>st</sup> defendant, who was his wife, as a caretaker, to stay, use, and occupy the said share at the farm on his behalf.
4. Further, the plaintiff avers that the deceased and the 1<sup>st</sup> defendant took advantage of the magnanimity and secretly approached the directors of the 4<sup>th</sup> defendant to assume and change ownership documents of the suit land, without his consent or approval.
5. The plaintiff avers that following the complaint he lodged with the area chief over the issue, he was referred to the Land Disputes Tribunal, where he sued the 4<sup>th</sup> defendant's directors, and after deliberations, it was confirmed that the deceased was not an original member of the 4<sup>th</sup> defendant, hence should be evicted from his land.
6. The plaintiff avers that the Land Disputes Tribunal award was adopted as a judgment of the court in Kitale SPMCC No. 136 of 1996, and a decree of eviction issued on 9/12/1996. The plaintiff avers that the said deceased moved to challenge the said decree in Eldoret HCC Misc. No. 135 of 1996, later Kitale HCC Misc. Appl. No. 16 of 2000. The plaintiff avers that the 1<sup>st</sup> defendant's husband unfortunately passed on before the case was finalised, though it was later marked as abated on 1/3/2000.
7. The plaintiff contends that he eventually filed citation proceedings in HCC Misc. Cause No. 17 of 2010. The plaintiff avers that, despite the eviction order, the 1<sup>st</sup> defendant, who was occupying the suit land as a licensee on account of the deceased's goodwill, has remained on the land.
8. The plaintiff avers that out of political expediency in the then handshake government, seeking to reward its cronies, the management committee of the 4<sup>th</sup> defendant hurriedly prepared a list of members purportedly cleared by the society to acquire title deed without doing a background check of the original members, and the existing complaint. The 3<sup>rd</sup> defendant resorted to inviting the 2<sup>nd</sup> defendant to beat the strict timelines to carry out an haphazard survey and mapping exercise, riddled with errors, and irrationality, resulting to preparation of an area list, before finalization of the registered complaints, later forwarded to the lands office for approval and preparation of title deeds.
9. Again, the plaintiff avers that upon receiving the survey report, map, plan, and area list, the 3<sup>rd</sup> defendant rubber-stamped the same and, out of political pressure or expediency, fraudulently, illegally, and unlawfully issued a title deed for the suit land to the 1<sup>st</sup> defendant, yet she lacks membership credentials of the society.
10. The plaintiff terms the entire process of issuance of the title deed as muddled with misrepresentation of facts, fraudulent, and illegal on the part of the 1<sup>st</sup> defendant, who presented herself as a bona fide shareholder of the society, used forged documents to mislead or misrepresent the facts, acted dishonestly to defeat his interest in the suit land, and colluded with her late husband to abuse the goodwill, secretly obtained documents without clearance of the payments, registered herself as the sole owner while aware the land belongs to him, and proceeded to obtain the title deed without undergoing any succession proceedings.
11. According to the plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants acted fraudulently, or illegally, and abused their authorities by failing to act diligently, passionately, fairly, and carry out due diligence to protect his interest on the land, failed to relook at the authenticity of documents presented to them, and yield



- to political expediency or pressure instead of acting professionally, failed to accord all members of the society an opportunity to check and confirm their particulars, in the original farm register or society records, and the subsequent area list to avoid errors or omissions.
12. The plaintiff avers that the 1<sup>st</sup> defendant deliberately colluded with the society directors who had also hurriedly surveyed the land and issued title deeds in total violation of the *Land Act*, *Survey Act*, and *the Constitution*.
  13. In particular, the plaintiff blames the 4<sup>th</sup> defendant for falsifying the farm register, receiving benefits from the 1<sup>st</sup> defendant to alter the register in her favour, hastily preparing survey documents, a map sheet, and the area list to insert the 1<sup>st</sup> defendant's name, failing to carry out fresh audit of the farm registers to determine genuine and bona fide members, subjecting members to political expediency, remaining and holding themselves illegally as bona fide directors, without filing returns, calling meetings or performing their duties with the sanction of the members, taking away his land rights and failing to secure letters of grant from the 1<sup>st</sup> defendant, who merely rode on the goodwill of the deceased.
  14. The 1<sup>st</sup> defendant opposed the suit through a statement of defence dated 25/5/2023. The 1<sup>st</sup> defendant admitted that she is in occupation of the suit land, as the lawfully registered owner, by virtue of being a member of the 4<sup>th</sup> defendant.
  15. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants opposed the suit through a statement of defence dated 3/10/2023, denying the contents of the amended plaintiff, generally and in particular, knowledge of or privity of purchase of shares at the 4<sup>th</sup> defendant, or the entitlement of shares to the plaintiff.
  16. Further, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants deny knowledge of or being party to the cases quoted in paragraphs 4D, E, F, and G of the amended plaintiff. Equally, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants denied the particulars of fraud, abuse of authority, or illegality contained in paragraphs 6D(a-g) of the amended plaintiff. In the alternative and without prejudice to the foregoing, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants termed the suit as disclosing no cause of action against the 3<sup>rd</sup> and 5<sup>th</sup> defendants, frivolous, mischievous, statute-barred, scandalous, and untenable.
  17. According to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants, any action and or registration in favour of the 1<sup>st</sup> defendant was done in utmost good faith in line with execution of statutory duties bestowed upon them and affirmation that at all material times, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acted in accordance with the law and pursuance of their statutory mandate. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants denied receipt of any demand letter.
  18. The 4<sup>th</sup> defendant opposed the suit through a statement of defence dated 29/11/2023, denying in to the contents of the amended plaintiff, save to add that it was a team of surveyors from the Titling Centre Nairobi, who carried out the survey and prepared the requisite map that was approved and registered by the Director of Survey of Kenya and not the County Surveyor, Trans Nzoia.
  19. The 4<sup>th</sup> defendant avers that an area list of the bona fide members of the society was prepared, and each member was allocated land in accordance with his or her shareholding, and no member was left out, and subsequently, title deeds were prepared and given out to the members.
  20. Similarly, the 4<sup>th</sup> defendant avers that the process of procuring the title deeds for all the members of the 4<sup>th</sup> defendant went on well to the satisfaction of all the members. It denies that the area list was altered to the disadvantage or detriment of the plaintiff or any other member, by altering the register or any document to include non-members.



21. The 4<sup>th</sup> defendant avers that L.R. No. 10914/R was duly surveyed and subdivided into 570 portions in accordance with the number of the society members and for public utilities thereof. The 4<sup>th</sup> defendant avers that the map and the area list were prepared following the laid down procedure, legally, lawfully, and openly, with the participation of members of the 4<sup>th</sup> defendant, with no alteration of either the map or the area list by any of the defendants or any other party.
22. The 4<sup>th</sup> defendant avers that the title documents for the subdivision of L.R. No. 10914/R were prepared for the bona fide members of the society, for only those who were entitled to the land to the exclusion of all others.
23. Further, the 4<sup>th</sup> defendant denies that the entire process of issuing titles was muddled with irregularities, illegalities, and misrepresentations to which the defendants were all privy, as alleged in paragraph 6D of the amended plaint, or at all.
24. The 4<sup>th</sup> defendant avers that it is a stranger and was not a party to Land Case No. 136 of 1996, hence was not privy to the eviction orders issued therein, the suit is statute-barred, an abuse of the court process, and discloses no known cause of action.
25. At the trial, Isaac Wepukhulu Khalama testified as PW1. He relied on a witness statement dated 8/7/2021 as his evidence -in-chief. PW1 told the court that his relative, one Jonathan, now deceased, who had inherited his brother's wife, the 1<sup>st</sup> defendant, left his first wife's home and requested him for an occupation on the suit land in 1986, to which afterwards the two secretly attempted to change ownership documents to the land, without his approval.
26. PW1 said that the two approached the initial directors of the Farm, who resisted their moves, thus he complained to the area chief, who ordered the 1<sup>st</sup> defendant and the deceased to vacate the suit land. PW1 said that he escalated the complaint to the Land Disputes Tribunal, where he obtained an award that was later made a decree of the court.
27. PW1 said that the deceased appealed to the Eldoret High Court and later Kitale Law Courts, whose suit was marked as abated on 1/3/2010. PW1 said that eventually he cited the 1<sup>st</sup> defendant for letters of administration, since she is the one occupying the land by virtue of being married to the deceased.
28. Further, PW1 relied on a copy of the order dated 25/5/1997, decree dated 9/12/1995, and proceedings in Misc. Appl. No. 16 of 2010, proceedings before Land Disputes Tribunal, citation application in Cause No. 17 of 2014, affidavit in support of the citation application, and a letter dated 24/1/1996 from the District Commissioner to the 4<sup>th</sup> defendant as P. Exhibit Nos. (1) - (7).
29. PW1 termed the title deed held by the 1<sup>st</sup> defendant as fraudulently obtained, while there was a pending case. PW1 said that he was among the initial shareholders, No. 72 of the society, who acquired the suit land between 1986 and 1987. PW1 said that the defendants did not involve him in the process of issuing the title deeds. PW1 said that he was the one who allowed his deceased cousin to occupy the land, to which he was the owner, as shown in land rates and rents receipts, as well as demand notices from the County, produced as P. Exhibit No. 8(a) and (b).
30. PW1 termed the entry of the 1<sup>st</sup> defendant as a shareholder in the area list instead of him as fraudulent, or irregular, otherwise, the farm register was altered or doctored at the instance of the 1<sup>st</sup> defendant, who colluded with the directors of the 4<sup>th</sup> defendant to remove his name, since it had initially been included in the initial list sent to the area District Commissioner in the presence of the area chief.



31. Again, PW1 said that all these changes occurred without his knowledge; otherwise, he would have reported to the police, had he become aware of the same. PW1 said that the irregularities, alterations, or misrepresentations occurred while the matter was still pending in court since 1986.
32. PW1 admitted that since 1986, it was the deceased as a caretaker who, together with the 1<sup>st</sup> defendant have been utilising the land. PW1 admitted that his share certificate or payment receipt was not before the court. PW1 termed the omission of his name as member No. 72 in the final list as fraudulent.
33. PW1 said that membership to the society was after the payment of some money, whose receipts he did not have, to show that he was a fully paid founder member as at 3/1/1972 for Kshs.1,020/=. PW1 said that the survey and mapping took place without his knowledge, for he was staying away from the land.
34. Elizabeth Kimasi Wanyonyi testified as DW1. She relied on a witness statement dated 25/5/2022 as her evidence-in-chief. She told the court that she has been a resident of Weonia Farm since 1985 and the registered owner of the suit land, acquired by purchase and became a registered member of the 4<sup>th</sup> defendant, going by the area list as No. 476, having 0.9 acres.
35. DW1 said that she has lived peacefully on the said plot with no conflict whatsoever with the plaintiff, who has never owned or been registered as its owner. The court also notes that there is a witness statement dated 7/11/2022. DW1 said that his late husband, Jonathan Walunywa, was the owner of plot No. 72 in Weonia Farm, to which one Christopher Simiyu had sued in Kitale SRMC Land Case No. 90 of 1995, claiming ownership of the same. DW1 said that she and her late husband used to live in the said plot and that is what the Tribunal awarded them. DW1 said that the award of the Land Disputes Tribunal was also adopted as a judgment, and a decree was extracted, which was never appealed against.
36. DW1 said that after her late husband passed on, she continued to live on plot No. 72 in Weonia Farm; she does not reside on the plaintiff's plot No. 476 as alleged. DW1 relied on a copy of the title for No. Saboti/Sidhendu/Block 9 (Weonia)/476, a copy of the clearance certificate, and a copy of the area list as D. Exhibit Nos. (1), (2), and (3).
37. In cross-examination, DW1 said that she made an entry to the suit land in 1970, after she bought the shares equivalent to 0.9 acres. DW1 had no share certificate for the same before the court. She said that she could neither remember the share certificate number nor the secretary and treasurer of the farm at the time of issuance of the share certificate.
38. DW1 confirmed that D. Exhibit No. (2) had no date of issuance and was not signed by the rest of the officials of the Farm. DW1 could not remember the maker of that exhibit. Equally, DW1 could not tell who prepared the area list produced as D. Exhibit No. (3), listing her name as No. 476. DW1 confirmed that the area list has missing pages and some entries inserted by hand, which are not countersigned.
39. As to a decree mentioned in the initial witness statement, DW1 said that she did not know who Jonathan Walunywa was. As regards the order in the High Court Misc. No. 5 of 1997, produced as P. Exhibit No. (2), DW1 said that she was not privy to that suit or the decision; otherwise, her late husband was known as Wangongi and not Walunywa.
40. DW1 denied that her title deed was irregularly obtained, while there was an existing court order. DW1 further denied entry into the suit land following the eviction or vacation of the land by Jonathan Simiyu Walunywa.



41. Concerning the clearance certificate, DW1 termed it as authentic; otherwise, she would not tell the alleged errors since she was not the maker of D. Exhibit No. (3) alleged to be lacking a stamp or certificate from the Land Adjudication & Settlement Officers.
42. DW1 said that she paid statutory fees of Kshs.1,000/= to acquire the title deed, based on the area list. DW1 said that there must have been a land register that the Land Registrar relied on while issuing her a title deed. DW1 said that she could not blame the Land Registrar for issuing her a title deed; she may not know if the plaintiff's name was in the area list or the land register relied upon by the Land Registrar.
43. DW1 said that since the allocation of the land in 1985, the plaintiff had never laid claim or sought to evict her from the same till the issuance of the title deed.
44. George Songwa testified as DW2. He relied on a witness statement dated 29/11/2023 as his evidence-in-chief. DW2 told the court that he was the chairman of the 4<sup>th</sup> defendant since 2005, and the proprietor of L.R. No. 10914/R, whose main role was to ensure members of the society acquired title deeds in line with their shares.
45. DW2 said that for a long time, no survey had been done, yet members were anxious to acquire title, until a team of surveyors from the Titling Centre, Nairobi, came and carried out a survey, prepared the requisite map, which was eventually approved and registered by the Director of Surveys of Kenya.
46. DW2 said that the society officials were the ones who prepared the area list, which included all the bona fide members of the society, allocating each member a portion, in line with his or her shareholding, leaving no member out. DW2 said that based on the area list, title deeds were prepared and issued to the members. DW2 added that no map or area list was altered by any of the defendants, to omit or deny a bona fide member his share.
47. According to DW2, the process and the exercise of surveying, preparing the map, and the map and the area list were conducted above board, publicly and openly, with the participation of all the members of the 4<sup>th</sup> defendant, without any anyone raising any complaints.
48. DW2 termed the plaintiff's claim as unfounded. He relied on an area list signed by his officials on 30/11/2015 as D. Exhibit No. (4). DW2 said that D. Exhibit No. (4) was generated by his office, and according to it, the plaintiff was not a bona fide member of the 4<sup>th</sup> defendant.
49. DW2 said that he became an official of the 4<sup>th</sup> defendant on 26/4/2005; all genuine members of the society were already occupying their respective portions on the Farm, on already surveyed land; the officers from Nairobi found the 1<sup>st</sup> defendant already occupying the plot No. 476.
50. In addition, DW2 said that the previous directors of the society before 26/4/2005 were led by Mzee Emanuel Milimo, Peter Wanjala, Nathan Simiyu, and Mark Khalama. DW2 had no minutes to show when he was elected to the office of the director. Similarly, DW2 said that there was no handing over of the office records to the incoming officials when he was elected, to use in the regularisation of their registration with the co-operatives office, since the former officials refused to hand over, leading to Co-operative Tribunal Case No. 1 of 2010 in Eldoret.
51. DW2 said that the official register for members was in the custody of the treasurer. He admitted that the title deeds were processed during the pendency of the Co-operative Tribunal case. Similarly, DW2 confirmed that there have been no elections of the officials of the 4<sup>th</sup> defendant since 2010. Further, DW2 confirmed that the title deeds were issued before all the disputes as regards the area list could be resolved.



52. DW2 said that the area list was prepared by his office in 2015, after which it was verified and signed by all the members, though the one before the court was not signed.
53. DW2 said that the National Titling Centre is the one who directed the 4<sup>th</sup> defendant to fast-track preparation of the area list so that title deeds could be generated. DW2 said that as a result, all members of the society were summoned to participate in the process and verify the area list. DW2 said that all disputes that arose were resolved. He denied knowing the plaintiff or dealing with his complaint before the suit was filed.
54. DW2 said that he was not privy to any land dispute involving the subject land or plot No. 476, and in particular, the Land Disputes Tribunal case; otherwise, he found the 1<sup>st</sup> defendant on the land in 1976.
55. According to DW2, one would become a member of the 4<sup>th</sup> defendant by payment of a share contribution of KShs.1,000/=, followed by the issuance of a share certificate and the Farm rules. DW2 confirmed that D. Exhibit No. (4) was neither sealed by the Land Adjudication and Settlement Officer, nor was it dated, stamped, or signed by all the 4<sup>th</sup> defendant's officials.
56. DW2 confirmed that the politics of the day found them in the process of preparing the area list; each member was supposed to pay statutory fees or charges to obtain a title deed. DW2 said that since all the members were already in occupation of their respective portions, all that the Nairobi Surveyors did was to verify the occupants' names and portion sizes. DW2 said that his committee merely came in to facilitate the issuance of the title deed.
57. In the absence of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants' witnesses, the statement of defence dated 3/10/2023 was marked closed.
58. The plaintiff relies on written submissions dated 10/12/2025. It is submitted that in a witness statement dated 7/11/2022, the 1<sup>st</sup> defendant admitted that she was the owner of plot No. 72, and does not reside on plot No. 476, which had a suit filed by Christopher Simiyu. Further, it is submitted that in the initial statement of defence dated 10/11/2010, through M/s Kiarie & Co. Advocate, the 1<sup>st</sup> defendant had admitted that both the plaintiff and herself were members of the 4<sup>th</sup> defendant.
59. The plaintiff isolates three issues for determination. It is submitted that under Section 26(1) of the Land Registration Act, a title deed can be impeached on the grounds of acquisition through a corrupt scheme, fraud, or misrepresentation, where the proof is on a higher degree than in ordinary suits, as held in *Kuria Kiarie & Others -vs- Sammy Magare* [2013] eKLR, *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000], and *Kinyanjui Kamau -vs- George Kamau* [2015] eKLR.
60. It is submitted that the plaintiff has demonstrated through her evidence, that the plot which was in the custody of Walunywa, a relative and which he was decreed to in the Land Disputes Tribunal case, is the one that the 1<sup>st</sup> defendant, using different names as a different person, was issued a title deed with, through collusion with the directors of the 4<sup>th</sup> defendant.
61. The plaintiff submits that he has pleaded and particularised the misrepresentation and illegality in line with Order 2 Rule 4 of the Civil Procedure Rules and going by paragraph 6(2) of the amended plaint. The plaintiff submits that she has discharged the burden of proof in terms of demonstrating that the original area list was changed and his name replaced with that of the 1<sup>st</sup> defendant.
62. The plaintiff submits that there was a court decree followed by a letter dated 24/1/1996, by the District Commissioner to the Farm's directors raising issues of the membership of Jonathan Walunywa, which is the same land the 1<sup>st</sup> defendant as the wife of the deceased became the owner, upon change of



- ownership particulars, by adopting different names to create an impression that she was a different person.
63. Further, the plaintiff submits that the 1<sup>st</sup> defendant has failed to explain how she acquired the land despite a valid court decree. Similarly, the plaintiff submits that the 4<sup>th</sup> defendant has failed to produce the original membership list, survey map, and the initial area list or any other duly stamped and approved area list from the Director of Surveys.
  64. The plaintiff submits that the 1<sup>st</sup> defendant has also failed to explain how the title deed in favour of the 1<sup>st</sup> defendant was issued while there was a valid court decree and a pending Co-operative Tribunal dispute over the leadership of the 4<sup>th</sup> defendant.
  65. On trust, the plaintiff submits that there is a demonstration that he was an original shareholder, whose share was given back to him through a valid court decree before 2017, and therefore, the 1<sup>st</sup> defendant can only be holding the same in trust.
  66. The 1<sup>st</sup> defendant relies on written submissions dated 2/12/2025. It is submitted that the plaintiff has failed to produce a share certificate or a receipt that he was a member of the 4<sup>th</sup> defendant in the first instance, or that his name appears anywhere in the area list produced before the court.
  67. The 1<sup>st</sup> defendant submits that the plaintiff has called no evidence to show that she was in a marriage relationship with her or had any other relationship with her. The 1<sup>st</sup> defendant submits that the plaintiff has failed to produce any documents to show any forged documents as to implicate her in any alleged fraud, illegalities, misrepresentation, and collusion with the directors of the 4<sup>th</sup> defendant to obtain the title to the suit land.
  68. Further, the 1<sup>st</sup> defendant submits that she has proved occupation of the suit land by virtue of membership in the 4<sup>th</sup> defendant, as confirmed by the 4<sup>th</sup> defendant, the chairman of the document.
  69. The 4<sup>th</sup> defendant relies on written submissions dated 11/12/2025. It is submitted that the title held by the 1<sup>st</sup> defendant has not successfully been impeached, in line with Sections 25(1), 26(1), and 80(1) and (2) of the *Land Registration Act*.
  70. The 4<sup>th</sup> defendant submits that the allegation made against the defendants, as per paragraph 6D of the amended plaint, has not been substantiated through evidence. In particular, the 4<sup>th</sup> defendant submits that the plaintiff has failed to show membership of the society by way of a share certificate, co-operative register, and how the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant were aware, caused, or became a party to the alleged fraud.
  71. As to the reliefs sought, the 4<sup>th</sup> defendant submits that, bearing in mind the circumstances of registration and the issuance of title to the plaintiff, the plaintiff has not adduced any evidence to warrant a declaration of trust. The 4<sup>th</sup> defendant submitted that trust is a matter of fact, to be established through evidence, and a court of law may not infer trust, unless in an absolute necessity to do so.
  72. The 4<sup>th</sup> defendant submits that the plaintiff has failed to meet the text of trust as held in *Isaack M’Inanga Kiebia -vs- Isaaya Theuri M’Lintari & Another* [2018] eKLR, to be entitled to cancellation of the title, eviction, or the issuance of a permanent injunction.
  73. The issues calling for my determination are:
    1. If the plaintiff has proved misrepresentation, fraud, and or illegality on the part of the 1<sup>st</sup> defendant.



2. If the plaintiff has proved fraud, abuse of authority, and illegality on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
  3. If the suit property is registered in the name of the 1<sup>st</sup> defendant in trust for the plaintiff.
  4. Whether the plaintiff is entitled to the reliefs sought.
  - (5) What is the order as to costs?
74. It is trite law that parties are bound by their pleadings and issues for determination arise from the pleadings. See *Raila Odinga & Others -vs- Independent Electoral and Boundaries Commission & Others* [2017] eKLR. Black's Law Dictionary, 7<sup>th</sup> Edition, defines misrepresentation as the act of making a false or misleading statement about something.
  75. Fraud is defined as a deceitful practice or willful device, resorted to with intent to deprive another of his right or in some manner to do him an injury. It is where there is an intentional perversion of truth for the purpose of inducing others in reliance upon it to their detriment.
  76. The elements of fraud include: a representation of fact, its falsity; its materiality; the representor's knowledge of its falsity and the representor's intent that it should be acted upon.
  77. In *Kakad -vs- Anne (Suing as legal representative to the Estate of Lucas Oluoch Mumia)* (Civil Appeal 174 of 2019) [2025] KECA 1757 (KLR) (24 October 2025) (Judgment), the credentials used to seek the debt turned out to be untrue and fraudulent, as there was no such money, due and owing to the respondent from the Central Bank of Kenya. The respondent denied being the author of the documents attributed to him or from the Central Bank of Kenya.
  78. On appeal, the court discussed the applicable law and the requirements to prove misrepresentation. It said that misrepresentation takes various forms, including innocent, negligent, or fraudulent misrepresentation, each with different legal consequences and remedies. The court held that innocent misrepresentation occurs when a false statement is made without knowledge of its inaccuracy and the misrepresenting party believes the statement to be true.
  79. Negligent misrepresentation was defined as when a party fails to take reasonable care in verifying a statement's veracity. On the other hand, fraudulent misrepresentation is where a false statement is made intentionally to deceive the other party.
  80. To prove the three, the court held that five elements must be established, namely: false representation, the intent or negligence, reliance, causation, and lastly, damages.
  81. In *Kuria Kiarie & Others -vs- Sammy Magera* [2018] eKLR, the court observed that the standard of proof is obviously higher than that required in an ordinary suit, since fraud cannot be inferred.
  82. Applying the foregoing to the instant suit, the plaintiff in the amended plaint dated 17/7/2023 described the 1<sup>st</sup> defendant as Elizabeth Simiyu Walunywa, also known as Elizabeth Kimasi Wanyonyi, residing at Weonia Farm. In the statement of defence dated 29/11/2023, the 1<sup>st</sup> defendant, at paragraph 2, admitted the descriptive parts of the amended plaint.
  83. The main claim by the plaintiff is that the 1<sup>st</sup> defendant assumed a different name but was known to him as the wife of his relative, the late Jonathan Walunywa, who had assumed and changed documents on ownership and whom he had litigated with up to 2008.



84. The plaintiff's contention in this suit is that the 1<sup>st</sup> defendant, after assuming different names, used the said name to mislead the 4<sup>th</sup> defendant to include the said name in the area list which belonged to the plaintiff, and later was issued with a title deed on land belonging to the plaintiff.
85. In the amended defence dated 25/5/2023, the 1<sup>st</sup> defendant, without leave of court, purported to amend the names Elizabeth Simiyu Walunywa and, in paragraph 1 thereof, removed the words "about the names and description of parties in the plaint" and replaced the same with the correct name as Elizabeth Kimasi Wanyonyi.
86. It is notable that there was an amended defence dated 6/7/2022 and that the one amended on 25/5/2023 did not comply with the law on pleadings at all. Looking at the said pleadings, I agree with the plaintiff that the 1<sup>st</sup> defendant's pleadings and witness statements dated 7/11/2022 and 25/5/2023 are completely at variance.
87. Other than, without leave, amending the description, the 1<sup>st</sup> defendant did not, in any pleading, completely denounce that she was also known as Elizabeth Simiyu Walunywa. More curious, the 1<sup>st</sup> defendant in court denied knowing the late Jonathan Walunywa or the existence of the previous suit or marriage status, yet it is the 1<sup>st</sup> defendant in her witness statement, thumb-printed in 2022, who mentioned the earlier decree.
88. This court is aware that the 1<sup>st</sup> defendant, in a supporting affidavit dated 15/5/2023, denounced giving written instructions to the former lawyer to file the statement of defence, who had also filed a witness statement dated 7/11/2022, duly thumb-printed. The 1<sup>st</sup> defendant attached an identification card No. 205827364 issued on 21/10/1996 in the name of Elizabeth Kimasi Wanyonyi. However, the 1<sup>st</sup> defendant did not seek to subject the said documents for forensic examination to prove that the thumbprint appearing thereon and also the one appearing on the supporting affidavit sworn on 21/6/2022, in support of an application for leave to amend the defence, were not hers.
89. To compound it all, in the citation in HC Misc. Appl. Case No. 17 of 2010, the plaintiff had sworn on oath that the 1<sup>st</sup> defendant was the surviving spouse of the late Jonathan Simiyu Walunywa. The 1<sup>st</sup> defendant did not denounce that relationship at all in this suit, yet the descriptive part of the amended plaint describes her as a former spouse.
90. Section 61 of the *Evidence Act* provides that no fact need be proved in any civil proceedings which the parties thereto or their agents agree to, admit, or which by any rule of pleadings in force at the time are deemed to have been admitted by their pleadings.
91. In *Choitram -vs- Nazari* [1984] KLR 327, the court held that for purposes of Order X11 Rule 6 of the Civil Procedure Rules, an admission can be express or implied either on the pleadings or otherwise, but has to be plain, obvious, readable, and must leave no room for doubt. See *Cassam -vs- Sachania* [1982] eKLR.
92. Order 2 Rule 11 of the Civil Procedure Rules provides that any allegation of fact made by a party in his pleadings shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleadings, or a joinder of issue under Rule 10.
93. Order 2 Rule 4 (2) of the Civil Procedure Rules provides that a traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.
94. Further, Order 2 Rule 3 of the Civil Procedure Rules provides that every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit, should be specifically traversed by him in his defence or defence to the counterclaim, and a general denial of such



- allegation or a general statement of non-admission of them shall not be a sufficient traverse of them. Abbreviation for also known as an acronym, where a person uses a nickname, a maiden or married name.
95. Section 119 of the *Evidence Act* Cap 80 provides that a court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
  96. In Bromley Family Law 5<sup>th</sup> Edition, it is stated that if a man and woman cohabit and hold themselves as husband and wife, this in itself raises a presumption that they are legally married. It means, therefore, that courts are permitted to make a prima facie legal inference that certain facts exist without proof. See Hortensia Wanjiku Yaweh -vs- Public Trustee Nairobi [1976] eKLR.
  97. In this suit, the plaintiff specifically pleaded the issue of description, but the 1<sup>st</sup> defendant opted not to specifically deny the same and, at the hearing, to offer evidence to rebut the presumption of marriage. In Mary Njoki -vs- John Kinyanjui Matheru & Others [1985] eKLR, the court held that only cogent evidence to the contrary can rebut the presumption of marriage.
  98. Again, in this suit, the plaintiff has pleaded that he had allowed Jonathan Walunywa, a relative, to stay on the suit land after he married the 1<sup>st</sup> defendant as a second wife. The 1<sup>st</sup> defendant did not specifically plead or deny the issue of being a second wife to the late Jonathan Walunywa. Instead, she vehemently told the court that she did not know such a name and was not known as such.
  99. Unfortunately, in the amended statement of defence, the issue of identity of the 1<sup>st</sup> defendant was not specifically traversed, yet the 1<sup>st</sup> defendant knew that the issue of misrepresentation of names and facts to obtain title to the land, even after there was a court decree before the registration, was at the core of this suit. The court takes judicial notice that the plaintiff had gone to the extent of filing citation proceedings against the 1<sup>st</sup> defendant to sustain the suit by the late Jonathan Walunywa before it abated.
  100. In Phylis Njoki Karanja & Others -vs- Rosemary Mueni Karanja & Another [2009] eKLR, the court held that since the presumption is like an assumption, certain customary rites do not need to be performed, for a presumption of marriage to arise, as long as there is establishment of long cohabitation and acts of general repute.
  101. In CWN -vs- DK [2021] eKLR, the court held that for a presumption to be invoked, it is a status of relationship that turns much on evidence as much as it is a presumption of law.
  102. In this suit, the 1<sup>st</sup> defendant did not controvert the names (a.k.a), both in the amended statement of defence and by production of documentary evidence that she was not related in marriage to the late Jonathan Walunywa, or was not a relative of the plaintiff, the basis upon which the late Jonathan Walunywa and herself, found themselves in the suit land in the first instance.
  103. In Mary Nyambura Kangara alias Mary Nyambura Paul -vs- Paul Ngari Mayeka Petition No. 92 of 2021, the court observed that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The court said that, considering the facts as pleaded and the evidence tendered, in particular, the existence of the said marriage and the failure by the respondent to prove the presumption of marriage, and or controvert the appellant's evidence, a presumption of marriage could not be inferred.
  104. In this suit, the plaintiff's pleadings were that the 1<sup>st</sup> defendant, while she was a reputed second wife of the late Jonathan Walunywa, and while aware of the circumstances in which the deceased was settled on the land by his relative, held herself by another name after the court decree to procure registration



- of the land. In *Mary (Supra)*, the court held that the evidence to rebut the presumption of marriage has to be strong, distinct, satisfactory, and conclusive.
105. Coming to whether the plaintiff has proved fraud, abuse of office, collusion, and illegality upon the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants, it is not disputed that there was an earlier suit and an attendant order and decree dated 25/4/1991, and 9/12/1995, respectively, followed by citation proceedings in the High Court Misc. Succession Cause No. 17 of 2014. All these documents were produced by PW1 as exhibits.
  106. The plaintiff testifies that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants should not have issued the title deed in favour of the 1<sup>st</sup> defendant in view of the pending decrees or orders, and or without his knowledge or consent.
  107. In *Euton Njuki Makungo -vs- Republic & Others* [2014] eKLR, the court held that a person who knew of a pending appeal could not come to court and submit that, because there were no restrictions entered in the register, he could deal with the land as he pleased. The court said that he who comes to equity must come with clean hands and that a Land Registrar had no jurisdiction to issue a title deed while there was a pending Minister's Appeal.
  108. In *Ashmi Investments Ltd -vs- Riakina Ltd & Another* Petition No. E014 of 2023, a title deed had been issued while there was a pending suit. The trial court's judgment was affirmed on appeal, as neither party was lawfully entitled to deal with the properties while the suit was pending. The court found the title deed irregularly obtained in an unlawful scheme. At the Supreme Court, the petition was dismissed.
  109. Sections 79(3) and 80(1) of the *Land Registration Act* grant the court power to direct the cancellation of a registration. See *Super Nova Properties Ltd & Another -vs- District Land Registrar Mombasa & Others* [2018] KECA 17 [KLR] (19<sup>th</sup> April 2019) (Judgment).
  110. In *Kinyanjui Kamau (supra)*, the court said that the standard of proof required on fraud, as held in *Ndolo -vs- Ndolo* [2008] KLR (A&F) 742, is higher than that required in ordinary civil suits, and that fraud cannot be inferred from the facts.
  111. In *Dina Management Ltd -vs- County Government of Mombasa & Others* [2023] KESC 30 [KLR], the court held that a title deed issued against the law cannot qualify for indefeasibility. The decree of the court said to have been in existence, was issued in a Land Disputes Tribunal proceedings. The Land Disputes Tribunal Act, Cap 303 A, was repealed by Section 30 of the *Environment and Land Court Act* No. 19 of 2011, which became operational on 30/8/2011. Section 3(1) of the Act dealt with disputes on a claim to occupy, work on, and trespass to land. It covered agricultural and unregistered land, or land which was not the subject of determination by the court or falling under Cap 300, repealed.
  112. Adoption of the decree was allowed by the Act. Vide Gazette Notice No. 16262 and Practice Directions No. 6; all the proceedings pending before the Magistrates' courts were to be heard and determined by the said courts. In accordance with Section 23(3) of the *Interpretation and General Provisions Act*, Cap 2, the repeal of the Land Disputes Tribunal Act did not affect any rights, privileges, or obligations acquired, accrued, or incurred under it, unless a contrary opinion was indicated.
  113. In *Christopher Wafula Mutoro -vs- Richard Lordia Lokere* [2019] eKLR, the court was clear that, as per Section 23(3) of Cap 2, the previous operations or anything done under Cap 302 A were not affected by the repeal.
  114. In *Florence Nyaboke Machani -vs- Mogere Amos Ombui & Others* [2014] eKLR, the court held that a valid judgment of a court, unless overturned, remains as such and is enforceable.



115. As to the validity of a decree and its execution, Sections 4 and 7 of the *Limitation of Actions Act* provide that a decree is valid within 12 years of its issuance. A decree of the Land Disputes Tribunal, which was adopted on 9/12/1996, had to be executed by 9/12/2008. P. Exhibit No. (2) show that the late Jonathan Walunywa appealed against the decree in the High Court Misc. Appl. No. 5 of 1997, which unfortunately abated upon his death.
116. DW2 says that he became an official of the 4<sup>th</sup> defendant on 26/4/2005, and was not aware of the pending suit or decree in favour of the plaintiff regarding plot No. 476. DW2, however, admitted that the title deeds for the area were processed and issued during a pending Co-operative Tribunal Case No. 1 of 2010 in Eldoret, and that the titles were also issued before all pending disputes regarding the area list could be resolved.
117. Equally, DW2 said that his officials prepared the area list in 2015, without the benefit of handover minutes, reports, and documentation by the former officials of the 4<sup>th</sup> defendant.
118. The 4<sup>th</sup> defendant admitted that the list was hurriedly, fast-tracked, prepared, and handed over due to the pressure from the National Titling Centre. Evidence of the involvement of all the members of the 4<sup>th</sup> defendant in the verification of the area list is missing.
119. Section 41 of the repealed Physical Planning Act, revised in 2012, covered the subdivision of private land under the superintendence of the Director of Surveys.
120. In *General & Another -vs- Hussein & Others* [2025] KECA 1022 [KLR] (5<sup>th</sup> June 2025) (Judgment), the court held that the root of title is the deed to which title to property is ultimately traced, to prove that the owner has a good title and in doing so, a court scrutinizes whether the title followed all due processes and procedures. See also *Hebert L. Martin & Others -vs- Margaret P. Kamar & Others* [2016] eKLR.
121. In *Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School* [2025] eKLR, the court listed the elements of a good title as:
  - a. It must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question.
  - b. It must contain a recognisable description of the property.
  - (c) It must not contain anything that casts doubt on the title.
122. A court of law cannot sanction an illegality based on indefeasibility of title or give a seal of approval to an irregularly or illegally obtained title. See *Dina Management Ltd* (supra).
123. It is not enough for a party to allege that a title is valid. In *Funzi Island Development Ltd & Others -vs- County Council of Kwale* [2014] eKLR, the court was of the view that a proprietor only acquires an absolute and indefeasible title if, and only if, its allocation was legal, proper, and regular.
124. In *Kori -vs- Njoki & Another* [2023] KECA 439 [KLR], the court held that a title holder could not just come to court and place the very same title before the court, without going further and explaining the process by which he obtained the said title.
125. In *Elizabeth Wambui Githinji & 29 Others -vs- Kura & 4 Others* [2019] eKLR], the court held that a party must, over and above waiving the title, where a mistake is proved, or total failure of consideration, or other vitiating constitutional and statutory factors are raised showing the title as defeasible.



126. Going an extra mile in this suit to show that the title deed issued was free of any encumbrances or illegalities, especially since there was a decree in which the 1<sup>st</sup> defendant's late husband and herself were aware of, is what the 1<sup>st</sup> defendant, together with the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants, have not rebutted before this court. See *Munyu Maina -vs- Hiram Gathiha Maina* [2013] KECA 94 [KLR] (10<sup>th</sup> December 2018) (Judgment).
127. In *Frann Investment Ltd -vs- Kenya Anti-Corruption Commission & 6 others* Civil Appeal No. E038 of 2021, the court said that the doctrine of indefeasibility of title does not apply where title was acquired by way of fraud or misrepresentation, in which the proprietor is proved to be a party.
128. In this suit, the central issue is that the 1<sup>st</sup> defendant, while aware of the decree and the claim by the plaintiff, misrepresented herself, caused her name to be inserted in the area list, and later obtained the title from the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants, through non-disclosure of or concealment of material facts.
129. In *M'Ithaara & Another vs Magambo & Another* Civil Appeal No. 19 of 2019 [2025] KECA 404 [KLR] (21<sup>st</sup> February 2025) (Judgment), the court said that a sanctity of title and the principles of procedural fairness demand that a party whose rights are at stake must be allowed to be heard, and that any contrary position would set a dangerous precedent that undermines the rule of law and due process.
130. In this suit, the plaintiff has demonstrated that the 1<sup>st</sup> defendant was complicit in the scheme or was involved in the inclusion of her name in the area list. The 4<sup>th</sup> defendant has not provided the authenticated area list, register of members, and the evidence that there was adequate notice for the members or all claimants, including the plaintiff, to attend the process of verification of the area list, before it was forwarded to the Director of Surveys and later to the Land Registrar for issuance of title deeds.
131. A title deed is an end product of a process. If the process that was followed to the issuance of a title deed did not comply with the law, then the end product remains invalid. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants had the obligation to follow due process to the letter and ensure that the processing of the area list and the bona fide members therein was above board.
132. The defendants before this court have not tendered authentic documents to rebut the plaintiff's evidence that the title deed was issued before the pending disputes were resolved, generally as regards the bona fide officials of the 4<sup>th</sup> defendant, in view of the pending Co-operative Tribunal Case No. 1 of 2010 and the pending decree in favour of the plaintiff.
133. The upshot is that I find the title deed held by the 1<sup>st</sup> defendant defeasible.
134. As to the constructive trust. Constructive trust was held in *Njami -vs- Njami* Civil Appeal No. 34 of 2018 [2025] KECA 492 [KLR] (14<sup>th</sup> March 2025) (Judgment), as a right traceable in equity where a party conducts himself in a manner to deny the other party beneficial interest in the property acquired and where such a party while already a trustee takes advantage of his position for his own benefit.
135. In *Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & Others* [2023] KESCE 106 [KLR], the court said that the concept is imposed by law whenever justice and good conscience require it, to avoid unjust enrichment.
136. In *Ngao -vs- Kitheka* Civil Appeal No. 152 of 2019 [2024] KECA 21 [KLR] (25<sup>th</sup> January 2024) (Judgment), the court cited *Archer & Another -vs- Archer & 2 Others* [2023] KECA 298 [KLR], that constructive trust is generated by circumstances where, through some prior agreement or bargain, a trustee takes a fiduciary role which she cannot be allowed to disavow, while a resulting trust focuses on monetary contribution.



137. In MNK -vs- POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment), the court said that the common intention can be inferred for conduct other than making a financial contribution.
138. In this suit, the plaintiff alleges that the 1<sup>st</sup> defendant was a relative whose late husband they litigated with over the subject land, leading to an eviction decree dated 9/12/1996. The 1<sup>st</sup> defendant has not denied those facts.
139. Further, the plaintiff has produced a letter dated 24/1/1996 written to the directors of the 4<sup>th</sup> defendant by the District Commissioner raising the issue of the late Jonathan Walunywa as not being a bona fide owner of plot No. 476.
140. The 1<sup>st</sup> and 4<sup>th</sup> defendants have not disputed the facts that they knew of the claim by the plaintiff over the land. The wrongs committed against the plaintiff cannot be remedied otherwise, as held in Shah & Others (supra), without invoking equitable remedies to right the said wrongs.
141. The upshot is that I find the suit proved to the required standards. The following reliefs are granted:
- a. Declaration that the registration and issuance of the title in favour of the 1<sup>st</sup> defendant by the 3<sup>rd</sup> defendant in conjunction with the 4<sup>th</sup> defendant was irregular, unprocedural, tainted with misrepresentation, and in breach of the overriding interests pursuant to the existing and binding decree of the court, which the 1<sup>st</sup> defendant's late husband and herself were aware of or privy to.
  - b. The County Land Registrar, under Section 80 of the *Land Registration act* is directed to recall and cancel Title Deed No. Saboti/Sikhendu Block 8/Weonia/476 and re-issue the same in favour of the plaintiff.
  - c. An eviction notice shall issue for the 1<sup>st</sup> defendant to hand over vacant possession to the plaintiff after 90 days from the date hereof, in default, eviction to issue at the 1<sup>st</sup> defendant's expenses and costs.
  - d. A permanent injunction is declined.
  - e. Costs of the suit to be met by the 1<sup>st</sup> and 4<sup>th</sup> defendants.
142. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 28<sup>TH</sup> DAY OF JANUARY 2026.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant - Dennis

Ingosi for the 4<sup>th</sup> defendant -present

Bororio for the 1<sup>st</sup> defendant -present

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants

No appearance for the plaintiff

