

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NANYUKI**

**ELC APPEAL NO.E030 OF 2024**

**SIMON NJUGUNA KABARE.....**  
**APPELLANT**

**VERSUS**

**PHILOMENA NJOKI KABARE.....1<sup>ST</sup>**  
**RESPONDENT**

**NJOROGE KABARI KABOGO.....2<sup>ND</sup>**  
**RESPONDENT**

**STEPHEN NKUNJA MURUNGI.....3<sup>RD</sup>**  
**RESPONDENT**

**JOSEPHAT OSORO MAOGA.....4<sup>TH</sup>**  
**RESPONDENT**

**THE LAND REGISTRAR, NANYUKI.....5<sup>TH</sup>**  
**RESPONDENT**

***(Being an appeal from the judgement and Decree of  
Hon Kithinji A.R. (CM) delivered in Nanyuki CMELC 37  
OF 2020)***

**JUDGMENT**

***The Case before the Trial Court***

- 1.** The appellant herein instituted the proceedings in the trial court vide a plaint dated 12.8.2020 claiming that at all material times relevant to this suit, he was the registered proprietor of the land parcels no. Laikipia/Daiga/Umande Block III (Muramati)/431, Laikipia/Daiga/Umande Block III (Muramati)/432, Laikipia/Daiga/Umande Block III (Muramati)/433.
- 2.** The Appellant avers that a share was transferred to him after the death of his father one Kabare Kabogo as his official nominee at Muramati Farmers Co-operative Society Limited which translated to the allocation of land reference no. L.R Laikipia/Daiga/Umande Block III (Muramati)/181 in his name.
- 3.** The appellant further avers that the 1<sup>st</sup> respondent illegally and without the appellant's authority applied to Muramati Farmers Co-operative Society Limited to transfer into her name land reference no. L.R Laikipia/Daiga/Umande Block III (Muramati)/181 and when he lodged a complaint at the Co-operative Tribunal, an award dated 27<sup>th</sup> July 1987 was given in his

favour and declared the transfer of the suit property to the 1<sup>st</sup> respondent as null and void.

4. He states that the 1<sup>st</sup> respondent subdivided and transferred illegally land reference no. Laikipia/Daiga/Umande Block III (Muramati)/181 to wit land parcels no. Laikipia/Daiga/Umande Block III (Muramati)/431, Laikipia/Daiga/Umande Block III (Muramati)/432, Laikipia/Daiga/Umande Block III (Muramati)/433 to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents during the pendency of the suit and after judgment had been entered and decree issued against her with the intention of defeating the cause of justice.

5. The appellant further avers that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were aware of the decree of the court which was to the effect that the suit property belonged to the appellant and had been illegally transferred to them. That the 1<sup>st</sup> respondent's fraudulent action could not transfer a better title to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as she did not have a good title then and that the fraudulent activities and registration of the illegal

transfers were as a result of misfeasance by the 5<sup>th</sup> respondent. The appellant's claim against the 5<sup>th</sup> respondent therefore was for rectification of the records in respect of the suit land.

6. The appellant therefore sought the following orders;

**“a) Revocation and cancellation of the title issued in respect of L.R No. LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/431, registered in the name of NJOROGE KABARE KABOGO, LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/432, registered in the name of STEPHEN NKUNJA MURUNGI, LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/433 issued in respect of JOSEPHAT OSORO MAOGA and that the Land Registrar Nanyuki do effect the changes in his records to reflect the ownership of the land herein as the plaintiff's.**

**b) Rectification of the records in respect of the registration of Land Parcel No. LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/431, LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/432 and LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/433 being the resultant parcels of subdivision of the original parcel land No. LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/181 by deleting the registration of Njoroge Kabare Kabogo in respect of LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/431, LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/432 in respect of Stephen Nkunja Murungi and LAIKIPIA/DAIGA/UMANDE BLOCK III (MURAMATI)/433 in respect of Josephat**

**Osoro Maoga and in place thereof, the said parcels be registered in the name of the plaintiff.**

- c) Permanent injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, their agents, servants and or persons acting under them from disposing, damaging or wasting**
- | <b>Land</b>                                      | <b>Parcel</b> | <b>No's</b> |
|--|---------------|-------------|
| <b>LAIKIPIA/DAIGA/UMANDE<br/>(MURAMATI)/431,</b> | <b>BLOCK</b>  | <b>III</b>  |
| <b>LAIKIPIA/DAIGA/UMANDE<br/>(MURAMATI)/432</b>  | <b>BLOCK</b>  | <b>III</b>  |
| <b>LAIKIPIA/DAIGA/UMANDE<br/>(MURAMATI)/433</b>  | <b>BLOCK</b>  | <b>III</b>  |
- and**

**d) Costs and interests of the suit herein”.**

**7.** The 1<sup>st</sup> and 2<sup>nd</sup> respondents were the 1<sup>st</sup> and 2<sup>nd</sup> defendants before the trial court. They opposed the suit vide their statement of defence dated 11.9.2019 where they denied the particulars of illegality and fraud, contending that they were not parties to the proceedings

before the tribunal and they were not made aware of the orders made in the said proceedings. They further denied that the deceased Kabare Kabogo ever appointed the appellant as his official nominee at Muramati Co-operative society. They contend that the 1<sup>st</sup> respondent lawfully subdivided the suit property to the 1<sup>st</sup> - 4<sup>th</sup> respondents and to the appellant.

- 8.** The 3<sup>rd</sup> respondent opposed the suit vide his statement of defence dated 20.11.2020 where he contends that he is an innocent purchaser of parcel 432, and that he was not aware of any previous proceedings.
- 9.** The 4<sup>th</sup> respondent opposed the suit vide his statement of defence dated 30.9.2020 where he states that he is a bonafide purchaser of parcel 433. He denies the particulars of fraud and illegality enumerated in the plaint.
- 10.** The 5<sup>th</sup> respondent (the Land Registrar) had apparently filed a memorandum of appearance but did not file a defence.

**11.** At the trial, the appellant adopted his witness statement and also produced 8 documents in support of his case. His case was that his father Kabare Kabogo bought one share in the society in 1964 and upon his death, his share was transferred to him in 1977. However, his mother successfully applied to the society for his share to be transferred to her claiming that the same belonged to her husband. This prompted the appellant to lodge a complaint with the tribunal against the society and his mother culminating in the tribunal awards. Then he filed the miscellaneous suit no. 415 of 1987 seeking orders authorizing the Registrar of the High Court to sign the necessary transfer documents on behalf of the 1<sup>st</sup> respondent. He was to make a second application seeking orders that the Land Registrar Nanyuki cancels the titles arising from the subdivision of parcel 181, the suit land in view of the fact that the 1<sup>st</sup> respondent had subdivided the land, of which a decision was delivered on 13.10.2017 directing that parcels 429 and 430 to revert to the name of the appellant. He avers

that the suit properties were illegally and fraudulently transferred to the three parties. He contends that the 1<sup>st</sup> respondent was a party in the tribunal proceedings.

**12.** In cross-examination, the appellant stated that he sued the company for transferring the land to his mother, the 1<sup>st</sup> respondent and he informed her about the award, served her with all the documents but she declined to enforce the same. He came to learn that the land had been subdivided in year 2017.

**13.** The case of the 1<sup>st</sup> and 2<sup>nd</sup> respondents was advanced by Philomena Njoki Kabare (1<sup>st</sup> respondent) who identified the appellant as her son. She adopted her witness statement dated 6.11.2020 as her evidence. Her testimony is that land parcel no.181 was measuring 8 acres, that it was registered in her name and she divided the same amongst her children with the appellant getting 1 acre as he had taken her cows, 2 acres to the 2<sup>nd</sup> respondent, Kimani and Maina got 2 acres which they sold to the 3<sup>rd</sup> respondent, while the rest, she reserved for herself and her daughters from which 2 acres were

sold to the 4<sup>th</sup> defendant. She avers that the appellant was not satisfied and wanted more land, thus he was abusing and assaulting her.

**14.** The 1<sup>st</sup> respondent contends that she subdivided her land using due process and that there was no fraud or illegality, adding that in converse, it is the appellant who had tried to get the suit land from the land offices claiming that she had sold the land to him and that she had died. She avers that she was not part of the cooperative tribunal proceedings and she was not made aware of the said proceedings. She also contends that her husband, the deceased never appointed the appellant as his official nominee.

**15.** In cross-examination, the 1<sup>st</sup> respondent stated that she does not know if her deceased husband had transferred his share to the appellant. She does not know that the appellant went to court to get the land, but she was an interested party in the case 415 of 1987. She reiterated that she transferred the suit land to her sons when the case was in court.

**16.** After hearing the case, the trial court delivered its judgment on 29.11.2024, the court stated that;

**“In this case, as I have stated in this judgment, the plaintiff had the duty to prove that the 1<sup>st</sup> defendant was aware of the court decree or order and that she proceeded to subdivide the mother parcel. This is a duty that I find that the plaintiff did not discharge for the reason that he did not avail proof of service upon the 1<sup>st</sup> defendant. As such the reliance on the doctrine of lispendens is untenable.**

**Further, owing to the fact that the 1<sup>st</sup> defendant was a beneficiary of the estate of the late Mzee Kabare, she was not barred from claiming shares being held at the Muramati Farmers Co-operative Society Limited and subdivide the same to the beneficiaries as she did in this case. The conduct of the 1<sup>st</sup> defendant does not in any**

**way reveal element of fraud as alleged by the plaintiff. That being the case, I find that the plaintiff has failed to prove the allegations of fraud against the 1<sup>st</sup> defendant. His claims against the defendants thus fail.**

**In the end, I enter judgment as follows;**

***a. That the plaintiff's suit by way of plaint dated 12<sup>th</sup> day of August, 2020 is hereby dismissed with costs to the defendants".***

*At The Appeal*

**17.** Aggrieved by the aforementioned judgment, the appellant lodged this appeal vide his Memorandum of Appeal dated 16.12.2024 on the grounds summarized as follows; That the trial magistrate erred in law and fact in failing to appreciate that the appellant had established the doctrine of lis pendens as against the respondents as affirmed in the case Misc application no. 415 of 1987 and

failing to appreciate that fraud was well established by the appellant.

**18.** The appellant therefore seeks the following orders;

**“a) The appeal be allowed.**

**b) The judgment of the trial magistrates court be set aside and there be substituted therefore an order allowing the appellant’s case No. 37 of 2020 as prayed.**

**c) That the costs of this appeal and at Nanyuki Magistrate’s LEC Case No. 37 of 2020 be awarded to the appellant against the respondents jointly and severally”.**

**19.** The appeal was head by way of written submissions.

The submissions of the appellant are dated 27.10.2025 where the appellant contends that his mother, the 1<sup>st</sup> respondent illegally and without the authority of the appellant applied and caused the transfer of the suit land 181 from the society to herself. That the appellant lodged a complaint with the tribunal which gave an

award in his favour. He also filed the case Misc 415 of 1987 seeking orders authorizing the High Court Registrar to sign the necessary transfer documents in his favour in respect of the suit land.

**20.** The appellant contends that the doctrine of lis pendens applies to the 2<sup>nd</sup> -4<sup>th</sup> defendants as the suit parcels 432, 433 were transferred during the pendency of the case Misc 415 of 1987. This far, the appellant relies on the case of **Margaret Wairimu Warima v Phyllis Wanjiru Thairu & 2 Others Nrb Civil Appeal no 127 of 2014 ( 2017) eklr** and **Olympic Company Trading Limited v Said Mohammed 7 4 others( 2014) eklr** amongst other cases.

**21.** It is further argued that there was a valid decree that nullified the share of the 1<sup>st</sup> respondent, thus the issue of service does not arise.

**22.** The 4<sup>th</sup> respondent filed submissions dated 3.12.2025 where he avers that after the 1<sup>st</sup> respondent subdivided her land to her children, the appellant filed a suit Nanyuki Elc 37 of 2020, but the same was dismissed. He

argues that the award and decree which the appellant relies upon is silent on share and property number, and no documents were availed to connect the shares at Muramati with the suit parcel 181. That vide a caution lodged by the appellant, he was claiming the land through purchase. That the appellant never executed the decree between 1990 and 2017 when he made the miscellaneous application dated 28.11.2014. Thus the appellant is barred from relying on the said decrees under the limitation of Actions Act. He cites the case of **Isaac Olang Solongo v Gladys Nanjekho Makhoha (being the administrator of the estate of Antonina Makhoha , deceased) & Another ( 2021) ekIr** to buttress this point

**23.** The 4<sup>th</sup> respondent argues that he lawfully purchased his parcel 433 from Mary Nyambura who is not a party in these proceedings. He contends that the doctrine of Lis pendens prohibits a party to the suit from transferring land to a third party. He relies on the case of **Emmanuel**

**Ngade Nyoka v Kitheka Mutisya Ngata (Malindi C.A  
No. 63 of 2016 (2017) eklr.**

24. On fraud, it is argued that the particulars of fraud were merely pleaded but not proved. On this point, the 4<sup>th</sup> respondent relied on the case of **Ambale v Musiola (1986) Klr 241.**

25. I did not see submissions of the other parties.

**DETERMINATION**

26. The duty of the 1<sup>st</sup> appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123,** where it was observed thus:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in**

**mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**

**27.** There is no controversy in this matter that the appellant is a son of the 1<sup>st</sup> respondent, that one Kabare Kabogo was the father of the appellant and husband of the 1<sup>st</sup> respondent and that the 2<sup>nd</sup> respondent is a son and brother of the 1<sup>st</sup> respondent and the appellant respectively.

**28.** It is also not in dispute that the parcels 429-433 emanated from the subdivision of the suit parcel 181 which subdivision was done by the 1<sup>st</sup> defendant. It is also on record that there was a case filed before the Cooperative Tribunal where an award was given on 17.7.1987 and another one given on appeal on 26.5.1989, which awards were adopted as a judgment of the court culminating in the decree issued in High court Miscellaneous suit no.415 of 1987.

**29.** The issue falling for determination turns on two issues, whether the trial court failed to appreciate the doctrine

of lis pendens and also failed to find that the appellant had established a case of fraud and illegality, thereby arriving at the wrong conclusion.

**30.** At this juncture, I must point out that issues which were not made a subject of contest by the parties cannot be tabled for determination before this court, See; **Abraham Yattani Guyo v Qunche Woge [2020] eKLR** . In that regard, it is noted that the 4<sup>th</sup> respondent has raised issues of facts and law in the platform of submissions, yet this party did not tender evidence to that effect before the trial court. As such, his assertions that the appellant had filed a case ELC No.37 of 2020 which was dismissed and that the decree of the appellant was stale in terms of the provisions of the Limitation of Actions Act are hereby disregarded.

**31.** On the violation of the doctrine of lis-pendens, by the 1<sup>st</sup> respondent, I find that the appellant has rightly submitted at length on the jurisprudence in this sphere. In particular, I make reference to the cited case **of Abdalla Omar Nabhan vs The Executor of the**

**Estate of Saad Bin Abdalla Bin Aboud & another, Malindi HCCC No. 63 of 2023** where it was stated that:

**“The purpose of the principle of lis pendens is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with”.**

**32.** The 1<sup>st</sup> issue to consider is whether the 1<sup>st</sup> respondent was a defendant in the primary suits before the tribunal. The parties in the initial tribunal suit of 1987 cannot be discerned, but the appeal case of 1989 clearly lists the parties as *Muramati Co-operative Society and its management committee* as the appellants while the respondents are mentioned as *James Mungai Kaburu and Simon Njuguna Kabare*. It follows that the 1<sup>st</sup> respondent was not a defendant or a party in the suits in terms of the tribunal awards. Similarly, the decree given on 30.5.1990 in High Court Misc. 415/1987 captures just the aforementioned parties. It follows that the 1<sup>st</sup>

respondent was not a party let alone a defendant in the aforementioned proceedings.

**33.** The second issue to consider is; Which property was the 1<sup>st</sup> respondent alienating in violation of the decree? It is noted that the decree was issued in the case Misc. Application no 415 of 1987, and the same was adopting the tribunal award of 14.8.1987 as a judgment of the court. However, the suit property **Laikipia/Daiga/Umande Block 111 Muramati 181** came into existence on 8.12.1989 where it was registered in the name of the Government of Kenya as per the green card availed by the appellant at page 42 of his Record of Appeal. It follows that by the time the Misc. suit 415 of 1987 was filed, there were no identifiable suit parcel, and the rights and interests in the land within the society had not crystalized into rights of proprietorship in favour of the appellant.

**34.** Thirdly, there is no evidence to indicate that the respondents were made aware of the proceedings and the award of the tribunal. It is noted that in the ruling

delivered by the court on 13.10.2017 in Misc. case 415 of 1987, the 1<sup>st</sup> respondent is named as an interested party. However, by the time the decree was issued on 18.6.1991, the 1<sup>st</sup> respondent was not in the picture. It is not clear as to when the 1<sup>st</sup> respondent was brought on board in those proceedings in Elc 415 of 1987. All that can be discerned is that for the ruling of 13.10.2017, the court was dealing with two applications filed by the appellant. The 1<sup>st</sup> one is dated 5.12.2002 seeking orders for the Registrar of the High Court to be authorized to sign transfer documents. There is no mention of the 1<sup>st</sup> respondent as a party. The second application is dated 28.11.2014 where the applicant was seeking orders directing the Land Registrar to cancel the titles registered in the name of the respondents. That is the point at which the 1<sup>st</sup> respondent is identified as an interested party. According to the green card, the new titles came about on 27.8.2008, but the 1<sup>st</sup> respondent was appearing as a party 6 years later in that application of 2014.

35. This far, it becomes clear that the claim of the appellant cannot succeed on the basis of violation of the doctrine of lis pendens by the respondents.

36. On fraud, the court makes reference to the case of **Vijay Morjaria v Nansingh, Madhusingh Darbar & another [2000] eKLR** where it was held that:

**“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”**

37. I have looked at the evidence on record and considered the statements and submissions of the parties. The Appellant had set out the particulars of

fraud and illegality at paragraph 11 of the plaint, that the 1<sup>st</sup> respondent dealt with the suit property without any registrable rights and interests in the suit land. However, and as noted in the body of this judgment, the 1<sup>st</sup> respondent was the 2<sup>nd</sup> registered proprietor of the suit property at entry number 2 on 8.12.1989 after the registration in the name of the government of Kenya. No sufficient evidence was adduced to give a nexus between the suit property and the alleged interests of the appellant, noting that the tribunal award was silent on the issue. Thus even as at the time the appellant filed his Miscellaneous Case 415 of 1987, the rights and interests in the suit property had not crystalized or matured as the first registration occurred 2 years later in 1989.

**38.** As the registered owner of the suit property, the 1<sup>st</sup> respondent had every right to deal with the said land, hence the subsequent subdivision of the same cannot be termed as fraudulent. Thus the trial court rightly made a finding that the conduct of the 1<sup>st</sup> respondent did not

reveal elements of fraud, noting that she was a beneficiary of her husband's estate.

**39.** As I conclude, I will refer to the observation made by the court in **Paul Kirinya v Delfina Kathiri [2019] eKLR ( Mbugua J)** that;

**“The national values enshrined in our constitution include; human dignity, equity, social justice. The orders sought by the plaintiff certainly do not embrace these values. Defendant deserves peace and tranquility in her sun set years and she has the right to use her small piece of land in the manner she pleases. Borrowing the words of Judge D. Musinga (as he then was) in the case cited by defence - John Ndungu Muriithi versus Gideon Karegwa Ndungu and 5 Others H.C.C.NO. 94 of 2004, I find that plaintiff has displayed unmitigated greed and utter selfishness by haranguing his septuagenarian mother over a one acre**

**piece of land, yet he (plaintiff) has 8 other siblings”**

**40.** Similarly, the conduct of the appellant haranguing his mother for decades over a parcel of land which belonged to 1<sup>st</sup> respondent’s husband, who certainly must be of advanced age flies against the National values of human dignity and social justice.

**41.** In the final analysis, I find that this appeal is not merited, the same is hereby dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 25<sup>TH</sup> DAY OF MARCH 2026 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA  
JUDGE**

**In the presence of:**

Wambui Mwai for Appellant.

Mwathi holding brief for Mr. Chweya.

Warigia holding brief for Ms. Chege for 5<sup>th</sup> Respondent.

Nancy Mwangi – Court Assistant

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