



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. 200 OF 2011

KIMULI KILONZO.....

.....PLAINTIFF

-VERSUS-

**KATELEMBO ATHIANI FARMERS &
RANCHING CO.**

LTD.....1ST DEFENDANT

JULIANA MATEE MATAKI.....2ND

DEFENDANT

MARTIN KYALO MALIKI.....3RD

DEFENDANT

MACHAKOS DISTRICT LAND REGISTRAR.....4TH

DEFENDANT

ATTORNEY GENERAL.....5TH

DEFENDANT

JUDGMENT

Background of the case

1. In filing these proceedings, Patrick Daudi Kimuli (“Patrick”) sued the defendants, and when he died on 5 May 2018, his father, the plaintiff herein, substituted him and filed an amended plaint dated 14 October 2020.
2. In the amended plaint, the plaintiff informed this court that the 1st defendant illegally and fraudulently altered its records, which the 4th defendant held, and transferred title no. **Athi River/Athi River/Block 1/118 (“suit property”)** to the 2nd defendant, who later sold it to the 3rd defendant. He detailed allegations of fraud against the defendants for illegally altering the members’ register, altering records of the plot allocation process, and varying the green card entries of the suit properties.
3. He also accused the 4th defendant of illegally, and without the plaintiff’s knowledge, subdividing the suit property into the name of the 3rd defendant, thereby creating **Athi River/Athi River/Block 1/4960-4975 (“subdivisions”)** and consequently sought the reliefs listed below from this court: -
 - a) ***A permanent injunction against the defendant, their servants, and/or agents, refraining them from encroaching or trespassing onto title nos. Athi River/Athi River/Block 1/4960-4975.***

b) Spent.

c) The 4th defendant be compelled to rectify and/or cancel the green card entries on the subdivisions, revert them to the suit property, and register it in the plaintiff's name.

d) A declaration that the subdivisions issued in the 3rd defendant's name were illegal and be cancelled.

e) General damages.

f) Costs of the suit.

g) Interests on (a) and (f) above.

h) Any other and further relief this court may deem just and fit to grant.

4. On service of the pleadings, the 1st defendant filed a defence dated 30 August 2011, in which it denied the plaintiff's allegations, put him to strict proof, and maintained that the 2nd defendant was its member no. 1099 and had been allocated plot no. 1556, which is now the suit property.

5. As for the 3rd defendant, he challenged the claim against him by filing a defence dated 19 August 2021, in which he stated that he was a stranger to some of the averments in the amended plaint, particularly those concerning illegality and fraud. He denied others and put the plaintiff to strict proof. He also averred that he was an innocent buyer of the suit property from the 2nd defendant, paying value and without notice of any defect on the title. He informed the court that, as the proprietor, he enjoyed an absolute and indefeasible title over the property.
6. Additionally, he stated that he had since subdivided the suit properties into several parcels of land, some of which had been sold and transferred to various persons before the commencement of these proceedings. He urged the court to dismiss the plaintiff's claim.
7. The 5th defendant entered an appearance for itself and the 4th defendant on 19 August 2011, but from the record, it never filed a defence.

Issues for determination

8. Having considered the pleadings and the evidence presented by the parties during the hearing on the merits and the plaintiff's submissions, the singular issue for determination

that will adequately address the dispute is **whether the plaintiff proved his claim of fraud to the required standards**. Having outlined the issue to be decided, this court will now summarise the parties' evidence on the issue.

Hearing and evidence

9. The matter ultimately proceeded to a hearing on 21 March 2022, where **Kimuli Kilonzo (PW1)** and the 3rd defendant **(DWI)** testified. Their evidence included witness statements, oral testimonies, and various documents. Their testimonies in chief reflected their pleadings.
10. Although the 1st defendant filed a defence, they did not testify. Notably, the plaintiff had sought summons for its (1st defendant's) officials to testify, which were honoured by Simon Maithya Mbaluka, who expressed willingness to testify on 17 November 2025. However, Mr. Othini, counsel for the plaintiff, informed the court that the summonses were forfeited, leading the court to lift the warrants of arrest and grant counsel's relief.
11. Regarding the 2nd defendant, her case was marked as closed due to her failure to appear. However, the proceedings show that as of 12 October 2021, she was deceased; therefore, in the absence of substitution, the case against her had long abated, and there was nothing further for the court to close. As

for the 3rd and 4th defendants, their cases were closed for failing to file a defence and to testify.

12. Respecting the plaintiff, he testified that he was a member of the 1st defendant and that he purchased two shares in Patrick's name, with Patrick being issued a membership card **(Pex. 2)** and share certificate **(Pex. 3)**, both numbered 2420, in 1983. Subsequently, after balloting, Patrick was allocated plot no. 1556, measuring 2.04 acres, which was the suit property, and he began cultivating it.
13. Later, the 1st defendant, in a letter dated 2 November 2010, allowed the 4th defendant to proceed with issuing the plaintiff a title deed for the suit property **(Pex. 7)**, and he subsequently made the necessary payments for this to the 4th defendant **(Pex. 8 and 9)**. Additionally, when Patrick made follow-ups in 2010 to obtain title documents, he was unsuccessful, as evidenced by several documents, including official searches, a letter dated 5 April 2011 from the 1st defendant informing him that the suit property, previously plot no. 1556, had double allocation-him and the 2nd defendant, and since the 2nd defendant had already collected the title deed, it was willing to allocate him an alternative plot **(Pexs. 4, 5 and 6)**.

14. On cross-examination and re-examination, he informed the court that he had possessed the suit property for 30 years, was unwilling to be allocated an alternative plot, and denied knowledge of **(Pex. 6)** or that the 1st defendant had ever offered him another plot. He stated he was in occupation before the 2nd defendant's entry and that when he paid for the title documents, he was not informed of any conflicting interests. That when he later went to pick up the title documents from the 4th defendant, he was referred to the 1st defendant.
15. As for the 3rd defendant, he testified that he purchased the suit property from the 2nd defendant on 20 September 2010**(Dex.1)** and followed due process to have it transferred to his name including obtaining the relevant consents **(Dex. 2-4)** before the eventual transfer of the suit property to his name **(Dex. 5-6)**. Later, and on application, consent to have the suit property subdivided was obtained **(Dex. 7-8)**, a mutation form was prepared **(Dex. 9)**, and the necessary payment was made **(Dex. 10)**. Subsequently, title documents of the subdivisions were issued **(Dex. 11-41)**.
16. Some of the subdivided land parcels still bear the name of the 3rd defendant: **Athi River/Athi River/Block 1/1963, 1964, 1965, 1970, 1971, 1973, 1974, and 1975**. Those of **Athi River/Athi River/Block 1/1960, 1961, and 1962** were registered in the name of Winfred Ndinda Musyoka, while **Athi**

River/Athi River/Block 1/1966, 1967, 1968, and 1969 were registered in the name of Harrison Mutua Ndungi. Finally, Bernadette Mwikali Mutili was registered as the owner of **Athi River/Athi River/Block 1/1972**. He testified that he had never met the 1st defendant.

Submissions

17. After the hearing concluded, the parties were to file written submissions and the plaintiff, through his law firm on record, **Ms. Muttisya & Co. Advocates**, filed his dated 9 January 2026. However, the defendants have yet to file theirs, and if they do so at all, this court will consider them filed out of time. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the submissions, along with the relevant law and judicial precedents cited. The issue previously identified will be addressed shortly.
18. The pertinent legal framework for protection and impeachment of title documents over land is found in our **Article 40 (1) and (6)** of the **Constitution**. These provisions restrict legal protection to property that has been lawfully acquired and owned. According to these **Sub-Articles**, every person has the right, whether individually or in association with others, to acquire and own property within Kenya.

19. Statutorily, **Sections 24** and **25** of the **Land Registration Act** acknowledge the registered owner as the absolute owner of the land and provides protection under **Section 24**. However, a title document may be impeached on various grounds outlined in **Section 26** of the Act, including fraud and illegality.
20. It is a well-established principle of law that fraudulent conduct must be specifically pleaded as required by **Order 2 Rule 4** of the **CPR**. In the present case, the plaintiff's claim met the 1st threshold by alleging and particularising fraud and illegality against the defendants.
21. With respect to the 2nd threshold of proof, the evidential burden rests on the person alleging fraud to prove his claim, as provided by **Sections 107** and **109** of the **Evidence Act**. Furthermore, reliance solely on inference from the facts to establish fraud or irregularity is not permitted. In **Koinange and 13 others v Koinange [1986] KLR 23**, which has been cited in several court decisions which this court associates with, the court reaffirmed the fundamental principle of the law of evidence that he who alleges must prove.
22. Having particularised fraud as earlier emphasised, the onus was on the plaintiff to substantiate it on a standard of proof exceeding the balance of probabilities but falling short of proof

beyond a reasonable doubt. **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)**. Notably, the burden was on the 3rd defendant to substantiate the origin of his title, which he successfully did to the court's satisfaction, as demonstrated by the various documents from the land control board, transfer payments, subdivision payments, and sale agreement, among others **(see Dex. 1-41)**.

23. Moreover, in **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. 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.

24. Regarding the specifics of the alleged fraud, the plaintiff asserted that the 1st defendant had altered records related to the suit property held by the 4th defendant; however, these claims of alterations were not substantiated by an iota of evidence. In fact, the plaintiff presented **Pex. 6** showing not fraudulent activity but a case of double allocation of the suit

property. This means that at one time or another, as unregistered owners, Patrick and the 2nd defendant held equal equities, but this equality ended when the 2nd defendant was registered as the owner of the suit property. The green card for the suit property demonstrates that it was registered in the 2nd defendant's name on 16 September 2010.

25. In effect, when the plaintiff applied for a title deed through the 4th defendant on 21 December 2010, the suit property was no longer available for registration in Patrick's name. Being first in time to be registered, the 2nd defendant's title prevailed. This principle of law was well explained in the decision of **Gitwany Investment Limited v Tajmal Limited & 3 Others [2006] KEHC 2519 (KLR)**, which this court associates itself with, and it held: -

“46. My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997 (unreported):- is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs J.B. Martin Glass Industries and 3 others C.A.

130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel.”

26. The plaintiff further contended that the 4th defendant acted unlawfully in registering the 2nd defendant as the registered owner of the suit property. He also claimed that alterations were made to the 1st defendant's register concerning the plot allocation process and members' register, and illegal changes were made to the entries on the green card. However, he failed to provide any evidence to support these claims. He also did not tender evidence to show he ever occupied the suit property.

27. It is therefore clear that his evidence was neither cogent nor substantiated and was thus unpersuasive. Additionally, records indicate that the 2nd defendant was the first registered owner and, as such, had the authority and right to sell the property to the 3rd defendant, who also possessed similar rights, including subdivision and lawful transfer to third parties. Moreover, the plaintiff was untruthful when he testified that the 1st defendant never offered him an alternative plot due to the double allocation and denied knowing **Pex. 6**. Yet, this very document, which confirmed that an alternative parcel of land had been offered to him, was produced by none other than himself. The onus was on him to accept the offer, which he did not do, and perhaps it is now time for him to. Nonetheless, this court finds that the plaintiff did not prove his claim of fraud and illegality to the required standard.

28. Ultimately, based on the reasons and findings outlined above, this court determines that the plaintiff has failed to establish his case to the required standard. Consequently, his case is dismissed. It is well-established law that costs follow the event; however, given the special circumstances in which the 1st defendant caused the other parties to be in their current situation by doubly allocating the suit property, each party shall bear their own costs of this suit.

Judgment accordingly.

Delivered and Dated at Machakos this 14th day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
14.04.2026**

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

In the presence of;

Ms. Kanja Court Assistant

Mr Owira holding brief for Mr. Saluny for 3rd defendant.

Mr Odhiambo Othim for plaintiff

No appearance for other parties.