



**Ngunyi v Ndumbi & another (Environment and Land Case
E4 of 2020) [2025] KEELC 5507 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE E4 OF 2020**

JM MUTUNGI, J

JULY 23, 2025

BETWEEN

MARY GAKENIA NGUNYI PLAINTIFF

AND

JAMES MUNENE NDUMBI 1ST DEFENDANT

MOSES KIREGA NJOGU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff, Mary Gakenia Ngunyi, initiated this suit by way of a Complaint dated 8th October 2020, and prayed for orders that:-
 - a. A declaration by this Honourable Court, that the Defendants herein connivingly filed and prosecuted Kerugoya Chief Magistrate's Court ELC No. 191 of 2019; fraudulently and with bad intention; and the proceedings and orders thereof are therefore fraudulently obtained, illegal and unlawful; and are consequently declared null and void.
 - b. That all the registrations and titles issued to the 1st Defendant on the strength of the said orders in [a] above over Mutira/Kaguyu/5014 and the subsequent subdivisions and issuance of derivative titles; Mutira/Kaguyu/6317, 6318 and 6319; by the, or to the Defendants, is fraudulent, illegal and unlawful and are consequently cancelled; and the land to revert to Mutira/Kaguyu/5014.
 - c. That the Land Registrar, Kirinyaga County, be and is hereby ordered and authorized to revoke and cancel the said registrations.
 - d. A permanent injunction do issue directed against the Defendants, jointly and/or severally, their agents, assigns or anybody working under them for selling, alienating, wasting, or illegally interfering with the Plaintiffs' peaceable occupation and utilization of parcels No. Mutira/



Kaguyu/6317,6318 and 6319 or their mother title Mutira/Kaguyu/5014 without consent from the Plaintiff and or without lawful cause.

- e. Costs
- f. Any other order that this Honourable Court may deem justified to order.

The Plaintiff's Case

2. The Plaintiff's case is that she is the legal wife of the 2nd Defendant and has lived on land parcel Mutira/Kaguyu/5014 [now subdivided into parcels Mutira/Kaguyu/6317, 6318 and 6319] hereinafter referred to as "the suit land". The Plaintiff averred that the land was ancestral and part of the family inheritance. The Plaintiff stated that she was the wife of the 2nd Defendant but are separated owing to the 2nd Defendants alcoholism and violent behavior. According to the Plaintiff, the 1st Defendant fraudulently purchased the suit land from the 2nd Defendant without her knowledge or consent. She stated she became aware of the transaction only when the 1st Defendant entered the land with surveyors, prompting her to conduct an official search. She averred the search revealed that the land had been transferred through consent orders recorded in Kerugoya CM ELC No. 191 of 2019. The Plaintiff averred that her application to be joined as a party in the case was declined by the Court as the suit had been finalised. The Plaintiff alleges that the Defendants colluded to obtain fraudulent Court orders that were used to unlawfully remove restrictions placed on the title to facilitate the transfer and subdivision of the land on 23rd July 2020.
3. The Plaintiff further averred that the Defendants colluded and acted fraudulently to have the suit land fraudulently transferred and subsequently subdivided. The Plaintiff contended that the filing of Kerugoya CM ELC No. 191 of 2019 was through collusion with the objective of obtaining fraudulent Court orders to facilitate the unlawful and fraudulent transfer of the suit land without the involvement of the Plaintiff who had a beneficial interest over the suit land.

The 1st Defendant's case.

4. The 1st Defendant filed his Statement of Defence dated 10th December 2020 where he averred that he lawfully purchased the original suit land from the 2nd Defendant in 2015 for Kshs. 4,200,000/-. He averred that the 2nd Defendant breached their sale agreement and he sued him for specific performance in Kerugoya CM ELC No. 191 of 2019. The 1st Defendant stated in the suit before the Magistrate's Court a consent order was entered into which was adopted by the Court authorizing the transfer of the suit land to him. He asserts that he subdivided the original suit land after the registration of the decree from the Court and complied with all statutory formalities required by law. The 1st Defendant asserted that he had effected developments on the suit land and had been in occupation of the land since it was transferred to him. He contended he was a bonafide purchaser of the suit property without any notice of any defect in the title.

The 2nd Defendant's Case:-

5. The 2nd Defendant filed his Statement of Defence dated 9th December 2020 where he affirmed he was separated from the Plaintiff and asserted their union had broken down due to the Plaintiff's conduct. He stated he voluntarily sold the suit land, received consideration, and signed the consent order willingly. He averred the Plaintiff has never lived on the original suit land and that she owned plot No. 1178, Gitura, Kenol. He denied the particulars of fraud and asserted that they did not commit any fraud, and/or abuse the Court process as alleged by the Plaintiff. He denied the suit land was ever a matrimonial home and/or constituted matrimonial property. The 2nd Defendant contended the



instant suit was res judicata on account of the earlier suit before the Magistrate's Court and prayed that the same be struck out.

Evidence of the parties

6. The Plaintiff testified as PW1 and it was her evidence that the 2nd Defendant was her husband and that they were before they separated residing together on the suit land where they had a semi permanent house as their matrimonial home. She explained that she and the 2nd Defendant had two children born in 2005 and 2011 respectively. She stated the suit land was ancestral land and had been transferred to her husband by her mother in law as a gift as his inheritance. She stated she had been farming on the suit land and that they had tea and coffee on the land. She stated after the transfer to her husband, her mother in law gave to her the original title [parcel 5014] to hold in custody which she held to date. The original title was produced before the Court in evidence.
7. PW1 further in her evidence explained that her husband was an alcoholic and had been admitted in various rehabilitation centres. In 2017 she stated her husband transferred the coffee to her name so that she could utilize the proceeds to support their two children who were under her custody. She stated the transfer of the land to the 1st Defendant was done secretly and her consent was not sought. She stated she learnt of the sale when persons claiming to be the owners came to the land and upon carrying out an official search at the Lands Office she confirmed that indeed the land had been transferred to the 1st Defendant.
8. In Cross examination the witness reiterated that her husband, 2nd Defendant, was given the land by the mother as a gift. She further stated she separated from her husband after he sold the land. She stated she had not been aware that her husband had been sued in the Magistrate's Court and that she only became aware after the land had been transferred. She testified that her application to be joined in the Magistrate's Court case and to review the decision of the Court was denied. She affirmed the 1st Defendant was presently in occupation of the suit land.
9. PW2, Anthony Mwandime, a Land Registrar at the Kerugoya Land Registry testified that the suit land Mutira/Kaguyu/5014 [now subdivided into parcels 6317 to 6319] was registered in favour of Lucy Mumbi Njogu on 18th October 2011 who transferred the same by way of gift to Moses Kirega Njogu [2nd Defendant] on 4th November 2011. He stated a restriction was registered against the title on 17th May 2016 on the strength of a letter from the ACC Kirinyaga Central. On 14th January 2020 a decree dated 5th December 2019 in CMELC No. 191 of 2019 was registered. He stated the decree was by consent and ordered the Land Registrar to register the land in favour of James Munene [1st Defendant]. He explained the order did not dispense with requirement of consent, or production of the original title and/or payment of stamp duty. He stated there was no evidence of consent, payment of stamp duty and/or any transfer instrument duly executed as the parcel file only contained the decree and no other documents.
10. In Cross examination the Land Registrar stated that the restriction placed was not time specific and had no conditions. He stated once served with a Court order they are obliged to give effect to the orders. It was his position that the Land Registrar complied with the order of the Court.
11. PW3, the 2nd Defendant's mother, corroborated the Plaintiff's testimony. She confirmed that she gifted the land to the 2nd Defendant to benefit his children and family, but entrusted the title to the Plaintiff due to concerns regarding the 2nd Defendant's drinking problem. She expressed disapproval of the sale and confirmed that the Plaintiff and the 2nd Defendant were married in Church and had used the land for farming.



12. The 1st Defendant, James Munene Ndumbi testified as DWI. He adopted his witness statement dated 14th October 2022 and relied on the bundle of documents that he had filed which were admitted as exhibits. He testified that he carried out a search before he purchased the suit property which revealed the land had been transferred to the 2nd Defendant by his mother who had inherited the same from her husband. He stated the 2nd Defendant showed him the land before he purchased and it was his evidence that the land was vacant and had no developments. The witness explained that he bought the land at Kshs 6,000,000/- with an acre costing Kshs 2,000,000/- though he stated he indicated Kshs 4.2 Million in his statement. He stated he entered into the sale agreement with the 2nd Defendant in 2015.
13. The 1st Defendant explained that he sued the 2nd Defendant in the Magistrate's Court for specific performance, and before the Court they entered into consent pursuant to which a decree issued which he utilized to complete the transaction. The witness stated he was unaware that the 2nd Defendant had a drinking problem as according to him [1st Defendant], he appeared to be normal when he dealt with him. The witness affirmed that he did not during the sale transaction consult the family of the 2nd Defendant. He maintained due process was followed to have the suit land transferred to his name.
14. The 2nd Defendant [DW2] testified that he signed documents while under the influence of alcohol, did not attend the Land Control Board, and could not recall the details of the case before the Magistrate's Court. He admitted that he had been dismissed from his job due to alcoholism and had attended various rehabilitation centers, including Mathari Mental Hospital. He stated that although the sale agreement with the 1st Defendant indicates it was entered into in 2015, he did not receive the consideration indicated thereon.

Parties written submission

15. The Plaintiff filed her written submissions dated 11th November 2024. In her submissions she argued that the Court's jurisdiction had not been invoked as an appellate court but rather as a Superior Court with the authority to investigate allegations of fraud and/or abuse of the Court process by litigants pursuing unlawful purposes. The Plaintiff argued that, in seeking specific performance for a contract regarding agricultural land, the law required that such a contract be accompanied by a valid Land Control Board [LCB] consent, which was not obtained in this case. She contended that the Lower Court lacked jurisdiction to validate a contract that had, by law, become void as six months had lapsed without obtaining the requisite consent of the Land Control Board under the provisions of the [Land Control Act](#), Cap 302, Laws of Kenya.
16. The Plaintiff contended that the alleged consent entered into before the Magistrate's Court was utilized to remove restrictions imposed by third parties who were not parties to the suit, and that such removal was not prayed for in the Plaint and therefore the Court was manipulated to grant what were essentially unlawful and illegal orders. The Plaintiff further submitted no duly and validly executed transfer instrument was submitted to support the transfer to the 1st Defendant nor was the original title surrendered by the 2nd Defendant as required before the transfer was registered. The Plaintiff further submitted there was no evidence of payment of stamp duty for the transfer.
17. The Plaintiff in support of her submissions placed reliance on the privy Council case of *Hip Foong Hong v H. Neotia & Company* [1918] AC 888 where it was held that a Judgment alleged to have been fraudulently obtained can be set aside through the institution of an independent action where the particulars of fraud are set out. Our Court of Appeal in the case of *Richard K. Bunei & 8 Others t/a Geo – estate Development Services v Lorian Ranching Co. Ltd & 799 Others* [2017] eKLR cited the privy case with approval. On the issue that the sale transaction was void for lack of consent of the Land Control Board the Plaintiff placed reliance on the Case of *Chemey Investment Ltd v AG & 2*



Others [2018] KECA 863, [KLR] and Hirani Ngaithe Githire v Wanjiku Mugo [1919] KLR 50. As regards the issue that the Lower Court acted outside the scope of the pleadings that were before it, the Plaintiff relied on the Case of Galaxy Paints Co. Ltd v Falcon Glands Ltd [2000] 2 EA 385 to support her position.

18. The 1st Defendant filed his written submissions dated 12th March 2025, and it was his argument that the Plaintiff did not prove her claim on the balance of probabilities as required by law. He argued that the case was *res judicata*, on account of the determination by the Magistrate's Court. He contended that if the Plaintiff was dissatisfied with the previous determination, she ought to have appealed rather than filing a new suit. He further submitted the Plaintiff had not adduced any evidence to support her allegations of fraud against the Defendants. He submitted that the fact that the Plaintiff still possessed the original title deed, ought not be interpreted as evidence of fraud regarding the registration of the transfer in favor of the 1st Defendant. The 1st Defendant in support of his submissions placed reliance on the following authorities. *Mwangi Njangu v Meshack Mbogo Wambugu & Another-HCCC 2340 of 1991*[unreported] *Joseph Kaguthi & 11 Others v Permanent Secretary Ministry of Interior and Co-ordination of Government & Another* [2021] eKLR, *Selina Mecca Wekesa v Kennedy Ellan Wekesa & 7 Others* [2014] eKLR, *Wema Foundation Trust Company Limited of Nairobi v County Government of Nairobi City & Another* [2022]eKLR, and *Central Bank of Kenya Ltd v Trust Bank Ltd & Others CA No. 215 of 1996* [1996] eKLR.

Analysis, evaluation and determination

19. I have reviewed the pleadings, the evidence and the submissions of the parties and have considered the authorities cited and referred to by the parties:

The issues that stand out for determination are as follows:-

- i. Whether the Plaintiff had any beneficial interest in land parcel Mutira/Kaguyu/5014 [subdivided into land parcels Mutira/Kaguyu/6317, 6318 and 6319]?
 - ii. Whether the Defendants connived and fraudulently filed and prosecuted Kerugoya CM ELC No. 191 of 2019 and fraudulently and unlawfully obtained illegal and unlawful orders that were utilized to fraudulently effect transfer to the 1st Defendant?
 - iii. Whether the orders issue by the Kerugoya CM ELC No. 191 of 2019 and the consequent registration of the 1st Defendant as owner of Mutira/Kaguyu/5014 on the strength of the said orders was null and void?
 - iv. Whether the 1st Defendant acquired title to the suit property lawfully?
 - v. What reliefs should the Court grant?
20. On the first issue, it was common ground that the Plaintiff was the lawfully wedded wife of the 2nd Defendant. The Plaintiff and 2nd Defendant were married under Kikuyu Customary Law in 2001 and subsequently solemnized their marriage under the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya on 20th February 2005. A copy of the marriage certificate was exhibited as PEX 16. It was equally not disputed that land parcel Mutira/Kaguyu/5014 was transferred to the 2nd Defendant by his mother, Lucy Mumbi Njogu, for consideration of 'Gift' being his inheritance from his late father. The 2nd Defendant was registered as owner of the land on 4th November 2011 and issued title to the land. The Plaintiff in her evidence testified that her mother infact gave her the original title to keep custody of as it was feared her husband could sell off the land if the title was released to him. The 3rd Plaintiff's witness, her mother in law, corroborated the Plaintiff's evidence that they had a house



on the suit land where they used to reside whenever they came home for holidays. PW3 confirmed that she gave land to all her 4 sons from the land left to her by her late husband. She affirmed that she transferred the suit land to her son [2nd Defendant] as a gift and her intention was that he was to hold the land for the benefit of her grandchildren. She stated it was not her intention that the 2nd Defendant sells the land.

21. PW3 in her evidence stated her son sold the land secretly and did not inform her and that she only learnt the land had been sold when a large group of people came to the land to take possession. She affirmed the 1st Defendant was now in possession though she did not know how the land got transferred to him.
22. On the evidence it is not in doubt that the 2nd Defendant got the suit land transferred to him by his mother as part of his inheritance from his deceased father. The land without any doubt constituted ancestral land.
23. The 2nd Defendant's brothers also got their inheritance from their mother. At the time the land was transferred to the 2nd Defendant in 2011 he was married to the Plaintiff, and that although they are separated, they are still married as there has never been a formal divorce between them. The Plaintiff and the 2nd Defendant have 2 children from their marriage born in 2005 and 2011 respectively. The land transferred to the 2nd Defendant was part of ancestral land and it is my determination that the same having been acquired by the 2nd Defendant during the subsistence of his marriage to the Plaintiff, the Plaintiff acquired a beneficial interest in the suit land and that the Plaintiff's concurrence and/or consent to the sale ought to have been sought and obtained if the property was to be sold as it constituted family property.
24. It is instructive that the 1st Defendant at the time of purchase did not bother to ascertain the history of the suit land and in that regard did not seek out and obtain the sanction of the family members to proceed with the sale.
25. The 1st Defendant in his evidence stated that he did due diligence by conducting a search which revealed the 2nd Defendant was the registered owner of the land and that the land had no encumbrances. He stated that he entered into the sale agreement on that basis. Courts have repeatedly held an official search and/or indeed a title is not sufficient proof of ownership and/or validity of title and that an intending purchaser ought to do more than merely carrying out a search to ascertain the ownership of the land.
26. The Court of Appeal in the Case of Kukan & Another v Kibutha [2023] KECA 742 KLR agreed with and approved the scope of due diligence that is required in establishing the validity of title as was set out by this Court in the Case of Esther Ndegi Njiru & Another v Leonard Gatei [2014] eKLR where the Court stated thus:-

“whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40[6] of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the Constitution* coupled with the provision of Section 26[1] [a] and [b] of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when



many cases if what has been described as “grabbed public lands.” It is essential to endeavor to ascertain the history and/or root of the title.”

27. The Supreme Court in the case of *Dina Management Ltd v County Government of Mombasa & 5 Others* [2023] KESC 30 KLR considered who qualified to be deemed a bonafide purchaser and/or an innocent buyer for value without notice and approved the Court of Appeal holding in the case of *Samuel Kamere v Land Registrar* [2015] eKLR and the Case of *Munyu Maina v Hiram Gathia Maina* [2013] eKLR where the Court of Appeal held that where a registered proprietor’s title was under challenge, the process and procedure through which such title was acquired ought to be demonstrated to establish the root of the title. The Supreme Court in the *Dina Management Ltd Case* [supra] at Paragraph 110 of its Judgment held:-

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such title cannot be held as indefeasible.”

28. Further the Court of Appeal in the Case of *Funzi Development Ltd & Others v County Council of Kwale* [2014] eKLR held as follows:-

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

29. In the instant matter the 1st Defendant entered into a sale agreement on 14th August 2015 with the 2nd Defendant to purchase land parcel Mutira/Kaguyu/5014 for the consideration of Kshs 6,000,000/-. As per the agreement the 1st Defendant paid a sum of Kshs 500,000/- on execution of the agreement. Under clause 4 of the agreement the balance of Kshs 5,500,000/- was to be paid on demand. Clause 6 of the agreement provided thus:-

6. That the vendor shall execute all necessary documents to ensure that the land is transferred to the purchaser free from all encumbrances.

30. It was the evidence of the 1st Defendant that the 2nd Defendant failed to honour the terms of their agreement and that prompted him to sue the 2nd Defendant in Kerugoya CM ELC No. 191 of 2019 to have their agreement enforced. The said suit before the Magistrate’s Court was compromised by the 1st and 2nd Defendant entering a consent whereby the 2nd Defendant was ordered to transfer the suit land to the 1st Defendant.

31. The Plaintiff contended there was connivance between the 1st and 2nd Defendants in entering the consent before the Magistrates Court, as there was no valid agreement that could be enforced the same having become null and void for lack of the Land Control Board consent. In the suit before the Magistrate’s Court the 1st Defendant, as the Plaintiff and the 2nd Defendant as the Defendant, pleaded under paragraphs 3, 4 and 5 of the Complaint dated 19th November 2019 as follows:-

3. The Plaintiff vide the sale agreement dated 14th day of August, 2015 bought 1.2 Ha out of land parcel No. Mutira/Kaguyu/5014 from the Defendant.
4. That in flagrant breach of the said agreement the Defendant has adamantly refused to transfer the land.



5. In the premises the Plaintiffs claim against the Defendant is for an order of specific performance of the sale agreement dated 14th day of August, 2015.
32. The 1st Defendant in the suit before the Magistrate’s Court prayed for Judgment against the 2nd Defendant for orders:-
- [a] specific performance of the sale agreement dated 14th August, 2015.
- [b] Costs of the suit.
33. The substratum of the suit before the Magistrate’s Court was anchored on the agreement of sale dated 14th August 2015. It is that agreement that the 1st Defendant sought to have specifically enforced by the Court against the 2nd Defendant. The Plaintiff has contended that the agreement had become null and void for all purposes as no consents of the Land Control Board had been sought and obtained within the prescribed period under the provisions of the *Land Control Act*, Cap 302 of the Laws of Kenya.

Section 6[1] [a] of the *Land Control Act* provides that:-

1. Each of the following transactions that is to say—
- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. -----
- is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
34. Under Section 7 of the *Land Control Act*, consideration paid for a transaction which becomes void is recoverable as a debt subject to Section 22 of the Act. An application for consent is made under Section 8[1], which requires that the application for consent should be made in the prescribed form within 6 months of the making of the agreement. The High Court may however on application extend the period if sufficient reasons are advanced.
35. In the present matter there can be no dispute that the sale transaction between the 1st and 2nd Defendants related to Agricultural land and was therefore subject to the provisions of the *Land Control Act*. Both the 1st and 2nd Defendants conceded that no Land Board consent was obtained for the sale transaction. Consequently, under Section 6[1] of the *Land Control Act*, the sale agreement became void for all purposes after the expiry of six months. The agreement therefore could not be specifically enforced as it had ceased to exist having become void. On the basis of the pleadings, the Learned Magistrate in the Lower Court could not lawfully grant the orders sought by the 1st Defendant in his Plaint; to wit: to order specific performance of the sale agreement dated 14th August, 2015 as it had become void for all purposes. The consent the parties had entered into could not confer jurisdiction on the Learned Magistrate to do what the Law had declared to be illegal and/or null and void.
36. The consent entered into between the 1st and 2nd Defendant before the Lower Court was in my view intended to sanctify and sanction what the law had declared to be void. The effect of the consent order was to alter the nature of the suit from being one of specific performance of a contract to one of rectification of title when one considers Order [2] of the extracted decree which provides:-
- [2]. That the Land Registrar-Kirinyaga is hereby ordered to register land parcel number Mutira/Kaguyu/5014 in the names of the Plaintiff James Munene Ndumbi.



37. The pleadings without doubt did not support such an order and this gives credence that the orders may have been obtained through connivance, manipulation and/or unlawfully with the result that the orders were fraudulent and illegal. The conduct of the 1st Defendant before and after he obtained the decree and the manner through which he processed title put to question his bonafides.
38. While the sale agreement is stated to have been entered into on 14th August, 2015 and a deposit of Kshs 500,000/- paid, and the balance was payable on demand, it was not explained why no further purchase price was paid until 2019 and 2020 when the bulk of the purchase price was purportedly paid as per the acknowledgement slips exhibited in evidence. The 1st Defendant did not adduce any evidence to show an instrument of transfer was executed and/or any stamp duty paid as required. Additionally, the original title deed for the suit property was not surrendered to the Land Registrar for cancellation as provided under the *Land Registration Act*, 2012 and there was no order dispensing with its production.
39. I am persuaded that the orders obtained by consent in the Magistrate’s Court Kerugoya CM ELC No. 191 of 2019 were not regularly obtained and were unlawful and illegal. The 1st Defendant through his Advocate has argued that the consent entered into was valid and the same could only be challenged on grounds of fraud and/or collusion and cites the Case of Kenya Commercial Bank Ltd v Specialized Engineers Co. Ltd v Specialised Engineers Co. Ltd [1982] KLR 485 to support his submission. He argued that no fraud or collusion was demonstrated by the Plaintiff to vitiate the consent. However, the consent led the Court to issue a decree that in effect was to enforce a void contract, that the law expressly provided to be null and void.
40. The Court of Appeal in the Case of Richard K. Bunei & 8 Others v Lorian Ranching Co. Ltd & 799 Others [supra] stated as follows:-
- “Given that resounding endorsement of a new trial as the mode for uprooting a Judgment obtained by fraud, spoken no less than this Court itself we do not see that any argument to the contrary stood any chance. The Appellants knew this well and kept their peace. The decision of this Court was before the Learned Judge and it was binding upon him. In proceeding to hear and determine the case he proceeded properly and we, on our part have no difficulty finding and holding that the suit was competent and that fraud having been established, the Learned Judge was perfectly entitled to nullify the fraud tainted consent orders.”
41. The Court of Appeal in holding as above had made a reference to a House of Lords decision in JONESCO v BEARD [1930] AC where the Court had held:-
- “It is the settled practice of the Court that the proper method of impeaching a completed Judgment on the ground of fraud is by action in which the particulars of the fraud must be exactly given and the allegations must be established by strict proof.
- Although there is jurisdiction in special cases to set aside a Judgment for fraud on a motion for new trial, if for any special reason departure from the established practice is permitted the necessity for stating the particulars of fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.
42. I am in the premises, guided by the above Court of Appeal decision, persuaded that the Plaintiff properly instituted the present action where she faulted the orders obtained before the Magistrate’s Court as having been obtained fraudulently. I have observed the Chief Magistrate lacked jurisdiction to give the orders that he issued pursuant to the consent of the parties. The claim was one for specific



performance of a void contract of sale and the order given was one for rectification of title in respect of which there was no pleading or prayer to support the same.

43. From the analysis I have given, it should be apparent the plea of res judicata pleaded and submitted on by the 1st Defendant would be inapplicable and I disallow that defence. The suit is not and cannot be resjudicata the claim being one based on beneficiary interest under customary law which is an overriding interest that need not be noted in the land register.
44. On the evidence I am satisfied that indeed the Plaintiff proved on a balance of probabilities that she had a beneficial interest over the suit property and that the transfer of the same to the 1st Defendant by the 2nd Defendant was unprocedural, unlawful and illegal. I accordingly enter Judgment in favour of the Plaintiff and make the following consequential orders:-
1. That the Plaintiff has a beneficial interest over land parcel Mutira/Kaguyu/5014 now subdivided into land parcels Mutira/Kaguyu/6317,6318 and 6319.
 2. That the orders issued in Kerugoya CM ELC No. 191 of 2019 on 5th December 2019 were obtained fraudulently and unlawfully and are declared null and void.
 3. That the transfer/registration of the 1st Defendant, James Munene Ndumbi as owner of land parcel Mutira/Kaguyu/5014 [now subdivided into Mutira/Kaguyu/6317, 6318 and 6319] was null and void and is hereby cancelled.
 4. The Land Registrar, Kirinyaga is hereby ordered to cancel the registration of James Munene Ndumbi as owner of land parcel Mutira/Kaguyu/5014 and the resultant subdivisions therefrom being land parcels Mutira/Kaguyu/6317, 6318 and 6319 and to revert the title land parcel Mutira/Kaguyu/5014 to the name of Moses Kirega Njogu.
 5. The 1st Defendant is ordered to vacate land parcel Mutira/Kaguyu/5014 [subdivided into land parcels Mutira/Kaguyu/6317, 6318 and 6319 within 30 days from the date of this Judgment failing which an eviction order to issue on application.
 6. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 23RD DAY OF JULY 2025.

J. M. MUTUNGI

ELC - JUDGE

