



**Kiruthi v Abdi & 4 others (Environment and Land Case
17 of 2018) [2025] KEELC 5390 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 17 OF 2018**

**OA ANGOTE, J
JULY 17, 2025**

BETWEEN

MARY KIRUTHI PLAINTIFF

AND

IBRAHIM ABDI 1ST DEFENDANT

DANIEL NDUNGU 2ND DEFENDANT

LANDS REGISTRAR, NAIROBI 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

BEATRICE HANNAH NJERI MATUMU 5TH DEFENDANT

JUDGMENT

1. Vide an Amended Plaint dated 16th April, 2021, the Plaintiff seeks as against the Defendants the following reliefs:
 - i. The Honourable Court declares the Certificate of Lease issued to the 2nd Defendant and subsequently to the 1st and 5th Defendants as null and void and order the 3rd Defendant to cancel the same.
 - ii. A declaration that the Plaintiff is absolute owner of the suit property.
 - iii. An order that the proprietorship section of the register of the suit property be rectified by inserting the Plaintiffs as the proprietors of the said suit property in place of the 5th Defendant.
 - iv. Cost of this suit and interest thereon.
 - v. Such other or further reliefs as this Honourable Court may deem fit and proper.



2. The Plaintiff's case is that at all material times relevant to this suit, her late husband, Raphael Kiruthi Kinuthia, was the registered proprietor of land title number Nairobi/Block/110/991, measuring approximately 0.045 hectares [hereinafter referred to as "the suit property"]. She contends that he was not only in possession of the property but was also actively developing it.
3. The Plaintiff stated in the Complaint that on 9th February, 2016, her and her husband were victims of a burglary at their home where a number of documents and other valuables were lost; that amongst the lost documents was the original certificate of title in respect of the suit property and that they reported the loss and were issued with a police abstract.
4. After the loss, she averred, they began the process of replacement of the title which was to be done concurrently with the registration of a caution; that at the point of procuring an official search which is a pre-requisite to both the replacement of title process and the registration of a caution, she was denied issuance of the same by the 3rd Defendant prompting the institution of judicial review proceedings -JR Cause No 53 of 2017 and that Judgment was delivered in her favour and a decree issued to that effect.
5. According to the Plaintiff, on the 24th December, 2017, the 2nd Defendant, accompanied by unknown individuals, unlawfully entered the suit property, claiming ownership and attempted to fence it off and that the subsequent transfer of the suit property from her late husband's name to the 1st, 2nd and eventually the 5th Defendants was tainted by fraud.
6. The particulars of fraud as against the 1st Defendant were set out in the Complaint as using fake documents and signatures to effect transfer of the suit property to himself, colluding with the 3rd Defendant to transfer the suit property to himself without the Plaintiff's knowledge, and colluding with the 2nd and 3rd Defendants to transfer the property to the 5th Defendant without his knowledge.
7. As regards the 2nd Defendant, the particulars of fraud against him were set out as using fake documents and signatures to effect the transfer to himself, failing to conduct due diligence as required by law before purchasing the suit property, colluding with the 1st and 3rd Defendants to transfer the suit property to himself and thereafter the 5th Defendant, and transferring the suit property to the 5th Defendant despite being aware of the dispute over the same.
8. With respect to the 3rd Defendant, it was alleged that it failed to verify the authenticity of the signatures and documents used by the 1st Defendant to effect the transfer of the suit property to himself. It was further alleged that the 3rd Defendant colluded with the 5th Defendant to irregularly transfer the suit property without the Plaintiff's authority, despite being fully aware of her existing rights thereto.
9. The 1st Defendant filed a Defence dated the 2nd December, 2019. In it, he denied the assertions as set out in the Complaint stating that he purchased the suit property from Raphael Kiruthi Kinuthia after confirming that he was the bona fide owner thereof.
10. He averred in the Complaint that at the time of the purchase, no encumbrance was registered as against the title at the relevant land registry, a fact corroborated by the certificate of official search. Similarly, he stated, there were no court proceedings touching on the ownership of the property.
11. According to the 1st Defendant, upon purchasing the suit property, vacant possession thereof was handed over to him on the 11th May, 2016 after registration of the transfer in his favour and payment of the purchase price as agreed. He asserted that apart from due diligence evinced by the certificate of official search aforesaid, he voluntarily executed all the requisite documents which enabled the 3rd Defendant to register the instrument of transfer in his favour.



12. The 2nd Defendant filed a Defence on the 9th April, 2018. He denied the assertions as set out in the Plaintiff stating that the Plaintiff ceased to be the property's registered owner on or about the 11th May, 2016 when the 1st Defendant became the owner. Contrary to the averments in the Plaintiff, he stated, he took over possession of the suit property from the 1st Defendant who was already in possession. He denied knowledge of any orders having been served on the 3rd Defendant to vitiate the legal processes pursuant to which he became the property's registered owner.
13. In response to the allegations of fraud, he asserted that he conducted all the requisite due diligence with the 3rd Defendant who issued him with a certificate of official search and that the 1st Defendant executed a valid lease as required under the relevant land laws and which were procedurally and legally registered.
14. The 3rd and 4th Defendants filed their Defence on the 15th February, 2018. In their response, they denied the allegations set out in the Plaintiff and contended that, if indeed the suit property was transferred to the 1st Defendant and subsequently to the 2nd Defendant, the transfer was effected procedurally based on documents duly presented to the 3rd Defendant. They further asserted that the said documents were believed, at the time, to be authentic and valid.
15. In the alternative, they averred, should the court find that that the suit land was irregularly transferred to the 1st Defendant and consequently to the 2nd Defendant, then the 1st and 2nd Defendants should indemnify them against any liability because they relied on the documents by the said parties to effect the transfer.
16. The 5th Defendant filed her Defence on 21st June, 2021. In her response, she denied the allegations contained in the Amended Plaintiff and maintained that the suit property was lawfully transferred to her following its purchase.
17. She asserted that prior to the purchase, she conducted due diligence, including an official search, which confirmed that the 2nd Defendant was the registered proprietor of the suit property. She further stated that she was issued with a title deed after complying with all legal requirements, executing all necessary documents, paying the requisite fees, and remitting the full purchase price.

Hearing and Evidence

18. The matter proceeded for hearing on 29th May, 2024. PW1 was Mary Wanjiru Kinuthia Wanjiru, the widow of the late Raphael Kinuthia. She testified that the Late Raphael Kinuthia died in April 2019 and that she is the Administrator of his Estate. She adopted her witness statement [undated] as her evidence in chief and produced the bundle of documents dated 17th August, 2018 as PEXHB1. She adduced the further list of documents dated the 14th June, 2021 as PEXHB2[except document no 9- the photo.]
19. It was her evidence vide the statement that at all material times, her deceased husband, one Raphael Kiruthi Kinuthia, was the registered proprietor of the suit property and that on or about the 9th February, 2016, she and her husband were victims of burglary at their home in which they lost a number of documents and other valuables, amongst them the original certificate of title with regard to the suit property.
20. It was Ms Kiruthi's testimony that they immediately reported the loss and were issued with a police abstract; that soon thereafter, the process of replacement of the title was commenced and this was to be done concurrently with the registration of a caution and that at the time of procuring an official search, a pre-requisite to both the replacement of the title and the registration of a caution, they were denied issuance of the same by the 3rd Defendant.



21. As a result of the 3rd Defendant's actions, the Plaintiff stated, they instituted Judicial Review Cause No. 53 of 2017 at the High Court in Milimani, seeking orders to compel the 3rd Defendant to issue, among other things, an official search; that Judgment was entered in favour of her late husband, and the search was subsequently issued and that thereafter, they filed the present suit and sought injunctive reliefs.
22. It was her evidence that on the 24th December, 2017, the 2nd Defendant, in the company of unknown persons, invaded the suit property claiming ownership thereof and with the intent to fence the property; that at the time, they had let the property to one Gabriel Mwendia Wangana who was running a car wash business thereon and that they have at all times paid Nairobi City Council rates through their tenant.
23. It was the evidence of PW1 that on 14th February, 2018, the court granted injunctive orders in favour of her husband directed towards the 2nd Defendant requiring him to grant them quiet possession of the suit property and that they subsequently put up a sign board on the suit property stating that the same was not for sale which was necessitated by frustrations caused by the 3rd Defendant who, despite receiving their booking form registering the injunctive orders refused to do so.
24. The Plaintiff stated that they remained in possession of the suit property until around August 2019, when the 2nd and 5th Defendants colluded to unlawfully deprive them of possession through fraudulent means. In this regard, she asserted, the 5th Defendant orchestrated a suit against the 2nd Defendant, Milimani Commercial Court Case No. 298 of 2019, purporting to seek vacant possession of the suit property.
25. According to PW1, in that suit, the 2nd and 5th Defendants recorded a consent dated 31st July, 2019, granting the 5th Defendant possession of the property and that pursuant to the consent, the court issued orders directing the OCS Kasarani to enforce the same, which resulted in a forcible takeover and extensive destruction on the property, with losses valued at over Kshs. 1,000,000.
26. Ms. Kiruthi stated that she instructed her counsel to seek joinder in Milimani Commercial Court Case No. 298 of 2019 and that during the proceedings, counsel for the 5th Defendant, Mr. Mariaria, appeared before the court and disowned both the suit and the consent order, asserting that he had no knowledge of the 5th Defendant.
27. It was the testimony of PW1 that consequently, the court found the consent to be fraudulent, expunged it from the record, and dismissed the entire suit for being a nullity and that the court further directed that the file be forwarded to the Directorate of Criminal Investigations [DCI] for further investigation, which remains ongoing.
28. She noted that despite the court's findings aforesaid, the 5th Defendant forcibly took possession of the property and commenced construction, and efforts to regain possession have been unsuccessful; that although the 3rd Defendant eventually agreed to register a restriction on the title, this was done after the property had already been transferred from the 2nd to the 5th Defendant and that attempts to have the Nairobi City County's Department of Urban Planning revoke the development permits were also unsuccessful.
29. She asserted that the suit property belonged to her deceased husband both legally and beneficially and any transfer to the 1st Defendant and thereafter to the 2nd Defendant can only have been through fraud because neither her nor her deceased husband ever met the 1st Defendant.
30. She maintained that the irregularities surrounding the fraudulent transfer of the suit property were enabled by the 3rd Defendant's failure to verify the signatures on the transfer documents constituting



- a breach of its statutory duty and that the identity card used in registering the fraudulent transfer had been missing and reported lost by her husband at the time of the registration of the transfer.
31. She stated that she has reason to believe that the 1st, 2nd and 5th Defendants are part of land cartel terrorizing city residents; that all their actions were well calculated to ensure all their tracks are covered and that the illegal transfer of her late husband's property to the 5th Defendant should be nullified.
 32. In cross-examination, PW1 testified that, according to the records, the suit property was transferred from the late Raphael Kiruthi Kinuthia to the 1st Defendant on 1st December 2015 and was subsequently registered in the 1st Defendant's name on 11th May 2016. She acknowledged that this registration occurred before any attempt was made to lodge a caution over the property.
 33. She further admitted that although she alleged that the deceased's identity card had been lost, she did not report the matter to the police and therefore did not possess any OB number or formal documentation to support the claim. She also conceded that the deceased's certified KRA PIN was visible on the transfer documents. Additionally, she confirmed that the deceased did not record any statement at the time of the institution of the suit.
 34. In re-examination, PW1 stated that the first formal dispute concerning the suit property was initiated in April 2017 through a Judicial Review application; that this was prompted by her inability to obtain a land search despite having made a formal application and that she was informed that there was no corresponding file for the property at the lands office, which rendered it impossible for her to lodge a caution. It was her evidence that she only became aware of the 5th Defendant's interest in the property upon the filing of Milimani CMCC No. 298 of 2017.
 35. PW2 was Gabriel Mwandia. He adopted his witness statement dated 11th June, 2021 as his evidence in chief. It was his evidence that he entered into a lease with the deceased's husband one Raphael Kiruthi Kinuthia in November, 2015 and took possession of the suit property with his consent.
 36. According to PW2, he conducted his carwash business thereon for a number of years taking out annual business permits as required and paying the property's land rates which he paid on behalf of the Plaintiff, and which would be offset from his monthly rent.
 37. PW2 informed the court that on 24th December, 2017, as he was going about his business, the 2nd Defendant accompanied by persons unknown to him accosted him claiming they had come to take possession of the suit property.
 38. It was his evidence that he thereafter called the deceased who came up to the property with the Plaintiff and that they produced court documents showing the existence of a dispute on the property and the 2nd Defendant left.
 39. He stated that with the Plaintiff's permission, he took measures and placed a sign board on the property stating that the property was not for sale and that he remained in possession of the suit property until sometime in 2019 when the 2nd and 5th Defendants colluded to deprive the Plaintiff of the property through unscrupulous means by stage managing a case being Milimani Commercial Court 298 of 2018.
 40. Vide the aforesaid suit, he stated, the 2nd and 5th Defendants recorded a consent dated the 31st July, 2019 allowing the 5th Defendant to take possession of the suit property and further directing the OCS Kasarani to intervene and execute the said orders. The OCS Kasarani executed the order as instructed leaving a trail of destruction of property worth Kshs 1,000,000/=.



41. According to Mr Wangana, the 5th Defendant took forceful possession of the suit property and begun construction of a multi storey building on thereon; that despite his best efforts, the deceased was unable to regain his property and that he was never made aware of any sale of the suit property and believes that any transfer was fraudulent.
42. In cross-examination, he testified that he had been in occupation of the suit property from 2015 to 2019, during which period he leased the land from the late Raphael Kiruthi Kinuthia. He confirmed that his witness statement was recorded while the deceased was still alive. He further stated that Raphael passed away in the year 2022.
43. DW1 was Beatrice Hannah Njeri. She adopted her witness statement dated 20th May, 2024 as her evidence in chief and produced the bundle of documents of an even date as 5DEXHB1.
44. It was her evidence that she entered into a sale agreement with the 2nd Defendant after conducting due diligence which showed him to be the owner of the suit property. She stated that neither the Plaintiff nor the 1st Defendant are known to her and that she is a stranger to the allegations by the Plaintiff.
45. She asserted that at the time she was purchasing the suit property, there was no sign that the same was not for sale and that she followed due process in acquiring the same and as such, it legally belongs to her.
46. During cross-examination, DW1 testified that the suit property was initially vacant at the time of purchase. However, she later found some individuals occupying the land, who eventually vacated peacefully after discussions.
47. She stated that she was unaware that her then Advocate, Mr. Mariaria, had been summoned to court and had allegedly denied filing the suit on her behalf. She also indicated that she had no knowledge of any investigations being conducted by the Directorate of Criminal Investigations [DCI] in relation to the matter.
48. With regard to the purchase price, she testified that she bought the property for Kshs 20,000,000, although the sale agreement indicates Kshs 20,500,000. She explained that she had made partial payments through bank-to-bank transfers but admitted that she did not have any documentary evidence to support this claim. Additionally, she conceded that she did not possess a rent clearance certificate, nor did she have proof of payment of the Kshs 200,000 allegedly remitted as stamp duty.
49. In re-examination, DW1 reiterated that the transfer of the suit property was effected at the lands office. She maintained that she paid a total of Kshs 20,500,000 as the purchase price. However, she stated that she was unaware why her Advocate had indicated a figure of Kshs 6,000,000 as the purchase price in certain documents, and that she could not explain the discrepancy.
50. DW2 was Wilberforce Mariaria, an Advocate. He adopted his witness statement dated the 20th May, 2024 as his evidence in chief. It was his evidence that sometime in the month of July, 2019, he was instructed by the 5th Defendant to file a case against the 2nd Defendant seeking vacant possession of the suit property and that at the time of the issuance of the instructions, the 5th Defendant had all the documents of ownership.
51. DW2 stated that he filed a Misc Application at the Milimani Law Courts against the 2nd Defendant and the matter was subsequently settled by way of consent between his firm and the firm of M/S Ombali, Otieno and Opiyo Advocates which had been engaged by the 2nd Defendant. He confirmed that the proceedings in the lower court were legitimately lodged by his law firm and at the time thereof, no other litigation was filed or pending on the subject matter herein.



52. In cross-examination, DW2 acknowledged that he is aware that perjury constitutes a criminal offence. He confirmed that he had previously been summoned to appear before the Magistrate in Milimani CMCC No. 298 of 2018, and that the ruling delivered on 1st November, 2019 indicated that he had disowned both the pleadings and the consent previously filed in the matter.
53. He testified that at the time the suit was filed, he did not know the 5th Defendant and had not personally handled the matter. He maintained that his earlier statement to the court, asserting lack of knowledge of the 5th Defendant was truthful because he was not aware that his law firm was actively prosecuting the case at that time.
54. DW2 stated that owing to the volume of matters handled by his firm, he could not recall the specific role he may have played in this particular case unless he was presented with the relevant documentation.
55. During re-examination, DW2 clarified that he is the managing partner of his law firm, which consists of other associates who prepare pleadings and handle client matters. He explained that he was served with summons in that managerial capacity and that when the 5th Defendant visited his office, he had to consult with his partner to establish who had drawn the pleadings.
56. According to DW2, it was only after making these inquiries that he became aware that the pleadings had indeed been prepared by his law firm. He reiterated that at the time he was summoned by the Magistrate's Court, he had no personal knowledge of the client and only came to learn of her identity later.
57. DW3 was Edwin Wafula, an employee of the Ministry of Lands, Lands Registrar, Chuka. He adopted his witness statement dated the 13th July, 2018 as his evidence in chief and produced the documents of an even date as 3DEXHB1.
58. It was his evidence that he served as a Senior Land Registration Officer at the Ministry of Lands and Physical Planning, stationed at Ardhi House. He testified that according to the official land records held at the registry, the suit property is currently registered in the name of Daniel Ndungu, following a transfer effected by Ibrahim Abdi on the 13th July 2017. He further confirmed that Ibrahim Abdi had been registered as proprietor pursuant to a transfer from the late Raphael Kiruthi Kinuthia, which was duly registered on the 11th May, 2016.
59. DW3 averred that based on the documents available at the land registry file, all procedural requirements were complied with by the Land Registrar in effecting the transfer from the Plaintiff to the 1st Defendant. He concluded that, in the circumstances, there was no basis for the Plaintiff's allegations of fraud or negligence on the part of the Land Registrar, as the registration process followed due process under the applicable law.
60. During cross-examination, DW3 clarified that he did not personally sign the transfer documents relating to the suit property. He observed that the signatures attributed to Ibrahim Abdi appeared to differ across documents.
61. DW3 stated that it is the responsibility of the party preparing the transfer to verify and confirm the authenticity of the parties' signatures and that the role of the Land Registrar is limited to confirming that the documents presented have indeed been signed before proceeding with registration.

Submissions

62. The Plaintiff filed submissions on the 28th April, 2025. Counsel submitted that it is not in dispute that Mr. Kinuthia [deceased] purchased the suit property from its previous proprietor in 2005 and that



- not having testified, the 1st Defendant failed to meet the legal and evidentiary burden of proof placed upon him to show that he purchased the property from the Plaintiff's deceased husband, as guided by Section 107 and 108 of the *Evidence Act*.
63. Further, it was submitted, in the absence of any written agreement, Section 38 of the *Land Act* presumes an illegality on the said transaction and in view of the foregoing, any subsequent sale of the said property is tainted with illegality that the law cannot cure since the subsequent purchasers, just like the first, never acquired any valid or good title.
 64. Further still, it was argued, there was no spousal consent, a requirement before the sale of matrimonial property. Reliance in this regard was placed on the case of *Sehmi & another v Tarabana Company Limited & 5 others* [Petition E033 of 2023] [2025] KESC 21 [KLR] [11 April 2025] [Judgment].
 65. According to counsel, the Plaintiff made several requests to the 3rd Defendant, including the replacement of the title, provision of official search results, registration of a caution over the suit property on multiple occasions, entry of injunctive orders against the property title in the registry file, and access to the transfer instruments.
 66. It was submitted that none of these requests were honoured, thereby jeopardizing her proprietary rights and violating her constitutional rights to information under Article 35 and freedom from discrimination under Article 27 of *the Constitution*.
 67. Further, it was submitted, the 3rd Defendant wilfully disobeyed the injunctive orders barring any further dispositions on the suit property by failing to register the Order against the Title, which would have prevented convoluted court proceedings and safeguarded the property from the 5th Defendant's malicious interference. Ultimately, it was urged, the 3rd Defendant violated the Plaintiff's constitutional rights and breached their duty of care towards her warranting compensation in the nature of general damages.
 68. The 1st and 2nd Defendants did not file submissions.
 69. The 3rd and 4th Defendants filed submissions on 21st May, 2025. Counsel submitted that it is not the mandate of the Land Registrar to verify whether a signature is fake or not; that their role is limited to ensuring all relevant documents have been duly executed, and all the necessary consents had been obtained and that the 1st Defendant produced all the necessary documents in support of the transaction
 70. It was submitted that it is a cardinal precept of the law of evidence that he who alleges must prove. Consequently, it was urged, the Plaintiff should not only have pleaded fraud on the part of the 3rd Defendant, but also adduced evidence to prove the same. Reliance in this regard was placed on the case of *Koinange and 13 Others v Koinange*[1986]22.
 71. Having failed to do so, it was submitted, the Plaintiff failed to impeach the title as per Section 26 of the of the *Land Registration Act* and that the transfer from the deceased to the 1st Defendant not having been impeached, the subsequent transfers to the 2nd Defendant and subsequently to the 5th Defendant are not subject to challenge.
 72. The 5th Defendant filed submissions on 6th May, 2025. It was submitted that parties are bound by their pleadings and in this instance, the Plaintiff's new claims, to wit, the issue of spousal consent and matrimonial property and back dating the transfer form and the OB number Number 35/17/2/2016 should not be considered having not been pleaded.
 73. Submissions, it was argued do not constitute pleadings as stated in *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007.



74. Nonetheless, it was contended, no evidence was adduced to establish that the subject property qualifies as matrimonial property as defined under Section 93 of the Land Registration Act, read together with Section 12 of the Matrimonial Property Act. As such, it was argued, there was no legal requirement for the Plaintiff's consent at the time her husband sold the property to the 1st Defendant.
75. It was further argued that the Plaintiff's alleged residency in the United States during the transaction is irrelevant, given that the transaction was solely between the 1st Defendant and her now-deceased husband.
76. According to Counsel, evidence was led to show that the Plaintiff's husband executed transfer forms in the presence of an Advocate, who also certified his National Identity Card and KRA PIN Certificate as true copies of the originals. Notably, it was submitted, the said Advocate, who could have clarified whether a sale took place between the Plaintiff's husband and the 1st Defendant was not called to testify, and no explanation was offered by the Plaintiff for this omission.
77. It was submitted that despite the absence of a formal sale agreement, the 5th Defendant produced various documents confirming the transaction between the Plaintiff's husband and the 1st Defendant; that these documents were not opposed by the Plaintiff and that no evidence was presented to dispute the authenticity of the signature on the transfer forms.

Analysis and Determination

78. Vide the present suit, the Plaintiff seeks, inter-alia, a declaration that she is the legitimate owner of the suit property and seeks to have the Certificate of Lease registered in favour of the 5th Defendant cancelled.
79. It is her case that her deceased husband was the registered proprietor of the suit property. She maintains that sometime in February 2016, there was a house burglary which resulted in the loss of the suit property's Certificate of Title. She asserts that their attempts to recover the same was thwarted by the 3rd Defendant and that they thereafter realized that the suit property had been transferred to the 1st, 2nd and ultimately the 5th Defendants.
80. The Plaintiff adduced into evidence a copy of the Certificate of Lease for the suit property, police abstract dated 7th October, 2016, application for registration of caution, online search certificate, copies of letters addressed to the Registrar, and a decree issued by Justice Aburili on 12th April, 2017.
81. The Plaintiff also adduced into evidence online generated search results issued on 7th March, 2016, court proceedings before Justice Eboso, booking form for registration of court order dated 30th May, 2018, lease between Raphael Kiruthi Kinuthia and Gabriel Mwendia Wangana, Nairobi City Business permit payments for 2015, 2016 and 2017 and land rates demand forms.
82. The Plaintiff also adduced into evidence search results issued on 15th May, 2018, court orders issued by the Magistrates Court on 1st August, 2019, 15th October, 2019 and 1st November, 2019, letter dated 15th August, 2019 addressed to the County Secretary Nairobi, internal memo dated 26th November, 2019 and the Plaintiff's passport entries.
83. The 1st and 2nd Defendants did not testify.
84. The 3rd and 4th Defendants maintain that the transfers of the suit property to the Defendants was above board and all processes were duly undertaken. They assert that should the court find otherwise, the 1st and 2nd Defendants should indemnify them against any liability because the 3rd Defendant relied on the documents presented to it to effect the transfers.



85. The 2nd and 3rd Defendants adduced into evidence a copy of the official search for the suit property, a copy of transfer of lease dated 1st December, 2015, a copy of Certificate of Lease dated 18th March, 2005 [cancelled], copy of identity card, pin certificate for Rapheal Kiruthi Kinuthia, a copy of the application for valuation for stamp duty, a copy of rent clearance certificate dated the 4th April, 2016, and a copy of the Certificate of Lease for the suit property dated 11th May, 2016.
86. The Defendants also filed a copy of the identity card and pin certificate for Ibrahim Abdi, and a copy of the application for valuation for stamp duty dated 6th July, 2017.
87. The 5th Defendant, on her part, maintains that she legitimately purchased the suit property. She adduced into evidence the sale agreement dated 3rd August, 2018, rate clearance certificate dated the 15th August, 2018, and a copy of the official search.
88. In view of the foregoing, and in consideration of the pleadings and submissions, the issues that arise for determination are:
- i. Whether the 5th Defendants’ title to the suit property should be cancelled?
 - ii. Whether the 3rd Defendant acted fraudulently and/or in breach of its duty of care in effecting the transfers in respect to the suit property?
 - iii. What are the appropriate orders to issue?

Whether the 5th Defendant’s title to the suit property should be cancelled?

89. The Plaintiff herein asserts that she is the bona fide owner of the suit property and seeks for the cancellation of the 5th Defendant’s title. As the party asserting this claim, the Plaintiff bears the legal and evidentiary burden of proving her case to the required standard. This is set out under Sections 107[1][2] of the *Evidence Act* which provides as follows:

“[1] Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[2] When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

90. And Sections 109 and 112 of the same Act which states:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

91. The evidence herein shows that the title to the suit property is in the name of the 5th Defendant, having been registered as the owner of the land on 13th September, 2018. Consequently, the law applicable to the title is the *Land Registration Act*, 2012. The provisions of Section 24[a] and 25[1] of the *Land Registration Act*, 2012 outlines the rights and interests of a registered proprietor as follows:



92. Section 24[a] provides:

“Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

93. Whereas Section 25 [1] states:

“[1] The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

94. Section 26[1] aforesaid, while affirming the principles of indefeasibility of title, also sets out the circumstances under which a party’s title is amenable to challenge. It states:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

95. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. This was discussed by the court in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR thus:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

“...it needs to be appreciated that for Section 26[1] [b] to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of



Section 26 [1] [b] is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 [1] [b] in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum."

96. The Plaintiff contends that the 5th Defendant's title was acquired through fraud. The Black's Law Dictionary defines fraud thus:

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another."

97. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in *Demutila Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR relying on an earlier exposition by *Vijay Morjaria v Nansingh Madhusingh Darbar & Another*[2000]eKLR thus:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts 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."

98. As regards the standard of proof, the Court of Appeal in *Demutila Nanyama Pururmu v Salim Mohamed Salim* [supra] looked to its earlier decision in *Kinyanjui Kamau v George Kamau* [2015] eKLR wherein it had held:

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR [G & F] 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..." In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

99. According to the Plaintiff, the 5th Defendant's acquisition of the suit property was tainted with fraud, allegedly arising from a chain of fraudulent dealings, beginning with the 1st and 2nd Defendants, aided by the 3rd Defendant. The 3rd, 4th and 5th Defendants, however, disputes these allegations, asserting that no particulars of fraud have been specifically pleaded or attributed to them, and therefore, the claim must fail.



100. Upon examination of the amended Plaint, it is evident at paragraph 14 that the Plaintiff pleaded that the 5th Defendant, jointly with the 1st, 2nd and 3rd Defendants, fraudulently transferred the suit property. Further, the Plaintiff alleges collusion amongst the said Defendants in effecting the impugned transfer. The court finds that this meets the threshold for pleading and particularising fraud as required under the law.
101. Moving now to the evidence, it is not in dispute that the suit property originally belonged to the late Raphael Kiruthi Kinuthia, the Plaintiff's husband. What is in issue is the legitimacy of the chain of transfers, from the deceased to the 1st Defendant, then to the 2nd Defendant, and ultimately to the 5th Defendant.
102. It is trite that when a registered proprietor's title is challenged, that proprietor bears the burden of proving the legitimacy of their title's root. [See *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR.
103. In elaborating what is required to establish a cogent root of title, the Court of Appeal in *General & another v Hussein & 3 Others* [Civil Appeal 100 of 2018] [2025] KECA 1022 [KLR] adopted the test it set out in *Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School* [2025] eKLR, stating:
- “The elements for a good root of title are: [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 recognizable description of the property; and [c] it must not contain anything that casts doubt on the title.”
104. The court will begin by examining the first transaction in the chain, the alleged transfer of the suit property by the deceased, Raphael Kiruthi Kinuthia, to the 1st Defendant. Whereas the 1st Defendant did not testify, the 3rd and 4th Defendants produced a transfer instrument dated the 1st December 2015, purportedly executed by the deceased in favour of the 1st Defendant.
105. The Plaintiff contests the authenticity of this transfer and alleges that the deceased never executed it. She contends that in February 2016, their residence was burglarized and the original title to the property was stolen.
106. However, the only supporting documentation provided was an Occurrence Book [OB] report dated October 2016, nearly eight months after the alleged incident. No explanation was rendered with respect to the delay in reporting of the incident.
107. The Plaintiff also alleges that the deceased's national identification documents were lost and that his signature as appears on the transfer instrument was forged. However, no handwriting expert report was submitted to prove that the signature on the transfer document was not that of the deceased.
108. DW3's observation that Raphael Kiruthi's signature “appears to differ across documents” cannot without more be said to be proof of fraud. Similarly, PW1 admitted that the loss of the deceased ID was not reported.
109. Further, the transfer instrument has a Kenya Revenue Authority [KRA] Personal Identification Number [PIN] certificate in the name of the deceased. The Plaintiff offered no satisfactory explanation of the presence of this document, nor did she adduce evidence to show that it was forged or fraudulently procured.
110. The Plaintiff has further asserted that the transfer of the suit property from the deceased to the 1st Defendant was invalid for lack of spousal consent. This argument was first raised through submissions.



It is a settled principle of law that parties are bound by their pleadings and that submissions, however forcefully presented, cannot take the place of evidence. The court will as such disregard this argument.

111. The Plaintiff has also sought to rely on Section 38[1] of the Land Act, 2012, to challenge the sale between the deceased and the 1st Defendant on grounds that it did not comply with statutory formalities. Section 38[1] provides that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded—[a] is in writing; [b] is signed by all the parties thereto; and [c] the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

112. The above provision is intended to safeguard parties against informal or oral land transactions. The primary purpose of Section 38[1] is to bar suits that are founded on unenforceable land sale agreements.

113. Considering that the 1st Defendant did not testify in this matter, this court is unable to tell if indeed there was a formal agreement of sale between the deceased and the 1st Defendant, save to say that sale agreements are never deposited at the lands office during the transfer process.

114. In the present case, the transaction between the deceased and the 1st Defendant culminated in the registration of the 1st Defendant as proprietor. The Plaintiff has not presented any evidence demonstrating that the transfer failed to comply with the statutory processes required under the Land Registration Act, 2012 or any other relevant legal instrument.

115. As such, and the transferor having died, and the 1st Defendant having not testified, the invocation of Section 38[1] of the Land Act is inapplicable to the circumstances of this case. Ultimately, the Plaintiff has not successfully impugned the transfer from the deceased to the 1st Defendant.

116. The second link in the chain of title is the transfer of the suit property from the 1st Defendant to the 2nd Defendant. In this regard, the 3rd and 4th Defendants produced an official search confirming that, as at the 13th July 2017, the 1st Defendant was the registered proprietor of the suit property.

117. They also produced a transfer instrument evidencing the registration of the transfer from the 1st Defendant to the 2nd Defendant registered on the same date. The Plaintiff has similarly alleged that this transaction was tainted by fraud alleging the use of fraudulent documentation.

118. No evidence of this has been adduced. The claim of failure to undertake due diligence is answered by the search which shows that at the time the 2nd Defendant acquired the suit property from the 1st Defendant, the property was registered in his name. There was no restriction on the property at the time.

119. In the absence of any credible evidence of fraud or irregularity, the court finds no basis to invalidate the transfer from the 1st to the 2nd Defendants.

120. The third and final link in the chain of title is the transfer of the suit property from the 2nd to the 5th Defendant. The Plaintiff has raised several concerns aimed at impugning the legitimacy of this transaction. First, the Plaintiff points out that the firm of advocates that acted for the 1st Defendant also appeared on record for the 2nd Defendant in Milimani CMCC No. 298 of 2019, a suit that was later nullified for being fraudulent.

121. There is however no evidence before the court to show that the firm's conduct in Milimani CMCC 298 of 2019 had any bearing on the legality of the transfer between the 2nd and 5th Defendants.



122. Secondly, the Plaintiff raises doubts regarding the credibility of DW2 who testified as a witness for the 5th Defendant. In this regard, the Plaintiff alluded to DW2's contradictory stance on when he knew about the 5th Defendant and the fact that he is the same Advocate who attested to the signatures of both the 1st and 2nd Defendants in the transfer dated 26th June, 2017 and registered on the 13th July 2017.
123. As aforesaid, it has not been demonstrated that the dismissal of CMCC No 298 of 2019 on account of DW2's statement that he was unaware of the 5th Defendant has any direct bearing on the legitimacy of the transaction between the 2nd and 5th Defendants.
124. Moreover, although it was alleged that DW2 had previously been suspended from practice, no evidence was adduced to show that such disciplinary action had any direct bearing on the transaction in question.
125. As regards his attestation, it is common practice for one Advocate to attest to both the transferor and transferee's signatures. This does not in itself point to any fraud.
126. The Plaintiff also questioned the financial integrity of the transaction, citing inconsistencies between the alleged purchase price and the declared value for stamp duty purposes. It was claimed that whereas the 5th Defendant paid Kshs. 20,000,000 to the 2nd Defendant, the stamp duty was calculated based on a consideration of Kshs. 6,000,000 as reflected in the transfer documents.
127. Whereas this points to under-declaration of the value, potentially a criminal matter, it cannot in itself impugn the transaction especially as the 2nd Defendant, the recipient of the purchase price, did not contest the sale or raise any claim of fraud, coercion, or non-payment.
128. The Plaintiff has further contended that the sale of the suit property by the 2nd Defendant to the 5th Defendant was irregular, having been effected during the pendency of this suit and while interim court orders were in place restraining any interference with the suit property.
129. However, the Plaintiff did not present any evidence demonstrating that the said orders had been formally served upon the 2nd Defendant prior to the transaction. More importantly, the orders had not been registered against the title to the suit property in accordance with the procedure outlined under the *Land Registration Act*.
130. This contention however also brings into focus the doctrine of lis pendens, which Black's Law Dictionary defines as:

“ the jurisdiction, power, or control acquired by a court over property while a legal action is pending.”
131. The doctrine is underpinned by the principle that the subject matter of litigation should be preserved during the pendency of a suit to avoid rendering the court's eventual decision nugatory. It prevents parties from undermining the authority of the court by transferring the disputed property in a manner that may defeat the rights of the successful litigant.
132. However, the doctrine of lis pendens does not operate to render such transfers void per se. Rather, it renders any transfer made during the pendency of proceedings subordinate to the final outcome of the suit. Where the party asserting the doctrine is ultimately successful, the transaction may be set aside to give effect to the judgment. Conversely, where the claimant fails to establish a valid proprietary interest, the doctrine cannot be invoked to defeat the rights of a transferee.



133. The foregoing position was explained by the Court of Appeal in *Marete v Ndegwa & 2 others [Civil Appeal E042 of 2021]* [2024] KECA 545 [KLR] [24 May 2024] [Judgment] thus:

“In our understanding, the doctrine of lis pendens runs with the suit so that its application depends on the outcome of the suit. Where the person relying on the doctrine succeeds in the suit, the doctrine may come to its aid in setting aside a transaction that might have been entered into between the other party to the suit and a third party without necessarily affecting the other party’s liability to the third party. However, where the party who seeks to rely on the doctrine fails in the suit, he can no longer rely on the doctrine.”

134. Ultimately, in the present case, the Plaintiff has failed to establish any actionable fraud, illegality, or procedural irregularity capable of impeaching the transaction between the 2nd and 5th Defendants. Accordingly, the Court finds that the transfer of the suit property from the 1st Defendant to the 2nd Defendant and from the 2nd Defendant to the 5th Defendant has not been impugned and stands as valid and lawful transactions.

135. The Plaintiff has further alleged that the 3rd Defendant was complicit in the fraudulent dealings affecting the suit property and is liable for both fraud and breach of statutory duty of care. Specifically, the Plaintiff contends that the 3rd Defendant failed to properly vet the authenticity of the documents presented by the Defendants during the transfer of the suit property.

136. The court has considered these allegations in light of the statutory role of the Land Registrar as outlined under Section 14 of the *Land Registration Act*, 2012. It is well established that the Land Registrar’s duties do not extend to the forensic verification and/or authentication of signatures.

137. The Registrar is primarily tasked with examining whether the documents presented meet the formal requirements for registration. Unless there is a clear statutory obligation or a legal caveat entered on the register, the Registrar is entitled to rely on the face value of duly presented and apparently regular instruments.

138. In any event, it has not been established that the documents used in the transactions were fraudulent.

139. The Plaintiff has also alleged that the 3rd Defendant wilfully disobeyed an injunctive court order issued on the 14th February 2018, which barred the 2nd Defendant from interference with the suit property.

140. Apart from the booking form, there is no evidence to show that the 3rd Defendant was properly served with the court order and that the registration process was duly complied with. The Plaintiff’s allegation, therefore, does not meet the evidentiary threshold necessary to impute liability. The claims against the 3rd Defendant therefore fail.

141. In the end, the court finds that the Plaintiff has not established her case to the requisite standards, being on a balance of probabilities. Consequently, the suit is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF JULY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Oduor for 5th Defendant

Mr. Kinyanjui for Plaintiff



Court Assistant: Tracy

