



Nkatha & 2 others (Suing as the administrators of the Estate of Mary Kooru Kirema (Deceased)) v Kirema & 5 others (Environment & Land Case 4 of 2020) [2024] KEELC 461 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 4 OF 2020
CK NZILI, J
JANUARY 31, 2024**

BETWEEN

**SARAH NKATHA 1ST PLAINTIFF
ANN MAKENA 2ND PLAINTIFF
LYDIA WANJA 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF MARY KOORU
KIREMA (DECEASED)**

AND

**PETER KIAMBI KIREMA 1ST DEFENDANT
MORRIS MUGUNA KIREMA 2ND DEFENDANT
AHMED ABDULLAHI 3RD DEFENDANT
LANDS REGISTRAR, MERU 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT
ABDI ABUDULLAHI 6TH DEFENDANT**

JUDGMENT

1. The plaintiffs, suing as the administrators of the estate of Mary Kooru Kirema, sued the defendants, claiming that L.R No. Nyaki/Mulathankari/595 belonged to their late father, Stanley Kirema, who had built therein and ran a school known as Mutindwa Art College; before his demise, he had transferred the said parcel of land to the 1st defendant as the elder brother to hold it in trust for the family.



2. Upon the demise of the father, the plaintiffs averred their late mother filed a Land Dispute Tribunal Case No. 9 of 1999, to have the land registered under her names and that of the 1st and 2nd defendants and another deceased son, whose decree was issued on 9.2.2001 ordering for registration of a joint proprietorship in equal shares.
3. Further, the plaintiffs averred the deceased and the 1st & 2nd defendants continued running the school as a family business and at one time leased it for Kshs.120,000/= per term, which proceeds they would share equally but after the death of their mother on 9.3.2010, they denied the estate its share. The plaintiffs averred the 1st & 2nd defendants in 2013 illegally, unlawfully, unprocedurally, and without the deceased's estate consent or approval colluded with the 4th defendant, subdivided the suit land into three portions, namely Nyaki/Mulathankari/2375, 2376 and 2377 and registered the first two in the name of the 1st defendant while the latter came under the name of the 2nd defendant.
4. The plaintiffs averred that the 1st and 2nd defendants occupied, illegally and fraudulently sold and transferred the three portions together with the school or family business to the 3rd defendant in 2013 after their mother passed on without taking out any letters of administration, consulting, or involving them and or seeking for their consent.
5. Further, the plaintiffs averred that despite notice to the 3rd defendant of their interest in the family land or business, the 3rd defendant illegally demolished all the structures on the property, including exhuming the remains of their parents buried on the property. They termed the sale and transfer of the three portions to the 3rd and 6th defendants as fraudulent, illegal, and irregular for inter-alia, ignoring the rights of the estate of Mary Kooru Kirema.
6. The plaintiffs sought:
 - a. A permanent injunction restraining the defendants from leasing, transferring, alienating, developing, or dealing with the properties by infringing on their proprietary rights.
 - b. Declaration that the estate of Mary Kooru Kirema is the legitimate and rightful owner in equal shares with the 1st & 2nd defendants as regards the initial L.R No. Nyaki/Mulathankari/595.
 - c. Allocation to the estate of one portion of the subdivisions above or the initial parcel of land.
 - d. Revocation and cancellation of the sale and transfer of the resultant subdivisions.
 - e. Rectification of the land register record with the estate of Mary Kooru Kirema allocated one portion of the subdivisions.
 - f. Eviction of the 3rd defendant from the subdivisions.
 - g. In the alternative, an order compelling the defendants to compensate the plaintiffs the current market value of one portion in the subdivision of L.R No. 595.
 - h. General damages for intermeddling, trespass, demolition of the school and exhumation of the bodies.
7. The 1st and 2nd defendants opposed the suit through a statement of defense dated 12.2.2020. While admitting that their late father owned L.R No Nyaki/Mulathankari/595 during the adjudication. The 1st and 2nd defendants denied the transfer to the 1st defendant was to be held as trust property. Instead, the 1st and 2nd defendants averred the land was a gift without any condition as to trust, implied or express, and for 16 years before his demise, the deceased never laid a claim on the property.



8. Consequently, the 1st and 2nd defendants averred the land Dispute Tribunal award was made without jurisdiction due to the 1st registration in favor of the 1st defendant; hence, it was a nullity. Further, the 1st and 2nd defendants averred that after the issuance of a decree dated 9.2.2001, all parties agreed that the 1st defendant, as the registered owner, was at liberty to deal with his land as he desired. They denied any alleged fraud or collusion in subdividing, registering, and transferring the parcels to third parties, including gifting a portion to the 2nd defendant out of love and affection.
9. The 1st and 2nd defendants averred that the sale and transfer to the 3rd & 6th defendants were regular and lawful, and the plaintiffs only objected to it eight years later. Further, the 1st and 2nd defendants denied that their late parents had shares in the school built on the suit properties, which the two did not own after they transferred it as a separate and distinct entity from the land of the 3rd defendant. Additionally, the 1st and 2nd defendants denied knowledge of any succession case regarding their mother's estate; otherwise, they would have been at the forefront as beneficiaries thereof.
10. The 3rd and 6th defendants opposed the suit by an amended statement of defense dated 16.2.2022. They admitted that in 2013, they lawfully bought a school L.R No. 2375, 2376, and 2377, free from fraud, misrepresentation, illegality, irregularity, conspiracy, or collusion with the 1st and 2nd defendants.
11. Further, the 3rd and 6th defendants averred that they undertook all the requisite due diligence showing that the 1st and 2nd defendants were the lawfully registered owners of the suit properties, for value and took possession in 2013 in an open manner, which possession or ownership was not objected to till seven years down the line. The 3rd and 6th defendants denied that the suit properties were part of the estate of the late Martha Kooru Kirema or that they ever committed any criminal offense in acquiring them, since there was no adverse claim affecting the school or the land. The 3rd and 6th defendants averred that as lawful owners of the school, they undertook works to add value to it, including alteration and additional works duly approved by the relevant government agencies.
12. The 4th and 5th defendants opposed the claim by a statement of defense dated 26.2.2020. They denied knowledge or being privy to the goings on over and the allegations of collusion, fraud, illegality and irregularities set out in the amended plaint. The 4th and 5th defendants averred they only dealt with the suit properties under the statutory powers relating to registration of documents, information or explanation given verification thereof, payment of costs, charges and expenses by such document holder(s), and such other powers and functions as prescribed by law.
13. Similarly, the 4th and 5th defendants averred that the plaintiffs were privy to the said dealings but deliberately chose to ignore such affairs to their peril. The 4th and 5th defendants denied receiving any statutory notice of intention to sue and termed the claim offensive to Section 16 of the [Government Proceedings Act](#) and statute barred under Section 3 (1) of the [Public Authorities Limitation Act](#).
14. In response to the 3rd and 6th defendants' amended statement of defense, the plaintiffs filed a reply dated 26.5.2022. They reiterated the contents of the amended plaint save to add that the 3rd and 6th defendants did not conduct any due diligence to ascertain the true and rightful owners of the property or acquire a good title to the property; hence, the doctrine of purchaser for value could not aid them.
15. Following pre-trial directions, the 3rd – 6th defendants filed a paginated bundle of documents dated 9.2.2022 and 28.1.2021. The plaintiff relied on a list of documents dated 27.1.2020 and 16.3.2020. The 1st and 2nd defendants relied on a list of witnesses and documents dated 12.2.2020.
16. At the trial, Anna Makena testified as PW 1 and the only witness following authority to act on behalf of the co-plaintiffs dated 22.1.2020. She adopted her witness statement dated 22.1.2020 as her evidence in chief. PW 1 produced a copy of limited grant ad litem dated 24.4.2019 as P. Exh No. (1), letter from



- the chief, dated 15.3.2109 as P. Exh No. (2), death certificate as P. Exh No. (3) authority to act as co-plaintiff as P. Exh No. (4), demand letter dated 25.10.2013 as P. Exh No. (5), letter to the District Land Registrar dated 11.10.2011 as P. Exh No. (6), notice to sue the Hon. Attorney General as P. Exh No. (7), chief's letter dated 17.9.2013 as P. Exh No. (8), letter dated 22.6.2000 from Kibera Advocates as P. Exh No. (9), copy of pleadings in the Land Dispute Tribunal Case as P. Exh No. (10), copy of decree thereof as P. Exh No. (11), official search dated 9.8.2017 for L.R No's. Nyaki Mulathankari/595, 2375, 2376, and 2377 as P. Exh No. 12 and 13 (a) (b) & (c), copy of registration of Mutindwa Art College as P. Exh No. (14) and a letter from Ndubi and Associates dated 25.10.2013 as P. Exh No. (15).
17. PW 1 told the court she was the 2nd born child of the late Stanley Kirema and Mary Kirema, while the 1st and 2nd defendants were her young brothers. She said the deceased had acquired the land from her grandfather, Jackson Angaine, under instructions to register it in a separate name from his other parcels of land. Therefore, PW1 said the 1st defendant held the land in trust of the entire family since he was registered as a minor. PW 1 said that before her father passed on, he had unsuccessfully tried to re-transfer the land to himself in 1992 by attending a land control board meeting. She said her late mother took over the process of the land control board, and parties were advised to subdivide the land into four portions. PW 1 said her late mother filed a Land Dispute Tribunal Case in 1999 alongside her two brothers demanding subdivision of the land by the 1st defendant as per the proceedings and decree produced in this suit.
 18. PW 1 testified that a subdivision of the initial land was done contrary to the decree after a fresh application at the land control board was made in favor of the three brothers and the late mother, which should have been for them as per her instructions before the area chief.
 19. PW 1 said Parcel L.R No. 2377 was not transferred to her late father, where she was later buried alongside their late father and other siblings after she passed on in 2010. PW 1 insisted that the 1st defendant was a trustee and was not gifted the land, and instead of transferring the three portions, he sold them to the 3rd and 6th defendants. Similarly, PW 1 said that after learning of the transfers from Murega Baichu, she instituted investigations. Her evidence was that the school belonged to her late father, who had established it in 1975, and left the land under the management of her late mother, which she had rented to one Isaac Aden Tolicho and others. PW 1 said she registered a caution against the titles on 11.10.2011, which the defendants ignored, and the demand letter from Kibera and Co. Advocates and instead went ahead and subdivided and sold the land. PW1 urged that the land be reverted to the deceased parent or they be compensated.
 20. In cross-examination by the 1st, 2nd, 3rd and 6th defendants, PW 1 said she was not interested in any compensation, she was not privy to the Land Dispute Tribunal Case and that a title deed was in place when the Land Dispute Tribunal Case was filed. According to PW 1, her late mother passed on in 2010, following which she sought letters of administration ad litem to follow up on L.R No. 2377, which her late mother had gifted them as a share of the initial parcel of land. She believed that had the 1st and 2nd defendants not interfered with such portion, there would have been no case before this court. She nevertheless said she had warned the 3rd and 6th defendants of the claim by her demand letters as P. Exh No. (15) and reports before the police and Criminal Investigation Department.
 21. PW 1 said that though her father passed in 1992, she had nothing to show that he had demanded the land from the 1st defendant at the land control board or that the plaintiffs had sought a share of the inherited land. PW 1 admitted her late mother owned land in Sirimoni area, Timau, which she subdivided among the girls, exclusive of the boys after she passed on. She said she did not involve the 1st and 2nd defendants since they had already sold the school land. PW1 was of the view that Parcel No. L.R 2377 was added as part of parcel No.2375 & 2276; hence, the 3rd and 6th defendants were lawfully sued.



22. Cross-examined by the 4th and 5th defendants, counsel PW 1 said she wrote P. Exh No. (6) regarding parcel L.R No. 2377 to the District Commissioner, she admitted that P. Exh No. (9) had not mentioned the District Land Registrar, though he had been served with the Land Dispute Tribunal award or decree issued on 7.12.2000. According to PW 1, the three parcels were registered in the name of the 1st defendant on 28.3.2008 as per P. Exh No. 13(a). She said that before the demolition, the family used to visit the burial site but stopped thereafter.
23. Asked by the court PW 1 said her late mother had left some of her properties behind among them the Timau land she had acquired on her own. She said the school was in the name of their late father and that at no time did she summon the 1st defendant to discuss the issue of succession for the rest of their late mother's estate.
24. Peter Kiambi Kirema and Morris Muguna Kirema testified as DW 1 and 2, respectively. They adopted their witness statements dated 12.2.2020 as their evidence in chief. They told the court that their late father used to own parcel L.R No. 595 as his land during the land adjudication in 1976, but out of love and affection, he gifted it to DW 1 which he did not demand from him for 16 years until he passed on. They termed the Land Dispute Tribunal proceedings the award and a decree a nullity.
25. DW 1 said he lawfully applied to subdivide L.R No. 595 with knowledge of their late mother with no objections from the plaintiffs. DW 1 said for two years, their mother never objected to the subdivision or transfer including the gifting of a portion of it to the 2nd defendant since the property did not form part of the estate of their late father or include his late mother as a beneficiary including the school built on the land.
26. Further, DW 1 termed the sale and transfer to the third parties lawful DW 2 on the other hand said the family, after 2001, left the 1st defendant to deal with the land the way he wished, since none of the family members had a share in it DW 1 produced a copy of the sale agreement as D. Exh No. 1.
27. In cross-examination, DW 1 said that the land was gifted to him by his late father and registered under his name at 13 years of age. He could not tell if the rest of the seven children of his late father were equally gifted with other parcels of land. Regarding the Land Dispute Tribunal award, DW 1 said it was not affected since he voluntarily subdivided the land into three portions, one of which he transferred to the 2nd defendant as L.R No.2376, remaining with L.R No's. 2375 and 2377. He believed the alleged award was never enforced against the initial title to the land.
28. DW 1 said that though his late father had put up a school on the land, the same had been leased out to a third party who used to pay rent to the family. He said D. Exh No. (1) was signed after the mother passed on, and the plaintiffs were never involved in the transaction since they had no interest in the land. Regarding clause D (iv) – (vi) of D. Exh. No. (1) DW 1 said he never mentioned the alleged decree. He denied withholding material facts to the purchasers. DW 1 said he was not obligated to involve the plaintiffs in the sale and transfer even though the land sold included the family burial site(s).
29. DW 1 said he had papers to show that his late mother had voluntarily relinquished any rights over the land. He said there was no need to seek letters of administration or a chief's letter to deal with the suit land and the resultant subdivisions. Additionally, DW 1 said he obtained a title deed in 2009 before her mother passed on in 2010. He said none of the family members had objected to the title deed or the transfer processes. DW 1 said that in sharing his land with DW2, he took into and respected the views of their late mother.
30. In cross-examination, DW 2, said as a party to the Land Dispute Tribunal case, the decree was effected by the land being subdivided in his favor and the 2nd defendant. He said none went to his late brother



since he had no heirs. He also said that the 1st defendant willingly transferred to him a share. He said her late mother never demanded a share and neither did the plaintiffs seek for it because they were not parties to the suit.

31. DW 2 admitted that the land was sold together with the school and burial sites for the deceased parents, which they were now unable to access. He also said there was no need to file for any succession cause relating to the three parcels of land. He said he had no transfer forms and land control board consents before the court relating to the sale. According to DW1, their late mother, was among the persons who attended the land control board meeting; hence, she consented to the subdivisions of the initial parcel and transferred to their names before she passed on. DW1 said the family initially occupied the land until 1976 when they moved elsewhere after the school was established. DW 1 said he sold his portion L.R No.2376 to the 3rd defendant without involving the plaintiffs since they had no share in it. He said part of the school buildings were on his parcel of land.
32. Ahmed Abdullahi and Abdi Abdullahi testified as DW 3 and DW 4, respectively, and adopted their witness statements dated 12.2.2020 as their evidence in chief. DW 3 told the court that in 2013, together with his brother DW 4, they lawfully bought a business known as Imenti North Muslim Girls Boarding High School, jointly owned by Isaack Adan and Shaban Mwenda Salim and its assets among them the buildings standing on the suit properties which transaction was free of any fraud misrepresentation or illegality. He produced a copy of the sale agreement dated 29.8.2013 as D. Exh No. (2), sale agreement between the 2nd and 6th defendants as D. Exh No. (4), title deed for L.R No's. Nyaki/Mulathankari/2375, 2376 and 2377 as D. Exh No. (5), (6) & (7), and a sale agreement dated 30.8.2013 for the business with Isaack Adan Tulicha and Shaban Mwenda as D. Exh No. (8).
33. In a cross-examination, DW 3 said he did not inquire about the school's history when he bought the business. He denied the sellers were tenants to the business or the premises for a search conducted showed they have bought the business they had been operating for a while. He said he may not remember who had been collecting their rent. Moreso DW 3 said he undertook due diligence before the purchase and established the valid owner of the business and the land. He said he was not informed of any previous court decree over the land by the sellers. Shown P. Exh No. (14), DW 3 insisted the actual owners of the business remained Isaack and Shaban, from whom he bought the business.
34. Similarly, DW 3 said the school buildings were on the three parcels of land he bought and that the sale agreement was self-explanatory; the property sold included the land with all the developments on the parcels.
35. On his part, DW 4 told the court he bought the three parcels of land as per D. Exh No's. (2), (3) & (4) from the 1st & 2nd defendants, together with all the developments thereon. DW. 4 admitted the school was under lease when he bought the parcels of land, a copy of the lease agreement, which the 1st and 2nd defendants had furnished, and a certificate of registration of the school. DW 4 said he did not involve the family of the initial business owner of the school in the sale, for he was unaware of P. Exh No. (14)
36. Further, D.W. 4 said he was not notified of any previous court decree or shown any burial sites by the 1st and 2nd defendants when he bought the land. Regarding the transfer form, DW 4 said he had not filed any before the court. He insisted that due diligence was conducted before the sale and transfer, which he insisted was lawful since no encumbrance existed against the titles to the suit parcels of land in favor of anyone. He denied that the transaction was rushed to defeat any interests of the plaintiffs. DW 4 also testified that there was no need to involve the area chief and that after he bought the business, he was still running the school under the previous name with the certificate of incorporation bearing the names of the former business persons. He denied that D.W. 3 owned any of the suit parcels of land.



37. Mwiti K. Njue, a Land Registrar, testified as DW 5 and adopted his witness statement dated 18.7.2023 as his evidence in chief. He told the court L.R No. Nyaki Mulathankari/595 was registered on 25.10.1967 in the name of Peter Kiambi, then a minor, and was cautioned by the chief Land Registrar on 17.1.1973, until the minor attained the age of majority. He said the restriction was removed on 15.7.1976, a change of names was effected, and the title deed was issued to Peter Kiambi S. Kirema. DW 5 said that on 30.3.1988, the title was charged for a loan of Kshs.60,000/= with Kenya Commercial Bank and later on discharged on 20.4.1989, the property was later charged in favor of Kenya Finance Corporation Ltd for Kshs.40,000/= and discharged on 1.12.1992.
38. Additionally, DW 5 said Mary Kooru Kirema placed a caution on the title on 31.1.1994, and Devinder Kumar Bhalla placed another on 8.7.1994. He said the two cautions were eventually removed on 6.7.2005 and 13.7.2005, respectively.
39. DW 5 said the suit land was subdivided into L.R No's. 2375, 2376, and 2377 on 24.9.2008. Further, he said L.R No. 2376 was transferred to the 2nd defendant. He said that on 24.9.2013, the name Peter Kiambi S. Kirema was corrected to read Peter Kiambi Kirema on L.R No's. 2375 and 2377. D.W. 5 also said that L. R No. 2375 was transferred to the 6th defendant on 8.10.2013, while the 2nd defendant transferred his L.R No. 2376 to the 6th defendant. Regarding L.R No. 2377, D.W. 5 said the 1st defendant charged it with Eco Bank (K) Ltd for Kshs.2,500,000 on 10.5.2012, which was discharged on 25.9.2015. He said L.R No. 2377 was transferred to the 6th defendant on 8.10.2013.
40. DW. 5 produced copies of the green card for L.R No's 595, 2375, 2376 & 2377 as D. Exh No. 4DDD (a) – (12), copy of the mutation form as D. Exh No. 4DD "2", copy of the adjudication register as 4DD (4), transfer form as D. Exh 4DD (3), land control forms as D. Exh 4DD (5) and land Control Board consent as D. Exh No. 4DD (6).
41. In cross-examination, DW 5 told the court that a minor under the law can own land under a trustee who must be an adult. He said that from the copy of the records for the initial land, it was not clear who had made the application for the registration in the name of the 1st defendant. Regarding correction of names, D.W. 5 said such an application is usually made through the area chief, through a correction of names forms, and in this case, the 1st defendant was the one who had applied after attaining the age of majority in 1976 and acquiring an identity card number as 14498/M.B.U, currently ID No.8964744.
42. DW 5 said that a deed poll would have been ideal in the instant case, but changes related to the correction of names were minor. Regarding the differences in the identity card number, DW 5 said the letter from the chief and the land control board consent were the ones used to correct the 1st defendant's names DW 5 agreed there were some irregularities for the names in D. Exh No. 4DD (1) (c) & (d) remained as Peter Kiambi "S" Kirema while in the green card the letter "S" was missing. He could, therefore, not clarify who Peter Kirema was without the record at the land registry tallying.
43. Similarly, DW 5 said that in the instant case, the registered proprietor was the one who made the subdivisions and transfers; hence, there was no need for letters of administration. He termed the anomalies or discrepancies appearing in form R "1" as minor; otherwise, in the absence of an I.D. card, they could affect the validity of the title deed.
44. In re-examination, DW 5 said there was no indication in D. Exh No. D.D. (1) that the land was held in trust, was ever owned by the late Stanley Kirema, or transferred from and by him to the 1st defendant. Further, DW 5 said he had no records showing that the late Stanley Kirema or his wife had raised beneficial interest over the land. As to the application for change of particulars made by the 1st defendant, DW 5 said the spelling mistakes pointed out by the plaintiffs may have occurred during the



initial registration. In this case, an official form was filled out for the removal of the letter "S." He said that the law empowered a land registrar to effect such minor changes whose exercise did not interfere with the ownership of the land. He termed the records and processes undertaken by the 4th and 5th defendants over the suit parcels lawful, regular, procedural, and legal. Further, DW 5 said there was nothing from their records to show that a Land Dispute Tribunal or probate court decree was registered against the title register of the suit land by the plaintiffs or predecessors, save as shown above.

45. At the close of the defense case, parties were directed to file and exchange written submissions by 16.12.2023. It was only the 4th and 5th defendants who complied on time. The rest were filed late.
46. The plaintiffs relied on written submissions dated 14.12.2023 and isolated four issues for the court's determination. On whether L.R No. Nyaki/Mulathankari/595 was a trust/family property; the plaintiffs submitted that the suit land was initially owned by their late father and transferred to the 1st defendant, creating a customary trust by operation of law. Reliance was placed on Section 28 of the [Land Registration Act](#) and the ingredients of customary trust as set out in *Kiebia vs. M'Lintari & another* (2018) eKLR.
47. The plaintiffs submitted that traditionally, it was customary for a firstborn son to hold family land in trust for the rest of the family. In this instance, the land was registered in the name of the 1st defendant, a minor, while the family occupied it before they relocated in 1976 after the school was built. Further, the plaintiffs submitted that their late father built the school, which the family continued operating until the demise of their late mother when the 1st and 2nd defendants sold it without their consent or approval.
48. The plaintiffs submitted the entries in the land records at the proprietorship section indicated the circumstances of the registration, while the 1st defendant was a minor. Further, it was submitted that since the 1st defendant knew it was family land, he subdivided the land into four portions after an agreement with their late mother, who was to acquire L.R No. Nyaki/Mulathankari/2377. It was submitted that the 1st and 2nd defendants decided to sell the portion to which their late mother and brother were entitled to. The plaintiffs submitted the evidence of the Land Disputes Tribunal proceedings, and the interment of the remains of the deceased parents on the suit land was a clear intention that the land was held and used as a family land.
49. On whether the 1st and 2nd defendants fraudulently subdivided and sold the land, the plaintiffs submitted the title was issued while the 1st defendant was a minor, a different name, and I.D. number were used, which were contradictory, and subsequently, there were irregularities in the manner the names and I.D. number of the 1st defendant were changed.
50. The plaintiffs urged the court to find that the evidence of the Land Registrar was unsatisfactory on the way the entries were made, rubbed, altered, and or deleted, which was a clear pointer of mischief and fraudulent or illegal activities regarding the process of change, subdivisions sale and transfer of the suit parcels of land. Reliance was placed on Section 26 of the [Land Registration Act](#), *Munyu Maina vs Hiram Gathiha Maina C. A No. 239 of 2009*, *Hubert L. Martin and others vs. Margaret J. Kamar & 5 others* (2016) eKLR, on the proposition that the 1st, 2nd, 4th, and 5th defendants have failed to prove the acquisition and subsequent sub-divisions and transfers were legal, lawful and procedural and more so, for lack of family members' approval.
51. On whether the 3rd and 6th defendants acquired good title, the plaintiffs submitted that the 1st defendant conspired to deceitfully subdivide the land while aware it was trust property in a fraudulent, irregular, and unprocedural manner, as highlighted in the alteration on the green card. Reliance was placed on



R.G Patel vs Lalji Mjakani (1957) E.A 314 as cited with approval in Gladys Wanjiru Ngacha vs Theresa Chepsant and others (2013) eKLR.

52. The plaintiffs submitted that due to discrepancies in the names or the alterations, the 6th defendant should have been aware before he bought the land on 29.8.2013 and 30.8.2013 when he bought the school with indicators of mischief, underhand dealings, fraud, and despite a clear warning from the plaintiffs, otherwise had there been due diligence, the 3rd and 6th defendants would not have bought the land with the school. Reliance was placed on *Dina Management Ltd vs. County Government of Mombasa & others* S.C Petition No. 8 (E010) of 2021 and *Kirangi James Ngugi & others vs Beronica Ndinda & others* E.L.C. No. 522 of 2017.
53. On the reliefs sought, the plaintiffs submitted that since the land was trust property, the overriding interests of customary trust had been proved, making the subdivisions and the subsequent transfers of the resultant titles subject to and in breach of the said overriding rights or interests. Reliance was placed on Sections 26 & 80 of the *Land Registration Act*, *Elijah Makeri Nyangwara vs Stephen Mugai Njuguna & others* (2013) eKLR. *Kenya National Highway Authority vs. Shalien Masood Mughal & others* (2017) eKLR as cited with approval in *Chemei Investments Ltd vs A.G. & others* Nairobi Petition No. 94 of 2005.
54. The plaintiffs submitted an award of general damages should be given against the defendants who have continuously trespassed into the suit land. Reliance was placed on *Kenya Power and Lighting Company vs Ringera & others* E.A E247 & E248 of 2020 (consolidated) 2022 (KECA) 104 KLR (4th February 2022) (Judgment), *John Chumia Nganga vs AG 7 another* (2019) eKLR citing with approval *park Towers Ltd vs. John Mithano Njika et all* (2014) eKLR, *Rhoda S. Kiilu vs Jiangxi Water & Hydropower Construction Ltd* (2019) eKLR citing with approval *Willesden Investments Ltd vs Kenya Hotel Properties LR NRB HCC No. 367 of 2000* and *Cecilia Karuru Ngayu vs B.B.K. & another* (2016) eKLR.
55. The 1st, 2nd, 3rd and 6th defendants relied on written submissions dated 23.1.2024. It was submitted that the plaintiffs lacked locus standi, for there were no pending or determined succession proceedings regarding the estate of Mary Kooru Kirema, who died in 2010, save for letters of administration ad colligenda to file this suit. Therefore, it was submitted that since no succession proceedings have been made placing the suit properties and appointing the plaintiffs to administer the suit properties as part of the estate of the deceased by way of a petition before a probate court, they cannot seek substantive orders over the suit property in the absence of appointment as administrators.
56. On jurisdiction the 1st, 2nd, 3rd and 6th defendants submitted in disputes relating to ownership of property as part of the estate of a deceased person, one can only invoke the jurisdiction of this court after a probate court has set aside such property after a proper petition is filed and determined. In this instance, it was submitted that the jurisdiction of this court was not properly invoked; otherwise, the court would grope in the dark in a matter touching on the estate and distribute the estate when it has no jurisdiction to do so. Reliance was placed on the *Re-estate of Alice Mumbua Mutua (deceased)* (2017) eKLR.
57. On whether the suit land was trust property, the 1st, 2nd, 3rd and 6th defendants submitted no evidence was tendered to prove trust since a gift intervivos was not necessarily tied to an implied or customary trust and in this instance, love and natural affection was at play with no intention to impose a trust. In this instance, the deceased father did not write a will to that effect or impose any conditions on trusteeship in the title register. Reliance was placed on *Patrick Mbasu vs. Meshack Odhiambo Mbasu & another* (2020) eKLR, *Juletabi Africa Adventure Ltd & another vs Christopher Michael Lockley* (2017) eKLR, *John Karanja Gitonga vs Penina Karima Njihia & others* (2018) eKLR.



58. On the decree by the lower court, the 1st, 2nd, 3rd, and 6th defendants submitted that it became stale or time-barred after 12 years. Reliance was placed on M'Ikiara M'Rukunga and another vs. Gilbert Kabeere M'Mbijiwe (2007) eKLR. Further, it was submitted that the decree was never registered against the title for over 20 years before this suit was filed, and in any event, the alleged subdivisions of the suit land was at variance with the alleged decree, which talked of the suit land being registered as joint proprietorship in the names and equal shares of all the parties.
59. Additionally, it was submitted that even if the 1st and 2nd defendants had followed the decree, having survived the other two parties, they would still have remained as joint proprietors of L.R No. Nyaki/Mulathankari/595, since in a joint proprietorship, shares remain undivided, and the doctrine of survivorship would apply.
60. On fraud, the 1st, 2nd, 3rd, and 6th defendants submitted that the plaintiffs did not tender any evidence to show that the 1st and 2nd defendants, as survivors of the four parties to the decree, acted unlawfully or fraudulently, registered themselves as land owners and dealt with their parcel's contrary to the law. On the contrary, it was submitted that the plaintiffs were not envisaged in the decree or on the title when the land was gifted to the 1st defendant, who transferred a portion out of magnanimity and generosity to the 2nd defendant. In the absence of any acts of omission or commission by the 1st, 2nd, 3rd, and 4th defendants, the court was urged to find no evidence of fraud.
61. Regarding the cause of action against the 3rd defendant, it was submitted that he did not own any of the properties before the court, so the claim against him was un justified.
62. As to whether the 6th defendant acquired good title, the land registrar's transactional history of L.R No. 595 was laid bare through the evidence by the land registrar. Therefore, it was clear that the plaintiffs had raised no adverse claim with the land registry, which the 6th defendant would have discovered by due diligence. Further, it was submitted that the 6th defendant bought the parcels of land lawfully, procedurally, and for valuable consideration and, hence, was entitled to the full protection of the law.
63. In addition, the 1st, 2nd, 3rd, and 6th defendants submitted that the plaintiffs were in pursuant of a wild goose and did not demonstrate any proprietary interest over the suit properties, superior to what devolved to the 1st and 2nd defendants under the doctrine of survivorship even if the suit properties were to be found to be part of the estate of the deceased. Additionally, as testified by the Land Registrar, the 1st, 2nd, 3rd, and 6th defendants submitted it was lawful to register the 1st defendant as a title holder, though a minor, under Section 113 of the Registered *Land Act* (repealed).
64. The 4th and 5th defendants relied on written submissions dated 6.12.2023, where they isolated two issues for the court's determination. On whether the suit disclosed a cause of action, it was submitted that the 4th defendant was a creature of Section 12 of the *Land Registration Act* and a tort against it according to Sections 3 (1) of the *Public Authorities Limitation Act* (Cap 39) as read together with Section 4 (2) of the *Limitation of Actions Act* Cap 22 for an alleged fraud as pleaded in paragraph 25 of the amended plaint had to be filed within three years with effect from 2008.
65. Therefore, filing the suit 12 years after 2008 without sufficient reasons for the delay or leave was against the law since equity aids the vigilant but not the indolent. The 4th and 5th defendants submitted there was a time bar limit on the right to seek judicial redress to prevent indolent delays that may be detrimental to the interest of justice. Since the plaintiffs' suit was based on various alleged torts committed by the 4th and 5th defendants, the same was time-barred. Further, the 4th defendant submitted that a party alleging fraud must explicitly plead the particulars or facts suggesting fraud or illegality and that general, vague, evasive allegations would not be enough. The 4th and 5th defendants



submitted on a fair assessment of paragraphs 25 of the amended plaint, one could not find fraud and illegality against them pleaded with proper particularity. Regarding whether the plaintiffs were entitled to the reliefs sought, the 4th and 5th defendants submitted under Section 16 (2) of the Government Proceedings Act that, a permanent injunction against them was untenable.

66. The court has carefully reviewed the pleadings; evidence tendered written submissions, and the law. The issues calling for the court's determination:
- i. If the plaintiffs have any legal capacity to advance the interests of their deceased as regards the school and the estates of the deceased parents
 - ii. If the two deceased parents built, owned, and ran Mutindwa Art College on L.R No. Nyaki/Mulathankari/595.
 - iii. If the late Stanley Kirema and Mary Kooru had any registrable interests over L.R No. Nyaki/Mulathankari/595.
 - iv. If the suit land and the developments thereon were held by the 1st defendant in trust for the family.
 - v. If the suit against all or some of the defendants is time-barred.
 - vi. If there was fraud, illegality, and irregularity in the manner L.R No. Nyaki/Mulathankari/595 was subdivided and transferred by the 1st defendant to himself and the 2nd defendant.
 - vii. If there was fraud, illegality, or irregularity in the manner, the 4th defendant registered the title, its subdivisions, and transfers in favor of the 1st and 2nd defendants.
 - viii. If there was fraud, illegality, and irregularity in the manner, the 1st and 2nd defendants sold and transferred L.R No's Nyaki/Mulathankari/2375, 2376 & 2377 to the 6th defendant.
 - ix. If there was fraud, illegality, or irregularity on the part of the 4th defendant in registering the transfer and issuance of titles to L.R No. Nyaki/Mulathankari/2375, 2376 and 2377 between the 1st, 2nd & 6th defendants.
 - x. If the Land Dispute Tribunal decree was an overriding interest on L.R No. Nyaki/Mulathankari/595, and it's the subdivisions.
 - xi. If the 3rd and 6th defendants' title deeds were subject to any overriding interests of the deceased's estate and, by extension, in favor of the plaintiffs,
 - xii. If the 3rd and 6th defendants were innocent purchasers for value without notice.
 - xiii. Whether the plaintiffs are entitled to the reliefs sought.
 - xiv. What is the order as to costs?
67. The plaintiffs base their capacity on the limited grant of letters of administration ad litem for the estate of Mary Kooru Kirema, who died on 10.3.2010, that was issued by the court on 24.4.2019 under Section 54 and schedule 5th of the Law of Succession Act.
68. In paragraph 8 of the amended plaint, the plaintiffs averred L.R No. Nyaki/Mulathankari/595 was owned by their late father, Stanley Kirema, who built and ran Mutindwa Art College on the said land, which later changed to Imenti North Muslim Girls.



69. It was averred that their late father transferred the said parcel to the 1st defendant to hold it in trust for the family, and upon the demise of their father, Mary Kooru Kirema, their mother, filed Land Dispute Tribunal No. 9 of 1999, seeking that the suit land be registered under her names and her three sons namely, the 1st & 2nd defendants and Michael Kirema, now deceased. It was also averred that a decree was issued on 9.2.2001, ordering the suit land to be registered as a joint proprietorship in all parties' names and equal shares. Further, it was averred that the deceased mother, the 1st and 2nd defendants, continued running the school as a family business, which they had leased to a third party at Kshs.120,000/- per term and would share the proceeds equally.
70. The plaintiffs contended that in 2008, the 1st and 2nd defendants illegally, unlawfully, irregularly, unprocedurally, and secretly colluded with the 4th defendant and subdivided the land into L.R No's. Nyaki/Mulathankari/2375, 2376, and 2377, registered L.R No's. 2375 & 2377 in the 1st defendant's name while L.R No. 2376 went to the 2nd defendant. It was averred that following the death of their mother, the 1st and 2nd defendants continued running the family business and shared the proceeds amongst themselves without regard to the estate of the deceased.
71. Further, it was averred that the 1st and 2nd defendants conspired to illegally and fraudulently sell and transfer L.R No's. 2375, 2376, and 2377 to the 6th defendant, together with the school, a family business, and transferred it to the 3rd and 6th defendants in 2013, without taking letters of administration of the estate of their late mother or consulting or seeking the consent of the plaintiffs, or in total disregard of the existing decree.
72. Further, the plaintiffs averred that they lodged investigations with the police and notified the 3rd and 6th defendants of their overriding interests, who instead went ahead to demolish all the structures on the property, illegally and even exhumed the bodies of their deceased parents buried on the said land. The plaintiffs averred that the 1st and 2nd defendants had no capacity to sell and transfer the suit parcels of land. They termed the same as fraudulent, illegal, and irregular since they have overriding rights and interests over the suit's land more so the plaintiffs sought the reversal of the sub divisions transfers and registration so that the initial land could be dealt with as per the decree dated 9.2.2001.
73. The 1st & 2nd defendants, while admitting that the land initially belonged to their late father at the adjudication stage, averred it was gifted to the 1st defendant in 1976 without any conditions as to trust implied or express and that their father for over a period of 16 years before he passed on never lay any claim on the suit property.
74. Regarding the Land Dispute Tribunal award and the decree made on 9.2.2001, the 1st and 2nd defendants averred the panel of elders lacked jurisdiction to hear and determine the suit over registered land, which fact the parties became aware of after the decree, and that the 1st defendant was at liberty to deal with his land as he deemed necessary. The 1st and 2nd defendants denied any alleged fraud, illegality, or irregularity in the subdivision's sale and transfers. The 1st and 2nd defendants also termed the suit as filed after an inordinate delay of eight years. Further, the 1st and 2nd defendants denied that their late parents had any shares in the school built on the said property, which they termed separate and distinct from the land upon which it was built, which they admitted to have been sold to the 3rd defendant.
75. The 4th and 5th defendants attacked the suit on account of Sections 13A & 16 of the [Government Proceedings Act](#) and Section 3 (1) of the [Public Authorities Limitation Act](#). Additionally, the 4th and 5th Defendants averred that the 4th defendant had statutory powers to register instruments presented by the 1st, 2nd, 3rd, and 6th defendants, so long as they complied with the law. It was averred that the plaintiffs were aware of the transactions but deliberately chose to ignore such a state of affairs to their



- peril. The 3rd and 6th defendants admitted they purchased the Imenti North Muslims Girls Boarding High School in 2013, from one Isaack Adan and Shaban Mwenda Salim with all buildings on the suit properties. They termed the sale and transfer lawful, regular, legal, and procedural.
76. On his part, the 6th defendant averred he lawfully bought L.R No's. 2375, 2376, and 2377 from the 1st & 2nd defendant after undertaking due diligence, which properties he established were not part of the estate of any deceased persons, and without notice of any adverse claims affecting the school or the parcels of land in favor of the plaintiffs. He denied committing any alleged fraud, illegality, irregularity, or unprocedurally in acquiring the suit properties. He termed himself an innocent purchaser for value without notice.
77. In reply to the defense, the plaintiffs did not address the issue of inordinate delay, the suit being statute time-barred, the alleged acquiescence or knowledge of the transactions, and the issue as to whether the deceased parents had any notable share(s) or interest in the suit lands or business therein.
78. It is trite that parties are bound by their pleadings, and through pleadings, issues for the court's determination arise. See *Raila Odinga & others vs IEBC & Others* (2017) eKLR. The plaintiffs filed a list of issues dated 16.3.2020. Among the issues they listed were:
- a. Whether or not the subdivisions by 1st, 2nd, and 4th defendants of L.R No. 595 were legal and procedural.
 - b. If the sale of L.R No's 2375 & 2376 & 2377 and the school by the 1st & 2nd defendants to the 3rd defendant was lawful and legal.
 - c. If the 3rd defendant had a proper title and
 - d. Whether the estate of Mary Kooru Kirema was entitled to the suit premises.
79. There is no dispute that the 1st and 2nd defendants disclosed in their defense statement that the 3rd and 6th defendants bought a business known as Imenti North Muslims Girls Boarding High School, per Certificate number B.N./2009/20636, registered with the Ministry of Education under certificate number Pu/5/2/1887/11, from Isaack Adan Tulicha and Shaban Mwenda Salim.
80. The 1st and 2nd defendants attached a sale agreement for the business to their statement of defense and later produced it as D. Exh No's. (1). The sale took place on 30.8.2013. On the other hand, the 3rd and 6th defendant admitted that they bought and took over the business and the suit properties with effect from 8.10.2013. The 4th and 5th defendants confirmed that the initial land was lawfully transferred to the 1st defendant by the initial owner, Stanley Kirema, on 15.5.1976, who took out loans against the title until he subdivided and closed the title on 28.3.2008, paving the way for new titles registered as L.R No.2375, 2376 and 2377 which were later on transferred to the 6th defendants on 2013. The 4th and 6th defendants produced D. Exh No. 4DD (1) – (6), respectively, as the record for the transactions starting 1967 to 2019.
81. A cause of action refers to the act on the part of the defendant that gives the plaintiff his cause of complaint. See *AG & another vs Adrew Maina Githinji & another* (2016) eKLR, *Letang vs Cooper* (1964) 2 ALL ER 929 as cited with approval in *Anne Jepkemboi Ngeny vs Joseph Tireito & another* (2021) eKLR.
82. In *G4s Security Services (K) Ltd vs Josesh Kamau & others* (2018) eKLR, the court cited *A.G. & others vs Andrew Maina Githinji* (supra), that the cause of action arose on 2.10.2010 when dismissal letters were received and by filing the suit on 16.6.2014 limitation of 3 years had been surpassed.



83. Regarding the cause of action based on fraud, Section 7 of the *Limitation of Actions Act* provides that a claim for land recovery must be filed within 12 years, while under Section 26 (a) thereof, in an action based on fraud, time begins to run when the fraud is discovered or could with reasonable diligence have been discovered.
84. In *Mary Osundwa vs Nzoia Sugar Co. Ltd* (2002) eKLR, the court of appeal affirmed that the law does not provide for an extension of time in claims other than those specified in Section 27 of Cap 22. Once the operation of any written law has extinguished the right of action, it cannot be revived under the principle of the court's overriding objective. The right of access to justice, to own property, and to a fair hearing must relate to claims not statute-barred. See *John Gatumu Nyaga & others vs Bonface Njuki Rugi & others* (2018) eKLR.
85. As to a statute-barred decree, Section 4 (4) of the Limitations of Actions Act requires the execution within 12 years from the date the decree was passed. In *M'Ikiara M'Rinkanya & another vs Gilbert Kabeere M'Mbijiwe* (2007) eKLR, the court said the decree on possession of land should have enforced before the expiry of 12 years, and one could not under Section 7 of (Cap 22) recover the land after 12 years from the date in which the right of action accrued.
86. In this suit, the plaintiffs averred their rights to the land accrued on 9.2.2001. So, 12 years expired on 9.12.2013. Therefore, my finding is that the plaintiffs were, as of the 23.1.2020 statute barred from enforcing any rights for the deceased's estate accruing from a decree issued on 9.2.2001. See *Menta vs Shah* (1965) E.A 321.
87. On the legality of the said decree, there is no dispute that the suit land became registered land on 25.10.1967, going by the D. Exh No. 4 D.D. 1 (a). The decree issued by the lower court, which the plaintiffs allege was ignored or overlooked by the defendants, was over the land with a title deed. Jurisdiction flows from *the Constitution* or legislation as held in *Samuel Kamau Macharia & another vs. K.C.B. & others* (2012) eKLR. Land Disputes Tribunal had no jurisdiction over titled land. See *Florence Nyaboke Machani vs Mogere Amosi Ombui & others* (2015) eKLR, *Joseph Malakwen Lele & another vs. Rift Valley Land Dispute Appeals committee & others* (2014) eKLR. Therefore, the decree was null and void. Denning L.J in *Macfoy vs United Africa Co. Ltd* (1961) e ALL ER 1169, said one cannot expect to put something on nothing to get anything. The trial court could not adopt an award made by an entity without jurisdiction. I agree with the pleadings by the 1st and 2nd defendants that the Land Dispute Tribunal had acted without jurisdiction and, therefore, the award or decree was not binding on the 1st defendant while dealing with his land after 2001.
88. The next issue is when the cause of action accrued. The plaintiffs aver their claim accrued when the initial land was subdivided, and titles issued to the 1st and 2nd defendants in 2008. The 4th defendant has pleaded that the statutory powers and functions to subdivide the land were invoked by the 1st and 2nd defendants through a mutation form on 20.2.2008 and registration made after title deeds were issued for L.R No's. 2375, 2376, and 2377. Again, the plaintiffs pleaded that there was a sale and transfer of the three parcels of land to the 6th defendant in October 2013.
89. As indicated above, a cause of action refers to the factual situation giving rise to a complaint or right to sue the opposite party. The plaintiffs have not pleaded or disclosed when they became aware of the subdivisions, sale, and transfers by the 4th defendant at the request of the 1st and 2nd defendants. The plaintiffs did not plead any disability, mistake, or ignorance. The plaintiffs have, however, admitted that their late mother passed on 10.3.2010. Even assuming the plaintiffs are advancing the deceased's rights over the accrued rights as per the decree, they should have sought letters of administration ad litem before the decree became stale in 2013.



90. Assuming the plaintiffs advance the family interest out of accrued rental income in the school, P. Exh No. 14 is silent on whether the deceased mother or any of the plaintiffs were directors/partners/beneficiaries, or landlords in the business and its premises. The parcel number for the business was not indicated as L.R No. 595. The date of registration of the business was 15.8.1975. The business manager, the late Stanley Kirema, passed on in 1992. No evidence was presented to the court that any of the plaintiffs or their late mother replaced the deceased father as the registered manager. The death of a sole business proprietor is not disputed. There was no evidence tendered to show that the plaintiffs or their late mother applied for and obtained letters of administration to run the business or take over its assets in place of the deceased father. Without evidence that the deceased mother took out letters of administration and carried on the school's business during her lifetime, I find no basis for the plaintiffs to seek to enforce the deceased's rights or interests based on the alleged loss of rental and business income. See *Ismail Adan Suleman & another vs. Nawaz Transport Co.* (1993) eKLR.
91. The plaintiffs averred that the land was held in trust. Particulars and nature of the trust were not pleaded, and evidence was not tendered during the hearing to sustain the claim. See *Mumo vs Makau 2002 1EA170*, *Richard Auka vs Josephine Motaroki* and *Kiebia vs M'Lintari* (supra).
92. Regarding fraud, in *Central Bank of (K) Ltd vs Trust Bank Ltd and others* (1996) eKLR, the court said fraudulent conduct must not be made in vague and general terms. The transfers and the sale agreements occurred in 2008 and 2013, respectively. The 3rd and 6th defendants averred they took possession and developed the suit properties. The title of the land changed in 2008 and later in 2013. P. Exh No. 5 was written by the plaintiffs on 25.10.2013. The letter clearly shows that the plaintiffs were aware of the subdivisions, the sale, and the transfer to the 3rd and 6th defendants as of 2013. The letter was also copied to the 4th defendant. P. Exh No. 6 is dated 11.10.2011.
93. The 4th and 5th defendants raised an objection based on the Public Authority Limitations Act and *Limitation of Actions Act*. In *Richard Oduol Opole vs Commissioner of Land and others C. A No. 285 of 2007 Kisumu*, the court held that Cap 39 incorporates Part III of Cap 22 and particularly Section 26 thereof, which states time does not begin to run until the plaintiff has discovered fraud provided that the section does not enable an action to be brought to recover property which has been purchased by valuable consideration for a person who was not party to the fraud.
94. In this suit, the plaintiffs were aware that their late mother had passed in 2010. Section 7 of Cap 22 says a suit for land recovery should not be brought after the end of 12 years. The green card shows that the 1st defendant became the registered owner in 1976. The plaintiffs' deceased mother and late father were aware of the registration. When the tribunal case was filed, the deceased knew of the entries.
95. Similarly, when the late mother died in 2010, she knew of the decree dated 9.2.2001. The decree expired on 7.12.2012. Therefore, limitation started to run against the deceased mother from the date of discovery. After she passed on, the plaintiffs slept on their rights until 2013, when they wrote P. Exh No. (5). The plaintiffs did not seek letters of administration to advance their late mother's claim until 24.4.2019. They already knew of the changes to the title in 2003 and 2013. Therefore, twelve years had lapsed by the time the suit was filed on 23.1.2020. On the tort of fraud, twelve months had also lapsed. Therefore, the suit was filed out of time and was time-barred as against the 4th and 5th defendants. See *Richard Oduol Opole vs Commissioners of Lands* (2015) eKLR. As against the 1st, 2nd, 3rd, and 6th defendants, I find the suit was not time-barred.
96. Coming to whether the registration of the land in favor of the 1st defendant was subject to a trust for and on behalf of the family, trust is a matter of fact to be proved through evidence as held in *Heartbeat Ltd vs. Ngambwa Heartbeat Community Children's Home and Rescue Centre* (2018) eKLR. The



- intention to find a trust must be evident. In *Twalib Hatayan & another vs Said Saggar Ahmed Al-Heidy & others* (2015) eKLR, the court said the trust was a right enforceable solely in equity where a property is held by a trustee at the request of another (settlor) for the benefit of a third party (beneficiary). The court said under the *Trustee Act* trusts includes implied constructive trusts and resulting trusts.
97. In *Peter Ndungu Njenga vs Sophia Waitiri Ndungu* (2000) eKLR, the court said that in case of absolute necessity, the court may impose or presume a trust to effect the intention of the parties. The ingredients to found customary trust were set in *Kiebia vs M'Lintari* (supra) that the property belonged to family clan, family or group, the clan was not so remote as to be untenable, the claim was against the members of the clan, family, or group and that the land would have been registered in the name of the claimant save for some intervening reasons.
98. In this suit, the plaintiffs have averred that the land initially belonged to their deceased father, who transferred it to the 1st defendant to hold it in trust for the family. No evidence was tendered to show that between 1976 and 1992, to when their father passed on, he had asserted his rights that the land was family land and was subject to the rights or interests of his wife and the plaintiffs. It may be very true that the 2nd defendant's rights or interests in the land were asserted and acted upon by the 1st defendant. What baffles me and has not come out is why the plaintiffs did not feature anywhere until 20 years after their mother passed on to assert their rights. Evidence shows that the plaintiffs wrote a demand letter in 2013 but waited until 2020 to lodge the suit. Indeed, a claim founded on trust cannot be statute-barred. A party, however, asserting a claim on trust must plead it with particulars, its nature, and how it arose. It was not enough to mention the word trust in the amended plaint without particulars, its nature, and how it was breached by either of the defendants as required under Order 2 Rule 10 (1) of the Civil Procedure Rules. See *Juletabi African Adventure Ltd & another vs. Christopher Michael Lockley* (2017) eKLR.
99. The plaintiffs have averred that their late mother was running the family business on the suit land and, hence, was a beneficiary of its proceeds, and therefore, trust was envisaged. Unfortunately, no particulars of loss, benefits, or accounts were pleaded or documents produced to show her involvement in the renting out of the suit premises, collections and receiving of its rental income, and generally, whatever repairs, maintenance, and superintendence she had on the rented buildings or business over the suit parcels of land. Evidence from the copy of the records for L.R No. 595 shows that the deceased mother removed her caution from the suit land on 6.7.2005. The circumstances leading to the removal of the caution are unclear. If the deceased mother attended any land control board after 2001, particularly in 2008, the plaintiffs should have availed documents to show that she was following up any beneficial interest on her behalf and their behalf relating to L.R No.2377 and the rental income arising out of the school premises.
100. The 1st plaintiff testified that L.R No. 2377 was to belong to the girls, and that is why the deceased was following it up. PW 1 said their late mother had expressed that intention before the area chief and the elders. Unfortunately, no corroborative evidence was tendered to prove such an intention. My finding is that the issue of trust and its breach was never pleaded with specificity and or proved to the required standards.
101. Regarding fraud, it has to be pleaded and proved. In *Wambui vs Mwangi and others* C.A No. 465 of 2019 (2021) KECA 144 (K.L.R.) (19th November 2021) (Judgment), the court held no court of law should sanction and pass as valid any title to property founded on fraud, deceitfulness, a contrived decree, illegality, nullity, irregularity, unprocedurally obtained or otherwise a product of a corrupt scheme. The court affirmed the trial court's reasoning based on the definition of fraud in *Black Laws Dictionary* 8th Edition page 731 and its ingredients as set in *Railal Gordhanmbail Patel vs Lalji Makanji*



- (1957) E. A 314, as a knowing misrepresentation of the truth or concealment of a fact to induce another to act to their detriment.
102. In this suit, the plaintiffs produced no evidence to show that the 1st and 2nd defendants concealed or misrepresented any facts to the 4th defendant to subdivide and transfer L.R No. 595 to themselves or sale and transfer the resultant subdivision titles to the 6th defendant. Though the plaintiffs pleaded that they lodged investigations with the C.I.D., no report was brought to court to show the outcome. The plaintiffs failed to point out fundamental irregularities, illegalities, or unprocedural steps taken to subdivide, transfer, and register the suit land in the name of the 1st defendant, the 2nd defendant, and later to the 6th defendant. There was no evidence tendered that the 4th defendant conspired with and or ignored any interests or rights belonging to their deceased mother and or, by extension, the plaintiffs.
 103. The plaintiffs failed to prove when and how the 4th defendant ignored registering any interests belonging to their deceased mother arising out of a decree dated 9.2.2001. Furthermore, the plaintiffs did not clarify whether they raised any cautions against the three titles of land in 2008, 2010, and or immediately after they were transferred to the 6th defendant.
 104. Above all, the plaintiffs failed to explain the inordinate delay in coming to court, especially against the 3rd and 6th defendants, who were aware of their acquisitions of the suit land and taking over vacant possession in 2013. To this end, the plaintiffs failed to prove any fraud, illegality, irregularity, or unprocedural ways in how the 1st and 2nd defendants obtained titles to the subdivision and eventually sold and transferred the subdivision titles to the 6th defendant.
 105. As to whether the 3rd & 6th defendants were innocent purchasers for value without notice in, *Dina Management vs. County Government of Mombasa & others* Supreme Court of Kenya Petition No. 8 (E10) of (2021) (2023) KESC 30 K.L.R. The court said a title deed was an end product of a process, and if the process before the issuance of title did not comply with the law, the title could not be held as indefeasible. The court said the title was not protectable under Article 40 of *the Constitution*, the consequence of which, if the root of the title had been challenged, the appellants could not benefit from the doctrine of bona fide purchaser. See *Equity Bank (K) Ltd vs Thiong'o & 4 others* (C.A No. 168 of 2019) 2023 KECA 558 (K.L.R.) (12th May 2023) (Judgment).
 106. In this suit, the 3rd and 6th defendants pleaded that their titles were obtained lawfully, regularly, procedurally, openly, and for value, without any notice of the plaintiffs' alleged interests.
 107. The onus was on the plaintiffs after the 3rd and 6th defendants, and the rest of the defendants showed the procedure, and the law was followed in the transaction to prove otherwise. As held in *Raila Odinga & others vs IEBC* (supra), the burden of proof is on who stands to lose if no more evidence is produced to prove or disapprove such facts.
 108. In *Weston Gitonga & others vs Peter Rugu Gikanga & another* (2017) eKLR, the court cited *Katende vs Harridar & Co. Ltd* (2008) 2 E. A 173 that a bona fide purchaser was the one who held a certificate of title he purchased for value in good faith with no knowledge of the fraud from a party with an apparent valid title without notice of any fraud and was not a party to any fraud. *Torino Enterprises Ltd vs A.G.* Petition E006 of 2022 (2023) KESC (K.L.R.) 22.9.2023 (judgment), the court held that due diligence involves more than obtaining an official search certificate. See *Esther Ndegi Njiru & another vs Leonard Gatei* (2014) eKLR, *AON World Co. Ltd vs Eric Mumo Mutisya & others* (2021) eKLR.
 109. The 3rd and 6th defendants averred and testified that they did more to ascertain who was running the school business on the suit land and lawfully bought the same as per D. Exh No. (1). There were no warning signs on the titles to the suit lands that the plaintiffs had some overriding interests. There was no evidence tendered that P. Exh No. 14 was superior to the business registration certificate and



the Ministry of Education registration documents held by the owners of Imenti North Muslim Girls Secondary School.

110. I find the plaintiffs have failed to prove that the 3rd and 6th defendants knew, ignored, and breached any of their overriding rights in obtaining titles to the suit parcel and taking over the school.
111. Consequently, I find the suit against the defendants by the defendants due for dismissal. The same is hereby dismissed with costs to the defendants.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31ST DAY OF JANUARY 2024

In presence of

C.A Kananu/Mukami

1st & 2nd defendants

Ingutya for the 1st, 2nd, 3rd and 6th defendants

Mutinda for Ayieko for the plaintiffs

HON. CK NZILI

JUDGE

