



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE 185 OF 2014

(FORMERLY KERUGOYA E.L.C CASE NO. 402 OF 2013)

SOSPETER NJUKI KAGUNDU 1ST PLAINTIFF

RACHEL M. KAGUNDU 2ND PLAINTIFF

NGURUNGU MUTHOKE 3RD PLAINTIFF

VERSUS

NICHOLAS NGUTHI KIVINDA 1ST DEFENDANT

MUTUNYI KIVEO NGUTHI 2ND DEFENDANT

STANLEY NJIRU KIURA 3RD DEFENDANT

JUDGEMENT

1. By a plaint dated 26th March 2013 and filed on 27th March 2013, the Plaintiffs sought the following reliefs against the Defendants;

a. A permanent injunction restraining the Defendants either by themselves, their servants, agents or any person, body or authority from harassing, threatening, constructing, wasting, using, alienating and or disposing or in any manner interfering with the Plaintiff's use and quiet enjoyment of the suit properties namely land parcel numbers Mbeere/Mbita/2600, 3184, 3185, 3186, 3187, 3189 and 10.

b. An order directing the Land Registrar at Siakago Land Registry to cancel the fraudulently acquired titles held by the Defendants herein and the consequent lawful issuance of titles to the Plaintiffs and all other rightful parties respectively.

c. In the alternative, a declaration that the Defendants have been holding the disputed titles in trust for and on behalf of the Plaintiffs herein and other rightful clan beneficiaries.

d. Costs of this suit.

2. The Plaintiffs pleaded that at all material times they were occupants of all those parcels of land originally known as *Mavuria/Mbita/7, 19, 9, 11, 12, 14, 17 and 18* which were subsequently converted into *Title Nos Mbeere/Mbita/2600, 3184, 3185, 3186, 3187, 3188, 3189 and 10* (hereinafter known as the suit properties) and fraudulently and illegally registered in the name of the Defendants.

3. The particulars of fraud and illegality were particularized in paragraph 9 of the plaint as follows;

a. Misleading the illiterate parents of the Plaintiffs to signing away their adult children's rightful shares of land as allocated by the Nditi clan. (Sic)

b. Causing the illegal interference, alteration and changing in the initial register as to the ownership of the disputed parcels of land to the Plaintiff's detriment. (Sic)

c. Acquisition of the titles to the disputed land despite the matters pending before the High Court at Embu thereby gaining an upper hand albeit unlawfully and illegally.

d. Forcefully taking of the Plaintiff's land, wastage, usage, disposing and or developing the disputed parcels of land herein. (Sic)

4. It was further pleaded that the Defendants had illegally entered the suit properties, commenced developments thereon and threatened the Plaintiffs with eviction. It was also pleaded that the Defendants' said actions were a violation of their right to property guaranteed under Article 40 of the Constitution of Kenya, 2010.

5. The Defendants filed similar statements of defence in 2013 denying the Plaintiffs' claims. The said defences were amended in 2015 to introduce counterclaims. In his amended defence and counterclaim amended on 2nd February 2015, the 1st Defendant denied the Plaintiffs' claim to the suit properties. It was denied that the Plaintiffs had been in occupation thereof. He asserted that he was the rightful proprietor of the suit properties.

6. The 1st Defendant further pleaded that the suit properties had at some point been unlawfully given out by one Ngiri Ngichenge who was the father of the 1st Plaintiff and the father-in-law of the 2nd Plaintiff but that the recipients had voluntarily surrendered the suit properties when the 1st Defendant filed several cases before the Unit Committee of Mbita Land Adjudication Section.

7. In his counter-claim, he reiterated the contents of his amended defence and asserted that he was lawfully registered as proprietor of the suit properties after completion of the land adjudication and demarcation process and was proprietor by first registration. He further pleaded that the Plaintiffs had started interfering with the suit properties and some had deposited building materials thereon with a view to unlawfully taking over his land.

8. The 1st Defendant, therefore, sought the following prayers against the Plaintiffs;

a. A declaration that the 1st Defendant Nicholas Nguthi Kivinda is the lawful proprietor of land parcel numbers Mbeere/Mbita/10, 3186, 3187, 3188, 3189 and 2600 and that the Plaintiffs have no rights at all, proprietary or otherwise, to the said parcels of land.

b. That the Plaintiffs in the original claim/Defendants in the counterclaim by themselves, their family members, their servants, agents and properties be forcefully evicted from land parcels numbers Mbeere/Mbita/10, 3186, 3187, 3188, 3189 and 2600 and thereafter a permanent injunction be issued restraining the Plaintiffs their family members, servants and agents from entering upon, occupying, utilizing and/or in any other way interfering with land parcel numbers Mbeere/Mbita/10, 3186, 3187, 3188, 3189 and 2600.

c. That all cautions, prohibitions, restrictions and/or inhibitions placed by the Plaintiffs in the original claim/Defendants in the counterclaim in the registers for land parcels numbers 10, 3186, 3187, 3188, 3189 and 2600 be lifted and/or removed by the Land Registrar.

d. Costs of the original suit and the counterclaim.

9. In his amended defence and counterclaim amended on 2nd March 2015, the 2nd Defendant denied the Plaintiffs' claim in its entirety. He asserted that he was the registered proprietor of *Title No. Mbeere/Mbita/3184* (hereinafter described as parcel No. 3184) and that the Plaintiffs had no valid claim against him. He denied holding parcel No. 3184 in trust for the Plaintiffs as alleged or at all.

10. The 2nd Defendant reiterated the contents of the amended defence in his counterclaim and pleaded that parcel No. 3184 originally belonged to the 1st Defendant who transferred it to Kabangi Festus Douglas who in turn transferred it to him in 1997 before the land demarcation and adjudication process was completed. The 2nd Defendant also pleaded that the Plaintiffs did not raise any objection to such transfers during the adjudication process.

11. The 2nd Defendant further pleaded that the Plaintiffs were trying to unlawfully enter and take possession of parcel No. 3184 after the filing of the suit. He, therefore, sought the following reliefs against the Plaintiffs in the counterclaim;

a. A declaration that the 2nd Defendant Mutunyi Kiveo Nguthi is the lawful proprietor of land parcel number Mbeere/Mbita/3184 and that the Plaintiffs have no rights at all, proprietary or otherwise, to the said parcel of land.

b. That the Plaintiffs in the original claim/Defendants in the counterclaim by themselves, their families, agents, servants or anybody acting on their instructions and their properties be evicted from land parcel number Mbeere/Mbita/3184 and thereafter a permanent injunction be issued restraining the Plaintiffs, their family members and/or agents from entering upon, occupying, cultivating, utilizing, constructing on or in any other way interfering with land parcel number Mbeere/Mbita/3184 and/or the 2nd Defendant's use and occupation of the same.

c. That all cautions, prohibitions, restrictions and/or inhibitions placed by the Plaintiffs in the register for land parcel number Mbeere/Mbita/3184 be removed and/or lifted by the Land Registrar.

d. Costs of the original suit and of the counterclaim.

12. The 3rd Defendant similarly filed an amended counterclaim amended on 2nd March 2015. He also denied the Plaintiffs' claim in its entirety. He asserted his ownership of *Title No. Mbeere/Mbita/3185* (hereinafter described as parcel No. 3185) and pleaded that the Plaintiffs had no valid claim against him. He denied holding parcel No. 3185 in trust for the Plaintiffs as alleged or at all.

13. In his counterclaim, the 3rd Defendant reiterated the contents of his amended defence and stated that parcel No. 3185 originally belonged to the 1st Defendant who transferred it to him during the land demarcation and adjudication process vide objection No. 984 of 1992. It was further pleaded that the Plaintiffs did not raise any objection to the transfer at the material time.

14. The 3rd Defendant pleaded that after the filing of the suit the Plaintiffs had started interfering with his property by attempting to unlawfully enter and take over parcel NO. 3185 in consequence of which he sought the following reliefs in the counterclaim;

a. A declaration that the 3rd Defendant Stanley Njiru Kiura is the lawful proprietor of land parcel number Mbeere/Mbita/3185 and that the Plaintiffs have no rights at all, proprietary or otherwise, to the said parcel of land.

b. That the Plaintiffs in the original claim/Defendants in the counterclaim by themselves, their families, agents, servants or anybody acting on their instructions and their properties be evicted from land parcel number Mbeere/Mbita/3185 and thereafter a permanent injunction be issued restraining the Plaintiffs in the original claim/Defendants in the counterclaim from entering upon, occupying, cultivating, utilizing, constructing on or in any other way interfering with land parcel number Mbeere/Mbita/3185 and/or the 3rd Defendants occupation, use and exercise of his proprietary right to the said land.

c. That all cautions, prohibitions, restrictions and/or inhibitions placed by the Plaintiffs in the original claim/Defendants in the counterclaim in the register for land parcel number Mbeere/Mbita/3185 be lifted and/or removed by the land registrar.

d. Costs of the original suit and the counterclaim.

15. There was no indication in the court file of the Plaintiffs having filed any defence to the Defendants' 3 counterclaims. There were no such defences on record and there was no minute of filing of any defence to counterclaim in 2015.

16. During the pretrial stage, the parties were called upon to frame and agree on a common statement of issues for determination. The court was informed that the parties had agreed on the statement of issues which was filed on 1st March 2017. A perusal of the said statement, however, reveals that it was a statement of issues prepared and filed by the Defendants' advocates only. It was not signed by the Plaintiffs' advocate.

17. At the trial hereof, the Plaintiffs called seven (7) witnesses in support of their case whereas the Defendants called only the 1st Defendant to testify. Upon conclusion of the trial on 14th December 2017, the Plaintiffs were required to file and serve their written submissions within 21 days whereas the Defendants were to file and serve theirs within 21 days upon service.

18. At the time of preparation of this judgement, however, none of the parties had filed any submissions. The Defendants appear to have filed their submissions on 12th June 2018 when the court was concluding the judgement.

19. The 1st Plaintiff, Sospeter Njuki Kagundu, testified as PW 1. He stated that he was the last son of Ngiri Ngichenge. He testified that his parcel of land was No. 14 i.e. *Mavuria/Mbita/14* (hereinafter parcel No. 14) which was given to him by the clan. He stated that he took over the land and utilized it peacefully until 1992 when he was served with an eviction notice.

20. It was his case that the 1st Defendant obtained parcel No. 14 fraudulently by cheating his father Ngiri Ngichenge. He denied having signed the letter dated 19th April 1977 purporting to surrender parcel No. 14 to the 1st Defendant. He maintained it was his father Ngiri Ngichenge who signed it without consulting him. He stated there were at least three (3) persons whose fathers or relatives signed on their behalf including the Plaintiffs herein.

21. During cross-examination by the Defendants' counsel, PW 1 stated that land adjudication in the area in dispute commenced in 1972 and that he did not have any adjudication record showing that parcel No. 14 was given to him. He also conceded that both he and his late father were given some clan land elsewhere. The witness also stated that he knew as far back as 1977 that parcel No. 14 was no longer his. He also conceded that he did not lodge a claim for the land during the land adjudication process.

22. During re-examination, PW 1 stated that his father Ngiri Ngichenge was the chairman of the family for the purpose of land demarcation and adjudication. He also denied that his father had given him any clan land by mistake and that he was not involved in the agreement to return parcel No. 14 to the 1st Defendant.

23. The 2nd Plaintiff, Rachel M. Kagundu, testified as PW 2. She stated that she was the wife of the late Festus Kagundu who was the son of Ngiri Ngichenge. She stated that her late husband was allocated parcel No. 19 by the clan. It was her case that they occupied the said parcel from 1966 until 2012 when she was evicted by the 1st Defendant.

24. PW 2 stated that her late husband was literate and there was no reason why his father could sign a document on his behalf to surrender parcel No. 19 to the 1st Defendant. Her further evidence was that her father-in-law reported the matter to the clan elders who resolved that the land be returned to the rightful owner.

25. During cross-examination, PW 2 conceded that Ngiri Ngichenge was the chairman who was responsible for distributing land to clan members. She also stated that she did not have any adjudication record indicating that her husband was the rightful owner of parcel No. 19. It was her evidence that she did know about the adjudication process and that she and her late husband did not participate in it.

26. The 3rd witness was Josephat Nyaga Muthoke who testified as PW 3. He testified that he was from the Muthoke family and he was allocated parcel No. 12 where he had resided ever since. He stated that sometime in 1977, he was called to a Unit Committee meeting to consider a land dispute. Upon arrival, the 1st Defendant came with a book which he forced him to sign because "judgement" had already been passed. He claimed to have signed under duress and to have signed for one of his brothers.

27. It was his further evidence that he was informed that the land would be his upon signing the documents. He signed on behalf of his brother, Ngurungu Muthoke who was not present, to that he could also get his land. It was his case that it is the chairman of the Unit Committee who gave him the book or document to sign.

28. The 4th witness was Ngurungu Muthoke who testified as PW 4. He told the court that he was the 3rd Plaintiff and that he was allocated parcel No. 11 by the clan. He testified that he was still residing there with his family. It was his case that he started utilizing parcel No. 11 in 1963 or thereabouts. His further evidence was that he did not authorize his brother (PW 3) to sign any document on his behalf and that he was not involved in the process of surrendering the land to the 1st Defendant. He was away working at Kamburu at the material time in 1977.

29. During cross-examination, he stated that he never participated in the land adjudication process and that he had never visited the lands office in search of a title deed for parcel No. 11. It was his case that he did not know about the adjudication process.

30. The 5th witness was Ernest Ngungi Nthukene who testified as PW 5. He stated that he was a member of the Unit Committee. He was involved in the land dispute concerning the parties to the suit. The complainant was the 1st Defendant in this suit who was claiming various parcels of land from the Plaintiffs and other parties.

31. Upon PW 5 being shown the letter dated 19th April 1977 (marked as exhibit P1), he confirmed that it was the one signed to bring about a settlement of the dispute. He also stated that some of the parties were not physically present hence their fathers signed on their behalf. It was his case that the persons allocated the disputed parcels were still in possession although he did not know who were registered as proprietors.

32. During cross-examination, PW 5 stated that the 1st Defendant was the complainant before the Unit Committee. He also confirmed that the agreement was signed at the venue of the meeting. He, however, disputed that the parcels of land in dispute were to be given to the 1st Defendant. According to him, those parcels were to remain with the persons in occupation. He also stated that a copy of the agreed resolutions were not forwarded to the Land Adjudication Officer. During re-examination, however, he stated that the secretary of the meeting was the Land Adjudication Officer.

33. The 6th witness was Joram Gachuba who testified as PW 6. His evidence was that sometime in 1982, he was called by Ngiri Ngichenge to a committee of the clan because the 1st Defendant was taking away some land which he (Gichenge) had already allocated to other persons. It was his evidence that it was resolved by elders that the land be returned to the Plaintiffs and other original allottees.

34. It was also the evidence of PW 6 that the 1st Defendant had admitted during an oath-taking ceremony that he had lied in order to obtain the parcels of land in dispute fraudulently.

35. The 7th witness on behalf of the Plaintiff was Nyaga Ngiri who testified as PW 7. His evidence was that sometime in 1977 he attended a meeting of the Unit Committee over some land disputes involving the parties herein. He stated that the 1st Defendant was the claimant although he could not remember the parcel numbers in dispute. He further stated that at some later date the 1st Defendant took some documents to his house for him to sign and told him that they were for the acquisition of survey numbers. He later on discovered that it was a scheme to defraud him of his land.

36. It was also the evidence of PW 7 that although he had been in possession of his allocated land, (parcel No 9) he has never obtained any title documents. It was also his case that the 1st Defendant has never taken possession of his land (parcel No. 9). During cross-examination, PW 7 stated that he did not have a copy of the decision of the Unit Committee allowing the Plaintiffs to retain the disputed properties.

37. The 1st Defendant, Nicholas Nguthi Kivinda was the sole witness for the Defendants. He adopted his witness statement dated 5th April 2013 as his sworn testimony. His evidence was that the suit properties herein were an inheritance from his grandfather, Thingi Mbiru son of Nyambado and not clan land *per se*. He stated that the 1st Plaintiff's grandfather was called Ngiri Ngichenge and that he was also given his share and that he had no right to claim any land from the lineage of Thingi Mbiru.

38. It was the 1st Defendants' case that that his grandfather had 3 children namely, Ngichenge, Kivinda and Mbungu. He stated that when land adjudication started around 1973 he was away on work related duties and that when he went back home, he found that Ngiri Ngichenge had already sub-divided the land and given out some of it to people who were not entitled to it.

39. It was his case that some of the beneficiaries from the family of Muthoke were not of the Thingi Mbiru lineage hence he lodged various objection cases with the land adjudication board which consisted of 25 elders. He produced copies of the documents relating to the 8 cases he had filed.

40. It was his further evidence that when the adjudication committee visited the suit properties for the hearing the Respondents in those cases agreed to surrender all the parcels in issue in consequence of which he withdrew the objection cases. The parcels which were returned were Nos 18, 19, 14, 12, 11, 9 and 2600.

41. He further stated that after waiting for about 3 years for any objections or cases to be filed by any aggrieved parties he applied for

consolidation of the various parcels into one. The resultant parcel was *Title No. Mbeere/Mbita/10*. He later on sub-divided, sold and transferred various portions of the suit properties to various persons including some of his children.

42. The 1st Defendant's further evidence was that whereas he got the suit properties through the lineage of his grandfather Thingi Mbiru, the Plaintiffs were supposed to get their share through the lineage of their grandfather, Ndiri Emwe. He denied ever cheating the Plaintiffs of their land. He stated that the objection cases were before a committee of 25 elders and an Adjudication Officer.

43. The 1st Defendant also alluded to various legal attempts by the Plaintiffs to obtain the suit properties from him which did not materialize. At some point, the Land Disputes Tribunal decided the dispute against him but he apparently successfully moved the High Court to quash the award.

44. During cross-examination by the Plaintiffs' counsel, DW 1 conceded that the Plaintiffs were not present at the meeting of the Unit Committee but stated that two of them sent their father and one his brother to represent them. He also stated that the document of surrender was signed in the presence of the committee and that he did not use any influence to defraud the Plaintiffs.

45. A review of the pleadings, evidence and the documents filed by the parties reveals that the main issues which fall for determination are the following:

- a. Whether the Defendants fraudulently and illegally obtained the suit properties.
- b. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- c. Whether the Defendants are entitled to the reliefs sought in their respective counterclaims.
- d. Who shall bear the costs of the suit and the counterclaim.

46. The Plaintiffs' case of fraud is hinged on the grounds which are particularized in paragraph 9 of the plaint. The first is that the Defendants misled the illiterate parents of the Plaintiffs in signing away the Plaintiffs' land. The second is causing illegal interference and alteration of the initial register as to ownership of the suit properties to the detriment of the Plaintiffs. The 3rd and 4th particulars are not really particulars of fraud as known to the law.

47. The court is aware that parties herein were passionate about the relationships and the lineage of inheritance. The two grandfathers whose descendants were at war were Thingi Mbiru and Ndiri Emwe. The court is aware that this is not a succession suit and it shall not base its decision upon the law of inheritance and succession. The court is aware that the suit properties were subjected to a comprehensive process of land adjudication under the relevant laws. The court shall, therefore, determine the suit on the basis of the pleadings on record, the evidence and the law.

48. The court has considered the evidence of the Plaintiffs and their witnesses in this suit. The court has also considered the documentary evidence on record. There is no doubt that the 1st Defendant filed at least 8 objection cases claiming the suit properties. The only question for determination was whether or not the letter dated 19th April 1977 by which several persons, including the Plaintiffs herein, surrendered the suit properties was genuine and whether any of the signatories were tricked into signing it.

49. The court has noted that all the signatories who signed that letter in person have not filed suits for recovery of the surrendered parcels even though their parcels are mentioned in the body of the plaint. That was also the evidence of PW 7 who was a member of the Unit Committee which was involved in the resolution of the dispute involving the suit properties. In those circumstances, the only parcels which are properly before court for adjudication are parcel Nos. 11, 14 and 19 which are being claimed by the 3 Plaintiffs.

50. The only persons who are challenging the surrender are the 3 Plaintiffs. The evidence on record shows that it was their father, Ngiri Ngichenge, who signed on the behalf of the 1st and 2nd Plaintiffs. It is also on record that it was the 3rd Plaintiffs' brother, PW 6, who signed on his behalf since the 3rd Plaintiff was away. The 1st Plaintiff denied having authorized his late father to sign on his behalf. The 2nd Plaintiff also denied that her late husband had authorized his father to sign on his behalf.

51. The court having considered the evidence on record and the circumstances obtaining at the material time rejects the contentions of the 1st and 2nd Plaintiffs. First, there is ample evidence that Ngiri Ngichenge was the chairman who was representing the entire family in matters of land demarcation and allocation. In fact, he was the one allocating the land to clan members as well as family members. He was also the father of the 1st Plaintiff and the father of the 2nd Plaintiff's husband. In those circumstances, he was entitled to represent their interests and even sign documents on their behalf. There was, moreover, no evidence on record to demonstrate that the Plaintiffs distanced themselves from the actions of their father within a reasonable time. Second, the Plaintiffs did not take any official steps to lodge any complaints or objections with the land adjudication authorities for correction of the perceived anomaly.

52. With regard to the 3rd Plaintiff, the said letter was signed by his brother PW 3 on his behalf. He admitted that he was away during the period of land adjudication and could not attend the meeting of the Unit Committee. It was his brother who represented him. PW 3 in his evidence in chief asked what else he was expected to do when his brother, the 3rd Plaintiff, was away. He could not allow the proceedings to go on whilst his brother was unrepresented. In my opinion, the PW 3 acted reasonably in the circumstances by appearing before the Unit Committee. It was out of necessity and the 3rd Plaintiff cannot be heard to say that his brother needed express or written permission to represent him. The process of land adjudication could not come to a standstill simply because he was working away from the adjudication area. The court is satisfied that a family member could represent him in a such a process.

53. The other reason why the 3rd Plaintiff's complaint is not tenable is that he did not take any steps thereafter to distance himself from the acts of his brother who represented him before the Unit Committee. He did not at any time afterwards lodge any complaint, objection or case with the adjudicating authorities on the deprivation of his parcel of land.

54. There is, however, one aspect of the evidence of PW 3 which needs to be disposed of. He stated in his evidence in chief that he was misled into believing that upon signing the document the land would be his own. That is also why he signed on behalf of his brother so that he could get his land as well. He further stated that he was forced to sign. The court is unable to believe this rendition. First, those particulars were not included in the particulars of fraud in that plaint that such a scheme was employed. Second, the Unit Committee consisted of at least 25 persons plus the Land Adjudication Officer and it is inconceivable that PW 3 could be misled in such a manner without any member raising a finger. The court does not believe the suggestion by PW 3 that he signed the document on a different date at his house. The court instead believes the evidence of PW 5 who was a member of the Unit Committee that all the documents of agreement were signed at the venue of the meeting.

55. Although it was pleaded in paragraph 9 of the plaint that the Defendants had misled the illiterate parents of the Plaintiffs into giving away the Plaintiffs' land, it was not demonstrated at the trial in what manner those parents were misled. On the contrary, the case of the Plaintiffs all along was that they did not send or authorize their parents or brother to represent them or sign any documents on their behalf. The court is not satisfied that the Plaintiffs demonstrated that their parents were misled on account of illiteracy or at all.

56. The Plaintiffs also relied on a handwritten document marked as exhibit P3 which purported to be a copy of an oath taken by the 1st Defendant on 17th October 1992. The said document is not clearly legible and it does not appear to be signed by the 1st Defendant. It does not indicate the Commissioner for Oaths before whom it was taken. The document does not bear the signature and/or stamp of the person or authority administering the oath. It is, therefore, not clear whether it was a lawful or unlawful oath. For those reasons, the court shall not accord it any probative value as it does not comply with the **Oaths and Statutory Declarations Act (Cap 15)**.

57. The second paragraph of particulars of fraud allege illegal interference with and alteration of the initial register to the Plaintiffs' detriment. The court has considered the evidence on record and found nothing which can substantiate this allegation. Although it is not immediately clear whether the Plaintiffs were referring to the adjudication register or the land register, there is no evidence on record to support either.

58. The Plaintiffs were asked during cross-examination if they had a copy of an adjudication register which indicated that any of the suit properties belonged to them but they had none. None of the Plaintiffs' witnesses were able to produce copies of the initial register which was allegedly altered, changed or interfered with. It is also noteworthy that none of the Plaintiffs produced a copy of the clan register in that regard.

59. It is trite law that allegations of fraud are serious allegations. Any party who alleges fraud against another is required to strictly prove such allegations to the required standard. In the case of **Koinange & 13 Others Vs Koinange [1986] KLR 23** it was held, *inter alia*, that allegations of fraud must be strictly proved on a standard beyond a balance of probabilities but not as high as beyond reasonable doubt.

60. In the circumstances, the court is not satisfied that the Plaintiffs have proved the allegations and particulars of fraud to the required standard. The evidence on record was solely directed at the 1st Defendant hence the 2nd and 3rd Defendants were not shown to have played any role in the alleged fraud which was not, in any event proved.

61. The second issue for determination is hinged upon the court's determination on the first one. The court having found that the Plaintiffs have failed to prove their case to the required standard, there would be no basis for holding that the Plaintiffs are entitled to any of the reliefs sought in the plaint. The court, therefore, holds that the Plaintiffs are not entitled to the reliefs sought in the plaint.

62. The third issue is whether or not the Defendants are entitled to the reliefs sought in their respective counterclaims. There is no doubt that the Defendants are the registered proprietors of the suit properties herein. The Plaintiffs filed the instant suit to challenge their title on account of fraud and illegality. The Plaintiffs have failed to prove their case against the Defendants or any one of them. In those circumstances, the Defendants are entitled to enjoy all the rights of a registered proprietor as provided for under the provisions of **section 25 of the Land Registration Act, 2012**. The court, therefore, holds that the Defendants and each one of them are entitled to the reliefs sought in their respective counterclaims. The court also notes that none of the Plaintiffs filed a defence to the counterclaims.

63. The final issue relates to costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs follow the event as provided for under **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant will normally be awarded costs unless, for good reason, the court directs otherwise. The court is aware that the parties are all relatives of an extended family except, perhaps, the 3rd Defendant. The court is of the view that each party should bear own costs, except the 3rd Defendant whose costs should be paid by the Plaintiffs.

64. The upshot of the foregoing is that the court finds that the Plaintiffs have failed to prove their case to the required standard hence the Plaintiffs' suit is hereby dismissed. The Defendants' respective counterclaims are hereby allowed as prayed. The Plaintiffs shall have a grace period of 90 days within which to vacate the suit properties they may be occupying. Any eviction shall be conducted strictly in accordance with the law including the Land Laws (Amendment) Act, 2016. Each party shall bear its own costs except for the 3rd Defendant whose costs should be paid by the Plaintiffs.

65. For the avoidance of doubt, the orders of inhibition granted on 14th December 2017 pending delivery of judgement are hereby vacated.

66. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **JUNE 2018**.

In the presence of Mr Lee Maina holding brief for Mr Njoroge for the Plaintiff and Mr Okwaro for the Defendant.

Court clerk Mr Muinde.

Y. M. ANGIMA

JUDGE

14.06.18