Kuyumya & another v Kivuva (Suing as the Administrator of the Estate of David Kivuva) & 2 others (Environment & Land Case 49 of 2021) [2025] KEELC 893 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELC 893 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT & LAND CASE 49 OF 2021

A NYUKURI, J

FEBRUARY 26, 2025

BETWEEN

GREGORY MUSEMBI KUYUMYA ..... 1ST APPELLANT

SAMSON MUNGUTI KUYUMYA ..... 2ND APPELLANT

AND

MONICA MBATHA KIVUVA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID KIVUVA) ..... 1ST RESPONDENT

MACHAKOS COUNTY LAND ADJUDICATION OFFICE .... 2ND RESPONDENT

MACHAKOS COUNTY LAND REGISTRAR ..... 3RD RESPONDENT

(Being an appeal against the Judgment of Honourable Martha Opanga, SRM, in Kangúndo CMC Environment and Land Case No. 62 of 2020 delivered on 9 th November 2021)

JUDGMENT

Introduction

1. This appeal was filed by Gregory Musembi Kuyumya and Samson Munguti Kuyumya, the appellants herein upon being dissatisfied with the judgment of Honourable Martha Opanga, Senior Resident Magistrate, delivered on 9th November, 2021 in Kang'undo CMC ELC Case No. 62 of 2020. In the impugned judgment, the learned trial magistrate dismissed the appellants' counterclaim wherein they had sought orders of declaration, permanent injunction and damages. The trial court consequently allowed the 1st respondent's claim of ownership of part of the disputed property on the basis that the appellant's mother obtained registration thereof through fraud.

Background

2. By a plaint dated 15th April, 2020, the plaintiff before the trial court who is the 1st respondent herein, alleged that the 1st to 4th defendants obtained registration of the parcel of land known as Machakos/Nguluni/282, (suit property) through misrepresentation, fraud and corruption. She stated that the suit property abuts her other parcel known as Machakos/Nguluni/3333. According to the plaintiff, the suit property belonged to her late husband Kivuva Mukuna (hereinafter referred to as Kivuva) and that Kivuva sold a portion thereof approximately one bench to one Benjamin Musau Ngui (hereinafter referred to as Benjamin). That subsequently, Benjamin sold the same to one Milcah Kiyumya (hereinafter referred to as Milcah) who is the mother of the 1st to 4th defendants), where she built her home.

3. The plaintiff accused Milcah of fraudulently registering the whole of the suit property in her name and that of the 1st to 4th defendants without the knowledge of the plaintiff or her husband, and that it was only in 2013 upon obtaining an official search that she realized the fraud and registered a caution against the title of the suit property. She stated that she made inquiries from the land Adjudication offices why the suit property was registered in the defendants' names and was informed that Benjamin wrote a letter of no objection for his portion of the suit property to be registered in the names of the defendants. She also averred that the letter was not clear and indicated that Benjamin owned the whole land.

4. According to her, she confronted the wife of Benjamin who clarified that her husband only sold the portion where the mother of the 1st – 4th defendant had constructed her house. She sought the following orders;

    a. A declaration that the registration of the whole parcel of land known as Machakos/Nguluni/282 in the name of the 1st – 4th defendants and their mother was fraudulent and the court be pleased to set it aside.

    b. The honourable court be pleased to order the Machakos County Surveyor to survey and hive out the defendants' homestead from property reference number Machakos/Nguluni/282.

    c. The Honourable court be pleased to order the remaining portion after hiving out the defendants' homestead be transferred to the plaintiff and the executive officer of this court be empowered to execute all the documents necessary to effect transfer.

    d. Eviction order to issue against the defendants for the portion belonging to the plaintiff.

    e. Costs of the suit.

    f. Any other relief the court may deem fit.

5. The 1st and 2nd defendants filed statement of defence and counterclaim dated 22nd April, 2020 which was amended on 26th February, 2021. They denied the plaintiff's claim and stated that Benjamin sold their late mother Milcah the suit property measuring 0.13 hectares on 4th October, 1994. They denied the plaintiff's allegation that registration of the suit property into their names was done fraudulently. They maintained that their mother purchase of the suit property with the full knowledge of the plaintiff and her husband. They stated that they had been in ownership, use and quiet possession of the suit property for over 25 years without interference or queries by the plaintiff or her now deceased husband and accused the plaintiff of filling the suit as an afterthought.

6. They stated that they were perplexed with the plaintiff's claim which had been brought after all the parties who transacted on the suit property had passed on. They maintained that the claims of fraud were unprecedented, pure afterthought and merely a fishing expedition. They stated that during adjudication, Kivuva was alive, and fully and actively participated in the adjudication and never raised an objection on the suit property being registered in the defendants' names.

7. The 1st and 2nd defendants further stated that neither the plaintiff nor the widow of Benjamin were party to the sale agreements in regard to the suit property and hence their allegations regarding the same were farfetched, an afterthought and in bad faith. They argued that no grant had been issued in respect of the estate of Milcah, hence the suit was misconceived and bad in law.

   They stated that having lived on the suit property for over 25 years without any interference from the plaintiff the suit was a fraudulent scheme based on malice, envy and bad faith.

8. They averred that the plaintiff has no valid claim over the suit property; that the registration of the suit property in their name was not based on fraud; that the suit property does not form part of the estate of Kivuva and that the plaintiff is not the administrator of Kivuva's estate in respect of the suit property. They stated that it was only in 2017 that the plaintiff started trespassing on the suit property threatening the defendants.

9. They further stated that in March, 2020, the 1st and 2nd defendants placed construction materials on the suit property but that the construction was halted due to harassment, threats and trespass of the plaintiff frustrating the defendants hired labourers and making construction impossible. That this resulted in destruction and theft of construction materials. Further that the plaintiff also destroyed the maize crop growing on the suit property belonging to the defendants. They lamented that due to constant trespass, threats and disturbance from the plaintiff, they were unable to use the suit property, they were unable to use the suit property for any meaningful income.

10. They alleged to have suffered loss and damage of Kshs. 992,868 /= being the cost of construction materials; a sum of Kshs. 72,000/= in respect of transportation and Kshs. 12,000/= in respect of County cess fees paid to the County Government of Machakos.

11. Therefore the 1st and 2nd defendants counterclaimed for the following orders;

    a. A declaration that the plaintiff's forceful, unlawful and illegal destruction of the 1st and 2nd defendants' crops and halting/interfering with constructions on land Machakos/Nguluni/282 amounts to trespass.

    b. A permanent injunction to restrain the plaintiff whether by himself, or by his servants or agents or any of them or otherwise dealing with the property known as Machakos/Nguluni/282 in any manner whatsoever by trespassing, constructing, occupying, selling, alienating, disposing, charging, mortgaging, or creating or placing a lien, charge, caveat or any other illegal encumbrances on the said property.

    c. A declaration that the 1st and 2nd defendants herein are the rightful owners of the suit land Machakos/Nguluni/282.

    d. Kshs. 1,056,868/= being the value of the destroyed construction materials, transportation of the construction materials and County cess fees.

    e. An award of general damages to the 1st and 2nd defendants for the sum to be assessed by this Honourable court.

    f. Costs of this suit with interest on the above.

12. The rest of the defendants did not enter appearance or file defence. The matter proceeded to hearing by way of viva voce evidence. The plaintiff presented three witnesses while the 1st and 2nd defendants presented two witnesses.

Plaintiff's Evidence

13. PW1 was Monica Mbatha the plaintiff. She adopted her witness statement filed as her evidence in chief and produced documents filed as P. Exhibits 1 to 9. From her witness statement dated 16th August, 2020 her testimony was that she was the widow of the late Kivuva and also administrator of his estate. She stated that her late husband owned the suit property measuring 0.13 hectares and that in 1993, he sold a portion thereof measuring "one bench" which had been fenced by Benjamin. That Benjamin entered into a sale agreement for sale of the portion he had purchased with the 1st to 4th defendants, on which the latter's mother build her home.

14. She further stated that in 1994 during the adjudication process, the 1st to 4th defendants' mother caused the suit property to be fraudulently registered in her name and the name of the 1st to 4th defendants a fact she never knew until 2013 when she obtained an official search. That this prompted her to register a caution over the title of the suit property. That at that time she could not file suit because she had not succeeded the estate of her husband and was having financial challenges.

15. She informed court that she made inquiries at the land adjudication office only to be told that Benjamin wrote a no objection letter to the Land Adjudication office to the effect that the whole property be transferred to Milcah, instead of indicating only a portion thereof. She stated that on 1st April, 2020, the 1st defendant trespassed on the whole property and started construction thereon and that in 2013, the defendant trespassed on the suit property and began constructing a small shop. She averred that she began the process of taking out grant of representation so as to evict the defendants. According to her, the place where the defendants built a small shop had been given to Benjamin as an access road to the property. She further stated that despite receiving several warnings from the widow of Benjamin, the defendants have continued to trespass on the entire parcel of the suit property.

16. She produced certificate of confirmed grant; sale agreement and the English translation thereof; letter dated 4th October, 1994 from Benjamin; application for caution dated 5th August, 2013; application for caution dated 30th June, 2016; official search dated 2nd July, 2013; caution receipts and application for registration.

17. On cross-examination, she stated that she included the suit property in her husband's estate and that her husband died in 2007. She further stated that her husband sold land to Benjamin and that she never complained about it. That at the time her husband sold land to Benjamin, no measurements were taken. That the person was shown the portion sold and sisal plants grown. She denied the truth in her exhibit number 4 (letter dated 4th October, 1994 by Benjamin). In re-examination she stated that the defendants began trespassing on the suit property in 2013.

18. PW2 was Dorcas Nthenya Musau. She adopted the contents of her witness statement as her evidence in chief. From her statement, it was her evidence that she was wife of Benjamin, now deceased and that she got married in 1982 under Kamba Customary Law. She also stated that Benjamin died on 14th May, 2011. She further stated that in November, 1985 they entered into a sale of land agreement with the plaintiff's husband to purchase a "shamba" being part of property known as Machakos/Nguluni/282. That she used to do farming on the land before they sold it to Milcah. That they never took measurements of the portion they purchased but they never sold the first part of the land as they never purchased it from Kivuva.

19. According to her, they were given an access road. She also stated that Milcah fenced the property and build her residential house. She maintained that they never sold the whole land to Milcah, and that she was present during the sale. She stated that she had seen the defendants' agreement which is the agreement signed by the parties to the agreement and stated that the part indicating that the land was measuring 0.13 ha had been inserted fraudulently to indicate that they sold the whole property. She stated that she is the one who advised the plaintiff to place a caution on the title of the suit property when the defendants began trespassing.

20. Besides her statement, she added on 4th October, 1994, they sold land to Milcah as per the agreement dated 4th October, 1994 filed by the defendants. She stated that as Benjamin's wife she signed the aforesaid sale agreement. She stated that at the time of sale of the land the portion sold was not measured. That they did not sell the whole plot. She stated that when Kivuva sold them the plot he showed them a ten, foot access path as Kivuva said he intended to build rental houses on the front part of the plot. She stated that she was cultivating the portion she was sold and that Milcah built a house and planted trees in the said portion while the front portion of the parcel was not utilized. She claimed that she did not know how measurements were inserted in the agreement and that it was Milcah's son one Musembi who wrote the agreement.

21. In cross-examination, she stated that the agreement was done in 1994 and that there was no plot number by then. She stated that she had a survey letter showing number 282 and confirmed that the agreement filed by the defendants is the same agreement that was used to sell the suit property to the defendants. On re-examination she stated that they bought the portion at the back of the parcel and were given access road and that what they bought is what they sold.

22. PW3 was Daniel Mukuna Nzyuko, a former Assistant chief Nguluni and brother of Kivuva. He adopted the contents of his witness statements dated 16th August, 2020 as his evidence in chief. He testified that he witnessed Kivuva sell a portion of the suit property to Benjamin in 1985 and that he was a witness. That what was sold was a portion of the land and another portion remained. That the children of Milcah trespassed on the land and that the family sat and Musembi agreed that the other portion of the plot belongs to Kivuva.

23. He further stated that what was sold was demarcated on the ground. That Kivuva did not sell the front part of the suit property because he told him that he intended to construct commercial houses. That he said this in the presence of the widow of Benjamin. That in 1994, he was told by Benjamin and his wife that they sold the purchased portion to Milcah. That Milcah constructed on the land she bought and never trespassed on Kivuva's portion.

24. That in 2013, the 2nd defendant started constructing a small shop on Kivuva's land which led to the plaintiff placing a caution on the land and that in 2016 the defendants were fraudulently issued with title for the whole land and refused to surrender the remaining portion to the plaintiff. That in 2017, they settled the matter and the defendants agreed to give up that part of the land they had grabbed but later changed their mind and began constructing thereon. He maintained that the defendant inserted measurements in the agreement so as to mislead the court because no measurements were taken but that the land is demarcated on the ground.

25. On cross-examination, he stated that in 1985 the land being sold was parcel number 282 and that no measurements were included in the agreement. That it was a physical portion with sisal planted as a boundary and that plot no. 333 is not in dispute. That marked the close of the plaintiff's case.

1st and 2nd Defendants' Evidence

26. DW1 was Gregory Musembi Kuyumya. He adopted his witness statement as his evidence in chief. From his witness statement dated 26th February 2021, it was his testimony that the 1st to 4th defendants are children of Milcah and that in 1994, their late mother purchased the suit property from Benjamin who had also acquired it from the late Kivura. He stated that in 1995, their mother also bought parcel Machakos/Nguluni/283 from Elijah Mbondo's family, and more specifically from the late Ruth Mbenge (wife) and Richard Mwema Mbondo (son) which land had previously been owned by the late Kivuva and that parcel Nos. 282 and 283 are adjacent to each other and abut the parcel known as Machakos/Nguluni/3333 belonging to the late Kivuva.

27. He stated that in September, 1994, Kivuva, Benjamin and Milcah attended the Lands Office at Nguluni and confirmed that the suit property was registered under the name of Benjamin and that the same measured 0.13 hectares. That, that is when Milcah accepted to purchase the entire suit property. That on 4th October, 1994, Benjamin, in the company of his wife Dorcas Nthenya sold the suit property to Milcah at a price of Kshs. 50,000/= and that three witnesses including Easter Nduku Ngui, Benjamin's sister witnessed the sale. That it is the same day of 4th October, 1994 that Benjamin wrote a "no objection" letter to the senior Land Adjudication Officer stating that he had no objection to have parcel No. 282 transferred to Milcah and that Milcah indicated the names of all her children on the file.

28. He stated that the land adjudication office had given one year between 1994 to 1995 for anyone owning land in Nguluni Location to confirm their plot sizes, plot numbers and names against the land office register, before the information was transferred to title deeds. He stated that that information is contained in the bundle of documents he had filed in court.

29. He maintained that neither Kivuva nor his wife the plaintiff, raised any objection against their registration as owners of the suit property.

30. He also stated that in 2000, his brother who is the 2nd defendant erected his shop on the suit property near the main road and that the construction was finished in 2008. He stated that during the construction, Mr. Kivuva was still alive as he died in 2006. He averred that upon purchase of the suit property, Milcah fenced it, built a four-bedroom house, planted trees in the compound and the rest of the property was under cultivation. He stated that after purchase, his family has been in ownership, use and quite possession of the suit property for over 25 years without queries or interference from anyone.

31. He alleged that the defendants were perplexed by the strangeness of the plaintiff's claims which are clear fishing expedition calculatedly brought when all the persons involved in the sale transactions are dead. He maintained that even during the lifetime of Kivuva, the defendants' family occupied the entire parcel and Kivuva raised no objection.

32. The witness stated that in 2017, the plaintiff approached him and the 2nd defendant claiming that Milcah had not bought the whole of the suit property. That thereafter, she sent her two sons who trespassed on the suit property and destroyed their maize crop by uprooting the same. He further stated that on 28th November, 2017, the plaintiff and the 1st and 2nd defendants attended a meeting to discuss matters relating to parcel known as Machakos/Nguyuni/283 and that the resolution made was that parcels 282 and 283 belong to Milca's family which was subject to confirmation by the surveyor. That the plaintiff brought a surveyor who confirmed the correct boundaries between parcel 282 and 3333.

33. He stated that in March, 2020, together with his son one Leo Musembi, they began to construct residential building on the suit property but that the said construction was halted due to frustrations, trespass activity and persistent threats from the plaintiff. That in the result, his construction materials

were destroyed. He stated that the plaintiff and her husband had began construction on the parcel of land No. Machakos/Nguluni/ 3333 and that the plaintiff had shown the said construction of the unfinished shop in his documents. He maintained that the suit property does not form part of the estate of Kivuva hence the plaintiff has no claim over it. It was also his testimony that the plaintiff lacked capacity to file the suit as she was not the administrator in respect of the suit property hence the suit is incompetent and an abuse of the due process.

34. He produced certificate of confirmation; sale agreements dated 6th June, 1995 and 23rd August, 1995 for Plot No. 283; title deed for parcel Machakos/Nguluni/283; Public Notice in the Star Newspaper for change of user of the suit property and death certificate for Milcah; letter of objection dated 4th October, 1994; certified duplicate of adjudication record for parcel No. 282; certified copy of green card for parcel Machakos/ Nguluni/282; condensed copy of map showing parcel No. 282, 283 and 3333 as at 2020 and 2021, photographs of defendants' permanent home on parcel No. 282 and the remaining construction material on parcel No. 282; receipts from the hardware, Leyani Construction Ltd and Gansu Hauling Kenya Ltd for costs of material being Kshs. 972,868/=; receipt from Leyani Construction Ltd for transportation of construction materials being kshs. 72,000/=; and receipts from County Government of Machakos for cess fees being Kshs. 12,000/=.

35. On cross-examination, he stated that PW2 (wife of Benjamin) witnessed the sale agreement of Milcah, but that the plaintiff was not present. He stated that the land recorded in the agreement of 2017 was parcel No. 283 and that the subject matter is parcel 282. He stated that the plaintiff did not have an agreement in regard to parcel No. 283. He stated that the disputed part is part of parcel No. 282 and that parcel No. 283 is adjacent to the disputed land. He stated that they obtained title thereof in 2019 and that although the land was registered in his mother's name, green cards were opened in 2009. He stated that he witnessed the agreement between his mother and Benjamin. He denied there being a pathway to their parcel. He stated that there seemed to be a different pen notation on the agreement.

36. DW2 was Samson Munguti, the 2nd defendant. He stated that he relied on his witness statement filed. In his witness statement, his evidence was that he reiterated the contents of the statement of his brother Gregory Musembi, the 1st defendant (DW1). In cross-examination, he stated that he constructed his shop in 2000 because there were no claims. This marked the close of the defence case. Parties filed submissions in support of their respective cases.

37. Upon consideration of the pleadings, evidence and submissions, the trial court found that the agreement between Kivuva and Benjamin was valid and complied with Section 3 (3) of the *law of Contract Act*. On whether Kivuva intended to sell a portion or part of the suit property, the trial court held that he had no intention to sell the whole parcel, he only sold a portion as confirmed by PW2 who stated that she had cultivated maize and beans on the land for a while before her husband sold the land to Milcah.

38. Regarding the second agreement between Benjamin and Milcah, the trial court found that Benjamin could not sell more land than he had purchased. The trial court further found that the sold parcel and the acreage were properly described in the agreement but that Benjamin could not sell more land than he had purchased. The court further found that DW1 in cross-examination stated that the pen tone used to write the parcel number and size of land in the agreement for purchase of the suit property by Milcah, was different from the rest of the writing in the agreement. The trial court found that the insertion appeared darker than the rest of the writings.

39. The court agreed with the evidence of PW2 that at the time of the agreement, the parcel number and the acreage were not included in the agreement which would imply that they were inserted later on. The court also stated that if this was the case, then it meant that there was fraud.

40. The trial court also found that in the agreement of 28th November, 2017, demonstrated that Milcah is entitled to a portion measuring 70 feet by 90 feet in parcel no. 283 which originally belonged to Ruth mbunge Mbondo and that the remaining adjacent plot belonged to Kivuva. The trial court therefore concluded that Kivuva only sold a portion of the suit property to Benjamin, who sold it to Milcah. That when Benjamin wrote the letter of no objection during adjudication process "perhaps he did not understand the consequences or full import thereof because by this doing so he caused the entire parcel to be registered in the names of Milca and her four children." The trial court further held that there is a possibility that the person who inserted the parcel number and size in the agreement did so fraudulently. The court further found that Benjamin intended to sell only that which he purchased from Kivuva. On that basis, the trial court dismissed the appellants' counterclaim and allowed the respondent's claim in the plaint.

41. Aggrieved with the decision of the trial court, the appellants in this appeal who were the 1st and 2nd defendants before the trial court, filed the instant appeal vide a memorandum of appeal dated 1st December 2021 citing nine grounds of appeal as follows;

    a. The learned trial magistrate erred in law and fact by exonerating the 2nd and 3rd respondents as parties to the suit without granting them audience before the trial court. The trial court was therefore unable to appreciate the role of the 2nd and 3rd Respondents in suit land Machakos/Nguluni/282.

    b. That learned trial magistrate erred in law and fact by failing to appreciate and direct her mind on the *Land Adjudication Act*, Cap 284. The laid out procedures/processes on lands under the 2nd Respondent and issuance of title deed by the 3rd Respondent on such lands.

    c. The learned trial magistrate erred in law and fact by entertaining the suit when the 1st respondent is guilty of laches and the Appellants herein still invoke the doctrine of estoppel. The suit is brought 27 years after the purchase of the suit land and possession thereof and calculatedly, upon the demise of all key parties mentioned by the 1st Respondents.

    d. That learned trial magistrate erred in law and fact by failing to appreciate and direct her mind to the fact that land parcel Machakos/Nguluni/282 did not form part of the estate of the 1st respondent's husband. The 1st respondent therefore did not have any capacity and/or locus standi to file the suit on behalf of her deceased husband's estate. Further the 1st Respondent in her personal capacity is also not a party to any land transactions/agreements touching on the suit land.

    e. The learned trial magistrate erred in law and fact by finding that the Appellants late mother, Milcah Kuyumya, did not purchase the whole parcel of land Machakos/Nguluni/282 despite the evidence to demonstrate the land purchasing process up until issuance of title.

    f. That the learned trial magistrate erred in law and fact by impeaching fraud on the Appellants and their late mother in acquisition of the suit land when the 1st respondent's allegations of fraud were not strictly proved to the standard required by law.

    g. That the learned trial magistrate erred in law and fact by finding that the Appellants mother Milcah Kuyumya did not purchase the whole of the suit land from Benjamin Ngugi Musau by discrediting the copy of sale agreement dated availed by the Appellants before the trial court without the 1st respondent availing their own copy of sale agreement in respect to the suit land to counter the sale agreement dated 4/10/1994 availed by the Appellants.

h. That the learned trial magistrate erred in law and fact in that she failed to consider the Appellants evidence and pleadings filed and thereof arriving at the wrong decision.

i. That the decision of the learned trial magistrate was against the weight of evidence and the law.

42. Consequently, the appellants sought the following orders;

a. That the appeal be allowed.

b. That judgment of the Honourable Senior Resident Magistrate be set aside and proper findings be made.

c. Costs of the appeal be provided for.

43. Parties filed their submissions in support of their respective cases. The appellant filed submissions dated 12th November, 2023 while the 1st respondent's submissions dated 23rd May, 2024.

Appellants' Submissions

44. Counsel for the appellant submitted that upholding the trial court's judgement would mean a floodgate of suits with frivolous and vexatious claims revoking agreements entered into 27 years and cancelling titles issued many years ago and unsettling people who purchased their properties, settled on the properties and buried their loved ones on the properties. Counsel submitted that it was not disputed that Milcah entered into agreement with Benjamin for sale of the entire parcel known as Machakos/Nguluni/282 and that the sale was witnessed by Benjamin's wife Dorcas Nthenya Musau who never disputed Milcah's title. That the fact that Milcah took possession of the suit property is not disputed and that it is not disputed that the agreements do not refer to sale of a portion of the suit property.

45. They further submitted that it is not disputed that in the letter dated 4th October, 1994 by Benjamin to the Land Adjudication Officer, he confirms clearly that he was transferring the whole and not part of the suit property to Milcah. That it is also not disputed that the adjudication record confirmed ownership of the entire parcel as belonging to Milcah. They also submitted that it was not disputed that the agreement dated 28th November, 2017 was in respect of parcel Machakos/Nguluni/283 and not 282 and that it was not disputed that since Milca purchased the suit property on 4th October, 1994, no one had challenged the sale and transfer for 27 years.

46. It was also argued for the appellant that Dorcas Nthenya Musau was not the vendor of the suit property but a witness and for 27 years she never challenged the sale. Further that it was not in dispute that for 27 years the appellant had quiet possession of the suit property.

47. Regarding the trial court's finding on fraud, counsel submitted that a mere pleading of fraud is not enough and that the same was used to avoid the statute of Limitation as the respondent was on a fishing expedition.

48. Counsel submitted that Kivuva never raised objection for the years he was alive and that the suit property did not form part of his estate. Counsel questioned the timing of the suit having been filed when Kivuva, Benjamin and Milcah were all dead and argued that the suit is motivated and based on fraud. Counsel argued that the standard to proof of fraud is higher than the standard required in civil cases and cited the case of Kibiro Wagoro –vs- Francis Nduati Macharia & Another ELC 63 OF 2017. In that regard, counsel submitted that the respondent did not meet the required standard in proving fraud against the appellant.

49. It was further submitted for the appellants that the process of acquiring title by Milcah was procedural. Counsel submitted that there was no expert evidence in the alleged different ink in the agreement. Counsel submitted that PW2 confirmed signing the appellants agreement on 4th October, 1994 and did not challenge the signatures of the parties thereon. Counsel also relied on the case of Mohandra Shah –vs- Barclays Bank International Ltd & Another (1979) KLR 76 and Gichinga Kibutha –vs- Caroline Nduku (2018) KLR on the threshold of proof of fraud.

50. Reliance was placed on Section 26 of the *Land Registration Act* and counsel argued that the appellant being the registered proprietor of the suit property and the respondent having failed to prove fraud, cannot interfere with their absolute and indefeasible ownership.

51. On whether the sale agreement of 4th October, 1994 was a forgery, counsel submitted that the 1st respondent's witness confirmed that the suit property was sold to the appellants' mother and that there was no proof of forgery.

The 1st respondent's Submissions

52. Counsel for the 1st respondent submitted that the history of the case was well captured by the trial court that the late Milcah only purchased part and not the entire suit property and that she secretly registered herself and her children as owners thereof until 2013 when the 1st respondent realized the secret at the point of taking out grant of letters of administration for the deceased. Counsel submitted that the agreement of 28th November, 2017 settled the issue showing that the appellants land measures 70feet by 90feet and that the rest belonged to Kivuva.

53. Counsel further contended that Benjamin could not sell what he did not own and that Milca settled on the property that was demarcated by sisal boundary. Counsel argued that although the agreement by Kivuva had no measurements, the position was confirmed by sisal boundary made at the time and beacons set as stated in the evidence of the 1st respondent's witnesses.

54. Responding to ground five of the appeal, counsel argued that property registered in another person's name even by fraud cannot be included as a deceased person's estate. Counsel further argued that the letter by Benjamin dated 4th October, 1994 to the Land Adjudication officer was void. Counsel argued that the property stated in the agreement of 28th November 2017 was in reference to parcel No. 282. Counsel argued that the suit property was not cultivated by Milcah.

55. It was argued for the 1st respondent that this court had no advantage of hearing the witnesses as the trial court and that this court ought to uphold the trial courts findings.

56. Regarding the standard of proof of fraud, counsel referred to the case of Vijay Murjaria v Nansing Dar bar & Another (2000) eKLR and Central Bank Ltd –vs- Trust Bank Ltd & Others [1994] eKLR and submitted that fraud ought to be pleaded and also proved.

57. According to counsel, the 1st respondent specified particulars of fraud as false misrepresentation alleging to have purchased the whole of the suit property and misleading the demarcation and adjudication officers that she purchased the whole of the suit property.

58. Counsel submitted further that the 1st respondent called three witnesses who proved fraud showing that the appellants' mother did not buy the entire parcel. Counsel referred to the case of Kiplagat Arat Biator –vs- Esther Tala Cheyegon (2016) e KLR and argued that the court should uphold the intention of the parties as shown in their agreement and that Kivuva did not intend to sell the entire suit property as a portion had been demarcated which evidence was corroborated by PW2 and PW3.

59. Counsel maintained that the 1st respondent proved fraud to the required standard. Reference was made to Section 26 of the *Land Registration Act* and the case of Joseph Arap Ngok –vs- Moijo Ole Keiwua & 5 Others Civil Appeal no. 60 of 1997 for the proposition that title can be impeached on proof of fraud.

60. The court was referred to Section 80 and counsel submitted that the trial court had power to cancel title that had been obtained fraudulently.

61. On whether the suit was statute barred, counsel submitted that where there is fraud, time starts running from the time of discovery of fraud. They also submitted that the no objection letter by Benjamin did not grant the appellants ownership of the suit property. On the question of the 1st respondent's capacity to file suit before the trial court, reference was made to the case of Omari Kaburu –vs- ICDC (2007) e KLR and counsel argued that having obtained grant for the estate of Kivuva, the respondent had the requisite capacity to file suit. Counsel concluded that the appellants ought to bear the costs of the suit.

Analysis and determination

62. The court has carefully considered the appeal herein, the parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-assess, re-evaluate and re-analyze the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

63. The duty of the first appellate court was discussed in the case of Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR, where the Court of Appeal stated as follows;

> "An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

64. While a first appeal is decided on facts and the law, generally, the first appellate court is the final court on facts and therefore on appeal, parties deserve a fair, just, independent and full consideration of the evidence tendered before the trial court, as anything short of that would amount to an injustice. Thus, the role of this court being the first appellate court is to apply its mind to the entire case, re-evaluating both questions of fact and law and considering all issue arising from the case as well as the basis for conclusions made by the trial court. (See Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs [2001] 3 SCC 179)

65. Having considered the grounds of appeal raised in the Memorandum of appeal, my view is that the same raises the following issues for this court's determination;

    a. Whether the respondent lacked capacity to institute suit before the trial court on the basis that and for allegations that the suit property did not form part of the estate of Kivuva Mutune

    b. Whether the respondent was guilty of laches.

    c. Whether the trial court could be faulted for the failure of the 2nd and 3rd respondents to participate in the proceedings before the court below and whether their non-participation resulted in miscarriage of justice.

    d. Whether the trial court failed to appreciate provisions of the *Land Adjudication Act* on processes of issuance of title deeds.

e. Whether the respondent proved that Milca purchased part and not the whole of the suit property.

f. Whether the respondent proved fraud.

g. Whether the appellants proved their counterclaim

66. On the question of capacity, it is not disputed that the respondent filed suit in her capacity as administrator of the estate of Kivuva, upon obtaining confirmed grant of letters of administration in regard to the said estate. Section 82 of the *Law of Succession Act* provides that to institute suit for the benefit of the estate of a deceased person, a claimant needs to have a grant of letters of administration. In this case, the 1st respondent having demonstrated being administrator of the estate of the late Kivuva and having produced a confirmed grant to that effect, I find and hold that she demonstrated capacity to bring suit for the benefit of the estate of Kivuva, and it was not necessary that she must prove that the suit property is part of the estate of Kivuva so as to validate her locus standi. Therefore, that ground of appeal fails.

67. Regarding allegations of laches, the appellant argued that the respondent having filed suit in court 27 years after the contested sale, she was guilty of laches and her claim was statute barred.

68. Section 7 of the *Limitation of Actions Act* provides that an action to recover land must be filed within 12 years from the date the cause of action accrued.

69. However, section 26 of the *Limitation of Actions Act* provides that where there is allegation of fraud, time starts running from the date of discovery of fraud.

70. In the instant case, the respondent alleged that the appellants were registered as owners of the suit property by fraud, and that she realized the fraud in 2013. Therefore, from 2013 to 2020 when the suit was filed in the court below, is a period of seven years, hence the respondent was not guilty of laches. Again, that ground of appeal fails.

71. On whether the trial court ought to be faulted for the 2nd and 3rd respondents' non-participation in the trial in the court below, it is trite that a party to a suit has the choice of participating in the trial or not; with each choice having consequences which are borne by the party. A court cannot force a party to participate in a trial. In this case the appellants did not challenge service of summons on the 2nd and 3rd respondents. Their arguments were that the court excluded them from the trial. I have considered the record and there is no evidence to show that the 2nd and 3rd respondents' failure to participate in the trial was the fault of the trial court. In any case, if the appellants needed the said respondents to appear in court and give evidence concerning the adjudication process as they allege, nothing stopped them from obtaining court summons to that effect. The record shows that no such attempt was made by the appellants. I have also considered the record and nothing therein suggests that non-appearance of the 2nd and 3rd respondents resulted in injustice and in this case the appellants did not make any claim against the 2nd and 3rd respondents and the two had the right to choose to appear or not. In the premises, I find and hold that the appellants failed to demonstrate the nature of prejudice suffered due to the non-participation in the trial by the 2rd and 3rd respondents and therefore that ground of appeal fails.

72. It is not in dispute that the appellants are the registered proprietors of the suit property. Section 26 of the *Land Registration Act* provides for indefeasibility of title as follows;

> Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as

prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b). Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

73. Therefore, registration vests in a proprietor absolute and indefeasible rights, unless there is evidence that the proprietor acquired the title in question by fraud, misrepresentation, illegality or corruption, whether or not the registered proprietor was party to the same. Therefore, the law only protects property that is lawfully, procedurally, and honestly acquired.

74. In the case of *Munyu Maina v Hiram Gathiha Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held that:-

> We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

75. On fraud, the Black's Law Dictionary 11th Edition defines "fraud" as "a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment".

76. It is trite that fraud ought not only be pleaded but must be strictly proved, and the standard of proof for fraud in civil cases is higher than the standard required in ordinary civil matters of the balance of probabilities but slightly lower than the standard of proof required in criminal cases of beyond reasonable doubt.

77. In the case of Kinyanjui Kamau vs George Kamau [2015] eKLR the court stated that:

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

78. On the other hand, misrepresentation is defined in the Black's Law Dictionary 11th Edition as follows;

The act or an instance of making a false or misleading assertion about something usually with the intend to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion. The assertion so made; an incorrect, unfair or false statement; an assertion that does not accord with the facts.

79. Therefore, to prove misrepresentation, a claimant must demonstrate that the defendant made a false, incorrect or misleading assertion with intend to deceive. They must prove the correct facts in their

favour and show that the defendant made assertions that contradicted the facts, for the purpose of deception.

80. In the instant case, the 1st respondent's case as framed in her plaint, is that in 1993, herself and Kivuva sold a portion of the parcel of land known as Machakos/ Nguluni/282 to Benjamin, which the latter sold to Milcah the mother of the appellants. That instead of registering part of the suit property Milcah fraudulently registered herself and her four children including the appellants as owners of the entire parcel. The respondent alleged that during adjudication Milcah got herself and her four children registered as owners of the entire suit property through misrepresentation, fraud and corrupt scheme. The appellant listed two particulars of misrepresentation, namely,

    a. Falsely misrepresenting that they had bought the whole of property known as Machakos/ Nguluni/282; and

    b. Misleading the demarcation and adjudication officers that they had purchased the whole property known as Machakos/ Nguluni/ 282.

81. It is clear from the 1st respondent's argument above that her complaint before the trial court was that Milcah misled the demarcation and adjudication officers into being registered as owner of the entire suit property, when she had only purchased a portion thereof. The 1st respondent pleaded that Milcah purchased one "Bench" of the suit property. Together with her legal counsel they did not state what is a bench or what that meant in contemporary measurements of area. She maintained that argument, alleged that at the time of sale by Kivuva there was already a sisal boundary on the ground and ultimately purported to rely on an agreement dated 28th November 2017 to allege that the measurement of the land purchased by Milcah was 70 feet by 90 feet.

82. Section 13 of the *Land Adjudication Act* grants everyone with interest in land within an adjudication section the opportunity to lay their claim before the recording officer, and provides as follows;

    13. Claims and attendance

        1. Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.

        2. Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or board shall attend in person or by a duly authorized agent at the time and place ordered.

        3. If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the case may be, may proceed in his absence.

        4. If the demarcation officer or the recording officer considers that a person who has not made a claim has an interest in land within the adjudication section, he may, but is not bound to, proceed as if that person had made a claim.

        5. Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.

83. Therefore, the process of adjudication is clear, elaborate and well spelt out in sections 3, 4, 5, 20, 21, 25 and 26 of the *Land Adjudication Act*. The same starts with the Cabinet Secretary responsible

for matters relating to land, making orders by a Notice in the Gazette for adjudication to be done within a specified adjudication area and thereby appointing adjudication officers for that area and for that purpose. What follows is the establishment of an adjudication section by an adjudication officer. Then any person with interest in land within an adjudication section should make their claim to the recording officer and point out their boundaries to the demarcation officer. Before demarcation is done, the demarcation officer gives warning of not less than seven clear days of intended demarcation and recording of claims stating the time and place where that will be done. The recording and demarcation proceeds, but where a party is dissatisfied with the decisions made by the recording and demarcation officers, he or she may appeal against such decisions to the adjudication committee. Where a dispute remains unresolved after consideration by the committee, the latter refers it to the Arbitration board. Once the disputes are determined, by the Arbitration board, the demarcation map and the adjudication record which form the adjudication register are prepared shall be availed to the public for interrogation for 60 days. Any person affected by the adjudication register and who considers it to be incorrect or incomplete, may object to the same to the adjudication officer specifying the aspects in which the adjudication register is incomplete or incorrect. Upon consideration of the objection, the adjudication officer determines the objection and where any of the parties is dissatisfied, they may appeal to the "Minister".

84. Where there is an appeal to the Minister, section 29 of the *Land Adjudication Act* provides that the Minister's decision shall be final. Therefore, the *Land Adjudication Act* does not allow, a contest on the merits of the determinations made within the adjudication process before courts of law.

85. In the instant case, from the unrebutted evidence of the appellant, it is clear from the adjudication record filed by the appellants that Benjamin had been indicated as owner of the entire parcel Known as Machakos/Nguluni/282 measuring 0.13 hectares. That adjudication register contains both the record and the demarcation map. This was before Benjamin sold the suit property to Milcah. The record shows that there was no objection filed by Kivuva or his wife the 1st respondent herein, before the adjudication officer challenging the correctness or completeness of the adjudication register. Clearly, they did complain to the adjudication officer to the effect that the adjudication register was incorrect as the same had indicated more land to Benjamin than what he had purchased. There was no complaint whatsoever. In fact, it is Benjamin who wrote a letter to the adjudication officer which confirmed that he had no interest in the entire suit property as he had sold the same to Milcah and sought that a transfer be effected accordingly.

86. On the question of whether Milcah misled the demarcation and adjudication officer on the amount of land which belonged to her, from the evidence on record, it is clear to me that the respondent, her late husband Kivuva and Benjamin together with the wife of Benjamin (PW2) were all aware of the adjudication process that was going on in Nguluni section from around 1994, as none of them suggested being unaware or being away at the time of adjudication. It is on record that the 1st respondent's husband owned parcel No. Machakos/ Nguluni/3333, which is adjacent to the suit property. While it is recorded within the adjudication process that Benjamin wrote to the adjudication officer indicating that he did not object to the whole of the suit property being transferred to Milcah, the 1st respondent is eerily silent on their participation in the adjudication process. If indeed they also owned part of the suit property, and were aware that Benjamin was involved in the adjudication process regarding his alleged portion, it would be expected that their participation in the adjudication process would be like that of any other person claiming interest in land within Nguluni section. It would be expected that like Benjamin their name would also appear in the adjudication register and they would not just be restricted to make an objection.

87. In this case, Kivuva and the 1st respondent neither made any claim to the recording or demarcation officers, nor filed any objection against the adjudication register which showed that Benjamin owned the entire plot No. 282.

88. While the 1st Respondent accuses Milcah and the appellants of misleading the demarcating and adjudication officers, she never told the trial court that together with her husband, they presented the right information to the said officers, in their effort to be registered as owners of the portion they alleged was not sold to Benjamin. The adjudication process was not exclusive to Benjamin and Milcah it was open to all and sundry who had an interest in land within Nguluni Adjudication section.

89. In the premises, the late Kivuva and the respondent did not exercise their rights under section 26 of the *Land Adjudication Act*, while they were aware of the adjudication process, hence the estate of the late Kivuva cannot through a suit in court purport to exercise that right outside the adjudication process. I therefore agree with submissions made by the appellants that the trial court failed to appreciate the provisions of the *Land Adjudication Act*, thereby resulting in injustice against the appellants. In the premises, I find and hold that the 1st respondent did not prove that the appellants and their mother Milcah made misrepresentations to the demarcating and adjudication officers as alleged or at all.

90. I now turn to the question of fraud. When the 1st respondent filed suit before the trial court, she never contested the agreements by the parties in her pleadings or witness statement. She did not even produce her own agreements. It is during the hearing that together with the widow of Benjamin they tried to find fault with the agreements filed by the appellants. Both the 1st respondent and PW2 conceded to the fact that both agreements were entered into and were signed by the parties to the agreements. They however raised a query over the agreement between Benjamin and Milcah, arguing that the number and size of the land sold were inserted in the agreement. Regarding the agreement between Kivuva and Benjamin, the trial court found that Kivuva had no intention of selling the entire portion but only sold a portion thereof. The basis for that finding was that there is an agreement dated 28th November 2017 between the 1st respondent and the 1st appellant stating that the measurement for the appellant's land is 70 feet by 90 feet.

91. The trial court also found that Kivuva only intended to sell part and not the entire suit property as the evidence of PW2, PW3, that is the wife of Benjamin and the brother of Kivuva showed that there was sisal boundary on the land at the time of sale. In my view, this finding was made in error. I have considered the agreement between Kivuva and Benjamin. It is clear from that agreement that Kivuva stated that he was selling his land to Benjamin and no where in the agreement shows that what was sold was part of Kivuva's land, or that Kivuva sold what the 1st respondent is referring to as a "Bench", or that there was a sisal boundary at the time of agreement. In addition, the fact that there were no measurements stated in the agreement point to the conclusion that the land sold was not part but the whole land owned by Kivuva. I take judicial notice of the fact, which has been a common practice, that from time immemorial, in the traditional African setting, if a man sold part of their land, measurements thereof would, as a matter of course, be taken. If no formal measurements were taken, then at the bare minimum, the land would be measured by a man's steps. In the case before me, it is clear that no measurements were done, and it appears to me that that was unnecessary because what was sold was the entire land.

92. This court has had a good look at the agreement between Kivuva and Benjamin, which was written in Kamba language and translated by an advocate into English. The Kamba version is well written in a legible and good handwriting, with a mix of English words including "agreement", "balance", "cash" "Kshs" and "December 1985". In addition, besides the purchaser, it is well signed by the seller, who legibly wrote his name as David Kivuva, which signature was not contested by the 1st respondent or

PW2, the widow of Benjamin. There were four witnesses to the agreement, who signed the agreement by pen. These demonstrate that the person who wrote the agreement as well as the parties thereto and the witnesses were all literate and knew exactly what they were doing. My impression therefore is that the agreement unequivocally demonstrated that the clear intention of Kivuva was to sell his entire parcel of land to Benjamin.

93. It is not in dispute that as at 1985, the suit property had not been registered as land in Nguluni area had not been adjudicated upon. Therefore, the allegation by the respondent that Kivuva sold one "bench" of his land has no basis as that is not in the agreement. In any event, the respondent does not give the equivalent of the alleged "bench" in modern measurements. Besides, there was no basis for the trial court to state that Kivuva's intention was to sell only part of the suit property on the basis that PW1, PW2 and PW3 stated that the same was demarcated by sisal boundary on the ground; when no such evidence was in the agreement, and none was pleaded in the plaint. The mere fact that the widow and brother of Kivuva as well as the widow of Benjamin said so in their testimony, was not sufficient reason for the trial court to make such finding as documentary evidence showing the vendor sold the entire suit property was contrary to that oral evidence and therefore, documentary evidence, which in this case was not contested, ought to have carried the day, before the trial court.

94. Although the three witnesses testified that the part of the suit property abutting the road belonged to Kivuva and that he sold the lower part, looking at the English translation of that agreement, there was nothing in the agreement pointing to that proposition. If Kivuva was selling the lower part and not the part next to the road, nothing stopped him from mentioning that in the agreement, which he did not. In any event, no evidence of an existing boundary as at 1985 when Benjamin purchased the suit property was availed before the trial court. Just because that evidence is coming from Benjamin's widow does not mean it is true. There is no basis in the decision of the trial court, why the court believed the oral evidence of the three witnesses when the documentary evidence which is the agreement did not support that position. Having considered the evidence, and in view of the fact that the agreement between Kivuva and Benjamin was done by adults who in my view understood the import of the sale and purchase, I find and hold that in the agreement between Kivuva and Benjamin, the intention of the parties was to sell and buy respectively, the entire suit property and not part thereof. Therefore, the trial court was wrong to find that the intention of Kivuva was to sell only a part thereof, which part even the trial court did not define.

95. Turning to the second agreement between Benjamin and Milcah, the same was dated 4th October 1994. It stated in English as follows;

> " Today 4/10/94 Mr. Benjamin Musau Ngui have sold my piece of land plot No. 282 at Nguluni village, to Millicah Mueni Kuyumya, at a price of Kshs. 50, 000/= (fifty thousands only). The sold land is measuring 0.13 hectares. And I have received the total amount in cash (50, 000/=) fifty thousands only
>
> L O N 282
>
> Sign ID No.
>
> Seller: Benjamin Musau signed 14 xxx19/64
>
> Seller's wife: Dorcas Nthenya Musau signed
>
> Buyer: Milicah Mueni signed
>
> Witnesses
>
> Gregory Musembi signed

Regina Mutheu signed

Esther Nduku Ngui signed

Money for witnesses issued is 1, 400/="

96. The record shows that on 4th October 1994, besides entering into the agreement of even date, Benjamin also wrote a letter to the Land Adjudication Officer regarding adjudication register in respect of plot No. 282 and stated that he sold plot No. 282 to Milcah and that he intended to transfer the whole plot to her because, him and his family have no objection for the plot to be transferred to Milcah. In her judgment concerning this letter and the agreement, the trial court found that Benjamin having purchased part of the suit property could not sell beyond what he purchased, and that when Benjamin wrote the letter of 4th October 1994, "perhaps he did not understand the consequences or full import thereof because by his doing so he caused the entire parcel to be registered in the names of MMK and her four children". Having considered the letter by Benjamin, which is hand written in English by Benjamin and which clearly states that Benjamin was sanctioning the Land Adjudication officer to transfer the entire suit property to Milcah and was exercising his right under section 26 of the *Land Adjudication Act*, I cannot perceive anything in that letter that suggests that Benjamin did not understand the consequences of the letter. In addition, no other evidence was given to suggest that when he wrote the letter dated 4th October 1994, Benjamin did not understand the import and consequences of that letter. In fact, this letter confirms the contents of the agreement between Kivuva and Benjamin that indeed Benjamin was the owner of the entire plot 282 and that is why he was selling the whole of it. At the time Benjamin was writing this letter, his name was the one recorded against the whole of plot No. 282 in the adjudication register and the demarcation thereof done for the entire parcel. In the premises, contrary to the findings of the trial court, I find and hold that Benjamin owned the entire plot No. 282, which had been recorded by the recording officer of Nguluni Adjudication section and boundaries thereof demarcated by the demarcating officer thereof, and that is what he sold to Milcah. I further find that as Benjamin owned the entire suit property he had the requisite capacity to sell the whole of it to Milcah and hence the trial court errered in finding that Benjamin could not sell the entire suit property. That being the case and bearing in mind that Milcah and the appellants were registered as proprietors of the suit property pursuant to both the sale agreement of 4th October 1994 and Benjamin's letter of even date of no objection to the Land Adjudication Officer, it is clear that the appellants' registration as owners of the suit property was based on proper and correct information and the respondents did not prove that Milcah and the appellants misled the demarcation officer and the adjudication officer.

97. The respondent argued that the agreement dated 4th October 1994 had insertions. The trial court found that due to insertions on the number of the plot and the area of the land there was fraud. This court has checked the proceedings and from the proceedings, the 1st appellant in his testimony stated as follows; "There seems to be a different pen notation on the agreement." The specific parts of the agreement with a different pen connotation is not stated in DW1's evidence and therefore the trial magistrates conclusion and finding that DW1 on cross examination was able to see that the pen tone used to write the parcel number and the size of the land was different is not supported by evidence on record as DW1 only stated that there was a different pen connotation in the agreement but did not mention the number and the size of the land. The trial court stated that it agreed with PW2 that the number of the land and size were inserted. The court has looked at the agreement. The same is written in continuous prose by hand. While I agree that it appears that there is a different pen connotation on the agreement, that is only in respect of what is inscribed as "P L O N 282" which writing appears as a stand-alone inscription between the terms of the agreement and the signatures of the parties. That notwithstanding, the rest of the agreement is in a consistent handwriting and there is no suggestion

of insertion whatsoever in so far as the plot number and size of the land is concerned. The agreement specified that "Benjamin Musau Ngui have sold my piece of land plot No. 282 at Nguluni village to Millicah" thus describing the plot number of the land being sold. The agreement further stated that "The land sold is measuring 0.13 hectares." There is no difference in pen connotation in the words stated above as compared to other words in the agreement or anything to suggest that the said writings were inserted into the agreement. That being the case, I do not agree with the findings of the trial court that the parcel number and the measurements were inserted or that the pen connotation is different because clearly, there is no difference in pen connotation as concluded by the trial magistrate that the number and size of the plot are in darker ink. The agreement is written in hand, and therefore if any insertion had happened latter, that would be clearly be seen as it would have interfered with word spacing. In the agreement, the spacing between words and the handwriting are apparently uniform and consistent and the impugned words fall in place properly where they are written and there is nothing to suggest that they were inserted in the agreement. That being the case, whether or not the word/ number "P L O N 282" in the middle of the agreement was inserted, is immaterial and does not in any way impute fraud because plot No. 282 and the measurements thereof are already indicated in the body of the agreement. Therefore, the trial court was wrong in concluding that the plot number and size of the plot were inserted in the agreement with a different pen connotation on the basis that DW1 said so, as that is neither reflected in DW1's evidence on record nor does the hand-written agreement support that conclusion.

98. In addition, the trial court referred to the agreement dated 28th November 2017 to conclude that the portion of the suit property sold to Milcah measures 70 feet by 90 feet. The court has carefully considered that agreement. First, the agreement is done by the 1st appellant who is only one of the registered proprietors of the suit property, the other registered proprietors are not privy to the agreement and therefore cannot be bound by the same. Besides, that agreement specifically mentions that measurements of 70 feet by 90 feet refer to the property which originally belonged to Ruth Mbenge Mbondo which was sold to Milcah on 6th June 1995. Among the documents produced by the appellant is the agreement dated 6th June 1995 between Ruth Mbenge Mbondo and Milcah. The same states that Ruth sold 70 feet by 90 feet within the parcel of land known as plot number 283 at a consideration of Kshs. 30, 000/=. In view of the above evidence, the trial court was clearly wrong in concluding that the measurements of 70 feet by 90 feet stated in the agreement of 28th November 2017 referring to the agreement between Ruth Mbenge Mbondo and Milcah, was in respect to the agreement between Kivuva and Benjamin as there is no evidence on record to support that conclusion. I therefore agree with the appellants that the respondent who complained that Milcah misled the demarcation and adjudication officers, had no evidence but was merely on a fishing expedition. Unfortunately for her, that expedition, has been an exercise in futility.

99. On the 1st respondent's allegation of corruption, no evidence was presented in support of that allegation and therefore the same was not proved.

100. In view of the reasons given above, it is clear that the 1st respondent failed to prove fraud, misrepresentation and corruption alleged against Milcah and the appellants. Therefore, the appellants being the registered owners of the suit property, are entitled to protection of their rights as enshrined in section 25 of the *Land Registration Act*. On that basis, the appellants are entitled to declaratory orders sought in their counterclaim to the effect that the 1st respondent's actions amount to trespass and that the appellants are the lawful owners of the suit property. Being owners of the suit property, the appellants are entitled to orders sought of injunction against any form of interference from the 1st respondent. The appellants' claim that the respondent and her agents were trespassing on the suit property were not rebutted or denied by the respondent. The appellants averred that the 1st

respondent has been trespassing on their land which frustrated their construction leading to a loss of Kshs. 1, 056, 868/= being the cost of construction materials, transportation and cess fees to the County Government. I have considered the receipts and photographs produced by the appellants and it is clear that they lost the claimed amount due to the frustrations by the respondent and her agents. In the premises, the appellants are entitled to the sum of Kshs. 1, 056, 868/= as sought in the appellants' counterclaim. The appellants also sought for general damages for the sum to be assessed by this honourable court". The appellants having not disclosed the nature, purpose or justification for the alleged general damages, this court will not speculate and therefore the claim under that item is rejected.

101. For the above reasons, I find and hold that this appeal is merited and the same is hereby allowed. Consequently, this court sets aside the judgment of the trial court and substitutes it with an order dismissing the 1st respondent's claim with costs. Ultimately, this court enters judgment for the appellants against the 1st respondent as follows;

    a. A declaration is hereby made that the 1st respondent's forceful, unlawful and illegal destruction of the 1st and 2nd appellants crops and halting/interfering with constructions on land parcel Machakos/ Nguluni/282 amounts to trespass.

    b. A permanent injunction is hereby granted restraining the 1st respondent whether by herself, or by her servants or agents or any of them or otherwise from dealing with the property known as Machakos/Nguluni/282 in any manner whatsoever by trespassing, constructing, occupying, selling, alienating, disposing, charging, mortgaging, or creating or placing a lien, charge, caveat or any other illegal encumbrances on the said property.

    c. A declaration is hereby made that the 1st and 2nd appellants herein are the rightful owners of the suit land Machakos/Nguluni/282.

    d. A sum of Kshs. 1, 056, 868/= being the value of the destroyed construction materials, cost of transport and county cess fees is awarded to the appellants and the same shall be paid by the 1st respondent.

    e. The costs of the suit and the counterclaim in the court below shall be borne by the 1st respondent.

102. The appellants are awarded the costs of this appeal which shall be borne by the 1st respondent.

103. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 26TH DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Munguti for the 1st respondent

No appearance for the appellants

No appearance for 2nd and 3rd respondents.

Court Assistant: M. Nguyai