



**Katam & 2 others v Maiyo & another (Environment & Land Case  
361 of 2013) [2024] KEELC 4437 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 361 OF 2013**

**JM ONYANGO, J**

**MAY 29, 2024**

**BETWEEN**

**ENOCK CHIRCHIR KATAM ..... 1<sup>ST</sup> PLAINTIFF**

**MARK KIPYEGO KATAM ..... 2<sup>ND</sup> PLAINTIFF**

**MUSA ARUSEI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**WILLIAM MAIYO ..... 1<sup>ST</sup> DEFENDANT**

**PIUS CHERONO KENGO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs' journey in pursuit of justice commenced in 2006 in the High Court when they filed suit against the Defendants vide HCCC No. 69 of 2006. The dispute revolves around a parcel of land lying within Ilula Scheme originally known as land parcel No. Uasin Gishu /Illula/108 measuring 6.6 Hectares. The said parcel of land was initially under the custody of the Settlement Fund Trustees, (SFT). Sometime in 1987 the 1<sup>st</sup> Plaintiff bought the suit property from the SFT through a loan. The title was discharged on 25<sup>th</sup> March, 2004 after the 1<sup>st</sup> Plaintiff paid the full purchase price. He subsequently divided the land into three portions known as land parcels No. Uasin Gishu / Illula/470,471 and 472. He then sold parcel No. 471 measuring 5 acres to the 3<sup>rd</sup> Plaintiff and parcel No. 472 measuring 5 acres to the 2<sup>nd</sup> plaintiff. He retained the third parcel of land known as parcel No. 470.
2. The 3<sup>rd</sup> plaintiff took possession of his parcel of land and bought an additional 2 acres from the 2<sup>nd</sup> plaintiff. He also leased the remaining portion of the 1<sup>st</sup> Plaintiff's land measuring 3 acres after which he started cultivating the land. However, sometime in the year 2006, the 1<sup>st</sup> defendant trespassed onto the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' land and has remained in possession thereof to date.



3. The claim against the 2<sup>nd</sup> defendant is that he trespassed onto parcel number 470 belonging to the 1<sup>st</sup> plaintiff.
4. The plaintiffs seek the following reliefs from the defendants:
  - a. A declaration that the defendants are trespassers on land parcels numbers Uasin Gishu / Illula/470,471 and 472.
  - b. The 1<sup>st</sup> Plaintiff prays for an order of eviction directed at the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants, agents and/or their other persons (sic) to remove themselves or by the assistance of the OPPD (sic) Kapsoya Police Post or any other senior police officer from all that parcel of land known as Uasin Gishu/Illula/470 and in addition the 2<sup>nd</sup> Defendant be ordered to restore the original boundary (ies) of the said parcels of land No. Uasin Gishu/Illula/470 and the parcel of land known as Uasin Gishu/Illula/86.
  - c. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs jointly and severally pray for an order of eviction directed at the 1<sup>st</sup> Defendant to remove himself, his servants, agents and his other persons (sic) or by the assistance of the OPPD ( sic) Kapsoya Police Post or any other senior police officer, from all that parcel of land known as Uasin Gishu/Illula/472.
  - d. A declaration that the Plaintiffs are the lawful owners of the land parcels numbers Uasin Gishu /Illula/470,471 and 472.
  - e. An order of permanent injunction restraining the Defendants, their servants, agents and their other persons(sic) from entering into, re-entering, fencing or building structures thereon or in any way or manner whatsoever interfering with the boundaries and/or with the possession and enjoyment of the said parcel of land known as Uasin Gishu/Illula/471 and 472 by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and from doing anything that will interfere with and/or violate the Plaintiff's proprietary rights over the said parcels of land.
  - f. Mesne profits
  - g. Costs of this suit.
5. The 1<sup>st</sup> Defendant filed a Defence and Counterclaim dated 2<sup>nd</sup> August 2006 which was amended twice on 30<sup>th</sup> March, 2010 and 18<sup>th</sup> September, 2012 respectively. In the Further Amend Defence, the 1<sup>st</sup> Defendant denies the Plaintiffs' claim that he has encroached on land parcels number Uasin Gishu / Illula/470, 471 and 472. He states that he has a right to occupy the said parcels of land as they belong to his late father.
6. It is his further contention that the Plaintiff has encroached on 3 acres of his late father's land parcel number Uasin Gishu /Illula/86. He states that the suit is res judicata as the 1<sup>st</sup> Plaintiff sued the 2<sup>nd</sup> Defendant's father, the late Cheronno Kengo over the same subject matter in ELD. SRMCC No. 2895 of 1995 and the said case was dismissed. The 1<sup>st</sup> Defendant contends that the Plaintiff fraudulently conspired with the Director of Land Adjudication and Settlement and a Chief by the name Ben Kattam to allocate and transfer land parcel No. Uasin Gishu/Illula/108 to the 1<sup>st</sup> Plaintiff.
7. In his counterclaim, he prays that the Plaintiffs suit be dismissed with costs. He prays for cancellation of land titles No.Uasin Gishu/Illula/108, Uasin Gishu/Illula/470, 471 and 472. He also prays for a permanent injunction restraining the Plaintiffs, their agents and servants from trespassing upon land parcel number Uasin Gishu/Illula/108 or any further subsequent sub-divisions.



8. Additionally he prays for a declaration that the 1<sup>st</sup> Defendant is the sole and absolute owner of and/or proprietor of land parcel number Uasin Gishu/Illula/108.
9. On the other hand, the 2<sup>nd</sup> Defendant filed a Defence dated 21<sup>st</sup> May, 2015. In the said Defence, he admits that the 1<sup>st</sup> Plaintiff is the owner of land parcel no. Uasin Gishu /Illula/108 but states that the said parcel has encroached on land parcel no. Uasin Gishu /Illula/86.
10. He further states that the suit against him is null and void as he is being sued as the administrator of his late father's estate without any citations having been issued against him yet he has no Grant of Letters of Administration. He is therefore of the view that he has been wrongly joined in the suit.
11. After some considerable delay occasioned by various applications and the subsequent transfer of the case from the High Court to this court, the case proceeded for hearing on various dates between 2015 and 2023.

### **Plaintiff's Case**

12. The Plaintiffs' case is that the original parcel of land known as Uasin Gishu /Illula/108 measuring 6.6 ha (approximately 16.6 acres) was registered in the name of the Settlement Fund Trustees (SFT) under the Ministry of Lands and Settlement. The 1<sup>st</sup> Plaintiff (Enock Chirchir Katam) purchased the suit property from the SFT through a loan in 1986. He took immediate possession the suit property and started cultivating it. In 1988 he sold a portion of the suit property measuring 5 acres to the 2<sup>nd</sup> Plaintiff (Mark Kibiego Katam). In 1995 he sold a portion measuring 5 acres to the 3<sup>rd</sup> Plaintiff Musa K. Arusei).
13. In 2006, the 1<sup>st</sup> Plaintiff divided the suit property into 3 portions known as Uasin Gishu / Illula/470,471 and 472 after obtaining the necessary consent from the Land Control Board. He transferred 5 acres each to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs (parcels 471 and 472 respectively) and remained with one portion (parcel 470). In the meantime, the 2<sup>nd</sup> plaintiff sold 2 acres of his land to the 3<sup>rd</sup> plaintiff who now had a total of 7 acres. The 3<sup>rd</sup> plaintiff took possession of his 7 acres and started farming thereon. He also dug trenches on a section of the land which was water-logged.
14. It is the plaintiffs' case that sometime in the month of March 2006, the 1<sup>st</sup> Defendant, with the help of goons armed with crude weapons forcibly entered the plaintiffs' land and has remained in possession thereof to date. He has constructed a house on the suit property and he continues to cultivate the same. The Defendants' acts of trespass were reported to the police station vide OB No.521/20/06 which was produced as exhibit P16 by PW6. The plaintiffs were advised to file a civil case in court. This is what prompted the Plaintiffs to file this case.
15. The 2<sup>nd</sup> Defendant who is the registered owner of land parcel No Uasin Gishu /Illula/86 that borders the suit property is also alleged to have trespassed onto the 1<sup>st</sup> plaintiff's land parcel no. 470. Owing to the boundary dispute between the 3<sup>rd</sup> Plaintiff and the 2<sup>nd</sup> Defendant, the court directed the County Surveyor to visit the land and establish if there was any encroachment. Upon visiting the suit property, the County Surveyor established that land parcel no.86 had encroached on parcel no 470 by 56 meters on one side and 57.6 meters on the other side. The said survey report dated 30<sup>th</sup> September, 2015 was produced as PEX15.
16. In support of his case, the 1<sup>st</sup> Plaintiff produced a copy of the allotment letter certified by the District Land Adjudication and Settlement Officer as plaintiff's Exhibit 3. He also produced receipts (PW3-PEX 13(a), (b), and (c) for the amount paid as purchase price together with the Discharge of Charge (PW3-PEX8) and green card for land parcel No. 470 (PEX 9a) and title deed for land parcel no. Uasin Gishu /Illula/108.



17. On his part, the 2<sup>nd</sup> Plaintiff testified that he bought a portion of the suit property measuring 5 acres from the 1<sup>st</sup> Plaintiff on 3<sup>rd</sup> May, 1988. He cultivated it for a while after which he sold 2 acres of the said parcel to the 3<sup>rd</sup> Plaintiff and remained with 3 acres. He produced a copy of the sale agreement and title deed in respect of land parcel no. Uasin Gishu /Illula/472 as PW2 PEX-3. He planted wheat on the said land until 1990 when he leased it to the 3<sup>rd</sup> Plaintiff.
18. It was the 3<sup>rd</sup> Plaintiff's testimony that at the time he bought the suit property, there was a small grass-thatched house on the land where an elderly woman lived alone. He ploughed the land between 1996 until 2006 when it was invaded by the 1<sup>st</sup> Defendant. He stated that he was not aware of any dispute between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant over the suit property.
19. The 3<sup>rd</sup> Plaintiff's witness Musa Tirop Benjamin (PW7) testified that he was employed by the 3<sup>rd</sup> Plaintiff as a tractor driver to plough his farm at Illula Settlement Scheme from 1996 to 2006 when he was stopped by the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Plaintiff also called the County land Adjudication and Settlement officer, Uasin Gishu (PEX 8) who confirmed that land parcel No 108 was allocated to the 1<sup>st</sup> Plaintiff as per the area list. (PEX17). He confirmed that the 1<sup>st</sup> Plaintiff paid for 16.5 acres even though his letter of allotment indicated that he was allocated 5 acres. He stated that the discrepancy in the acreage could be explained by the fact that part of the land was either swampy or rocky. He clarified that the acreage was determined by the purchase price paid by the allottee and in this case the 1<sup>st</sup> Plaintiff paid for 16.5 acres and he was issued with a title in 1987. The Discharge of Charge was issued to the 1<sup>st</sup> Plaintiff in 2004.

#### **1<sup>st</sup> Defendant's Case**

20. The 1<sup>st</sup> Defendant is the son of the late Kimoyi Kimaiyo who died in 2005. Before her demise she lived on parcel no. 108 with the 1<sup>st</sup> Defendant. It was the 1<sup>st</sup> Defendant's testimony that he lived on the land with his late mother from 1983 and they cultivated the land and kept some livestock thereon.
21. He stated that parcel 108 was allocated to Kapsamich Primary School by the Ministry of Lands and Settlement. The deceased later surrendered her land parcel No. Elgeyo Marakwet/Mosop/310 in exchange for parcel no.108 to allow for expansion of the school. He states that his mother lived on the suit property in a house built for her by the school upto the time of her death. He told the court that the deceased was buried on her piece of land in Elgeyo Marakwet. The 1<sup>st</sup> Defendant then continued living on the suit property but by then the 1<sup>st</sup> Plaintiff had started laying claim to the said land.
22. Owing to the 1<sup>st</sup> Plaintiff's claim over the suit property, the deceased complained to the school. The school sought assistance from the District Commissioner who referred the matter to the District Commissioner. After investigations, it was established that the land had been allocated to the Plaintiff instead of the late Kimoi Kimaiyo. The said allocation was done by the chief, one Ben Kattam who is the 1<sup>st</sup> Plaintiff's brother.
23. In support of his case, the 1<sup>st</sup> Defendant produced a series of correspondence between the District Commissioner and the School and the chief. He also produced minutes of meetings held by the School Committee regarding the suit property. The said documents were produced ad DEX 12-43. He prayed that the Plaintiffs' titles be revoked and that the land be declared to belong to him as the Plaintiffs had acquired the suit property by way of fraud.
24. Upon cross-examination, the 1<sup>st</sup> Defendant admitted that his Counterclaim was not accompanied by a Verifying Affidavit. He also admitted that he had not sued the Chief or Kapsamich Primary School even though it is the school that had given them land. He further admitted that there was no allotment



letter in the name of the school nor was he sure if the school had paid for the land. He claimed that his late mother had sued Ben Katam in 1992 vide HCCC No. 42 of 1992 although he did not know the outcome of the case. He admitted that he had no document to prove that his mother had exchanged her land for parcel no. Uasin Gishu/Illula/108. He stated that the minutes of the School Committee (DEX 5) indicated that the suit property had been allocated to one Chepkeitany who refused to take it before it was allocated to his late mother. It was his evidence that the 2<sup>nd</sup> Defendant's father was also given land (parcel No. 86) by the school.

25. The 1<sup>st</sup> Defendant's witness Samsosn Kiprop Cheboi (DW2), a retired Assistant Chief and Chairman of Kapsamich Primary School corroborated the 1<sup>st</sup> Defendant's evidence that the 1<sup>st</sup> Defendant's mother was allocated parcel no. 108 at Illula Settlement Scheme in exchange for 2 acres of her land to allow for expansion of Kapsamich Primary School. He however stated that the land that was donated by the 1<sup>st</sup> Defendant's mother was still in the name of her late husband Willian Kiprop Kimayo.
26. DW2 stated that he had nothing to show that the school built a house for the 1<sup>st</sup> Defendant's mother although he was aware that the school had built a house for her. He confirmed that there had been a dispute between the 1<sup>st</sup> Defendant's family and Cherono Kengo over the suit property since the 80s. Even though he alleged that the 1<sup>st</sup> Defendant had grabbed the land belonging to the school, he admitted that the school did not pay any money to the Settlement Fund Trustees for the said parcel of land, nor was the school registered as the owner of parcel 108.
27. Ernest Kurgat Koech , the Head Teacher of Kapsamich Primary School testified that he was aware of the dispute pitting William Maiyo against Enock Chirchir and Others. He relied on his witness statement filed in court. He admitted that in the said statement he had not mentioned that Kimoi Kimaiyo donated her land to the school. He confirmed that Illula Settlement Scheme belonged to the Settlement Fund Trustees and that he had not come across any letter of allotment issued by SFT to Kapsamich Primary School or Kimoi Kimaiyo. Likewise, he had not come across any agreement for exchange of land between the school and Kimoi Kimaiyo. He confirmed that the school did not pay for the land nor was there a Discharge of Charge in favour of the school.
28. Moses Kipkoech Cheboi, who stated that he was the Chairman of the Board of Kipsamich Primary School in the 80s, produced Defence Exhibits 12-43 mainly consisting of correspondence which are contained in a file. However, he confessed that he did not prepare any of the documents in the said file. He said he attended some of the meetings whose minutes were in the file although he could not remember what was discussed at the said meetings as his memory and eye sight were failing.

## **2<sup>nd</sup> Defendant's Case**

29. Pius Cherono Kengo, the 2<sup>nd</sup> Defendant told the court that their land parcel no. Uasin Gishu/Illula/86 which is registered in his late father's name borders Kimoi Kimaiyo's land (parcel 108) and each of the said parcels measures 13 acres. He informed the court that his mother was allocated the land because she donated her other parcel of land to the school. He claimed that the 1<sup>st</sup> Plaintiff had encroached on 3.2 acres of their land since 1985. He testified that his late father had a land dispute with the 1<sup>st</sup> Plaintiff vide ELD CMCC No. 2895 of 1995 which was determined in his father's favour. He told the court that the school constructed houses for them on parcel No. 86 in 1982 and the said houses are still on the land. He explained that his family and Kimoi Kimaiyo's family were each allocated 13 acres because their land was swampy.
30. Following the closure of the Defendants' case and at the request of the 2<sup>nd</sup> Defendant, the court visited the suit property to see the features mentioned in the parties' evidence. Thereafter the parties each filed



their final submissions for the court's consideration. I will not rehash the said submissions although I will refer to them in my analysis where necessary.

### **Issues for Determination**

31. Having considered the Amended Plaintiff, Defences and the 1<sup>st</sup> Defendant's Counterclaim as well as the oral and documentary evidence on record, the following issues arise for determination:
  - i. Who are the lawful owners of land parcels number Uasin/Gishu/Illula/ 470,471,472?
  - ii. Have the defendants trespassed on any of the suit properties?
  - iii. Did the 1<sup>st</sup> Plaintiff acquire land parcel no. Uasin/Gishu/Illula/108 fraudulently?
  - iv. Have the Plaintiffs proved their case
  - v. Has the 1<sup>st</sup> Defendants proved his Counterclaim?
  - vi. Are the Plaintiffs entitled to the reliefs sought in the Plaintiff?
  - vii. Is the 1st Defendant entitled to the reliefs sought in his Counterclaim?

### **Analysis and Determination**

32. Since both the Plaintiffs and the Defendants have raised the claim of trespass against each other, it is important to determine who owns the suit properties comprised in land parcels no. Uasin/Gishu/Illula/ 470,471,472 originally parcel No. Uasin/Gishu/Illula/ 108. From the evidence on record, land parcel No. Uasin/Gishu/Illula/ 108 was initially owned by the Settlement Fund Trustees which is housed under the Ministry of Lands and Settlement.
33. The mandate of the SFT is spelt out in Section 67 of the *Agriculture Act* (now repealed) as follows:

“The Settlement Fund Trustees shall by that name be a body corporate having perpetual succession and a common seal and may in its corporate name sue and be sued, and for an in connection with the purpose of this part, may purchase, hold, manage and dispose of movable and immovable property and may enter into such contracts as it may deem necessary or expedient”
34. It is not in dispute that the 1<sup>st</sup> Plaintiff was issued with an allotment letter dated 25<sup>th</sup> May, 1983 for a parcel of land measuring 5 acres. He was eventually registered as the owner of land parcel No. Uasin/Gishu/Illula/ 108 measuring 16.6 acres. The explanation given for the discrepancy in the size of the land in the letter of allotment and the ground measurement is that part of the land was marshy. The Land Adjudication and Settlement Officer who testified as PW8 explained that what ought to guide the Court in determining the size of the land that was allocated to the 1<sup>st</sup> Plaintiff is the purchase price paid to the Settlement Fund Trustees. He confirmed that the 1<sup>st</sup> Plaintiff paid for 16.6 acres as indicated in the title deed.
35. Although the 2<sup>nd</sup> Defendant claimed that his late mother, Kimoi Kimaiyo had been allocated the said parcel of land in exchange for two acres of her land known as Elgeyo Marakwet.Mosop/310 which she had surrendered to Kapsamich Primary School, he did not produce any documents from the Settlement Fund Trustees to confirm that they allocated the said parcel of land to the school. The correspondence in the school file produced by DW3 seems to suggest that the school purported to give the suit property to the 1<sup>st</sup> Defendant although there is nothing to prove that they ever owned the land in the first place. How then could they give out what they did not own? The submission Dr.



- Chebbi. learned counsel for the 2<sup>nd</sup> Defendant that Ben Kattam who was the Assistant Chief at the time fraudulently allocated parcel No. 108 to his brother (1<sup>st</sup> Plaintiff) is neither here nor there.
36. As correctly submitted by learned counsel for the 2<sup>nd</sup> Defendant, this being a land dispute, the crucial evidence is documentary in nature. I have carefully scrutinized the documents produced by both parties. Whereas the 1<sup>st</sup> Plaintiff has produced evidence to show that he was allocated parcel No. 108 in 1983 after which he paid for it and he was eventually issued with a title deed, the 2<sup>nd</sup> Defendant's claim is mainly supported by correspondence between the Provincial Administration and minutes of the Board of Management, Kapsamich Primary School. The thread that runs through the said correspondence and minutes which date back to the 80s is that there may have been some foul play in the manner in which the suit property was allocated to the 1<sup>st</sup> Plaintiff. It is alleged that his brother one Ben Kattam who was the chief, Marichor Location was involved in coordinating the allocation of plots at Illula Scheme to those who had surrendered their land for the expansion of local schools. However, most of the correspondence is in the form of photocopies and none of the makers of the said letters was called as a witness. The said correspondence is therefore of no evidentiary value.
37. Furthermore, it is surprising that no action was taken by the school or 2<sup>nd</sup> Defendant's family to ensure that that the 2<sup>nd</sup> Defendant got title to the suit property. Despite the allegation that the 1<sup>st</sup> Plaintiff did not deserve to be allocated parcel 108, the school did not lodge a complaint with the Settlement Fund Trustee. Engaging in protracted correspondence and holding meetings at the school was certainly not the way to secure the 2<sup>nd</sup> Defendant's title as these have no legal backing.
38. Faced with the two scenarios where the court has been presented with correspondence and minutes on the one hand, and a letter of allotment coupled with evidence of payment and a title deed on the other hand, I have no choice but to hold that the 1<sup>st</sup> Plaintiff's case carries more weight.
39. Consequently, I find as a fact that land parcel No. Uasin/Gishu/Illula/ 108 was purchased by the 1<sup>st</sup> Plaintiff from SFT who was registered as the owner thereof. The 1<sup>st</sup> Plaintiff then sub-divided it into three parcels known as land parcels No. 470,471 and 472. He subsequently sold two of the parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. Land parcel no. 471 is currently registered in the name of the 3<sup>rd</sup> Plaintiff while parcel No. 472 is registered the name of the 2<sup>nd</sup> Plaintiff. Land parcel number 470 remained in the name of the 1<sup>st</sup> Plaintiff. Land parcels no 471 ad 472 were being utilized by the 3<sup>rd</sup> Plaintiff in 2006 when the 2<sup>nd</sup> Defendant unlawfully entered the said parcels and has remained in occupation thereof to date.
40. Having arrived at the conclusion that the suit property belongs to the Plaintiffs, it is my finding that the Defendants have trespassed onto land parcels no. Uasin/Gishu/Illula/ 470, 471 and 472.
41. With regard to the question of fraud, the 1<sup>st</sup> Defendant has in his Defence and Counterclaim alleged that the Plaintiff acquired his title fraudulently. The particulars of fraud are captured at paragraph 12 of the Defence as follows:

“

“ 12. It has now transpired that the Director of Settlement has fraudulently transpired sic) the parcel number 108 to the 1<sup>st</sup> Plaintiff herein and it defence case that the said transfer and/or sale is fraudulent and for that reason be declared null and void and the title be cancelled. (sic).

Particulars of Fraud

- i. Misinforming the Director of Settlement.



- ii. Being aware that the Defendant and his other family members were entitled to the land yet failing to inform the Director of Settlement
  - iii. Secretly seeking and obtaining registration of the land parcel number 108 without obtaining the consent from the relevant Land Control Board.
  - iv. Colluding with the Director of Survey and one Ben Kattam”
42. It is trite law that fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. In the case of *Koinange & 13 others v. Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* (1957) EA 314 observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”

43. Furthermore in the case of *Vijay Morjaria .v. Nansingh Madhusingh Darbar& another* [2000]eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:-

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

44. This decision was upheld by the Court of Appeal in Nairobi in the case of *Kinyanjui Kamau .v. George Kamau Njoroge* [2015] eKLR(Civil Appeal No 132 of 2005) where it was stated that to succeed in the claim for fraud, the appellant needed to not only plead and particularize fraud, but also lay a basis by way of evidence, upon which the court would make a finding.

45. The Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, *Precedent of pleadings* 13<sup>th</sup> Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune v Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence v Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). “General



allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see *Insurance Company of East Africa v The Attorney General & 3 Others* Hccc 135/1998.

46. Additionally, in the case of *BKW (of unsound mind suing through the next friend (MIK) v. Samuel Maina Kung'u & 4 Others*, the Court while dealing with an application whereby an applicant was seeking orders to join the Land Registrar as a party held at page 4 paragraph 7 that:-

“The presence of the Land Registrar would be necessary to ascertain how title was acquired and whether the requisite process was followed should the orders for cancellation be issued, the Land Registrar is by the law the party to enforce”

47. Furthermore, in the case of *Edward Gitbaka Kiandingu v Mary Naomi Mwangi & another* [2020] eKLR, the Court held that:

“First, fraud is a serious offence which is a personal responsibility. The Plaintiff has not shown that the purported deceased persons...were reported for the commission of the alleged criminal acts and prosecuted in accordance with the law. The other players in the commission of the alleged fraudulent acts were named as the surveyors, Land Registrar and members of the Land Control Board who gave consent for the transaction to be completed. They have not been enjoined as parties in this suit ... The 1st Defendant is being accused for the alleged fraudulent acts committed by her late husband who was not even reported to any law enforcement authority for prosecution ... alleged fraud purportedly committed by deceased persons who were not charged during their live time. The It is my finding that the Plaintiff has failed to demonstrate how the Defendants are linked to the commission of the Plaintiff has not established a causal link and cannot therefore be held responsible for actions allegedly committed by deceased persons who were not brought to account in their life time.”

48. In the instant case, the Defendants did not deem it fit to join the Director, Land Adjudication and Settlement yet he was at the Centre of the alleged fraud. Furthermore, Kapsamich Primary School which is alleged to have been the first allottee of the suit property was not joined as an Interested Party to explain how the land moved from the school to the 1<sup>st</sup> Plaintiff. In the absence of these critical parties, the claim of fraud could not be proved. It is therefore my finding that the alleged fraud has not been proved to the required standard.

49. The 1<sup>st</sup> Defendant raised an alternative claim of adverse possession. By doing so the 1<sup>st</sup> Plaintiff was blowing hot and cold. One cannot claim that a title was fraudulently acquired and at the same time claim that they are entitled to the said title by way of adverse possession.

50. In the case of *Wellington Lusmet Barasa & 75 others v Lands Limited & another* [2014] eKLR the Court held that:

“... a party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. The two orders cannot be made in the same suit, for to sustain a claim for adverse possession, there must be a title, to which the party claims possession that is adverse to that of the title holder.”



51. Similarly, in *Ravindranath Dabhybhai Bhagat v Hamisi Haro & 5 others* [2014]eKLR. the Court held that an adverse possessor is a squatter and he has no rights of his own. The Court stated thus:

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

52. It goes without saying the 1st Defendant’s claim for adverse possession is without basis as it does not meet the necessary threshold.

53. Having considered the pleadings, the evidence on record and the submissions filed by learned counsel as well as the relevant authorities and the law, I have come to the inescapable conclusion that the Plaintiffs have proved their case on a balance of probabilities. On the other hand, the 1<sup>st</sup> Defendant has failed to prove his Counterclaim and the same is hereby dismissed. I therefore enter judgment for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and make the following final orders:

- a. A declaration is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the lawful owners of land parcels number Uasin Gishu Illula /470, 471 and 472.
- b. The Defendants herein are trespassers on the suit land to wit Uasin Gishu Illula /470, 471 and 472.
- c. A permanent injunction is hereby issued restraining the Defendants, their servants, agents or anyone acting on their behalf from entering into, re-entering, fencing or building structures or in any way or manner whatsoever interfering with the boundaries and/or with the possession and enjoyment of the parcel of land known as Uasin Gishu/Illula/470, 471 and 472 belonging to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and from doing anything that will interfere with and/or violate the Plaintiff’s proprietary rights over the said parcels of land.
- d. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hereby ordered to vacate the suit properties known as land parcels Number Uasin Gishu/Illula/470, 471 and 472 within 90 days. Additionally, the 2<sup>nd</sup> Defendant is ordered to restore the original boundary between land parcel number Uasin Gishu/Illula/470 and Uasin Gishu/Illula/86.
- e. In view of the circumstances of this case, particularly the fact the Defendants may have been prevailed upon to surrender their different parcels of land for the public good, each party shall bear their own costs.
- f. Parties are at liberty to apply.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 29<sup>TH</sup> DAY OF MAY 2024.**

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**J.M ONYANGO**

**JUDGE**

In the presence of:

1.Mr. Wafula R.M for the Plaintiff

2. Mr. Kimani for the 1<sup>st</sup> Defendant and holding brief for Dr. Chebii for the 2<sup>nd</sup> Defendant.

Court Assistant: Brian

