



Kiere v Karaiti & 6 others (Environment & Land Case E84 of 2021) [2024] KEELC 5750 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E84 OF 2021**

**A OMBWAYO, J
JULY 31, 2024**

BETWEEN

PATRICK GITHINJI KIERE PLAINTIFF

AND

MICHAEL MAINA KARAITHI 1ST DEFENDANT

NYANDARUA PROGRESSIVE AGENCIES COMPANY LIMITED 2ND DEFENDANT

ELIUD SAMUEL WAWERU 3RD DEFENDANT

PETER KINYANJUI NGUGI 4TH DEFENDANT

JESSE KAMERIA NGWIRI 5TH DEFENDANT

JOSPHAT MUREITHI MURUTHI 6TH DEFENDANT

PETER WANJOHI KARANIA 7TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide an Amended Plaintiff dated 23rd September, 2022 against the Defendants seeking the following orders:
 - a. A Declaration that the Plaintiff is the lawful proprietor of the parcel Nyandarua Progressive Agencies Company Limited Plot No. 99 (now Solai/Arutani Block 1/99 (NPA).
 - b. A Declaration that the Defendants are trespassers to the parcel Nyandarua Progressive Agencies Company Limited Plot No. 99 (now Solai/Arutani Block 1/99 (NPA).



- c. An Order of Permanent and temporary injunction against the Defendant herein either by themselves, agents and/or servants from trespassing, surveying, resurveying, sub-dividing, putting up beacons, transferring beacons, selling, invading, disposing, reallocating, fencing, demolishing, fences, ploughing or in any manner whatsoever dealing with the Plaintiff/Applicant's parcel Nyandarua Progressive Agencies Company Limited Plot No. 99 (now Solai/Arutani Block 1/99 (NPA). ca. In the alternative an order that the 2nd to the 7th Defendant do compensate the Plaintiff herein by payment to him equivalent of the current market price of the land parcel and all the development in the land of Kshs. 2,000,000.
 - cb. The said amount to be paid back with interest at the Court's rate from the date of judgment until payment in full.
 - cc. The 2nd Defendant do compensate the Plaintiff herein, with a similar plot as the one that Plaintiff had purchased.
 - d. Costs of this suit with interest till payment in full.
2. The 1st – 7th Defendants filed their Amended Statement of Defence dated 7th November, 2022 where they denied the Plaintiff's claim.
 3. The interested party also filed its Statement of Defence dated 15th November, 2022 where it denied the allegations in the plaint.

Plaintiffs' Case

4. Patrick Githinji Kiere the Plaintiff herein testified as PW1. He produced his statement dated 23/9/2022 which the court adopted as his evidence in chief. He also produced his list of documents filed on 23/7/2022. The documents were produced and marked as follows:
 5. PEX1- Letters dated 18/7/1988, 19/7/1988, 21/7/1988, 7/9/1988 and 21/7/1988
 - PEX2- Letter dated 9/9/1988 and 20/9/1988
 - PEX3- List of unallocated plots of August 1986
 - PEX4- Minutes dated 25/6/1988
 - PEX5- Judgment in CoA No. 213 of 2013
 - PEX6- Minutes dated 26/4/2003 and 2004
 - PEX7- Certificate of Ordinary Shares
 - PEX8- Payment Receipts
 - PEX9- Valuation Report of 19/5/2022
10. He testified that he knew through his relative Kumu who was a shareholder that the land was on sale. He testified that he was taken to the field by the Director where he paid the office Kshs. 240,000 for the land measuring 4 acres. He further testified that he bought 120 shares which was equivalent to the 4 acres. It was his testimony that he was issued with receipts and a share certificate in 2003. He testified that he has since utilized the land having planted maize, beans and hay. He testified that he has utilized the land for 20 years and that in 2020, the 1st Defendant came with a title deed and claimed that he was the owner of the suit land.



7. It was his testimony that he never complained to the company since the directors were pro-Defendants. He urged the court to enter judgment in his favour, compensation for his spoilt hay and refund of the monies paid.
8. On cross examination by Kairu for the Defendants PW1 denied having lived in Solai. He stated that he bought shares in 2003 where he dealt with Macharia as the director. He further stated that he bought 120 shares for Kshs. 240,000 paid in cash and was given a share certificate on 6/5/2004. He stated that the receipt was for both shares and the land. He admitted that he did not have records which confirmed that he ploughed the land since the locals did not give receipts.
9. He confirmed that he was not a member of the company and added that some of the plots were repossessed, plot number 99 being one of them. He stated that plot No. 99 was not amongst the unallocated plots since as at August 1986, the said plot was not there. He added that the owner of plot No. 99 had moved to plot 88 which was vacant and that the 1st Defendant was the owner of plot No.99. He further stated that the 1st Defendant had shifted from plot No.99 to 88. PW1 stated that he was aware that the 1st Defendant had the title but added that he could not confirm how and where he got it. He admitted that he did not do a search.
10. He stated that he was given the share certificate by the company. He added that the land belonged to him. He further stated that he did a valuation but admitted that he did not have the valuer's authority as he only showed him the document. PW1 admitted that the title was not in his name. He stated that he waited for the company to issue them with titles but he confirmed that he was not certain of the same.
11. On re-examination, he stated that when he bought the land he was not a member but bought it through a relative. He further stated that he had a list of 1996 which was for parties that were not allocated. He stated that the land was not in the list of unallocated plots as it was awaiting allocation. He also stated that the defendants register did not show the years. PW1 went on to state that the 1st defendant was registered as the owner on 15th December, 2020. He added that the chief was not involved in issuance of the land.
12. Peter Macharia Njunge testified as PW2 where he produced his statement dated 23/9/2022 which was adopted as evidence in chief. He testified that between 1997 and 2015 he was a director and secretary of the 2nd Defendant company. He testified that between 1987-1997, the company was run by a provincial administrator. He added that before 1987, there were directors. It was his testimony that the shareholders had complained of the poor plot allocation. He further testified that there were grabbing of plots by directors and misuse of other properties. It was also his testimony that the Omollo report was done in 1987 to 1988 but the same was not implemented. He testified that they repossessed the plots that were illegally acquired by the directors.
13. He explained that they called for re-registration of documents in 1997 and also compiled a register. He went on to explain that they discovered vacant plots such as plot number 88. It was his testimony that before they sold the plot, the 1st Defendant went to their office requesting to have plot 99 exchanged with plot 88 which they did. He testified that plot 88 was consolidated with plot 73 and 75 and became plot number 73. He further testified that plot number 99 was vacant and the board sold it to the Plaintiff. He testified that it became vacant after they exchanged with the 1st Defendant who owned other plots such as 73, 75, and 88.
14. He testified that there was no registration surrendered to the Registrar of lands. He added that the Omollo Committee handed over a new register to the provincial Commissioner. He testified that Plot 99 was in the 1st Defendant's name.



15. Upon cross examination by Kairu, he stated that he was the Director from 1997 to 2015 then later secretary to the Board. He confirmed that he had no evidence confirming that he was a director. He stated that the company operated from 1975 and that he was a member from 1974 to date. He further stated that his plots were 334 and 300. He confirmed that he had never seen the Omollo register. He added that they did not institute a suit because there was a court order barring Omolo from implementing Omolo recommendation.
16. He stated that the re-registration was in respect of all the plots after which they compiled a member register. He confirmed that he did not have a copy and that surrender has not been done. He further confirmed that the registration exercise revealed un-allocated plots including plot 88. PW2 stated that the 1st Defendant exchanged plot number 88 with 99. He confirmed that he had no record of the same. He stated that directors could alter the register at the land's office. He further stated that titles were to be issued through a register.
17. On reexamination, he stated that he was a director from 1997-2012. He added that the CR12 was for 2012-2014 which time he was not a director. He stated that he never implemented the Omolo report since the previous directors moved to court and barred the implementation. He further stated that re-registration was done so as to compile a register. He added that there was no record for consolidation. He stated that the map was with the 2nd defendant. He further stated that he was not in agreement with the Omollo register as it was too old thus did not reflect the current status. He faulted use of the old register being and added that the current directors ought to surrender the register.
18. David Ntara Arimi a licensed valuer testified as PW3. He testified that he did a valuation report listed at page 67–75 of the trial bundle. He testified that he did a valuation in respect of plot number 99 in May 2022. He further testified that the land had grass that had been harvested. It was his testimony that they relied on market analysis and that they looked at the general area. He testified that they used a value rate of Kshs500,000 per acre. He added that the property was 4 acres. He also testified that there was a google extract which showed the correct coordinate position of the property.
19. Upon cross examination by Kariu, he stated that he had been instructed to do a survey by the Plaintiff and was supplied with a share certificate of 120 shares. He confirmed that it did not have the property's name and added that he did not conduct a search since it was not a registered title. He stated that he relied on the information given by the Plaintiff. He stated that the methodology adopted was comparison and that he gave an open market value. He further stated that the values were not appropriate and that the mortgage value was for the banks. He stated that he took photos but there were no structural improvements on the land. He stated that he was an experienced valuer of 40 years but added that he had not annexed his license, gazette notice and practice certificate.
20. On reexamination, PW3 stated that the absence of a title could not change the value of a property. He stated that he only found agricultural activities and that the property was fenced. He further stated that they were not required to attach the methodology but he could supply the same.
21. That marked the close of the Plaintiff's case.

1st Defendant's Case

22. Michael Maina Kariithi testified as DW1 where his statement dated 26/10/2023 was adopted as evidence in chief. His list of documents was also adopted as evidence is chief and marked as follows:
DEX 1- Title Deed
DEX2- Copy of Search



DEX3- Voting Cards
DEX4- Share Certificates
DEX5- Payment receipt
DEX6- Authority to plead
DEX7- Authority from the chief
DEX8- Extract from Companies Register
DEX9- CR12
DEX10- Chief's letter

23. He testified that the Plaintiff represented him in 2021 and added that he never issued the land to the Plaintiff. He further testified that he owned a total of 24 acres which he lost possession when the court issued an order in 2021. It was his testimony that he took possession in 1986 and cultivated. He added that he was in occupation up to 2010. He testified that Peter Macharia owned plot number 88. He further testified that no. 88 is owned by John Kingori and added that they never swapped our lands. He also testified that he never asked for the land to be consolidated. It was his testimony that they have individual titles.
24. Upon cross examination by Chepkulul for the Plaintiff, DW1 stated that in 2021 he leased the land to neighbors. He confirmed that he did not keep any records. He stated that he bought the property in 1973 and the shares in 1974. He further stated that he was shown plot 99 in 1986 and they started paying in 1974. He stated that he was issued with the title in 2020 and explained that he did not process the title since the company had a long process. He stated that in 2023 the company sold properties and not shares. He also stated that they did not exchange plot 88 and 99. DW1 stated that some plots were irregularly allocated, others were vacant while some were unregistered. He stated that the report showed that 55 members were not registered and that Plot No. 88 was also unregistered but belonged to the company.
25. Upon cross-examination by Chepkurui for the interested party, DW1 stated that he was allocated the land by the company and that he had the title. He stated that the due procedure was followed.
26. On reexamination, he stated that the company was formed in 1974 where he bought 6 shares. He further stated that in 1986, the land was subdivided into shares and that was how he came to own it. He was referred to page 64 of the bundle where he confirmed that it was not signed. He added that it did not show the person who prepared the document. He stated that plot No. 99 was not vacant.

Interested Party's case

27. Collins Liyai Aliela the Land Registrar, Nakuru testified that he knew one R. G. Kubai who was his predecessor. He testified that he joined Nakuru in 2021 and added that the signature on the statement belonged to Kubai. He produced a letter dated 25/11/2022 which the court adopted as the interested party's statement. He testified that from the original register the suit parcel of land is parcel number 99. He further testified that the name register had one name Kinuthia. He added that there was a green card and that the parcel of land was Solai/Arutani Block 1/(NPA). He testified that the property has no encumbrance. It was his testimony that the 1st Defendant was the current proprietor and that he obtained it legally.
28. Upon cross examination by Kairu for the Plaintiff, he stated that the register was for the 2nd Defendant which came to the register after land adjudication. He stated that the register was opened on



24/12/1992 and added that the alterations were counter signed. He stated that plot 99 was not altered. He further stated that lands office was not allowed to do any amendments. He confirmed that they did not have another register. He stated that there was a court matter that challenged the titles but that the case was dismissed.

29. On cross-examination by Chepkulul, he stated that there was no encumbrance on the matter. He stated that the members were 1575 and added that the register was opened in 1982. He further stated that regulation was based on readiness of a member. He also stated that there was no subdivision and added that they issued titles based on RIM.
30. Upon re-examination, he stated that there was no encumbrance on the title.

2nd Defendant's case

31. Eliud Samuel Maina Waweru testified as DW1 where his statement dated 26/10/2023 was adopted as evidence in chief. He relied on the list of documents as produced by the 1st Defendant. He testified that he was the chair of the 2nd Defendant company which he registered in 1974. It was his testimony that the register was tendered upon the land adjudication in 1988. He testified that Plot number 99 belonged to the 1st Defendant and added that the Plaintiff's records is not in the register. He testified that the company issued shares in 1974 up to 1977. He further testified that it was not possible to buy shares in 2003. It was his testimony that 1 share was equivalent 20 shillings. He added that the Plaintiff's receipt and constitution were not in the registry. He also testified that he was not a director in 2003. He testified that there were no records in the company that the Plaintiff bought land. He added that the company records were not the permanent. He testified that the 1st Defendant acquired parcel No. 99 among other plots. He further testified that the register showed no swapping of plots. He went on to testify that Plot No. 88 belonged to John Maina Kithinji. He testified that they were cleared 2012 and that another group of Directors took over the company. He added that Plot 99 and 88 were not affected. He testified that Benjamin Komu was a shareholder and not a director. He further testified that that the company was established in 1974 and added that it could not compensate because a transaction was done fraudulently.
32. Upon cross examination by Ms Chepkulul for the Plaintiff, he stated that he was a director in 1974 when the company was established. He stated that one acquired the property by paying Kshs.2,400. He confirmed that the Omolo report resulted from many claims of irregularities including members who were wrongly allocated land. He further confirmed that he was a director from 1977-1979 and added that the farm was subdivided later. He also confirmed that the actual acreage of the company was 7104 (7104) acres and that they were given authority to sell 4 acres per share. He went on to state that the total number of members was about 1000. He confirmed that there were irregularities as the Directors were told to pay Kshs. 40,000 per plot allocated to the retirees. He further confirmed that the Omolo Report prepared in 1988 showed that the entire land had been allocated to members. He confirmed that there was no more land as it was subdivided and given to members. He stated that they surrendered the mother title to lands Nairobi in 1992. He further stated that the title deeds were issued in Nakuru. He confirmed that Peter Macharia was a director and a member. He explained that if a receipt was issued in the name of the company, it depended on how it is issued to make the company liable. He stated that the person who issued the receipt was a fraud as it was done by individuals and not the company. He confirmed that the Omolo committee called for a re-registration and some members did not turn up. He further confirmed that the registry could not issue a title just by reading the register as it was necessary to consult the office. He stated that the company was not liable.
33. On reexamination, the witness was referred to Page 28 of DEX5 where he stated that shares were sold in 1997. He stated that the mother titles were individually surrendered by the founder directors in



1992 by Josephat Murethi and James Zacharia Theuri (See DEX7). He added that the actions by other Directors were null and void. He stated that Plot No. 99 was not available for sale. He further stated that the company had not sold shares. He stated that when a member bought shares, he was heard and a solution given. He stated that the Plaintiff never appealed before the company.

34. That marked the close of the Defendants' case.

Submissions

35. Counsel for the Plaintiff filed his submissions dated 7th May, 2024 on 14th May, 2024. He gave a summary of the evidence identified three issues for determination. First issue was whether the sale of the suit property by the 2nd Defendant to the Plaintiff was lawful. He submitted in the affirmative and relied on the share certificate at page 65 and the company's resolution at page 59 of the Plaintiff's trial bundle. He submitted that in 2004, the Plaintiff bought 120 shares from the 2nd Defendant which sale was authorized by a resolution of the members on 26th April, 2003. Counsel further submitted that from the Omolo report, the 2nd Defendant repossessed over 80 plots. It was his submission that the 2nd Defendant company directors were authorized to repossess the members plots that had not been re-registered and to sell some of the company plots including plot 99.
36. He submitted that vide minute 88/3(e)(vi) of the special general meeting, the company allowed repossession of the said plots and also a resolution by the members to sell the plots, the Plaintiff acquired the suit land. Counsel further submitted that the Plaintiff bought plot 99 for Kshs. 240,000 from the 2nd Defendant and was issued with a share certificate. He went on to submit that the Plaintiff took possession and developed the plot until 2021 when the 1st Defendant interfered with his possession. He submitted that the resolutions flowing from the meetings of 25/6/1988, 26/04/2003 and 23/11/2004 were valid and binding hence the sale of the suit property was lawful. He added that the said resolution was never challenged or reversed making the said transaction enforceable.
37. The second issue was whether the sale by the 2nd Defendant to the Plaintiff created a constructive trust in favour of the Plaintiff. Counsel submitted that the Plaintiff became a shareholder of the company by virtue of the purchase of 120 shares equivalent to 4 acres. He further submitted that the said shares constituted property under article 260 of *the constitution*. Counsel relied on the Supreme Court case in *Shah & 7 Others V Mombasa Bricks & Tiles Limited & 5 Others*. It was counsel's submission that the sale of the 120 shares by the 2nd Defendant to the Plaintiff and in particular plot 99 and knowing that the said property had been allocated to the Plaintiff created a constructive trust in favour of the Plaintiff. He submitted that by virtue of owning shares in the 2nd Defendant company, he became an owner of the assets as evidenced by the share certificate issued on 6th May, 2004 produced as PEX 7 and 8. He added that a constructive trust could be imported into a shareholding of a company. It was his submission that the Plaintiff was made to believe that upon buying shares in the 2nd Defendant, he would become an owner of the suit land and that created a constructive trust by conduct of the parties. Counsel further relied on the case in *Salomon & Salomon & Co. Ltd V Salomon [1897] A.C. 22 H.L* and submitted that the 2nd Defendant was a legal separate entity from that of its shareholders and the Plaintiff having bought shares as shareholder, he acquired rights in this case, allocation of the suit property.
38. The final issue was whether the Plaintiff is entitled to the prayers as sought. Counsel submitted that the 2nd Defendant is a separate entity from its members and therefore the directors cannot be liable for the acts or contracts entered into by the said company. He cited the case in *Kolaba Enterprises Ltd V Shamsudin Hussein Varvani & Ano [2014] eKLR*. He further submitted that the 3rd to 7th Defendants are not liable to the actions purporting to bind the 2nd Defendant company. He submitted that the



documents issued to the Plaintiff in respect of the purchase of the said shares were legal and thus he is entitled to the prayers as sought.

39. Counsel for the Defendants filed their submissions dated 29th March, 2024 on 12th April, 2024 where he identified four issues for determination. One, whether the affairs of the company are binding upon the Plaintiff. He submitted in the negative and relied on Section 105 of the *Companies Act*. Counsel argued that there was no material produced by the Plaintiff to confirm that he was a member of the company other than the share certificate. He submitted the members' register of a company was the only evidence that one was a member. Counsel further submitted that none of the mentioned plots for repossession and re-registration in the report belonged to the 1st Defendant. He added that the Plaintiff was not a member and he therefore had no interest in any of the unlawfully allocated land. It was his submission that plot 99 was registered in the 1st Defendant's name and therefore it did not fall in the category of vacant, unallocated or unregistered land. He submitted that the same was private land and the 2nd Defendant had no control of it. Counsel submitted that the Plaintiff failed to adduce any evidence that he was sold to plot 99. He added that the said plot being private land, it could not have been addressed in the company's meetings. He also submitted that the 1st Defendant was the only one who could have sold the plot to the Plaintiff which he denied having sold to anyone in his testimony. Counsel submitted that the Plaintiff failed to demonstrate how the company's affairs related to his claim of plot 99.
40. The second issue was whether the Plaintiff demonstrated merits in ownership of the land. Counsel submitted that the Plaintiff alleged that he purchased the suit property on 4th December, 2003 for Kshs. 240,000 and was issued with a receipt. He argued that the receipt indicated that he purchased plot no. 99 and not shares. Counsel further argued that the Plaintiff at the time was not a shareholder and added that he had not proved how he made the said payment. He submitted that the Plaintiff purported to have purchased the land before he became a shareholder. It was counsel's argument that the value of the purported shares was unknown since shares receipt was never produced. He submitted that the Plaintiff failed to demonstrate that he purchased the suit land from the 1st or 2nd Defendants or that he has been in active possession of the land. Counsel relied on Section 24 of the *Land Registration Act* and submitted that the 1st Defendant produced a title deed and official search confirming that he was the owner. Counsel cited the case *Ashit Patani & 2 Others V Dhirajlal V Patani & 2 Others* [2014] eKLR.
41. The third issue is whether the company is obligated to compensate the Plaintiff. Counsel while submitting in the negative argued that that the 3rd Defendant testified that the Plaintiff was never a member of the 2nd Defendant. He further submitted that the member's register as lodged at the lands office for production of title did not bear the Plaintiff's name. Counsel submitted that the Plaintiff's only claim was that he deposited the purchase sum in the company's bank but he failed to produce any deposit slip to prove the same. He also submitted that PW2 did not produce any company's record to confirm that the register was amended in 2004 to include the Plaintiff as a member or purchaser of plot 99. He added that the Plaintiff was never issued with a title deed for the suit land. Counsel argued that the alleged history of plot 99 at page 64 of the Plaintiff's trial bundle did not bear the company's official letter head or signature from the directors. He also submitted that it was alleged that the plot was sold on 14/12/2004 yet the receipt was dated 4/12/2003.
42. It was counsel's submission that PW3 the land valuer did not produce any document to confirm that he was a qualified land valuer. He also submitted that he did not produce a Kenya Gazette for the publication of licensed valuers in the year 2021-2022. He went on to submit that the 1st Defendant produced a certified copy of the map that showed that his land had never been consolidated. Counsel submitted that the Plaintiff failed to establish that he purchased land from the company thus his claim



for compensation ought to fail. He cited the Court of Appeal case in *Wambui V Mwangi & 3 Others (civil appeal 465 of 2019)* 2021 KESA 144 KLR.

43. On the final issue of costs, counsel relied on Section 27 of the *Civil Procedure Act* and urged the court to grant them costs of the suit.

Analysis and Determination

44. This court has carefully considered the pleadings and the evidence on record and is of the view that the issues for determination are:
- a. Who is the lawful owner of Solai/Arutani Block 1/99 NPA the suit property herein?
 - b. Whether the Plaintiff should be granted the prayers sought.
 - c. Whether the Plaintiff ought to be compensated by the 2nd-7th Defendants payment equivalent to the current market price of the suit property.
 - d. Who should bear the costs of this suit.
45. On the first issue for determination, it was the Plaintiff's case that he bought 120 shares from the 2nd Defendant company which was linked to allocation of the suit property herein. PW1 testified that he paid Kshs. 240,000 in cash and was subsequently issued with a share certificate on 6th May, 2004. It was the Plaintiff's case that the sale of the suit property was authorized by a resolution of the members of the 2nd Defendant company passed on 26th April, 2003. He also confirmed that he bought the said plot after re-registration and consolidation of the register but admitted that he did not have records to prove the same. It was also his evidence that he bought the suit before he became a member of the company and that he bought it through a relative. It was also the Plaintiff's submission that he deposited the purchase price to the 2nd Defendant vide bank. The Plaintiff called PW2 who upon cross examination confirmed that he did not have evidence to prove that he was a director 1997 to 2015. He also confirmed that he did not have records to prove that the alleged re-registration took place. PW3 on the other hand confirmed that the values were not appropriate as the same was for the banks. He admitted that he had not annexed his license, gazette notice and practice certificate.
46. The 1st Defendant on the other hand testified that he bought the property in 1973 and the shares in 1974 and was issued with the title in 2020. He confirmed that he had leased the property to his neighbors and added that he had never sold the suit property to the Plaintiff. He produced a copy of the title deed issued to him on 15th December, 2020, copy of official search issued on 15th July, 2021 and a copy of the certificate of 120 shares issued by the 2nd Defendant on 11th July, 1979.
47. The interested party confirmed that the suit land was lawfully issued to the 1st Defendant and added that the member register for the 2nd Defendant was opened on 24/12/1992. He confirmed that the original register of the suit parcel of land was parcel number 99 and that any amendments on the register were countersigned. He produced a copy of the green card which confirmed that the suit land belonged to the 1st Defendant. The members register also lists the 1st Defendant under plot 99 the suit property herein.
48. The Eliud Maina a director of 2nd Defendant company as evidenced by the CR12 confirmed that the Omolo Report prepared in 1988 showed that the entire land had been allocated to members. He also confirmed that there was no more land as it had been and given to members.



49. Section 24(a) of the *Land Registration Act* provides that:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

50. Section 26(1) of the *Land Registration Act* further provides that:

“...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
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” [Emphasis mine]

51. In the case of *Kinyanjui Kamau –vs George Kamau* [2015] eKLR expressed itself as follows; -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo –vs- Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in *Criminal Cases...*”

52. In the instant case, the Plaintiff alleged fraud on the part of the Defendants and the interested party, however, he failed to adduce any evidence to proving the same. It is this court’s view that the Plaintiff’s testimony was clearly marred with inconsistencies. The 1st Defendant on the other hand convinced this court on how he acquired the suit land. In addition, the Land Registrar corroborated this by confirming that the 1st Defendant was the lawful owner of the suit property having acquired it lawfully. In addition, the Plaintiff never challenged the 1st Defendant’s title.

53. From the overall evidence and testimonies by both parties, this court finds that the Plaintiff failed to prove his case to the required balance of probabilities. I therefore find that the 1st Defendant is indeed the lawful owner of the suit property having obtained it legally and procedurally.

54. On the second issue for determination, this court having found that the Plaintiff failed to prove his case to the required standard, he is therefore not entitled to the prayers as sought in his Amended Plaint dated 23rd September, 2022.

55. The Plaintiff in the alternative also sought for compensation for the monies paid to the 2nd Defendant for purchase of the suit property. However, this court shall not issue the same at this juncture but the Plaintiff is at liberty to pursue the said claim against the 2nd Defendant in a separate suit.



56. In the upshot, having found that the Plaintiff failed to prove his claim to the required standard of probabilities, the Plaintiff's case is hereby dismissed and judgment is hereby entered in favour of the Defendants in the following terms:

- a. A declaration that the 1st Defendant is the lawful proprietor Plot No. 99 (now Solai/Arutani Block 1/99 (NPA).
- b. The Plaintiff shall bear the costs of the suit.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY ON THE 31ST JULY 2024.

A.O.OMBWAYO

JUDGE

