



**Waweru v Njuguna (Sued as legal representative of the Estate of George Gikonyo Kamau (Deceased) & 4 others (Environment & Land Case 394 of 2017) [2024] KEELC 5818 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 394 OF 2017**

**OA ANGOTE, J  
JULY 31, 2024**

**BETWEEN**

**GEOFFREY THIONG’O WAWERU ..... PLAINTIFF**

**AND**

**KEZIAH WAHU NJUGUNA (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE GIKONYO KAMAU (DECEASED) ..... 1<sup>ST</sup> DEFENDANT  
ROSEMARY WAMBUI GICHURU ..... 2<sup>ND</sup> DEFENDANT  
JOSEPH GIKONYO KAGWI ..... 3<sup>RD</sup> DEFENDANT  
LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Further Amended Plaint dated 6<sup>th</sup> December, 2021, the Plaintiff seeks as against the Defendants, jointly and severally, the following reliefs;
  - i. A declaration be and is hereby issued that the Plaintiff is the rightful legal and beneficial owner of all that parcel of land comprising by measurement approximately 0.25 Acres that ought to have been excised from initially Title Number Dagoretti/Riruta/2243 or subsequently from Title Number Dagoretti/Riruta/4472, and is now currently comprised in 2 parcels of land known as Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 each measuring approximately 0.07Hectares(0.173 Acres) (collectively 0.346 Acres).
  - ii. A declaration be and is hereby issued that the Title Deed issued on the 17<sup>th</sup> May, 2016 in respect of Title Number Dagoretti/Riruta/6629 to George Gikonyo Kamau and Rosemary



Wambui of P.O Box 30 Kikuyu is null and void ab initio and liable for cancellation by the Land Registrar.

- iii. A declaration be and is hereby issued that the Title Deed issued on the 17<sup>th</sup> May, 2016 in respect of Title Number Dagoretti/Riruta/6630 to George Gikonyo Kamau and Rosemary Wambui of P.O Box 30 Kikuyu is null and void ab initio and liable for cancellation by the Land Registrar.
- iv. A mandatory order be and is hereby issued directing the Land Registrar of the Nairobi District Land Registry or other appropriate Registrar to forthwith cancel in the Land Register, the registrations of Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 in the names of George Gikonyo Kamau and Rosemary Wambui of P.O Box 30 Kikuyu, and to effect all consequential rectifications of the Register thereof.
- v. A mandatory order be and is hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to within 60 days of grant of this Order or such other reasonable time as this Honourable Court may limit, and at their sole costs and expenses, prepare or cause to be prepared, and to execute plans and other necessary documents, make applications for and obtain all appropriate consents, and carry out an amalgamation and sub-division in amendment to the Registry Index Map Sheet Number 14 to create a portion of land measuring 0.25 Acres out of the two Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 and to prepare or cause to be prepared, execute and cause to be registered a Transfer over the property so created measuring 0.25 Acres in favour of the Plaintiff and to cause the issuance of title to the Plaintiff.
- vi. In the event of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants default in complying with Order(5)above, an order be and is hereby issued instructing the Deputy Registrar of the Environment and Land Court at Nairobi to execute all applications for consent, transfers and other conveyance instruments as shall be necessary to excise a portion measuring 0.25 Acres out of Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 and instructing the 4<sup>th</sup> Defendant to register and issue title over the property so created in favour of the Plaintiff, and all the costs and expenses thereof be recoverable from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.
- vii. An order of permanent injunction be and is hereby issued to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, either by themselves, their agents, servants or representatives or any person whatsoever claiming under of through each of them from interfering with the quiet possession and enjoyment by the Plaintiff either by himself, his agents, servants, employees or representatives of the portion of land measuring 0.25 Acres that shall be created out of Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 registered and transferred to the Plaintiff pursuant to these Court Orders.
- viii. An award of aggravated damages be granted in favour of the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as compensation for the fraudulent acquisition of title over, and illegal trespass into the Plaintiffs' suit property and that this Honourable Court assesses and determines the quantum thereof.
- ix. Costs of this suit be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.
- x. Interests on the aggravated damages and costs of this suit be awarded to the Plaintiff as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally computed at Court rates from the date of entry of Judgement until payment in full.



2. It is the Plaintiff's case that he is the legitimate proprietor of all that parcel of land measuring approximately 0.25 acres being a portion of land previously identified as plot E in the amended approved sub-division plan registration no 5064 approved on 26<sup>th</sup> October, 1996 in respect of a parcel of land known as Dagoretti/Riruta/2243 and which 0.25 acres is presently comprised in two separate parcels of land known as Dagoretti/Riruta/ 6629 and 6630 (hereinafter the suit property) registered in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
3. According to the Plaintiff, he purchased the portion aforesaid from the late Kamau Waweru vide a written sale agreement dated 23<sup>rd</sup> May, 1998; that following the purchase, the late Kamau Waweru and his brother, applied for and obtained an LCB Consent to sub-divide Dagoretti/Riruta/2243 into 7 portions for purposes of transferring, among others, the suit property to him and that the consent was applied for on 3<sup>rd</sup> September, 1990 and obtained on 5<sup>th</sup> September, 1990 but the transfer was only executed in 2004.
4. The Plaintiff states that in addition to the consent, the deceased caused his name to be in the list of allottees of an initial 6 sub-plots marked plot A-F in the sub-division plan of the mother title Dagoretti/Riruta/2243 approved by the Nairobi City Council on the 15<sup>th</sup> June, 1988, and in the list of allottees of 7 sub-plots marked A-G in the amended sub-division plan of the same mother title, parcel 2243 approved on 26<sup>th</sup> October, 1996 by the City Council of Nairobi and on 5<sup>th</sup> February, 1997 by the then Commissioner of Lands.
5. The Plaintiff avers that recognizing his legal and beneficial entitlement to the suit portion, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, in their capacity as Administrators of the Estate of Kamau Waweru (deceased) executed a transfer in his favour on 25<sup>th</sup> August, 2004; that they however erroneously cited the mother title Dagoretti/Riruta/2243 and not the land reference number assigned to the suit property after sub-division thereof and that the erroneous transfer was never acted upon.
6. He maintains that upon purchasing the suit property, he was given vacant possession thereof on or about 2<sup>nd</sup> November, 1989; that despite knowledge of his rights over the portion of 0.25 acres to be excised from Dagoretti/Riruta/ 2243, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as Administrators of the deceased's estate, caused the sub-division of the aforesaid parcel into parcels 4468, 4469, 4470, 4471, 4472, 4473 and 4474, and further caused the transfer of his 0.25 acres in and to be excised from the new Title No Dagoretti/Riruta/4472 to themselves, to his exclusion.
7. The Plaintiff posits that despite the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' family members, Edward Wainaina Kamau, Grace Warigia Kantai, Hannah Wambui Waweru and Amos Waweru Kamau sent him an eviction notice on 27<sup>th</sup> April, 2017 claiming to be legitimate beneficiaries of the property as represented by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that the aforesaid notice further stated that the property had been sold.
8. The Plaintiff asserts in the Complaint that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' actions aforesaid amount to fraud as evinced by their failure to transfer to him the portion of land measuring 0.25 acres which ought to have been excised from Dagoretti/Riruta/2243 and later on 4472; causing further mutilation of parcel 4472 into parcels Dagoretti/Riruta 6628, 6629 and 6630 to disguise the true character of the suit property and defeat his claim and claiming ownership of parcels 6629 and 6630.
9. According to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are equally liable for trespass, the particulars of which include issuing or causing to be issued to him and his tenants a notice to vacate; carrying out, with the aid of family members and thugs an illegal, armed attack on the property on the night of 27<sup>th</sup>



- April, 2017 in an effort to enforce the notice; purporting to enter into an agreement for the sale of the suit property to the 3<sup>rd</sup> Defendant and failing to prepare, execute and register a transfer in his favour.
10. The Plaintiff urges that the 1<sup>st</sup>-3<sup>rd</sup> Defendants actions are malicious and intended to deprive him of the suit property and that unless restrained, the 1<sup>st</sup>-3<sup>rd</sup> Defendants will continue in their fraud and trespass and that the suit is merited.
  11. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Further Amended Defence and Counterclaim on 19<sup>th</sup> April, 2022. They denied the assertions as set out in the Plaintiff aforesaid stating that Dagoretti/Riruta/2243 was the mother title and was registered in the name of Kamau Waweru(deceased) and that the aforesaid parcel was later on sub-divided into Dagoretti/Riruta/4468, 4469, 4470, 4471, 4472, 4473 and 4474 and registered in the name of the 1<sup>st</sup> Defendant (now deceased) and the 2<sup>nd</sup> Defendant as the Administrators of the Estate of Kamau Waweru Thiong'o.
  12. According to the Defendants, when the grant was confirmed, they transferred Dagoretti/Riruta/4468 to Leonard William Kungu; 4469 to the 2<sup>nd</sup> Defendant; 4470 to Onesmus Njoroge; 4471 to Gerald Waweru Kamau(deceased) which has since been sub-divided into 6294 and 6295 registered in the name of Francis Mburu Maiga; 4472 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and which has since been sub-divided into parcels 6628, 6629 and 6630; 4473 registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and has since been sub-divided into 6245, 6243 and 6244 and registered in the names of the 1<sup>st</sup> Defendant and Francis Mburu Muiguah and 4474 transferred to the Plaintiff.
  13. The Defendants aver that the property that was transferred to the Plaintiff is Dagoretti/Riruta 4474 and the same was done with the consent Kamau Waweru Thiong'o(deceased) who had sought and was granted consent to sub-divide and transfer the portion before he died and that they transferred the aforesaid parcel to the Plaintiff upon obtaining the certificate of confirmation of grant.
  14. According to the Defendants, parcel 4472 was legally sub-divided pursuant to the Court's determination in Succession Cause No 254 of 2005 in which it was directed that one Joseph Gikonyo Kinyua, the 3<sup>rd</sup> Defendant, purchases 0.22 acres therefrom; that the parcel was sub-divided into three portions being parcels 6628, 6629 and 6630 to enable the transfer of parcel 6628 to Joseph Gikonyo pursuant to the aforesaid Orders after he paid the requisite consideration and that he thereafter took possession of the parcel.
  15. The Defendants assert that the consent was clear that the Plaintiff was entitled to 0.5 acres of parcel 2243; that they have no knowledge of any application to the LCB by their father to transfer the whole of parcel 2243; that at no point did they execute any transfer in favour of the Plaintiff for parcel 2243; that any such purported transfer is a forgery and that as Administrators, they simply finished the transactions began by their father by executing transfers in accordance with the consents to sub-divide sought by, and granted to him.
  16. They maintain that the Plaintiff received the 0.5 acres due to him and has no other entitlement; that the Plaintiff has never been in possession of the property since 1989 as alleged but illegally took possession thereof in 2017 contrary to the Court orders of 20<sup>th</sup> December, 2017; that they did not issue any eviction notice as alleged and that the Plaintiff seeks to unjustly enrich himself.
  17. Vide their Counterclaim, premised on the same facts, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seek for the following orders:
    - i. An order of injunction do issue to refrain the Plaintiff by himself, assigns or agents from alienating, transferring, trespassing or causing nuisance or interfering with all that piece of land



registered in the name of George Gikonyo Kamau(deceased) and the 2<sup>nd</sup> Defendant known as Dagoretti/Riruta 6629,

- ii. An eviction order against the Plaintiff from Dagoretti/Riruta/6629 for vacant possession.
  - iii. An order directing Satelight Police Station to supervise the compliance of the orders granted.
  - iv. Costs of this suit; and
  - v. Any other remedy that this Honourable Court may deem fit to grant.
18. The 3<sup>rd</sup> Defendant did not participate in the proceedings.
19. The 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a joint statement of Defence on 6<sup>th</sup> December, 2017. Vide their Defence, they denied the Plaintiff's averions in their entirety asserting that they are strangers to the allegations that the Plaintiff is the lawful proprietor of the suit property and that they maliciously and deliberately frustrated the Plaintiff's proprietorship rights.

### **Hearing and Evidence**

20. The Plaintiff, PW1, adopted his witness statement dated 10<sup>th</sup> October, 2017 and supplementary statement dated 16<sup>th</sup> October, 2019 as his evidence in chief. He produced the bundle of documents dated 16<sup>th</sup> October, 2019 as PEXHB1.
21. It was his evidence vide the statement that sometime in the 1980's, he purchased a parcel of land from Kamau Waweru(deceased) measuring approximately 0.5 acres comprised in the Title Deed for Dagoretti/Riruta/2243 and that Kamau Waweru(deceased) sought for and obtained an LCB consent to enable him sub-divide parcel number 2243 aforesaid into 7 portions.
22. PW1 stated that in the process of the transfers, Kamau Waweru (deceased) discovered that a caution had been registered against the title and was unable to complete the transfers; that on 23<sup>rd</sup> May, 1988, he entered into a second agreement with Kamau Waweru for the purchase of the parcel of land identified as plot C as per the proposed sub-division plan approved on 8<sup>th</sup> April, 1975 and being approximately 0.25acres and that upon making the final payment on 2<sup>nd</sup> November, 1989, the beacons were pointed out to him and he was granted vacant possession of the parcel of land.
23. According to PW1, in 1990, Kamau Waweru(deceased) sought to renew his consent to sub-divide the land which was granted on 5<sup>th</sup> September, 1990; that the caution was however still registered against the title; that an amendment of the previously approved sub-division plan was prepared and approved on 5<sup>th</sup> February, 1997 in which the 0.50acres was marked as G whereas the 0.25 acres which he had purchased in 1989 was marked E.
24. He asserts that after the deceased's death, his family and purchasers of the various portions of the deceased property held a meeting in which it was agreed that each person entitled to a plot was to contribute Kshs 10,000 to enable completion of the sub-division; that he paid Kshs 20,000 being in respect of two plots; that his portion of 0.5 acres was eventually transferred to him vide a transfer dated 12<sup>th</sup> February, 2007 and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants however failed to cause a sub-division of parcel 4472 and transfer to him his 0.25 acre portion.
25. PW1 stated that sometime on 27<sup>th</sup> April, 2017, he and his tenants were issued with a notice to vacate the suit property and that on the same night, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' family members together with armed thugs carried out an attack demolishing the structures on the suit property.



26. On cross-examination, PW1 stated that he only has one sale agreement and the acreage is not indicated therein; that plot C was  $\frac{1}{4}$  acre and he is in Court in respect of plot E; that the two consents were in reference to the two parcels he purchased; that he did not join in the succession proceedings and was unaware of them when they were ongoing; that he is in possession of the suit property and that he is unaware of the Court Order of 20<sup>th</sup> December, 2017.
27. PW2 was Joseph Thiong'o Waweru, the Plaintiff's son. He adopted his witness statement dated 16<sup>th</sup> October, 2019 as his evidence in chief. It was his evidence that sometime in November, 1989, after his father finished paying for the portion of 0.25 acres in Dagoretti/Riruta/4472 purchased from the deceased, his father took possession of the property and built him a house to occupy as well as several semi-permanent mabati houses to be used as rentals.
28. It was the evidence of PW2 that him, together with his family, occupied the house from November, 1989 until June, 2014 when it was mysteriously burned down and that he moved to his father's other parcel 4474.
29. It was his assertion that during the deceased's lifetime and after his death, no one disputed his father's ownership of the suit property and that from 1989, until 2017 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' family members accompanied by armed thugs invaded the suit property, he had been in charge of collecting rent from the tenants in the mabati houses which rent together with the milk shop on the property would generate Kshs 40,000/= per month.
30. It was his evidence that sometime in April, 2017, the Defendants issued to his tenants a notice to vacate and wrote to his father a handwritten letter indicating their willingness to refund him for the sums he used in the purchase of the property; that after the armed attack of 2017, Edward Wainaina Kamau and Amos Waweru Kamau were charged with the attack at the Kibera Magistrates Court and that after the attack, he hired armed guards to protect the property but the tenants eventually moved out and none was willing to take up the houses leading to loss of income.
31. He conceded on cross-examination that the sale agreement relates to plot 2243 and does not make reference to 4472; that 4474 was purchased in 1980 but he has never seen the sale agreement; that his averment that he has lived on the suit property from November, 1989 to June, 2014 when the house was burned down is not supported by evidence and that there is no evidence to show that his father was ever registered as the owner of 4472.
32. PW3 was Sammy Matara, a licensed surveyor. It was his evidence that sometime in September, 2020, he received instructions to trace the history of the suit land and identify it on the ground.
33. He stated that in undertaking the assignment, he went to Survey of Kenya, purchased maps and took measurements; that the land was sub-divided in 2008 and he has given the histories of parcels 2243, and 4472 which arose from 2243 in his report; that he conducted a site visit and saw a fenced portion with mabati and old toilets; that he saw an old well and that the Plaintiff's portion of land is on parcel 6629 and 6630.
34. PW3 relied on the report he prepared dated 2<sup>nd</sup> February, 2021 as his evidence in chief and produced the same as PEXHB3.
35. DW1 was Keziah Wahu Njuguna, the 1<sup>st</sup> Defendant and wife to the late George Gikonyo. She adopted her witness statement dated 26<sup>th</sup> April, 2022 and produced into evidence the documents dated 12<sup>th</sup> July, 2017 as 1DEXHB1-8, documents dated 22<sup>nd</sup> October, 2019 as 1DEXB9 and documents dated 25<sup>th</sup> April, 2022 as 1DEXHB10-14.



36. It was her testimony that she is the legal representative of the Estate of George Gikonyo Kamau who died while the proceedings were ongoing and that the suit property is registered in the names of her deceased husband and the 2<sup>nd</sup> Defendant as Administrators and beneficiaries of the Estate of Kamau Waweru(deceased).
37. She stated that parcel 2243, the mother title, was registered in the name of Kamau Waweru(deceased) and later subdivided into parcels 4468, 4469, 4470, 4471,4472, 4473 and 4474 and that after the grant was confirmed, they transferred parcel number 4468 to Leonard William Kungu, 4469 to the 2<sup>nd</sup> Defendant; 4470 to Onesmus Njoroge and 4471 to Gerald Waweru since divided into 6294 and 6295 and registered in the names of Francis Maiguah.
38. Further, it was the evidence of DW1 that parcel number 4472 was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and has since been sub-divided into 6628, 6629 and 6630; that parcel number 4473 was registered in the names of George Gikonyo and Francis Maiguah and 4474 registered in the name of the Plaintiff, and that the transfer of parcel number 4474 to the Plaintiff, and other purchasers was in accordance with the consent earlier sought by the deceased.
39. She stated that the sub-division of parcel 4472 was done after it became the subject of proceedings in Succession Cause no 254 of 2003 in which the Court ordered that the parcel be sub-divided and ordered Joseph Gikonyo to purchase the same; that Joseph Gikonyo took possession of 6628 after purchasing the same; that the Plaintiff illegally took possession of the property in 2017 and continued to stay there contrary to the Court Orders of 20<sup>th</sup> December, 2017 and that the Plaintiff is attempting to unjustly enrich himself.
40. On cross-examination, she stated that since her and her husband got married, they have never lived on the suit property and no one stayed there before 2017; that she has heard that Edward and Amos, her brothers in law demolished the Plaintiff's house and were arrested but she is unsure of the same; that the case is ongoing and that the Plaintiff is her father in laws' step brother.
41. She stated that the Defendants have never been charged for invasion of the property and the same has not been reported; that the signature in the minutes of 2004 belong to her husband; that her late husband never told her that his signature was forged; that the notice to vacate was issued the same day Mungiki invaded the suit property; that the letter asking for the refund of the purchase price was not signed by her husband and that the Plaintiff constructed the buildings on the suit property.
42. DW2 was Rosemary Wambui Gichuru, the 2<sup>nd</sup> Defendant. She adopted her witness statement dated 20<sup>th</sup> May, 2022 as her evidence in chief and produced the documents dated 12<sup>th</sup> July, 2017, 8<sup>th</sup> January, 2018, 22<sup>nd</sup> October, 2019 and 25<sup>th</sup> April, 2022 as 2 DEXHB 1, 2, 3 and 4. It was her evidence that Keziah Wambui is her sister in law and George Gikonyo was her brother.
43. DW2 reiterated the evidence by DW1, to wit, that the suit property belonged to the deceased; that they undertook transfers of the parcels as per the consents sought and granted by the deceased and that they duly transferred to the Plaintiff parcel 4474 being the only parcel he was entitled to.
44. During cross-examination, she testified that she knows the Plaintiff; that her father sold to him ½ an acre only; that no one is on the suit parcel at the moment; that before the suit was filed, their father was on the land until 2017 and that they never held any meeting as alluded to in the minutes of 31<sup>st</sup> August, 2004.
45. DW2 stated that she is unaware of the transfer contained in the Plaintiff's bundle dated 25<sup>th</sup> August, 2004; that she doesn't know the Advocate known as Mbula; that she never instructed anyone to issue the eviction notice dated 27<sup>th</sup> April, 2017; that neither her name nor her signature is on the letter and



that she would not call Hannah and Grace, her sisters in law and Edward and Amos Kamau her brothers who were in Court to testify.

## Submissions

46. The Plaintiff's Counsel submitted that the Plaintiff has demonstrated that he purchased the suit property, made full payments, and subsequently took possession, none of which has been rebutted; that the sale met the threshold of section 3(3) of the Law of Contract Act in force at the time and that as stated by the Court in *Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 Others* [2015] eKLR, seisin is a root of title and possession is nine-tenths ownership.
47. According to Counsel, the Court in *Munyu Maina vs Hiram Gathitha Maina* [2013] eKLR was categorical that where a registered proprietor's root of title is under challenge, the registered proprietor must go beyond the instrument and prove the legality of its acquisition; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to do so in this case and that the transfer of the suit property to themselves was laden with latent fraud, and in breach of their statutory duty as Administrators.
48. Counsel submitted that contrary to their assertions, it is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who trespassed onto the suit property; that they failed to prove having ever been in occupation thereof and to disprove the Plaintiff's occupation since 1989; that having established trespass, the Plaintiff is entitled to damages for breach thereof as well as aggravated/exemplary damages and that considering the violent nature of the trespass, the sum of Kshs 8,000,000/= or more will suffice. Reliance in this respect was placed on the case of *Kenya Power & Lighting Company Ltd vs Ringera & 2 Others* [2022] KECA 104 (KLR).
49. It was submitted that further, guided by the Court of Appeal decision in *Stanley Mombo Amuti vs Kenya Anti-Corruption Commission* [2019] eKLR, the Court should draw an adverse inference from the failure of Edward Wainaina Kamau and Amos Waweru Kamau to testify and that as the Plaintiff established his case, the Defendants should bear the costs of the suit jointly and severally.
50. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the legitimate owners of the suit property by virtue of transmission as per Section 51(1) of the Land Registration Act; that the Plaintiff has not impugned their title on account of fraud as set out in Section 26 of the Land Registration Act and that as expressed by the Courts in *Enfil Limited vs Registrar of Title Mombasa & 2 Ors*[2014]eKLR and *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others*[2015]eKLR, fraud is serious allegation and must be specifically pleaded and proved.
51. Counsel urged that as the suit property was transferred pursuant to a succession process, the allegations of fraud should have been addressed as such under Section 76 of the Law of Succession Act and under Rule 41(3) of the Probate and Administration Rules and that consequently, this Court's jurisdiction has been wrongly invoked. Reliance was placed on the case of *In the Matter of the Estate of the Late George Gikundi-Deceased, Cause No 15 of 2018*.
52. Counsel maintained that the Plaintiff did not prove purchase of the portion of 0.25 acres claimed from parcels 6629 and d6630 there being no evidence in this respect; that the Plaintiff ought to have produced two agreements with respect to the sale of the two parcels and that there is further no evidence of the deceased having sought an LCB consent to transfer the 0.25 acre portion alleged.
53. Counsel asserts that in any event, the suit is statute barred the cause of action having arisen on 23<sup>rd</sup> May, 1989; that pursuant to Section 7 of the Limitation of Actions Act and as expressed by the Court in *Edward Moonge Lengusuranga vs James Lanaiyara & Another* [2019] eKLR, an action to recover land cannot be brought after the end of 12 years; that in the circumstances, time lapsed sometime in



2000 and that as affirmed by the Court in *Iga vs Makerere* [1972] E.A, a Plaintiff barred by limitation is a Plaintiff barred by law.

54. Counsel submitted that the Plaintiff did not produce any LCB Consent approving the sub-division for the transfer of the 0.25 acres and consequently, and guided by the decision in *Kiplagat Kotui vs Rose Jebor Kipngok* [2014] eKLR, the alleged transaction is void by reasons thereof.
55. The 4<sup>th</sup> and 5<sup>th</sup> Defendants' Counsel submitted that the Plaintiff has not established any wrong doing on the part of the 4<sup>th</sup> Defendant contrary to the dictates of Section 107 and 109 of the *Evidence Act*. Reliance was placed on the case of *Karugi & Another vs Kabiya & 3 Others*[1987]KLR 347 and *CMC Aviation Ltd vs Crusair Ltd*[1987]KLR 103.
56. Counsel submitted that in carrying out registration, the 4<sup>th</sup> Defendant relies on documents presented by parties as long as they meet the legal requirements and that in this respect, the 4<sup>th</sup> Defendant is guided by the provisions of Sections 37, 43, 44, 45 and 46 of the *Land Registration Act*, 2012.
57. It was submitted that as set out in Section 26 of the *Land Registration Act* and discussed by the Court in *Charles Karathe Kiarie & 2 Others vs Administrators of Estate of John Wallace Mathare & 5 Others* [2013] eKLR, the title of the registered proprietor can only be challenged on grounds of fraud or irregularity, none of which has been established.
58. The Plaintiff filed rejoinder submissions to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions on 7<sup>th</sup> June, 2024. Counsel submitted that section 51(1) of the *Land Act* cannot limit or oust this Court's jurisdiction, vested upon it under Articles 162(2) and 165(2)(b) of *the Constitution*, Section 13 of the *Environment and Land Court Act* and Section 101 of the *Land Registration Act*, to issue appropriate orders for cancellation of a land title and rectification of a land register where it is proven that the title is tainted with fraud and/or illegalities.
59. Counsel submitted that the Defendants' reliance on the provisions of the *Law of Succession Act*, the Probate and Administration Rules, and the cited authority of *In the Matter of the Estate of the Late George Gikundi (Deceased)* [2019] eKLR, is misguided as the dispute concerns ownership of the suit property, a matter within the sole mandate of this Court.
60. It was asserted that submissions on limitation of time are misguided, irrelevant and for summary rejection and that Order 2 rule 4 of the Civil Procedure Rules mandatorily requires a plea of limitation to be pleaded and cannot be raised for the first time in final submissions after close of trial. Reliance was placed on the Court of Appeal decisions of *Achola & Another vs Hongo & another* [2004] eKLR 462, and *Lulu Drycleaners Ltd & another vs Kenya Industrial Estates & Another* [2005] eKLR.
61. According to Counsel, like the question of limitation, the contention that there was non-compliance with provisions with respect to the LCB Consent ought to have been pleaded in the Defence; that contrary to the present circumstances, in the case of *Kiplagat Kotui vs Rose Jebor Kipngok* [2014]eKLR, the question of the lack of the LCB consent was pleaded in the Defence and that it was not up to the Plaintiff to anticipate all Defences the 1<sup>st</sup> and 2<sup>nd</sup> Defendants may belatedly raise in their final submissions and pre-empt them by pleading replies and adducing evidence during trial.

### **Analysis and Determination**

62. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;
  - i. Whether this Court has jurisdiction to entertain the suit?



- ii. Whether the Plaintiff's claim is statute barred?
- iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles to Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 should be cancelled, and a portion measuring 0.25 acres excised therefrom and registered in the Plaintiff's name?
- iv. What are the appropriate orders to issue?

**Whether this Court has jurisdiction to entertain the suit?**

63. It is trite that jurisdiction is everything. This was expressed by Nyarangi JA in the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1 as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

64. A Court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court of Kenya in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated as follows in this respect:

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

65. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the Plaintiff has wrongly invoked the jurisdiction of this Court. They assert that the present dispute is in the nature of a succession dispute falling within the jurisdiction of the probate division of the High Court. This is disputed by the Plaintiff who maintains that he is seeking for ownership of the suit property and that is only this Court that it is mandated to determine this question.

66. This Court's jurisdiction is found in Article 162(2) (b) of *the Constitution* of Kenya, 2010 as read with Section 13 of the *Environment and Land Court Act*. Article 162(2)(b) provides thus:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to – the environment and the use and occupation of, and title to, land.”

67. Pursuant to the constitutional dictate aforesaid, Parliament enacted the *Environment and Land Court Act*, 2011 which provides at Section 13 as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;



- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

68. On the other hand, Article 165(3) of [the Constitution](#) confers the High Court with jurisdiction and provides:

- “(3) Subject to clause (5), the High Court shall have-
- a. Unlimited original jurisdiction in criminal and civil matters.”

69. Within the High Court, the Probate Court’s jurisdiction is derived from Sections 2 and 47 of the [Law of Succession Act](#). Section 2, under the head ‘Application of the Act’ provides as follows:

- “(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”
- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

70. Whereas Section 47 of the same Act provides:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

71. The jurisdiction of the Environment and Land Court vis a vis the High Court with respect to matters touching on both land and succession was considered by Nyamweya J. in *Mbula Muoki Ndolo & Another vs Kenya Power and Lighting Company Limited* [2017] eKLR as follows:

“In *Salome Wambui Njau* (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru, ELC (2013) eKLR, I held that in matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of [the Constitution](#) and the High Court as the Succession Court under Section 47 of the [Law of Succession Act](#) would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”



72. Expounding on the same, the Court in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR had this to say:

“...The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

73. In the present case, the Plaintiff is asserting ownership of the suit property. In so doing, he is not claiming the suit property as a beneficiary of the deceased estate but as a legitimate proprietor having purchased the same. He seeks to impeach the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ title thereto pursuant to Section 26 of the *Land Registration Act*. The Court harbours no doubt that this is a question of title to land and this Court is well vested with jurisdiction to determine the same.



74. As aptly expressed in Joseph Kaberia Kumari vs Tony Mwenda Muthaura [2021]eKLR:

“What resonates from the Constitution, the relevant statutes and case law is that issues appertaining to use, occupation and title to land and environment are in the domain of an Environment and Land Court. Even when such issues arise in relation to the estate of a deceased person concerning third parties, they still remain in the domain of the aforementioned court and not the probate court.”

**Whether the Plaintiffs’ claim is statute barred?**

75. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have raised another jurisdictional issue alleging that the suit is statute barred. In response the Plaintiff urges the Court to disregard this assertion, the same having been first brought by way of submissions.

76. Having critically read the pleadings in this respect, to wit, the further Amended Defence and indeed the testimonies during trial, the Court notes that at no point did the 1<sup>st</sup> and 2<sup>nd</sup> Defendants allude to the Plaintiff’s claim being statute barred. This is, as submitted by the Plaintiff, a new issue raised by way of submissions, a practice abhorred by the Courts. In Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR the Court of Appeal expressed itself thus:

“Submissions cannot take the place of evidence...What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

77. The Courts have time and again emphasized that parties are bound by the pleadings and should be keen not to venture beyond the same as in so doing they contravene their opponents’ rights to be fully aware of and prepared to respond to the case against them thus breaching their right to a fair trial.

78. The Court of Appeal in the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus:

“It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

79. Further still, Order 2 Rule 4 of the Civil Procedure Rules specifically sets out the plea of limitation as one of those matters that must be specifically pleaded. Having been brought by way of submissions, the same is for disregarding.

80. Nonetheless, even if the Court were to consider this contention, it would not find that the suit is statute barred by virtue of Section 7 of the Limitation of Actions Act. The dispute herein is centered on the



issue of an alleged fraudulent subdivision of parcels 2243 and 4472 and registration of parcels 4472 and thereafter parcels 6629 and 6630 to the Plaintiff's exclusion.

81. The cause of action in this respect arose when the aforesaid parcels were registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff's exclusion, being in the years 2007 and 2014 respectively. Considering both dates as against the filing of the suit in 2017, 12 years had not lapsed.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles to Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 should be cancelled, and a portion measuring 0.25 acres excised therefrom and registered in the Plaintiff's name?**

82. The Plaintiff instituted this suit seeking inter-alia, a declaration that he is the legitimate proprietor of 0.25 acres comprised in Dagoretti/Riruta 6629 and 6630; declaration that the titles to Dagoretti/Riruta 6629 and 6630 are void and cancellation of the titles in respect thereof; mandatory injunction compelling rectification of the register and transfer to him of his portion of the suit properties; permanent injunction restraining interference with the aforesaid portion and aggravated damages for trespass.
83. It is the Plaintiff's case that he is the legitimate owner of all that parcel of land measuring approximately 0.25 acres previously identified as plot E in parcel Dagoretti/Riruta/2243 and which is presently comprised in parcels 6629 and 6630 having purchased the same from the deceased, George Waweru, vide a written sale agreement dated 25<sup>th</sup> May, 1988.
84. The Plaintiff maintains that pursuant to the sale, he was given vacant possession of the property which he has resided on since 1989; that despite knowledge of his ownership of the parcel aforesaid, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants caused the sub-division of parcel 2243 into 7 parcels in which his portion was comprised within parcel 4472 and a further sub-division of parcel 4472 into parcels 6629 and 6630 in which his portion is now comprised in and that the aforesaid was undertaken in a bid to deprive him of his portion of property.
85. The Plaintiff adduced into evidence copies of the Dagoretti LCB Consents dated 3<sup>rd</sup> February, 1988, and 5<sup>th</sup> September, 1990; Kikuyu and English versions of the sale agreement dated 23<sup>rd</sup> May, 1988; amended sub-division plan for parcel 2243 approved on 26<sup>th</sup> October, 1996; approved and registered RIM in respect to parcel 2243; handwritten minutes of the meeting held on 31<sup>st</sup> August, 2004; executed and unregistered transfer in respect of parcel 2243; executed and registered transfer in respect of parcel 4474 dated 12<sup>th</sup> February, 2007 and title deed in respect of parcel 4474 issued on 19<sup>th</sup> February, 2007.
86. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants maintain that the Plaintiff has no claim to the portion of 0.25 acres comprised in parcels Dagoretti/Riruta/6629 and 6630 as alleged and has trespassed thereon; that as Administrators of the Estate of the deceased, Kamau Waweru, they transferred the portions of the property as sub-divided by the deceased as per his intention and that in this respect they transferred Dagoretti/Riruta/4474 to the Plaintiff, being the parcel of land that he purchased.
87. Vide the Counterclaim, they seek to restrain the Plaintiff from interfering with parcel 6629 and have him evicted therefrom.
88. The Defendants adduced into evidence a copy of the green card; letter of consent; transfer; title numbers Dagoretti/Riruta 4468, 4469, 6243, 6244, 6245, 6294, 6295, 6628, 6619 and 6630; survey map; search and title for parcel 4474; transfer of parcel 6628; photos; charge sheet; certificate of confirmation of grant dated 3<sup>rd</sup> August, 2000; limited grant of letters of administration; sale agreement dated 4<sup>th</sup> April, 2017 and court orders dated 7<sup>th</sup> October, 2013 and 20<sup>th</sup> December, 2017.



89. The 3<sup>rd</sup> Defendant did not participate in the proceedings whereas the 4<sup>th</sup> and 5<sup>th</sup> Defendants maintain that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the lawful proprietors of the suit property and the registration of the suit parcels in their names was legitimate.
90. It is trite law he who alleges must prove. This is set out under Section 107(1)(2) of the [Evidence Act](#) which provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
91. And Sections 109 and 112 of the same Act which states:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
92. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows;
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.
- ...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:
- “Whereas under section 107 of the [Evidence Act](#), (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”
93. The evidence before the Court shows that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the registered proprietors of Dagoretti/Riruta/6629 and 6630 having been so registered on the 17<sup>th</sup> May, 2016 pursuant to the provisions of the [Land Registration Act](#). The provisions of Section 24(a) and 25(1) of the [Land Registration Act](#), 2012 outline the interests and rights of a registered proprietor. Section 24(a) provides as follows:
- “Subject to this Act—



- a. 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.”

94. Whereas Section 25 (1) under the heading rights of a proprietor provides as follows:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

95. Section 26(1) of the *Land Registration Act*, while affirming the principles of indefeasibility of title, also sets out the circumstances under which a party’s title is amenable to challenge. The Section provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 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.”

96. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

97. The Plaintiff herein seeks to impeach the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ title claiming that the title was acquired fraudulently. Black’s Law Dictionary defines fraud as:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”



98. The prevailing jurisprudence on fraud is that any allegations thereof must be pleaded and strictly proved. As expressed by the Court of Appeal in case of Kuria Kiarie & 2 Others vs Sammy Magera [2018]eKLR:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

99. The Plaintiff has indeed pleaded fraud. So has fraud been proved? In considering this question, the first port of call is a determination of whether indeed the Plaintiff has established that its proprietorship rights over the suit property which he alleges the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have fraudulently deprived him.
100. The Court has keenly considered the evidence in this regard. The Plaintiff has adduced into evidence a sale agreement dated 23<sup>rd</sup> May, 1988. The Agreement is in writing and duly executed by the parties thus meeting the pre-requisites of the pre 2001 Section 3(3) of the Law of Contract Act.
101. The agreement aforesaid makes reference to plot C from Plot no 1064 located in Dagoretti/Riruta/2243 being sold at the sum of Kshs 65,000. The Plaintiff established by way of the said agreement that the payment of the entire purchase price was made. The same is indicated in the sale agreement and vide the acknowledgement dated 2<sup>nd</sup> November, 1989.
102. As aforesaid, the sale agreement makes reference to plot C. The Plaintiff however alleges that there was an amendment to the original sub-division plan and subsequently, the plot meant for him became plot E. He has in this respect produced the amended sub-division plan approved on 26<sup>th</sup> October, 1996. This evidence was not disproved.
103. In support of the foregoing position, the Plaintiff also adduced into evidence the minutes of the meeting of 31<sup>st</sup> August, 2004 in which it was agreed under minute number 3 that. “Mr Thiong’o will afterwards be allocated a portion of plot E or plot number 4472. These same minutes identify the parcel 4474 as having been plot “G”.
104. It was DW2’s evidence that she was not aware of the aforesaid meeting and was not party to it. Indeed, she is not listed among the attendees. DW1 on the other hand essentially admitted to her husband’s participation in the meeting indicating that the signature was his and that he never complained to her that his signature had been forged.
105. Despite having been in Court, neither Edward Kamau nor Amos Waweru gave evidence to deny the existence of the said meeting. Further still, the Plaintiff has adduced into evidence a letter dated 27<sup>th</sup> April, 2017 in which he was informed that the “ Ngando Plot,” which is the suit plot, had been sold and they sought to refund him for the monies used in purchasing the same.
106. Lastly, the un-rebutted evidence of PW3, the survey report, shows that the Plaintiff’s 0.25 acre portion of land is now within parcels 6629 and 6630. Indeed, the evidence before the court shows that the



- Plaintiff took possession of the suit land in 1989 when the seller was still alive, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants kept possession of the land allocated to them by the deceased.
107. PW1 and PW2's testimony of having put up structures on the suit property is supported by evidence in the survey report. DW1 also adduced photographs of structures on the suit property conceding that the same were constructed by the Plaintiff. While maintaining that the Plaintiff took possession in 2017, DW1 conceded that there was a well and old mature trees on the property that could not have been planted in 2017.
  108. Overall, the Court finds that the Plaintiff has established on a prima facie basis that he purchased a portion of land measuring 0.25 acres being parcel E comprised within initially parcel 2243, then 4472 and thereafter 6629 and 6630 and has been in possession thereof.
  109. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants take the position that even if the Plaintiff purchased the property as alleged, the same is void there having been no LCB Consent approving the sub-division for the transfer of the 0.25 acres.
  110. The Plaintiff has produced into evidence two LCB consents dated 3<sup>rd</sup> February, 1988 and 5<sup>th</sup> September, 1990. Looking at the special considerations as set out in the consents, the 0.25 acres due to the Plaintiff is not indicated therein. There is therefore no evidence that consent was sought for the transfer of the aforesaid parcel. Does this then render the transaction void?
  111. The Court of Appeal in *Aliaza vs Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24 June 2022) (Judgment) rendering a detailed exposition on the effect of lack of an LCB consent on a transaction stated as follows:

“I recognize that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in *Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another and Kiplagat Kotut v Rose Jebor Kipngok* best capture the spirit of the *Land Control Act* when interpreted through the prism of *the Constitution* of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of *the Constitution*.

In *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati* [1987] eKLR, an obviously unhappy Apaloo JA captured the injustice visited on purchasers in interpreting situations such as presently before us as voiding the contract of sale of land on the basis that Land Control Board consent has not been obtained. In that case, the original owner of the land, one Ismael Machio, had sold it to the respondent, then he reneged on the sale on the basis that Land Control Board consent had not been obtained. He then sold it to the appellant and, together, they applied and obtained consent, and the land was transferred to the appellant. The High Court ruled in favour of the initial purchaser, and the appellant, the subsequent purchaser in whose name the land had been registered appealed. In his decision, Apaloo JA observed as follows: “In a contest of title between Machio and the respondent, if the latter sought to rely on the *Land Control Act* to defeat the sale he himself made, it would seem to me perfectly legitimate to reply that it would be contrary to good conscience for him to be permitted to do that. He ought not to be allowed to use an Act of parliament as a vehicle for fraud. If that argument could properly be made against Machio, it can, in like manner be made against the appellant, who as the judge found colluded with Machio to purchase the land.”



“.....In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.”

112. The Court need not say more. As was held in the above case, from the time the appellant entered the parcel of the suit land in 1989, or 2007 as claimed by the Defendants, a constructive trust in his favour was created in respect of the land. Such trust, became an overriding interest over the suit land. The failure on the part of the vendor to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the purchaser transfer the suit land into his name does not render the transaction void.
113. Having found that the Plaintiff purchased the suit property, and paid the purchase price, and was granted possession thereof, it follows that the deceased and subsequently his estate was holding the suit portion in trust for the Plaintiff.
114. Moving to whether there has been actual proof of fraud, the Court finds in the affirmative. The minutes of 31<sup>st</sup> August, 2004 make it clear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were fully aware of the Plaintiff's entitlement to a portion of parcel 4472. While they cannot be faulted for its sub-division, the same having been directed by the succession court, the registration of parcels 6629 and 6630 arising therefrom to themselves to the Plaintiff's exclusion was clearly fraudulent.
115. In view of the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Counterclaim fails.
116. The Court has found that the Plaintiff has established his entitlement to a portion of land measuring 0.25acres to be excised from parcels 6629 and 6630 and further that the registration of the titles thereof was fraudulent. This being so, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title is amenable to revocation and/or cancellation pursuant to the provisions of Section 80 of the *Land Registration Act*.
117. Similarly, the Plaintiff is entitled to exclusive rights over the portion so created and the claim for permanent injunction is in this respect merited.
118. Turning to the claim for aggravated damages, the nature thereof was discussed by the Court in *Francis Xavier Ole Kaparo vs the Standard & 3 others HCCC No. 1230 of 2004* (UR) who stated thus:

“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive.”
119. The Plaintiff seeks aggravated damages on account of the violent nature of their eviction from the suit property. However, this has not been established. Indeed, this court was informed that people who had been charged for alleged violent eviction of the Plaintiff from the suit property were acquitted by the trial court. The claim therefore fails.



120. In conclusion, the Court is satisfied that the Plaintiff has proved his case on a balance of probabilities and enters judgment in his favour in the following terms;
- a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Further Amended Counterclaim be and is hereby dismissed with costs.
  - b. A declaration be and is hereby issued that the Plaintiff is the rightful legal and beneficial owner of all that parcel of land comprising by measurement approximately 0.25 Acres that ought to be excised from Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630.
  - c. A mandatory order is hereby issued directed to the Land Registrar of the Nairobi District Land Registry or any other appropriate Registrar to forthwith cancel in the Land Register, the registrations of Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 in the names of George Gikonyo Kamau and Rosemary Wambui of and to effect all consequential rectifications of the Register thereof.
  - d. A mandatory order be and is hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to within 90 days of this Order and at their sole costs and expenses, prepare or cause to be prepared, and to execute plans and other necessary documents, make applications for and obtain all appropriate consents, and carry out an amalgamation and sub-division in amendment to the Registry Index Map Sheet Number 14 to create a portion of land measuring 0.25 Acres out of the two Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 and to prepare or cause to be prepared, execute and cause to be registered a Transfer over the property so created measuring 0.25 Acres in favour of the Plaintiff and to cause the issuance of title to the Plaintiff.
  - e. In the event of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants default in complying with Order(4)above within the 90 days, the Deputy Registrar of the Environment and Land Court at Nairobi shall execute all applications for consent, transfers and other conveyance instruments as shall be necessary to excise a portion measuring 0.25 Acres out of Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 to enable the 4<sup>th</sup> Defendant to register and issue the title over the property so created in favour of the Plaintiff, and all the costs and expenses thereof be recoverable from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.
  - f. An order of permanent injunction be and is hereby issued to restrain the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, either by themselves, their agents, servants or representatives or any person whatsoever claiming under or through each of them from interfering with the quiet possession and enjoyment by the Plaintiff either by himself, his agents, servants, employees or representatives of the portion of land measuring 0.25 Acres that shall be created out of Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 registered and transferred to the Plaintiff pursuant to these Court Orders.
  - g. Costs of this suit shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ichumba for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms Elphine for Raso for Plaintiff



Court Assistant- Tracy

