



Mugo “A” & another v Mukunya (Environment & Land Case 24 of 2022) [2024] KEELC 5759 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 24 OF 2022**

LN GACHERU, J

JULY 18, 2024

BETWEEN

MUKUNYA MUGO “A” 1ST PLAINTIFF

WIINIE WAMBUI 2ND PLAINTIFF

AND

ELIZABETH MUGURE MUKUNYA DEFENDANT

JUDGMENT

1. Vide a Complaint dated 4th June, 2019, the Plaintiffs herein brought this claim against the Defendant, and sought for Judgment against him in the following reliefs from the Court:
 1. A declaration that the Plaintiffs as Joint Trustees are the owners and proprietors jointly of the property described as Loc 1/Kiunyu/172, measuring approximately 3.41 Hectares, the same being held in trust of Mukunya Mugo “B” and that the Defendant’s occupation of the same is illegal and unlawful and therefore amounts to trespass.
 2. An eviction order to issue against Elizabeth Mugure Mukunya, the Defendant herein requiring her to unconditionally and forthwith vacate the suit premises at her own costs and in the alternative the OCS Kirwara Police station to conduct the said eviction.
 3. A permanent injunction to issue against Elizabeth Mugure Mukunya, the Defendant herein whether by herself, her servants, agents, representatives, employees and/or any other person deriving authority under her restraining her from entering, cultivating, occupying or interfering in any manner whatsoever with the property described as Loc 1/Kiunyu/172 situated at Kiunyu within Murang’a County.”
 4. An order for the payment of mesne profits from the sale of coffee beans.
 5. Costs of the suit and interests thereon”.



2. It is the Plaintiffs' claim that sometimes in December, 1999, the registered proprietor of land parcel no. Loc 1/Kiunyu/172 (the suit property) one Livingstone Mukunya Muriu (deceased), invited both Plaintiffs before the Gatanga Land Control Board, and lodged an application for the Land Control Board's consent, transferring the suit land to both Plaintiffs.
3. They alleged that the said application was approved by the Land Control Board on 16th December, 1999. However, the suit land is currently occupied by the Defendant who asserts that the same came into her possession as a gift from her father (deceased).
4. It was their further claim that the said parcel of land is the subject of proceedings in Milimani Succession Cause no.397 of 2005, wherein the Defendant has urged the Court to cancel the Plaintiffs' title to the suit property on allegation that it was obtained through fraud.
5. In the said suit at Milimani Succession Cause, the Plaintiffs described the Defendant as a trespasser onto the suit property as they are the registered owners. They further claimed that the deceased, Livingstone Mukunya, transferred the suit property to them inter vivos between 1999 and 2000, and that they completed the said transfer upon registration on 24th February, 2004. That after that transfer, they were issued with a title deed thereof on 7th February, 2005.
6. The Plaintiffs further contended that on 24th December, 2000, the registered owner, Livingstone Mukunya Muriu (deceased), executed a transfer of the suit property before Mbiyu Kamau Advocate ,based in Thika Town in favour of the Plaintiffs jointly. Further, that Livingstone Mukunya Muriu (deceased) thereafter handed over the original Title Deed in respect of the suit property together with the Transfer Form that he had executed in the Plaintiffs' favour to the Plaintiffs thereby, perfecting the gift inter vivos.
7. The Plaintiffs further alleged that Livingstone Mukunya Muriu (deceased), directed them not to register the transfer during his lifetime, so that he could enjoy the proceeds of the sale of his coffee from the suit property.
8. It was their further contention that they registered the transfer in respect of the suit land on 24th February, 2004, and made the requisite statutory payments on even date as evidenced by a copy of the said transfer which was annexed in their bundle of documents.
9. The Plaintiffs further contended that following the death of Livingstone Mukunya Muriu on 31st July, 2004, they initiated the process of acquisition of a Title Deed in respect of the suit property in their names, which process was completed on 7th February, 2005, when a new title was issued in the names of the Plaintiffs. They annexed a copy of the new title to suit land and Green Card thereof showing that they are the joint registered proprietors of the suit property.
10. The Defendant opposed this suit through his Statement of Defence and Counter-claim dated 26th May, 2021. It was her contention that she is the daughter of Livingstone Mukunya Muriu ,who died on 31st July, 2004. She alleged that her deceased father had distributed the suit land together with land parcel nos. LR. No. Loc 16/Kimandi-wanyaga/776 and Loc 16/Kimandi-wanyaga/778, to her son Mukunya Muriu "B".
11. Further, she claimed that her deceased father died before he could transfer the suit property, and the two other properties to the Defendant's son.
12. She refuted the Plaintiffs' claim that the suit land was transferred by the deceased in the Plaintiffs' favour, and contended that the suit property formed part of the estate of the deceased, and was



- incapable of being transferred in the absence of a grant being issued by the Court because the deceased died intestate.
13. The Defendant controverted the Plaintiffs' claim that the suit land was gifted to them by the deceased, and further contended that there were no directives issued by their deceased father to that effect. She claimed that their deceased father suffered from arthritis, and thus, was incapable of visiting the Land Control Board's office to execute a transfer of the suit property as claimed by the Plaintiffs herein.
 14. She accused the Plaintiffs of fraud by transferring the suit property to themselves in the absence of a confirmed grant in respect of the estate of their deceased father. It was her contention that the Plaintiffs failed to obtain the necessary Land Control Board Consent, for transfer of the suit property.
 15. It was her further contention that the Plaintiffs transferred the suit land without a confirmed grant and/or letters of administration, which action amounted to intermeddling with the estate of the deceased. She further accused the Plaintiffs of forgery in respect of the documents which were used to aid in the illegal and unlawful transfer of the suit property.
 16. The Defendant's further contended that she settled on the suit land on account of having been gifted the same by her late father, and that the suit land is the subject of proceedings in Milimani Succession Cause no.397 of 2005, which suit was filed by her to conclusively determine the rightful ownership of the suit property.
 17. It was her further claim that the issues raised in paragraph 18 of the Plaint have been rendered res judicata by the decision of the court issued on 28th March, 2019, which decision dismissed Murang'a ELC. No. 111 of 2017.
 18. Therefore, the Defendant urged the court to allow her Counter- claim dated 26th May 2021, in the following terms:
 - a. A declaration that the transfer of the property described as Loc 1/Kiunyu/172, to the Plaintiffs or any other person/persons thereof is null and void ab initio as the property is part and parcel of the estate of the Late Livingstone Mukunya Muriu.
 - b. Cancellation of the transfer of title no. Loc 1/Kiunyu/172, in favour of the Plaintiffs or any other person/persons thereof and the same to revert in the name of Livingstone Mukunya Muriu.
 - c. That the legal proprietorship of title no. Loc 1/Kiunyu/172, be determined in Succession Cause No..397 of 2005, where the property is listed as one of the properties in the estate of Livingstone Mukunya Muriu.
 - d. That the Defendant be and is hereby allowed to stay and [eke] her livelihood in the suit property title no. Loc 1/Kiunyu/172 until the successful hearing and determination of Succession Cause No..397 of 2005.
 19. The Plaintiffs opposed the Defendant's Counter- claim, by repeating the contents of their Plaint. Further, they reiterated that the suit land No. Loc 1/ Kiunyu/ 172, was not part of the deceased's estate, as the same was legally gifted to the named trustees, who are the Plaintiffs in this suit. Further, that upon the registration of the trustees as the registered owner, they were vested with the absolute ownership of the suit land.
 20. The Plaintiffs agreed with the Defendant's allegations that the deceased gave all his children and siblings individual parcels of land, and they asserted that the suit land was given to Mukunya Mugo B (Minor then), to be held in trust by the Plaintiffs herein.



21. It was their claim that the Defendant has been staying on the suit land with the permission of the Plaintiffs, as a licensee, or Muhoi. Further, that the Defendant has now abused the compassionate ground, and she should be ordered to vacate the suit land.
22. The Plaintiffs urged the court to dismiss the Defence and Counter-claim herein with costs, and further allow the Plaintiffs suit with costs.
23. The suit proceeded for hearing via viva voce evidence. The Plaintiffs gave evidence for themselves, and called one witness to support their case. On her part, the Defendant gave evidence for herself and called no witness.

Plaintiffs' Case

24. PW1; Mukunya Mugo A, adopted his witness statement dated 4th September 2019, as his evidence in chief. He also produced his list of documents as P. Exhibits 1-10
25. In his witness statement, he reiterated that the suit property Loc 1/Kiunyu/172, was initially registered in the name of Livingstone Mukunya Muriu, who was his grandfather.
26. Further that during his lifetime, their grandfather distributed his parcels of land to members of his family, including the suit land. That the grandfather transferred the gifted parcels of land to his nuclear family members, who were issued with title deeds.
27. Thereafter, their grandfather gifted his grandchildren, who were named after him, and he gave them parcels of land within Ndakaini, Gatanga and Kanderendu areas.
28. Further, he testified that the Defendant herein, Elizabeth Mugure, and her son Mukunya Mugure, refused to accept the two acres that her son had been gifted. Further, the Defendant sold her 4 acres that she had been gifted, and travelled to America for holiday.
29. It was his further evidence that their grandfather gifted the suit land Loc 1/ Kiunyu/ 172, to Mukunya Mugo B, who was a minor then. Further that his grandfather appointed the step mother Winnie Wambui, and himself as joint trustees for the minor.
30. That the said suit land had coffee planted thereon, and since his grandfather wanted to continue picking and selling the said coffee during his lifetime as a source of income, he only perfected this parcel of land as a gift by appearing before the Gatanga Land Control Board, accompanied by the grandchildren, the trustees for Mukunya Mugo B(minor), and obtained requisite consents to transfer to various parcels of land, apart from the suit land.
31. However, on 24th December 2000, their grandfather appeared before Mbiyu Kamau Advocate, and executed transfer documents for the suit land. He gave instructions that the actual transfer be done after his death. Indeed, the actual transfer was done on 7th February 2005, after the death of their grandfather on 31st December 2004.
32. He claimed that prior to the death of Livingstone Mukunya Muriu, their grandfather, the Defendant moved into the suit land. Their grandfather wanted to evict her and her two children, but he found out that she was living in abject poverty. She was allowed to stay on, but temporarily.
33. That despite demand and notices to move, the Defendant has refused to do so, and has declined to give vacant possession to the trustees of Mukunya Mugo B, so that they can exercise their right of ownership and possession.



34. Further, that the Defendant has illegally harvested coffee from the suit land for the last 14 years, and has refused to account the proceeds of sale. Therefore, the Defendant action is illegal, and unlawful, and amount to trespass.
35. On cross exam, he confirmed that he is called Mukunya Mugo, without A. He also confirmed that Mukunya Mugo B, is his step brother, and who is now a major, and this land parcel no. Loc 1/ Kiunyu/ 172, was gifted to him by their grandfather.
36. He confirmed that they attended the Land Control Board in 1999, and this parcel of land was transferred to them, by their grandfather, Livingstone Mukunya Muriu.
37. He further confirmed that his grandfather signed the application form for consent to transfer. Further, he denied being aware of any Will, that touched on the suit land, and that he has never seen any. He also stated that the title deed, over the suit land does not have his ID Card number on it.
38. He denied that the title deed herein is a forgery, although he did not have the booking form with him. He also confirmed that the transfer forms were signed in 1999, and that there are several cases over the suit land.
39. It was his evidence that even if ‘Mukunya Mugo B’, is now of age, the trusteeship has not been dissolved, and the title deed is still in his name, and that nothing prevents the land from being transferred to Mukunya Mugo B.
40. PW2; Winnie Wambui Mugo, the 2nd Plaintiff also adopted her witness statement dated as her evidence in chief.
41. In her witness statement, she stated that she got married in the Livingstone Mukunya’s home in 1982. She alleged that in 1997, her father in law summoned all the family members. She did not attend, but later on, she was told that her son, ‘Mukunya Mugo B’ was gifted land parcel No. Loc 1/ Kiunyu/ 172, by his grandfather Livingstone Mukunya Muriu, and she was nominated together with PW1, as trustees, to hold the said land in trust for Mukunya Mugo B, her son.
42. It was her further evidence that on 24th December 1999, she accompanied her husband and her father in law Livingstone Mukunya Muriu to Gatanga Land Control Board for hearing of several Applications for consents to transfer his parcel of land to various beneficiaries.
43. Further in December 2000, she accompanied her husband and her father in law, Livingstone Mukunya Muriu, to the office of Mbiyu Kamau Advocate, where her father in law executed the transfer of the suit land to his grandson ‘Mukunya Mugo B’.
44. Further, that her father in law handed over the original title deed of Loc 1/ Kiunyu/ 172, and the executed transfer documents to her husband and he instructed him not to effect the transfer of the said land whilst he was alive.
45. It was her evidence that as trustees, the Plaintiffs have served upon the Defendant demand and notices requiring her to give vacant possession to no avail. She urged the court to allow her claim.
46. On cross exam, she confirmed that she is a wife of Benson Mugo, who is a son of Livingstone Mukunya Muriu, and that the suit land got into her name as she is a trustee of her son ‘Mukunya Mugo B.’ She also confirmed that her Co Plaintiff, Mukunya Mugo A, is her step son.
47. She confirmed that when Livingstone Mukunya Muriu summoned his family in November 1997, he was ailing, and he gifted his children and grandchildren his various properties.



48. She reiterated that the said Livingstone Mukunya Muriu, attended the Land Control Board meeting at Gatanga on 24th December 1999, with the donees of the parcels of land donated to them. However, though she attended the meeting, she did not sign the Application form for consent.
49. She also confirmed that even if they appeared before Mbiyu Kamau Advocate, with her husband, Benson Mugo Mukunya, both of whom are still alive, they were not called as her witnesses.
50. She denied that the entire process herein is shrouded in forgery, perpetuated by herself and her husband. She also confirmed that there are other cases filed over the suit land. It was her evidence that her husband is an advocate, and that she has not attended the other cases.
51. She alleged that the Defendant was given another parcel of land, but she declined to take it, but she did not have any documents to support that allegation.
52. PW3; Joseph Karanja Kinyanjui, a Pastor of ACC&S Church at Ndakaini area also adopted his witness statement dated 4th June 2019, as his evidence in chief. It was his evidence that he knew the family of Livingstone Mukunya Muriu, very well. That the said Livingstone was a young brother to his father, John Kinyanjui Muriu, and he was close to him. Further, that the said Livingstone Mukunya Muriu (deceased), was also a member of his church, and a founder of ACC& S Ndakaini.
53. It was his evidence that during his youth, he lived with the family of Livingstone Mukunya Muriu, in land parcel No Loc 1/ Kiunyu/ 172, the suit land, and he is therefore close to all the children of the late Livingstone Mukunya, as they are his first cousins.
54. He also stated that on 27th November 1997, the late Livingstone summoned him at his home, as he wanted to distribute his properties. That a number of his immediate family members attended too.
55. He further stated that in respect to the suit land, Loc 1/Kiunyu/ 172, the late Livingstone gave it to 'Mukunya Mugo B' who was a minor then, and the said land was to be held in trust by his mother Winnie Wambui, and step brother 'Mukunya Mugo A' the Plaintiffs herein.
56. It was his further evidence that even if the late Livingstone Mukunya, gifted his grandson Mukunya Mugo B, the suit land, he wished to enjoy the fruits of the proceeds of coffee until his death. Therefore, he directed the transfer to be done after his death.
57. However, the said Livingstone appeared before the Gatanga Land Control Board, and obtained consent to transfer the said land parcel to 1st and 2nd Plaintiffs, as trustees for Mukunya Mugo B(minor). Thereafter, Livingstone went to the office of Mbiyu Kamau Advocate, at Thika township, and executed the transfer of the land to the said grandson.
58. On cross exam by counsel for the Defendant, he testified that the Will was prepared by the late Livingstone Mukunya Muriu, and he was invited for the meeting, wherein, the late Mukunya distributed his property to his children and grandchildren. That the suit land was referred in the Will, and the late Livingstone Mukunya, gifted the suit land to Mukunya Mugo B.

Defendant's Case

59. DW1; Elizabeth Mugure Mukunya, told the court that she lives on the suit land, being Loc / Kiunyu/172. She adopted her witness statement as her evidence in chief. She also produced her list of Documents as D.Exhibits1.



60. She denied that her father left any Will over his properties, especially in regard to the suit land. She also denied authoring the document referred to by the Plaintiffs. It was her evidence that she live on the suit land, and she utilizes the whole of it, and she practices subsistence farming.
61. In her Witness statement dated 26th May, 2021, the Defendant alleged that her son ‘Mukunya Muriu B’ was gifted land parcel nos. LR. NO. Loc 16/Kimandi-Wanyaga/776, and Loc 16/Kimandi-wanyaga/778, by his grandfather (the deceased), who died before the said parcels of land could be transferred to her son during the lifetime of the deceased.
62. The Defendant accused one Benson Mugo Mukunya, who is the husband to the 2nd Plaintiff of intermeddling with the estate of the deceased by secretly filing Thika Succession Cause NO.510 of 2004, wherein, the said Benson Mugo Mukunya deliberately omitted several properties from the list of the properties owned by the deceased with the intention of disposing off those properties and which include: the suit land, and land parcel Nos. LR. NO. Loc 16/Kimandi-Wanyaga/775; Loc 16/Kimandi-wanyaga/778; and, Mitubiri Wempa BLoc 1/5629.
63. The Defendant also stated that the said Benson Mugo Mukunya, commenced Milimani Succession Cause No.397 of 2005, wherein, he failed to give the court a proper account of the deceased’s estate in respect of the properties listed in Thika Succession Cause No.520 of 2004, which suit he had commenced. She prayed for the dismissal of the Plaintiffs’ suit arguing that the suit property was fraudulently transferred to the Plaintiffs.
64. Upon being cross examined by counsel for the Plaintiffs, she stated that she did not have evidence that the suit herein was res-judicata, and was part of the property named in the succession cause.
65. She denied that this land was ever given to any one by her father. She admitted that her father had many parcels of land, and that she was the last person to speak to her father before he died, and he did not tell her about a Will, but he informed her about of all his assets.
66. She claimed that when the said transactions were done, her father was ailing, and therefore the transactions are fraudulent. That she was the one who used to take her father to the bank and back, and he could not have gone to the Land Control Board, without her knowledge. That if there was any visit, it was fraudulent.
67. She accused her brother of intermeddling in the estate of her father. She claimed that she moved into the suit property in 2000, with the consent and knowledge of her father. Further, that she has been living and utilizing the suit land since then.
68. However, the said land was never transferred to her, and when her father wanted to transfer the land to her, her brothers stole the title deed.
69. On re-exam, she claimed that this land was never given to anyone by her father, and it is one of the assets in the Succession Cause. That the Plaintiffs filed this case to delay the Succession Cause. She referred to the said Succession Cause No 397 of 2005, which is pending. She denied that her father had bequeathed this suit land to anyone.
70. She denied that she wrote a bad letter to her father, accusing him of having abused her. She claimed that she utilizes the whole suit land and the said land has never been sold.
71. After the viva voce evidence, parties filed and exchanged their respective written submissions. The Plaintiffs filed their written submissions on 17th November 2023, through CM Advocates LLP, whereas the Defendant filed her submissions on 5th February 2023, through Gitamo Onsombi & Co Advocates.



Plaintiffs' Submissions

72. In their submissions, the Plaintiffs submitted that the deceased Livingstone Mukunya Muriu, who was the father-law to 2nd Plaintiff and grandfather to 1st Plaintiff, convened a meeting for the purpose of distributing his properties to his children and grandchildren on 27th November, 1997, wherein, the suit land was gifted to Mukunya Mugo B(Minor), to be held in trust by the Plaintiffs.
73. Further, they submitted and reiterated their averments as contained in the Plaint, to the effect that the Defendant should to be deemed to have trespassed onto the suit land on 7th February, 2005, when the Plaintiffs were registered as the rightful owners of the suit property.
74. They identified two (2) issues for determination as follows;
1. Whether Land Parcel No.Loc 1/Kiunyu/172, was transferred to the Plaintiffs by the deceased Livingstone Mukunya Muriu, by way of gift inter vivos;
 2. Whether the court should proceed and cancel the transfer of Land Parcel No.Loc 1/ Kiunyu/172, on account that the said transfer was obtained fraudulently.
75. In their submissions, they cited Section 42 of the *Law of Succession Act*, for a definition of “gifts inter vivos”. For this, they relied on these cases: *Re Estate of the late Gideon Mantbi Nzioka (Deceased)* (2005) eKLR; *Lucia Karimi Mwamba v Chomba Mwamba* (2020) eKLR; *In Re Estate of Chesimbili Sindani (deceased)* (2021) eKLR; *In Re Estate of Nyachieo Osindi (deceased)* eKLR;and, *In Re Estate of Muchai Gachuika (deceased)* [2019] eKLR.
76. Further, the Plaintiffs’ cited *Halsbury’s Laws of England*, 4th Edition, Volume 20(1) paragraph 70, on the issue of perfection of incomplete gifts and also referred to *Odunga’s Digest on Civil Case Law and Procedure* Vol. (III) page 1417 at paragraph 5484(d).
77. It was the Plaintiffs’ assertion that they have acquired their rights as the registered owners of the suit land pursuant to Section 26 of the *Land Registration Act*, 2012. Further, they submitted that they did not acquire the title to the suit property through fraud.
78. They also submitted that the legal burden of proving allegations of fraud regarding the Plaintiffs’ acquisition of title over the suit property was imposed on the Defendant pursuant to the provisions of Sections 107, 108 and 109 of the *Evidence Act*, and they claimed that the Defendant failed to prove fraud on the Plaintiffs’ part regarding the transfer of the suit land.
79. For this, the Plaintiffs relied on the case of *Evans Otieno Nyakwana v Clephas Bwana Ongaro* [2015] eKLR, and several other decided cases on the necessity to distinctly prove allegations of fraud.

Defendant’s Submissions

80. On her part, the Defendant identified three (3) issues for determination:
81. It was the Defendant’s submissions that the suit property was transferred to the Plaintiffs on 7th February 2005, while the deceased registered owner died on 31st July, 2004. That the said transfer was done through a corrupt and fraudulent scheme orchestrated by the Plaintiffs.
82. She further submitted that the suit land was not part of the properties distributed by the deceased during his lifetime, and neither did the deceased issue instructions to the effect that the suit property was to be held by the Plaintiffs as joint trustees.



83. It was her further submissions that the suit land forms part of the deceased's estate, and that the Plaintiffs have failed to identify the particular properties which they claimed were allocated by the deceased to the Defendant and her son and which the latter reportedly rejected.
84. She further submitted that when it came to the attention of the Defendant that her brother Benson Mugo Mukunya, had filed Thika Succession Cause No. 510 of 2004, without the involvements of his siblings, she lodged Milimani Succession Cause No.397 of 2005, seeking inter alia the revocation of the Grant issued in Thika Succession Cause No. 510 of 2004. Further, that the suit land is one of the properties listed in Milimani Succession Cause No.397 of 2005.
85. She also submitted that her brother Benson Mugo Mukunya who is married to the 2nd Plaintiff herein, omitted the suit property alongside other properties of the deceased from the accountability Schedule as part of a scheme to snatch away the suit property, so that it does not form part of estate of the deceased.
86. It was her further submissions that there was a contradiction in that the Plaintiffs have claimed that the suit land devolved to them as a gift inter vivos whereas in the Plaintiffs' bundle of documents on pages 13 and 15, they claimed that the deceased left behind a written will.
87. Reliance was placed on the decision of the court in the cases of *In Re Estate of Lawrence Nginyo Kariuki* (deceased 2021); *In re Estate of fanice Mary Khanali Aura* (deceased) [2019- eKLR]; *Re Estate of Ephantus Muntyuttu Waigi* (deceased) [2013]eKLR.
88. Further, the Defendant submitted that the Plaintiffs ought to have occupied the suit land in December 2000, when the transfer forms in respect of the suit were allegedly signed by the deceased. The Defendant cited the holding of the Court in the case of *In Re Estate of Gordana Songoro Guyo* (deceased) [2020] eKLR in support of the proposition that an article of property cannot be both given and retained.
89. Further, that the Plaintiffs gave conflicting dates for the execution of the transfer form in respect of the suit land, that is, 24th February, 2004, and 7th February, 2005, while the transfer forms executed on December 2000, were not been availed by the Plaintiffs.
90. The Defendant urged the Court not to sanitize the illegalities committed by the Plaintiffs as the documents presented by them in support of the transfer of the suit land contained irregularities such as missing ID numbers of all the transacting parties, missing passport pictures of the transferor and transferees, missing KRA PIN numbers of the transferor and transferees contrary to the requirements of Section 110 (1) of the *Registered Land Act* (repealed). Further, that the 1st Plaintiff was not among those individuals who went to the Advocate's office in Thika Town to execute the transfer forms.
91. She added that that transfer form presented by the Plaintiffs does not bear the stamp and signature of the Chairperson of the Land Control Board, Gatanga and only contains the signature of the District Officer – Gatanga signed in his own capacity.
92. For this she relied on the decision of the court in the cases of *Estate Sonrisa & Another v Samuel Kamau Macharia & 2 other* [2020]eKLR; *Joseph Kibet Tuwei v JLT & Another* [2014] eKLR; and, *Samuel Odhiambo Oludhe & 2 others V Jubilee Jumbo Hardware Lts & Another* [2018] eKLR.
93. The Defendant urged the Court to exercise its powers pursuant to Section 80 of the *Land Registration Act*, and direct that the registration of the Plaintiffs as the owners of the suit land be cancelled as it was obtained through fraud.



94. The above is the summary of the pleadings, the evidence adduced by the Parties, the rival written submissions and the cited authorities, which the court has carefully read and considered, and finds the issues for determination are;-
- I. Whether the issues raised in the present suit are res-judicata?
 - II. Whether the Plaintiffs are entitled to the orders sought in their claim?
 - III. Whether the Defendant is entitled to the prayers sought in her Counter- claim?
 - IV. Who shall bear the costs of this suit and the Counter- claim?

Whether the issues raised in the present suit are res-judicata?

95. Section 7 of the [Civil Procedure Act](#), provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally by such court.”

96. The Court has perused its decision delivered on 28th March, 2019, in Murang’a ELC No.111 of 2017, which dismissed the said suit on the grounds that the mover of the same was non-suited. This court holds and finds that the said decision rendered in Murang’a ELC No.111 of 2017, does not render the issues raised in the instant suit res-judicata, for the reason that the court did not entertain and decide on the issues raised in the instant suit.
97. Further, this court has also noted that in its Ruling of 8th June 2023, the court dealt at length with the issue of Res judicata, and held that the suit was not Res-judicata, and that Muranga ELC NO. 111 OF 2017, was stuck out for being non- suited.
98. Consequently, this court will be reiterated that this suit is not Res judicata, to Muranga ELC 111 Of 2017, and will proceed to determine the other issues.

Whether the Plaintiffs are entitled to the Orders sought in their claim?

99. From the Pleadings herein, and the evidence adduced in court, it is evident that the Plaintiffs claim is for declaration that they are the joint owners of the suit properties, as trustees for ‘Mukunya Mugo B’. it is also evident that their claim is based on the allegations that the said suit land was given to the said ‘Mukunya Mugo B’ as a gift by the original registered owner – the late Livingstone Mukunya Muriu. The said registered owner was the grandfather to the done and 1st Plaintiff.
100. However, it is evident that the Defendant herein has vehemently denied the above allegation. She claimed the suit land forms part of the free properties of the deceased, which is subject a Succession Cause of the said estate of Livingstone Mukunya Muriu. She also claimed that she has occupied the suit land for long, and that her occupation started during the lifetime of the deceased registered owner.
101. Further, she alleged that the registration of the said land in their names of the Plaintiffs herein was done through fraud or corruption. She urged the court to dismiss the Plaintiffs’ claim and allow her Counter- claim.



102. It is trite that he who alleges must prove. The Plaintiffs herein have alleged, that the suit land was given to them to hold in trust for ‘Mukunya Mugo B’ (minor then). Therefore, they had a duty to call sufficient evidence to prove their case on the required standard.
103. The ‘*Evidence Act*’ is very clear in the issue of burden of proof. See Sections 107, 108 and 109 of the said Act, which provide as follows:
- Section “Whoever desires any court to give judgment as to any legal right or liability dependent on the 107(1) existence of facts which he asserts must prove that those facts exist.
- Section When a person is bound to prove the existence of any fact it is said that the burden of proof 107 (2) lies on that person.
- Section The burden of proof in a suit or proceeding lies on that person who would fail if no evidence 108. at all were given on either side.
- Section The burden of proof as to any particular fact lies on the person who wishes the court to believe 109. in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
104. See also the case of *Evans Otieno Nyakwana vs Cleophas Bwana Ongara* (2015) eKLR, where the Court held:
- “as a general proposition, the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issues. That is the purport of section 107(1) of the Evidence Act.....”
105. From the available evidence and the exhibits produced in court, specifically the certificate of title dated 7th February 2005, the suit land Loc 1/Kiunyu/ 172, is registered in the names of the Plaintiffs herein. This registration is under the repealed “The *Registered Land Act* (Cap 300)” regime (repealed).
106. It is also evident that proof of ownership of any parcel of land is through production of a certificate of title. So on the face of it, the Plaintiffs herein have produced a title deed, and without any evidence to the contrary, then the court would take it that they are the owners of the said parcel of land. however, the Defendant has challenged the said registration, and thus the Plaintiffs have the onus of proving that they are regularly registered as the owners of the suit land, but to hold it in trust for ‘Mukunya Mugo B’ (Munyu). In the case of *Maina v Hiram Gathiba Maina* [2013] eKLR, the Court stated that:
- “When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal.’
107. Under Cap 300 (repealed) section 27, provides that the registration of a proprietor of a parcel of land, grants such a proprietor all rights and privileges appurtenant thereto. Therefore, the Plaintiffs herein have all the rights and privileges appurtenant to the suit Land. See also section 24(a) of the *Land Registration Act*, which provides;
108. However, such rights can only be defeated as provided by the Act. see Section 28 of the repealed Cap 300, and /or section 25 of the *Land Registration Act*.



Overriding interests. 28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) spousal rights over matrimonial property;
- (b) trusts including customary trusts ;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law”.

109. The actions that can lead to defeat of the registered proprietor’s right are provided for in section 26 of the [Land Registration Act](#), which provides;

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

110. The Defendant herein has alleged that the registration of the Plaintiffs herein was done through fraud, and /or corruption. The Plaintiffs herein denied the said allegations. It was their evidence that the former proprietor of the suit land, Livingstone Mukunya Muriu, voluntarily transferred the suit land to them. They produced the Application to the Land Control Board for Consent to transfer, consent to transfer, and the Transfer form, which they alleged was duly signed by the deceased before he passed on.



111. The Plaintiffs also explained that the actual transfer was done on 7th February 2005, after the death of Livingstone Mukunya Muriu, because the said Livingstone Mukunya Muriu, he had made it clear that even after gifting the land to his grandson Mukunya Mugo B, he still wished to enjoy the proceeds of the coffee, and directed that the transfer should be done after his death.

112. These allegations were not controverted by the Defendant herein. Though the Defendant alleged fraud, she did not call sufficient evidence to prove such fraud. It is trite that allegations of fraud are serious and must be specifically proved. See the case of *Kuria Kiarie & 2 Others v Sammy Magera* (2018) eKLR, where the Court held as follows:

“The next and only other issue is fraud. The law is clear and we take from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR where Tunoi (J) 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”.

113. The Defendant did not call any evidence to prove that the Plaintiffs herein were involved in acts of fraud. She disputed the Transfer documents, but she did not call any evidence from the relevant offices to dispute that the said transfer documents did not come from the said office.

114. Though the burden of proof is always on the person who has alleged, but it is also clear that evidential burden may shift to the person who may lose if no sufficient evidence is not called to support an allegation. See the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR, the Court held;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty to adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

115. Courts have severally held that they are very protective of registered titles, and can only impeach a title where sufficient evidence of misrepresentation or irregularities are proved. See the case of *Zacharia Wambugu Gathimu & Another v John Ndungu Maina* [2019] eKLR, where it was held that:

“...As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

116. It is evident that the court has power to cancel an illegally acquired certificate of title. It is also evident that misrepresentation, irregularity, corrupt scheme, or fraud are some of the actions that can lead to a cancellation of a title deed. However, the instances of misrepresentation, irregularity and corrupt schemes must not just be alleged but also proved through calling of sufficient evidence.



117. However, for a court to reach such decision of cancellation of a title, sufficient evidence must be availed. See Section 80 (1) of the [Land Registration Act](#), 2012, which provides instances when the Court can make orders for rectification of title or register, as follows-

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

118. Though the Defendant herein disputed that the Plaintiffs title deed was acquired genuinely, she did not call sufficient evidence to convince this court that the said title deed was acquired corruptly and should thus be cancelled/ rectified. In the case of [Mary Ruguru Njoroge v John Samuel Gachuma Mbugua & 4 Others](#) [2014] eKLR, the court understood the meaning and import of Section 80(1) of the [Land Registration Act](#), 2012 as follows:

“In my view, the mistake referred to under section 80 (1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. In short, the court wields powers equivalent to those donated by statute to the registrar under Section 79 of the Land Registration Act. A party seeking rectification may therefore elect to attend before the registrar or appear before the court and prompt the process of rectification of a title or a register.”

119. The Plaintiffs averred and testified that the suit land was given and transferred to them by the registered owner during his lifetime, and therefore the gift inter vivos was perfected. This evidence by the Plaintiffs was not controverted by the Defendant herein, by production of evidence to the contrary.

120. In the case of [Re Estate of the Late Gedion Mantbi Nzioka \(Deceased\)](#) [2015] eKLR, the Court held as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”?

121. Further, Halsbury’s Laws of England 4th Edition Volume 20(1) at paragraph 67, states as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”



122. The Court has also considered *Odunga's Digest on Civil Case Law and Procedure* Vol (III) Page 2417 at paragraph 5484 (d) e – 1, which states as follows:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in *Re Fry Deceased* {1946} CH 312 *Rose*; and *Trustee Company Ltd v Rose* {1949} CL 78 *Re: Rose v Inland Revenue Commissioners* {1952} CH 499 *Pennington v Walve* {2002} 1WLR 2075 *Maledo v Beatrice Stround* {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it is held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See *Shell's Equity* 29ED Page 122 paragraph 3)”

123. Since the Defendant alleged that the Plaintiffs acquired the registration of the suit land into their names by fraud, this court also considered the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where the court held 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.”

124. In regard to the standard of proof in claims of fraud, the court has considered the holding in the case of *Kinyanjui Kamau –vs George Kamau* [2015] eKLR, where the court expressed itself as follows;

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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*...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

125. Further, in the case of *Michael Njiru Kariuki v Ferdinand Ndungu Waititu & 3 others* [2021] eKLR the court held that:

“Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the Defence, such averment stands as a mere statement. Further if there is no rebuttal of evidence by a party, the evidence remains uncontroverted...”



126. Moreover, in the case of *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23, the court held that:

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

127. The Plaintiffs have produced a title deed, which on the face of it looks genuine. This title deed was issued by the Lands office, which office has not denied issuing the same. It is evident that title documents are prepared and issued by the Land Registrar. The Certificate of title in the name of the Plaintiffs herein is to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per Section 26 of the *Land Registration Act*, 2012.

128. With the above in mind, prima faciedly, this court finds and holds that the Plaintiffs are the absolute and indefeasible owners of the suit land, but if evidence to the contrary is availed, on the required standard, this court will not hesitate to impose the provisions of sections 80 of the *Land Registration Act*.

129. In the case of *Munyu Maina v Hiram Gathiha Maina*[2013]eKLR, the court declared that:

“...when a registered proprietor’s root of the title is under challenge, it is not sufficient to dangle the instruments of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

130. Further, in the case of *Embakasi Properties Limited & another v Commissioner of Lands & anor* [2019] eKLR, the Court held as follows:

“Although it has been held time without end that the certificate of title is: “. conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.

131. The Court has perused the pleadings herein, the evidence adduced and the rival written submissions of the parties, and finds that the Plaintiffs herein contended that the deceased executed a transfer of the suit land in their favour. However, the aforesaid transfer was not completed during the lifetime of the deceased, as he request that they hold of on the same as the deceased wished to continue earning the proceeds of sale of the coffee from the suit property.

132. This bit of evidence was not controverted by the Defendant herein. Subsequently, the deceased died on 31st July, 2004, as per his Death Certificate dated 11st November, 2004, annexed to the Plaintiffs’ bundle of documents.



133. The Plaintiffs registered the transfer form executed by the deceased on 7th February, 2005, which is about five months to the date the deceased died. The Plaintiffs have explained to the Court the process through which they assumed ownership of the suit land. They have annexed the transfer form executed by the original proprietor of the property (now deceased) in their favour.
134. Therefore, the Plaintiffs herein did much more than just dangle their Certificate of title when their ownership of the suit land was questioned by the Defendant. The Defendant alleged that the deceased suffered from arthritis and was incapable of making his way to the Land Control Board's offices in Gatanga or to Thika Town to execute the transfer forms in respect of the suit land in favour of the Plaintiffs.
135. However, the Defendant failed to attach any medical records to demonstrate that the deceased suffered from either mental or physical infirmity rendering him incapable of executing the aforesaid transfer documents. The defendant asserted that fact, and she ought to have called a witness from the said offices to support her claim that the deceased did not present himself in the said offices and/ or execute the said documents.
136. Having carefully considered the available evidence, this court finds and holds that the Plaintiffs herein have been able to explain the root of their title deed. Consequently, the court is satisfied that the Plaintiffs have proved their case on the required standard, and are thus entitled to the prayers sought in their claim.

Whether the Defendant is entitled to the prayers sought in her Counter- claim?

137. In her Counter- claim, the Defendant had urged the court to find that the transfer of the suit land to the Plaintiffs was null and void. Further, that the court should cancel the title deed in favour of the Plaintiffs, and allow the Defendant to continue staying on the suit land until the succession case is heard and determined.
138. However, this court has found and held that the Plaintiffs have been able to explain the root of their title. The court too has found that the Plaintiffs are entitled to the prayers sought in their claim, therefore this court cannot hold that the said transfer was null and void.
139. Further, this court has held and found that though the Defendant alleged fraud, she did not call sufficient evidence to prove such fraud and or corruption over the registration of the suit land. cancellation of title can only be allowed after cogent evidence is availed to prove fraudulent actions over the said registration. The Defendant failed to avail such evidence, and consequently, this court finds no reasons to order for cancellation of the title deed of the suit land in favour of the Plaintiffs herein.
140. The Plaintiffs are the registered owners of the suit land to hold in trust for 'Mukunya Mugo B'. As the registered owners, and as provided by Section 24(a) of *Land Registration Act*, they are deemed to be the absolute and indefeasible owners, with all rights and privileges appurtenant thereto. Having access, and possession of the suit land is one of such right. Therefore, this court cannot order that the Defendant to continue staying on the said suit land, as sought by her in her counter-claim.
141. Having carefully considered the available evidence, this court is not satisfied that the Defendant has called sufficient evidence to prove any of her claims as raised in her counter-claim. Therefore, this court finds and holds that the Defendant is not entitled to the prayers sought in her counter- claim dated 26th May 2021.
142. Further, upon a careful consideration of the evidence presented by the parties herein, this Court is satisfied that the Defendant has failed to establish that the Plaintiffs are guilty of fraud in respect



of the registration of the suit land in their names. In the absence of contrary documents from the Land Registrar, that the said documents were not genuine, this court has no reason to find the title documents availed by the Plaintiffs have been fraudulently acquired.

143. Therefore, this court finds and holds that having carefully considered the available evidence, the Plaintiffs have proved on the required standard that the suit property was bequeathed to Mukunya Mugo B (minor then), by the deceased, Livingstone Mukunya Muriu, the initial owner of the suit land Loc 1/ Kiunyu/172. Further, the court is satisfied that the deceased directed the Plaintiffs herein to hold the said suit land in trust for the said Mukunya Mugo B (minor then).
144. Accordingly, the Court finds and holds that the Plaintiffs have proved their case on the required standard of balance of probabilities. For the above reasons, this court finds and holds that prayers No, 1,2, and 3 of the Plaint dated June 4, 2019, are merited, and the court proceed to allow them as prayed.
145. However, Prayer No. 4, of the said claim is found not merited and consequently it is disallowed because the Plaintiffs failed to establish the actual amount received by the Defendant as proceeds from sale of coffee beans from the suit property.
146. Having found that the Plaintiffs are entitled to the prayers sought in their claim, this court further finds that the Defendant's Counter-claim dated May 26, 2021, is not merited. Consequently, the said Counter- claim is dismissed entirely with costs to the Plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY 2024

L. GACHERU

JUDGE

18/7/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

N/A for the Plaintiffs

Mr Onsombi for the Defendant.

