



**Meli v Rop (Environment & Land Case 598 of 2012)
[2025] KEELC 609 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 598 OF 2012
JM ONYANGO, J
FEBRUARY 13, 2025**

BETWEEN

KIBET MELI PLAINTIFF

AND

SUSAN ROP DEFENDANT

JUDGMENT

1. The Plaintiff commenced the proceedings herein on 25th February, 2010 by a Plaint of the same date filed in the High Court. The Plaintiff averred that he had been the registered owner of the parcel of land known as Nandi/Cheptil/105 until 29th May, 2009 when a subdivision was done without his knowledge and the Defendant registered in her name land parcel No. Nandi/Cheptil/480 (the suit property herein). The Plaintiff stated that his claim was for a declaration that the title deed issued to the Defendant in respect of Nandi/Cheptil/480 was by mistake and/or through fraud and he outlined the particulars of fraud. He prayed for judgment against the Defendant in the following terms:-
 - a. The Defendant, her agents and/or servants be restrained from trespassing and/or interfering in anyway whatsoever with Land Parcel Nandi/Cheptil/105.
 - b. A declaration that land parcel Nandi/Cheptil/480 was registered in the name of the Defendant by mistake/fraud.
 - c. An order that title registered in the name of the Defendant that is, Nandi/Cheptil/480 be cancelled and subsequent registration in the name of the Plaintiff.
 - d. Costs of this suit plus interest.
2. On 21st November, 2016 the Defendant filed her Statement of Defence denying the Plaintiff's allegation that she acquired the property by mistake and/or fraud. She averred that the Plaintiff obtained consent from the Kibiyet Land Control Board to subdivide Nandi/Cheptil/105. That the



Plaintiff then sold and transferred Nandi/Cheptil/480 to her and the same was registered in her name with the full knowledge and consent of the Plaintiff. The Defendant denied that notice of intention to sue had been served as alleged in the Plaintiff. She also denied the allegation that there has been no other case involving the suit property, claiming that there was Kapsabet PMCC No. 400 of 2006 where one Cheruiyot Meli was evicted from her land. She prayed that the Plaintiff's suit be struck out and/or dismissed with costs as well as for any other orders this Court may deem fit and just to grant.

Plaintiff's Case

3. Hearing of the suit initially commenced before Hon. Ombwayo J. on 15th March, 2017 with the Plaintiff giving his testimony. However, when the learned judge proceeded on transfer, the court directed that the hearing will start de novo, which it did on 9th November, 2020. The Plaintiff called Violet Lamu, a Land Registrar in Nandi County who testified under oath as PW1. She produced the Green Card for Nandi/Cheptil/105 as PEX1, explaining that it was opened in the name of Kipruto Arap Kogo. The second entry was Kibet A. Meli with a title deed issued on 17th September, 1969. Entry No. 3 is a mutation closing the title on 29th May, 2009. She produced the green card for parcel 479 as PEX2 which was opened in the Plaintiff's name on 29th May, 2009.
4. PW1 testified that she did not see a green card for parcel 480. She was shown a Certificate of Search dated 8th January, 2010 for the said parcel 480 and testified that it shows the property was registered to the Defendant on 29th May, 2009 as a result of a transfer of even date by the Plaintiff, and a title issued on 16th June, 2009. PW1 testified that the transfer was however not entered in the presentation book. PW1 produced a letter dated 14th October, 2009 (PEX3) from the Land Registrar addressed to the Defendant indicating that the title was issued irregularly and should be surrendered to the office. She also produced the search certificate over Plot No. 480 as PEX4 as well as the green card for Plot Nos. 481 and 482, both in the name of the Plaintiff, which she produced as PEX5 and PEX6 respectively.
5. PW1 produced the mutation (PEX7) registered on 29th May, 2009 giving rise to the four plots numbers 479-482, countersigned by the District Surveyor. She explained that the Application for Land Control Board Consent (PEX8) for the subdivision was attached but is not dated. PW1 explained that the alterations on acreages of the four plots appearing thereon were not countersigned by the Plaintiff, and he could not tell who did the alterations. PW1 produced PEX9, a Letter of Consent dated 19th March, 2009 approving the initial acreages by the Plaintiff and not the alterations. She noted that the Letter of Consent also bore alterations that were not countersigned. PW1 produced two Certificates of official Search over Plot No. 481 and 482 as PEX10 and PEX11 respectively. She was shown the minutes of the Kabiyet Land Control Board (LCB) of 17th March, 2009 and she testified that on the last page, the Chairman indicated that there was no Special LCB on 19th March, 2009 which is the date of the consent. The Minutes were narked as MFI-12.
6. With regards to the transfer in respect of Plot No. 480 dated 29th May, 2009 PW1 reiterated that it was not entered in the presentation book. Further, that there was no evidence that the stamp duty and other fees for registration were paid including the registration fee of KShs. 500/- and the transfer fee of KShs. 500/-, which amounts ought to have been paid and receipted. In addition, that the necessary completion documents such as photographs, PIN and ID Cards were not attached. She testified that the transfer is attached to a consent issued on 25th January, 2009 a date before the parent title had been closed. She produced the transfer of Plot 480, the Application for consent and letter of consent as PEX 13, PEX 14 and PEX15 respectively. PW1 testified that Plot Nos. 479 to 482 are in the names of the Plaintiff as was Parcel No. 105.



7. PW1 was cross-examined by Mr. Choge and she testified that she could not verify that the signature attributed to the Plaintiff on the transfer over Plot 480 did not belong to him, but agreed that the document showed that the people signing appeared before the registrar for alteration. PW1 acknowledged that she could not tell whether or not the person who signed the application for subdivision and transfer was actually the Plaintiff. She could not confirm whether the Defendant received the letter dated 14th October, 2009 (PEX3). She clarified that the Land Registrar is the secretary to the Land Control Board and custodian of the minutes, acknowledging that PEX12 was a copy of the certified minutes but they were not confirmed. She could not tell whether the alterations on the mutation and the alterations on the application for consent were made by the County Surveyor.
8. PW1 testified that there was no title deed surrendered with the mutation for parcel 105. She went on to state that the attesting on the transfer by the Land Registrar indicates that the person named had appeared before the Land Control Board. She explained that whereas Section 79 of the [Land Registration Act](#) requires a court order for cancellation of title, PEX3 was not accompanied by a court order. She reiterated that the consent of 25th January, 2009 was issued before the parent parcel was subdivided. PW1 testified that she did not have the presentation book of 25th January, 2009 to confirm that the transfer was effected before the mutation was registered. Under re-examination, PW1 testified that the register she had used should be under lock and key. She also stated that she could not confirm if the title deed for parcel No. 105 had been surrendered with the mutation registered on 29th May, 2009 but that if it had, she would have traced it.
9. Naftali Kaigeroi Kojo, an Assistant County Commissioner based at Nandi North, Kabiyet Division, testified under oath as PW2. He testified that the LCB sitting of 17th March, 2009 was chaired by George Juma. At the end of the meeting, he remarked that there was no special LCB on 19th March, 2009 as indicated in the certified copy of the minutes of the said date. PW2 testified that he had however seen the transfer indicating that the consent was issued on 19th March, 2009. Referring to the consent to subdivide dated 19th March, 2009 and the consent to transfer dated 25th January, 2009 PW2 testified that the consent to subdivide was before the consent to transfer. PW2 clarified that a consent to subdivide a consent to transfer cannot be issued on the same date. He noted that the two consents above seem to indicate that the one for transfer was issued before the subdivision.
10. On cross-examination by Mr. Choge, PW2 testified that the minutes of 17th March, 2009 did not make reference to the previous sitting's minutes, explaining that the Land Control Board does not refer to the minutes of previous meetings. PW2 testified that the parties in court had never attended an Land Control Board meeting chaired by him. PW2 was re-examined and he testified that he had not been shown any evidence that the applicant made any application through an agent like an advocate or that it was posted with a return envelope. PW2 told this court that an application can be brought at any time but will be dealt with during the next scheduled meeting.
11. The Plaintiff testified under oath as PW3 and adopted his witness statement dated 3rd September, 2018 as his evidence-in-chief. PW3 explained that the suit land is parcel No. Nandi/Cheptil/105 which he purchased in 1966 from Kipruto Arap Kogo and he has title to as well as possession of that land. He testified that he had never sold his land to the Defendant or to anyone who later sold to the Defendant. Further, that he had never subdivided his land to produce Parcel Nos. 479-482. He also testified that he had never applied for or attended any Land Control Board meeting for consent to subdivide or transfer. He disowned the signature on the application to subdivide or transfer, or the one on the mutation, stating that they were not his. PW3 testified that he visited the Land Registrar's office and learned of the subdivision. That he then informed the Registrar that he knew nothing of it, and the Registrar sent him to the Nandi Hills Police where he made a report.



12. PW3 testified that on advice from the Police, he obtained PEX2 and took it to the Police Station. He testified that it is also the Registrar who informed him that Plot No. 480 had been transferred to the Defendant and registered in her name, while the other three were left in his name. He told this court that he declined to take the three titles as he still has the original Title for the original parcel being Plot No. 105. PW3 testified that he bought 8 Acres of Plot No. 238 from Kimei Chumba who is the son of the first registered proprietor. That Lazarus, the Defendant's Attorney in the Kapsabet Case, asked him to give him 3 Acres out of Parcel No. 105 in exchange for an equal parcel in Plot No. 501 which was in the name of Mathew and they made an agreement to that effect which he produced as PEX16. PW3 testified that he withdrew the offer when he learnt that the land did not belong to Lazarus. He produced the green card for Plot No. 238 as PEX17. He prayed that the land reverts back to parcel 105 and for costs.
13. Upon cross-examination, PW3 stated that when he withdrew from the exchange agreement with Lazarus each was to keep his land. He explained that he did not know that the Defendant was related to Lazarus. That he learned that Lazarus did not own the land after his land had already been subdivided. PW3 told this court that Lazarus never took possession of his land and neither did he take possession of Lazarus's land. He added that he was aware that the Land Registrar wrote to the Defendant to return the title deed that had been issued to her, but the Defendant was never traced. PW3 admitted that the photograph on the transfer form was his, but denied appearing before the Land Registrar to sign the transfer. He termed the transfer form and the mutation form as forgeries. He said that he never attended the Land Control Board meeting for consent to subdivide Plot No. 105 or consent to transfer Plot No. 480. PW3 testified that the original Title Deed to Parcel 105 got lost. He reported to the Police and got a document to that effect. He told this court that Parcel No. 238 from which he purchased 8 Acres belonged to Lazarus's family. He denied receiving title for the 8 Acres in parcel No. 238 before surrendering parcel No. 105.
14. When he was re-examined, PW3 testified that he bought parcel No. 238 and he has the title thereto. He stated that there was no exchange of the land agreement between him and the Defendant. He reiterated that the Registrar gave him the letter to take to the Chief but he was informed that she was not traced. He said that he did not know the Defendant in person. He explained that he had purchased 8 Acres out of Plot No. 238 and the remaining portion is registered in the name of Lazarus's mother.
15. The Plaintiff then called Lenny Kemboi (PW4), who also testified under oath. He told the court that he was a clerical officer at the Assistant County Commissioner's Office in Kabiyet in charge of the Land Control Board records for the Chairman since 2009 to date. He presented the file containing Land Control Board minutes for the period between 2007 to August, 2009. Among them were the minutes of 17th March, 2009 and he confirmed that Nandi/Cheptil/105 was not among those parcels dealt with during that period. He also confirmed that the minutes he had did not include any of 19th March, 2009. That in the month of March, 2009 there was only one meeting of 17th March, 2009 and he produced the Original Minutes of that meeting as PEX4.
16. Upon cross-examination, PW4 testified that he is only a clerical officer and not the chairman of the Kabiyet Land Control Board. He admitted that he is not the secretary of the Kabiyet Land Control Board and that he does not prepare the minutes. He also admitted that he had no written authority to bring the minutes and had not been summoned to court, further that the minutes are not signed or certified. When cross-examined, PW4 testified that the secretary to the Land Control Board is from the Ministry of Lands, Land Registrar's Office. He however explained that the secretary hands to him the files to keep until the next meeting. After this witness, the Plaintiff closed his case.



Defendant's Case

17. When the Defendant opened his case, she called one Judith Chepkoech Cherutich, a Land Registrar who had worked in Nandi County for 3 years. She presented a copy of a register and Power of Attorney donated by Lazarus Kirui Kipkurui. She testified that according to the register, the owner of Parcel No. 480 is the Defendant and a title deed was issued on 16th June, 2009. She testified that the Power of Attorney was registered on 11th February, 2012 as No. 1732/12. She produced a certified copy of the Register as DEX1. The Power of Attorney was marked as DMFI-2.
18. DW1 was cross-examined by Mr. Kibii and he testified that the register of parcel No. 480 was opened on 4th October, 2021. That the first entry was made on 29th May, 2009. She explained that the register is a reconstruction that is why the file opening is later than the first entry. DW1 testified that she had no supporting documents for entry No. 2. She listed the necessary documents as being the transfer instrument, application for Land Control Board Consent, the Land Control Board Consent, and payment receipt, but she could not find them in the parcel file. She confirmed that parcel No. 480 resulted from parcel No. 105. The witness was shown the Defendant's list of documents and stated that there were alterations on the consent and expressed doubts as to whether alterations can be made after consent has been issued. She also noted that the said alterations were not countersigned.
19. DW1 confirmed that the Consent for transfer comes before the consent for subdivision and admitted that this was irregular; she testified that one cannot obtain consent to transfer before obtaining consent to subdivide. When shown the Mutation form, she noted that the first page indicated that the owner was Kibet Arap Meli while the last page indicated that the owner was a Kibet Arap Muge, two different individuals. She testified that the mutation was registered on 29th May, 2009 which is 4 months after the issuance of the consent to transfer. She told the court that she was unaware that one officer had recalled the title because of the irregularities. She testified that she could not tell if the title for parcel No. 480 was genuine. DW1 also revealed that the entire parcel file for parcel No. 480 was missing and they reconstructed it pursuant to a court order, she could not however tell when the parcel file went missing.
20. DW1 was stood down so she could come and produce the register for the Power of Attorney and be re-examined. The matter was fixed for hearing on 27th July, 2023 to enable the Defendant to appear. Come that date, Counsel for the Defendant indicated that the Land Registrar was not available. Counsel also informed the court that he had filed an application to cease from acting for the Defendant. The Application came up for hearing on several dates where Counsel failed to appear, and the Application was dismissed on 10th June, 2024 for want of prosecution. The record indicates that the last time the Defendant's Counsel appeared in court was on 4th October, 2023 where the matter was fixed for hearing on 13th December, 2023. On that date, neither the Defendant nor her Advocate had appeared in this court. The suit came up for hearing on 25th September, 2024 and despite having been served, the Defendant and her Advocate once again failed to attend without any explanation. The Court closed the Defendant's case and directed parties to file their closing submissions.

Plaintiff's Submissions

21. The Plaintiff filed his submissions dated 7th October, 2024. It is submitted on behalf of the Plaintiff that the Defendant filed her defence but failed to adduce any evidence either in person or through third parties to corroborate her averments. Her Defence thus remains mere allegations and *Shaneebal Limited vs County Government of Machakos (2018) eKLR* was cited to in support of this submission. Counsel for the Plaintiff also cited Section 107 of the [Evidence Act](#) on proof of existence of facts.



- Counsel submitted that from the testimony of PW1, 2 and 4, it is evident that the registration of the suit property in the Defendant's name was effected by forgery. In addition, that the Plaintiff has established his case against the Defendant on a balance of probabilities and is entitled to the reliefs sought.
22. Counsel for the Plaintiff submitted that the Plaintiff's evidence was uncontroverted as the Defendant was given an opportunity to explain how she became registered as owner of the land but failed to adduce evidence to corroborate the averments in her Defence. He relied on the case of *Munyu Maina vs Hiram Gatbiba Maina, Civil Appeal No. 239 of 2009*. Counsel argued that Section 26(1) of the *Land Registration Act* empowers this court to impeach a title obtained fraudulently or un-procedurally. Counsel also submitted that under Section 80(1) of the *Land Registration Act*, the court may order rectification of the register if it is satisfied that any registration was made by fraud or mistake. He asked the court to find that the provisions of Section 26(1) have been met rendering the Defendant's title liable for cancellation.
23. On costs, Counsel cited Section 27 of the *Civil Procedure Act* and urged that the court finds for the Plaintiff on costs. He relied on Republic vs Rosemary Wairimu Munene ex parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd. He urged that the Plaintiff's suit is meritorious and prayed that it be allowed as prayed.

Analysis and Determination

24. The court has considered the pleadings filed, testimonies of the witnesses and documentary evidence tendered as well as the submissions of counsel. The issues arising for determination in this suit are the following;
- i. Whether the Defendant acquired the suit property lawfully;
 - ii. Whether the Plaintiff is entitled to the reliefs sought in the plaint;
 - iii. Who is liable to for the costs of the suit?
25. In a nutshell, the Plaintiff's position is that he is and has always been the proprietor of the property known as Nandi/Cheptil/105. The property was subdivided without his knowledge into 4 parcels being Nandi/Cheptil/479, 480, 481 and 482. Plot No. 480 was then registered in the name of the Defendant herein. The Plaintiff alleged that the subdivision and transfer of the property to the Defendant was fraudulent and called for cancellation thereof and rectification of the register. The Defendant on the other hand, filed a Defence consisting mostly of denials, where she claimed that the said Nandi/Cheptil/105 does not exist as its register was closed on 25th May, 2009. She claimed that the Plaintiff obtained Consent from the Kabiyet Land Control Board to subdivide Parcel No. 105 into the 4 portions and then sold and transferred Plot No. 480 to her.

i. Whether the Defendant acquired the suit property by mistake or fraud;

26. It is not in dispute that the suit land emanates from land parcel number Nandi/Cheptil/105. It is also not in dispute that the title of the suit land, being Plot No. 480 is now registered in the name of the Defendant. The issue arising herein is that the Plaintiff alleges that the said title was not properly acquired and that it was issued to the Defendant by mistake or fraud and he pleaded the particulars of the alleged fraud in his plaint.
27. Indeed, Section 26 of the *Land Registration Act* CAP 300 Laws of Kenya provides that:-

“26. Certificate of title to be held as conclusive evidence of proprietorship



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

28. From the above statutory provision, a certificate of title is to be taken as prima facie proof that the person named is the indefeasible proprietor of the land. However, such a title can be challenged on grounds of fraud, misrepresentation or that it was acquired illegally, unprocedurally or through a corrupt scheme. The court must therefore examine the title held by the Defendant to determine whether it was acquired by mistake or fraud as alleged. In ascertaining this, the court must interrogate the root of title and the documentary evidence presented by the parties. On this, I am guided by the Court of Appeal case of *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR that was cited by the Plaintiff, where the court held that:

“We state 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. 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 need not be noted on the register.”

29. Among the documents produced by the Plaintiff is a letter dated 14th October, 2009 (PEX2) from the Ministry of Lands addressed to the Defendant through the Chief. The letter reads:

REF: Nandi/Cheptil/480

I refer to the above title deed which was issued to you erroneously from this office.

I hereby summon you to surrender the same to this office immediately.

Failure to comply I will use full force of law to ensure it is surrendered to me.”

30. I am aware that the Plaintiff has admitted that the Defendant could not be traced to enable service of this letter. Even so, this court will take it as an admission by the office of the Land Registrar, the custodian of titles, that the title to the suit property was issued indeed to the Defendant erroneously, by fraud or mistake. The Plaintiff also produced the Mutation form which is the basis of the impugned subdivision. Indeed, at the first page, the name of the owner is indicated as Kibet Arap Mele whereas



on the last page, his name is indicated as Kibet Arap Muge. This small variation has not been explained and, despite the alterations on the acreages of the four portions, no effort was made to amend the name to reflect the proper name of the registered owner.

31. That aside, the suit property as well as the former Plot No. Nandi/Cheptil/105 is agricultural land. By law, at the time of the mutation as well as the transfer to the Defendant, the consent of the relevant Land Control Board ought to have been obtained. PEX8 is an application for Consent to subdivide Plot No. 105 into 4 portions measuring 1 Acre, 4.0 Acres, 3.2 Acres and 12.5 Acres. These Acreages were altered by hand to indicate 1 Acre, 4.1 Acres, 8.15 Acres and 8.0 Acres respectively. These alterations were not countersigned by the Plaintiff who is indicated as the Applicant. PEX9 is a letter of consent to subdivide Plot No. 105 into 4 portions bearing the said original Acreages and the altered Acreages. Presumably, if the Application for consent had already been altered, then the letter of consent ought to have been issued bearing the altered measurements. It is unheard of that the Land Control Board can alter the acreages after the consent has been issued, and if there was such an alterations then the Chairman ought to have countersigned the alteration or issued a fresh consent. Even DW1, the Defendant's sole witness expressed doubts as to whether a letter of consent can be altered after it has been issued.
32. Notably also the letter of consent for the subdivisions was issued on 19th March, 2009. However, the letter of consent for the transfer (PEX15) was issued on 25th January, 2009 over two months before the subdivision was registered. PW1 pointed out that the Consent for transfer of the suit property was obtained before the consent for the subdivision was issued. PW2, an Assistant County Commissioner testified that he sat on the LCB in place of the County Commissioner. He not only noted that irregularity but also testified to the effect that the consent to transfer cannot be issued before the consent to subdivide.
33. DW1, a Land Registrar herself, also acknowledged that the Consent to transfer cannot come before the consent for subdivision and admitted that this was irregular. DW1 told this court in no uncertain terms that one cannot obtain consent to transfer before obtaining consent to subdivide. While cross-examining PW1, Counsel for the Defendant took issue with the fact that the copy of the presentation book of 25th January, 2009 was not presented to confirm if the transfer was done before the mutation was registered. This argument is however inconsequential because for the parties to have known the parcel number for which they were seeking consent to transfer, the mutation ought to have been completed. If the mutation had not been registered and the mother file closed, I fail to understand how the Plaintiff or Defendant would have known the parcel numbers that would be assigned to the plots being created by the mutation. Logically speaking, the suit property did not exist at the time the consent to transfer was issued. For this reason, this court does agree with the witnesses on this irregularity, which can only be attributed to fraud on the part of the Defendant.
34. Still on the consent to transfer, PW1 and PW4 both testified that there was only one meeting of the LCB in March of 2009 and it was held on 17th March, 2009 yet the letter of consent for the subdivision was allegedly held on 19th March, 2009. I have perused the copy of minutes produced in court for the meeting of 17th March, 2009 and the said plot No. Nandi/Cheptil/105 was not among the properties discussed on that day. The Defendant failed to testify and neither did she present any witnesses or evidence to show that a Special or Ordinary Land Control Board was indeed discussing and issuing consent for the subdivision of Parcel No. Nandi/Cheptil/105. The only conclusion to be drawn is that no consent was ever issued on 19th March, 2009 allowing the subdivision of Plot No. 105. The alleged consent was either forged and/or fake.



35. Moreover, PW1 testified that she could not present the Green Card for the suit property. She also testified that no stamp duty, registration fees or transfer fees were paid on the alleged transfer to the Defendant. She clarified that these payments are receipted yet this court has seen no receipts to that effect. DW1 did produce the green card for the suit property, however she indicated that the same was a reconstruction as the entire parcel file had gone missing but she could not tell when it had gone missing.
36. It must be noted that DW1 testified that she had no supporting documents for entry No. 2 on the extract of the register for Plot No. 480 in the reconstructed file supporting the transfer to the Defendant registered on 29th may, 2009. DW1 listed the necessary documents as being the transfer instrument, application for LCB Consent, the LCB Consent, and payment receipts, but she could not find them in the parcel file. DW1 also told this court that she could not confirm whether the title deed held by the Defendant was genuine. The Defence had an opportunity to defend her claim, and she did so by calling a witness, DW1, to testify on her behalf. It is safe to say however, that her evidence was not supportive of the Defendant's case.
37. It is trite that allegations of fraud must not only be specifically pleaded, but have also to be proved to standard of proof that is higher than on a balance of probability, but lower than beyond reasonable doubt. See the case of Demutilla Nanyama Pururmu vs Salim Mohamed Salim (2021) eKLR where the Court of Appeal cited with approval the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another (2000) eKLR, where Tunoi, JA. (as he then was) stated as follows:-
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
38. And in this case, the court finds that the Plaintiff has successfully pleaded and proved to a standard above a balance of probabilities that the Defendant acquired title to the suit property illegally through fraud.

ii. Whether the Plaintiff is entitled to the reliefs sought in the plaint;

39. It is trite that registration is not absolute as a person must prove that the said Registration was one that was in accordance with the law and the laid down procedures. Section 26(1) of the [Land Registration Act](#) No. 3 of 2012, extracted hereinabove, and provides inter alia that a certificate of title can be challenged on the grounds of fraud or misrepresentation or where the title was acquired illegally through a corrupt scheme.
40. The Court has already made a finding that the Respondent has failed to prove the root of his title and found that her title was obtained by fraud. Having so found, it goes without saying that the Plaintiff is entitled to Prayer (b) of his Plaint for a declaration that land parcel Nandi/Cheptil/480 was registered in the name of the Defendant by mistake/fraud.
41. The Plaintiff also prayed for an order that title registered in the name of the Defendant that is, Nandi/Cheptil/480 be cancelled and subsequent registration in the name of the Plaintiff. Section 80 of the [Land Registration Act](#) which is a reflection of the provisions of Section 143 of the Registered [Land Act](#) states as follows;

“ 80. Rectification by order of Court:-



- (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.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

42. The transfer of the suit property and subsequent registration in favour of the Defendant has been held to have been obtained through fraud as the root of the Defendant’s title cannot be explained. The title held by the Defendant falls under the category of titles that can and must be impeached. Any protection afforded under law by the said Section 26(1), Article 40 of *the Constitution* or any other relevant law must thus be lifted as was held in the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR, that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

43. This court has no choice but to forthwith cancel the title of the Defendant and direct that the same be surrendered to the Land Registrar, Nandi County, to effect the said cancellation. If the said title is left in circulation it may be used as a tool of further fraud. Flowing from the above, and by virtue of the powers donated by Section 80(1) of the *Land Registration Act*, the court may order the rectification of the register where it is satisfied that any registration was obtained, made or omitted by fraud or mistake. In exercise of this power, the court shall order for substitution of the Defendant’s name with that of the Plaintiff.

44. Towards the tail end of his oral testimony, the Plaintiff asked that the land be restored to Nandi/Cheptil/105. It has become clear that the Plaintiff never undertook the subdivision that resulted in the four portions currently existing in place of parcel No. Nandi/Cheptil/105. I am alive to the fact that if matters are left as they are, the Plaintiff will be forced to incur extra expenses to undertake another nutation merging the four parcels back into one parcel. Unfortunately for the Plaintiff, the said prayer was not included in the Plaintiff. If the a prayer had been made seeking to nullify the subdivision, this court would have allowed it and ordered that the land revert back to the initial parcel being Nandi/Cheptil/105.

45. However, it is trite law that parties are bound by their pleadings. In the case of *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd* (2018) eKLR, Justice A.C. Mrima held that:-

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for



rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded...”

46. Since the prayer for cancellation and/or nullification of the subdivision/mutation was not made in the Plaintiff, this court has no basis upon which to grant it. Be that as it may, the Court has already ordered that the register of the suit property be rectified and registered in the name of the Plaintiff, the court will leave it at that.
47. Another prayer set out in the Plaintiff is for an order restraining the Defendant, her agents and/or servants be from trespassing and/or interfering in anyway whatsoever with Land Parcel Nandi/Cheptil/105. It is trite that trespass is an unlawful intrusion into another’s land without their permission of justifiable cause as defined under Section 3 of the *trespass Act*. It has not been made clear in this suit who is in possession of the Plot No. Nandi/Cheptil/480. But, having regard to the Defendant’s conduct herein, it is not inconceivable that whether or not she is in possession of the suit property, she will attempt to find a way to interfere with the land. I note that the Defendant attempted to transfer the suit property while the matter was pending in court, despite orders having been issued barring her from such dealings and was found to be in contempt.
48. To avoid any such interferences by the Defendant, I am convinced that the prayer for a restraining order is necessary. However, I must bear in mind that the parcel of land known as Nandi/Cheptil/105 no longer exists. I have also considered the fact that the other three portions that emanated from the mother title, that is Plot Nos. 479, 481 and 482 are in the name of the Plaintiff already and their seems to be no dispute as to those parcels. In the event the Defendant trespasses, the Plaintiff is at liberty to approach the court in that regard. The restraining order shall therefore be made with respect to the suit property herein being Nandi/Cheptil/480.

iii. Who is liable to for the costs of the suit?

49. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. It is trite that costs usually follow the event. This is per the proviso to Section 27, which simply means that the successful party is always entitled to costs of the litigation. It is only in exceptional circumstances that a successful party will be denied costs. No exceptional circumstances exist in this suit to deny the successful party his costs. Thus the Court finds that the Plaintiff being the successful litigant is entitled to the costs of the suit.
50. Consequently, the Court finds that the Plaintiff has proved his case to the required standard and is entitled to the prayers sought in the Plaintiff dated 25th February 2010. Judgment is hereby entered for the Plaintiff against Defendant the in the following terms:-
 - a. The Defendant, her agents and/or servants be and are hereby restrained from trespassing and/or interfering in anyway whatsoever with Land Parcel Nandi/ Cheptil/480.
 - b. A declaration be and is hereby issued that land parcel Nandi/Cheptil/480 was registered in the name of the Defendant by mistake/fraud.
 - c. An order be and is hereby issued that title registered in the name of the Defendant that is, Nandi/Cheptil/480 is cancelled and subsequently the suit property shall be registered in the name of the Plaintiff.
 - d. The Plaintiff is shall have the costs of the suit.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF FEBRUARY 2025.

.....

J. M ONYANGO

JUDGE

In the presence of :

Ms Isiaho for the Plaintiff

No appearance for the Defendant

Court Assistant: Hinga

