



Ngoma (Suing as the Daughter and Legal Representative of the Estate of Alice Mbinya Ngoma -Deceased) v Matheka & 6 others (Environment & Land Case 33 of 2017) [2023] KEELC 185 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 33 OF 2017
CG MBOGO, J
JANUARY 26, 2023**

BETWEEN

STELLA KAVINDU NGOMA (SUING AS THE DAUGHTER AND LEGAL REPRESENTATIVE OF THE ESTATE OF ALICE MBINYA NGOMA - DECEASED) PLAINTIFF

AND

**CATHERINE NDINDA MATHEKA 1ST DEFENDANT
TITUS TAITI MUENI 2ND DEFENDANT
ABEDNEGO MULINGE TWILI 3RD DEFENDANT
ABEDNEGO KAVOO MUTUA 4TH DEFENDANT
PIUS MUEMA MAVINDU 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT
JOSEPH NZIOKA NGOMA 7TH DEFENDANT**

JUDGMENT

1. On the 16th March, 2017, the plaintiff filed a plaint dated 19th October, 2016 seeking judgment against the defendants jointly and severally and/or separately as the case may be for: -
 - a) An order directed at the Land Registrar, Makueni District Lands Registry to cancel registration of Land Title Number Kisau/Mangani/374, Kisau Mangani/935 and Kisau Mangani/936 and title deeds issued in respect thereof.
 - b) An order that Land Title Numbers Kisau/Mangani/374, 935 and 936 be repacelled into one title number Kisau/Mangani/374 in the name of Alice Mbinya Ngoma.



- c) There be an order of permanent injunction directed at the 4th and 5th defendants, by themselves, their agents and/or servants prohibiting them from trespassing or otherwise interfering with the suit property or part thereof.
 - d) General damages for trespass and/ or mesne profits be paid by the 4th and 5th defendants.
 - e) That there be any other or further orders as the honourable court may deem mete and just to grant.
 - f) Costs of this suit be to the plaintiff.
2. In her plaint, the plaintiff averred that the adjudication process in Mangani section was completed on or about 26th September, 1994 and which the deceased, Alice Mbinya Nguma, was the registered owner of Kisau/Mangani/374 measuring about 0.81 hectares. That during the adjudication process, there was no objection and none was raised by the time the deceased died on 27th December, 2005 and as such the suit land has all along been the property of the deceased. The plaintiff stated that the 1st defendant in cohorts with the District Land Registrar fraudulently interfered with and manufactured the adjudication records with respect to the suit land. The plaintiff pleaded particulars of fraud as follows:-
- a) Altering or doctoring and/or manufacturing an adjudication record in regard to the suit land depicting the approximate area thereof to be 0.26 hectares and that the same had been signed by the deceased, Alice Mbinya Ngoma on 30th March, 2005.
 - b) Making a false document and/or altering the document referred to in particular (a) above and purporting such alterations to the document to have been authored, in part by the adjudication officer.
 - c) Purporting, in the document aforesaid, that the 1st defendant had objected to the survey of Land parcel number Kisau/Mangani/374 on her on behalf and on behalf of the plaintiff, the 2nd and 3rd defendants and one Felix Muteti Mueni (now deceased) and that the adjudicating officer had allowed such objection on 18th September, 2007 and extracted two new portions to wit plot number 935 in favour of the 1st defendant and plot number 936 in favour of the plaintiff and the persons referred to hereinabove with the original portion to wit 374 remaining in favour of the deceased, Alice Mbinya Ngoma.
 - d) Making a false adjudication record and purporting it to have been made on 11th May, 2007 in regard to parcel number 935 and purporting it to have been acted upon by the adjudication officer on 31st May, 2007.
 - e) The 1st defendant signing and/or purporting to, on 11th May, 2008, sign adjudication record in regard to parcel number 936 on behalf of the plaintiff as the owner thereof and without authority of the plaintiff and knowing that the plaintiff did not own any such parcel.
 - f) Making false adjudication records on behalf of the 2nd and 3rd defendants and Felix Muteti Mueni (deceased) and purporting such record to have been made on 11th May 2008 when such persons were of minor ages.
 - g) Without prejudice to the foregoing, interfering or purporting to interfere with land parcel number 374 which formed part of the estate of the deceased person, Alice Mbinya Ngoma.
 - h) Dealing or interfering with registration regarding to the suit land in blatant disregard to the law of succession.



- i) Failing to appreciate that no valid objection to the registration of the suit land in the name of Alice Mbinya Ngoma (deceased) could be raised by the 1st, 2nd and 3rd defendants or indeed the plaintiff.
 - j) Failing to appreciate that the only tenable claim by the 1st, 2nd and 3rd defendants to the suit land could only be raised in their capacity as beneficiaries of the estate of Alice Mbinya Ngoma.
3. The plaintiff further averred that the District Land Registrar went ahead and issued title deeds for subdivision of the suit land, the 4th and 5th defendants without any colour of right trespassed onto parts of the suit property, fenced the same and engaged in wanton destruction of vegetation by cutting trees and have now tilled the same for farming. Further, that this state of affairs is tantamount to intermeddling with the estate of the deceased and is calculated to disinherit the rightful heirs and beneficiaries of the deceased.
4. The 1st, 4th and 5th defendants filed their statement of defence dated 29th May, 2017 in which they averred that by the time adjudication had been completed in respect of the suit land, the deceased had subdivided the suit land into three portions in the name of the 1st defendant, the second in the names of the 2nd and 3rd defendants and the plaintiff and the third in the name of the deceased. The 1st, 4th and 5th defendants further denied the particulars of fraud and stated that the adjudication process was lawful and that all the necessary documents were executed by the rights persons. Further, they denied that the issuance of the title deeds was a result of fraud, that they have not intermeddled with the estate of the deceased and the 4th defendant averred that he is not a trespasser but a lawful owner having acquired parcel number 935 through a lawful purchase.
5. The plaintiff filed a reply to defence dated 21st June, 2017 and averred that the purported subdivision was done after the deceased had passed on and that the 1st defendant purported to sign documents for and on behalf of the plaintiff and others without any colour of right. The plaintiff further averred that the 4th defendant could not have lawfully purchased parcel number 935 from the 1st defendant as being a neighbour he ought to have known that the 1st defendant did not have any land to sell. Further, that Joseph Nzioka (7th defendant) did not have capacity to lease out property belonging to the deceased. The plaintiff further averred that the statement of defence does not comply with the mandatory provisions of the law and the same should be struck out.
6. The 6th defendant filed its statement of defence dated 24th August, 2017 and denied the contents of the plaint.
7. On 26th November, 2018 the plaintiff filed a notice of withdrawal dated 26th November, 2018 against the 2nd and 3rd defendants.
8. The 5th defendant filed amended statement of defence dated 22nd September, 2020 and whose contents were similar to the statement of defence dated 29th May, 2017 save for the new details of the law firm now on record which is Muumbi and Company Advocates.
9. The 7th defendant filed a statement of defence and counter claim dated 13th November, 2020. The 7th defendant denied the contents of the plaint and averred that it is only the 4th defendant who is illegally in occupation of the suit land and should vacate immediately.
10. In his counter claim, the 7th defendant averred that the deceased had six children and together with the plaintiff, they are the only surviving children. The 7th defendant further averred that before their mother's demise, she was the registered owner of the suit land upon successful completion of the adjudication process which was on or about 26th September, 1994. Further that their mother left the



suit land intact and there has never been any objections during the lifetime of their mother and even after her death. The 7th defendant further averred that it came to his attention that the 1st, 2nd and 3rd defendant in collusion with the District Land Registrar fraudulently interfered with the adjudication records as well as the land registration records of the deceased and illegally subdivided the suit land into three portions.

11. The 7th defendant pleaded particulars of fraud as below:-
 - a. Altering and manufacturing adjudication record to subdivide the suit property purporting to have been signed by the deceased.
 - b. Alleging that the 1st defendant objected to the adjudication process of the deceased and proceeded to allow the same when none existed.
 - c. Making false adjudication records so as to subdivide the land.
 - d. Proceeding to obtain title deeds for the subsequent subdivisions being Kisau/Mangani/374,935 and 936 while aware the same to be illegal.
 - e. Obtaining the said illegal title deeds which are not supported by the relevant land records.
 - f. Defrauding the deceased of her land and the rest of the beneficiaries.
12. The 7th defendant pleaded that the subsequent titles are illegal and being a son of the deceased and having settled on the land since birth, he is surprised that all the parcels of land have been registered leaving himself and the plaintiff landless. Further, that the 5th defendant has issued a notice of claim against him for Kshs. 200,000/- being the purchase price vide the agreement dated 8th June, 2015 which he has not defaulted and is ready to comply.
13. The 7th defendant prayed for judgment against the 1st, 2nd, 3rd and 6th defendants be entered as follows: -
 - a. A declaration that the subdivision of Kisau/ Mangani/ 374 into Kisau/ Mangani/ 374, Kisau/ Mangani/935 and Kisau/ Mangani/ 936 was fraudulent, illegal and the resultant titles are null and void.
 - b. That the land registrar Makueni do cancel the resultant titles being Kisau/Mangani/374, Kisau/Mangani/935 and Kisau/Mangani/936 and the same be reissued in the name of Alice Mbinya Ngoma so that it can be subjected to succession as per the applicable law.
 - c. An order of permanent injunction directed against the 4th defendant by himself or his servants/ agents from trespassing and/or in any other manner interfering with the suit land.
 - d. A declaration that the 7th defendant has not breached the sale agreement dated 8th June, 2015 and therefore the 5th defendant should wait for the determination of this suit to enable the 7th defendant comply with the said sale agreement.
 - e. Costs of the suit and the counterclaim be paid by the 1st, 2nd and 3rd defendants.
14. This matter proceeded for hearing on 13th April, 2021 during which the plaintiff while adopting her witness statement 19th October, 2016 testified that the suit land was within Mangani Adjudication Section and was in the name of her mother who died on 27th December, 2005. On cross examination, the plaintiff testified that the suit land was not measuring 0.26 hectares as per PEX4 but as per the title deed she produced, the same is in the name of Alice Mbinya Ngoma and measures 0.26 hectares. The plaintiff further testified that she has evidence to show that the 1st defendant and others fraudulently manufactured documents as the acreage indicated on the title came about after their mother died. She



- testified that she did not file a complaint with the police and neither did she include the Land Registrar and the Land Adjudication Officer as parties in the suit. Further, that their family land was sold by other people but did not take the documents to a document examiner. She further testified that she has evidence to show that the suit land was subdivided by the Registrar to create two other portions that is parcel number 935 and 936.
15. The plaintiff further testified that when their mother died, she left the suit land measuring 0.8 hectares and it was after her death that it was divided into three portions and she was not aware that her mother had subdivided the suit land while she was alive but she maintained that the subdivision was done after she had died. She further testified that her complaint is directed towards the land's office. With regard to parcel number 935 which is in the name of the 1st defendant, the plaintiff testified that she has no documents to show that it belonged to her late mother. As per DEX2, the plaintiff testified that as per the green card, it shows that the 1st defendant is registered as the owner of parcel number 935 and is aware that the 1st defendant sold it to someone else and further that she did not seek cancellation of the title sold to the 4th defendant by the 1st defendant.
 16. The plaintiff further testified that her late mother did not allocate any parcel of land to her although there is a title deed in her name. On further cross examination, the plaintiff testified that she has three other parcels of land and that her late mother did not subdivide the suit land amongst her children while she was still alive. Further, that she has not sued the 7th defendant even though he resides on the suit land but she reiterated that the 7th defendant had no title to sell to the 5th defendant.
 17. On further cross examination, the plaintiff testified that the 4th and 5th defendants are not her relatives but neighbours and that initially, the suit land was 0.81 hectares and in her statement it reads 0.83 hectares although she had no documents to prove the same. She further testified that the adjudication record which shows a thumb print of her deceased mother indicates that her mother was allocated plot number 374 which is signed by the chairman and the executive officer and a witness by the name of Francis M.Nalamai. The said record is signed on 30th March, 2005. The plaintiff further testified that the thumb print in the document belongs to her late mother and the suit land was to remain as originally recorded which is 0.26 hectares. She further testified that the Land Registrar informed her that there were irregularities in the registration and although she does not know the name of the said Land Registrar, she could call him as her witness. She further testified that she has filed the officer's witness statement which shows that no adjudication process was carried out before the death of her mother. That in the year 2005, the suit land had not been subdivided and she does not know if her mother filed an objection after the adjudication was done. Further, that the title deed had not been issued by the time of her mother's death. In addition, she visited the Adjudication Officer after she found out that the title deeds had been issued and the Adjudication Officer was not aware of her mother's death until she informed them.
 18. On further cross examination, the plaintiff testified that as per DEX5, the 1st defendant filed a complaint on 11th May, 2005 after her mother had died and that the objection was allowed and dealt with on 31st May, 2007.
 19. On re-examination, the plaintiff testified that her mother died on 27th December, 2005 and was buried on 31st December, 2005 as per the burial permit.
 20. The 1st defendant while adopting her witness statement filed on 27th February/July, 2019 testified that she did not fraudulently manufacture documents in conjunction with the Land Registrar and the adjudication record DEX No. 4 was prepared by someone she did not know.



21. On cross examination she testified that she is aware of parcel number 935 which previously belonged to her but sold the same to the 4th defendant. She further testified that in the year 2007, the Adjudication Officer came to the ground to survey the land and the said parcel of land was allocated to her. That the Adjudication Officer found her with her father in law Mutisya Kiiva and the Adjudication Officer was out to see if there were any objections on the land and that she never filed any objection on the suit land. Further, that by the time the Adjudication Officers came, her mother in law was already deceased and prior to which she had subdivided the suit land by the time she got married. Further, that she only took her national ID to the land's office to acquire title. Further, she testified that she did not file a succession cause of her husband's estate who died in the year 2004 but the title deed was issued to her in the year 2004.
22. On further cross examination, the 1st defendant testified that the land was allocated to her by the Adjudication Officers as her mother in law had subdivided the suit land into three portions before her death and that she is not aware whether the 7th defendant sold his portion of the land.
23. On further cross examination, the 1st defendant testified that when she was married in the year 1999, her mother in law had subdivided the land into three portions. One portion belonging to her husband, another portion belonging to the 7th defendant and the rest of the land belonging to the children of her deceased sisters in law and the plaintiff as well. She further testified that under Kamba customary law, sons and children of daughters who are deceased can be given land. She further testified that she does not know that parcel number 935 was originally in the name of Catherine Mueni Matheka and whether the same was rectified as per PEX4 only that she took her national identity card to the land office to be issued with a title deed in her name.
24. On further cross examination, the 1st defendant testified that Mutisya Kiiva is brother to Ngoma who is her father in law and knowing how to read and write, the adjudication record for parcel number 935 does not bear her signature and neither did she attend any objection proceedings. She further testified that she did not fill objection form for parcel number 936 on behalf of Titus Taita Mueni, Felix Muleti Muteti, Abedneo Mulinge and Stella Kavindu Ngoma and neither did the plaintiff authorise her to use her name although the form bears her signature. The 1st defendant further maintained that the suit land was already subdivided by the time she was married in the year 1999 although she has no documents to show that subdivision was done in the year 1999. She further testified that she does not know the parcel number that was allocated to the 7th defendant and is not sure whether he was to inherit her late mother in law's land.
25. She further testified that by the time she lodged the objection of Titus and Abednego Mulinge Twili, they had not attained the age of majority and further that the plaintiff threatened to set her ablaze but she did not report the matter to the police.
26. On re-examination, the 1st defendant maintained that her mother in law subdivided the land while still alive and further, that she did not lodge a complaint to correct the name.
27. The 4th defendant while adopting his witness statement dated 5th June, 2017 testified that he bought parcel number 935 from the 1st defendant vide a sale agreement dated 11th March, 2015 and the 1st defendant transferred the same to him on 17th October, 2016 and as such he is on the land legally and there is no prayer for cancellation of his title deed.
28. On cross examination, the 4th defendant testified that there was a title deed by the time he purchased the land and which he confirmed before entering into a sale agreement. With regard to his family land, the 4th defendant testified that he was issued with a title deed in the year 2015 and participated in the adjudication process in the year 2012 although he could not tell exactly when the adjudication process



- took place. Further, he is aware that the husband to the seller of the land is deceased but his name does not appear in the record. Further, that during the sale of the land, he sat down with his uncle and the 7th defendant but did not include the are chief.
29. On further cross examination, the 4th defendant testified that transfer of parcel number 935 was done in the year 2016 and he obtained the board consent which is not signed by the seller and he did not attend the board meeting and cannot recall the date of the said meeting. On re-examination, the 4th defendant testified that the relevant documents are with the land's office.
 30. The 5th defendant while relying on his witness statement dated 12th August, 2020 testified that the 7th defendant sold the land he owns and currently cultivates the same. On cross examination, the 5th defendant testified that the land has no parcel number. On further cross examination, the 5th defendant testified that the 7th defendant sold him his portion of land which he informed him that his mother had subdivided the land and that his siblings were all allocated their portions. He further testified that the 7th defendant did not explain to him why the land he sold to him did not have a title deed since he is familiar with the problems the 7th defendant's family faces.
 31. On further cross examination, the 5th defendant testified that the portion of land he purchased is about half an acre but the agreement does not show the size of the land and neither does it show the number. He agreed that the parcel number is 374 in the name of the deceased and the 7th defendant has not chased him from the land but the plaintiff is disputing the sale and is willing to wait until the 7th defendant acquires his share of the suit land. He testified that he bought the land for Kshs. 260,000/- and has paid Kshs. 200,000/- with a balance of Kshs. 60,000/- which is remaining and is willing to pay the same.
 32. The 7th defendant while adopting his witness statement dated 13th November, 2020 testified that his mother had not subdivided the suit land at the time of her death. On cross examination, the 7th defendant testified that his case is similar to the plaintiff and that the suit land initially measured 0.83 hectares when his mother was alive and after her death, it was reduced and the said reduction was done at Mangani Adjudication Office whom he has not sued but blames the 1st, 2nd and 3rd defendants. He further testified that the suit land is in his late mother's name and that he has obtained letters of administration but has filed the suit in his capacity as her son. Further, that he sold a portion of land which he occupies and that his mother did not plant sisal after pointing out their portions to them. Further, that his mother did not lodge any objection with respect to the suit land but his sister did and neither did he lodge any complaint with the police after tampering. He admitted that he did not sue the Adjudication Officer and neither did he serve the 2nd and 3rd defendants who have title deeds.
 33. On further cross examination, the 7th defendant testified that his late mother showed each one of them their portions of land and is willing to transfer to the 5th defendant the portion he sold to him. On further cross examination, the 7th defendant testified that the adjudication process was conducted in the year 1994 and his late mother was allocated the suit land which was about 0.833 hectares. Further, that the adjudication process is under the adjudication office and the Land Registrar is also involved in the process and whose role is to consider the parcels under dispute. He further testified that the Land Registrar came to the land in the year 1994 and the thumb print on the adjudication record does not belong to his mother. Further that he did not serve the Attorney General with his counter claim and that it is not a must to notify the Attorney General before suing him in court.
 34. On re-examination, the 7th defendant testified that his mother had not subdivided the suit land.
 35. Further defence hearing proceeded on 26th May, 2021 where Japheth Mutua Mutiso(DW1), Principal Land Adjudication and Settlement Officer, testified that the suit land was originally recorded in the



name of Alice Mbinya Ngoma (deceased) before the year 2007 when the adjudication register was closed which as per PEX4 measures approximately 0.26 hectares. Further, that there was an objection number 173 filed on 18th September, 2007 and according to their records the suit land was not fraudulently subdivided. The said objection was submitted by Catherine Ndinda Matheka and others and the same was heard ex-parte as per Section 11 of the Land Adjudication Act. Further, that the Adjudication Officer was within the law to hear the exparte objection. DW1 further testified that the suit land was divided into parcel number 935 and 936 and the office was required to survey and not subdivide.

36. With regard to parcel number 935, the same was first registered in the name of Catherine Mueni Matheka before it was corrected as per the national identity card and which was vide the objection number 234. With respect to parcel number 936, the same is registered in the names of Titus Taiti Mueni, Felix Muteti Mueni, Abednego Mulinge Twili and the plaintiff. DW1 further testified that once the adjudication process is completed, the register is forwarded to the Director of Land Adjudication for onward transmission to the Secretary of Lands who is mandated to issue title deeds and the title deeds are prepared based on the adjudication records which emanated from the Land's registrar, Makueni. He further testified that the adjudication process involves subdividing land but under court order or an order made by the tribunals. DW1 produced DEX17 and 18 respectively which are a rough book on objection and DEX19 which is a letter dated 23rd October, 2019. (I haven't seen these documents on record).
37. On cross examination, DW1 testified that he does not know the date when the adjudication process was conducted in Kisau/Mangani and as per the record parcel number 374 was subdivided into two portions and which process was a survey and not a subdivision. It was his testimony that the Land Adjudication Officer can correct errors and records in the register before it is submitted to the Director of Land Adjudication and from the records, the objection was submitted by the 1st defendant and others and appeared before the Adjudication Officer. He further testified that a minor can appear before the Adjudication Officer and an adult can appear or send a representative. In this case DEX6 shows that the 1st defendant signed on behalf of the others.
38. On further cross examination, DW1 testified that the Land Adjudication Officer is not a party to the suit but in this case, he has appeared as a witness. As such, all the records before the court have come from their office and no document was manufactured. Further, that what took place was a resurvey and not a subdivision. Further, that parcel number 935 has never been registered in the name of the deceased and no illegality was committed by the Land Adjudication Officer and the Land Registrar.
39. On further cross examination, DW1 testified that they only relied on the persons who went to sign the record and the persons who were on the ground and that there were timelines for objection which is as per the records in their custody. On further cross examination, DW1 testified that the original owner of the suit land was the deceased and there was an objection number 173 that was lodged on 18th September, 2007 by Catherine Ndinda Matheka and others which was for subdivision and that resurvey was done on the same day. Further, that parcel number 935 and 936 was created before 18th September, 2007 which records are there but not in court. He further testified that minors can own land and that since the deceased did not raise an objection, her name remains in the record if the title has not been registered.
40. On re-examination, DW1 testified that the adjudication record for the suit land was recorded in the year 2005 during which time parties were at liberty to file objections after the year 2005. Further, that what took place was a survey and not a subdivision. He further testified that a record is declared complete when all parcels in the adjudication section have been allocated numbers and a map is drawn. Further,



that changes can be done as long as the process has not been declared complete and that an objector can send a representative to the objection proceedings.

41. The plaintiff filed written submissions dated 28th July, 2022. The plaintiff raised the following issues for determination: -
 1. Whether the 1st defendant was in a position to make a valid objection to the registration of the suit land on behalf of the other beneficiaries of the estate of Alice Mbinya Ngoma.
 2. Whether the 1st defendant would pass a good title to the 4th defendant.
 3. Whether the 4th and 5th defendants are trespassers to the suit land and thus the plaintiff is entitled to general damages for trespass.
42. On the first issue, the plaintiff submitted that the 1st defendant had no capacity to launch an objection on behalf of the plaintiff and other family members without their consent and letters of administration and that the objection no 173 resulted in a subdivision of two portions of land which is illegal in law and contrary to Section 45 of the *Law of Succession Act*.
43. On the second issue, the plaintiff submitted that one cannot pass a better title than he had and the illegalities of the 1st defendant are null and void and no valid sale and transfer could be carried by the 1st defendant to the 4th defendant. The plaintiff relied on the case of Elijah Makeri Nyangwara versus Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609B of 2012. The plaintiff further submitted that even if this court was to find that there was no fraud on the part of the defendants, then the subdivision was obtained illegally because no valid objection would be raised by the defendants or the plaintiff without obtaining letters of administration or dealing or interfering with the subdivision of the land in regard to the suit land in blatant disregard to the law of succession. It was the plaintiff's submission that from the 1st defendant's demeanour during cross examination, it was clear that she could not tell how or where she had launched the objection.
44. On the third issue, the plaintiff submitted that both the 4th and 5th defendants have confirmed that they are in occupation of the suit land and for this reason, the plaintiff is entitled to general damages. The plaintiff relied on the cases of Park Towers Limited v John Mithamo Njika & 7 Others [2014] eKLR and Avid Developers Limited v Blue Horizon Properties Limited & 2 Others [2021] eKLR.
45. The 1st and 4th defendants filed written submissions dated 20th July, 2021. The 1st and 4th defendants raised the following issues for determination: -
 - i. Whether the plaintiff proved her case of fraud against the 1st and 4th defendants.
 - ii. Whether this court had jurisdiction to reopen the process of adjudication once title deed is issued.
 - iii. Whether the counter claim for the 7th defendant is time barred.
 - iv. Whether the 7th defendant counterclaim is defective in law and incompetent.
 - v. Whether the plaintiff has no capacity to prosecute the suit and therefore the proceedings are null and void.
 - vi. Whether the plaintiff is bound by her pleadings and a prayer not sought cannot be granted.



46. On the first issue, the 1st and 4th defendants submitted that under Section 24 (a) of the [Land Registration Act](#), the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto. Further, that the plaintiff did not give any evidence to prove the alleged fraud and failure to join the Land Adjudication Officer and the Land Registrar despite their role in the adjudication process and issuance of title deeds. The 1st and 4th defendants relied on the cases of Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR, Cyril J Haron and Andrew v Uchumi Services Limited and 3 Others [2014] eKLR and submitted that he who asserts must prove and the allegation of fraud must be strictly proved. They further submitted that they bear no evidentiary burden of proving their innocence from alleged fraud. Reliance was placed in the case of Central Kenya Limited v Trust Bank Limited and 4 Others [1996] eKLR. The 1st and 4th defendants further submitted that the adjudication process was conducted in accordance with the [Land Adjudication Act](#). They relied on the cases of Martha Kigen v Johana Tibino [2014] eKLR and Mathew Lekaota Sinteria v Francis Sialo Memantiiki & 2 Others [2014] eKLR.
47. On the second issue, the 1st and 4th defendant submitted that once title has been issued, the court has no jurisdiction to reopen the process of adjudication and that this case is an attempt to reverse the adjudication process. They relied on the case of Republic v Minister for Land & 3 Others, ex parte Mutia Nzaa [2014] eKLR. Further, that once title deed has been issued, the [Land Adjudication Act](#) ceased to apply and any impeachment of the adjudication process is misconceived and ill advised. The 1st and 4th defendants relied on the case of Livingstone Kunini Ntutu v County Council of Narok & 2 Others [2014] eKLR.
48. On the third issue, the 1st and 4th defendants submitted that the 7th defendant's counter claim is time barred for the reason that the suit properties were registered in the year 2010 and the defendant filed his counter claim after three years and eleven months. The 1st and 4th defendants submitted that since the counter claim is founded on fraud, the same cannot stand. They relied on the case of Julius Njuguna Mwangi v Kariuki Kamau Mbiuki & 4 Others [2018] eKLR.
49. On the fourth issue, the 1st and 4th defendants submitted that the 7th defendant's counter claim is defective for want of letters of administration as per Section 82 of the [Law of Succession Act](#). The 1st and 4th defendants relied on the cases of Kambora Mamau v Esther Nyambura Kirima [2002] eKLR, Francis Pius Omweri & Another versus Alice Chesire [2013] eKLR.
50. On the fifth issue, the 1st and 4th defendants submitted that the limited grant issued to the plaintiff was limited to filing suit and not to prosecute. The 1st and 4th defendants relied on the case of Priscilla Njeri Wamiti & 2 Others v Shiku John Company Limited [2017] eKLR and submitted that the plaintiff has no locus standi to prosecute the suit.
51. On the sixth issue, the 1st and 4th defendants submitted that the plaintiff did not amend the plaint to pray that the parcel number 935 be cancelled and therefore the prayer for cancellation of the 1st defendant's title deed is not available. The 1st and 4th defendants relied on the case of Dakianga Distributors Limited v Kenya Seed Company Limited [2015] eKLR and submitted that the plaintiff did not prove her case on a balance of probabilities.
52. The 5th defendant filed written submissions dated 30th July, 2021. The 5th defendant submitted that the plaintiff testified that she was not aware of any sale agreement for a portion of land to be hived off from the suit land and that upon cross examination of the 7th defendant, he confirmed that the portion of land sold to the 5th defendant was his portion of his inheritance and is willing and ready to transfer the said property and have the final balance of Kshs. 60,000/- fully settled.



53. The 6th defendant filed written submissions dated 23rd July, 2021. The 6th defendant raised three issues for determination: -
- a) Whether the 6th defendant is liable for any fraudulent activities.
 - b) Whether the plaintiff has proved her case.
 - c) Whether the plaintiff is entitled to the orders sought.
54. On the first issue, the 6th defendant submitted that Section 11 of the Land Adjudication Act provides that the Adjudication Officer has powers to correct any error or supply any omission occurring in the adjudication register and further, the Act provides for mechanisms of redress where a party is aggrieved. In this case, the 6th defendant submitted that the plaintiff should have exhausted the mechanisms available under the Act before coming to court.
55. On the second issue, the 6th defendant submitted that the plaintiff has not made any allegations in the suit against the Adjudication Officer with respect to the alleged forgery of documents. Further that from the definition of fraud in the Black's law dictionary, 7th edition, it was the plaintiff's duty to show that there was concealment of material facts by the 6th defendant that were induced to his detriment. The 6th defendant relied on the cases of R.G Patel v Lalji Makanji [1957] E.A 314, Alfred Sagero Omweri v Kennedy Omweri Ondieki [2015] eKLR and Ndolo v Ndolo [2008] 1 KLR (G& F) 742.
56. On the third issue, the 6th defendant submitted that it was upon the plaintiff to meet the threshold that is required in proving her case which she has not done so and the Land Adjudication Officer acted within the statutory mandate and forwarded the records to the land registrar who also acted within his mandate.
57. The 7th defendant filed written submissions dated 28th June, 2021. The 7th defendant raised three issues for determination as follows: -
- a. If the subdivisions were legal.
 - b. Whether failure to join the adjudication officer is fatal.
 - c. Whether the plaintiff's suit should be allowed.
58. On the first issue, the 7th defendant submitted that based on the testimony of the parties, it is clear that the suit land had not been subdivided by the time of the deceased's death. On the second issue, the 7th defendant testified that from the provisions of Order 1 Rule 3 of the Civil Procedure Rules, there are no orders sought against the Adjudication Officer and the suit is well within the rights of the plaintiff. The 7th defendant relied on the case of William Kiprono Towett & 1597 Others versus Farmland Aviation Limited & 2 Others [2016] eKLR.
59. On the third issue, the 7th defendant submitted that there is ample evidence to show that the 1st defendant lodged an objection long after the demise of the deceased and the purported objections were illegal and marred with fraud and illegalities. Further, the fact that the same was done after the death of the owner shows that it was an illegal act contrary to Section 45 of the Law of Succession Act and therefore the plaintiff's case has merit.



60. I have analysed and considered the pleadings, the written submissions and in my view, the authorities relied on by all the parties herein and the issues for determination are as follows: -

- i. Whether the allegations of fraud have been proven.
- ii. Whether the plaintiff is entitled to the orders sought.
- iii. Costs.

61. It was the plaintiff's case, that her deceased mother was the registered owner of the suit land that is Kisau/Mangani/374 and which was measuring 0.81 hectares which parcel of land she acquired after adjudication process conducted in the year 1994. It was further the plaintiff's case that the 1st defendant together with the District Land Registrar fraudulently altered and manufactured adjudication records to show that the deceased parcel of land was approximately 0.26 hectares. Among other prayers she has sought is for an order of cancellation of all the three parcels of land. The 1st and 4th defendants submitted that the plaintiff lacks locus to prosecute the suit. In my view, the plaintiff is quite in order to have brought the suit as a legal representative of the estate of her deceased mother since no letters of administration has been obtained. I rely on the case of *In re the estate of Helena Wangechi Njoroge (Deceased)* [2015] eKLR it was stated of letters of administration 'ad litem' that;

“It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third parties.”

62. Also, *In re Estate of Paul Kiunga (Deceased)* [2019] eKLR, the court observed as follows, “A limited grant of letters of administration ad litem is therefore made usually when the estate of a deceased person is required to be represented in court proceedings. Notably, however, limited grant is made due to the exigencies of matter; urgent need to file or join or defend suit on behalf of the estate, and which cannot wait until full grant is obtained. Of course, the process of obtaining full grant may be lengthy and protracted.”

63. As such, the plaintiff was well in order to file the instant suit. On the other hand, the 7th defendant filed a counter claim dated 13th November, 2020 and it was his evidence that he filed the same as a son of the deceased. In *Isaya Masira Momanyi v Daniel Omwoyo & anor* [2017] eKLR, it was stated as follows:

“It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person.”

64. I agree with the above findings that without the letters of administration, and in this case limited grant “ad litem” the 7th defendant though son of the deceased could not have filed the counter claim.



65. It is trite law that any allegations of fraud must be pleaded and strictly proved. In the case of Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR, it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

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

66. This court is aware that the standard of proof of fraud is higher than on a balance of probabilities. The court in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR held, inter alia, that:

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd v Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.” (emphasis mine)

67. The dispute at the centre of this case is the acreage of the suit land which the plaintiff claims to have been 0.81 hectares as opposed to the 0.26 hectares indicated in PEX4 which is a copy of the title to the suit land. Besides these, the plaintiff has not shown proof that the suit land was initially 0.81 hectares and is of the belief that the same was altered by the 1st defendant in cohorts with the Land Registrar.

68. There seems to be some disconnect as to how the 1st defendant acquired ownership of parcel number 935 which the 1st defendant and DW1 agreed that it was a subdivision of the suit. The evidence of the 1st defendant is in my view questionable. One is that how did she file the objection after demise of the owner of the suit land and what procedure was followed in allowing her objection and secondly how was it that she procured documents and more so title to parcel number 936 without authorisation of the plaintiff.

69. There are questions as to whether the procedures with regard to ownership of land in an area declared an adjudication section under the *Land Adjudication Act* was followed more so with regard to Sections 25 and 26 of the Act. It was the evidence of DW1 that parcel number 935 and 936 was created before 18th September, 2007 but which records were not in court. I am constrained to believe that in the absence of the said record, the same are in their custody. It is also baffling that the 1st defendant filed objection proceedings against the suit land whereas the owner was deceased. Also, it is not known when the adjudication register was closed and open for inspection to allow objections if any. If at all the adjudication process was completed in the year 2005, how was it possible for the 1st defendant to have filed an objection two years later.



70. Having stated the above, the plaintiff has not established fraud as against the 4th, 5th and 6th defendants to warrant this court's consideration. The plaintiff's claim against the 3 defendants is dismissed with costs. However, I am satisfied that there lies a claim as against the 1st defendant whose title cannot be said to have been acquired through a lawful procedure. I am aware that the certificate of title in the name of the 4th defendant and the 2nd, 3rd and the plaintiff are 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](#). Title documents are prepared and issued by the Land Registrar. However, the same cannot be said to be so where it is established that there was unlawful and illegal acquisition of the same as is the case here.
71. Another concern to this court was failure by the plaintiff to join the Land Adjudication and Settlement Officer and the District Land Registrar as parties to this suit. Whereas, it is within the plaintiff's right to join whoever it pleases her to join, it would also have been necessary to join the Land Adjudication and Settlement Officer and the Land Registrar as parties to this suit. This would have enabled the said parties to properly defend themselves and also shed more light on the circumstances of this case.
72. Be that as it may, I am alive to the provisions of the [Government Proceedings Act](#) Cap 40 which, inter alia, govern civil proceedings by or against government. Of particular interest, in so far as this suit is concerned, are Section 12(1) and Section 13 of that Act. Section 12(1) provides as follows: "12. (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be."
73. Section 13 of the same Act further provides: "13. All documents required to be served on the Government for the purpose or in connexion with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Attorney-General."
74. My understanding of the foregoing provisions is that, it is beyond doubt that any grievance against the government which a party chooses to address through civil proceedings must be instituted against the Attorney-General and secondly, in all cases, service of process of such proceedings must, as a matter of law, be effected upon the Attorney-General.
75. Arising from the above, I am satisfied that the plaintiff has on a balance of probabilities established a prima facie case as against the 1st defendant only and the plaint dated 19th October, 2016 is hereby allowed in terms of the prayer (a) as follows:
- a) An order is directed at the Land Registrar, Makueni District Lands Registry to cancel registration of Land Title Number Kisau/Mangani/374, Kisau Mangani/935 and Kisau Mangani/936 and title deeds issued in respect thereof.

Costs of the suit to be borne by the 1st defendant. The 7th defendant's counter claim dated 13th November, 2020 is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 26th day of JANUARY, 2023.

MBOGO C.G.

JUDGE

26/1/2023.

In the presence of: -

CA:T.Chuma

