



Patel & another (Suing as Legal Representatives and Administrators of the Estate of the Late Jayantibhai Rambhai Patel) v Patel & 2 others (Environment & Land Case 60 of 2018) [2023] KEELC 15681 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15681 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 60 OF 2018
A OMBWAYO, J
FEBRUARY 21, 2023
(FORMERLY ELC NO. 14 OF 2012)**

BETWEEN

**ANUPKUMAR JAYANTIBHAI PATEL 1ST PLAINTIFF
SACHINKUM JAYANTIBHAI PATEL 2ND PLAINTIFF
SUING AS LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE
ESTATE OF THE LATE JAYANTIBHAI RAMBHAI PATEL**

AND

**ASHOKKUMAR RAMBHAI PATEL 1ST DEFENDANT
COUNTY LAND REGISTRAR- KISUMU 2ND DEFENDANT
ATTONERY GENERAL 3RD DEFENDANT**

JUDGMENT

1. Sachinkumar Jayantibhai Patel and Anupkumar Jayantibhai Patel suing as legal representatives and administrators of the estate of the late Jayantibhai Rambhai Patel have come to this court against Ashokkumar Rambhai Patel the County Land Registrar – Kisumu and the Attorney General claiming that their father and the 1st defendant who is their uncle jointly owned the property known as Kisumu/Municipality Block7/387 having been registered as owners thereof on 15th December 2006. The plaintiff's aver that the property is situated along Gor Mahia Road -Makasembo Road junction within Kisumu city and comprises of a shop currently rented out to Amar Hardware limited paying monthly rent of Kenya shillings Eight thousand (Kshs80,000/=) shared equally between the owners (paid directly to their account).



2. The plaintiffs aver their father died on 29th October 2011 at Central Middlesex Hospital and that on 7th February 2012 the 1st defendant colluded with the 2nd defendant to fraudulently and illegally register himself as the sole owner of the suit property claiming it was a “joint ownership” property yet the same was not indicated in the register/green- card nor was it indicated in the certificate of lease issued on 15th December 2006.
3. The plaintiffs aver that it was presumptuous of the defendant to transfer this property to the defendant without involving the family of the deceased, and in violation of the express provisions of Article 40 of the constitution of Kenya (2010)
4. Further, the plaintiff avers that the registration of the defendant as the sole owner of the suit parcel was obtained by outright fraud directly perpetrated by the defendant, and the other defendants agents
5. The fraud is particularized as transferring the suit property without obtaining letters of administration of the estate of the late Jayantibhai Rambhai Patel after his death
6. Effecting transfer of the suit parcel on presumption that it was jointly owned, yet it was not registered as such and failing to pay for the procedure for the procurement of the consent to transfer the property to his name.
7. The plaintiff allege that the 1st defendant uttered a false documents in order to procure his title and failed to observe laid down procedure while transferring the suit title. The plaintiff allege that the 1st defendant committed perjury by swearing to false information as regards the deceased death certificate.
8. According to the plaintiff the 1st defendant used corrupt and underhand dealings to procure the suit title. The plaintiff’s claim against the defendant is that :-
 1. A declaration that the defendant’s acquisition of parcel No.Kisumu/Municipality Block 7/387 was null and void *abinitio* and this honorable court be pleased to issue an order cancelling the defendants title dated 7th February 2012 and the registered to be rectified to its original state of ownership, between the deceased (Jayantibhai Rambhai Patel and Ashokumar Rambhai Patel)
 2. A permanent injunction do issue restraining the defendant, his agent, servant, employee, agent or anybody claiming through him from selling off, disposing, charging or interfering with the plaintiffs/deceased interest in the suit property without their express consent.
 3. Costs and interest of this suit.
9. The defendant filed defence and counter-claim that was later amended, whose gist is that the property known as Kisumu/Municipality Block7/387 was held as a joint tenancy (co ownership) in the names of the deceased and himself. The defendant avers that in terms of the registered Land Act (repealed) and Land Registration Act 2012 he was and is entitled under the rights accruing under survivorship to the registration of the deceased’s share into his name making him the sole proprietor.
10. The defendant admits the contents of paragraph 4 of the plaint and avers that the tenant has not paid rent since January 2012 and in any event the defendants reiterates that he is the sole owner of the property.
11. The defendant categorically denies and refutes what he terms as the defamatory and spurious averments that on the 7th February 2012, he fraudulently and illegally registered himself as the sole owner of the property of the suit property claiming it was a “joint ownership” property yet the same was not indicated in the register/ green card nor was it indicated in the certificate of lease dated



- 1st December 2006 and that Kisumu/Municipality/Block7/387 was held under joint tenancy in the names of the deceased father of the plaintiffs and 1st defendant hence the transfer to the 1st defendant at the death of the deceased father of the plaintiffs was done legally.
12. The 1st defendant denies the allegations of fraud as letters of administration are not required for transferring a jointly owned property that is not a tenancy in common.
 13. The 1st defendant states that the criminal case preferred against him was dismissed and the appeal filed by the state was equally dismissed. The 1st defendant prays that the suit be dismissed.
 14. In the counter-claim, the 1st defendant states that property No. Kisumu/Municipality/Block7/387 was held as a joint tenancy between the 1st defendant and his deceased brother he is entitled to be registered as the sole proprietor and the restriction lifted.
 15. The 1st defendant further states that property No. Kisumu Municipality/Block X498 and Kisumu Municipality/Block X499 were jointly registered in his name and that of his deceased brother Jayantibhai Rambhai Patel as joint tenants hence the 1st defendant should be registered as the sole proprietor.
 16. The 1st defendant claims that the plaintiffs and their mother fraudulently transferred the property Kisumu Municipality/Block X498 and Kisumu Municipality/Block X499 in the names of the deceased, their mother and in their names. The transfer was through forgery and fraud.
 17. The 1st defendant states that that the plaintiffs illegally registered a restriction on Kisumu/Municipality /Block 8/222. The 1st defendant prays for a declaration that he is the sole and legal proprietor of the property Kisumu Municipality Block7/387 with all rights and interest arising therefrom. Moreover, orders directing the plaintiffs lift the restriction lodged by the plaintiffs against the property title Kisumu Municipality Block7/387.
 18. The 1st defendant prays for a permanent injunction restraining the plaintiffs their agents and servants or anyone claiming through them from interfering with, selling off, disposing, charging, transferring collecting rent from, leasing or in any other way dealing with the said property Kisumu Municipality Block7/387.
 19. Furthermore the 1st defendant prays for A declaration that the plaintiffs and their mothers fraudulent acquisition of shares in Kisumu Municipality Block X/498 and Kisumu Municipality/Block X/499 is null and void Ab initio and this honorable Court be pleased to issue an order cancelling the Title dated 22nd March 2007 and the register be rectified to its original state of ownership between the defendant/ Counter claimant and the deceased.
 20. Consecutively, the 1st defendant prayed for a permanent injunction against the plaintiffs restraining them, their agents and servants or anyone claiming through then from interfering with, selling off, disposing, charging, transferring, collecting rent from, leasing or in any other way dealing with the said properties Kisumu Municipality Block X/498 and Kisumu Municipality Block X/499 pending the hearing and determination of this suit.
 21. Last but not least, the 1st defendant prayed for orders directing the plaintiffs jointly and severally to lift the restriction lodged by the plaintiffs against the property title Kisumu Municipality Block 8/222.
 22. The 2nd and 3rd defendants filed a statement of defence denying any fraud or collusion in the property No. Kisumu Municipality/Block 7/387. The 2nd and 3rd defendant stated that where a property is registered in more than one name the presumption is that it is owned jointly in the absence of a contrary entry in the register and that was the case in Kisumu/Municipality Block 7/387.



23. When the matter came up for hearing on 14th October 2021, PW1 Anupkumar Jayantibhai Patel testified that Jayantibhai Patel was his late father who died on 29th October 2022 in the United Kingdom. The 1st plaintiff is his younger brother. The 1st defendant was their uncle. The court adopted his statement as his evidence in chief. In a nutshell, he states that plot no Kisumu/Municipality/7/387 was a commercial property that was a business asset used as a store by his father and uncle. Upon his father's death he transferred the property to himself. He states that the property was jointly owned. The lease does not indicate the share of each party. The parcel of land was bequeathed to the plaintiff and his brother in a will left behind by his father. The property was purchased by his father and uncle on 23rd November 1992 and registered in the names of the company. At the death of his father, the 1st defendant came back to Kenya and left the defendant plaintiffs in limbo and caused the property to be registered in his name after accessing all documents and titles for the parcels of land known as

Kisumu/Municipality/block10/498,

Kisumu Municipality/Block 8/102.

Kisumu Municipality/Block/8/222,

Kisumu Municipality/Block /7/387 and Kisumu Municipality/Block10/499.

He states that Kisumu Municipality/Block/ 10/498 and Kisumu Municipality/Block /499 are registered in the names of his father, mother and themselves. Parcel number 8/102 is registered in the names of his father and defendant.

24. The PW1 testified that they did not fraudulently remove Ashokkumar name from Kisumu Municipality/Block /498 and Kisumu Municipality/Block /499 but his father and uncle appeared before an advocate in Kisumu thus one Mr Onsongo advocate and executed a transfer. The 1st defendant was aware of the transfers. A document executed confirmed that the transfer were signed by the 1st defendant.
25. On cross examination by Mitch Menezes, learned counsel for the 1st defendant he agreed that there are five properties in this case thus, Kisumu Municipality/Block /8/102 in the name of AshokKumar Rambhai Patel and Jayantibhai Rambhai Patel. The property is a tenancy in common in equal shares. Kisumu Municipality/Block 8/222 is in the names of Ashokkumar Rambhai Patel and Sachinkumar Rambhai Patel. There is no dispute on the property. The dispute on Kisumu Municipality/Block 7/387 that is whether it was owned as a tenancy in common between the plaintiffs' father and 1st defendant. His uncle left Kenya on 31st January 2007 and returned on 24th January 2008. The documents in respect of Kisumu Municipality/Block/10/498 and Kisumu Municipality/Block /499 were executed between the plaintiff father and the 1st defendant.
26. PW2 Mr Richard Bush Obwocha Onsongo, an advocate of the High Court of Kenya and Commissioner for oaths and notary public of long standing testified that he had sworn an affidavit on 7th September 2015. He showed the court the transfer of the undivided share relating to Kisumu/ Municipality /Block 10/498 and Kisumu Municipality/Block /499. The documents were brought to him by 2 gentlemen Ashok Kumar Rambhai Patel and Jayantibhai Rambhai Patel who were the brothers. They showed him identity Cards, names. He proceeded to execute the transfers. He saw them sign the documents and he executed his part of transfer documents. On cross examination he insisted that at court the plaintiff's father and the 1st defendant appeared before him and that he knew them very well.
27. The 1st Defendant Ashokkumar Rambhai Patel on his part stated that he is the defendant counter - claimant. The defendants in the counter claim are his deceased brother's sons. His parents used to live in



Migori where they had a retail shop that sold goods. They used to do business in the names of R.B Patel and sons. His Elder brother Jayantimbai Patel who was very stubborn did not let him go for further studies asked the plaintiff counter claimant to join him in business in 1976. They opened a business in Kisumu in 1981 and bought their first property Kisumu Municipality/Block 8/102 funds generated from the business. His brother and his friend Jitendra Patel opened another business in Kisumu known as Format Furniture Limited from Capital that belonged to family business. Jitendra Patel resigned from Format Business hence the 1st defendant joined his brother and when their father died in the United Kingdom they bought their mother a house in the United Kingdom described As 69 Ealing Road in Wembley.

28. The property was purchased in the name of their mother but was later transferred into the names of his deceased brother's wife Indira Jayantimbhai Patel in 1989 and later it was transferred to his late brother and wife.
29. Their shareholding at Format furniture Limited was 50% against 50%. The first property they bought was Kisumu /Municipality/Block1/102. Purchased on 31st December 1981 the property was to be held in equal shares. The property is currently held in their joint names. The other property is Kisumu/Municipality/Block 8/222 purchased on 7th May 1990 purchased using money from the business. They held the property as tenancy in common in equal shares. The other property is Kisumu/ Municipality/Block 7 /387 that was initially registered in the names of Format Enterprises until 23rd November 1992 at later transferred to the plaintiffs' father's name and the 1st defendant as joint tenancy. They also purchased Kisumu/Municipality/Block10/498 and Kisumu Municipality/Block 499. When his brother died he obtained the death certificate from his sister and presented it to Kenya at the lands office on 23rd December 2011 and the lands office processed the transmission of the title into his name as the title was held jointly and not as tenancy in common. He stated that property number Kisumu Municipality/Block 10/ 498 and Kisumu Municipality/Block /499 were transferred illegally as he did not sign the transfer forms. He was charged with the offence of forgery but was acquitted. The state appealed but the appeal was dismissed. The 1st defendant claims to be the sole and legal owner of the Kisumu/Municipality/Block7/387 and the plaintiffs fraudulently acquired ownership of Kisumu Municipality/Block 10/498 and Kisumu Municipality/Block 10/498.
30. On cross examination by Mr Olel, the 1st defendant stated that they were joint owners of the property number Kisumu Municipality/Block /387 they were co shareholders. The property was purchased from the proceedings of a sale of Foamat business that was shared at 50% against 50%. Properties number Kisumu Municipality/Block 10/498 and Kisumu Municipality/Block 10/499 belonged to the defendant and his late brother who resided on block Kisumu Municipality/Block 10/498 block and block Kisumu Municipality/Block 10/499. Block 8/222 was owned by the defendant and his brother but he used to stay in the property. The property was transferred to him by his brother in 2011. The lease certificate for Kisumu Municipality/Block 7/387 did not show how the property was held. He states that property number Kisumu Municipality/Block 7/387 was bought on 23rd November 1992 in the names of Foamat Limited. The building was bought from the proceeds of the sale of business. The defendant is claiming his half share in property number Kisumu Municipality/Block 10/498, Kisumu Municipality/Block 10/499. He denied ever going to Onsongo's office.
31. The gravamen of the plaintiff's submissions is that the deceased Jayantibhai Rambhai Patel and the 1st defendant Mr. Ashokkumar Rambhai Patel were both registered as Co- owners of the suit property Kisumu Municipality/Block 7/387 on 15th December 2006 as per the green card. The property was previously registered in the names of Foamat Supermarket and where the plaintiff father and 1st defendant were partners and directors with equal shares. The plaintiff submitted that the white and green card are silent on the tenancy under which the leasehold was held. The plaintiff submit that the



- lease hold was tenancy in common as the 1st defendant and his brother were tenants in common and the right of survivorship has no place among merchants. The property was purchased as a business asset and that the 1st defendant and his late brother had equal shares. The plaintiff has urged the court to invoke the doctrine of equity that looks at the interest rather than the form. The plaintiff submits that the transfer from for Block Kisumu Municipality/Block 7/387 produced as PEX B25 was worthless as its authenticity was questionable as the documents had initially been missing from the land registry and was not dated and therefore could not be relied upon.
32. The plaintiff further submits that the defendant perpetuated a fraud in removing the late Jayantibhai Rambhai Patel interest.
 33. According to the plaintiff the registration and issuance of title for Kisumu Municipality Block 7/387 could not have been effected on 23rd December 2011 without surrendering the original certificate of lease. The original certificate of lease was only obtained on 31st January 2012. The 1st defendant did not have the original lease as at 23rd December 2011 and that it was accessed at the safe deposit locker at the Bank of Baroda Kisumu on the 31st January 2012. The 1st defendant presented a death certificate only but not the original lease certificate.
 34. On whether the defendant in the counter claim fraudulently retained and transferred the counter claimed share in Kisumu/Municipality/Block10/498 and Kisumu Municipality/Block 10/499 the plaintiff submits that the parcels of land comprised of the residence of the deceased Jayantibhai Rambhai Patel whereas the parcel number Kisumu/Municipality /Block8/222 belonged to the defendant/counter claimant. The plaintiff submits that there was evidence by Mr. Onsongo advocates that the partners appeared before him and executed the transfer forms relating to Kisumu Municipality/Block 10/498 and Kisumu Municipality/Block 10/499. Both to counter claimant and his brother appeared before Mr. Onsongo
 35. The gravamen of the 1st defendant counter claimant's submissions is that Kisumu Municipality/Block 7/387 was held as a joint tenancy Kisumu Municipality/Block defendant through the doctrine of survivorship. The plaintiff was not entitled to be registered as the owner of the property but the 1st defendant was entitled to be registered as the sole owner of the property . The 1st defendant submits that the properties number Kisumu Municipality/Block 498 and Kisumu Municipality/Block 499 were held as tenancies in common but were fraudulently transferred to the plaintiffs father and wife and the plaintiff's. The 1st defendant further submits that the transfer form for the said property from Foamat supermarket Limited to the brothers was signed by the deceased with the intention of having it registered as joint tenancy as opposed to a tenancy in common in equal shares. That Parties cannot speculate on the kind of tenancy held. The green card did not indicate that the property was held as a joint tenancy, neither did it show that the property was held as tenancy in common with equal shares. The 1st defendant submits that the will by the deceased purporting to leave his share of block 7/387 to the plaintiffs was untenable in law due to the doctrine of survivorship.
 36. The 1st defendant submits that where the registration does not indicate whether the ownership was joint tenancy or tenancy in common the presumption is that the property is held in joint tenancy and that section 91 (2) of the *Land Registration Act* 2012 provides that when the transfer instrument of land to 2 or many people does not specify the nature of their rights then it is presumed that they hold as tenants in common in equal shares. The 1st defendant submits that the words "As tenants in common" were deleted to leave the words "joint tenancy".
 37. The 1st defendant submits that the property in the United Kingdom known as 69 Ealing Road Wembley Middlesex is inter- linked with Kisumu Municipality/Block 7/387 as it was purchased using the proceeds of business of the Migori and Kisumu shop and the same was later transferred into



the names of the plaintiffs and their mother. That the 1st defendant did not receive a share of the property hence he was ultimately to take ownership of Kisumu Municipality/Block 7/387 at the demise of the deceased and that is why it was registered as a joint tenancy. The 1st defendant submits that the London property was transferred in December 2006 whereas Kisumu Municipality/Block 7/387 was transferred in July, 2006 suggesting that when the deceased was filling the transfer forms for Kisumu Municipality/Block 7/387 he was cognizant of the fact that he effected transfer of the London Property to his family. On the counter-claim, the 1st defendant submits that his half share in Kisumu Municipality/Block 10/498 and Kisumu Municipality/Block 10/499 was fraudulently transferred into the plaintiffs names by forging his signature and documents. The 1st defendant submits that the properties were held by Jayantibhai Rambhai Patel and Anupkumar Jayantibhai Patel as tenants in common in equal shares.

38. The 1st defendant did not appear before Onsongo advocate since he was not in Kenya. According to the 1st defendant the transaction was fraudulently Irregular and unlawful. Parcel number Kisumu/Municipality/block 8/222 has no dispute hence the restriction them should be lifted.
39. On the issue as to whether section 33(1) *Registration of Land Act* is unconstitutional the 1st defendant submitted that the same was not an issue in the pleadings.
40. The 2nd and 3rd defendants submit that property No Kisumu Municipality/Block 7/387 was held under joint tenancy and reiterate that where a property is held in names of 2 or more persons and tenancy is not stated, the same is deemed as joint tenancy. He refers to the case of *Mukazitoni Josephine v A.G* (2015) eKLR where the court of appeal held that when a property is registered in more than one name in the absence of contrary entry in register, the property is deemed to be held in joint tenancy and not tenancy in common or tenancy in entirety. That a tenancy is common or tenancy is entirety means the interest of each registered owner is determinable and severable while in joint tenancy the intent of each owner is indeterminate each owes all or nothing. The 2nd and 3rd defendant submits that the plaintiff has failed to prove fraud and collusion against the 2nd and 3rd defendants.

Analysis And Determination

41. The background facts of this case are that the plaintiffs' father namely Jayantibhai Rambhai Patel had a business in Migori in the name of Foamat Furniture Limited in partnership with one Jitendra Patel, which business was started in 1981. The 1st defendant the brother of Jayantibhai Rambhai Patel and uncle to the plaintiffs joined the business in 1989 when Mr. Jitendra Patel relinquished his interest and was made a director. In the course of their business the plaintiffs' father and their uncle purchased various properties including Kisumu/Municipality/Block7/387 which was purchased on 23rd November 1992. The property was registered in the name of the company thus Format Furniture Limited. The property was charged to the standard Bank on 24th November 1992. Format Furniture Limited had a shareholding of one each. The Memorandum of Association of the company shows that Jitendra Patel and Jayantibhai Rambhai Patel had a shareholding of one each .
42. Later the name was changed from Foamat Furniture Limited to Foamat supermarket Limited on 5th December 1997. The title was equally changed to Foamat supermarket Limited. This was on 13th May 1999. In December 2006 the brothers sold Foamat Supermarket Limited to Ukwala trading Company hence the property was transferred to the directors Jayantibhai Rambhai Patel and the 1st defendant . Before transfer of the property the plaintiff's father and the 1st defendant had one share each in the company, meaning that the plaintiff's father and the 1st defendant had equal shares in the property. This court observes that the transfer of the property to the Directors meant that they both received an equal share to the property. The court observes that the transfer document dated 13th December, 2006



is questionable because the deletion of the word Tenants in common is not signed by the person who deleted the same. Moreover, it is not clear as to who deleted the words tenants in common. The source of the document is equally questionable as the lands department initially appeared to have misplaced the same.

43. The certificate of lease of the property was issued on 15th December 2006. The property was rented out to company known as Amor Hardware and half rent was being paid to each of the brothers. Jayantibhai Rambhai Patel died on 29th October, 2011 in the United Kingdom. He prepared a will and bequeathed his half share to his two sons. The plaintiff was issued with a death certificate in the United Kingdom. It is on record that the 1st defendant obtained a copy of the death certificate from his sister Mita Kawadia. The 1st defendant later travelled to Kisumu and entered the deceased brother house on Block 10/498 and asked for the key from the caretaker and accessed all documents.
44. The 1st defendant took all the documents without the knowledge of the plaintiffs. The 1st defendant proceeded to the Kisumu Lands office and registered the death certificate and an entry was made in the green card. This was done on 23rd December 2011. The land was transferred in the 1st defendant name. The plaintiff was aggrieved, hence came to court.
45. The question that arises from the above facts is whether the property Kisumu/Municipality /Block 7/387 was held by the 2 brothers as Joint tenancy or Tenancy in common. To begin with the Register or the Green card is silent on the type of tenancy. The transfer of lease from Foamat Supermarket Limited to the two brothers is questionable as to who deleted the term “tenants in common” and when it was deleted and what was the intention. In absence of the entry as either “tenants in common” or Joint tenants” this court has to go back to facts of the case.
46. In this regard, I have perused the memorandum of Association of Foamat Furniture Limited and do find that the 1st defendant and his deceased brother held a share each in the company and this was after Jitendra Patel relinquished his interest in the company. When the property was transferred to Foamat Supermarket Limited the two brothers held a share each in the company. Meaning they had an equal share in the property which was the only property of the company. It follows that upon the sale of the company known as Foamat Supermarket limited to Ukwala Supermarket Limited and the only property of the company transferred to the two brothers was Kisumu/Municipality/Block7/387. They held an equal interest in the property as each had a share each in the company.
47. I have carefully discerned the submissions by the 1st 2nd and 3rd defendants and do observe that they have heavily relied on the court of appeal decision in *Mukazitoni Josephine v Attorney General of the Republic of Kenya* (2015) eKLR where the court held that in absence of a contrary entry in the register the property is deemed to be held in Joint tenancy and not tenancy in common. However, the facts herein are different from the facts in this case as from the onset, the property was held by a company where the partners had equal shares and that means the property was held by the Directors in equal shares. Upon the sale of the company it follows that the property could only be deemed to have been held by the two brothers in equal share of one each.
48. This court further finds that there has never been unity of possession of the property because initially, the property was being used by the company where each person had one share and they were sharing their dividends, secondly the property was rented out to Amor Hardware who was paying half rent to the plaintiffs father and the other half rent to the defendant. Currently the plaintiffs are in possession and are paying half rent to the 1st defendant. Moreover, the deceased brother of the 1st defendant gifted his half share to the plaintiffs and therefore it leaves the court with no option but to conclude that the property was held by the brothers as tenants in common in equal shares.



49. On whether the defendant to the suit perpetuated a fraud in removing the late Jayantibhai Rambhai Patel interest in the parcel of the land this court finds that though the manner at which the 1st defendant rushed from London to Kisumu after burial of his brother and effected change of title in his name caused suspicion, the same does not amount to fraud but the 2nd defendant committed a mistake in registering the 1st defendant as the sole owner of the property when the property was presumably held under tenancy in common. The facts in this case are different from the facts in *Mukazitoni Josephine v A.G* (2015) eKLR as the parties in that the appellant who had moved the court of appeal was wife to the late Mr Felicien Kabuga and that though they were not registered as joint owners of the property just like in this case, the proceeds of the business of the property was being used to evade the capture of Mr Kabuga and that the taxes were not being paid and that the four unities existed unlike this case where the unity of possession does not exist.
50. In this case, I do find that there was a mistake and error by the 2nd defendant in registering the names of the 1st defendant in the register as the sole proprietor of the parcel of land after striking out the name of the deceased father of the plaintiffs as the property was held by the brothers as tenants in common.
51. The plaintiffs in their submissions have raised the issue as to the unconstitutionality of the provisions of section 33 (1) of the *Registration of Lands Act* Cap 300 Laws of Kenya repealed). I do find that in the pleadings and prayers the unconstitutionality of section 33 of the *Registration of Land Act* is not raised and that the *Constitution* of Kenya 2010 is not properly invoked hence the court will not delve into it.
52. On the counter- claim this court finds that Kisumu/Municipality/block 10/498, the register was opened on 28th August 1989 in the names of Jashbhai Ashabhai Patel and Anandabar Jashbhai Patel and lease certificate issued on the same date. Entry number 5 was made on 29th November 1995 where Jayantibhai Rambhai Patel and Ashokbhai Rambhai Patel to 2 brothers were registered as tenants in common with equal shares and a certificate of lease was issued on 21st March 2007. The property was transferred to Jayantibhai Rambhai Patel, Anupkumar Jayantibhai Patel and Sachin Kumar Jayantibhai Patel as tenants in common and a certificate of lease was issued on 22nd March 2007. On the 22nd December 2012 a restriction was entered that no dealings without the consent of Ashokkumar Rambhai Patel claiming he did not sign the transfer. He is a joint tenant and the case was under investigation. The plaintiff in the counter claim states that the defendant in the counter claim were registered as the proprietors of parcel number 10/498 fraudulently.
53. I have looked at the transfer form of the undivided shares of Kisumu Municipality /Block10/498 where Jayantibhai Rambhai Patel and Ashokkumar Rambhai Patel agreed to transfer this parcel number to Jayantibhai Rambhai Patel, Indira Jayantibhai Patel, and Sachin Kumar Jayantibhai Patel as tenants in common. Mr Jayantibhai Rambhai Patel the remaining proprietor consented to the transfer. The transfer documents was signed by Jayantibhai Rambhai Patel, but Ashokbhai Rambhai Patel denied signing the same. The signing of the documents was attested or witnessed by Richard B. Onsongo advocate and was registered on 21st March 2007. The issue is whether Ashokkumar Rambhai Patel signed the transfer.
54. It is not in dispute that 10/498 was held as a tenancy in common in equal shares. It is not in dispute that Kisumu Municipality /Block10/498 and 499 was the residence of the plaintiff's father whereas the 1st defendant resided on Block 8/222. It is clear in the affidavit of Mrs Inchira A Changela sworn in London on 1st October 2012 and filed in court on 10th September 2013 and admitted as PEX 16 that the two brothers stayed in separate compounds. Going back to the transfer forms, Mr Onsongo advocate witnessed the transfer forms and when called to give evidence he was categorical that the two brothers appeared before him and signed the transfer forms for the parcel of land number Kisumu Municipality /Block 10/498.



55. Two forensic document examiners' reports were prepared. John Munde a forensic document examiner for Director of Criminal Investigations made a report on 8th July 2013 and indicates that the signature on the transfer of forms for Kisumu Municipality /Block /499 and Kisumu Municipality /Block 498 was not made by the same author. However, the makers were not called to give evidence and produce the reports.
56. Section 48 of the [Evidence Act](#), Cap 80 under which opinion of experts falls presupposes that the expert must testify; that section provides as follows:
48. Opinions of experts
- (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
- (2) Such persons are called experts.
57. The application of this provision of the law was explained by the Court of Appeal in [Mutonyi versus Republic](#) (1982) KLR 203 at 210 where Potter JA said:
58. Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
59. Section 48 of the [Evidence Act](#) (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.
60. In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in *Davie v Edinburgh magistrates* (1933) SC 34,40, as scenting the functions of expert witnesses:
- "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."
61. So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
1. Establish by evidence that he is specially skilled in his science or art.
 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."
62. Without calling the expert to testify there is no way the trial court can be satisfied that it had been established by evidence that the signatures were forged or that there was fraud.



63. The court has found time and again that fraud must be pleaded and proved. Sections 109 and 112 of the *Evidence Act* provide that:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

64. The law is clear as buttressed in the case of *Vijay Morjaria v 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.”(Emphasis ours)

65. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows:-

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

66. The provisions of section 62 of the *Evidence Act* require that all facts must be proved by oral evidence and section 63 of the same Act provides further that such evidence must be direct evidence which is defined to include opinion evidence; Section 63 of the *evidence Act* provides:-

63. Oral evidence must be direct

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, “direct evidence” means —

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;



- (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

- (3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

67. This court is convinced with the evidence of Mr. Onsongo, the advocate who witnessed the transfer forms that the two brothers appeared before him and signed the transfer forms. Mr. Onsongo clearly states that the two brothers were well known to him and therefore when they appeared before him he knew them very well. This applies to Kisumu Municipality/10/498 and Kisumu Municipality /Block 499. I do find that the plaintiffs in the counter claim have not established fraud to the standard required in law and therefore the counter claim does not succeed and is dismissed with costs. Ultimately the plaintiff succeeds and I do grant a declaration that the defendant's acquisition of parcel No.Kisumu/ Municipality Block 7/387 was null and void abinitio and this honorable court be pleased to issue an order cancelling the defendants title dated 7th February 2012 and the registered to be rectified to its original state of ownership, between the deceased (Jayantibhai Rambhai Patel and Ashokumar Rambhai Patel) Costs and interest of this suit to the plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED BY EMAIL AT NAKURU THIS 21ST DAY OF FEBRUARY 2023.

A O OMBWAYO

JUDGE

