

**Kipkulei v Ndibithi Farmers Co. Ltd & 3 others (Environment & Land  
Case E46 of 2021) [2023] KEELC 19001 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19001 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E46 OF 2021**

**LA OMOLLO, J**

**JULY 27, 2023**

**BETWEEN**

**BENJAMIN KIPKECH KIPKULEI ..... PLAINTIFF**

**AND**

**NDIBITHI FARMERS CO. LTD ..... 1<sup>ST</sup> DEFENDANT**

**EDWARD MAINA ..... 2<sup>ND</sup> DEFENDANT**

**JANE MAINA ..... 3<sup>RD</sup> DEFENDANT**

**MOSES GAKINYA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff commenced this suit vide the Complaint dated 3<sup>rd</sup> June, 2021 which was filed on 7<sup>th</sup> June, 2021.
2. He avers that his claim is for damages for trespass and malicious damage to property by the Defendants on his parcels of land known as LR No. 1695/12, LR No. 1695/13, LR No. 1695/14, LR No. 1695/15, LR No. 1695/16 and LR No. 1695/17.
3. He also avers that he seeks an order of injunction to stop the Defendants from interfering with his use and enjoyment of the suit properties as the Defendants had been invading the land, destroying the fence and purporting to lease out portions of it.
4. The Plaintiff prays for judgement against the Defendants for;
  - a. A permanent injunction against the Defendants, their associates and any other person claiming ownership from accessing or occupying properties LR No. 1695/12, LR No. 1695/13, LR No. 1695/14, LR No. 1695/15, LR No. 1695/16 and LR No. 1695/17.
  - b. An order compelling the OCS Kongani Police Station to provide Security and take lawful action against any trespasser.



- c. Damages for trespass and malicious destruction of property.
  - d. Interest on (b) thereon.
  - e. Costs of this suit.
  - f. Any other relief the court deems fit to grant.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants filed their Statement of Defence and Counterclaim on 10<sup>th</sup> November, 2021.
  6. In their statement of defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants deny the averments in the Plaint and state that the improper use of the police to enforce the Plaintiff's claim is a tactic that is employed by the Plaintiff to intimidate the members of the 1<sup>st</sup> Defendant.
  7. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants in their counterclaim state that the 1<sup>st</sup> Defendant was the registered owner of LR No. 1695.
  8. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants also state that the Plaintiff illegally subdivided the suit property and resulted in LR No. 1695/12, LR No. 1695/13, LR NO. 1695/14, LR No. 1695/15, LR No. 1695/16, LR No. 1695/17 which he is now claiming.
  9. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants have also set out particulars of fraud against the Plaintiff and state that the Plaintiff is in illegal occupation of the suit property.
  10. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants seek judgement against the Plaintiff in the following terms:
    - a. A declaration that the 1<sup>st</sup> Defendant is the lawful owner and registered owner of that land known as LR No. 1695.
    - b. A declaration that the subdivision of LR No. 1695 and issuance of the title deeds to the land parcels referred to as LR No. 1695/12, LR No. 1695/13, LR No. 1695/14, LR No. 1695/15, LR No. 1695/16 and LR NO. 1695/17 was illegal improper and fraudulent.
    - c. Cost of the suit and interest in respect of the Plaintiff's case and costs of the counter-claim and interest thereof at court rates.
    - d. Any other suitable or appropriate relief that this court may deem fit to grant.
  11. The suit against the 3<sup>rd</sup> Defendant was withdrawn.

### **The Plaintiff's Evidence.**

12. The Plaintiff testified as PW1 witness statement dated 13<sup>th</sup> October, 2021 was adopted part of his evidence.
13. The Plaintiff produced the documents in his List of Documents dated 13<sup>th</sup> October, 2021 as follows;
  - i. Title No. 1695/12 as Exhibit P1
  - ii. Title No. 1695/13 as Exhibit P2
  - iii. Title No. 1695/14 as Exhibit P3
  - iv. Title No. 1695/15 as Exhibit P4
  - v. Title No. 1695/16 as Exhibit P5



- vi. Title NO. 1695/17 as Exhibit P6
  - vii. Title No. 1695 as Exhibit P7
  - viii. Transfer as Exhibit P8
  - ix. FR 319/57 as MFI 9
  - x. Deed plans as Exhibit P10 (a)-(f)
  - xi. Letter dated 2<sup>nd</sup> July 2008 as Exhibit P11
  - xii. Ruling as Exhibit P12
  - xiii. Booking Form dated 21<sup>st</sup> June 2013 as Exhibit P13
  - xiv. Transfers as Exhibit P14 (a) to (f)
  - xv. Rent clearance certificate No. 314052 as Exhibit P15
  - xvi. Stamp Duty declarations as Exhibit P16.
  - xvii. Ruling as Exhibit P17
  - xviii. Certificates of Official Search as Exhibit P18 (a) to (f)
  - xix. Photos as Exhibit P19
14. In his witness statement, the Plaintiff states that he is the registered owner of LR No 1652/12, LR No. 1652/13, LR No. 1652/14, LR No. 1652/15, LR No. 1652/16 and LR No. 1652/17.
  15. He also states that he acquired the said properties directly from various persons who had been allotted the parcels of land by the Agricultural Development Corporation sometime in the year 2007.
  16. He further states that he had been enjoying peaceful occupation of the said parcels of land from the year 2007 to the year 2014 when a group of invaders trespassed onto the suit properties and begun to claim that they owned the original parcel of land LR No. 1695/1 which previously encompassed his parcels of land.
  17. The Plaintiff states that he obtained injunctive reliefs against the members of the 1<sup>st</sup> Defendant in February, 2016 until the year 2021, when the members of the 1<sup>st</sup> Defendant resumed their acts of trespass.
  18. The Plaintiff also states that the Defendants were well organized and were led by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants who wanted to conduct illegal subdivision of his land and who leased portions of it to members of the public.
  19. The Plaintiff further states that their invasion was reported severally to the police who have not been able to stop them from encroaching on his land.
  20. The Plaintiff states that the defendants destroyed a large portion of his electric fence and cultivated the suit properties under the cover of darkness.
  21. The Plaintiff also states that he reported the matter to OCS Kongoni Police Station and he was advised to obtain an injunction against the Defendants for enforcement.
  22. The Plaintiff further states that the Defendants actions have cost him a lot of resources and that it is necessary that his right to property be guaranteed.



23. Upon cross examination by counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants, the Plaintiff confirmed that he was a civil servant and the highest office he held was that of a Permanent Secretary in the Government of Kenya.
24. The Plaintiff also confirmed that he purchased the suit land from various allottees also confirmed and that he was not a direct allottee.
25. The Plaintiff further confirmed that he performed due diligence before purchase but he couldn't confirm if the documents point to the names of the allottees.
26. The Plaintiff admitted that he had not produced any sale agreement between himself and the other allottees and nether had he produced any proof of payment or consideration.
27. The Plaintiff also admitted that at the time of their dealings, there was no title given by the allottees because soon after they sold the land to him, they took him to Agricultural Development Corporation for purposes of finalizing and transfer.
28. When referred to Exhibit P14 which was for LR 1695/12, the Plaintiff admitted that it was not dated and the advocate who certified his signature did not indicate the date he appeared before him.
29. The Plaintiff also admitted that that was the case with all the transfers, they were not dated and neither did they have dates when he appeared before the advocate.
30. The Plaintiff further admitted that Paragraph 1 to 4 of his plaint provides for the history of the suit parcels adding that the mother parcel No. 1695 belonged to Lord Colville and it measured 2504 acres.
31. The Plaintiff confirmed that he purchased six parcels of land and further confirmed that that he did not know their total acreage.
32. The Plaintiff also confirmed that a transfer was issued by Agricultural Development Corporation and also confirmed that a survey had not been not conducted before purchase.
33. The Plaintiff stated that after purchase, a survey was done which survey report he stated would be produced but he could not remember the name of the surveyor who did the survey.
34. The Plaintiff also admitted that this was not his first or last land transaction and that at the time of purchase, he was dealing with a reputable government organization.
35. When referred to Exhibit P1, the Plaintiff confirmed that his name appeared on the Certificate of Title and also confirmed that the document did not have a page 2 or 3.
36. The Plaintiff also confirmed that he did not know if the title emanated from another title through the process of sub-division but later admitted that his title was from a sub-division and also admitted that the initial parcel was also from a subdivision.
37. The Plaintiff further confirmed that he did not know the last title that gave rise to the subdivision and when he was referred to Exhibit P7, the Plaintiff admitted that entry No. 8 read "discharge of charge" and added that there was no other entry after it.
38. The Plaintiff also admitted that there was no consent to transfer that had been annexed to his documents.
39. When referred to page 24 of Exhibit 11, the Plaintiff admitted that he did not have the original of this letter that he said was given by the Company Secretary of the Agricultural Development Corporation.



40. The Plaintiff confirmed that the photos that he had produced in evidence were taken from the middle of the farm and that the fence was far from the position from which the photograph was taken.
41. The Plaintiff also confirmed that he never attended court to give evidence in ELC Case No. 139 of 2015 and ELC Case No. 150 of 2012.
42. The Plaintiff further confirmed that with respect to the Ndibithi Farmers who are the 1<sup>st</sup> Defendant, he had never appeared in court to give oral evidence of ownership.
43. On re-examination, the Plaintiff was referred to page 8 of Exhibit P8 and he stated that the document contained the total acreage of the suit parcels.
44. The Plaintiff further stated that the parcel was surveyed and the boundaries shown to him by the surveyors at Agricultural Development Corporation while the transfer documents were also prepared by Agricultural Development Corporation.
45. The Plaintiff stated that the documents were given to him by Agricultural Development Corporation and later surrendered to the Lands office by the advocate dealing with Agricultural Development Corporation.
46. The Plaintiff further stated that he was not claiming anything from the allottees who sold the land to him adding that he had in his possession the Certificates of Title in respect to the suit parcels.
47. Gilbert Ayoo testified as PW2. It was his evidence that he is a licensed surveyor and knew about the survey report dated 9<sup>th</sup> February, 2022 which he wished to produce into evidence.
48. It was also his evidence that he had relied on FR 319/457 at page 17 on the Plaintiff's bundle to prepare his survey report. The said map was produced as Exhibit P9.
49. He gave evidence on the process of sub-division of land under Registration of Titles Act. First, the surveyor does the ground work, compiles the file and then submit it to the Director of Survey.
50. He testified that the Director of Survey then registers the survey and the subplots would be numbered. After which there would be a process of quality control where they would check the area, consistency, the beacons and the computation of the areas.
51. He also testified that once the Director is satisfied that survey has been done properly, he approves and authenticates the survey records.
52. He Further testified that thereafter new deed plans are prepared and submitted to the Director for checking, numbering and sealing.
53. It was his evidence that the deed plan is prepared by the surveyor who carries out the survey and once they are sealed, they are issued to the surveyor who then forwards them to his client.
54. It was also his evidence that the client then forwards the deed plans to the Lands Registrar for registration and once they are registered, new titles are issued.
55. It was further his evidence that if there is an intended transfer, it is usually done before new titles are issued and if there is no transfer, titles are issued in the name of the original owner.
56. When referred to Exhibit P9, PW2 confirmed that FR 319/57 that appears on page 17 of the bundle had the following features;
  - i. It had a certificate of the surveyor O.M Wainaina.



- ii. Registration was done on 19<sup>th</sup> November, 2002.
  - iii. Authentication was a three-tier process comprising of examination, approval and authentication.
  - iv. New numbers were indicated on the last column which was LR No. 1695/7 – 17. He stated that “stroke 7” came from the subdivision of 1695/6.
57. PW2 testified that the mother title was LR No. 1695 and was first subdivided into two to create LR No.1695/1 and LR No. 1695/2. LR No. 1695/2 was further subdivided into LR No’s. 1695/3, 1695/4, 1695/5 and 1695/6.
58. He also testified that the third series of subdivisions was the subdivision of LR No. 1695/6 which created LR No’s. 1695/7 to 1695/17 which is in the FR.
59. When referred to Exhibit P7 which is on page 7 to 12 of the bundle, he testified that it had the following features;
- i. Entry No. 6 at page 10 showed a transfer of LR No. 1695/1 to Ndibithi Farmers Company Limited. The acreage was 606.8 Ha.
  - ii. Entry No. 7 showed the transfer of LR 1695/2 to Agricultural Development Co-operation and it was 406.6 ha.
60. When referred to Exhibit P20 which is the status/survey report, he confirmed that the survey appearing at page 7 was the survey of the mother title LR 1695 which was subdivided to create 1695/1 and 1695/2.
61. He also testified that the deed plan for LR 1695 also appeared at page 12 of the bundle and was attached to the grant (Exhibit P7).
62. He further testified that Page 8 of his report had FR No. 128/60 which were related to the entries on the grant appearing at page 10 of the bundle.
63. It was his evidence that FR No. 128/160 is represented in entry No. 6 which was the transfer to Ndibithi Farmers and that FR No. 128/160 showed the acreage as 606.8 Ha.
64. It was also his evidence that it identified the LR No. as 1695/1 which was the one marked as Entry No. 6 that was transferred to Ndibithi Farmers.
65. It was further his evidence that 1695/12 at the bottom has an FR No. 7/57 and the deed plan number indicated on it is 107/21 (page 7 of his report). He confirmed that this deed plan number appears on both.
66. He testified that “Stroke R” on 1695/12 became Stoke 2 Which is entry No. 7 on the grant (Exhibit P7). This he, testified, is what was transferred to the Agricultural Development Co-operation.
67. He also testified that he had FR No. 319/57 which had been produced as Exhibit P9 at page 10 of his report and when asked to relate the two, he testified that FR 319/57 was the further subdivision of 1695/6 which created 1695/7 to 1695/17.
68. He further testified that at page 18 of the Plaintiff’s bundle was deed plan No. 2476/92 for LR No. 1695/12 which also appears on the survey plan No. 319/57.
69. It was his evidence that at page 19 of his bundle he has LR No. 1695/13 that appears on the Survey Plan FR No. 319/57, at page 20 he has LR 1695/14 that appears on survey Plan FR No. 319/57.



70. It was also his evidence that at page 21 of the bundle he has LR No. 1695/15 which appeared on survey plan FR No. 319/57 while at page 22 and 23 of the bundle was LR No. 1695/16 and 1695/17 which appeared on FR No. 319/57.
71. It was further his evidence that the Defendants contention that 1695 was never subdivided was not true as it was subdivided in 1973 which fact is included in page 4 of his report.
72. He testified that at page 5 of his report, he confirmed that LR No. 1695 does not exist as it had created various land parcels that he has given evidence on.
73. He further testified that he had also found that the suit properties LR No. 1695/12 – 17 was not part of 1695/1 but originated from 1695/2 which was transferred to Agricultural Development Corporation and was a further subdivision of 1695/6.
74. Upon cross examination by Mr Wairegi, he confirmed that he had explained the process of subdivision and had mentioned the Director of Survey, the Land Registrar and the Land Commissioner.
75. He also confirmed that the documents that could be found in the office of the Director of Survey that were submitted were as follows;
  - a. Fieldnotes of surveyor
  - b. Field note cover
  - c. Computation sheets
  - d. Survey Plan
  - e. Necessary approvals
  - f. Copy of the title
  - g. Recent search
76. He further confirmed that the Registrar of Lands had an RTA Map and in the preparation of his report, he concentrated on the documents from the Director of Survey.
77. He admitted that his terms of reference did not require a visit the Lands Office and he did not therefore visit it.
78. He also admitted that after ground work, the computation was submitted to the Director of Survey and when he was referred to Appendix A of Exhibit 20 (Survey Report) he admitted that FR No. 7/57 was not upon subdivision but was for the entire parcel no. 1695.
79. He confirmed that there was a line that cut across from the bottom right to the top left which meant that there was a proposed boundary of 1695/1.
80. He also confirmed that there was a note on FR No. 7/57 which talked about a permanent river above the dam and also said that there was a pipeline from the troughs to the dam.
81. When referred to Exhibit P7 (the grant), he admitted that there were special conditions that had been set out and they also confirmed the existence of a permanent river and pipeline i.e. the note on FR No. 7/57.
82. He also admitted that the two documents do not make reference to a boundary to be followed as FR No. 7/57 related to 1695 before subdivision.



83. He further admitted that FR 128/160 created the subdivision of 1695 to 1695/1 while appendix A and B which was on page 7 and 8 of the report indicated that the subdivision followed the dissecting line that was found on FR No. 7/57 that moved from the bottom right to the top left.
84. He confirmed that when the subdivision process is complete, the title is usually closed. He added that the subdivision of LR.1695 gave rise to LR No. 1695/1 and 1695/2 and that this led to the closure of the mother title.
85. He also confirmed that upon closure, no entry is made on the mother title as it ceases to exist and added that new titles are usually issued upon subdivision.
86. He further confirmed that there was no indication on Exhibit P7 (the grant) that the title had been closed.
87. He admitted that it was true that 1695 ceased to exist and transfer was affected to Ndibithi farmers and therefore entry No. 6 was in order.
88. He also admitted that after survey work is complete, the survey is approved. He further admitted that he had a deed plan that was signed and sealed by the Director of Survey.
89. He confirmed that his client had the mother title together with a signed and sealed deed plan which were the documents that were lodged for registration.
90. He stated that the mother title would not have been closed if there were pending subdivisions.
91. He further stated that from Appendix A and B, the moment 1695 was divided into 1695/1 and 1695/2, there was no pending subdivision and therefore it ought to have been closed.
92. He admitted that it was true that once the mother title was closed, new titles were issued. Pw2 stated that in preparation of his status report, he did not come across any titles for 1695/1 and 1695/2 as they were out of his scope of assignment but he stated that he came across the title for 1695 and 1695/1.
93. He also admitted that he did not have a copy of title for 1695/1 and when he was referred to appendix C on Exhibit P 20, he stated that once ground work is done, computation is submitted to the Director of Survey and there is a forwarding certificate.
94. He further admitted that Appendix C was done by one Wainaina and was dated 16<sup>th</sup> July 1999 and was received for registration on 30<sup>th</sup> July, 1999.
95. He confirmed that the surveyors date must come first as the surveyor must present documents first. He also confirmed that there was a discrepancy in the dates and it could be an error that the Director of Survey could confirm.
96. He further confirmed that the Survey Plan for FR No. 291/35 gave rise to 1695/3 – 1695/6 and also confirmed that he neither had their deed plans nor attached them to his report adding that they were outside of the scope of his assignment.
97. He admitted that he could not confirm that titles were issued but could only confirm that the deed plans were issued.
98. He also admitted that 1695/2 was subdivided into four portions and if transfer was done, 1695/2 ought to have been closed on subdivision.
99. He further admitted that he did not come across the title for 1695/3 to 1695/6 which arose from the subdivision of 1695/2.



100. He confirmed that in making his report, he obtained data from the Survey of Kenya which institution retains the original deed plan.
101. He also confirmed that he did not obtain deed plans for LR 1695,1695/2 or 1695/3-1695/6 and added that from the record, the said deed plans exist.
102. He further confirmed that the Plaintiff had the deed plans as (from page 10 to 23 of the Plaintiff's bundle) which deed plans correlate to Exhibit 9.
103. He admitted that he did not get the deed plans for 1695/3, 1695/4,1695/5 and 1695/6 but stated that the deed plans and survey plan correlate
104. PW2 also admitted that he had perused at the titles to the suit property which were produced as Exhibit P1 to P6 and when he referred to 1695/12 he confirmed that he was familiar with certificates of title.
105. He further admitted that the certificate he was holding related to 1695/12 and the registered owner was Benjamin Kipkech Kipkulei and confirmed that the acreage of the suit parcel is shown on the title.
106. He confirmed that it was possible to tell where the title originated from as there is a number 1695/2/7.
107. He also confirmed that the main title was LR No.1695, then there was subdivision to number 2 and one of the subdivisions in number 2 was number 7.
108. When referred to Exhibit P1 to P6, PW2 admitted that the number on the title should correspond to the survey number. He confirmed that there is a land survey plan number on the certificate of title and they are not the same adding that each LR number should have a unique deed plan number or land survey plan number. He confirmed that they were different and that's how they should be.
109. PW2 also confirmed that the surveys were not done on the same day and reiterated that appendix A and B on his report are survey plans which have folio numbers and not deed plan numbers.
110. He further confirmed that he did not know that the survey was done on the same day according to the date appearing on the deed plan (Exhibit P9). He admitted that there was no deed plan attached to exhibit P9 and further stated that the survey plan correlates with the deed plan.
111. He stated that the survey plans appear at page 18-23 of the Plaintiff's bundle of documents and that Exhibit P9 is the deed plan.
112. He further admitted that the deed plans are not produced but stated that they correlate. Exhibit P9 had LR No. 1695/6 which is where it originated from.
113. PW2 stated that when 1695/6 was closed for subdivision, they should have got the LR Numbers and the new number from the numbering box.
114. On re-examination, PW2 stated that he was familiar with both RLA and RTA titles and that the title in issue in this suit were RTA titles.
115. He also stated that RTA titles do not indicate closure of titles and that one would only know by getting the total acreage of the transfers compared to the acreage of the mother title.
116. He further stated that in this particular case, the total would mean that the mother title was closed.
117. The Plaintiff's case was then closed.



### **The Defendants' Evidence.**

118. Edward Maina testified as DW1. It was his evidence that he was a member of the 1<sup>st</sup> Defendant, Ndibithi Farmers Co. Limited and that LR 1695 belonged to Ndibithi Farmers Co. Limited.
119. It was also his evidence that the history of the parcel was that the land belonged to a white man named Gilbert Preville Colville who owned it from 1924 until independence.
120. He testified that after independence Gilbert Preville Colville decided to give the people working for him the land rather than have them resettled by the government.
121. He also testified that Gilbert Preville Colville asked his workers to register a company and they did. The said company is Ndibithi Farmers Co. Limited.
122. He went on to testify that on 12<sup>th</sup> March 1974, Ndibithi Farmers Co. Limited was given title documents in respect of the suit parcel IR 1417 and LR No. 1695.
123. It was his evidence that its acreage was 2504 and was owned by Gilbert Preville Colville. He produced the certificate of title as Exhibit D1.
124. His evidence is that the Memorandum of Registration of Transfer dated 11<sup>th</sup> March, 1974 was presented for registration on 12<sup>th</sup> March, 1974. He explained that it shows transfer of the suit property to the 1<sup>st</sup> Defendant. It was marked and produced as Exhibit D2.
125. He testified that Entry No. 2 on page No. 4 of the title document shows that the parcel was transferred to Ndibithi Farmers Company Limited on 12<sup>th</sup> March, 1974.
126. It was also his evidence that to the best of his knowledge, the 1<sup>st</sup> Defendant never sold the suit property and it is still owned by it.
127. It was further his evidence that he had a rent clearance certificate for plot No. 1695 that was issued on 31<sup>st</sup> December 2020 upon payment of Kshs. 122,145.00 on 17<sup>th</sup> August 2020. He explained that it was printed from e-citizen. It was produced as Exhibit D3.
128. He testified further that he had a search certificate which shows that IR No 1417, LR No. 1695 has an area size 2504 and deed plan No. 2838 was registered in the name of the 1<sup>st</sup> Defendant. The search certificate was issued on 3<sup>rd</sup> June, 2021 and was produced as Exhibit D4.
129. He also testified that entry no. 2 showed that the suit property was registered on 12<sup>th</sup> April 1974 to Ndibithi farmers.
130. When asked to cross reference page 3 of the title document with the surveyor's report that was produced as Exhibit 20, DW1 stated that page 3 of the title has special conditions which stated that on the suit parcel there was a portion LO No. 1715 which was reserved.
131. He testified that Exhibit P 20 had Roman I and II and that it was at Roman II where LO No. 1715 was. Roman I had deed plan No. 2838 while Roman II had deed plan No. 3026. The title document had a deed plan attached to it which was No. 2838.
132. He also testified that Exhibit P20 had a broken dissecting line which according to him is a water pipe. He stated that it is provided for in the Grant. The condition is as follows;

“Whereof is delineated on the said plan and for the purpose of issuing, altering, repairing, cleaning or maintaining the pipe pumping through or under the suit pipe lines...”



133. He further testified that the said line is not a boundary but represents water pipes. He stated that he was present when the surveyor testified and it was not true that there was parcel No. 1695/1 and 1695/2.
134. It was DW1's further evidence that upon comparison of page 7 and 8 of Exhibit P20, he saw 1695/1 and 1695/2 with a boundary in the middle. This boundary appeared on page 8 as a dissecting or broken line. He reiterated that it represents water pipes and is not a boundary as alleged.
135. It was also his evidence that the dispute in this suit hinges on what the surveyor refers to as a boundary is not a boundary but shows water pipes. He testified that this is what caused the suit property to be thought of as divided into two.
136. It was further his evidence that the Agricultural Development Corporation have never been owners of plot No. 1695 and they never sold the land to them.
137. He reiterated that they had never caused the sub-division of 1695 or sold any part of it and also did not receive a notice from the government indicating that 1695 was reverting back to the government or to Agricultural Development Corporation.
138. He stated that he was speaking from a point of knowledge as a member of the 1<sup>st</sup> Defendant.
139. He testified that page 8 of Exhibit P20 showed that there was a deed plan No. 94085 that is dated 6<sup>th</sup> December 1963. 1695/1 shows the area as 606.8 hectares. The lower side is described as 1695/R which was said to be the same as 1695/2 and yet there was no document changing the "R" to "2".
140. He also testified that 1695/R has FR NO. 7/57 whose deed plan is No. 107121, dated 29<sup>th</sup> May, 1980. He explained that this would mean that the plan was drawn twice i.e in the year 1973 and 1980.
141. He further testified that he was knowledgeable on matters of survey as he had worked privately with the survey offices. If LR No. 1695 was supposedly divided into 1695/1 and 1695/2 on the same day then the deed plan number ought to have indicated the same date and it was therefore not possible for one to be done in the year 1973 and the other in the year 1980.
142. It was his evidence that FR No. of 1695/1 i.e. 181/47-48 shows that 1695/1 came from it but looking at Exhibit P20 at page 7, the FR No. is 128/160. This would therefore mean that the subdivision of 1695 to 1695/1 and 1695/2 was illegal.
143. It was his further evidence that page 9 of Exhibit P20 shows that it had 9 columns with the date received as 30<sup>th</sup> July, 1990 and yet the map was drawn on 16<sup>th</sup> July, 1999. According to him, what should have happened is that the map should have been drawn before registration. He explained that there was a discrepancy as the drawing was done in the year 1999 while the registration was done in the year 1990. He testified that the said discrepancy led him to the conclusion that the subdivision was illegal.
144. The third issue, according to DW1, is that the folio number on page 9 of Exhibit P20 is 291/35 and that the genesis of this number has not been explained to the court adding that had it been explained, it would have shown 1695/R before subdivision into the four portions.
145. He also testified that on page 9, the folio number should have been 7/57 instead of 291/35.
146. He further testified that Exhibit P7, (the certificate of title) shows that the suit property was subdivided. Entry No. 6 is dated 12<sup>th</sup> March, 1974 which was the same date that appears on the Memorandum of Transfer produced as Exhibit D2.
147. It is his evidence that entry No. 7 is a transfer to the Agricultural Development Corporation on 21<sup>st</sup> September 1987 which shows that the 1<sup>st</sup> Defendant was in occupation before the Agricultural



- Development Corporation adding that the 1<sup>st</sup> Defendant did not transfer the suit parcel to Agricultural Development Corporation.
148. It was also his evidence that on further subdivision, he could see a few illegalities. He testified that before entry No. 6 and 7 there ought to be an entry showing authority to subdivide 1695 to 1695/1 and 1695/2 but instead it had gone directly to transfer adding that this is illegal.
  149. It was further his evidence that after subdivision, each portion would have its own title and there would be no entry after entry No. 7.
  150. He then cross referenced the transfer at page 13 of the Plaintiff's bundle with Exhibit D2 and pointed out the following inconsistencies; the transfer at page 13 shows a transfer from Colville Limited to Ndibithi Farmers Limited for 606.8 Ha that is approximately 2504 acres while the Exhibit D2 showed a transfer of about 2504 acres.
  151. He testified that he did not know the transfer produced by the Plaintiff and that the only transfer he knew was Exhibit D2.
  152. He also testified that the Plaintiff had seven titles in respect to the suit property and according to him, he bought the suit property from Agricultural Development Corporation and added that he may have made a mistake and took occupation of 1695.
  153. On clarification being sought by the court, he stated that the Defendants were in occupation of the suit parcel and were growing maize which was about to be harvested.
  154. He testified that the Plaintiff claims that he had purchased portions of the suit property from individuals but also admitted that he was not shown the beacons.
  155. It was his testimony that the Plaintiff claims that he bought 63 acres of land he had put up a fence around the said acres. DW1 explained that 1695/R was 1004 acres.
  156. He further testified that the Plaintiff had harassed and mistreated them and that they were facing criminal and civil charges.
  157. It was his prayer that the court dismisses the Plaintiff's suit and that the court declares that the portion claimed by the Plaintiff belonged to Ndibithi Farmers and the title 1695 should remain without any sub-division.
  158. DW1 stated that he would be relying entirely on his oral evidence even though he had filed a statement.
  159. Upon cross examination by counsel for the Plaintiff, DW1 admitted to being a member of the 1<sup>st</sup> Defendant company.
  160. He also admitted that he had nothing to show that he was a member of the 1<sup>st</sup> Defendant Company.
  161. He further admitted that he had nothing to show that he had the authority to speak for the 1<sup>st</sup> Defendant and neither did he have anything to show who the directors of the 1<sup>st</sup> Defendant were.
  162. He confirmed that he had not shown the certificate of incorporation of the 1<sup>st</sup> Defendant and that at the time Colville was transferring the suit property to the 1<sup>st</sup> Defendant, he was 18 years old.
  163. He also confirmed that he was not an employee of Lord Colville and neither was he present at the meeting of Lord Colville and his employees.
  164. He further confirmed that he was not present when the Memorandum of Transfer produced as Exhibit D2 was drawn.



165. He admitted that he is knowledgeable on land matters but was not an expert.
166. He also admitted to buying and selling land and stated that he was not an expert in survey.
167. He further admitted that he did not study survey and was not a survey professional.
168. On exhibit D1, DW1 confirmed that it had five pages. There was page one, page two was an overleaf, page 3 a deed plan, page 4 a continuation while page 5 was a continuation of title and it was blank.
169. He further confirmed that pages 1 to 5 were bound together with the same paper apart from the deed plan which was in the middle and on a different paper.
170. He admitted that there was a page 6 which was shorter in length and of a different color that was added in the year 1974 while the other pages were of 1924. He was not present when page 6 was added to the title.
171. He also admitted that page 6 forms part of Exhibit D1 as it was held together with a stapler and he was basing this on its characteristics, color, length and binding.
172. He further admitted that Exhibit D2 which was the Memorandum of Transfer of Land had no stamp showing payment of stamp duty.
173. He confirmed that Exhibit D1 had a deed plan which was the same as the one on the Plaintiff's bundle on page 12 and upon comparison with Exhibit P20, he confirmed that the shape and boundaries were the same.
174. He also confirmed that the deed plan had points marked as ABCD and on Exhibit P20 they were marked as CDEF and Roman II was inside the CDEF marks.
175. He further confirmed that there was a curved line that leads to the area marked as ABCD and the plot number is shown as No. 1715.
176. He denied that the broken line was intended to divided the parcel into two portions labelled as Roman I and Roman II.
177. He also admitted that Roman II was a parcel on its own and marked as CDEF. The special conditions that related to Roman II were in Exhibit P20 i.e. LO No. 1715 which gave permission to access 1715.
178. He further admitted that in his opinion the title at page 2 Line 13 made reference to the broken line appearing at Exhibit P20 as being the place that the pipes were to be laid.
179. DW1 confirmed that they had been to court before as Ndibithi Farmers where they had sued Mwau Mwireri Riruni and Naivasha Farmers Limited.
180. He also confirmed that it was case No. 150 of 2012 at the High Court at Nakuru the ruling was attached at Page 25 of the Plaintiff's bundle.
181. He further confirmed that he did not know anything about the said case.
182. When referred to page 9 of Exhibit P20, he confirmed that it was dated 30<sup>th</sup> July, 1990, the date for examination was 18<sup>th</sup> August, 1989 and approved on 20<sup>th</sup> August, 1999.
183. He admitted that FR No. 291/35 mentioned parcel No. 1695/3-6.
184. He also admitted to seeing 1695/3, 1695/4, 1695/5 and 1695/6. His understanding was that plot 1695 was subjected to sub division into four portions.



185. He also admitted that entry No. 6 on Exhibit P7 shows a number 1695/1 and according to him, when the said information is in the title document, it means that a new title had been created.
186. He further admitted that the “stroke” against title 1695/1 and 1695/2 meant that two title documents had been issued.
187. On exhibit D3 which was a rent clearance certificate, he confirmed that they paid kshs. 122,145/= online through MPESA (Mobile Money Transfer) but did not have the MPESA message.
188. He also confirmed that his evidence was that the subdivision was illegal based on the documents as there was no consent for subdivision from the Land Control Board.
189. He further stated that a document from the Director of Survey was of no legal consequence without the consent of the Land Control Board.
190. He admitted that they did not buy land parcel No. 1695, there was no sale agreement and that it was a gift. When asked to clarify the amount of Kshs. 200,000 appearing on the Memorandum of Understanding produced as Exhibit D2, he denied that it was a purchase price and reiterated that the suit parcel was given to them as a gift.
191. He further stated that the Plaintiff has been harassing them since the year 2015 and that they had complaints in various fora where they are always defending as he had sued them.
192. He confirmed that they were disputing the survey report produced as Exhibit P20 particularly page 8 of which mentions 1695/R. He also confirmed that they got arrested every time they tried to get into the suit property adding that the arrests are always conducted at night.
193. He further confirmed that they are also in occupation of 1695/R as shown on the map.
194. He stated that the Plaintiff was claiming 63 acres but the truth is that he had no land.
195. Upon re-examination, he stated that they had been harassed by the Plaintiff and that when they complained to the Regional Commander, the police who had been stationed on the suit parcel were removed.
196. He also stated that they held demonstrations in Nairobi on five occasions and were also arrested for demolishing a fence.
197. On Exhibit D9, he stated that page 1 to 5 were the same and page 6 was held together with a stapler and that page 6 was added after the transfer was done.
198. He stated that Exhibit D1 when compared to Exhibit D4 correspond with each other and it was therefore not true that they had just annexed page 6.
199. On Exhibit D1 as compared to Exhibit P 20, he stated that Line 13 of Exhibit D1 talks about a pipeline and a dam reserve but he could not locate the dam on the map.
200. He further stated that the broken line was a pipeline from a reading of the note contained in the map which stated that “...pipeline to have 5’ reserve each side. Dam reserve 50’ upstream...”
201. Max Muhia Njuguna testified as DW2. It was his evidence that he is the District Surveyor Naivasha and that he has a degree in Geomatic Engineering.
202. It was his evidence that he has perused Exhibit P20 and Exhibit P1 to P6.



203. He testified that he had also perused copies of certificate of title for 1695/14, 1695/15, 1695/12, 1695/13, 1695/16 and 1695/17 and the registered owner is Benjamin Kipkech Kipkulei.
204. He also testified that parcels 1695/12 to 1695/17 came from 1695/6 and they should all bear the number 1695/6 which is their mother title.
205. He further testified that it should have appeared on the part indicated as “Original number”.
206. It was his evidence that in 1695/12 the original number read 1695/2/7 which should not be the case as it ought to have read 1695/6 to mean that it came about as a result of the subdivision of 1695/6.
207. It was also his evidence that all the numbers ought to read 1695/6 but instead 1695/13 reads 1695/2/8, 1695/14 reads 1695/2/9, 1695/15 reads 1695/2/10, 1695/16 reads 1695/2/11 while 1695/17 reads 1695/2/12 and therefore the numbers do not tally.
208. It was further his evidence that the map on Exhibit P20 shows a boundary of two portions which were 1695 and 1715 with the arrow pointing at Roman II.
209. He testified that the broken line was not a boundary and would it have been a boundary, it would have indicated the distance and the bearing. For example, there was a boundary at the top point with a distance of 13442.1 meters and the bearing of 70°40'50" (70 degrees, 40 minutes and 50 seconds). The line ought to have been solid and not broken if it was intended to be a boundary.
210. He also testified that at page 8 of the status report was FR No. 128/160 which was an extraction of a portion of land which was parcel No. 1695.
211. He further testified that the broken line in FR 7/57 was adopted and the length indicated as 4032.04 M and a bearing of 297°57'26" (297 degrees, 57 minutes and 26 seconds).
212. It was his evidence that the new parcels of land that emanated from the subdivision were 1695/1 and 1695/R. The R meant remainder.
213. It was also his evidence that he had not seen anything in Exhibit P20 to show that the R became a different number and should have been captured in the title.
214. It was further his evidence that page 9 had FR 291/35 and was done by O. M Wainaina on 16<sup>th</sup> July, 1999 which was the day the sub division was executed.
215. He testified that the sub division was registered in the document dated 30<sup>th</sup> July, 1990 which was authenticated on 28<sup>th</sup> August, 1999.
216. He also testified that after survey, the map was drawn by a licensed surveyor and registered at the Survey of Kenya headquarters in Ruaraka on the date indicated on the registration column.
217. He further testified that the Director of Survey checks the accuracy of the survey and if it passes then it is authenticated in the third column.
218. It was his evidence that there was an anomaly on when the survey was conducted and when the map was received. He explained that it seemed to suggest that the registration was done earlier than when the survey was conducted.
219. When referred to Exhibit P7 (which was the copy of the grant found on page 10 of the Plaintiffs bundle in Exhibit No. 20 at page 4) he testified that Page No. 4 was a chronology of subdivisions with the entries at page 10.



220. It was also his evidence that every subdivision is registered in the Lands Office records. Page 4 indicated that 1695 was subdivided into 1695/1 and 1695/2 but was not captured on page 10 where it ought to have been captured.
221. It was further his evidence that there was no entry No. 2. After subdivision, 1695 ceased to exist and if it didn't happen then it would mean that 1695/1 and 1695/2 were amalgamated.
222. When referred to Exhibit D1 as against the entries on Page 4 of Exhibit P20, he testified that Page 4 showed at entry No. 2 that the land was transferred to Ndibithi Farmers Company Limited.
223. He also testified that it had no subdivisions adding that the suit parcel was situated within his area of jurisdiction. He stated that Request for subdivision should be accompanied by the following documents;
- a. Approvals from the county government.
  - b. Comments from the Land administrator of the area.
  - c. Comments from the surveyor.
  - d. Approvals from Lands office and the official searches before the documents could go to the director of surveys.
224. He further testified that the original copies of the title had to be surrendered and the Survey of Kenya would then issue the original deed plans.
225. It was his evidence that the original title deed and the deed plan are used as proof of ownership.
226. It was further his evidence that that according to the documents, LR No. 1695 /6 should have been surrendered and recorded as the original number. The illustration on page No. 4 showed that six titles came from 1695/6.
227. He testified that the acreage of the land parcels was found on the part above the land reference number.
228. Upon cross examination, DW2 confirmed that he is the District Surveyor Naivasha and he had an appointment letter.
229. He also confirmed that he was in charge of the Survey of Kenya Naivasha office adding that he was appointed as a surveyor in July, 2011 and worked at the headquarters in Ruaraka.
230. He further confirmed that he was in budget and training and had not been in any other department.
231. He admitted that in his experience as a surveyor he had not come across the torrents system nor of the mirror principle.
232. When was referred to FR 291/35 which was at page 9 of Exhibit P20, he confirmed that the date 16<sup>th</sup> July, 1999 showed when the surveyor executed the exercise and when it was finalised.
233. He also admitted that on the registration column, it was indicated that the map was received at the survey of Kenya on 30<sup>th</sup> July, 1990 and conceded that there was an anomaly.
234. He further admitted that he had made comments on Exhibit P1 to P6 and was aware of the process under the Registration of Titles Act.
235. He confirmed that when FR 291/35 was prepared, there must have been a computation file and yet the surveyor did not present anything.



236. He also confirmed that the land was subdivided into four portions which were identified by their acreage and deed plan number.
237. He further confirmed that he never worked in the deed plan section but was a surveyor by training and practice. Deed plans were prepared in triplicate by the Survey of Kenya.
238. When referred to the Deed plan on Page 18 of the Plaintiff's bundle, he confirmed that it was prepared by O.M Wainaina and that his name appeared because he was the one who received it.
239. He also admitted that with regard to land parcel No. 1695/12, the original number was 1695/6/7 which was the number that was to appear on the title.
240. He further admitted that page 19 had another deed plan for LR No. 1695/13 with the original number as 1695/6/8 which is the number he expected to appear on the title.
241. He confirmed that page 20 had another deed plan for LR No. 1695/14 which had the original number as 1695/6/9 which was also the number he expected to appear on the title.
242. He also confirmed that the deed plan at page 21 was for 1695/15 with the original number as 1695/6/10 which he expected to appear on the title.
243. He further confirmed that at page 22 was the deed plan for 1695/16 with the original number as 1695/6/11 which number he expected to appear on the title at page 6.
244. He admitted that the fault of quoting the wrong number would impeach the title as the survey comes first and the deed plan replicates what is captured during the survey.
245. He also admitted that the title at page No. 1 had survey plan number 247692 which corresponded with the deed plan on Page 18 which indicated as 247692.
246. He confirmed that he stands by his testimony that a wrong original number impeaches the title.
247. He also confirmed that under RTA titles, the District Surveyor comments on the part of approvals. When he was referred to Exhibit 20 FR No. 291/35, he admitted that it had a part for approval.
248. He further confirmed that the District Surveyor would ordinarily write a letter to say that the proposed sub-division was in compliance with the law and the circulation would also have comments of the physical planner.
249. He admitted that the letters would be in the custody of the Land Administrator and he admitted that he had not gone through the Land Administrator's file.
250. He also admitted that he had stated that there was an anomaly with the dates but he was not disputing the maps.
251. He further admitted that he should have got documents from the lands office to back his evidence but his evidence was from the documents submitted.
252. He confirmed that he is a government surveyor and his evidence had the capability of being used to nullify the title.
253. He also confirmed that he did not look at the other files which would have had important documents and that he was only giving evidence on the discrepancy on dates.
254. He further confirmed that he has no doubt about the maps and the dates that clashed did not mean that the map was invalid and that it could be proved otherwise.



255. He admitted that when a private surveyor initiated a sub-division and presented it for approval, it was not possible to proceed with authorities when they were not sure that the person was the owner.
256. He also admitted that the government officials would be looking at an official search. If there were two titles where one had subdivisions and the other did not have one, it would not have been a simple matter.
257. He further admitted that he would need to verify the maps and the titles presented which he had not done.
258. When referred to Page 24 of the Plaintiffs bundle, he confirmed that he could see six titles were in dispute and that the Commissioner of Lands had apportioned rent for the different parcels.
259. When referred to exhibit D1, he confirmed that it was a transfer to Ndibithi Farmers with no further entry.
260. He also confirmed that once a deed plan is done, the owner takes them to the Lands office for registration and that it was only a search that would tell them if there were further transactions. He referred to the search produced as Exhibit D4.
261. He admitted that the Director of Survey records were correct and that his take was that a survey had been done and a deed plan created.
262. When he was referred to page 84 of the Plaintiff's bundle, he admitted that it had a stamp of certification as being the true copy of the original which was not a search. It was not true that he did not know what a search looked like under the Registration of Titles Act.
263. Upon re-examination, he stated that he looked at the records at the Director of Surveys and the maps were the same as those in Exhibit P20 at page 9.
264. He also stated that if it had an anomaly it would be indicated as "cancelled". He further stated that ownership had to be verified before any approvals or registrations as there were instances where approvals were given and the titles were found to be fictitious.
265. He stated that when the deed plans were signed, the work of the survey is done and the lands office takes over. When he was referred to Exhibits P1 to P6 he stated that the original numbers did not tally adding that it was supposed to be 1695/6. He further stated that the original numbers were a mismatch and that 1695/2/7 should have been the correct one.
266. He also stated he disputed the deed plans to the extent that the number 1695/6/7 did not point him to the original mother title 1695/6.
267. When referred to Exhibit D4 and Exhibit D1, DW2 stated that they both tallied as LR 1695 was transferred to Ndibithi Farmers Company Limited as entry No. 2.
268. DW2 stated that the custodian of the title documents was the Land Registrar and that he understood the dispute to pertain to ownership, when 1695 was subdivided and whether 1695/2 resulted into other portions.
269. He confirmed that subsequent surveys had been done from 1695/1 to 1695/17 and would therefore recommend that the original documents be presented and that there would also be need to engage the Land Registrar.
270. He stated that the mistake on the map should not nullify it but the contents and that the maps in Exhibit P20 were the ones he found at the Survey of Kenya.



271. The Defendants case was then closed.

### **Issues For Determination.**

272. The Plaintiff filed his submissions on 31<sup>st</sup> January, 2023 while the Defendants filed their submissions on 24<sup>th</sup> February, 2023.
273. The Plaintiff in his submissions identifies the following issues for determination;
- a. Whether LR No. 1695 was subdivided resulting in the Plaintiff's titles.
  - b. Whether the Plaintiff titles LR No.1695/12, LR No. 1695/13, LR No. 1695/14, LR No. 1695/15, LR No. 1695/16 and LR No. 1695/17 are a product of fraud or misrepresentation.
  - c. Whether the Plaintiff is entitled of the orders being sought against the Defendants.
274. On the first issue, the Plaintiff submits that the surveyors who testified as PW2 and DW2 agreed that the survey records showed that LR No. 1695 had been subdivided and contained new title numbers and they therefore did not exist in its original state.
275. The Plaintiff relies on Sections 30 and 32 of the Survey Act, the case of Elizabeth Wambui Githinji & 29 Others Vs Kenya Urban Roads Authority & 4 Others [2019] eKLR and reiterates that DW2 had confirmed that the survey records in court were the correct records at the Survey of Kenya.
276. On the second issue, the Plaintiff submits that he has demonstrated that he is the registered owner of the suit properties by producing certificates of title and searches that confirm his ownership.
277. He relies on the cases of Munyu Maina Vs Hiram Gathiha Maina [2013] eKLR, Premier Daffodil Limited Vs Speedbird Travel and Safaris Limited [2021] eKLR and submits that the Land Registrar having issued new certificates of title to the Plaintiff, the previous certificates of title ceased to exist. He also relied on Section 22 of the repealed Land Registration Act.
278. The Plaintiff also submits that since the Defendants title was under challenge, the documentary evidence presented had to be carefully scrutinised.
279. The Plaintiff further submits that the certificate of search produced as Exhibit D4 was a forgery as it did not comply with the repealed Registration of Titles Act and was not a photostat copy of the register as was the norm for the Certificates of Search under the Registration of Titles Act.
280. The Plaintiff submits that Grant IR 1417 was subdivided into LR No. 1695/1 and 1695/2. LR No. 1695/1 was transferred to the 1<sup>st</sup> Defendant which was recorded as Entry No. 6 in Grant IR 1417 and it shows that only 606.4 Hectares were transferred. Grant IR was produced as Exhibit P7.
281. The Plaintiff on the decisions of Ndibithi Farmers Company Limited Vs Mwana Mwireri Rironi and Naivasha Farmers Co. Ltd [2012] eKLR, Benjamin Kipkech Kipkulei Vs Alex Kungu Kimani & 39 Others [2016] eKLR and submitted that the said courts made findings of fact which the Defendants did not appeal from.
282. The Plaintiff also submits that Exhibit D1 is a forgery because page 6 was not similar to pages 1 to 5 as it was a different color and length of different length.
283. The Plaintiff further submits that the transfer document relied on by the defendants does not have any evidence of registration, no booking form or stamp duty receipt.



284. The Plaintiff relies on the decision in *Fatuma Ali Omar & another Vs Omar Ali Omar & 2 Others* [2015] eKLR and submits that he has demonstrated how he acquired the suit properties and produced all the supporting documents while the Defendants have failed to prove their case on a balance of probabilities.
285. On the third issue the Plaintiff submits that the Defendants filed a Counterclaim where they seek to be declared as the genuine owners of 1695.
286. The Plaintiff also submits that the 2<sup>nd</sup> Defendant has no authority to file a counterclaim on behalf of the 1<sup>st</sup> Defendant as no company resolution was filed.
287. The Plaintiff further submits that the Defendants alleged fraud on the part of the Plaintiff with respect to the subdivision of the suit property but failed to join the Agricultural Development Corporation to the suit adding that it was the first owner of LR No. 1695/2.
288. The Plaintiff submits that the Defendants failed to sue the other beneficiaries of the other subdivisions and relied on the case of *Charles Karathe Kiarie & 2 Others Vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR in support of his arguments.
289. The Plaintiff also submits that the Defendants did not meet the threshold set out in Section 107 of the *Evidence Act* as it did not prove the alleged fraud.
290. On the fourth issue, the Plaintiff relies on the cases of *John Kiragu Kimani Vs Rural Electrification Authority* [2018] eKLR, *Kenya Power & Lighting Co. Limited Vs Sheriff Molana Habib* [2018]eKLR, *Kenya Power & Lighting Company Limited Vs Fleetwood Enterprises Limited* [2017]eKLR among other decisions and submits that he has proved that he is the registered owner of the suit properties and that the Defendants have trespassed onto his properties, have subdivided them and are leasing it out to members of the public.
291. The Plaintiff relies on the decisions in *Kenya Power & Lighting Company Ltd v Ringera & 2 Others (Civil Appeal E247 & E248 of 2020(Consolidated) [2022] KECA 104 (KLR)*, *Adrian Gilbert Muteshi v William Samoei Ruto & 4 Others* [2013] eKLR among others and seeks on award of Kshs. 15,000,000/= for general damages and malicious destruction to property.
292. The Plaintiff concludes his submissions and prays that the court grants the orders sought in the Plaintiff.
293. The Defendants in their submissions give a summary of the evidence adduced during the hearing and identify the following issues for determination;
- a. Whether the Plaintiff has acquired an indefeasible title over the suit properties.
  - b. Whether the anomalies established in the sub-division process render the Plaintiff's title a nullity.
294. The Defendants rely on the decision in *Vijay Morjaria Vs Nansingh Madhusing Darbar & another* [2000] eKLR and submit that they have demonstrated that they are still the registered owners of LR No. 1695 measuring 2504 acres and that it has never been subdivided.
295. They also rely on Section 22, 35 and 70 of the Registration of Titles Act and submits that they are still in possession of the original grant despite the Plaintiff's allegations that the suit property was subdivided.
296. The Defendants submit that the process of subdivision especially where the land is subdivided and transferred to different people requires the original grant to be closed or cancelled but that did not happen in the present suit.



297. The Defendants also submit that the validity of their title was not challenged and that while the Plaintiff claims that he purchased the suit properties from unnamed allottees, the transfers are not dated that he has also failed to produce agreements for sale and establish payment of consideration.
298. The Defendants reiterate the evidence adduced during trial on the alleged dissecting line that is on the map. They state that it is a pipeline that had been set up and not a boundary as alleged by the Plaintiff.
299. The Defendants rely on Section 21(2) of the Survey Act, the cases of *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR, *Gitwany Investment Limited v Tajmal Limited & 3 others* [2006] eKLR, *Iqbal Singh Rai vs Mark Lecchini & the Registrar of Titles Civil Case No. 1054 of 2001* and submit that the Plaintiff should not benefit from a process that had been established to be fraudulent.
300. The Defendants also submit that the court has power to order nullification of the titles held by the Plaintiff and rely on Sections 2 and 23 of the Registration of Titles Act, Section 26 of the Land Registration Act and submit that the Agricultural Development Corporation carried out illegal subdivisions of the land and pray that their counterclaim be allowed.

### **Analysis and Determination.**

301. After considering the pleadings, the evidence adduced, the documents relied on and the rival submissions filed in this suit, it is my considered view that the following issues arise for determination;
  - a. Whether or not LR No. 1695 was legally subdivided.
  - b. Whether the Plaintiff should be granted the orders sought in his Plaint.
  - c. Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants should be granted the orders sought in their Statement of Defence and Counterclaim.
  - d. Who should bear the costs of this suit.

#### **A. Whether or not LR No. 1695 was legally subdivided.**

302. The Plaintiff's case is that LR No. 1695 belonged to Lord Colville. It is further his case that LR No. 1695 was subdivided into 1695/1 which was registered in the name of the 1<sup>st</sup> Defendant and 1695/2 which was registered in the name of the Agricultural Development Corporation.
303. It is further the Plaintiff's case that the Agricultural Development Corporation subdivided LR 1652/2 into various portions and that he purchased the suit parcels from various allottees.
304. It was also the Plaintiff's case that the Defendants without any color of right, trespassed onto his properties and lay to claim to them.
305. In support of his case, the Plaintiff produced copies of his Certificates of title for the suit properties, a copy of the Grant IR No. 1417 – LR No. 1695 among other documents already outlined earlier in this judgement.
306. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants' case is that LR No. 1695 initially belonged to Lord Colville. Upon independence, Lord Colville advised his employees to form a company, which they did, for purposes of gifting the suit property to them.
307. The company that is formed was the 1<sup>st</sup> Defendant herein and soon after it was formed, Lord Colville transferred LR 1695 to them. It is their case that LR No. 1695 was never subdivided and was never transferred by them to the Agricultural Development Cooperation.



308. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants produced the Memorandum of Transfer whose contents have been set out in great detail in the pleading paragraphs, a rent clearance certificate of LR No. 1695 and a certificate of search issued on 3<sup>rd</sup> June, 2021 which shows that the suit property is still registered in the name of 1<sup>st</sup> Defendant. The Plaintiff has stated that this search certificate (Exhibit D4) is forgery but has not called evidence in support this allegation.
309. Before proceeding any further, it is important to point out that the Plaintiff claims that the courts in the decision of Ndibithi Farmers Company Limited v Mwana Mwireri Rironi and Naivasha Farmers Co. Ltd [2012] and Benjamin Kipkech Kipkulei versus Alex Kungu Kimani and 39 Others [2016] made findings of fact that LR No. 1695 was subdivided.
310. A perusal of the said rulings relied on by the Plaintiff show that they were delivered upon consideration of applications for interim injunctions.
311. A perusal of the court record for both cases show that the suits were dismissed for want of prosecution and not heard and determined on merit.
312. Ndibithi Farmers Company Limited v Mwana Mwireri Rironi and Naivasha Farmers Co. Ltd [2012] was dismissed for want of prosecution on 18<sup>th</sup> September ,2015 while Benjamin Kipkech Kipkulei versus Alex Kungu Kimani and 39 Others [2016] was dismissed for want of prosecution on 31<sup>st</sup> December, 2020. As such, the Plaintiffs claim that a finding on sub-division has been made is not correct.
313. As pointed out before, in support of both their cases, the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants produced certificates of title for I.R No. 1417.
314. The Certificate of Title produced by the Plaintiff as Exhibit P7 shows that it is for a term of 999 years from 1<sup>st</sup> June, 1924 to 1<sup>st</sup> June, 2923. It also shows that it was issued to Gilbert De Preville Colville and that the suit land measures 2,504 acres.
315. The said Certificate of Title does not have an entry No. 2. Entry No. 3 shows that the date of registration was 23<sup>rd</sup> October, 1959 when it was leased to a company whose name is not legible.
316. Entry No. 4 of the Certificate of Title shows that an instrument has been registered against the said title for Kshs. 495/=. It was registered on 11<sup>th</sup> July, 1961.
317. Entry No. 5 shows a surrender of lease of No. 3. It is registered on 11<sup>th</sup> May, 1964.
318. Entry No. 6 shows a transfer to Ndibithi Farmers Company Limited of an area measuring 606.8 ha of LR No. 1695/1 vide Certificate of Title IR 26876 on 12<sup>th</sup> March, 1974.
319. Entry No. 7 shows a transfer to Agricultural Development Corporation of LR 1695/2 of 406.6 Ha registered on 21<sup>st</sup> September, 1987.
320. Entry No. 8 is a charge to Barclays Bank of Kenya Limited registered on 21<sup>st</sup> September, 1987 while Entry No. 8 is a transfer to Agricultural Development Corporation for Kshs. 80,000,000/= also registered on 21<sup>st</sup> September, 1987.
321. Entry No. 9 is also registered on 21<sup>st</sup> September, 1987 and is a charge to Barclays Bank of Kenya Limited for Kshs. 104,000,000/=.
322. The Certificate of Title produced by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants as Exhibit D1 shows that it is I.R 1417 and is for a term of 999 years from 1<sup>st</sup> June, 1974 to 1<sup>st</sup> June ,2923. It was issued to Gilbert De Preville Colville and the suit land and measures 2504 acres.



323. Entry No. 2 is a transfer to Ndibithi Farmers Company Limited. This entry is registered on 12<sup>th</sup> March, 1974.
324. The Certificate of Title produced by the Plaintiff as Exhibit P7 has ten entries while the Certificate of Title produced by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants had only one entry which is entry No. 2.
325. It should be noted that the Certificate of Title produced by the Plaintiff did not have Entry No. 2 but instead at entry No. 6 indicates that LR No. 1695/1 measuring 606.8 ha was transferred to Ndibithi Farmers Company Limited on 12<sup>th</sup> March, 1974. No one explains why entry No. 2 is missing and/or what it is.
326. The dispute herein relates to the measurement of the parcel of land transferred to the Defendants. It is not in dispute that it was transferred to them by Lord Colville.
327. It is evident that both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants have Certificate of Titles in respect of the same parcel of land. The two certificates of title are different in terms of :
  - a. Measurement of the land owned by the Defendants.
  - b. The number of entries made on the certificate of title
328. Another document that was also produced by both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants is the transfer instrument.
329. The transfer instrument produced by the Plaintiff as Exhibit P8 indicated on page 1 that it was a transfer of Grant number 1417/6 from Colville Limited which was the registered owner of 2,504 acres of LR 1695 for a consideration of kshs. 200,000/= to Ndibithi Farmers Company Limited. At Page 2 of the transfer instrument, the measurement of the land being transferred to Ndibithi Farmers Company Limited is shown as being 606.2 hectares and described as 1695/1. This transfer instrument is dated 11<sup>th</sup> March, 1974.
330. The transfer instrument produced by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants is titled Memorandum of Registration of Transfer. It is dated 11<sup>th</sup> March, 1974. It is a transfer from Lord Colville to Ndibithi Farmers Company Limited of a parcel of land measuring 2504 acres at a consideration of Kshs. 200,000/= .The parcel of land is described as LR No. 1695. It was presented on 12<sup>th</sup> March, 1974.
331. These documents are crucial for purposes of supporting the Plaintiff's claim and defending the suit. The documents tell contradictory stories of acquisition and registration by both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants. They also tells a contradictory story on the area/measurement of land transferred to the Defendants.
332. As aforementioned, it was the Plaintiff's case that he purchased LR No's 1695/12 to 1695/17 from various people who had been allotted the said properties by the Agricultural Development Corporation.
333. LR No's 1695/12 to 1695/17 are said to be subdivisions of 1695/6 which came about upon subdivision of LR 1695/2.
334. According to the Certificate of Title that was produced by the Plaintiff, LR 1695/2 was transferred to the Agricultural Development Corporation.
335. Apart from the Certificates of Title produced for LR No's 1695/12 to 1695/17 by the Plaintiff, the Plaintiff did not produce any letters of allotment from Agricultural Development Corporation to the



people he allegedly purchased the suit properties from and neither did he produce the sale agreements he might have entered into for the purchase of the suit properties.

336. I have noted that the transfer instruments from Agricultural Development Corporation to the Plaintiff bear purported photographs and signatures of the chairman and Managing director but are not sealed with the Common Seal of the Agricultural Development Corporation.
337. It was the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants case was that LR 1695 is a gift from Lord Colville and was never subdivided and/or transferred to the Agricultural Development Corporation.
338. It is important to point out that both transfers produced by the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants show that Ndibithi Farmers Company Limited acquired LR 1695 at a consideration of Kshs. 200,000/=.
339. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants produced a Certificate of Search for LR 1695 conducted on 3<sup>rd</sup> June, 2021 which shows that the suit property as at that date is registered in the name of the 1<sup>st</sup> Defendant i.e Ndibithi Farmers Company Limited. The Plaintiff alleges that it is a forgery because it is not a photostat copy of the register. This allegation is better confirmed by the Registrar who was unfortunately not called to give evidence.
340. The Plaintiff claimed that the LR 1695 was subdivided into LR 1695/1 and 1695/2 while the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants claimed that LR 1695 was never subdivided. It was crucial for the parties call the Registrar in charge of the Registration District within which the land is situate to shed light on the acquisition, transfer and/ or subdivisions of the suit parcels.
341. DW2 and PW2 were the expert witnesses called to help the court make a determination of the dispute herein. Their testimonies are summarized as below.
342. The District Surveyor Naivasha gave his evidence as DW2. He pointed out the discrepancies in the title documents held by the Plaintiff with respect to LR No's 1695/12 to 1695/17 and stated that since their mother title was alleged to be 1695/6, the original number ought to be 1695/6 but instead, the original numbers were indicated to be 1695/2/7, 1695/2/8, 1695/2/9, 1695/2/10, 1695/2/11 and 1695/2/12.
343. The other discrepancy as pointed out by DW2 (District surveyor) is that the broken line appearing on the map at page 7 of Exhibit P20 (The status/survey report) is not a boundary and stated that if it were a boundary it would bear the distance and bearing and would be a solid and not broken line. This negates the evidence of PW2 (a licensed private surveyor) that it is a boundary between 1695/1 and 1685/2.
344. PW2 stated that his scope of work did not require him to visit the Land Registrar and he did not come across any certificate of title for 1695/1 or 1695/2. Earlier in his testimony he stated that in preparation of the report he concentrated on the documents from Director of Survey.
345. The District Surveyor's testimony was to the effect that after a survey is been done, a map is drawn and registered at the Survey of Kenya.
346. During cross examination, the Surveyor confirmed that FR 291/35 which was in respect of the subdivision of LR 1695/2 to LR 1695/3, 1695/4, 1695/5 and 1695/6 was in a file at the Survey of Kenya which file he did not go through. During re-examination, he stated that he went through the records at the Director of Surveys which leaves this court in doubt as to whether he did in fact go through the said records.
347. He also pointed out that the said map had an anomaly as it is shown as having been received on 30<sup>th</sup> July 1990 and yet it was drawn on 16<sup>th</sup> July 1999.



348. The District Land Surveyor Naivasha stated that given the various discrepancies in the documents produced by the parties, he would recommend that the original documents be presented and the Land Registrar be engaged.
349. The deduction drawn from the evidence of PW2 and DW2 is that the original survey records and maps which might shed light on the subdivisions of the suit property are at the Survey of Kenya offices. This makes the evidence of the Director of Survey crucial in the determination of the issues in controversy in this matter.
350. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants sought an order that witness summons be issued to the Director of Survey to give evidence in this matter. This court gave the said orders on 9<sup>th</sup> September 2022.
351. A perusal of the court record shows that on 29<sup>th</sup> September 2022, counsel for both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants informed the court that they had received confirmation that one Mr. Muchai from the Survey Department in Nairobi that he would be available to give his evidence but was not present in court on that day.
352. Thereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants opted to close their case without calling the evidence of the Director of Survey. Both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants did not inform the court of any difficulty in procuring the attendance of the Director of Survey.
353. PW2 who is a licensed private surveyor in his testimony stated that in preparation of the status/survey report he only concentrated on the documents from the Director of Survey and did not visit the Lands Office.
354. Part V of the Registration of Titles Act makes provision for Register of titles and mode and effect of registration. Section 25 has particularly caught my attention. It provides as follows;
- The registrar of each registration district shall keep a register, called the register of titles, and shall file therein the photostat copies of all grants and of all certificates of title to be issued as hereinafter provided, and each grant and certificate of title shall constitute a separate folio of the book; and the registrar shall record therein the particulars of all instruments, dealings and other matters by this Act required to be registered or entered in the register, affecting the land contained in each grant or certificate of title.
355. Given the totality of the evidence adduced by both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants, it is my view that the evidence of the Director of Survey and Registrar of the registration district within which the land is situate was necessary. All the witnesses who gave evidence on the transfer or subdivision admitted that their testimonies were lacking in some material aspects. For example
- a. DW1 conceded that he was not present during the transfer of the suit land to the 1<sup>st</sup> Defendant.
  - b. DW1 stated that it would have been important to call for records from the Land Administrator. He further conceded that he needed to verify the maps and title documents presented in evidence but had not done so,
  - c. PW2 stated that his evidence was in respect of documents obtained from the Director of Survey and that the scope of his assignment did not require him to visit the office of the Registrar of Lands,
356. There are apparent disparities in the documents produced by both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants. As things remain, the evidence adduced is not sufficient to enable the court effectually



determine the question of legality of title held by the parties herein and the alleged sub-division of the suit parcel.

357. Section 107 of the *Evidence Act* provides as follows;

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

358. Section 108 of the *Evidence Act* provides as follows;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

359. The court in the case of *Hellen Wangari Wangechi v Carumera Muthoni Gathua* [2015] eKLR held as follows;

“In my view, the issue that emerges for determination is, whether or not the appellant discharged her burden of proof to the required standard in civil cases. To my mind the burden of establishing all the allegations rested on the appellant who was under an obligation to discharge the burden of proof.

All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds* [16] remarked: -

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.” ( Emphasis is Mine)

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* [17]: -

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (Emphasis is mine)

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

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed” (Emphasis is mine)



360. Given the failure to call the evidence of the Director of Survey and also failure to call the Land Registrar to shed light on the process of transfer, it is this court's view that neither the Plaintiff nor the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants discharged their burden of proof.
361. The Plaintiff did not, on a balance of probabilities, prove his claim as outlined in the Plaint and neither did the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants prove their claim in their counterclaim.
362. As was held in the case of *Hellen Wangari Wangechi v Carumera Muthoni Gathua* [2015] eKLR cited above, courts are very reluctant to determine cases on the burden of proof but given the unsatisfactory evidence adduced by both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants in this matter, this court has no option but to decide this matter on the question of discharge of the burden of proof.
363. In *Hellen Wangari Wangechi v Carumera Muthoni Gathua* [2015] eKLR it was held as follows;
- “The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,<sup>[19]</sup> Lord Denning said the following about the standard of proof in civil cases: -
- ‘The ... {standard of proof} ...is well settled. It must carry a reasonable degree of probability.... if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’ (Emphasis is mine)In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. (Emphasis is mine). It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.” (Emphasis is mine)
364. The probability that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants own the parcel of land transferred to them by Lord Colville is equal to the probability that the plaintiff owns the suit parcels of land which he alleged were transferred to him by the Agricultural Development Corporation. With an equal probability, the burden of proof has not been discharged.
365. The Plaintiff cannot take advantage of the weakness in the defendant's defence to assert his claim. He had every opportunity to summon the Director of Survey and the Land Registrar in order to explain the root of his title.
366. I find that the plaintiff has failed to prove that LR 1695 was legally sub-divided and cannot, therefore, claim that his titles to the suit properties emanates from a supposed sub-division.

**B. Whether the Plaintiff should be granted the orders sought in his Plaint.**

367. Bearing in mind my finding on issue A above, I find that the Plaintiff is not entitled to orders sought in the plaint.



### **C. Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants should be granted the orders sought in their Statement of Defence and Counterclaim.**

368. The Defendants are seeking declaratory orders that they are the registered owners of LR. 1695 and that the subdivision of LR 1695 was illegal, improper and fraudulent.

369. They hinge this claim of particulars of fraud and illegality on the part of the plaintiff. Fraud must be strictly proved. The defendants failed to call evidence to support their allegation of fraud. The Director of survey and the Land Registrar are custodians of documents that would have explained the acquisition and transfer of LR. 1695 to the defendants but were not called to give evidence.

370. In *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] it was held as follows:

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

371. In *Kinyanjui Kamau vs George Kamau* [2015] eKLR it was held as follows:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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.” (Emphasis is mine).

372. The onus was on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants who sought to rely on fraud on the part of the Plaintiff to prove that the subdivision of LR 1695 was fraudulent and illegal and they failed to discharge that burden. Consequently, their counterclaim fails.

### **D. Who should bear the costs of this suit.**

373. Section 27 (1) of the *Civil Procedure Act* stipulates as follows;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid: and the fact that that court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reasons otherwise order.”

### **Disposition.**

374. In the result, I find that the Suit and Counterclaim lack merit and are hereby dismissed with no order as to costs.



375. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Kariuki for Odhiambo for the Plaintiff.

Mr. Wairegi 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> for Defendants.

