



**Mukhwana v Sawenja & another (Environment and Land Case  
60 of 2019) [2025] KEELC 6275 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6275 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 60 OF 2019  
CK NZILI, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**JACKSON SIUNDU MUKHWANA ..... PLAINTIFF**

**AND**

**PROTUS SAWENJA ..... 1<sup>ST</sup> DEFENDANT**

**JOHN WALOKI SAWENJA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff approached the court through a plaint dated 31/7/2019. He sought:-
  - a. Declaration that the registration of defendants as owners of Land Parcels Kiminini/Kiminini Block 8 (Birunda Farm)/ 343 and Kiminini/Kiminini Block 8(Birunda Farm)/340, hereinafter the suit parcels of land, is null and void.
  - b. Cancellation of the said registration and in place he be registered as the owner of 10 acres as originally comprised in L.R. No. 7121, otherwise known as Birunda Farm.
  - (c) Eviction to remove the defendants, their families, servants, or agents, and any other persons acting or claiming interest through them from the suit parcels of land.
2. The plaintiff averred that he was the owner of all that piece of land known as Plot No. 1 Birunda Farm, measuring 10 acres, comprised in part of L.R. No. 7121, owned by Birunda Farmers Company Limited, which he bought from the aforesaid company. That he took actual possession until 25/8/2017, when he was forcefully and unlawfully evicted therefrom by goons, including the defendants, who also destroyed his property valued at Kshs. 1,200,000/=.
3. Before the aforesaid eviction, the plaintiff averred that sometime in 2015, the defendants' mother one Rael Naliaka Sawenja (deceased), had sued him vide Kitale ELC No. 91 of 2015, claiming interest in



the suit parcels of land on behalf of her late husband William Sawenja, the owner of plot No. 2 Birunda Farm, which suit she did not prosecute and was dismissed on 13/12/2017.

4. The plaintiff averred that when the said suit was pending, the defendants and their mother, secretly and fraudulently subdivided plot No. 1, processed 3 titles, namely, Kiminini/Kiminini Block 8/ (Birunda Farm/343, 341 and 340, in favour of the 1<sup>st</sup> defendant, their mother, and the 2<sup>nd</sup> defendant, respectively.
5. The defendants opposed the suit through a statement of defence and counterclaim dated 16/10/2019. It was averred that the defendants have been in possession of the suit parcels since the 1970s, when the parcels were acquired through their deceased father from Birunda Farm Limited.
6. It is averred that the deceased was both a shareholder and a director; otherwise, if any purchase was made, then the purported vendors had no capacity to dispose of the land. Moreover, the defendants averred that a fence existed since taking over possession and that they were never parties to the alleged previous suit. The defendants denied the alleged fraud or illegality in the acquisition of titles to the suit parcels of land, as alleged or at all.
7. By way of counterclaim, the defendants averred that they are sons of the late William Sawenja, who was a beneficiary of 150 acres as part of his shares out of L.R. No. 7121, owned by Birunda Farm Limited, which had 25 members, then measuring 922.5 acres. The defendants averred that in 1979, the members of the Farm agreed to dissolve the company and allow each member to own land relative to his shares, after all the liabilities accruing to the company were paid off.
8. The defendants averred that out of the total acreage, 123 acres were sold to offset the outstanding loan, while the balance of 799.5 acres was shared out by the members in 1981, to which their late father acquired 150 acres. The defendants averred that they subsequently acquired the suit parcels of land by virtue of transmission, through succession.
9. Further, the defendants denied that the plaintiff ever bought such land from Birunda Farm Limited as alleged; otherwise, the sale agreement displayed before the court is tainted with fraud, illegality, misrepresentation, conspiracy and connivance to obtain the suit parcels of land. The defendants prayed for:-
  - a. Declaration that the suit parcels of land lawfully belong to them.
  - (b) Permanent injunction.
10. Nonetheless, the counterclaim was not accompanied by any verifying affidavit.
11. By way of reply to the defence and defence to the counterclaim, the plaintiff insisted that the membership of Birunda Farm was 29 and not 25. Further, the plaintiff denied the alleged dissolution of the company in 1979, as alleged or at all, and insisted that the company was in existence in 1998, when the head title deed was surrendered. While admitting that 123 acres of land were sold to offset loan arrears, the plaintiff insisted that later on, 10 acres comprising the homestead subject to this court was sold to him in 1985, to offset some pending debts of the company. The plaintiff prayed that the counterclaim be dismissed for lack of merits.
12. At the trial, Jackson Siundu Mukhwana testified as PW1. He relied on a witness statement dated 31/7/2019 as his evidence-in-chief. PW1 told the court that he owned plot No. 1 Birunda Farm, measuring 10 acres, comprised of L.R. No. 7121 owned by Birunda Farm Company Limited, which he bought in 1986, for Kshs. 190,000/=. He took possession thereof and occupied it until 25/8/2017, when he was allegedly forcefully evicted by the defendants, who destroyed or sold property valued at Kshs. 1, 200,000/=.



13. The plaintiff told the court that sometime in 2015, the defendants' mother, on behalf of her late husband and owner of plot No. 2, had sued him claiming interest in the land, which suit was dismissed for want of prosecution on 13/11/207. PW1 told the court that before the said suit was dismissed, the defendants allegedly subdivided plot No. 1 into three portions and obtained title without his knowledge, yet plot No. 1 was not part of the estate of the late William Sawenja.
14. PW1 relied on a sale agreement dated 3/12/1986 as P. Exhibit. No. 1, land control board consent marked PMFI-2(a) and (b), Minutes for Saboti Kwanza land control board as PMFI-2, receipts for payment of the purchase price as P. Exhibit. No. 3(a) - (l). PW1 told the court that when he bought the land, it had two houses, which he proceeded to occupy.
15. Similarly, PW1 said that the land was to be subdivided into 154 parcels, with William Sawenja, a neighbour and owner of plot No. 2, acquiring 384 acres, as per the list marked as PMFI1-2(a); otherwise, he never claimed plot No. 1 before he passed on in 2010.
16. PW1 told the court that in 2015, he received a letter from the latter Rael Sawenja claiming that he had trespassed into her land, and later was sued by her as per a plaint and ruling produced as P. Exhibit. No. 4(a) and (b). PW1 told the court that around 25/8/2017, four sons of the deceased invaded his land, armed with crude weapons, together with about 50 people, and destroyed his house in an attempt to forcefully evict him from the land. He said that from that day, he never stepped back into the land. PW1 produced the valuation report of the damage dated 27/11/2017 as P. Exhibit No. 5.
17. PW1 said that the said sons proceeded to harvest his coffee and cut down trees from the land, subdivided and acquired titles for the same as per copies of green cards produced as P. Exhibit. No. 6(a) - (k). Again, PW1 said that as of 2015, there were new officials of the Birunda Farm Company Limited, among them the secretary, Mr. Evans Wafula. He said that around 2018, issues were raised on the issuance of title deeds, leading to a meeting at the Assistant County Commissioner's offices as per minutes appearing on pages 39-41A of the trial bundle, produced as PMFI-7(a) and (b).
18. According to PW1, parcels No. 340, 341, and 342 measure about 16 acres in total, out of which 10 acres belong to him, for the deceased William Sawenja had already sold 314 out of his 384 acres by the time of his death.
19. PW1 told the court that he bought the land, and one of the directors of the Company, Mr. Jonathan Nyongesa, was a party to the sale agreement. PW1 said that the official search certificate of the Company marked as DMFI-12 showed Jonathan Nyongesa as among the directors with 25 shareholders, whereas PMFI-2 showed him as among the original 29 members of the company as per PMFI-2(c).
20. Further, PW1 said that the receipts produced as P. Exhibit No. 3(a) - (c) were genuinely issued to him by a Mr. Kitui, who was a director of the company. PW1 said that the area chief even wrote a letter to him dated 7/12/1986, when he was taking vacant possession. He denied being aware of Eldoret Civil Appeal No. 15 of 1988. PW1 said that he prepared a valuation report 4 months after the eviction, in the presence of the police.
21. PW1 said that PMFI-7(a) was called out by the Assistant County Commissioner after title deeds for the parcels were issued. He denied having bought the land from conmen; otherwise, he dwelt with Mr. Jonathan Nyongesa, Harrison Kitui, Ben Wanambisi and Elias Satia, who were the chairman, vice-chair, treasurer, and secretary, respectively. PW1 said that Rael Naliaka died in 2002, without seeking eviction orders against him.



22. Evans Samuel Mukuha Mikisi testified as PW2. He relied on a witness statement dated 31/7/2019 as his evidence-in-chief. As an owner of plot No. 63, as shown in certificate No. 2(a), he said that he bought the same in 1986 alongside the plaintiff, from the bona fide officials of Birunda Farm Company Limited, and appeared before the land control board for land control board consent on 6/12/1990, to subdivide L.R. No. 7121/7122 into 154 plots as per minutes of the land control board marked PMFI-2(b).
23. Additionally, PW2 told the court that the subdivision was not completed until a meeting was called at the chief's office on 7/8/2017, when their names were allegedly left out, out of those issued with title deeds. PW1 said that they then complained to the Deputy County Commissioner, leading to a meeting held on 5/9/2018 as per PMFI-7(a), only for the plaintiff to be evicted from the land. PW1 confirmed that he became the chair of the company on 5/9/2018.
24. Evans Wafula Wekesa testified as PW3. He relied on a witness statement dated 20/7/2019 as his evidence-in-chief. He told the court that he joined as a member and as secretary of the Company in 1985 and 2000, respectively, and had acquired shares from his father before he died in 2000, as member No. 48.
25. PW3 said that after the plaintiff was evicted from his land in 2017, the Company made a report to the area chief and Birunda Police Post and the Assistant County Commissioner, who summoned them to attend a meeting with the County Commissioner.
26. PW3 said that the County Commissioner read out names of 549 title holders, some of whom were not members of the Farm, and others who were members had been left out, such as PW1. He confirmed that the plaintiff was entitled to his land. He produced the minutes dated 5/9/2018 as P. Exhibit. No. 7(a) and the list attached as P. Exhibit. No. 7(b), (c), and (d).
27. David Wafula Tela testified as PW4. He relied on a witness statement dated 30/6/2021 as his evidence-in-chief. He confirmed he was a vice chair of the Company in 2000, as per the notification of change and P. Exhibit No. 2(c). PW4 confirmed witnessing the eviction in 2017 by the defendants, after which he reported to the police and the area chief.
28. PW4 similarly confirmed that Jonathan Nyongesa, Elias Satia, and Ben Wanambisi were directors of the Farm in 1986, before 2000, when he became an official with Evans Wafula as the secretary. PW4 confirmed that the area list produced as P. Exhibit. No. 2(c) is duly signed by the area chief and the chairman, Jonathan Nyongesa Wanambisi.
29. Francis Kariuki testified as PW5. He produced the valuation report dated 27/11/2017, as P. Exhibit. No. 5. PW5 said that he valued the land in 2015, whose registered owners, as the official search, were the defendants and their late mother.
30. Nelson Odhiambo testified as PW7. As a Land Registrar of Trans Nzoia County, he told the court that after title deeds for Birunda Farm were issued, the occupants on the ground turned rowdy, due to complaints regarding the authenticity, genuineness and legality of the owners of some of the titles. In addition, PW7 said that they stopped the issuance of the title deeds, and only a few people were able to obtain titles. PW7 confirmed that the issuance of titles had also been stayed by Petition No. 71 of 2019. He requested that this sit be stayed as well.
31. Following directions taken by counsel on 4/2/2025, this matter proceeded before this court from where the previous court had left it.
32. Mildred N. Chesoni testified as PW8. As the Senior Chief Baraton Location, she confirmed that the parcels herein come from Birunda village within her location. PW8 confirmed that letters dated



25/11/1987 and 2/12/1986, which she produced as P. Exhibit No. 9, were written by her predecessor, Mr. Charles Choya, when the current Kiminini Location was still covering the Baraton Location, which was created in 2010. PW8 denied having verified or authored P. Exhibit. No. 2.

33. Dickson Agoi, the Assistant County Commissioner, Kiminini Sub-County, testified as PW9. He told the court that the letter of consent dated 7/12/1990 was written at a time when Kiminini Sub-County had not been established and was, until 2016, falling under Sabaoti Division, whose land control board meetings used to take place in Trans Nzoia West. PW9 said that the minutes show that a land control board application for consent regarding Birunda Farm Company Limited was made, as per PMFI-2(a) and (b), which he produced as P. Exhibit. No. 2(a) and (b).
34. Protus Sawenja testified as DW1. He relied on a witness statement filed on 25/2/2020 as his evidence-in-chief. DW1 told the court that Birunda Farm was a Private Limited Company, comprised of 25 shareholders whose officials were Vincent Waswa, William Sawenja, Jonathan Nyongesa, Henry Wenganga Opicho, Elijah Makokha, Zakayo Waswa and Zefaula Wafula. DW1 said that the late William Sawenja was his father, who owned shares based on his contribution of KShs. 69,000/=, hence was entitled to 150 acres of land equivalent to 23 shares.
35. DW1 said that the entire parcel of land for the Company was 919 acres, equivalent to 123 shares and between 1970 - 1980, the shareholders resolved to dissolve the Company. Further, he said that they agreed to divide and share the land, out of which they sold 123 acres at KShs. 2,000/= per acre, to offset some liabilities owed by the Company from Banks, Agricultural Finance Corporation and land rates.
36. DW1 said that on 30/6/1979, 123 acres were sold to several new shareholders, bringing the total number to 22 members. DW1 said that after his father passed on, succession proceedings were undertaken on L.R. No. 7121, with their mother as the legal administrator. DW1 said that after the sharing of the said land, while awaiting surveyors to subdivide the land, the process was interfered with by the beneficiaries of the shareholders, among them the children of John Wekesa (Harrison Kitogi), Didimus Satia (Elias Satia), Jairo Wamacho (the late Ben Wanambisi) and Jonathan Nyonyenga, who, on or about 1981-1986, brought a private surveyor, who began to subdivide the land contrary to the shares held by the members, to which the original shareholders objected.
37. DW1 said that the company, on disposing of the land, did not sell by use of an agreement but rather by issuance of official receipts titled by Birunda Farm Limited. DW1 said that only individuals who bought the land from the Company were authorised to do so by way of an agreement as proof of sale when disposing of the land. He termed the plaintiff's claim a misrepresentation of facts; otherwise, he was conned by a person who had no capacity to sell the land on behalf of the Company and that there was no land available for sale on the alleged date, since the entire land had already been distributed among the shareholders.
38. DW1 relied on a certificate of incorporation of the Company dated 8/12/1965, official search certificate dated 30/11/2015, list of shareholders dated 3/10/1981, letter from the County Commissioner dated 21/11/2018, and a list of buyers of the land dated 30/6/1919, as D. Exhibit. No. 1 - 5, respectively. DW1 told the court that the sale agreement produced by the plaintiff was signed by persons who were not directors of the Company, but sons of some of the initial shareholders. Equally, DW1 termed P. Exhibit. No. 3(a)-(d) as forgeries; otherwise, there were no computer printouts at the time. The sequencing of the receipts was also termed suspect, and all were tailor-made to fit the purpose of the case.
39. According to DW1, the area list produced by the plaintiff was fake, lacking signatures of the company directors and as it contained more than 25 members, contrary to the company law requirements for



a private company. DW1 said that the suit parcels of land are currently occupied by himself and his brother, whose total acreage is 163 acres.

40. DW1 said that they obtained title deeds for the same as children of the late William Sawenja, who used to be a shareholder through inheritance. DW1 said that due to the national tilting programme, which took place after their father passed on, his mother became the legal administrator, and since there was no dispute amongst the beneficiaries, a request was made for the direct issuance of the title deed under their names.
41. DW1 said that the plaintiff was unknown to him before the suit was filed, though he hails from his village. DW1 admitted that his late mother had filed a suit as per P. Exhibit. No. 4(a) and (b). DW1 admitted that he had no minutes to show that the Company was wound-up; otherwise, as of 1980, he was too young to be aware of the Company's shareholders or its affairs. DW1 confirmed that he authored D. Exhibit. No. 2.
42. Again, DW1 said that Birunda Farm Ltd, composed of 25 shareholders, used to own L.R. Nos. 7121 and 7122, measuring 919 acres. DW1 had no evidence to show that the directors of the Company had undertaken the subdivision of its land amongst the shareholders. Equally, DW1 had no evidence to show that the company owed any monies to the Agricultural Finance Company or sold 123 acres of land to offset any liabilities, save for D. Exhibit. No. 3. DW1 said that he was neither a shareholder nor an official of the Company. DW1 admitted that he had not produced any letters of administration in favour of the estate of his deceased father.
43. DW1 said that since there was a delay in processing the succession suit, the officials of the Company allowed families who had no dispute over beneficial owners to acquire title deeds. DW1 further said that he had no agreement from the family to forego the succession process; otherwise, he was uncertain if the entire 10 acres were included in the succession cause.
44. John Wakoli Sawenja testified as DW2. He relied on a written statement dated 25/2/2020 as his evidence-in-chief. DW2 confirmed that he inherited parcel No. 340 from his late father. He denied that the plaintiff had bought, taken possession of, or had been sued by his late mother regarding the suit parcels of land. DW2 told the court that he lives on parcel No. 341, which belongs to his late mother. Again, DW2 said that he had no documents to show that his late father owned 15 acres of land, save for the area list.
45. After the close of the defence testimonies, parties were directed to file written submissions by 15/8/2025. The plaintiff relies on written submissions dated 30/7/2025, isolating four issues for the court's determination. On whether he is a lawful and rightful owner of the suit parcels of land, the plaintiff relying on *Munyu Maina -vs- Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR*, submitted that he has availed evidence on how he acquired and retained the suit parcels of land, which the defendants have not dislodged, on how, through transmission, they obtained their title documents from the deceased father.
46. The plaintiff, relying on The *Administrators of The Estate of Maxwell Maurice Ombogo (Deceased) -vs- Standard Chartered Bank Kenya Ltd & Another* [2000] KECA 22 (KLR), submitted that the defendants were unable to produce documentation on how they acquired what they alleged to be free property of their deceased father, by way of transmission. It is submitted that in the absence of such evidence, the defendants obtained the titles to the suit parcels of land unprocedurally, irregularly and unlawfully, which titles under Sections 26 and 80 of the *Land Registration Act* ought to be cancelled by this court on account of fraud or misrepresentation.



47. The plaintiff submitted that the defendants lacked the capacity to deal with the property of a deceased person under Section 45 of the *Law of Succession Act*, before obtaining letters of administration. Reliance is placed on *Law Society of Kenya -vs- Commissioner of Lands & Others*, Nakuru HCCC No. 464 of 2000, *Alfred Njau & Others -vs- Nairobi City Council* [1982] KAR 229, *Juliana Adoyo Ongunga & Another -vs- Francis Kiberenge Bondeva (Suing as Administrator of the estate of Fanuel Evans Amundavi (deceased))* [2016] eKLR and *Eddah Wangu & Another -vs- Sicilia Magwi Kivuti (deceased) substituted with Ribereta Ngai* [2021] eKLR.

48. The plaintiff submitted that the defendants' counterclaim hinges on obtaining title for a deceased's property with letters of administration, hence the failure to prove the transaction makes the counterclaim untenable in law or lacking merit. Reliance is placed on *Trouistik Union International & another -vs- Jane Mbeyu & another* [1993] KECA 89 (KLR).

49. Further, the plaintiff submitted that the consequence of the foregoing is that the titles held by the defendants are illegitimate, as the defendants have failed to trace the root of the title, as held in *Dina Management Ltd -vs- County Government of Mombasa & Others* [2023] eKLR. The plaintiff submitted that the title deeds by the defendants are therefore impeachable in law under Sections 24 and 25 of the *Land Registration Act* and the court, in the absence of evidence that they were obtained formally, procedurally and regularly, as held in *Hubert L. Martin & Others -vs- Margaret P. Kamar & Others* [2015] eKLR and Section 30 of the *Land Registration (General) Regulations, 2017*, must cancel them.

50. The defendants relied on written submissions dated 7/8/2025. It is submitted that the plaintiff had the burden of proof under Sections 1-7 of the *Evidence Act* to prove the existence of a valid sale agreement as well as fraud against the defendants on the titles to the suit land. Reliance is placed on *Hellen Wangari Wangechi -vs- Carol Weru Muthine Gathinji* [2005] eKLR.

51. The defendants submitted that the sale agreement relied upon by the plaintiff was signed by persons who were neither directors nor shareholders of Birunda Farm Limited, in the absence of a board resolution or permission by the Company to do so. Equally, it is submitted that the sale agreement lacks a description of the property. Reliance is placed on *Daniel Kiprugut Maiywa -vs- Rebecca Chepkurgat Maina* [2019] eKLR *Kiringa -vs- Kimathi* [2024] KEELC 5639 [KLR], citing with approval *Arthi Developers Ltd -vs- West End Butchery Ltd Others* [2015] eKLR and *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR.

52. Equally, the defendants submitted that the registration of the suit parcels of land was done by the Land Registrar, hence the failure to plead fraud or join him to the suit was fatal. The defendants also submitted that they have proved occupation of the land since 1970 and that they are the lawful owners by surviving the interest of their father, who was a shareholder of the Company. Reliance is placed in *Gabriel G. Odhiambo -vs- Wilson Chepkwony* [2019] eKLR.

53. The court has carefully gone through the pleadings, evidence tendered and the written submissions. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. See *Raila Odinga & Others -vs- Independent Electoral Boundaries Commission & Others* [2017] eKLR.

54. The plaintiff's claim is based on a sale agreement dated 3/12/1986. He pleads that after he bought the land for value from the bona fide officials of the company, he took vacant possession until 25/8/2017, when he was allegedly unlawfully evicted from the land by the defendants. He pleaded that his occupation of the land was known, since the mother of the defendants had sued him in Kitale ELC No. 91 of 2015.



55. The plaintiff produced the sale agreement, letter of consent, area list, plaint and ruling in the former suit, valuation report, copies of the title deed and green card, and minutes of the annual general meeting as exhibits in support of his suit. In P. Exhibit. No. 4(a), the late Rael Naliaka Sawenja was bringing the suit as an administrator and beneficiary of the estate of William Sawenja, who died on 4/10/2002, pursuant to a confirmation of grant issued on 15/11/2007. She admitted that the plaintiff was living on a house built by Europeans on 10 acres of land within plot No. 1, Birunda Farm, after the plaintiff had allegedly evicted them from the land in 1986, and fenced off the land as his.

56. The deceased in paragraph 8 of the plaint averred that after 1986, her late husband had filed Kitale SRM Land Case No. 20 of 1987, which was decided on 5/5/1988 in favour of the plaintiff herein, leading to Civil Appeal No. 15 of 1988. The deceased had sought, inter alia, an eviction order against the plaintiff out of the 10 acres in plot No. 1, Birunda Farm.

57. In P. Exhibit No. 4(b), the deceased had sworn a replying affidavit that the defendants had allegedly obtained title deeds. Further, the plaintiff swore a further affidavit dated 7/10/2017, that there was Kitale Criminal Case No. 3233 of 2017, against the deceased and others, relating to malicious damage. The court proceeded to dismiss the suit for want of prosecution.

58. In this suit, the defendants have denied knowledge of the said suit. They equally challenge the sale agreement for non-compliance with the law. In *Peter Mbiri Michuki -vs- Samuel Mugo Michuki* [2014] KECA 342 [KLR], the court observed that Section 3(3) of the *Law of Contract Act* came into effect on 1/6/2003, and excluded contracts made before its commencement. In this case, there is evidence that the plaintiff and the sellers, some of whom testified herein, performed part of the contract, including putting the plaintiff into possession of the land until 25/8/2017. The defendants' late mother had admitted occupation of the land by the plaintiff with effect from 1986, to the filing of the suit by her late husband in 1987, and hereof in 2015. This is after a period of close to twenty years. The continuation of occupation or possession of the land by the plaintiff between 1986 and 2017 in furtherance of the performance of the sale agreement was not disputed by the holder of the confirmed grant.

59. The title deeds held by the defendants were issued on 6/6/2017, while the certificate of confirmation of grant held by the defendants' late mother was issued by the court on 15/11/2007. There is no evidence that the suit parcels of land formed part of the estate of the late William Sawenja, for the defendants to have inherited the same from their late father or mother.

60. Flowing from admitted facts and the documentation produced by the plaintiff, including witnesses by the former officials of the Birunda Farm Company Limited, the court finds no basis to hold the sale agreement, compliance with its terms and conditions for a period of over 20 years, null and void in law.

61. The defendants fault the sale agreement, possession and occupation of the land by the plaintiff on account of the sale. The defendants further allege that the signatories to the sale agreement lacked capacity to transact on behalf of the company. D. Exhibit. No. 2 is not a notification of directors of the company under the *Companies Act*. The maker is not the Registrar of Companies. The document is not certified by the Registrar of Companies.

62. D. Exhibit. Nos. 3 and 4 are not certified by the bona fide officials of the company. The defendants did not call any of the officials of the Company to testify on their behalf, to substantiate the contents of their defence and counterclaim as to the affairs of the Company, its membership, directorship, resolutions to dissolve, shares of their late father, use of forged or false documents to claim ownership, dissolution of the company in 1979, sharing of the land among the shareholders in 1981 and eventually, to prove that there was illegality and fraud in the manner that the plaintiff bought and took vacant possession of the 10 acres between 1986 and 2017.



63. He who alleges must prove. It is the defendants who stood to fail if evidence was not led that the plaintiff's sale agreement, possession and occupation of the land was unlawful, illegal and based on a fraudulent transaction. For fraud or illegality to vitiate a contract, it must be proved with tangible and cogent evidence. Fraud or illegality cannot be inferred. See *Arthi Developers Ltd -vs- West End Butchery Ltd* (*supra*) and *Vijay Morjaria -vs- Nansingh Madbusingh Darbar* (*supra*).

64. The court therefore finds that the defendants have not been able to tender evidence to vitiate the sale agreement between the plaintiff and the officials of the Company. The defendants have admitted in their testimony that they were neither members nor shareholders of the Birunda Farm Company Limited. How, then, they could speak and produce exhibits for and on behalf of the Company or the Registrar of Companies remains a mystery.

65. The next issue is whether the plaintiff proved trespass to and an illegal eviction from the suit parcels of land by the defendants without justification.

66. Trespass refers to unjustified entry to private land and the commission of acts of waste. See Section 3(3) of the *Trespass Act*. It is a violation of the right to occupation or possession. A claimant must prove immediate exclusive possession of the land. See *M'ikiara M'rinkanya & another -vs- Gilbert Kabere M'mbijiwe & another* [2014] KEHC 281 (KLR). The plaintiff had pleaded that he was forcefully evicted from the land in August 2017. The defendants became registered owners on 6/6/2017. There was no notice given to the plaintiff that he was a trespasser to the land under Section 152A-l of the *Land Act*.

67. In *Sarah Njeri Warobi -vs- John Kimani Njoroge* [2013] KECA 501 [KLR], the court observed that the doctrine of waiver operates to deny a party his rights on the basis that he had accepted to forego the same rights, having known of their existence. The court further held that the doctrine of estoppel operates to preclude a person from asserting something contrary to what is implied by a previous action or statement of that person. Further, the court cited waiver, estoppel and acquiescence, by word or conduct. In this suit, the defendants assert inheritance or transmission rights.

68. There is no evidence that the suit parcels of land before the registers were opened on 24/5/2017, were the free property of the late William Sawenja as of his death in 2002.

69. Equally, there is no evidence tendered that the defendants were legal administrators of the estate of William Sawenja, capable of acquiring his shares out of Birunda Farm Company Limited. There is also no evidence that the defendants involved the Company officials in the process of acquiring the title deeds on 1/6/2017. The documentation preceding the issuance of the title deeds in favour of the defendants has not been tendered before this court. The minutes for an annual general meeting held on 5/9/2018 were produced by an official of the Company, who confirmed that there were irregularities in the issuance of title deeds generally and, in particular, to the defendants, yet they were not shareholders of the Company.

70. In *Black's Laws Dictionary*, 9<sup>th</sup> Edition, page 131, fraud refers to a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. The defendants knew that they were not members or shareholders of the Company. The defendants were not legal representatives of the late William Sawenja with the capacity to inherit his shares. Evidence that the defendants were nominated as heirs to the shares by their late father and were such nominees as per the area list is lacking.

71. Evidence that the defendants were nominated as such by their late mother or the other beneficiaries of the estate of their deceased father is lacking. Evidence that the defendants were included in the authentic area list, which was forwarded to the national titling centre in Nairobi for issuance of title deeds, is



lacking. Evidence that the defendants followed the formal, regular and lawful process to obtain the title deeds is lacking. See Dr. Arap Ngok -vs- Moijjo Ole Keiwsa, CA No. 60 of 1997.

72. A title deed is an end product. It normally follows documentation. It was upon the defendants to prove that they followed the whole chain in the process of acquisition of title deeds without a break. There is a presumption of regularity in the discharge of official duties. The onus was upon the defendants to call the officials who presided over the process, right from the Company to the Land Registrar, to show that the title deeds they hold were regularly and formally issued. I say so because of the previous suit brought against the plaintiff by both the late father and the late mother of the defendants, which was not in their favour. The said deceased persons knew of the occupation and possession of the land by the plaintiff between 1986 and 2017, on alleged superior rights or interests.
73. The defendants, instead of following the law to evict or have their rights declared, took the law into their hands and unlawfully evicted the plaintiff from the suit parcels of land without notice or a valid court order.
74. A court of law should not be used to sanitise an illegality. The defendants took the law of the jungle and cannot, after the unlawful eviction, seek the court to rubber-stamp their illegal actions. The counterclaim has no verifying affidavit or authority to plead. It has no titular heading. Trespass is actionable per se.
75. The upshot is, I find that the plaintiff has proved his claim on a balance of probabilities. The defence and counterclaim is dismissed. I proceed to grant the following prayers:-
  - a. A declaration that the registration of defendants as owners of Land Parcels Kiminini/Kiminini Block 8 (Birunda Farm)/ 343 and Kiminini/Kiminini Block 8(Birunda Farm)/340, is null and void.
  - b. The said registration be cancelled and the plaintiff be registered as the owner of 10 acres as originally comprised in L.R. No. 7121, otherwise known as Birunda Farm.
  - c. Eviction of the defendants, their families, servants, or agents, and any other persons acting or claiming interest through them from Land Parcels Kiminini/Kiminini Block 8 (Birunda Farm)/343 and Kiminini/Kiminini Block 8(Birunda Farm)/340, in accordance with the law.
76. Costs to the suit and the counterclaim to the plaintiff.
77. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2025.**

In the presence of:

Court Assistant - Dennis

Mr. Mukabane for defendants present

Lichana for Ngeywa for the plaintiff

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

