



**Sagalla Ranchers Limited v Westermann's Camp Limited & 4 others
(Environment and Land Case E001 of 2023) [2025] KEELC 6461 (KLR)
(Environment and Land) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND CASE E001 OF 2023
EK WABWOTO, J
SEPTEMBER 16, 2025**

BETWEEN

THE SAGALLA RANCHERS LIMITED PLAINTIFF

AND

WESTERMANN'S CAMP LIMITED 1ST DEFENDANT

KALE HOLDINGS LIMITED 2ND DEFENDANT

WILMOT MWADILO 3RD DEFENDANT

PATRICK MBINGA 4TH DEFENDANT

THE LAND REGISTRAR, MOMBASA 5TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 22nd August 2023 seeking for the following reliefs:-
 - i. A declaration be issued to declare that the Certificate of Lease issued to the 2nd Defendant on 2nd November 2012 regarding Sub Division L.R No. 24787 is illegal, null and void ab initio.
 - ii. A declaration be issued to declare that the Defendants procured the alleged certificate of Leases in respect of the Sub Division L.R No. 24787 fraudulently and/or illegally hence the same is invalid and should be revoked by this Honourable Court.
 - iii. An order for the eviction of the 1st and 2nd Defendants and anyone else claiming from Land Reference Number 12177/1 whose alleged subdivision brought about LR. No. 24787.



- iv. An order to revoke/cancel the transfers of Sub Division L.R No. 24787 to the 2nd Defendant as issued by the 5th Defendant.
 - v. An order that Land Reference Number 12177/1 be reverted back to the Plaintiff.
 - vi. A permanent injunction restraining the 1st and 2nd Defendants by themselves, their nominees, their agents, servants and/or any other person authorized or purporting to be authorized by it from trespassing on the alleged Sub Division L.R No. 24787.
 - vii. General damages for the loss occasioned upon the Plaintiff by their fraudulent acts and/or omissions of the Defendants herein jointly and severally.
 - viii. General damages for the loss of use of the title of the suit property alleged Sub Division L.R No. 24787.
 - ix. Exemplary damages against the 1st, 2nd, 3rd, 4th and 5th Defendants for unlawful transfer of the Plaintiff's parcel of land.
 - x. Damages for violations of the Plaintiff's constitutional rights of ownership of the property the subject matter of the suit herein to be paid by all the Defendants.
 - xi. Interest on general damages as may be assessed by the Court from the date of filing suit until payment in full.
 - xii. Cost of this suit.
 - xiii. Any other relief that this Honourable Court may deem fit to grant given the circumstances.
2. The suit was contested by all the Defendants. The 1st and 2nd Defendant filed a Statement of Defence dated 25th September 2023 the 3rd and 4th Defendants filed a Statement of Defence dated 6th October 2023 while the 5th Defendant filed a Statement of Defence dated 11th October 2023.

The Plaintiff's case and evidence

3. It was the Plaintiff's case that the 1st Defendant introduced the 2nd defendant as its nominee for the purpose of transfer of the title L.R. No 12177/4, the subject of this suit herein.
4. The 3rd and 4th defendants unlawfully assumed and held office in the Plaintiff company as directors. They did not fully disclose their capacity in law since they had not obtained letters of administration to represent their respective deceased fathers, who were members of the plaintiff company.
5. The 3rd and 4th Defendants fraudulently held themselves out as directors of the plaintiff company for the period 2009 and 2012 and purported to execute the transfer of titles to the 2nd Defendant which act was illegal.
6. In their alleged tenure as directors, which was unlawful in any event, the 3rd and 4th Defendants wreaked havoc to the Plaintiff's interests by unlawfully executing purported transfers to its property herein averred.
7. It was stated that the Plaintiff was the registered proprietor of the Land Reference Number 12177/1, measuring 17,402 Hectares situated in the south of Voi Town in Taita Taveta County.
8. By an Agreement for sale dated 29th July 1999, the Plaintiff agreed to sell to the 1st Defendant one of the portions of land measuring approximately Four Hundred and Four-point Seven (404.7) Hectare at the price of Kenya Shillings Five Thousand (Ksh. 5,000.00) per acre or thereabouts.



9. It was averred that the agreed purchase price for the 404.7 Ha was Kenya Shillings Five million (Kshs.5,000,000). The 1st Defendant purportedly paid a deposit of Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000/=) at the alleged execution of the agreement. Out of this sum, the purchaser's lawyer disbursed Kenya Shillings One Million (Kshs.1,000,000.) to the Agricultural Finance Corporation for the partial discharge of the existing Charge in respect to the 1,000 acres. The remaining Kenya Shillings, One Million Five Hundred Thousand (Kshs 1,500,000), was allegedly paid directly to the Vendor, the Plaintiff herein.
10. According to the Plaintiff, 1st Defendant was supposed to settle the balance of the purchase price of Kenya Shillings Two Million and Five Hundred Thousand (Kshs.2,500,000.) upon the completion date which didn't happen as the fraudulent mission had been accomplished.
11. It was averred that by virtue of its minute's references of MIN/17/2011, the committee charged with handling the intended sale of a portion of L.R. No.12177/1 was mandate to consult the Chairman of the Board every time and obtain Board resolutions for any other action that may be required.
12. It was further averred that under clause 7 of the alleged Sale Agreement of 29th July 1999, the completion date was "the 30th day next following the day on which the purchasers Advocates shall have received the new grant or other proper documents of title in respect of the property being sold and the transfer registered in favour of the purchaser, clear of all the encumbrances" and the purchaser is the 1st Defendant herein.
13. By a further Agreement on 28th April 2010, the two parties alleged to have varied the 29th July 1999 agreement through a "Deed of Variation". The revised agreement modified the completion date to be "One Hundred and Eighty days from the date of the execution of the Variation Agreement or the 30th day following the day on which the purchaser's Advocates shall have received the new grant and all other proper documents of title in respect of the property being sold together with all the completion documents registered in favour of the purchaser clear from encumbrances".
14. It was also averred that the 1st Defendant in collaboration with the 3rd and 4th Defendants fraudulently transferred the property on 2nd November 2012 to its nominee the 2nd Defendant and thereafter failed or neglected to settle the balance of the purchase price for the 2nd Defendant, which is Kenya Shillings Two million Five Hundred Thousand (Kshs 2,500,000).
15. The 1st Defendant did not pay the alleged balance of the purchase price despite effecting a transfer of an illegal and fraudulent suit property to date.
16. It was pleaded that the registration of the transfer dated 2nd November 2012 in respect of Land Reference No. 12177/1 measuring 404.7 Hectares or thereabout and the subsequent issuance of a certificate of title to the 2nd Defendant under a new title, L.R. No 24787, was and remains illegal because of the unlawful actions of the 3rd and 4th Defendants acting jointly and severally with the 1st and 2nd Defendants.
17. The Plaintiff further stated that without prejudice to its right that to the extent that there was no 'completion of the transaction' by the agreed completion date, the 1st Defendant breached the agreements for sale of 29th July 1999 and the "Deed of Variation" of 28th April 2010.
18. Failure by the 1st Defendant to complete the transaction as provided for in the two agreements rendered the agreements void and the purported transfer of the said property a nullity in law.
19. The plaintiff further stated that the Defendants jointly and severally unlawfully and without any colour of right of reason whatsoever released the plaintiff's mother title to strangers who used it to fraudulently



transfer L. R Nos 12177/4 and 12177/7 without authority from the plaintiff, which matter is in court in other proceedings not related to this suit and particulars of fraud and illegality were pleaded at paragraph 23 of the Plaintiff.

20. It was also pleaded that the Plaintiff has suffered loss and damage due to the unlawful actions of the Defendants.
21. During trial, Raphael Lewela Mbinga testified on behalf of the Plaintiff as PW1.
25. It was his testimony that he is a Director of the Plaintiff. He relied and adopted his witness statement dated 23rd August 2023 together with his bundle of documents dated 22nd August 2023 and a further bundle of documents dated 3rd March 2025.
26. On cross-examination by Counsel for the 1st and 2nd Defendants, he stated that the Directors were to have 1 share as per the Articles of Association. He also stated that Clause 4 of the Company's Articles permitted a person to buy shares of the company for one to become a member of the said company. He also stated that membership of the company can also be by transfer of shares. He conceded that Clause 4 of the Articles did not expressly mention the need for letters of administration.
27. When asked about whether he had any authority to testify on behalf of the company he stated that the instant suit was filed on 25th August 2023 and the letter giving authority was dated 3rd August 2023. When asked about the discrepancy on the date of the letter, he stated that the same could be a misprint since the said letter is genuine. He further stated that the said letter had no seal nor the company's stamp. He also stated that he did not have the minutes and notice of the meeting before court.
28. On further cross-examination, he stated that the 3rd and 4th Defendant had no authority to transfer any title and they were not supposed to attend the meeting as Directors. He maintained that the 3rd and 4th Defendants were never elected as Directors. The transfer was signed in 2012 and the sale agreement was signed in 1999 while the meeting referred to was in 2011. The payment of purchase price was never completed and that the 3rd and 4th Defendants did not have any authority to transfer the property. According to him only Kshs. 2,500,000/= had been paid.
29. On cross-examination by Counsel for the 3rd and 4th Defendants, he stated that he had filed an authority to testify in the matter on behalf of the Plaintiff. The same was dated 3rd August 2023 before the filing of the case.
30. On further cross-examination, he admitted that there have been other suits challenging the 3rd and 4th Defendants as directors. He also stated that they were not parties to the variation dated 28th April 2010.
31. In respect to the payment made, he stated that there was a deposit of Kshs. 1,500,000/= which showed payment had been made to Sagalla Ranchers Limited.
32. When asked about the status of the 3rd and 4th Defendants, he stated that they are "illegal directors" even though the CR 12 had listed their names as directors. He also stated that he did not have any documents to show that the 3rd and 4th Defendants were ever paid by the 1st Defendant.
33. On cross-examination by Counsel for the 5th Defendant, he stated that they had sued the Land Registrar because the transfer was fraudulently done. He also stated that the purchase price has not been paid to date and the Land Registrar never witnessed the said transaction. He also stated that he could not remember if they had written any letter to the Land Registrar. He also stated that the report from DCI had indicated that there was no fraud on the part of the 3rd and 4th Defendants.



34. When re-examined, he stated that he had not seen any documents produced by the Land Registrar in respect to the transaction. The 3rd and 4th Defendants did not have any letters of administration.
35. He also stated that the company did not have a problem with the sale but had an issue with the transfer since there was no payment of the entire purchase price. He also stated that he could not confirm if any benefits were given to the 3rd and 4th Defendants by the 1st Defendant.

The case of the 1st and 2nd Defendants and evidence

36. The 1st and 2nd Defendants filed a statement of defence dated 25th September 2023. It was their case that they paid a sum of Kshs. 2,500,000/= as deposit of the purchase price and later paid the balance of Kshs. 2,500,000/= vide cheques dated 28th November 2012 through their advocates Ghalia & Ghalia Advocates. They denied acting fraudulently in respect to the transfer of the property which was registered in the names of the 1st Defendant on 2nd November 2012.
37. During trial, Christina M. Tozer testified as DW1 and on behalf of the 1st and 2nd Defendants. She relied on her witness statement dated 23rd September 2024 and bundle of documents dated 13th September 2024 in her evidence in chief.
38. It was her testimony, that the entire purchase price had been paid in instalments of Kshs. 1,000,000/=, 1,500,000/= and later vide Cheque No. 003148 of Kshs. 800,000/= dated 28th November 2012, Cheque No. 003149 of Kshs. 825,000/= dated 28th November 2012 and Cheque No. 003150 dated 28th November 2012 of Kshs. 875,000/= She also stated that she was aware that the cheques had been sent to the lawyer and were later returned.
39. When cross-examined by Counsel for the 3rd and 4th Defendants, she stated that she has no shares with the Plaintiff's company. The 3rd and 4th Defendants are Directors of the Plaintiff's company. The purchase price was paid in instalments. She has never been summoned to give any evidence in court. She has never been charged with any fraud.
40. On cross-examination by Counsel for the Plaintiff, she stated that she is a Director of the 1st and 2nd Defendant. The entire purchase price was paid in instalments adding up to Kshs. 5,000,000/= The cheques amounting to Kshs. 2,500,000/= had been returned to their advocates and no reason was given for the same.
41. When re-examined, she stated that the sale agreement required payment of Kshs. 1,000,000/= to AFC which was done. She also stated that they had produced copies of the cheques confirming payment was made and that the Plaintiff has not sought for refund of the same.

The case of the 3rd and 4th Defendants and their evidence

42. The 3rd and 4th Defendants filed their statement of defence dated 6th October 2023.
43. It was averred that the Plaintiff had not obtained any approval of the Board of Directors to file the suit neither was Raphael Lewela Mbinga authorized to swear the affidavit.
44. The 3rd and 4th Defendants also averred that they were and have been directors of the Plaintiff since 1999 to date.
45. It was the 3rd and 4th Defendant's case that vide a meeting held on 10th September 2011, the 3rd Defendant was elected as a Chairman of a sub-committee which was appointed and mandated to handle and oversee all pending land related issues pertaining to the Plaintiff's company. It was further



- averred that the said resolutions were indeed and authenticated by the Plaintiff's Chairman of the Board of Directors, the late E. T. Mwamunga.
46. It was stated that the said committee was later expanded to include the 4th Defendant and that the 3rd and 4th Defendants were thus duly authorized by the Plaintiff to handle and oversee all matters pertaining to the Plaintiff's parcels of land and to execute the transfer of various properties to the various purchaser including transfer of the suit property to the 1st Defendant's nominee as per the Plaintiff's Board Resolution dated 10th September 2011.
 47. As to whether or not the 3rd and 4th Defendants unlawfully assumed office of the Plaintiff, it was pleaded that the letter dated 7th March 2012 from Registrar of Companies and the CR 12 of the company clearly outlined their names as Directors.
 48. It was the 3rd and 4th Defendants case that minutes of 14th July 2012 titled 'Taarifa 13/2013 title deeds' puts all issues raised herein to rest beyond any argument with regard to their appointment and mandate to the sub committee.
 49. In respect to the acquisition of the property, it was averred that the transfer of the suit property was done lawfully and procedurally. There was a sale agreement dated 29th July 1999 and the deed of variation dated 28th April 2010. The 3rd and 4th Defendant also stated that they acted within the authority conferred upon them through the Board Resolution and further authenticated by the Chairman of the Board vide his letters dated 10th September 2011 and 14th July 2012.
 50. It was the 3rd and 4th Defendants case that the committee was expressly and categorically authorized to deal with finality all issues that affected the Plaintiff's land and in particular in obtaining the title deeds of the Plaintiff's land, free of all encumbrances and completely the registration of the transfers to the purchasers of portions of the Plaintiff's land thereof, including the 1st and 2nd Defendant herein.
 51. It was stated that the instruments of transfer were witnessed by the Plaintiff's own advocates namely Mr. Fred Adhoch and the 1st and 2nd Defendant's advocates.
 52. The 3rd and 4th Defendants also stated that the committee was expressly and categorically authorized to deal, with finality, all issues that affected the Plaintiff's land and in particular obtaining the title deeds of the Plaintiff's land, free of all encumbrances and completing the registration of the transfers to the purchasers of portions of the Plaintiff's land thereof including the 1st and 2nd Defendant herein. The instruments of transfer were further witnessed by the plaintiffs own Advocated namely Mr. Fred Adhoch and the 1st and 2nd Defendants Advocates. The 3rd and 4th Defendant followed due process of the law to execute the said instruments of transfer with full authorization and authority of the Plaintiff. That the Criminal Investigations Department fully investigated a report made by the Plaintiff through E.T Mwamunga (deceased) on the alleged fraudulent conduct of the 3rd and 4th Defendants and the CID in conjunction with the Director of Public Prosecution categorically found out that the said report made had no merit and no criminal offence was found to have been committed by the 3rd and 4th Defendants at all.
 53. During trial, Wilmot Mwadilo testified as DW2 on behalf of the 3rd and 4th Defendants.
 54. He adopted on his witness statement on record which was filed on 17th September 2024 together with their bundle of documents dated 17th September 2024 in his evidence in chief.
 55. It was his testimony that they never acted fraudulently in the said transaction and that the transfer was between the Plaintiff and the 2nd Defendant.



56. When cross-examined by Counsel for the 1st and 2nd Defendants, he stated that as at 2023, the company had 9 Directors and they never gave PW1 any authority to testify in the matter.
57. On cross-examination by Counsel for the Plaintiff he stated that his father was an original shareholder of the Plaintiff and he later became a shareholder upon his death. He also stated that his sister got the letters of administration and they are still following on the process of ensuring transmission of shares.
58. He also stated that he did not buy any shares from the company. He further stated that the Company's Articles do not allow one to be a director on account of being a relative. There were no letters of administration obtained.
59. When asked about his role in the sub committee meeting, he stated that he was tasked to ensure that the 1st Defendant's transaction is completed.
60. When re-examined, he stated that he is still a Director of the Plaintiff's company. The C.R 12 confirms the same. He was never requested to produce the letters of administration at any given time. There was a board resolution giving him specific role in respect to the transaction herein.
61. He also stated that was tasked to follow up and finalize the transaction between the Plaintiff and the 1st Defendant.

The case of the 5th Defendant and evidence

62. The 5th Defendant filed a Statement of Defence dated 11th October 2023 wherein they denied the averments made in the plaint and sought for dismissal of the Plaintiff's suit.
63. During trial, Sego Manyaki testified as DW3 and on behalf of the 5th Defendant. He adopted and relied on his witness statement dated 29th April 2025 together with the 5th Defendant's bundle of documents dated 15th April 2025 in his evidence in chief.
64. It was his testimony that the suit property is currently registered in the names of Kale Holding Limited as L.R No. 24787 measuring approximately 404.7 Ha and has a leasehold term of 45 years from 1st May 1972. He also stated that L.R No. 24787 and C.R No. 58067 is as a result of subdivision of grant No. C.R 16323 which belongs to Sagalla Ranchers Limited.
65. When cross-examined by Counsel for the 1st and 2nd Defendants, he stated that the stamp duty was paid by Kale Holding and the transfer was registered in their favour.
66. On cross-examination by Counsel for the 3rd and 4th Defendants, he stated that he has been working as a Land Registrar since 2015. He never came across any complaint in respect to the suit parcel. There was no caution nor any caveat registered on the property. Stamp duty was duly paid before the transfer was effected.
67. On cross-examination by Counsel for the Plaintiff, he stated that the lease of the property has since expired. No application has been made by Kale Holdings to extend the lease. He did not see any board resolution neither did he see any valuation report. He also stated that he did not see any consent from the Land Control Board.
68. On further cross-examination, he stated that all the documents are in the parcel file and the transfer was properly done.
69. When re-examined, he stated that Kale Holdings Limited is still the registered owner and that the transfer was lawfully registered. He also stated that when a lease expires, the land reverts back to the lead leasor.



The Plaintiff's submissions

70. The Plaintiff filed written submissions dated 28th May 2025. Counsel submitted on the following issues:-
- a. Whether the 3rd and 4th Defendants had the legal capacity and authority to act as Directors of the Plaintiff company and to execute the transfer dated 2nd November 2012?
 - b. Whether the transfer dated 2nd November 2012 was executed in accordance with the provisions of the sale agreements dated 29th July 1999 and the Deed of Variation dated 28th April 2010?
 - c. Whether the 1st Defendant breached the sale agreements by failing to complete the payment of the purchase within the stipulated time and pay the balance purchase price.
 - d. Whether the transfer dated 2nd November 2012 and the subsequent issuance of certificate of title L.R No. 24787 to the 2nd Defendant was fraudulent and hence illegally issued?
 - e. Whether the claims of res judicata and sub judice raised by the 3rd and 4th Defendants in their statement of defence are legally sustainable?
 - f. Whether the Plaintiff's suit complies with the procedural requirements under the Civil Procedure Rules?
 - g. What reliefs, if any, is the Plaintiff entitled to against each of the Defendants?
71. On whether the 3rd and 4th Defendants had the legal capacity and authority to act as Directors of the Plaintiff capacity, it was submitted that in the present case, it is undisputed that the 3rd and 4th Defendants assumed office purporting to act as Directors of the Plaintiff company in place of their deceased fathers, who were among the original members of the company. However, they did not obtain any Letters of Administration or Probate, nor did they apply for or obtain any actions undertaken in that capacity constituted intermeddling and was therefore illegal, null and void ab initio. They admitted as such upon cross-examination during the hearing.
72. It was also submitted that the *Companies Act*, 2015 governs the management and operation of companies in Kenya. It provides that only duly appointed directors, as entered in the company's register and appointed in accordance with its articles of association and statutory requirements, may exercise management powers on behalf of the company. Section 128 of the Act states that a person becomes a director when that person's appointment is registered in the company's register of directors. In manner acceptable in law.
73. It was further submitted that under Section 137, directors are under fiduciary obligations and may not act unless lawfully appointed. The doctrine of proper corporate governance requires that company affairs be conducted by persons with lawful authority. The 3rd and 4th Defendants were not such persons to conduct the affairs in manner envisaged by law. The cases of *Salomon = Versus = Salomon & Co. Ltd* (1897) AC 22 among others were cited in support.
74. On whether the transfer was executed in accordance with the sale agreement, Counsel submitted that in the instant case, the sale agreements dated 29th July 1999 and the Deed of Variation dated 28th April 2010 constituted binding contracts. The conditions contained in the agreements formed an integral part of the contract and were not mere formalities. These instruments expressly stipulated specific conditions for completion, including:
- a. Payment of the balance of the purchase price.



- b. Fulfilment of all completion obligations, including due execution and exchange of transfer documents.
 - c. Board resolution and consents where applicable.
75. Counsel submitted that the evidence presented before the court demonstrates that the 1st Defendant failed to pay the agreed balance of Two Million, Five Hundred Thousand Shillings (Kshs. 2,500,000/=) which was to be paid before or concurrently with the transfer of title. This non-payment constituted a material breach of the contract as it struck at the root of the consideration.
76. It was further submitted that, the 1st Defendant failed to settle the outstanding balance of the purchase price as stipulated in the sale agreement with the Plaintiff. Therefore, the purported transfer of the property to the 2nd Defendant was unauthorized and void, as the essential contractual obligation remained unfulfilled.
77. The Plaintiff further submitted that the evidence tendered and the admission by the Defendants of non-performance and impropriety during cross-examination clearly demonstrate the shaky grounds the Defendants stood and which they have attempted to explain. There is no cure available to them in law.
78. On whether the 1st Defendant breached the sale agreement, it was submitted that the sale agreements dated 29th July 1999 and the Deed of Variation dated 28th April 2010 constituted valid and binding contracts for the sale of land, governed by the Law of Contract Act (Cap.23), the Land Act, 2012 and the Land Registration Act, 2012. These agreements clearly stipulated that the balance of the purchase price amounting to Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/=) was to be paid as a condition for completion.
79. According to the Plaintiff, the 1st Defendant failed to pay the said balance despite the transfer of land being executed more than a decade ago. This failure amounts to a material and fundamental breach of the contract, as it goes to the roof of the agreement and undermines the consideration which formed the basis of the sale.
80. On whether the transfer and certificate of title were fraudulent and illegal, it was submitted that in the present case, the 3rd and 4th Defendants falsely represented themselves as authorized Directors of the Plaintiff company, despite lacking the requisite legal capacity. This misrepresentation induced the Land Registrar to register the transfer of L.R No. 24787.
81. It was also submitted that the certificate of title for L.R. No. 24787 was procured through fraudulent means including the use of counterfeit deed plans, while the Plaintiff retained the original deed plan and that this constitutes fraud on the Land Registry.
82. As to whether the claims of res judicata and sub judice are sustainable, it was argued that the doctrines of res judicata and sub judice are codified under Sections 7 and 6 of the Civil Procedure Act, respectively. Section 7 stipulates that no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue is raised, and has been heard and finally decided by such court.
83. Counsel submitted that while, the 3rd and 4th Defendants invoked res judicata and sub judice based on Voi HCC Suit No. 1 of 2018 and Mombasa COACA No. 3 of 2023, these suits pertain to Land Reference Number 12177/4 measuring 20,000 acres, whereas the present suit concerns L.R No. 12177/1 measuring 404.7 hectares. The subject matters are thus distinct and are in fact different. No



interest has ever been undertaken in respect to the subject land in issue in this case. Res judicata and Sub judice cannot stick and the court was urged to strike out such assertions. The cases of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 Others* (2021) KESC 39 and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR.

84. Regarding the doctrine of sub judice, it was argued that Section 6 of the *Civil Procedure Act* provides no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. Where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Given that the previous suits have been concluded and addressed different issues, the doctrine of sub judice is inapplicable in the circumstances of this case.
85. According to the Plaintiff, the claims of *res judicata* and sub judice raised by the 3rd and 4th Defendants are unsustainable, as the present suit involves distinct subject matter and cause of action not previously adjudicated.
86. It was further submitted that the Plaintiff's suit is properly before court since the Plaintiff's actions were undertaken in the best interest of the company and further that procedural technicalities cannot override substantive justice.
87. As to whether the Plaintiff is entitled to the reliefs sought, it was submitted that the Plaintiff's case is founded on clear evidence that the certificate of title L.R No. 24787 was obtained through fraudulent means, rendering the title and all subsequent dealings invalid and void ab initio. The Defendants' unlawful interference with the Plaintiff's property rights, including unauthorized occupation and transfer of the land, which was sanctioned by the 3rd and 4th Defendants has caused significant loss and damage. The court should therefore intervene by cancelling the fraudulent transfer, rectify the land register, evict the unlawful occupants, and grant appropriate damages and costs to uphold justice and protect the Plaintiff's proprietary interests.

The submissions of the 1st and 2nd Defendants

88. The 1st and 2nd Defendants filed written submissions dated 16th July 2025 and Counsel submitted on the following issues:-
 - i. Whether the suit is competent.
 - ii. Whether the Plaintiff has proved breach of contract by the 1st and 2nd Defendants.
 - iii. Whether the Plaintiff has proved fraud against the 1st and 2nd Defendants.
 - iv. Whether the Plaintiff is entitled to the sought orders.
89. It was submitted that although a party is allowed to file a board resolution at any time before a case is fixed for hearing, the Plaintiff filed a document purporting to authorize Raphael Mbinga authority to file the suit on 28th February 2025 well after the case had been fixed for hearing on 18th September 2024.
90. It was submitted that the document filed by the Plaintiff in its further list of documents dated 28th February 2025 is not a board resolution for the following reasons:-
 - a. The Plaintiff names the document as "letter granting Raphael Lewela Mbinga the authority to file suit" in its further list of documents dated 28th February 2025.



- b. The authority purports to emanate from a board meeting but does not name the directors present at the meeting.
 - c. The document does not indicate where the meeting was held.
 - d. The document is not a board resolution to institute the case; it strictly purports to authorize Raphael Mbinga to execute and sign documents on behalf of the company. It does not state anywhere that the Plaintiff has passed a resolution to institute the suit.
 - e. The document is signed by a single director is the same one purporting to have been authorized by the company despite the Plaintiff confirming on cross-examination that at the time, there were 4 directors available and that 1 director does not constitute quorum.
 - f. The document is not sealed with the company seal or even stamped.
 - g. There are no minutes of the purported meeting.
 - h. There is no notice or mention of a notice of the said meeting in the document.
 - i. The authority is dated 3rd August 2023 and purports to authorize Raphael Mbinga to execute or sign for and on behalf of the company any document relating to suit No. ELC Case No. E001 of 2023. A suit that had not yet been filed at the time as this suit was filed on 25th August 2023.
 - j. The person who purportedly gave that authority would not have known the case number on 3rd August 2023. It is therefore manifest that the document purporting to be an authority to file suit was manufactured after the suit had been filed and backdated to 3rd August 2023 to hoodwink the court into believing that the Plaintiff had authorized the said individual to file the suit.
91. On whether the Plaintiff has proved breach of contract by the 1st and 2nd Defendants, it was submitted that the agreements referred to by the Plaintiff were produced by both the Plaintiff and the 1st and 2nd Defendants.
92. The agreement for sale dated 29th July 1999 provided that the completion date is the 30th day following the day on which the purchaser's advocates shall have received the new grant or other proper documents of title in respect of the property being sold and the transfer registered in favour of the purchaser clear of encumbrances. Clause 6 provided that the balance of the purchase price Kshs. 2.5million was to be paid on or before the contractual completion date.
93. The variation agreement dated 28th April 2010 did not vary how and when the balance of the purchase price was to be paid, the agreement varied the contractual completion date to 180 days from the date of execution of the variation or the 30th day following the day on which the purchaser's advocates shall have received the new grant or other proper documents of title in respect of the property being sold and the transfer registered in favour of the purchaser clear of encumbrances.
94. The variation agreement also introduced the 2nd Defendant in the picture by appointing it as the nominated transferee of the land sold.
95. The agreement for sale was explicit on the date when the balance of the purchase price was to be paid and that is on or before the completion date.
96. The payment cheques for the balance of the purchase price were received by the Plaintiff's Advocates on 28th November 2012, more than a week before the contractual completion date which was the 30th



- day following the property being registered in favour of the 2nd Defendant as provided for under the agreements.
97. On whether the Plaintiff has proved fraud on the part of the 1st and 2nd Defendants, it was submitted that by not pleading and proving in evidence the particulars of fraud by the 1st and 2nd Defendants, the Plaintiff's allegations of fraud have no legs to support themselves.
 98. The allegation that the 2nd Defendant obtained title using a fraudulent deed plan is not supported by evidence of the said fraudulent deed plan.
 99. The 3rd Defendant testified on his behalf and on behalf of the 4th Defendant.
 100. The 3rd Defendant testified and produced a CR 12 dated 12th March 2012 showing that both himself and the 4th Defendant were directors of the company at the time they signed the transfer forms challenged by the Plaintiff.
 101. Mr. Wilmot Mwadilo also produced minutes of a special full board meeting held on 10th September 2011 at Voi town lodge, PW1, the 4th Defendants and himself were present at the said meeting where it was resolved under min 17/2011 that one of the issues is to complete the Westermann issue. Under the same minute 17/2011 it was resolved that a sub committee to be formed to deal with the issues.
 102. Under minute 18/2011, the board appointed a sub committee which included the 3rd and 4th Defendants. The minutes of the said meeting are from pages 84 – 87 of the 1st and 2nd Defendant's list and bundle of documents.
 103. It was also submitted that the 3rd Defendant had confirmed in cross examination that he was duly elected as a director in the year 2009 or 2010 and that the CR12 produced in court was obtained by the then chairman Mr. Eliud Mwamunga.
 104. On the allegations of fraud or the 3rd and 4th Defendant's lack of capacity to sign the transfer forms, it was submitted that the Plaintiff did not produce any evidence or call any expert witnesses to prove those allegations.
 105. It was also submitted that the Plaintiff confirmed on cross examination that he did not produce any document stating that the 3rd and 4th Defendants required letters of administration for them to be directors and that PW1 had further confirmed that he had not obtained any letters of administration for him to be a director of the Plaintiff.
 106. It was also submitted that PW1 was in attendance of the meeting of 10th September 2011 and that he did not object to the 3rd and 4th Defendants sitting in the meeting of the board of directors. He is therefore estopped from challenging their capacity as directors of the Plaintiff.
 107. The court was urged to find that the allegation of fraud had not been proved to the required standard.
 108. In respect to the reliefs sought, it was submitted that the Plaintiff failed to prove its case and that the only remedy available to the Plaintiff would have been to request for a re-issue of the cheques they gratuitously returned to the advocates acting for the purchasers but since that was not one of the prayers sought, the Plaintiff is bound by its pleadings.

The 3rd and 4th Defendants' written submissions

109. It was submitted that the Plaintiff has expressly admitted that it has never made a report to the police with regard to the alleged fraudulent actions of the Defendants in the manner that the suit property was transferred.



110. It was also submitted that additionally, the Plaintiff through its Chairman and other directors expressly accepted Wilmot Mwadilo and Patrick Mbinga as directors of the Plaintiff company and in fact, the Plaintiff gave them the heavy responsibility of retrieving the title documents for the Plaintiff's portion of land that measured over fifty thousand (50,000) acres of land a responsibility that Mwadilo and Mbinga successfully completed.
111. It was further submitted that the Plaintiff is estopped by its own actions with regard to how it related to the 3rd and 4th Defendant from now taking a dramatically different position to the effect that they were not legitimate directors of the Plaintiff company.
112. In respect to the issue of the Land Control Board Consent, it was submitted that there was a change of user and the issue of Land Control Board Consent was not necessary.
113. The court was urged to dismiss the case.

Submissions of the 5th Defendant

114. The 5th Defendant filed written submissions dated 11th July 2025. It was submitted that its witness testified and confirmed that the transfer was not unlawful and that the Plaintiff has not proved its case as against the 5th Defendant. The court was urged to dismiss the suit with costs.

Analysis and Determination

115. The court has considered the pleadings, the evidence adduced by the parties in support of their respective cases and the submissions by the advocates for the parties. From the pleadings, the issues arising for determination in this suit are the following;
 - i. Whether the suit filed herein complies with the procedural requirements as per the law.
 - ii. Whether the Plaintiff has proved breach of contract by the 1st and 2nd Defendants.
 - iii. Whether the Plaintiff has proved fraud against the Defendants herein
 - iv. Whether the Plaintiff is entitled to the reliefs sought.
116. The court shall proceed to analyse the said issues sequentially.

Issue No. I

Whether the suit filed herein complies with the procedural requirements as per the law.

117. On the first issue, the Defendants objected to the Plaintiff's suit on the basis that the same had been instituted without obtaining any board resolution from the Plaintiff's company and that PW1 had no authority to testify on behalf of the Plaintiff.
118. The Plaintiff in submitting on the said issue argued that the Plaintiff's suit is properly before this court and that the same was filed in the best interest of the company and further this court should not focus on the procedural technicalities over substantive justice.
119. Order 4 Rule 1 (4) of the [Civil Procedure Rules 2010](#), deals with particulars to be contained in a plaint and states that:

“where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an Officer of the Company duly authorized under seal of the company to do so.”



120. The Plaintiff describes itself as a limited company and therefore the deponent of the verifying affidavit ought to demonstrate that he or she has authority to do so. In the instant suit, I have seen the Plaintiff dated 22nd August 2023, I have also seen that the same was accompanied by a Verifying Affidavit sworn by Raphael Lewela Mbinga on even date who swore the Verifying Affidavit as one of the affected Directors of the Plaintiff.

121. In the case of *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR the court found that the mere failure to file the resolution of the Corporation together with the Plaintiff did not invalidate the suit and the learned judge associated himself with the decision of Kimaru J. in the case of *Republic vs. Registrar General and 13 Others* Misc. Application No. 67 of 2005 [2005] eKLR where the court held as follows:-

“...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

In the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR the Court of Appeal stated as follows: -

“...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

122. In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such, person was unauthorized then it was upto the disputing party to demonstrate with evidence that there was no such authority or that the person was not a director of the Company.

123. In the instant case, there was no dispute that Raphael Lewela Mbinga who testified as PW1 was not a director of the Plaintiff Company, PW1 also produced the authority to testify on behalf of the Plaintiff in the matter and as such the objection by the Defendants fails. Further as rightly submitted by the Plaintiff this court is bound to consider substantive justice over procedural technicalities. Equally no prejudice was demonstrated by the Defendants in respect to the same.

Issue No. II

Whether the Plaintiff has proved breach of contract by the 1st and 2nd Defendants.

124. On the second issue as to whether the Plaintiff has proved breach of contract on the part of the 1st and 2nd Defendants, it was the Plaintiff’s case that the sale agreements dated 29th July 1999 and the Deed of Variation dated 28th April 2010 constituted binding contracts. The conditions contained in the



agreements formed an integral part of the contract and were not mere formalities. These instruments expressly stipulated specific conditions for completion, including:

- d. Payment of the balance of the purchase price.
- e. Fulfilment of all completion obligations, including due execution and exchange of transfer documents.
- f. Board resolution and consents where applicable.

125. According to the Plaintiff the 1st Defendant failed to pay the agreed balance of Two Million, Five Hundred Thousand Shillings (Kshs. 2,500,000/=) which was to be paid before or concurrently with the transfer of title. This non-payment constituted a material breach of the contract as it struck at the root of the consideration.
126. It was also contended by the Plaintiff that the 1st Defendant failed to settle the outstanding balance of the purchase price as stipulated in the sale agreement with the Plaintiff.
127. According to the Plaintiff, the purported transfer of the property to the 2nd Defendant was unauthorized and void, as the essential contractual obligation remained unfulfilled. This failure amounts to a material and fundamental breach of the contract, as it goes to the root of the agreement and undermines the consideration which formed the basis of the sale.
128. The 1st and 2nd Defendants on the hand argued that they complied with all the terms of the agreement, the purchase price was paid in several instalments before the transfer could be finalized.
129. A breach of agreement is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the agreement, or performs defectively, or incapacitates himself from performing.
130. From the evidence that was tendered herein which has been duly considered by the court, there was an agreement for sale dated 29th July 1999 which provided that the completion date is the 30th day following the day on which the purchaser's advocates shall have received the new grant or other proper documents of title in respect of the property being sold and the transfer registered in favour of the purchaser clear of encumbrances. Clause 6 provided that the balance of the purchase price Kshs. 2.5million was to be paid on or before the contractual completion date.
131. There was also a variation agreement dated 28th April 2010 entered into by the parties. The variation agreement did not vary how and when the balance of the purchase price was to be paid, the agreement varied the contractual completion date to 180 days from the date of execution of the variation or the 30th day following the day on which the purchaser's advocates shall have received the new grant or other proper documents of title in respect of the property being sold and the transfer registered in favour of the purchaser clear of encumbrances.
132. The variation agreement also introduced the 2nd Defendant in the picture by appointing it as the nominated transferee of the land sold.
133. From a perusal of the said agreement, it was evident that the agreement for sale was clear on the date when the balance of the purchase price was to be paid and that is on or before the completion date.
134. From a further analysis of the evidence tendered, the payment cheques for the balance of the purchase price were received by the Plaintiff's Advocates on 28th November 2012, more than a week before the contractual completion date which was the 30th day following the property being registered in favour of the 2nd Defendant as provided for under the agreements.



135. Having now carefully considered the available evidence, it is the finding of this court that there was no breach of the agreement on the part of the 1st and 2nd Defendants.

Issue No. III

Whether the Plaintiff has proved fraud against the Defendants herein

136. As to whether the Plaintiff has proven fraud on the part of the Defendants herein, it is trite law that A party alleging fraud must specifically plead the particulars of fraud and lead evidence to prove the allegations of fraud. Fraud is defined under the *Black's Law Dictionary* 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Defendants. How then can fraud be proved? The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR held;

"Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities".

Similarly, the Court of Appeal decision in the case of *John Kamunya & another v John Nginyi Muchiri & 3 others* [2015] eKLR held that:

"we find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."

137. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See *Magutu Electrical Services Ltd vs Miriam Nyawira Ngure & Anor* [2019] eKLR.
138. From the evidence that was tendered herein, the Defendants witnesses demonstrated how the transaction was undertaken and the respective role played by each party. The Plaintiff's witness was unable to demonstrate any fraud on the part of the Defendants in respect to the said transaction, the allegation that the 2nd Defendant obtained title using a fraudulent deed plan was also not supported by evidence of the said fraudulent deed plan.
139. The 3rd Defendant testified and produced a CR 12 dated 12th March 2012 showing that both himself and the 4th Defendant were directors of the company at the time they signed the transfer forms that had been challenged by the Plaintiff. He also produced minutes of a special full board meeting held on 10th September 2011 at Voi town lodge, PW1, the 4th Defendants and himself were present at the said meeting where it was resolved under min 17/2011 that one of the issues is to complete the transaction. The Plaintiff did not produce any evidence to controvert the same.
140. The Land Registrar who also testified as DW4, gave out a history of the suit property and its current status producing all the necessary documents in respect to the said transaction that was in their custody.



It was also his testimony that from their records it was not proper for the Plaintiff to conclude that the transfer was unlawful simply because the Plaintiff had a misunderstanding with the 1st to 4th Defendants.

141. The DCI report that was produced in evidence was to the effect that there was no fraud on the part of the 4th Defendant and the Plaintiff equally did not adduce any evidence to controvert the same.
142. In view of the foregoing, it is the finding of this court that the Plaintiff has failed to prove and fraud on the part of the Defendants to the satisfaction of this court.

Issue No. IV

Whether the Plaintiff is entitled to the reliefs sought

143. The Plaintiff sought for various reliefs as was enumerated in its Plaint. To this end, there is no gainsaying that the Plaintiffs did not prove their claim in accordance with the provisions of Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya. Suffice it to state that the burden of proof laid on the shoulders of the Plaintiff and not otherwise. See the holding in the case of *Dr. Samson Gwer and 5 Others versus Kenya Medical Research Institute* [2020]eKLR; para 49,50 and 51, respectively.
144. Pertinently, it is the obligations of the Plaintiff to prove its case. The case must be proven on a balance of probabilities. This requirement must be complied with and met. This court having addressed itself on the issues herein, it is the finding of this court that the Plaintiff's suit has not been proved to the required standard to warrant the grant of the reliefs sought and the same cannot be granted. Flowing from the foregoing analysis of the issues raised herein which have been addressed by the court, is to the effect that the Plaintiff herein has failed to discharge the burden of proof cast upon it and the Plaintiff's suit fails.
145. In respect to costs, as a general rule, costs follow the event unless the court for good reasons orders otherwise. In the present case, the court has considered the long-standing relationship between the parties and directs that each party to bear own costs of the suit.

Conclusion

146. In the end, the final orders that commend themselves to the court are as hereunder;
 - i. The Plaintiff's suit as against the Defendants be and is hereby dismissed.
 - ii. Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 16TH DAY OF SEPTEMBER 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Kurgat for the Plaintiff.

Mr. Mwai for the 1st and 2nd Defendants.

Ms. Nyarabe h/b for Mr. Gikandi for the 3rd and 4th Defendants.

N/A for the 5th Defendant.



Court Assistant: Mary Ngoira.

