



**Ndungu & another v Kamau (Suing as the Administrator of the Estate of Damaris Wanjiku Kamau - Deceased) & another (Environment and Land Appeal E006 of 2024) [2025] KEELC 265 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 265 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E006 OF 2024  
LN GACHERU, J  
JANUARY 29, 2025**

**BETWEEN**

**NAHASHON MUGURO NDUNGU ..... 1<sup>ST</sup> APPELLANT**

**JAMES MWIRIGI MUNUKU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NELLIUS WANJIRU KAMAU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAMARIS WANJIKU KAMAU - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY-GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Orders of the Hon. E. Muriuki Nyagah Senior Principal Magistrate, at the Chief Magistrate's Court at Muranga delivered in 25th January 2024, in MCELC No. 11 of 2020)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent herein Nelius Wanjiru Kamau, (as the Plaintiff) filed Muranga CMELC No 11 of 2020, against five Defendants, two of them being the Appellants herein had sought for various orders against them. Among the orders sought is an order for a declaration that the 1<sup>st</sup> Respondent (Plaintiff) is the legal owner of Nginda/ Samar/ Block 2/75, and that the District Land Registrar be ordered to cancel and or annul the title of the suit land, which is in the name of the 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant), and to have it registered in her name.
2. The said suit was opposed by the Defendants thereon, who denied all the allegations of fraud levelled against them. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants thereon (Appellants herein) had alleged that they were innocent purchasers for value, and that they should be protected by the court, through the doctrine of bona fide purchasers for value without notice.



3. The suit before the trial court proceeded via viva voce evidence, and on January 25, 2024, the trial court entered judgement in favour of the Plaintiff (1<sup>st</sup> Respondent herein) and the said court declared her the rightful owner of the suit land, and further cancelled the title deed held by the 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant herein), who has purchased the said land from 2<sup>nd</sup> Defendant(2<sup>nd</sup> Appellant).
4. The Appellants herein were aggrieved and dissatisfied by the said Judgement of the trial court, and vide two Memorandums of Appeal filed in ELCLA NO E006/2024 and ELCLA NO. E007/ 2024, dated 30<sup>th</sup> January, 2024, 2024; they sought for the following orders;
  1. That their appeals be allowed.
  2. That the honourable Court be pleased to set aside the entire judgment and orders of the subordinate court given on 25<sup>th</sup> January, 2024.
  3. That the 1<sup>st</sup> Respondent to pays the costs of the Appeals
5. In her suit before the trial court, the 1<sup>st</sup> Respondent (then Plaintiff) claimed that her mother Damaris Wanjiku Kamau (Deceased) was registered as the proprietor of the suit land No. Nginda/samar/block 2/75 (the suit property), by virtue of being a member of Mboi-kamiti Farmers Cooperative Limited (the 3<sup>rd</sup> Defendant thereon), since 10<sup>th</sup> December, 1970.
6. The 1<sup>st</sup> Respondent (Plaintiff) had also averred that her late mother was issued with a letter by the 3<sup>rd</sup> Defendant (Mboi Kamiti Farmers Cooperative Ltd), which letter indicated that she is the owner of plot No. 532, referring to the suit land, and Share Certificate No. 13760.
7. Further, the Plaintiff averred that the suit property was illegally and fraudulently transferred to the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Appellant), James Mwirigi Munuku, on 13<sup>th</sup> September 2013, resulting from a conspiracy orchestrated by the 1<sup>st</sup> Defendant (Francis Maina Gaita), the 3<sup>rd</sup> Defendant and servants of the 5<sup>th</sup> Defendant.
8. It was her further contention that the suit land was thereafter transmitted to the 4<sup>th</sup> Defendant by the 2<sup>nd</sup> Defendant (now Appellants herein,) and registered in the name of Nahashon Muguro Ndungu (1<sup>st</sup> Appellant), and the said transfer was obtained illegally, through corrupt scheme and in an unprocedural manner.
9. The 1<sup>st</sup> Defendant, now deceased opposed the said suit at the trial Court through a Statement of Defence dated 29<sup>th</sup> March 2023, and admitted that he became the registered owner of the suit property on 4<sup>th</sup> November, 1998, until 13<sup>th</sup> September 2013, when the said land was conveyed to the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Appellant- James Mwirigi Munuku), through purchase. He denied all the allegations of fraud and illegality attending to the foregoing transfer as claimed by the Plaintiff (1<sup>st</sup> Respondent).
10. The 1<sup>st</sup> Defendant further contended that the suit land was thereafter transmitted from the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Appellant) to the 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant), and was registered in the name of Nahashon Muguro Ndungu, by the time the suit before the trial court was filed and at the time of trial.
11. The 2<sup>nd</sup> Defendant (2<sup>nd</sup> Appellant) also opposed the Plaintiff's (1<sup>st</sup> Respondent's) suit vide his Statement of Defence dated 8<sup>th</sup> September 2020. The 2<sup>nd</sup> Defendant (2<sup>nd</sup> Appellant) had averred that he purchased the suit property from the 1<sup>st</sup> Defendant after conducting due diligence in respect of the said property, and therefore his ownership of the suit land was legal and he lawfully & legally transferred it to the 4<sup>th</sup> Defendant through purchase.



12. The 3<sup>rd</sup> Defendant, Mboi Kamiti Farmers Cooperative Ltd, did not enter appearance nor file defence in the said suit before the trial Court. However, the 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant), also opposed the suit vide a Statement of Defence dated 25<sup>th</sup> August, 2020. The 5<sup>th</sup> Defendant, being the Attorney General filed a Statement of Defence dated 8<sup>th</sup> September 2020, wherein it was averred that the register in respect of the suit land was opened on 2<sup>nd</sup> February 1993, in the name of the Government of Kenya, and on the same day, the property was transferred to the 3<sup>rd</sup> Defendant and title deed issued.
13. Further, that the suit land was transferred to the 1<sup>st</sup> Defendant on 4<sup>th</sup> November 1998, and a title deed issued. Thereafter, the Plaintiff lodged a caution against the title to the suit property on 8<sup>th</sup> July 2013, which caution was removed on 12<sup>th</sup> September, 2013. Further, that the suit property was transferred to the 2<sup>nd</sup> Defendant on 13<sup>th</sup> September 2013, and a title deed issued in his name.
14. It was the 5<sup>th</sup> Defendant (2<sup>nd</sup> Respondent) averment that another caution was lodged in respect of the suit land on 11<sup>th</sup> November 2014, which caution was vacated on 9<sup>th</sup> December 2015. Further, that the property was transferred to the 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant) on 7<sup>th</sup> September 2016, and title deed issued, and thereafter, the Plaintiff (1<sup>st</sup> Respondent) registered a caution on 24<sup>th</sup> August, 2018.
15. In its Judgment delivered on January 25, 2024, the trial Court held and found in favour of the Plaintiff (1<sup>st</sup> Respondent), and stated that no evidence had been presented before the said court to demonstrate how the property was transferred to the 1<sup>st</sup> Defendant.
16. The Appeals are premised on various grounds that have been enumerated in the two Memos of Appeal. These grounds are;
  1. The trial Court erred in law and in fact in finding that the 1<sup>st</sup> Respondent had proved her case against the Appellants and the other Defendants.
  2. The trial Court erred in law and in fact by finding that the 1<sup>st</sup> Respondent had proved that the title deed to the suit property Title Number Nginda/samar/block 2/75, was fraudulently registered in the 1<sup>st</sup> Defendant's name while no evidence of fraud was presented by the 1<sup>st</sup> Respondent.
  3. The trial Court erred in law and in fact by finding that the 1<sup>st</sup> Respondent had proved her mother was the owner of the suit property bearing Title Number Nginda/samar/block 2/75, while she presented no evidence to prove ownership.
  4. The trial Court erred in law and in fact by ordering the 2<sup>nd</sup> Respondent to cancel the title deed in the 1<sup>st</sup> Appellant's name, and reissue the 1<sup>st</sup> Respondent with a title deed in her names, while she had instituted the suit as an administrator of her mother's estate, not in her personal capacity.
  5. The trial Court erred in law and in fact by finding that there was no explanation of how the 1<sup>st</sup> Defendant was registered as the owner of the suit property, while the Appellants presented clear evidence on how the suit property was initially registered in the 3<sup>rd</sup> Defendant's name and transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and later to the 4<sup>th</sup> Defendant(1<sup>st</sup> Appellant)
  6. The trial Court erred in law and in fact by ordering the cancellation of the 1<sup>st</sup> Appellant's title deed to the suit property without any evidence being presented that he had acquired a tainted title deed.
  7. The trial Court erred in law and in fact by failing to analyze the 1<sup>st</sup> Appellant's evidence that he was a bonafide purchaser for value without any notice of fraud.



8. The trial Court erred in law and fact by arriving at a decision/judgment which did not resonate with the relevant statutes and case law thereby rendering the aforesaid decision void in law and fact.
9. The trial Court erred in law and fact in holding that there was no evidence on record showing that the Appellants perpetrated fraud.
10. The trial Court erred in law and fact by failing to interrogate the circumstances under which the 2<sup>nd</sup> Appellant bought land parcel no. Nginda/samar/ Block 2/75, especially the fact that the 2<sup>nd</sup> Appellant undertook due diligence before purchasing the land from one Francis Maina Gaita (deceased).
11. The trial Court erred in law and fact in failing to appreciate that the 2<sup>nd</sup> Appellant was an innocent purchaser for value hence the title he subsequently transferred to Nahashon Muguro Ndungu was beyond reproach and unimpeached.
12. The trial Court erred in law and fact in finding that the 2<sup>nd</sup> Respondent (deceased) in ELCLA No E007/2024, did not have a valid title to pass to the 2<sup>nd</sup> Appellant thus causing a travesty of justice to the Appellants.
13. The trial Court erred in law and fact by failing to find that a cause of action anchored in the tort of fraud should be filed within three years from the date of such fraud and/or from the time of discovery of such fraud thus causing a miscarriage of justice as it is patently clear from the evidence on record that the 1<sup>st</sup> Respondent allegedly discovered the fraud on 5<sup>th</sup> July, 2013, but filed her suit in year 2020, more than 7 years after such discovery.
14. The trial Court erred in law and fact by failing to find the suit before it was caught up by limitation and no corresponding leave was sought to file the suit which is based on fraud out of time.
15. The trial Court erred in law and fact in failing to find that the 2<sup>nd</sup> Appellant passed a good/clean title to the Nahashon Muguro Ndungu (1<sup>st</sup> Appellant), and the said title was not tainted with fraud.
16. The trial Court erred in law and fact by cancelling the title held by Nahashon Muguro Ndungu(1<sup>st</sup> Appellant), the without any legal basis.
17. The two Appeals had been filed separately, and after the said Appeals were admitted under Section 79B of the *Civil Procedure Act*, the court directed that the same be canvassed together by way of written submissions, and be determined as one Appeal, since they emanate from the same Judgement, and thus the consolidation of the two Appeals.
18. The parties complied with the directions of filing their respective written submissions, and the court summarizes the rival written submissions as follows;

### **The 1st Appellant's Submissions**

19. Nahashon Muguro Ndungu, who is now referred to as the 1<sup>st</sup> Appellant filed his written submissions dated 2<sup>nd</sup> October 2024, through Ruiru Njoroge & Associates, and urged the court to allow his Appeal.
20. He submitted that he is the bonafide registered proprietor of the suit land, which he purchased from James Mwirigi Munuku(the 2<sup>nd</sup> Defendant) now referred as 2<sup>nd</sup> Appellant, for a consideration of Kshs.3,300,000/=, which he paid in two instalments as follows: Kshs.2,000,000/- paid through bank



deposit in favour of James Mwirigi Munuku, following a Search conducted on the suit property on 18<sup>th</sup> April, 2016.

21. That he thereafter paid Kshs.1,300,000/=, to the said James Mwirigi Munuku, upon obtaining a consent to transfer the suit land in the 1<sup>st</sup> Appellant's name on 30<sup>th</sup> August 2016. Further that he visited the suit property prior to purchasing the same wherein he noted that nobody was in occupation of the said land, nor were there any structures or buildings erected thereon, and the property was full of overgrown vegetation and bushes. Further, that the suit land was registered in the 1<sup>st</sup> Appellant's name on 7<sup>th</sup> September 2016.
22. The 1<sup>st</sup> Appellant further submitted that the 1<sup>st</sup> Respondent's mother did not raise any objection with regard to the occupation of the suit land by James Mwirigi Munuku during her lifetime. Reliance was sought on the provisions of Section 26 of the Land Registration Act and the holding of the Court in the cases of Tum & 2 Others Vs Towett & 5 Others (ELC Case no. 501 of 2017) [2022] KEELC 13790 (KLR); R.G. Patel Vs Lalji Mkanji (1957) EA 314; Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR; Eviline Karigu (Suing as the Administratrix of the Estate of late Muriungi M'Chuka alias Muriungi M'Gichuga B Ma'Chabari Kinoro [2022] eKLR, in support of the proposition that allegations of fraud must be specifically pleaded and distinctly proven.
23. The 1<sup>st</sup> Appellant also submitted that the 1<sup>st</sup> Respondent failed to adduce sufficient evidence before the trial court, which evidence would point to collusion and fraud as between the Appellants herein and the other Defendants before the trial Court attending the transfer of the suit land from the 1<sup>st</sup> Respondent's mother, without her knowledge or consent. The 1<sup>st</sup> Appellant further submitted that the transfer of the suit land from the 1<sup>st</sup>, to the 2<sup>nd</sup> and later to the 4<sup>th</sup> Defendants(now Appellants) was lawful and sound because the original title to the suit property was used; the necessary consents from the Land Control Board were obtained, and each registered owner paid stamp duty.
24. The 1<sup>st</sup> Appellant relied on the reasoning of the Court in the cases of Kuria Kiarie & 2 Others Vs Sammy Magera [2018] and Kinyanjui Kamau Vs George Kamau [2015] eKLR., and submitted that a perusal of the Green card for the suit land clearly indicates that the 1<sup>st</sup> Appellant is the registered owner of the said land, and the Green card reflects the history of the property since its registration. He further submitted that the 1<sup>st</sup> Respondent's mother is not listed in the Green card as having been a proprietor of the suit property; therefore, it is not possible that she could be defrauded of a parcel of land which she did not own.
25. Further, the 1<sup>st</sup> Appellant argued that the 1<sup>st</sup> Respondent failed to draw a nexus between the share certificate held by her late mother, and the suit property. Further, that neither the 1<sup>st</sup> Respondent nor her mother was ever in possession of the suit land.
26. It was also submitted that the 1<sup>st</sup> Appellant is a bona fide purchaser of the property within the meaning set out under Black's Law Dictionary 8<sup>th</sup> Edition, as expounded by the Courts in the cases of Samuel Kamere Vs Lands Registrar [Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR; and, Dina Management Ltd Vs County Government of Mombasa & 5 others (Petition No. 8 of (E010) of 2021).
27. The 1<sup>st</sup> Appellant argued that the trial Court disregarded several crucial matters of fact including, that he had followed due process in acquiring the suit land having conducted a search which showed that James Mwirigi Munuku was the registered proprietor of the suit property. Secondly, that the 1<sup>st</sup> Appellant visited the said suit land and found that there was nobody in occupation of the same.



28. Finally, the 1<sup>st</sup> Appellant submitted that he paid the full and entire purchase price of Kshs.3,300,000/=, to the registered proprietor of the suit property namely James Mwirigi Munuku, and the title was legally transferred to him and thus he was an innocent purchaser for value without notice.
29. The 1<sup>st</sup> Appellant argued that the trial Court misdirected itself on the point of law by cancelling his title, and ordering that a new title be issued in the name of the 1<sup>st</sup> Respondent whereas the 1<sup>st</sup> Respondent initiated the suit before the trial Court on the basis of a Grant Ad litem on behalf of her late mother's estate. Further, that the trial Court bequeathed the suit land to the 1<sup>st</sup> Respondent as if it was handling a Succession cause, whereas a grant Ad litem is used for limited purposes such as prosecuting or defending a suit on behalf of the estate of the deceased.
30. It was his further submissions that as the 1<sup>st</sup> Respondent brought the suit at the trial Court as "an administrator of her late mother's estate", and not 'in her own capacity'. Therefore, the trial Court erred in directing that a new title in respect of the suit property be issued in the 1<sup>st</sup> Respondent's name. Reliance was sought in the holding of the Court in the case of *Re the Estate of Helena Wangechi Njoroge (Deceased) (2015) eKLR*.

### **The 2Nd Appellant's Submissions**

31. The 2<sup>nd</sup> Appellant filed his written submissions dated 15<sup>th</sup> November, 2024, through Githumbi Ndung'u & Co. Advocates, and identified two issues for determination: -
  1. Whether the trial Court adequately evaluated the apparent evidence before it including the applicable laws and case-law in its Judgment dated 25<sup>th</sup> January, 2024.
  2. Who should bear the costs of the suit.
32. The 2<sup>nd</sup> Appellant submitted that the suit land was transmitted to Francis Maina Gaita (the 1<sup>st</sup> Defendant in the suit before the trial Court) by the 3<sup>rd</sup> Defendant- Mboi Kamiti Farmers Co. Ltd. Thereafter, the said Francis Maina Gaita, transferred the suit property to the 2<sup>nd</sup> Appellant through purchase.
33. Further, that he carried out due diligence prior to purchasing of the suit land, and paid consideration for the said purchase. He also submitted that the mother title in respect of the suit property was issued on 4<sup>th</sup> November 1998, whereas the suit before the trial Court was lodged on 21<sup>st</sup> February 2020, therein, rendering the said suit statutorily-time barred.
34. Reliance was sought in the decision of the Court in the case of *Mukuria James Chacha & 2 Others Vs Land Registrar Muranga [2019] eKLR*, concerning the meaning and import of Section 24 of the *Land Registration Act*. Further reliance was placed in the holding of the Court in the cases of *Gabriel Macharia Njoroge Vs Land Registrar, Muranga & Another [2020]*; and, *Irungu vs Miriti & 8 others (ELC Case No. 14 of 2019) [2022] KEELC 15540 (KLR) (8<sup>TH</sup> December 2022) (judgment)*, on the constitutive elements of a bonafide purchaser for value without notice of fraud or defect pertaining to title.
35. The 2<sup>nd</sup> Appellant also relied on the provisions of Section 26 of the *Land Registration Act*, and the Judgment of the Court in the case of *R.G. Patel V Lalji Makanji (1957) EA 314*, to buttress the position that a title can only be impeached or cancelled once allegations of fraud have been proved.
36. On the issue of costs, the 2<sup>nd</sup> Appellant submitted that he is entitled to the costs of the Appeal and the suit before the trial Court. For this submissions, he relied on the holding of the Court in the case of



### **The 1st Respondeent's Submissions**

37. These two Appeals were opposed only by the 1<sup>st</sup> Respondeent (Plaintiff thereon), who filed her written submissions dated 18<sup>th</sup> October, 2024 through C.W Waititu & Associates Advocates. Though she filed a set of submissions in each of the Appeal, the contents are the same, and this court will summarize them as one.
38. The 1<sup>st</sup> Respondeent submitted that on page 182 of the Record of Appeal there is a Letter marked "B," which indicates that Mboi-kamiti Farmers Cooperative Ltd, wrote to the Law Firm of Mathenge & Muchemi Advocates, authorizing them to prepare transfer documents in favour of the 1<sup>st</sup> Respondeent's mother, and a Clearance Certificate was duly issued on 20<sup>th</sup> September 2004.
39. On the issue of the utilization of the suit land by the 1<sup>st</sup> Respondeent and her mother during the latter's lifetime, it was submitted that there is a copy of a Letter issued by the Assistant Chief -Samar Sub-location dated 28<sup>th</sup> August 2013, wherein the suit property is located, and the said letter confirmed that Damaris Wanjiku Kamau (the 1<sup>st</sup> Respondeent's mother) has been in occupation of the suit property since year 1993.
40. Further, she submitted that on pages 222 to 227 of the Record of Appeal, the 1<sup>st</sup> Respondeent adduced evidence in support of the contention that she continued to cultivate the suit land following her mother's demise until the James Mwirigi Munuku 2<sup>nd</sup> Appellant), forcefully gained entry, and cut down mature banana trees growing thereon. Further, that the 1<sup>st</sup> Respondeent had registered caution twice over the suit property, which cautions were removed without her consent or knowledge.
41. She also submitted that the Directorate of Criminal Investigations Officer – Muranga (CID), vide a letter dated 13<sup>th</sup> November 2013, wrote to the Land Registrar that upon completion of investigations by the DCI, it was established that her mother was a registered shareholder of Mboi-kamiti Farmers Cooperative Ltd, and was allocated plot No. 532, upon making full payment in respect of the suit land.
42. It was her further submissions that the 1<sup>st</sup> Defendant in the suit before the trial Court was under investigation by the DCIO in respecting of how he acquired the suit property, and was subsequently charged vide Muranga Criminal Case No. 714 of 2013, which suit was withdrawn on 5<sup>th</sup> May 2015, pursuant to the provisions of Section 87 of the Criminal Procedure Code.
43. The 1<sup>st</sup> Respondeent further submitted that James Mwirigi Munuku (the 2<sup>nd</sup> Defendant at the trial Court) was a witness in the said criminal matter; therefore, he is well aware that the 1<sup>st</sup> Defendant had no legal title over the suit land to pass to any third party. Reliance was sought in the case of Alberta Mae Gacci Vs A-G & 4 Others on the issue of fraud.
44. On the issues of the Appellants being a bonafide purchasers without notice of fraud, reliance was sought in the case of Arthi Highway Developers Ltd Vs West End Butchery Ltd & 6 others (2015) eKLR, and she submitted that 1<sup>st</sup> and 2<sup>nd</sup> Defendants, before the trial court, lacked valid title over the suit land to pass to third parties.
45. It was her further submissions that the suit land was allocated to the 1<sup>st</sup> Respondeent's mother (deceased), upon making the necessary payments pertaining to membership fees, purchase of shares and payments towards purchase of the suit land to Mboi Kamiti Farmers Cooperative Society Ltd (the 3<sup>rd</sup> Defendant in the suit before the trial Court).



46. She cited page 183 of the Record of Appeal, which contained a list of members of Mboi Kamiti Farmers Cooperative Society Ltd wherein, her mother's name appears as a member. It was her further submission that she continued to utilize the suit property following her mother's demise until when the Appellants herein illegally entered the said land and cut down the 1<sup>st</sup> Respondent's banana groves.
47. It was her further submissions that the 1<sup>st</sup> Defendant had been charged in a criminal case, and the 2<sup>nd</sup> Appellant (the 2<sup>nd</sup> Defendant at the trial Court) was a witness in the said criminal matter; therefore, he is well aware that the 1<sup>st</sup> Defendant had no legal title over the suit land to pass to any third party. Reliance was placed in the holding of the Court in the cases of *Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others* [2015] eKLR; and *Alberta Mae Gacci V A-G & 4 Others*, on the issue of fraud.
48. Further reliance was sought in the definition of fraud as set out in Black's Law Dictionary 9<sup>th</sup> Edition, as follows: -
- Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury.
49. It was her further submissions that the Appellants are not bona fide purchasers for value, as the 2<sup>nd</sup> Appellant transferred the suit property to Nahashon Muguro Ndungu (1<sup>st</sup> Appellant), knowing fully well that the property was the subject of investigation by the Directorate of Criminal Investigations – Murang'a as well as the existence of Civil Suit lodged against Francis Maina Gaita, the person who conveyed the suit land to the 2<sup>nd</sup> Appellant.
50. Further, she submitted that the 2<sup>nd</sup> Appellant (James Mwirigi Munuku) could only blame the said Francis Maina Gaita for any illegal dealings entered into with regard to the suit property, and no one else. She relied on the holding of the court in the case of *Munyu Maina vs Hiram Gathiba Maina (Civil Appeal No. 239 of 2009)*, to buttress the submission that once a proprietor's title deed is under challenge he/she must establish the legality of its acquisition.
51. The 1<sup>st</sup> Respondent urged the Court to uphold the decision of the trial Court dated 25<sup>th</sup> January 2024, and dismiss the instant Appeals with costs to the 1<sup>st</sup> Respondent.
52. The court has considered the TWO Memos of Appeal, the available evidence before the trial court as contained in the two Records of Appeal, the rival written submissions, the cited authorities and the relevant provisions of law, and the court finds the issues for determination are:-
- I. Whether the appeals are merited.
  - II. Who shall bear the costs of the appeals?
53. These being a first Appeal, the court is bound to consider both facts and the law as provided by section 65(1) (b) of the *Civil Procedure Act*, which provides: -
1. Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
    - b. from any original decree or part of a decree of a subordinate court, on a question of law or fact;
54. The duty of the first Appellate court is to re-evaluate and re-consider the evidence placed before the trial court, as well as the Judgement, and then come up with its own independent Judgement. This was



the holding in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the court held that;

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. “

55. The same position was also elaborated in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123; where the court held;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

56. This court too as an Appellate court will not interfere with the trial’s court just because this is an Appeal. It will only interfere if satisfied that the trial court misdirected itself. In the case of *Mbogo & Another vs Shah*, [1968] EA, p.15, the Court held that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

See also the case of *Nkube vs Nyamiro* (1983) KLR 403, where the court stated that;

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

57. Being guided as above, this court has re-evaluated and re-analyzed the available evidence before the trial court as contained in the Record of Appeal, the Judgement of the trial court, and proceeded to determine the first issue of whether these Appeals as consolidated are merited.

58. From the available evidence, there is no doubt that prior to the filing of the suit before the trial court, and delivery of the impugned Judgement, the suit land was registered in the name of the 1<sup>st</sup> Appellant herein Nahashon Muguro Ndungu.

59. Further, there is no doubt that the suit land was sold to the 1<sup>st</sup> Appellant, Nahashon Muguro Ndungu, by the 2<sup>nd</sup> Appellant James Mwirigi Munuku. Further, it is evident that the said James Mwirigi Munuku, purchased this suit land from one Francis Maina Gaita (now deceased), who was the 1<sup>st</sup> Defendant in the suit before the trial court.

60. From the available evidence and exhibits before the trial court, the said Francis Maina Gaita, was registered as the owner of the suit land in 1998, and he later sold the said land to the 2<sup>nd</sup> Appellant



- in 2013. It is also evident that prior to the selling of the suitland to 1<sup>st</sup> Appellant, a criminal case had been filed against the late Francis Maina Gaita, but the said Criminal case was withdrawn under section 87(A) of the Criminal Procedure Act. Although the said Francis Maina Gaita, was charged, he was not found guilty and/or convicted as the charges against him were withdrawn.
61. It is also evident that the bone of contention herein is that the 1<sup>st</sup> Respondent had alleged that the suit land was allocated to her late Mother, Damaris Wanjiku Kamau, after having paid all the requisite monies / charges to Mboi Kamiti Farmers Coop Ltd, the 3<sup>rd</sup> Defendant, who were the initial owners of the suit land and on the other hand the late Francis Maina Gaita, the 1<sup>st</sup> Defendant in the suit before the trial court alleged that he was allocated the suit land by the siad Mboi Kamiti Farmers Coop Ltd in 1998(3<sup>rd</sup> Defendant), after paying all the requisite charges, and a title deed was issued in his name, in 1998.
  62. Indeed, a copy of the said title in the name of Francis Miana Gaita was produced as exhibits in court. The 1<sup>st</sup> Respondent had alleged that the Defendants colluded to deprive her late mother of the suit land, though her late mother had paid all the charges/ monies and was issued with a share certificate, to confirm that she owned plot No. 532, which is the suit land herein.
  63. However, the Defendants before the trial court could hear none of that, and they alleged and contended that at no time did the said Damaris Wanjiku Kamau ever acquire the title for the suit land. They also averred that the 1<sup>st</sup> Defendant was lawfully registered as the owner of the suit land in 1998, and that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants, (now Appellants) were innocent purchasers for value without notice, and that the trial court erred in finding for the 1<sup>st</sup> Respondent (Plaintiff).
  64. This court will now re-evaluate the available evidence, the grounds of Appeal, and thereafter determines whether the two Appeals are merited or not; - From the Green card produced before the trial court as exhibit, it is evident that Francis Maina Gaita, who was the 1<sup>st</sup> Defendant thereon, became the registered owner of the suit land on 11<sup>th</sup> November, 1998, for Nginda/Samar/Block 2/75.
  65. Further, it is evident that the nature of the title was absolute and the registration was done under ‘The Registered Land Act. Cap 300 Laws of Kenya (repealed). Under the said “The Registered Land Act,” (repealed), Section 27(a) provides: -
    - a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
  66. Therefore, Francis Maina Gaita(now deceased). after 4<sup>th</sup> November, 1998, became the absolute and indefeasible owner of the suit land. As an absolute owner, the said Francis Maina Gaita, (1<sup>st</sup> Defendant before the trial court), could deal with the said land as he so wished; and disposing the said land was one of such right.
  67. Further from the available evidence, it is evident that Nelius Wanjiru Kamau the 1<sup>st</sup> Respondent herein, had lodged a caution on 8<sup>th</sup> July, 2013, which caution was removed on 12<sup>th</sup> September 2013. After the removal of said caution, the suit property was sold to James Mwirigi Munuku(the 2<sup>nd</sup> Defendant before the trial court and now 2<sup>nd</sup> Appellant), and the said land was registered in his name on 13<sup>th</sup> September, 2013.
  68. This registration in favour of James Mwirigi Munuku, was done under the Land Registration Act 2012, and as provided by Section 24 of the said Act, James Mwirigi Munuku, (now the 2<sup>nd</sup> Appellant herein), became the absolute and indefeasible owner of the suit property. Therefore, the said title could only be defeated as provided by Section 25(1) of the said Act which reads: -



1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
69. Further Section 26 of the said *Land Registration Act*, provides that a Certificate of title can only be impeached where there is evidence of fraud, misrepresentation and/or if the same is acquired through fraud: the said Section reads as follows;-
  1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the 12 encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
    - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
70. The Green card herein which was produced as exhibit, also shows that a restriction had been placed on the suit land vide a letter dated 11<sup>th</sup> November, 2014, from the CID, and the 1<sup>st</sup> Respondent had testified that she is the one who had lodged a complaint at the DCIO-Muranga. Thereafter, the said former proprietor of the suit land Francis Maina Gaita(now deceased) was charged with various criminal offences.
71. However, the said charges were withdrawn under Section 87(A) of the Criminal Procedure Act. It is evident a person is only guilty of a criminal offence once he has been tried before a Competent Court and later convicted by the said court of law. The said Francis Maina Gaita(1<sup>st</sup> Defendant), was not convicted by any court of Law, and thus the said investigation by the CID and the charging of the said Francis Maina Gaita, is not conclusive evidence that he had indeed acquired the suit land fraudulently.
72. Further, from the said Green Card, it is very clear that after the withdrawal of the criminal charges against Francis Maina Gaita(deceased), the restriction placed on the suit land was removed on 9<sup>th</sup> December 2015, and thereafter, the suit land was sold to Nahashon Muguro Ndungu, (1<sup>st</sup> Appellant) on 7<sup>th</sup> September 2016. The 1<sup>st</sup> Appellant had testified that when he bought the suit land from James Mwirigi Munuku (2<sup>nd</sup> Appellant), he put up a permanent house thereon;- he also kept and reared livestock such as dairy cows, and he is now engaged in serious farming thereon.
73. He further testified that from the time of purchase of the suit land, and starting the developments thereon, he carried those developments in open, without secrecy, and the 1<sup>st</sup> Respondent saw all those developments coming up from 2016, and she did not complain, until 2020, when she filed the suit before the trial court. The 1<sup>st</sup> Appellant acquired the suit land in September 2016, and he therefore became an absolute and indefeasible owner of the said land as provided by section 24(a) of *Land Registration Act*.



74. Therefore his Certificate of title held by the 4<sup>th</sup> Defendant/1<sup>st</sup> Appellant could only be defeated as provided by the law, (See section 25 of *Land Registration Act*), and the title could only be cancelled as provided by Section 26(1) (a) & (b) of the said Act. The 1<sup>st</sup> Appellant's title could only be cancelled if it was obtained fraudulently, through misrepresentation and / or if acquired through corrupt practices.

75. In the case of in case of Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & another [2013] KEHC 5046 (KLR) (Eldoret ELC Case No.609B OF 2012), the court held that certificate of title could only be impeached if acquired fraudulently;-

“ .....is the title impeachable by virtue of Section 26(1)(b)? First, it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

76. The question that this court needs an answer to, is whether from the available evidence the 1<sup>st</sup> Respondent, as the Plaintiff was able to prove on the required standard that indeed the Appellants herein conspired, colluded and engaged in fraud, in acquisition of the suit land, and thus deprived the said Damaris Wanjiku Kamau(deceased) who was the mother to the 1<sup>st</sup> Respondent her rightful ownership of the suit land.

77. It has been held severally by our Courts that; fraud is a very serious allegations that needs to be pleaded and proved on a standard higher than balance of probabilities, but slightly lower than reasonable doubt. See the case of Terer vs State Law & 2 others [2025] KEELC 22 (KLR)(Nakuru ), where the court held: -

“ 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 facts.”

78. Further in the case of R.G Patel v Lalji Makanji [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

“ Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

79. It is evident that the burden of proof of allegations of fraud is on the person alleging. In Ndolo v Ndolo [2008] 1KLR) 742 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...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”



80. Again in the case of Christopher Ndaru Kagina v Esther Mbandi Kagina Another [2016] eKLR, the court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it.

81. The same position was held in the case of Central Bank of Kenya Limited vs Trust bank Limited; 4 Others [1996] eKLR, where the court rendered itself as follows:

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

82. In her claim before the trial court, the 1<sup>st</sup> Respondent particularized fraud or fraudulent activities as follows; that on diverse dates in 1998, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and the servants of 5<sup>th</sup> defendant jointly and severally planned and conspired to have the land registered in the name of the 1<sup>st</sup> Defendant (Francis Maina Gaita (deceased)), and that in execution of the said conspiracy, they caused a title deed to be issued to the 1<sup>st</sup> Defendant (Francis Maina Gaita) and later to 2<sup>nd</sup> Defendant (2<sup>nd</sup> Appellant) and eventually to 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant).

83. The above particulars are very serious allegations of fraud and conspiracy involving even public officers, being servants of 5<sup>th</sup> Defendant, which allegations needed prove. Apart from alleging that the Law Firm of Mathenge Muchemi & Co Advocates, had written a letter to inform her mother to pay all the money dues for the suit land, there was no other evidence to prove that the 1<sup>st</sup> Respondent's mother Damaris Wanjiku Kamau, was the owner of the suit land.

84. The 1<sup>st</sup> Respondent needed to call sufficient evidence to prove how the named Defendants (now 1<sup>st</sup> and 2<sup>nd</sup> Appellants) conspired to cause the suit land to be fraudulently registered in their names, instead of the said Damaris Wanjiku Kamau, the mother to the 1<sup>st</sup> Respondent. Without concrete prove of engagement of the Defendants (1<sup>st</sup> and 2<sup>nd</sup> Appellants) in acts of conspiracy and fraud, then the 1<sup>st</sup> Respondent claim remained a mere allegation. See the case of CMC Aviation Ltd Vs. Crusair Ltd (No.1) (1987) KLR 103 where the court held;

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

85. In arriving at its decision, the trial court cited various decided case among them ; Nelius Muthoni Thegeta vs Julius Ndungu Mwangi and Photer (2000) eKLR; Munyu Maina vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009 and Dorothee Wacera Macharia vs Mboi Kamiti Farmers Company Ltd and 2 others eKLR; and stated that the circumstances in the case before the trial court was similar to the circumstances of the above cited cases.



86. However, the trial court did not specifically analyse the evidence that had been placed before it, but just concluded that the circumstances in the case before it was similar to the above cited cases. However, it is trite that a trial court should first analyse the evidence before it, evaluate it and then comes to a conclusion. This seems not to have happened in the case before the trial court, as the said court made a conclusion, without analysing the evidence before it.
87. Turning now to the Grounds of Appeal, this court will collapse them as follow..
- i. Whether the trial court erred in finding and holding that the 1<sup>st</sup> Respondent (Plaintiff) had proved her case against the Defendants (Appellants) on the required standard of balance of probabilities.
  - ii. Whether the trial court erred in ordering for the cancellation of the title held by the 1<sup>st</sup> Appellant herein.
  - iii. Did the trial court err in failing to find that the cause of action anchored in part of fraud ought to have been filed within three years from the time of discovery of such fraud. Was the suit barred by Limitation of Actions Act?
88. On whether the trial court erred in finding and holding that the 1<sup>st</sup> Respondent had proved her claim on the required standard of balance of probabilities, it is trite that “he also alleges must prove” as provided by Sections 107 and 108 of the Evidence Act, which state;-
107. Burden of proof.
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.
108. Incidence of burden.
- 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.
89. The 1<sup>st</sup> Respondent as the Plaintiff before the trial court, was the one who had alleged, and therefore the burden of proof was upon her. The 1<sup>st</sup> Respondent alleged conspiracy and fraud, on the part of the Defendants, which allegations as stated above are serious allegations, which needed to be proved on the required standard, which standard is above the balance of probabilities, but below beyond a reasonable doubt. Did the said 1<sup>st</sup> Respondent discharge her onerous task of proving her case on the required standard?
90. In the matter before the trial court, the 1<sup>st</sup> Respondent was the sole witness, as she did not call other independent witnesses that she had named in her witness statement and evidence, to support her allegations. The 1<sup>st</sup> Respondent needed to call sufficient evidence to prove how the Defendants (the Appellants herein) conspired and/ or colluded to fraudulently acquire the suit land from her mother Damaris Wanjiku Kamau(deceased).
91. From the Green Card, the history or the root of the title held by the 4<sup>th</sup> Defendant (1<sup>st</sup> Appellant) could be traced, and that history was given by a witness from the lands office. The 1<sup>st</sup> Respondent had alleged that her deceased mother was issued with a Share Certificate for the suit property by the 3<sup>rd</sup> Defendant.



The 1<sup>st</sup> Respondent only had a share certificate, and not the title to the suit land, to confirm that the same was owned by her mother Damaris Wanjiku Kamau.

92. Though the 1<sup>st</sup> Respondent had alleged that she reported the matter to the CID, who carried out investigations and charged Francis Maina Gaita, none of the witness from CID gave evidence and details on her behalf to support her allegations, and also give evidence of their investigations. Further, the alleged area Chief who wrote a letter to confirm that the 1<sup>st</sup> Respondent's mother was the owner of the suit land, was also not a witness, and did not give evidence in her favour. Her allegations therefore remained mere allegations.

93. In the case of *Evans Otieno Nyakwara vs Cleopas Bwana Ongaro* (2015)eKLR , the Court held: -

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

The 1<sup>st</sup> Respondent herein too made allegations, which she did not prove by availing the witnesses or production of concrete evidence.

94. The 1<sup>st</sup> Respondent has also alleged collusion on the part of the Defendants/Appellants herein, but she did not avail any evidence to support that allegation of collusion. See the case of *Scholastica Nyaguthii Muturi vs Housing Finance Company of Kenya Ltd & Another* [2017]eKLR, where the court held: -

“... I have not found any evidence of collusion of fraud. In any event, a person who alleges collusion and fraud must prove these allegations to the satisfaction of the court. Apart from making these allegations there was no attempt at all to prove them...”

95. Further the 1<sup>st</sup> Respondent had alleged fraud on the part of the Defendants, which allegation led to the cancellation, of the 1<sup>st</sup> Appellants title. Indeed, Section 26(1)(a) of the *Land Registration Act*, provide that a proprietor's title can be cancelled on the grounds of fraud or on situation where the title was acquired illegally, un-procedurally or through corrupt scheme. See the case of *Alice Chemutai Too (Suing in her capacity as the personal representative of Kipkoech Tele (Deceased) v Nickson Kipkurui Korir, Attorney General (Sued on behalf of the Chief Land Registrar) & Consolidated Bank of Kenya* [2015] KEELC 151 (KLR)

96. However, for a court to cancel a proprietor's title on grounds of fraud, the said fraud must be pleaded proved on the required standard. See the case of *R.G. Patel vs Lalji Makanji* cited in the case of *Gladys Wanjiru Ngacha vs Theresa Chepsaat and 4 others*[2013]eKLR where the Court of Appeal held;

“...that allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere blance of probabilities is required and that is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court”

97. In the case of *Kinyanjui Kamau vs George Kamau* [2015]eKLR, the court 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 of prove that allegation lay squarely on him. Since the Respondent was making a serious charge



of forgery of fraud, the standard of proof required of him was obviously higher than that required in ordinary civil case, namely proof upon a balance of probabilities: but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal cases...” In cases where fraud is alleged, it is enough to simply infer fraud from the facts.”

98. Having considered the available evidence, before that court, this court finds and holds that the Green Card, was an exhibit which traced the history of the title held by the 1<sup>st</sup> Appellant herein, and there was no evidence of fraud on the part of the Appellants herein. The said registration in favour of the 1<sup>st</sup> Appellant was done legally and therefore the 1<sup>st</sup> Appellant is an innocent purchaser for value without notice of fraud or wrong doing. The 1<sup>st</sup> Respondent did not prove her case on the required standard of balance of probabilities.

99. This Court will be guided by the holding of the Court of Appeal in the case of Central Bank of Kenya Limited vs Trust Bank Limited company and others, court of Appeal No. 215 of 1996(KR) where the court held: -

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

100. On whether the trial court erred in ordering for cancellation of the title deed held by the 1<sup>st</sup> Appellant, this court finds and holds that the 1<sup>st</sup> Appellant became the registered owner of the suit land in 2016. Therefore, he became an absolute and indefeasible proprietor as provided by Section 24 of [Land Registration Act](#), and his title is protected by [the Constitution](#) and statutes law, and can only be defeated as provided by Section 25 of [Land Registration Act](#)

101. This court has found and held that the 1<sup>st</sup> Respondent did not call sufficient evidence to prove her case on the required standard of balance of probabilities, and failure to call sufficient evidence meant that allegations of Conspiracy and fraud were not proved, and therefore the 1<sup>st</sup> Appellant’s title could not be impeached under any of the grounds provided in section 26(1) of the [Land Registration Act](#).

102. In the case of Tum & 2 Others vs Towett & 5 Others (Environment and Land Case NO. 501 of 2017) [2022]KEELC 13790(KLR), the court held as follows:-

“it is trite law that fraud is a serious allegation that can lead to cancellation of a title. Section 26(1) of the [Land Registration Act](#) states that a certificate of title can be challenged on the ground of fraud or misrepresentation to which the person is proved to be party to. The Court of Appeal of Uganda Held in Katende – vs – Haridas and company Limited (2008) EA 173 that “ for a party to plead fraud in registration of land a party must first prove fraud was attributed to the transferee. It must attribute either directly or by necessary implications that is, the transfere must be guilty of some fraudulent act or must have known such act by someone else and taken advantage of such act. Fraud can be participatory that is, the party participates in the fraudulent dealings. Fraud can also be imputed on a person, that is, when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. All those people who actually participate in the fraudulent transactions and who had knowledge of it are privy and hade notice of fraud.”

103. Having found that there was no evidence of fraud on the part of the Appellants herein, then this court in its appellate jurisdiction indeed finds and holds that the cancellation of the 1<sup>st</sup> Appellant title was erroneous, and should not have been ordered by the trial court.



104. In any event, even if the 3<sup>rd</sup> Defendant could have been wrong in allocating the suit land to Francis Maina Gaita (deceased) the 1<sup>st</sup> and 2<sup>nd</sup> Appellants herein were innocent purchasers for value, without notice, and the title of the 1<sup>st</sup> Appellant should be protected. See the case of Samuel Kochele vs Lands Registrar (Kajiado) Civil Appeal No. 28 of 2005[2015]eKLR: - where the court held;

“.... In order to be considered a bona fide purchaser for values, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property....”

105. From the holding of this court as above, it is very evident that the Judgment of the trial court, did not consider the issue of bona fide purchaser for value without notice of fraud. If the trial court had considered the said issue, then juxtaposed the same with the available evidence and exhibits, it would have arrived at a different finding.

106. On the issue of whether the trial court failed to find that the suit was barred by limitation of time such that the 1<sup>st</sup> Respondent alleged that she discovered fraud of 2013, and filed the suit in 2020, the 2<sup>nd</sup> Appellant herein did not pursue that ground, but it is evident that the 1<sup>st</sup> Respondent allegedly discovered fraud in 2013, wherein she lodged a caution on the suit land and lodged a claim at the CID. The said claim at the CID, resulted in the charging of the 1<sup>st</sup> Defendant, Francis Maina Gaita, with a criminal offence, which criminal case was later withdrawn under section 87(A) of CPC, for reasons that it was Civil in nature.

107. Even with the withdrawal of the Criminal Charges in the year, 2015, the 1<sup>st</sup> Respondent did not file a Civil Suit until 2020, which was almost 7 years from the date of discovery of fraud. Section 26 of *Limitation of Actions Act*, Cap 22, provides that allegations of fraud must be brought to court within a period of 3 years after discovery of such fraud. Indeed, the cause of action herein has been barred by the Limitations of Actions Act. However, the Appellants did not pursue that ground of Appeal. See the case of Wambui vs Mwangi & 3 others (Supra).

“We can only appreciate, express and pronounce ourselves on issues raised in the condensed grounds of appeal as submitted thereon by the respective parties herein. None of which as already highlighted above, touch on the 3<sup>rd</sup> respondent’s above complain. We cannot therefore be called upon to confer a relief or pronounce ourselves on an issue not properly laid before us. We accordingly reject this complaint”.

108. Further, in its Judgment, the trial Court directed that the suit property be registered in the name of the 1<sup>st</sup> Respondent, Nelius Wanjiru Kamau, yet she was not the original allottee of the Share certificate, but the original allottee was her mother Damaris Wanjiku Kamau, who is now deceased. The 1<sup>st</sup> Respondent only had a Limited Letter of Administration for purposes of filing this case, but she was not the Legal Administrator of the mother’s estate.

109. The purpose of Limited Grants are provided for in Section 54 of *Law of Succession Act*, which provides as follows: -

54. limited grants

“ a court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.”



See also the case of Helena Wangechi Njoroge (deceased) [2015]eKLR , as cited by the 1<sup>st</sup> Appellant, where the court held the following concerning letter of administrations ‘ad litem’;

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

110. Therefore, it is clear that the suit as filed by the 1<sup>st</sup> Respondent is caught by [Limitation of Actions Act](#) and thus time barred. Further the suit land could not be registered in the name of 1<sup>st</sup> Respondent since she was only holding Limited Grant for purpose of filing this suit, but not the full Grant, for purposes of distribution of the estate Damaris Wanjiku(Deceased).
111. Having analysed the available evidence as above, it is the finding and holding of this court, that it is very clear that the two Appeals herein being ELCA NO E006/2024 & E007/ 2024 as Consolidated are merited. This court in its appellate jurisdiction has no option but to proceed and upset and/ or set aside the Judgment of the trial Court dated January 25, 2024. The court further sets aside all the orders granted therein and any other consequential orders emanating from the said impugned Judgement of the trial court.
  - ii. Who should bear Costs of this Appeal
112. On the issue of costs, the court will be guided by the provisions of Section 27 of the [Civil Procedure Act](#), which provides that costs are granted at the discretion of the court, but ordinarily Costs are awarded to the successful litigant, unless the court for good reasons directs otherwise.
113. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants herein are the successful litigants, and ordinarily they deserve to be awarded costs. However, given the circumstances of this case the court finds and holds that each party should bear its own costs.
114. This court has carefully re-evaluated, re-analysed, re-assessed and re-considered the available evidence as contained in the Records of Appeal, as was held in the case of *Selle vs Associated Motor Boat Co.* [1968] EA 123 and it has come to its own independent conclusion that the two Appeals as Consolidated, are merited.
115. Consequently, this court allows the two Consolidated Appeals; ELCA NO E006/ 2024 & ELCA NO. E007/ 0F 2024, in terms of their prayers Nos (1) and (2) of the said Appeals. However, on the issue of costs, each party to bear its own costs.
116. Further, for the interest of justice, given that the 3<sup>rd</sup> Defendant did not appear before the trial court to controvert the 1<sup>st</sup> Respondent’s allegations, this Court also finds and holds that maybe, the trial court should have allowed prayer No. (10), of the 1<sup>st</sup> Respondent claim in the Plaintiff dated 21<sup>st</sup> February 2020, which was an Alternative prayer.
117. As provided by Section 3A of the [Civil Procedure Act](#), having found that the suit land was lawfully registered in the name of the 1<sup>st</sup> Defendant, later in the name of 2<sup>nd</sup> Defendant and eventually the 4<sup>th</sup> Defendant( Appellants herein), then this Court directs and orders the 3<sup>rd</sup> Defendant in the suit before the that trial Court to give the estate of late Damaris Wanjiku Kamau an alternative land and/or refund



the purchase price and all monies paid by the said Damaris Wanjiku Kamau( deceased), with interest at court's rate from the date of this Judgment until payment in full.

Appeal is allowed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**L. GACHERU**

**JUDGE**

29/1/2025

In the presence of: -

Court Assistant – Joel Njonjo

Mr Ruiru for Appellant in E006/2024

Mr Ndungu for Appellant in E007/2024

M/s Waititu for the 1st Respondent

N/A for the other Respondent

**L. GACHERU**

**JUDGE**

29/1/2025

