



**Thuo v Ngugi & 4 others (Environment & Land Case 137 of 2017)
[2025] KEELC 3415 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 137 OF 2017
JG KEMEI, J
APRIL 29, 2025
(FORMERLY NAIROBI ELC NO. 278 OF 2015)**

BETWEEN

MARY HURO THUO PLAINTIFF

AND

CAROLINE GATHONI NGUGI 1ST DEFENDANT

VICTOR NICHOLAS NGUGI 2ND DEFENDANT

ROBERT MWAURA NGUGI 3RD DEFENDANT

SAMUEL JOSEPH WANYOIKE 4TH DEFENDANT

MARY WANJA MUTHIGA 5TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the Complaint dated 1st April, 2015 which was later amended on the 19th March, 2022. In the amended Complaint, the Plaintiff prays for Judgment against the Defendants jointly and/severally for; -
 - a. A declaration that the suit premises known as Githunguri/ Kiaria/1490 was held in trust by the Deceased for all lawful and legitimate beneficiaries.
 - b. A declaration that the transfer of the suit premises known as Githunguri/ Kiaria/1490 from the Deceased Widow to Martha Wanjiru the Deceased Daughter was fraudulent null and void and should be cancelled and the land register be rectified so that parcel of land title number Githunguri/ Kiaria/ 1490 reverts back to the Deceased Widow to be shared amongst all the beneficiaries of the Estate of Emily Wamaitha Mwaura.



- c. A declaration that all other dealings subsequent thereto are a nullity and of no legal effect and should be cancelled.
 - d. A permanent injunction restraining the Defendants or any one of them, their agents, servants and all claiming under them or any one of them from entering or interfering with the suit premises.
 - e. Costs of this suit; and
 - f. Any other or further relief which this Honourable Court would deem fit to grant.
2. The Plaintiff states that she is the administratrix of the Estate of Emily Wamaitha Mwaura. That the parcel of land known as Githunguri/ Kiaria/ 1490, the suit property herein, was registered before January, 1997 in the Deceased's name. Emily Wamaitha was registered as the absolute proprietor thereof subject to an implied trust for the benefit of her children. That the Deceased inherited the suit property from her deceased husband, one Michael Mwaura who died on 20th January, 1983.
 3. The Plaintiff claims that the suit property is a sub-division of a larger parcel of land known as Githunguri/Kiaria/238 owned by the late, Michael Mwaura. That before his demise, the late Michael Mwaura allocated the portions resultant of the sub-division of the said larger parcel as follows; Githunguri/Kiaria/ 1490 to his wife to be held in trust for the herself and that of her Children, Githunguri/Kiaria/ 1488 to Cornelius Kimani Mwaura, Githunguri/ Kiaria/1489 was allocated to Lucy Njeri Mwaura and Annah Wanjiku Mwaura was allocated Githunguri/Kiaria/ 1491.
 4. The Plaintiff states that Emily Wamaitha Mwaura, the Deceased held the suit property in trust for the remaining children who had not benefited from the sub-division of the larger parcel. The said children are; Regina Wangui, Teresia Waithera, Martha Wanjiru, Mary Huro, Pauline Njoki and Veronica Wairimu. She avers that the suit property currently contains the family's grave site.
 5. It is the Plaintiff's assertion that in January, 1997, the suit property was fraudulently transferred to one of the Deceased's daughters who is the Plaintiff's sister namely; Martha Wanjiru. That her said sister had been entrusted with possession of the title by their late mother. She avers that their Deceased mother numerously requested Martha to return the title to her, but she declined. She states that upon the demise of her sister Martha Wanjiru, they conducted a search over the suit property and it is only then that they discovered the fraud done on their property. The particulars of fraud against the Plaintiff's deceased sister, Martha Wanjiru, include falsification of her mother's identity card details, false thumb prints and attestation of the transfer instrument by a non-existent Advocate.
 6. Subsequently, in the year 2013, the 1st to 4th Defendants acting as Administrators of their deceased mother's estate (Martha Wanjiru) pursuant to proceedings in succession cause 1971 of 2012, transferred the suit property in their joint names at the exclusion of other original beneficiaries. Later, the year 2015, the 1st to 4th Defendants transferred the suit property to the 5th Defendant.
 7. The Plaintiff accuses the 5th Defendant of purchasing the suit property despite knowledge of the family dispute. Further, that the 5th Defendant's purchase was without vacant possession as some of the Deceased's beneficiaries were still residing thereon. She asserts that the 5th Defendant having purchased the suit property at a purchase price of Kshs. 3 Million instead of the then market value of Kshs. 12 Million per acre, is indicative that she was aware that something was amiss in the transaction. That the 5th Defendant therefore participated in the fraudulent scheme in purchasing the suit property. The particulars of fraud as against the Defendants are stated thereon.



8. The Plaintiff argues that as a consequence of the Defendants' fraudulent acts, the estates of the Deceased and the beneficiaries thereto, have suffered loss and damage. It is for those reasons that she seeks the orders stated above.

1st - 4th Defendants' Statement of Defence

9. The 1st to 4th opposed the suit vide a Joint Amended Defence dated 17th May, 2022 denying all the allegations levelled against them. They deny knowledge of the suit property being held in trust for any party as alleged by the Plaintiff. They further deny any fraudulent and unlawful transfer of the suit premises to any of the deceased's daughter as alleged and subsequently to their joint names. The particulars of fraud levelled against them are equally denied. In reference to the succession case, the Defendants aver that the said suit was initiated by the Plaintiff herein over the suit property.
10. They further content that this suit is barred by Sections 4, 7 & 17 of the Limitation of Actions Act and Section 2 (3) of the Law Reform Act. The 1st to 4th Defendants therefore pray that the Plaintiff's suit be dismissed with costs.
11. The 5th Defendant filed a Statement of Defence dated 31/5/2019 contenting that he was a bona fide purchaser for and an innocent purchaser for value. However, no evidence was adduced on behalf of the 5th Defendant hence the contentions therein were unsubstantiated.

Evidence adduced by the Plaintiff

12. At trial, the Plaintiff called 3 witnesses whereas the Defense called 1 Witness.
13. The Plaintiff herein, Mary Huro Thuo testified as PW 1. She averred that she commenced this suit on her own behalf and that of her siblings. She confirmed that she had Letters of Grant of Administration with respect to the Estate of their mother; Emily Wamaitha. She adopted her undated Witness Statements one filed on 30th July, 2019 and the other one adduced at Pages 14 to 16 in the Plaintiff's trial bundle dated 9th June, 2022.
14. In further support of her case, the Plaintiff adduced the documents on the Plaintiff's List of Documents dated 1st April, 2015, Plaintiff's Further List of Documents dated 29th July, 2019 as well as the Plaintiff's Second Further List of Documents dated 1st March, 2024 which were marked as PEx. No. 1 -38. Save for documents No. 1 to 3 on the Plaintiff's Further List of Documents dated 29th July, 2019 were marked as MFI respectively.
15. In cross examination, PW1 stated that she sued the 1st to 4th Defendants in their capacity as administrators of the Estate of her late sister Martha Wanjiru. She restated her assertions that the suit land was their deceased mother's, Emily Wamaitha Thuo's share. That their mother, Emily Wamaitha inherited the property from their deceased father, Michael Mwaura, who had purchased it.
16. In reference to the Green Card for the suit property, adduced by the Defendants, PW 1 averred that Entry No. 2 in the name of Emily Wamaitha, it does not show that she held it in trust for anyone. She testified that Entry No. 4, the transfer to Martha was fraudulent. The Witness was further referred to the minutes of the meeting held on 6th June, 1999 in which complaints were raised against Martha Wanjiru, her deceased sister. It was noted in the meeting that Martha had fraudulently transferred the land to herself and that she had refused to return the title to their mother as agreed in the meeting held in 1997.
17. PW 1 further testified that the Demand Letter dated 18th June, 1999 addressed to Martha Wanjiru referred to the fraudulent transfer. She averred that their late mother too, Emily Wamaitha in her letter



- dated 8th September, 1999 addressed to Martha Wanjiru requesting her to return the title. It was her evidence that she wants the land reversed back to their late mother for distribution.
18. The Witness further testified that the thumb print on the transfer form does not match that of their deceased mother. She referred to the Expert's opinion which confirmed that the thumb print on the Transfer Form marked as WM 1 and the Identification Card for their deceased mother are not the same. It was her further testimony that at the time of Martha's death, the title was registered in her name. That it is Martha's children who sold and transferred it to the late Muthiga Gituga, represented by the 5th Defendant.
 19. In reexamination, PW 1 averred that the suit property was registered during her mother's lifetime. She stated that her mother never saw the title in her lifetime. She averred that upon sub-division of the Original parcel 238, the resultant parcels were shared accordingly and their deceased mother held the subject land in trust for her children as listed in the Plaint. That their deceased mother was however unable to transfer the land to her children since the title was registered in Martha's name. It was her testimony that their mother never filed any suit before her demise save for demanding the title from Martha in vain.
 20. It was PW 1's evidence that she realized on 1st January, 1998 that the land was in the name of her late sister, Martha Wanjiru after conducting a search at the Lands Office. That the Search dated 24th March, 2015 shows the registered proprietor as Muthiga Gituga. She further stated that the Green Card was issued on 29th July, 2011 and she filed the suit in 2015. The Witness also stated that the alleged Advocate, Munene N. Kibuchi, who purportedly attested to Emily's thumb print on the Transfer Form does not exist. This is confirmed by the Letter dated 19th July, 2019 from the Law Society of Kenya as well as the one dated 26th July, 2019 from the Chief Registrar of the Judiciary.
 21. She reiterated that her late sister, Martha Wanjiru never returned the Title despite numerous demands from their mother and her promises to do so. That the Demand Letter dated 15th May, 2000 requested Martha to return the Title before the burial of their mother. She stated that the land is currently being cleared by the 5th Defendant who is cultivating it.
 22. The Plaintiff's second witness (PW 2) was Angelica Mecha, an Advocate of the High Court of Kenya and the Programme Assistant- Compliance and Audit at the Law Society of Kenya. She referred to the Society's response dated 19th July, 2019 confirming that there was no Advocate by the name Munene N. Kibuchi. The Letter from Law Society of Kenya was produced as Pex 34.
 23. During cross examination by, PW 2 she confirmed that she had produced the original letter, which was forwarded to the Advocate. However, she had not produced the roll of Advocates.
 24. There was no re- examination to this Witness. Further, the Letter dated 26th July, 2019 from the Chief Registrar of the Judiciary, initially marked for Identification, was by consent produced without calling the marker.
 25. Mr. Andrew Runji Njagi, a Civil Servant working at the National Registration Bureau, testified as PW 3. He informed the Court that he is trained in Finger Prints Systems. He stated that on examination and search from the Bureau's Database, ID No. 4352529/67, is registered in the name of Lesosia Ole Kotai and not Emily Wamaitha Mwaura. That this was authenticated by an expert whose report produced as Pex 36 to 38. He confirmed that the ID Number appearing on the Transfer Form is the same one he reviewed. That the ID does not belong to Emily Mwaura.
 26. In cross examination, PW 3 confirmed that the ID he reviewed belongs to another person other than Emily Mwaura. He stated that Pex 38 is the application for IDs which was done manually since the system had not been digitized. He further stated that the ID he verified contained a Thumb Print. That



the Thumb Print on the ID was scanned and the system found it to be implanted or imposed. However, he could not tell if the thumb print belongs to Lesosia. He further stated that although Mwaura's details are in the data base, he did not check for her details since he had not been given any reference.

27. With that, the Plaintiff's case was closed.

Evidence adduced by the Defendants

28. Mr. Samuel Joseph Wanyoike, the 4th Defendant herein, testified as DW 1. He relied on his Witness Statement dated 31st May, 2019 as his evidence in-chief. He also produced the documents on the Defendant's List of Documents dated 31st May, 2019 in support of the Defendants' case. The documents were marked as D Ex No. 1 -7.

29. In cross examination, he stated that the estate of his mother was distributed. That there were two properties one of which is the subject matter in these proceedings. The suit property was initially owned by their grandmother before transferring it to their mother. In reference to the Green Card, DW 1 stated that the Transfer to Emily Mwaura was an inheritance. The transfer was by personal representative. The ID No. is 4352529/67. He averred that the ID Card on P Ex 36 matches the ID No. indicated on the Green Card.

30. With regards to the Transfer dated 18/12/1996, DW 1 averred that the same ID indicated thereon is for Emily Wamaitha Mwaura. He averred that the Letters from LSK and the one from the Judiciary does confirm that Munene N. Kibuchi is not an Advocate. He however avers that he was not involved in the transaction with the purported Advocate. The stamps of the purported Advocate only appear in the transaction between his Deceased mother and his grandmother.

31. DW 1 further confirmed that the suit property, parcel 1490, is a sub-division of parcel 238 which belonged to his grandmother. He averred that his grandfather and his family lived on the suit property. That his grandfather, grandmother and his mother are buried on the suit property. That the purchaser, represented by the 5th Defendant herein, was well aware of grave sites on the land when he purchased. As for the ID indicated on the Land Control Board application, he could not tell if it was wrong or not. He stated that he was aware who presented the application to the Board as he was not involved in the transaction between his mother and grandmother.

32. Regarding the Transfer dated 18th December, 1996, DW 1 averred that the Letter by Registration Bureau states that it belonged to a third party. However, he could not tell if the transfer was presented at the Lands Registry.

33. In re- examination, DW 1 stated that he did not participate in the preparation of the transfer form on Page 17. As for the Letter from the National Registration Bureau adduced as P Ex No. 36, he stated that the same does not state that the ID does not belong to his grandmother.

34. That marked the close of the 1st to 4th Defendants' Case.

35. The 5th Defendant was absent throughout the hearing hence did not lead any evidence.

Court's directions

36. At close of the hearing, the parties elected to file and exchange written submissions which the Court has had a chance to read and consider them in its determination.



Analysis and Determination

37. Having have considered the pleadings, the evidence and submissions by counsel for the parties, I am of the view that the issues for determination that arise are as follows:
- a. Whether the Plaintiff has made a case for existence of a trust over the suit property;
 - b. Are the provisions of the *Limitation of Actions Act* applicable.
 - c. Whether the suit property was fraudulently transferred to the late Martha Wanjiru.
 - d. Whether the 1st – 4th Defendants lawfully acquired title to the suit property capable of being passed to the 5th Defendant.
 - e. Whether the 5th Defendant’s deceased father was a bona fide purchaser for value without notice.
 - f. Whether the 5th Defendant’s title should be cancelled.
 - g. Who should bear the costs of the suit?

a. Whether the Plaintiff has made a case for existence of a trust over the suit property;

38. Before delving into the proposed issues, it is important to give the history of the suit property from the undisputed facts from the pleadings and the evidence of the parties herein. It is not in dispute that the late Michael Mwaura owned the larger parcel of land known as Githunguri/ Kiaria/238 since 1958 after purchasing it. It is not in dispute that the said Michael Mwaura passed away in the year 1983. However, before his demise, Michael Mwaura issued instructions on how the said parcel should be distributed to his beneficiaries.
39. The Original parcel of land, Githunguri/ Kiaria/ 238 was subsequently sub-divided creating four (4) parcels of land. The parcels are; Githunguri/ Kiaria/ 1488 registered in the name of Cornelius Kimani Mwaura, Githunguri/ Kiaria/ 1489 registered in the name of Lucy Njeri Mwaura, Githunguri/ Kiaria/ 1490 registered in the name of Emily Wamaitha Mwaura, the Widow of Michael Mwaura and Githunguri/ Kiaria/ 1491 registered in the name of Hannah Wanjiku Mwaura.
40. The Plaintiff’s case is that Githunguri/ Kiaria/ 1490, the suit property herein, was registered in the name of their mother, Emily Wamaitha Mwaura, to hold it on her own behalf and in trust of the rest of Michael Mwaura’s children who did not benefit from the sub-division of the Original land-Githunguri/Kiaria/238. That the beneficiaries of Githunguri/ Kiaria/ 1490 were Regina Wangui, Teresia Waithera, Martha Wanjiru, Mary Thuo (the Plaintiff herein), Pauline Njoki and Veronica Wairimu. She avers that the suit property is the family’s gravesite.
41. She contends that the suit property was fraudulently transferred to one Martha Wanjiru, deceased. That Martha Wanjiru consistently refused to their late mother, the title despite repeated requests to do so.
42. On their part, the 1st to 4th Defendants argue that the suit property was not a trust property. They aver that Emily Wamaitha Mwaura transferred the suit property to Martha Wanjiru as gift inter vivo. They contend that the late Michael Mwaura purchased the Original Land, Githunguri/ Kiaria/238 from which the suit property was demarcated from. That the Original Land having not been inherited, the suit property cannot be said to be clan land. Further, that registration of the suit property in the name of Emily Wamaitha Mwaura was absolute. That there is nothing on the title to suggest that it was held in trust.



43. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. See Sections 107 - 109 of the Evidence Act. The Court of Appeal in the case of Mbuthia Macharia –vs- Annah Mutua Ndwiga & another [2017] eKLR explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden.
44. Has the Plaintiff proved her case on a balance of probability? Customary trust is a concept through which land may be acquired in Kenya. It is anchored in statute. It is an overriding interest in land which need not be registered. It subsists on and binds the land. Article 60 (1) (a) of the Constitution alludes to this concept when it refers to intergenerational and intra-generational equity.
45. Trusts including customary trust are provided for under Section 28 (b) of LRA as follows;
- i. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
 - ii. (a).....
 - iii. (b) trusts including customary trusts;
46. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24,25, 26 & 28 of the Land Registration Act, 2012.
47. Section 30 of the then Registered Lands Act provides:
- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:
-;
- SUBPARA g.
- the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.
- One of the overriding interests under Section 30 (g) is the right of the person in possession or actual occupation of the registered property.
48. In *Mwangi & Another –vs– Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights and the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the provisions of Section 126 (1) of the Registered Land Act as to the reference to a trustee are merely permissive and not mandatory.
49. In the case of *Kanyi -vs- Muthiora* 1984 KLR 712 CA, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It is binding on the land.



50. In the case of *Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others* [2005] eKLR which quoted with approval the holding in the case of *Muthuita –vs- Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.
51. Similarly, in the case of *Peter Gitonga -vs Francis Maingi M’Ikiara Meru HC.CC No. 146 of 2000-* it was stated that: -
- “A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.” (emphasis is mine).
52. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family.
53. Section 116 of the *Evidence Act* stipulates that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.
54. In the case of *Mbui Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000* the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.
55. The Supreme Court of Kenya has given detailed guidelines in the case of *Kiebia -vs- M’ Lintari & Another* (2018) eKLR when it stated as follows;
- “Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:
1. The land in question was before registration, family, clan or group land
 2. The claimant belongs to such family, clan, or group
 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”



56. It is evident that the Plaintiff and 1st to 4th Defendants are related. It is also evident that the Original Land from which the suit property was demarcated, was registered in the name of Michael Mwaura (deceased) who was the patriarch of the family. Upon sub-division of the Original Land, the suit property herein was transferred to the matriarch, Emily Wamaitha Mwaura. It is also evident that the son of the deceased patriarch as well as two of his daughters had already benefited from the other portions' resultant of the sub-division. Therefore, I find merit in the Plaintiff's assertion that the land was family land.
57. The Plaintiff also argued that the suit property is the family's gravesite. DW 1 confirmed the assertion in cross-examination when he stated that his grandfather and his family lived on the suit property. That his grandfather, grandmother and his mother and other relatives have been interred on the suit property, which contain the family's gravesite.
58. The Defendants have not adduced any evidence to controvert the Plaintiff's assertion that the suit property was trust land. Although the Defendants allege that Emily transferred the land to Martha as a gift, no evidence was adduced to that effect. In fact, Emily denied transferring the land to Martha. In her Letter of 8th September, 1999 adduced P ex 11, Emily categorically states that the suit property was among the four that was issued to the beneficiaries by their father the late Michael Mwaura.
59. Arising from the above issues and the evidence adduced herein, the Court finds the existence of customary trust merited. Emily Wamaitha was in deed registered as a trustee holding it for herself and that of the Six (6) daughters of the deceased patriarch, Michael Mwaura.

b. Are the provisions the Limitation of Actions Act applicable

60. The 1st to 4th Defendants herein argued that the Plaintiff's claim is time barred. In their Defence, the said Defendants aver that this suit is barred by dint of Sections 4, 7 & 17 of the Limitation of Actions Act and Section 2 (3) of the Law Reform Act. The Defendants aver that the suit herein is time barred having been filed 16 years after the cause of action arose.
61. In rebuttal, the Plaintiff submits that the suit is not statute barred. It was her evidence that she learnt of the transfer of the suit property to her late sister, Martha Wanjiru after conducting a search at the Lands Office. That the Search dated 24th March, 2015 shows the registered proprietor as Muthiga Gituga. She further stated that the Green Card was issued on 29th July, 2011 and she filed the suit in 2015.
62. To contextualize the Defendants' contention, it is necessary to set out the relevant provisions of the Limitation of Actions Act which they cite and I set the them out hereunder: -
Section 4 (2) reads:
"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
63. Section 7 of the Limitation of Actions Act provides:
"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"
64. Section 7 of the Act requires a Plaintiffs to file a suit within twelve years to recover land from the Defendants.



65. It is important to first and for most to establish the main cause of action in the suit. The Court of Appeal in the case of Pius Kimaiyo Langat -vs- Co-operative Bank of Kenya Limited (Civil Appeal 48 of 2015) [2017] KECA 152 (KLR) defined a cause of action as:
- “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”
66. Similarly, in the case of Edward Moonge Lenguuranga vs James Lanaiyara & Another (2019) eKLR, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. The court defined a cause of action to be the legal theory upon which a Plaintiff brings a suit.
67. The Court of Appeal in Mukuru Munge –vs- Florence Shingi Mwawana & 2 Others [2016] eKLR held that:
- “The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.”
68. With the definition and rationale of the limitation in mind, it is important to look at the averments and the prayers contained in the plaint to determine the cause of action raised by the Plaintiff. The Plaintiff, who is suing as an administratrix of the Estate of Emily Wamaitha Mwaura, alleges fraud against the Defendants. She states the particulars of fraud against the Defendants as well as her deceased sister, Martha Wanjiru. It is based on the alleged fraud that the Plaintiff seeks a cancellation of all dealings on the land and reversion of the suit property back to their deceased mother for distribution to the rightful beneficiaries.
69. It is clear from the Amended Plaint that the Plaintiff’s cause of action against the Defendants is that of recovery of land. A claim for recovery of land has to be instituted within 12 years.
70. So when did the cause of action arise? This is a critical question that goes to the root of determining the time when time starts running. It is evident from the Amended Plaint that the suit property was allegedly fraudulently transferred to the deceased, Martha Wanjiru from Emily Wamaitha in the year 1997. This is further evident from the Green Card adduced as P Ex No. 31 which shows that the suit property was transferred to Martha Wanjiru on 2nd January, 1997.
71. In her Witness Statement filed on 31st July, 2019, the PW 1 avers at Paragraph 9 that the late Emily requested her to inquire into the status of her land at the Lands Registry Kiambu. It is when that they discovered that land had already been transferred to Martha Wanjiru allegedly as a gift.
72. It has been argued that the late Emily Wamaitha requested the late Martha Wanjiru to return the title but her requests bore no fruits.



73. Besides the Plaintiff, the Plaintiff adduced Minutes of the family meeting held on 6th June, 1999 and the translation thereof, P Ex No. 8. The first paragraph of the said minutes reads;

“In reference to the matter of the land mentioned above especially how the Title Deed was transferred from Emily Wamaitha Mwangi to Martha Wanjiru Ngugi (daughter of Michael Mwaura).After a lengthy discussion those attending are of the view that it is good that an Advocate ought to be instructed to write to Martha Wanjiru reminding her that she did fulfil her promise made in 1997 promising to re-transfer to Emily Wamaitha her Title, Emily Wamaitha recommends that a letter be written to Martha because she (Wamaitha) never transferred the land and she does not know how the land was transferred.”

74. In deed soon after the meeting, an Advocate was appointed. The Advocate wrote the Letter dated 18th June, 1999 addressed to Martha Wanjiru Ngugi, which Letter was adduced as P Ex 9. The Advocate demanded that Martha re-transfers back the Title; failure to which Emily Wamaitha was to take legal action against her. The Advocate further reminded Martha Wanjiru of her promise she made in 1997 that she would re-transfer the Title.

75. On 8th September, 1999, Emily Wamaitha wrote Demand Letter herself to Martha Wanjiru requesting her to hand over the Title within 7 days from the date of the Letter. She threatened to take legal action if Martha did not comply.

76. From the documentary evidence adduced, Emily Wamaitha became aware of the fraud in the year 1997. This can be deduced from her Letters in which she alleges that Martha Wanjiru promised to re-transfer the Title. Therefore, the cause of action arose in the year 1997.

77. Even if the Court was to assume that there was no meeting in the year 1997 in which Martha promised to re-transfer the Title, then the court can rightly assume that the Cause of Action arose on 6th June, 1999 pursuant to the minutes of the family meeting.

78. Section 20 (1) and (2) of the *Limitation of Actions Act* provides: -

20. Actions concerning trust property

(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—

a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued: Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.



79. In the case of *Macharia Kihari -vs- Ngigi Kihari* [1994] eKLR, the Court of Appeal held as follows: -
- “Limitation period prescribed in Section 20 (2) of the *Limitation of Actions Act* will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law.”
80. See also *Stephens & 6 Others –vs- Stephens & Another* Civil Appeal No. 18 of 1987 where the Court of Appeal held that;
- “the period of Limitation as prescribed in the Limitation of Action Act (Cap. 22) Section 20(1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee property or proceeds thereof converted by the trustee for his own use.”
81. I am also persuaded by the decision of Olao J. in the case of *Michael Gachoki Gicheru vs- Joseph Karobia Gicheru* (2014) eKLR
82. This Court has already found that the suit property was a trust property. Emily Wamaitha was the trustee and the Plaintiff herein is among the six beneficiaries of the trust property. As earlier stated, Emily Wamaitha became aware of the fraudulent transfer on the property in 1997. She kept on requesting for the re-transfer of the suit property back to her with no success. Emily died in 2000 before getting the title back.
83. Emily being a trustee, the beneficiaries to the trust could not commence proceedings to recover the land when Emily was alive. Therefore, the beneficiaries of the trust property herein could only commence proceedings after the death of the Trustee.
84. Section 16 of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya) provides that:
- “For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”
85. The Court of Appeal in the case *Peter Mbiri Michuki -vs- Samuel Mugo Michuki* [2014] eKLR the Learned Judges stated that:
- “The effect of this provision is that when the letters of administration were granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death and an order reviving an abated suit does not operate prospectively to establish an interval of time between the abatement and revival of the suit but is retroactive; an order reviving a suit revives the case from the date the suit was filed by the deceased.
86. The Plaintiff, Mary Huro Thuo, was granted Limited Grant of Letters of Administration Ad Litem on 7th October, 2013 in respect of the Estate of Emily Wamaitha. The suit herein was commenced on 1st April, 2015. It is therefore my finding that the suit herein is not time-barred.



c. Whether the suit property was fraudulently transferred to the late Martha Wanjiru.

87. It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. In *R.G. Patel -vs- Lalji Makanji* (1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

“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.”

88. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

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

See also the case of *Kinyanjui Kamau -vs- George Kamau* [2015] eKLR

89. Looking at the Amended Plaintiff, the court is satisfied that particulars of fraud have not only been pleaded but particularised as against the Defendants.

90. As indicated on the Green Card that the suit property was transferred from Emily Wamaitha to Martha Wanjiru on 2nd January, 1997. However, the Plaintiff (PW 1) led evidence that the said transfer was fraudulent. That the purported Transferor, Emily Wamaitha denied ever transferring the suit property to Martha Wanjiru. In support of her assertion and as earlier noted, the Plaintiff adduced minutes of the meeting held on 6th June, 1999 in which it was agreed that an Advocate be appointed to write to Martha Wanjiru reminding her of the promise she made in 1997 that she would re-transfer the Title to Emily.

91. The Plaintiff also adduced two Demand Letters one dated 18th June, 1999 by Emily’s Advocate and the other one dated 8th September, 1997 in which Emily was requesting Martha to return the Title. Further, upon the demise of Emily, a meeting was held on 14th May, 2000 for her funeral arrangements. In attendance were family members including DW 1, Samuel Wanyoike Wanjiku. The attendees agreed that Martha was to return the title as requested by Emily in her lifetime.

92. Although the Defendants allege that Emily had voluntarily transferred the Title to Martha, it is evident from the minutes adduced and the Demand Letters that Emily denied transferring the suit property to Martha. Further, there is no doubt that Emily died before Martha re-transferred the title to her. If at all Emily had voluntarily transferred the Title to Martha, she could have objected to the resolution made in the meeting of 14th May, 2000 which she attended.

93. The Plaintiff further adduced evidence and challenged the Transfer Form purportedly signed by the late Emily. PW 3 confirmed that the Identification Card Number indicated on the Transfer Form belongs to one Lesosia Ole Katai and not Emily. He stated that the Thumb Print thereon is imposed.

94. DW 1 could not explain why the Identification Card belonged to someone else. He only maintained that the ID indicated on the Transfer Form matches with the one indicated on the Green card. This, in my view, does not explain why a Third Party’s ID was used for the Transfer.



95. To further prove the fraud, the Plaintiff adduced the Letter dated 19th July, 2019 from the Law Society of Kenya as well as the Letter dated 26th July, 2019 from the Chief Registrar of the Judiciary regarding the Advocate who allegedly attested the Transfer Form. PW 2 testified that the person stated thereon, one Munene N. Kibuchi is not an Advocate. The Letter from the Judiciary also confirms that there is no Advocate by such a name in their Records.
96. The Defendants did not have a satisfactory response on this as well. DW 1's explanation was that he was not involved in the transaction with the alleged Advocate. Further, that the Stamps of the purported Advocate only appears in the transaction between his deceased mother and grandmother.
97. Indefeasibility of the title is provided for in Section 26 (1) (b) of the [Land Registration Act](#) which states:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”
 1. Section 26 of the [Land Registration Act](#) is explicit that a title of a proprietor may be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. In the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR, the court elaborating on the provisions of Section 26 held hat: -

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

100. It is trite that when the root of a proprietor's title is under challenge the registered proprietor must travel beyond the instrument and proof the legality of how he acquired the title and show that the acquisition was legal formal and free from any defect or malady. See the decision of the court in *Munyu Maina –vs- Hiram Hiram Gathiha Maina* (2013) eKLR where the court stated as follows;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”



101. In the instant case, it is my finding that the Plaintiff has proved that the title was fraudulently transferred to Martha. Emily until her demise denied transferring the land to Martha. Further the ID used on the Transfer Form was not hers. In addition, the person who purportedly attested her Thumb Print on the Transfer is not an Advocate as alleged.
102. The Supreme Court in the case of National Bank of Kenya Limited –vs- Anaj Warehousing Limited (Petition 36 of 2014) [2015] KESC 4 (KLR) while determining whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of Section 34 (1) (a) of the Advocates Act held that:
- “..... no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”
103. Guided by above decision, the Transfer Form having been attested by an unqualified person, is null and void on that ground alone.
104. It is therefore my finding that the suit property was fraudulently transferred from Emily Wamaitha to Martha Wanjiru and for that reason no interest right and or title was conveyed to Martha at all.

d. Whether the 1st – 4th Defendants lawfully acquired title to the suit property capable of being passed to the 5th Defendant.

105. The 1st to 4th Defendants are beneficiaries of the Estate of Martha Wanjiru. The suit property was transferred to them pursuant to the Confirmed Grant of Letters of Administration in respect her estate. Having found that the Title was fraudulently transferred from Emily to Martha, it follows therefore that Martha did not have a good title to the suit property. She did not receive a good title and neither did could she pass a good title to her estate. This is the tenor of the Doctrine of Nemo dat quod non habet, which signifies that he who has no title, cannot pass anything to the 2nd party at all.
106. In the case of Diamond Trust Bank Kenya Ltd -vs- Said Hamad Shamisi & 2 others [2015] eKLR, the court observed as hereunder;

Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner’s authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd V. Transport Brakes Ltd* (1949) 1 KB 322, at pp. 336-337 when he stated:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”



107. Therefore, since Martha Wanjiru had no good title to pass, the consequence thereof is that the 1st to 4th Defendants acquired no title over the suit property. Consequently, they could not confer any title in respect thereof, to anyone, including the 5th Defendant herein.

e. Whether the 5th Defendant's deceased father was a bona fide purchaser for value without notice.

108. Having found that the 1st to 4th Defendants did not obtain a good title that could subsequently be transferred to the 5th Defendant lawfully, the 5th Defendant claimed that he was an innocent purchaser for value without notice of any fraud. Was he bonafide purchaser for value?

109. An innocent purchaser for value without notice is someone who exchanges value for property without any reason to suspect any irregularities in the transaction. See the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, where the Court of Appeal pronounced itself on the doctrine of bonafide purchaser for value without notice. It commenced off by definition as outlined in Black's law Dictionary 8th Edition as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

110. In the case of Lawrence Mukiri -vs- Attorney General and 4 Others [2013] as well as Katende -vs- Haridar and Company Limited [2008] 2 E.A.173 the Court of Appeal in Uganda defined a bona fide purchaser as here below:

“...a bona fide for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following: -

- a. He holds a certificate of title;
- b. He purchased the property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.”

111. On the same issue, the Supreme Court of Kenya in the case of Dina Management Limited -vs- County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] Eklr re-affirmed the Court of Appeal's decision in the case Samuel Kamere -vs- Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, 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...”

112. It is evident that the 5th Defendant is a neighbor of the parties herein. As a neighbor he must have been aware of the wrangles in the neighbour's home over the subject property. More so considering



that the dispute had subsisted for years. In fact, DW 1 averred that while purchasing the suit property, the deceased purchaser was well aware that the suit property was the family's grave site.

113. It is therefore my finding that had the 5th Defendant conducted due diligence, he could have found out that he was purchasing land subject of a dispute. He would have found out that Martha Wanjiru from whom the 1st – 4th Defendants inherited title from, had fraudulently acquired the subject land. The 5th Defendant was therefore not a bona fide purchaser for value?

f. Whether the 5th Defendant's title should be revoked

114. The 5th Defendant is presently the registered proprietor of the suit property. As such registered proprietor the 5th Defendant would have been, in terms of section 24(a) of the [Land Registration Act](#) No. 3 of 2012 the absolute owner of the suit property and it would be entitled to enjoy the rights of proprietorship as conferred under section 25 of the Land Registration Act.
115. However, owing to the fraud and/or illegality that informed the transaction in favor of Martha Wanjiru, the ultimate transfer to and in favor of the 5th Defendant herein cannot therefore be clothed with indefeasibility.
116. As earlier stated, Section 26 of the [Land Registration Act](#) is explicit that a title of a proprietor may be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
117. Where the title in favor of the vendor is proven to have been obtained and/or acquired unprocedurally, illegally or by corrupt practice, the second and subsequent purchaser of the suit property do not acquire any valid title, irrespective of whether she knew of the illegality or otherwise.
118. I am persuaded by the sentiments of Justice Oguttu Mboya in the case of Margaret Mukami Macharia (Administrator of the Estate of Esther Wangu Macharia) -vs- Jessie Maina Gitau [2022] Eklr, where he stated that:

“Indeed, the provisions of Section 26 1(b) of the [Land Registration Act](#), 2012, does not require Plaintiff/Claimant to prove that the title holder was privy or party to the illegality, and/or corrupt practice. For clarity, all that a claimant that must prove is that the process of the acquisition of the title was replete with impropriety, illegality or corrupt practice.”

119. In the case of Alice Chemutai Too – vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR, where the court held that;

... 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, unprocedurally 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, unprocedurally or through a 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.



The assertion of the defendants that they were innocent purchasers who were not aware of the fraudulent transaction does not hold the water in this case as the purpose of section 26 is to protect real title holders from the unscrupulous persons.

120. Further in the case of *Kassim Ahmed Omar & Another vs. Anwar Ahmed Abed & Others*, Malindi ELC No. 18 of 2015 the Court held that;

“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”

121. The court’s finding in this case is that the 1st to 4th Defendant’s title was null and void since Martha Wanjiru from whom they inherited was obtained illegally and by fraud, the Court must then determine whether it is in a position to cancel the said title.

122. Section 80(1) of the *Land Registration Act* comes into play. It provides: -

“Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

123. This Court is satisfied that the Certificate of title held by the 5th Defendant was procured illegally and as such it is impeachable and ought to be cancelled and/or revoked.

Final disposition

124. Based on the foregoing analysis, it is my finding that the Plaintiff’s suit is merited and I issue the following orders;

- a. A declaration is hereby issued that the suit premises known as Githunguri/ Kiaria/1490 was held in trust by the Emily Wamaitha (Deceased) for all lawful and legitimate beneficiaries.
- b. A declaration is hereby issued declaring that the transfer of the suit premises known as Githunguri/ Kiaria/1490 from the Emily Wamaitha (Deceased Widow) to Martha Wanjiru (the Deceased Daughter) was fraudulent, null and void and it is hereby cancelled in favour of the late Emily Wamaitha.
- c. That the transfer of the suit premises known as Githunguri/ Kiaria/1490 from Martha Wanjiru to the 1st to 4th Defendants and the subsequent transfer and the title issued to the 5th Defendant is hereby revoked and/or cancelled in favour of the late Emily Wamaitha.
- d. I hereby direct that the land register be rectified so that parcel of land title number Githunguri/ Kiaria/ 1490 reverts back to the Deceased Widow to be shared amongst all the beneficiaries of the Estate of Emily Wamaitha Mwaura.
- e. A permanent injunction is hereby issued restraining the Defendants or any one of them, their agents, servants and all claiming under them or any one of them from entering or interfering with the suit premises.
- f. Parties being related I order each to bear their own costs.
1. It is so ordered



DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF APRIL, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

- 1 .Ms. Wangui holding brief for Mr. Ndegwa
2. Ms. S. N. Nganga for the 1st – 4th Defendants
3. NA for the 5th Defendant
4. CA – Ms. Yvette

