



**Muchina (Suing on behalf of the estate of Regina Muthoni Gitau,
Deceased) v Attorney General & another (Environment and Land Appeal
12 of 2019) [2022] KEELC 2200 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 12 OF 2019**

JG KEMEI, J

JUNE 23, 2022

BETWEEN

**PAUL GITAU MUCHINA (SUING ON BEHALF OF THE ESTATE OF REGINA
MUTHONI GITAU, DECEASED) APPELLANT**

AND

ATTORNEY GENERAL 1ST RESPONDENT

JOSEPHINE KABURA GICHUHI 2ND RESPONDENT

*(Being an appeal from the judgment of the Hon Learned Senior Resident Magistrate
M. W. Wanjala delivered on the 8/2/2019 in CMCC No 687 of 2010, Thika)*

JUDGMENT

1. Aggrieved by the Judgement of the Learned Magistrate in the lower Court, the Appellant instituted an appeal by filing the Memorandum of Appeal dated 13/2/2019 raising a total of 12 grounds as follows;
 - a. That the Learned Magistrate erred in law and in fact in holding that the Appellant had not proved her case on a balance of probability that he is the owner of the suit parcel of land despite the overwhelming evidence and uncontested documents tendered before he which sufficiently proved his case on a balance of probability that he is the owner of the suit property.
 - b. That the Learned Magistrate erred in law and in fact by not taking into consideration that the Appellant's Title to the suit property was a first registration issued in the year 1992 while the Plaintiff's title was issued in 1993.
 - c. That the Learned Magistrate erred in law and in fact in failing to consider the CR 12 dated 24/6/2015 produced by the Appellants witness PW1, Henry Kinyua to show that he was a Director of Nyakinyua Company Limited and had facts regarding the suit but conclusively



relied on evidence of 2nd Respondent witness DW2, another alleged Director in whose evidence had a lot to be desired.

- d. That the Learned Magistrate erred in law and in fact by conclusively relying on DW1 evidence that the Appellants title deed dated 3/9/1992 and Green Card thereto were forgeries without subjecting the same for authentication yet the said DW1 was neither a handwriting expert, the author himself nor document examiner.
 - e. That the learned Magistrate erred in law and in fact by failing to appreciate that the evidence tendered by the Respondents as regards to authentication of Appellant's title was insufficient.
 - f. That the Learned Magistrate erred in law and in fact in holding that the documents produced by the Appellant was for one acre piece of land yet there was no prove tendered to the contrary by the Respondents. In any case the title produced by the Appellant has its acreage as 0.1008 hectares which is equivalent to a quarter acre which the Appellant is claiming.
 - g. That the Learned Magistrate erred in law and in fact by failing to appreciate that there were two rival groups of Directors in Nyakinyua Company and each party had an alleged Director as a witness and the only conclusive document to prove the legal Director was the DR 12 dated 24/6/2015 by the Registrar of Companies showing the legal Directors.
 - h. That the Learned Magistrate erred in law and in fact by failing to consider the principle of first in time in that the Appellant had acquired the property known as Land Reference Number Ruiru/ruiru East Block T.559 in 1992 whereas the 2nd Respondent claim of the land is of the year 1993.
 - i. That the Learned Magistrate erred in law and in fact by failing to consider the Appellants submissions and exhibited actual bias against the Appellant.
 - j. That the Learned Magistrate erred in law and in fact by shifting the burden or prove to the Appellant herein.
 - k. That the Learned Magistrate orders have occasioned grave injustice.
 - l. In view of the circumstances set out herein above, the Learned Magistrate totally misdirected himself in delivering Judgment in favour of the 2nd Respondent by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant.
2. The Appellant urged the Court to allow the appeal, vary and or set aside the judgement dated the 8/2/2019.
 3. The Plaintiff's /Appellant's case in the lower Court is comprised in the plaint dated the 16/6/2010 and brought on behalf of the estate Regina Muthoni Gitau (namely Regina), Deceased who was the wife of the Appellant.
 4. He averred that the Deceased was the registered owner of the land parcel Ruiru/mugutha Block 1/T.559 (suit land) having acquired it through her membership in Nyakinyua Investments Limited in 1982. That upon payment of the requisite charges including title processing and survey fees, she balloted and got Ballot No 559 and was subsequently issued with a title on the 3/9/1992. Both the Deceased and the Appellant took possession of the suit land. On the 20/9/2006 a search of the suit land revealed that the land was now registered in the name of the 2nd Respondent who held a title issued on the 20/1/1993 having been registered as such on the 23/9/1992.



5. It was the Appellants case that the 2nd Respondent's title was obtained through fraud illegality or in collusion with fraudsters to defeat the Deceased' rights as a first registration within the meaning of the Registered Land Act (repealed). Particulars of fraud were pleaded in para 6 of the plaint. The Plaintiff/Appellant sought the following orders;
 - a. The Court do declare that the estate of Regina Muthoni Gitauis the rightful owner of the suit land.
 - b. An order that the Land Registrar do rectify the land registry by deleting the name of 2nd Respondent and or any other name in lieu by entering the name of the Plaintiff as the proprietor on behalf of the estate of the Deceased.
 - c. Costs of the suit.
6. The 1st Defendant denied the Plaintiffs suit vide its statement of defence filed on the 7/12/2010 and contended that all the procedures laid down in the law were adhered to by its agents and servants.
7. The 2nd Defendant vide her amended defence and counterclaim dated the 23/11/2012 denied the Plaintiffs claim and averred that if the Plaintiff was ever registered as owner of the land then the same could only be fraudulent as the 2nd Defendant is the registered owner of the suit land. That the Plaintiff unlawfully lodged a caution on the suit land without any colour of right and despite demand to so remove the said caution he has persistently failed to do so. In her counterclaim she sought the orders as follows;
 - a. A declaration that the suit land belongs to the 2nd Defendant
 - b. That the caution against the title by the Plaintiff be removed
 - c. Costs of the suit.
8. The Learned Hon SRM M W Wanjala heard the suit in which the Appellant called 2 witnesses, whilst the 1st Respondent called one witness and the 2nd Respondent called 2 witnesses.
9. By a Judgment dated 8/2/2019 the Court determined the suit and dismissed the Appellants suit and allowed the 2nd Respondent's claim in terms of prayer a and b. It was the conclusion of the trial Learned Magistrate that the Appellant in the trial Court failed to discharge the burden of proof. This is the decision that has provoked this appeal.
10. Parties elected to canvass the appeal through written submissions. The firm of Bwogo Manoti & Chepngeno Associates filed for the Appellant while the firm of Mwangi Chege & Co Advocates filed on behalf of the 2nd Respondent. The 1st Respondent did not oppose the appeal.
11. On ground 1 the Appellant submitted and gave the history of how his deceased wife acquired the land. That she was a member of Nyakinyua Investment Limited and acquired plots, one of which is the suit land. That she purchased shares and was issued with a Share Certificate in 1982. She paid the requisite payments and balloted for the land measuring a ¼ acre in 1988, took possession of the land and was issued with a title on the 3/9/1992. That none of his acquisition documents were assailed by the Respondents. The Plots in Mugutha area where the land is situate only comprise of ¼ acres and not one acre and proceeded to dismiss the allegation by DW2 as unfounded that the ballot for ¼ acre was horizontal and so the vertical one produced by the Appellant was for one acre and went further to state that in any event Nduta Ndirangu was not a Director in 1992 when the Appellant's wife acquired the land.



12. He urged the Court to disregard the evidence of DW2, Nduta Ndirangu to the effect that there were no receipts issued by the company for the ¼ acre plots and submitted that indeed the Appellant had produced the receipts in support of the payments made with respect to the suit land.
13. It was his submission that his title was not challenged. He contended that the trial Court erred in ordering the Land Registrar to investigate the seal and the signature on the Appellant's title. That the fact that it was not done by an independent person/entity raises questions of validity since the Land Registrar cannot investigate itself, it, being a party in the suit that has been sued for fraud. He submitted that the report is tainted and should be disregarded as the Land Registrar is not a signature expert nor a document examiner. Interalia, that the Land Registrar's signature is similar on both titles and the claim that the fonts and the seal affixed on the titles are different are mere conjecture and far-fetched allegations unsupported by evidence. Further that the Land Registrar failed to produce the original register for the suit land. It was his submission that the Directors of the company created a fresh register which they failed to produce before the Court and which was used to give land to the 2nd Respondent.
14. The Appellant submitted that the title held by the 2nd Respondent was obtained fraudulently on grounds that; Nduta Ndirangu was not a Director of the company and yet she issued a clearance certificate for the 2nd Respondent confirming the title; Nduta and her cohort of Directors reallocated land already allocated by the previous two sets of Directors hence depriving the Appellant land and creating two titles; no evidence of fresh register was produced; no transfer from the 2nd Respondents mother in law to herself was tabled; original shareholder register was not produced;
15. In addition, the Appellant poked holes on the title of the 2nd Respondent while maintaining that her title should not be allowed to stand.
16. Relying on the case of *Raila Omolo Odinga & Anor Vs IEBC & 2 others* (2017) eKLR the Appellant maintained that the Appellant has proved title and the burden shifted to the 2nd Respondent to prove her title, which she has failed and urged the Court to uphold the title of the Appellant.
17. Citing the case of Alice *Chemutai Too Vs Nickson Kipkurui Korir & 2 Others* (2015) eKLR the Appellant stated that the 2nd Respondent having failed to proof title has lost protection of the Court as granted by Section 26 of the LRA. See also the case of *Hubert L Martin & 2 Others Vs Margaret J Kamar & 5 others* (2016) eKLR where the Court held that where there are two titles against one parcel of land, the holders of such titles must be always bear in mind that their titles are under scrutiny and therefore need to demonstrate how they got their titles starting with its root. The same dictum was espoused earlier by the Court of Appeal in the case of *Munyu Maina Vs Hiram Gathiba Maina* CA No 239 of 2009.
18. The Appellant further faulted the trial Court for failing to hold that his title was a first registration having been registered in 1992 and therefore under Section 143 of the Registered Land Act enjoys protection of the law and therefore cannot be cancelled even in the face of mistake or fraud and called in aid the decision in the case of *Obiero Vs Opiyo* (1972) EA 227 and *Esiroyo Vs Esiroyo* (1973) EA 388 interalia.
19. In conclusion the Appellant urged the Court to allow the appeal and set aside the judgement of the trial Court.
20. The appeal is opposed by the 2nd Respondent in her written submissions placed before the Court.
21. With respect to grounds 4, 5 & 8 the 2nd Respondent submitted that the title for the 2nd Respondent was registered on the 23/9/92 in the name of Government of Kenya and therefore was the first to be registered given the evidence of the Land Registrar that there exists no register with respect to the



title held by the Appellant's wife. The 2nd Respondent title was issued on the 20/1/93. In totality that the learned trial magistrate relied on the totality of the evidence presented before him in reaching the decision that he did in his judgement and that any claim that he ignored the evidence of the Appellant is not borne of the record.

22. Further the 2nd Respondent refuted the Appellant's claim that the title in his possession was a first registration as the same was not an outcome of an adjudication and registration. That the fact that there was no register for the Appellant's title does not support first registration as no registration in the name of the Appellant's wife ever took place.
23. With respect to grounds 3 and 7 of the appeal, the 2nd Respondent submitted that the PW1 Henry Kinyua Mukuria failed to produce CR12 to support his Directorship in the company. That the CR 12 dated the 24/6/2015 was produced by the Respondent to demonstrate that the said Kinyua was a not a Director of the company despite his assertions at the hearing. He exonerated the trial Magistrate in her submissions by stating that the said Learned Magistrate did not make a conclusive decision on the bonafide Directorship of the witnesses.
24. With respect to ground 6 of the appeal, the 2nd Respondent held that the green card for the land held by the 2nd Respondent is for ¼ acre and not one acre. That DW2 stated in evidence that no receipts were issued for ¼ acre plots but for one acre only.
25. That the allegations of bias on the part of the Learned Magistrate by the Appellant were not supported. In the end the 2nd Respondent urged the Court to dismiss the appeal with costs.
26. Having read and considered the record in the lower Court, the evidence adduced, the record of appeal, the written submissions and all the material placed before me the issues that commend themselves are;
 - a. Who between the Appellant and the 2nd Respondent owns the suit land?
 - b. Whether the 2nd Respondent acquired a good title to the suit land.
 - c. Who meets the costs of the suit and the appeal?
27. As this is a first appeal, it becomes my duty to analyze and re-assess the evidence on record and reach my conclusions in the matter. This was the holding in *Selle v Associated Motor Boat Co.* [1968] EA 123, thus:

“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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

This Court further stated in *Jabane – v- Olenja* [1986] KLR 664, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see also;



Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services(1982-88) 1 KAR 870.”

Who between the Appellant and the 2nd Respondent owns the suit land?

28. This is a classic case of two titles having been issued for one parcel of land within a span of 20 clear days from each other. Both the Appellant and the 2nd Respondent claim ownership of the suit land, Ruiru/mugutha/block 1/T.559.
29. The case of the Appellant is anchored on fraud, illegality and or collusion of the Respondents in registering the land in the name of the 2nd Respondent. The Respondent on the other hand has retorted that she is the registered owner of the land and not the Appellant and should the Appellant have a title the same must have been procured through fraud. That the Appellant has unlawfully lodged a caution on the land without any justifiable cause. That is her case in the counterclaim.
30. *Blacks Law Dictionary* defines fraud as;
- “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. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.
31. It is trite 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. The authors of *Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition* at page 427 stated as follows:
- “Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).
- The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount o an averment of fraud of which any Court ought to take notice”.
32. In the case of *Insurance Company of East Africa vs. The Attorney General & 3 Others* HCCC 135/1998 the Court held that whether there was fraud is, however, a matter of evidence.
33. The Appellant led evidence that his late wife Regina Muthoni Gitau (Regina) acquired properties from Nyakinyua Investment Limited in the 1980s and one of them was the suit land. In respect to the suit land, the Appellant stated that Regina bought 100 shares and was issued with a Share Certificate Number 4539 on the 21/2/1982. I have seen receipts paid by the said Regina to Nyakinyua Investment



Limited on account of survey fees and title preparation costs dated the 24/11/82, 17/8/83 and 5/1/89 (two receipts Nos. 2362 & 2363). All the receipts have been issued in the name of Regina. Thereafter a ballot No 559 was issued to Regina on the 10/11/88. The said ballot contains the No. 559, dated 10/11/88 and C. No 4539. On the 3/9/1992 the title was registered in the name of Regina.

34. On the 2nd Respondent's part, she led evidence that her mother in law namely Nyaruiru Gichuhi bought 100 shares in Nyakinyua Investments Limited and was issued with Share Certificate No 1516. That on the 26/10/1983 she paid Kshs 600/- to Nyakinyua Investment Limited on account of survey fees. That her mother in law then transferred her 100 shares to the 2nd Respondent and was issued with a Share Certificate No 5271 as well as a plot ownership certificate No 4939 both on the 5/3/1992. That following issuance of Share Certificate she was then eligible to ballot and upon balloting she was allocated ballot paper No 559, a copy which was produced in evidence. That it is the land buying company that processed the title and was registered as owner on the 23/9/92 and title was issued on the 20/1/1993. That she collected the title from the company's office in Ruiru as was the custom and practice of the company. Titles were prepared for the members and was called to pick the title upon registration.
35. Ordinarily where there are two titles issued for one land, other than evidence led at the trial, recourse is made to the Register to determine who the true owner is. The basis of this is that under the Torrens system of registration, like ours, the title is guaranteed by the Government and therefore the custodian of the title is the Land Registrar. In this scenario the parties are contesting ownership and the Land Registrar is obligated in law to show which of the two titles is a genuine one.
36. In this case the reverse happened. The Land Registrar testified and informed the Court that the only register which exists in the registry is that of the 2nd Respondent's title. The trial Court ordered him to investigate the two registers and file a report as to which of the two was genuine. In his report he dismissed the Appellants register (green card) on the ground that the signature appearing on the original title produced by the Appellant did not correspond with the known signature of Alex Muriuki, the then Kiambu Land Registrar who signed the title and the register and that the seal affixed thereto was also different. That the title with the smaller font was the genuine one. The witness admitted that he is a trained lawyer and not a document examiner and the basis of his finding was his bare naked eyes and that he did not subject the documents to examination of a document examiner. In my view the opinion of the Land Registrar cannot be held as a basis to dismiss the Appellant's title and register. Being the custodian of the title, the Land Registrar failed in his statutory duty to explain how the land ended up with two titles. The Land Registrar however held that the title and the register of the 2nd Respondent's title was authentic and yet in para 8 of his statement he stated that ;

“ that the Plaintiff and the 2nd Defendant should explain how they both obtained the titles in their possession.”

37. Under cross examination by the 2nd Defendants counsel the Land Registrar admitted that there was a parcel file for parcel 559. He stated;

“ we do not have any green card in the name of Regina Muthoni. There however is a parcel file for plot 559 and Regina's green card is not there (shown green card for 2nd Defendant). I do not have it in my custody.”

38. Given the above scenario, I find the evidence baseless and the best I can do in the circumstances is to disregard it for the reason that no document examiner's report was produced and neither was the seal



produced in Court for the trial Court to apply its mind on it. The evidence of the Land Registrar was purely speculative.

39. It is unfortunate that none of the parties enjoined the land buying company to shed light on how the two titles were processed for one parcel of land given that both parties commonly agree that the titles were processed by Nyakinyua Investment Limited.
40. What then should the Court do in the circumstances? The legal custodian having failed to explain the presence of the two titles over the subject suit land, the Court will then have to investigate the root of title. That is to say deduce how the title came into existence. In Kenya titles are creatures of law. It is a product of a legal process that culminates into a legal document called a land deed. A deed may arise from allocation of land by the National or County Government, sale, demarcation, assent, operation of law, etc.
41. In this case the root of the land is traceable to the land buying company namely Nyakinyua Investment Limited. The company acquired large tracts of land for purposes of settling its members in the 1980s and early 1990s. The process of acquisition of land was aptly explained by PW1 as follows; purchase of shares; issuance of Share Certificate to denote membership, payment of requisite payments such as survey and title preparation, balloting, inspection and identification of the land, occupation of the land and issuance of title. In this case it is commonly accepted that the titles were being processed by the land buying Company and once ready the members were called to collect from their offices.
42. For the title to be registered the following documents would be required; the transfer of the land from the land buying company to the individual, land control board consent, the clearance certificate, the members register or the area list where applicable, the survey plan and such identification documents of the owner as may be required.
43. In this case it is instructive to note that the Land Registrar failed to produce any of the documents that supported the registration or otherwise of the two titles.
44. Evidence was commonly led that the titles were processed by the land buying company and the members would be summoned to collect the same from the offices of the Company. DW2- Nduta Ndirangu Chege who introduced herself as the Chairperson of Nyakinyua Investment Limited stated as much in her evidence in cross examination that;

“ the certificate of the Plaintiff was issued in 1982. I was not in office then. I was elected to office in 1989.the 1st titles were issued in 1991.”
45. On processing of the titles , she stated;

“ we are the ones who processed the titles for members at the lands office. We provided consents, PIN, ID, passport size photographs and transfer. A member signs in a register upon collecting title.”
46. On the issue of multiple members registers, she stated as follows;

“... there was a directive by the government that land buying companies issue titles to members. The 1st titles were issued in 1991. There were issues and wrangles on leadership. ... The government ordered that we register our members afresh. ... We prepared a fresh register. Members were to surrender their Share Certificates to be registered afresh. Some



members refused to surrender. Members were also required to surrender their titles if already issued. The Plaintiff's Share Certificate was not surrendered.”

47. That said, it is clear that Regina balloted for the land in 1988 as shown on the ballot card. She was then allocated plot No 559 and for which a register and title was issued in her name on the 3/9/92. According to the evidence of the 2nd Respondent, it is not clear when she exactly balloted for the plot. She says the Share Certificate was transferred to her by her mother in law and was issued with a Share Certificate and plot ownership certificate on the 5/3/1992. In her own words she stated in her statement as follows;
- “Following the said transfer and issuance of the certificate and survey fees having been paid by my mother in law, I was eligible to ballot. And upon ballot in a public ballot conducted by Nyakinyua Management Committee I was allocated ballot No 559. I produce the ballot No 559 marked D.”
48. It is clear from the above testimony that the probable time that the 2nd Respondent could have balloted was between the 5/3/1992 (date of the Share Certificate and plot ownership certificate) and the 23/9/1992 when she was registered as the owner of the suit land and not earlier. There is no evidence that the 2nd Respondent paid for the preparation of the title. She only paid for the survey fees and the Directors have not explained how she was given a title in the absence of payment.
49. By the 5/3/1992, plot No 559 had been balloted for and allocated to Regina by the Nyakinyua Investments Limited, having made payment with respect to the requisite payments for survey and title processing. Regina was issued with a ballot on the 10/11/1988, 4 years before the 2nd Respondent. Therefore, plot No 559 having been balloted and allocated to Regina in 1988, was not available for balloting by the 2nd Respondent and or allocation by Nyakinyua Investment Limited in 1992. The latter had no rights interest remaining in the said property after having vested the same in the name of Regina vide ballot No 559 in 1988 with the corresponding Share Certificate issued to her on the 21/2/1982. The DW1 presented the members register which showed that Regina held Share Certificate Nos. 4596, 4538, 4539 and 7838. This list agrees with the Share Certificate No 4539 dated the 21/2/1983 issued in the name of Regina.
50. DW2 has alluded to wrangles of the Directors of the land buying company and how the members were asked to surrender Share Certificates after they created fresh registers. She stated that the board resolved that those members who had refused to surrender their titles and Share Certificates were to be taken to Court. But later they changed their minds and resolved that those who had refused to surrender their titles should not claim land from Nyakinyua. There was no evidence led to show that the company actualized its threat to sue the members who refused to surrender their titles; nor any evidence to show that the company recalled the titles; nor that they were actually sued in a Court of law. Whatever it was worth, it is trite that once a title is issued the land buying company had no power to cancel a title.
51. From the foregoing therefore, the 2nd Respondent's action of allegedly balloting and allotment of plot No 559 while the same had been allocated to Regina was fraudulent, deceitful and illegal. To put it otherwise, the 2nd Respondent balloted for nothing and got nothing in the process. The title therefore being held by the 2nd Respondent is a hollow title not supported at its root by any land. I say this because at the time the 2nd Respondent balloted Nyakinyua Investment Limited had divested itself of its rights interest and equity in the suit land. It was already in the hands of Regina.
52. The action of the 1st Respondent in opening the register and registering the 2nd Respondent 20 days after registering Regina's title was illegal fraudulent and deceitful. This is because the land was not available for registration the second time, it having been registered in the name of Regina. The 1st



Respondent is the custodian of the register and at any one time is in charge of what is registered and in whose name. It cannot feign ignorance that it was not aware that two titles were registered over the same land in a span of 20 days.

53. I am agree with the sentiments of the Court in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR when it was confronted with a case of similar nature when the Court observed that:

“As regards complicity by the Commissioner of Lands, the trial Court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title. This is what the trial Court said:”

54. Even if it were to be held (which is not) that the two titles were valid, then the first in time in registration should stand. I am persuaded by the decision of the Court in the case of *Gitwany Investment Limited v. Tajmal Limited & Others* (2006) eKLR wherein it was held as follows; -

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. Commissioner of Lands*, C.A. No. 71/1997 (unreported): ‘...Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by mistake that is admitted, the Commissioner of Lands issued two titles in respect of the same parcel of land, then if both are apparently and on the face they were issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail...”

55. In this case the title of Regina was registered on the 3/9/92 while that of the 2nd Respondent was registered on the 23/9/92 and therefore Regina’s title should stand.

56. The Court having found that the Appellant has explained the root of his title successfully, the burden then shifts to the 2nd Respondent to demonstrate that she has a good title.

57. It is commonly acknowledged by the parties that the Appellant and Regina had possession of the land upto 2006 when the 2nd Respondent attempted to enter and fence the land but was quickly rebuffed by the Appellant when they asserted title to the land.

58. Section 26 of the *Land Registration Act* provides how a title can be impeached. It states as follows;

“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.”
59. The case of the 2nd Respondent is that she is the registered owner and that if Regina has a title she obtained it through fraud. She relied on a register which was admitted to have been created by the Directors during the period of intense wrangling in the company. The evidence led by the 2nd Respondent through its two witnesses in my view did little to dent the case of the Appellant.
 60. Section 108 of the *Evidence Act* states 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. It is my finding that the 2nd Respondent has failed to discharge the burden of proof as set out in law. The 2nd Respondent is however not without a remedy as I believe her relief lies with the land buying company. I say no more.
 61. The issue of which set of Directors were legitimately in office in my view was a non-issue in this case and only helped to obfuscate and muddy the issues before the trial Court. I say so because the letters of clearance were issued in 2010 and 2015 long after the transactions happened in 1992. The CR12 produced by the 2nd Respondent was of no help in determining the real issue in question. Whether the ballots were vertically or horizontally shaped in my view was irrelevant and nothing turned on it. Likewise, the claim that the receipts held by Regina were for one acre plots and not ¼ acre as no evidence was led in support of this position.
 62. It is to be noted the Judgement in the lower Court did not provide for the cancellation of the additional title for the land. The title of the Appellant was left intact and therefore the issue of double titling was not resolved. Having held that the title of the 2nd Respondent was issued illegally/fraudulently the same cannot be left to stand. I am mandated by the provisions of Section 80 of the *Land Registration Act* to cancel the title and I shall make the appropriate orders in the end.
 63. Having made the findings as above it is clear that the 2nd Respondent did not acquire a good title. The answer to issue No 2 is in the negative.
 64. Having carefully considered the evidence and the material placed before me I have come to the irresistible conclusion that the Appellant has proved his case and that consequently I find that this appeal is merited.
 65. Final orders and disposal;
 - a. The appeal is allowed.
 - b. The Judgement of the trial Court delivered on the 8/2/2019 be and is hereby set aside in its entirety.
 - c. Regina Muthoni Gitau, Deceased be and is hereby declared to be the owner of the suit land.
 - d. The Land Registrar be and is hereby ordered to reinstate the register and title in the name of the said Regina Muthoni Gitau, Deceased, forthwith.
 - e. The register and the title held by the 2nd Respondent be and is hereby cancelled forthwith.
 - f. The costs of the suit in the trial Court and this appeal shall be in favour of the Appellant.



66. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent

1st Respondent – Absent

Chege for 2nd Respondent

Court Assistant – Phyllis Mwangi

