



**Kangethe v Muya & 4 others (Environment & Land Case 27 of 2020)
[2022] KEELC 15375 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15375 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 27 OF 2020
LN GACHERU, J
DECEMBER 8, 2022**

BETWEEN

PETER NGIGI KANGETHE PLAINTIFF

AND

IRENE WANJIRU MUYA 1ST DEFENDANT

MUNGAI KAMAU 2ND DEFENDANT

ESTATE OF MWANGI MACHARIA KANYATTE 3RD DEFENDANT

MURANG'A LANDS REGISTRY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. The plaintiff moved this court against the defendants jointly and severally *vide* an amended originating summons dated August 24, 2021, for determination of the foregoing:
 1. Whether the plaintiff is entitled to be declared as the legal registered owner of land parcel of title number Kakuzi/ Kirimiri Block 8/439, by virtue of his registration as the proprietor and issue of a title deed on May 5, 1989, despite all the registration thereon.
 2. Whether in the alternative the plaintiff is entitled to be declared as the proprietor of the land parcel title number Kakuzi/ Kirimiri Block 8/439, by virtue of adverse possession for the period prescribed under section 17 and 38 of the *Limitation of Actions Act* cap 22 Laws of Kenya
 3. Whether in the alternative the plaintiff is entitled to be declared as the proprietor of land parcel of title number Kakuzi/ Kirimiri Block 8/439 by virtue section 7(d) of the *Land Act* and section 28(h) of the *Land Registration Act*



4. Whether the plaintiff is entitled to be declared the proprietor of land parcel title number Kakuzi/ Kirimiri Block 8/439 by virtue of his registration as the proprietor on May 5, 1989 or adverse possession by the applicant for the period prescribed in the *Limitation of Actions Act*, cap 22 Laws of Kenya
 5. Whether a declaration that the subsequent registration over title number Kakuzi/ Kirimiri Block 8/439 is illegal, unprocedural and fraudulent should issue
 6. Whether an order for cancellation of the title resulting from the illegal, unprocedural and fraudulent registration should issue
 7. Whether a declaration should issue that the cancellation of the plaintiff's land proprietorship registration over title number Kakuzi/ Kirimiri Block 8/439 was done without due procedure, was fraudulent and unprocedural
 8. Whether the Land Registrar, Murang'a should be directed by this honorable court to cancel all other entries subsequently registered after May 5, 1989 on the green card to title number Kakuzi/ Kirimiri Block 8/439
 10. Whether the costs are to be in the cause.
2. The originating summons is supported by the affidavit sworn by the plaintiff on August 24, 2021. He deposes that he was allocated the suit property in 1989, and was subsequently issued with a title deed on the May 5, 1989, whereupon he took possession of the suit land and has been in occupation to date. He contends that in 2012, he discovered that the land had been registered in the name of another person and on inquiry at the land's registry, he noted that the land had a restriction placed by Chief Land Registrar.
 3. Further that by an act of fraud, the previous entries including one showing his ownership were cancelled and the land registered in the name of Mwangi Macharia Kanyatte, deceased. He deposes on the steps he took to assert his rights over the land including writing to the Attorney General. It is his case that despite his complaint the land was transferred to 1st respondent and later the 2nd respondent. He deposed that he has been in occupation of the suit property for over 31 years and he is thus by dint of prescriptive rights entitled to be declared the owner.
 4. The 4th & 5th defendants filed a joint response by a replying affidavit sworn by Joseph Kamuyu. In his dispositions, he details how the land was first registered in the name of the plaintiff and subsequently in the names of the 1st -3rd defendants.
 5. The 1st and 2nd defendants filed a replying affidavit sworn by the 2nd defendant. He claims that he bought the suit property from the 1st defendant on August 21, 2013, and took possession of the same in 2014. He contends that in 2020, the plaintiff trespassed into his suit property and he lodged a complaint at Makuyu Police Station. It is his case that he is a *bona fide* purchase and if the plaintiff has any claim over the suit property, he should have approached the Co-operative Tribunal to determine dispute of ownership.

The matter was set down for hearing.

Plaintiff's Case

6. PW1 Peter Ngigi Kangethe testified that he bought a share from Mutithi Farmers' Cooperative in 1988, and was member No 439. He contends that upon payment of the requisite fees, he was allotted land



- which tallies with his membership number. He reiterates the contents of his summons and further stated that he lives in Thika and his nephew has been utilizing the land.
7. On cross-exam, he testified that he was not aware that the Chief Land Registrar had closed title to the land since he was not informed. It was his further testimony that he lost his certificate of membership of Mutithi Farmers' Co-operative, but he paid the requisite fees and has the documentation. He further told the court that he neither knew Mwangi Macharia Kanyatte, nor knew his relationship with the 1st defendant. He testified that he never took any step after the discovery of the fraudulent transactions since he was waiting for response from the Land Registrar and the Principal Land Registrar.
 8. PW2 Joseph Njuguna testified that he is a nephew of PW1, and was employed as a caretaker of the suit land since 1992, where he has been cultivating thereon. He testified that no one ever claimed the land or even tried to evict him. He led evidence on the meeting they had with the (District Officer) over the ownership of the land and the squabbles surrounding the suit land.
 9. On cross-exam, he testified that he leased the suit land to Julius Ndungu from 1999-2011, and reiterated that the land belonged to the plaintiff.
 10. PW3 Julius Mwangi Ndungu, testified that he was utilizing the suit land in 1998-2011, which he was using exclusively. He added that the land was leased to him by PW2, but he used to pay PW1, the costs for the lease.
 11. PW4 John William Njane, told the court that he was the chairman of Mutithi Farmers' Co-operative Society from 2008-2014, and explained how plots No1-1274, were allocated as documented in the Presidential Report, PExh 15. He informed the court that the plaintiff was allocated the suit land and that there was no other presidential report that nullified the original one. It was his testimony that the title deed number was in consonance with the allottee number. Additionally, he testified that he did not know Mwangi Kanyatte
 12. On cross-exam, he confirmed that the receipts in the name of Mwangi Macharia belonged to Mutithi Farmers' Co-operative Society, but insisted he did not know the said Mwangi Kanyatte. It was his testimony that after the Presidential Report, there were petitions over the suit property and he does not know whether the petitions gave rise to the cancellation.
 13. On cross-exam, he maintained that some documents were destroyed by fire in 2013.

Defence Case

14. DW1 Irene Wanjiku Mwai testified that the suit land belonged to her and her husband, and that she participated in the allotment process, but the title was issued in her husband's name. It was her testimony that she sold the suit land in 2014 to the 2nd Defendant and confirmed that she cautioned the land in 2012.
15. On cross-exam, she testified that her allotment share was No. 135 and the Plaintiff's as per the list was No.439. She stated that she had no document to show her husband was registered as No.135, but maintained the suit land belonged to her deceased husband. It was her DW2 Mungai Kamau testified that he bought the land from the 1st Defendant and cultivated it in 2014, but later stopped in 2016. He further testified that he instituted a suit against Njoroge at Kigumo Law Courts, after he told him that he had bought a non-existing land.
16. On cross- exam, he testified that in 2012, when he went to the suit land and found the Plaintiff who was planting on the suit land and that was the case even in 2014, when he bought the land. Further he testified that the Plaintiff put up a temporary structure in 2012.



17. DW3 Muthoni Mputhia, Murang'a Land Registrar testified that entry 2 on the Green Card was cancelled because title was issued erroneously though with no side comments.
18. On cross-exam, she testified that she did not know why there was cancellation since there were no side notes. She further testified that the registration of Mwangi Kenyatte was on 29th April 1993, and led Court on the entries contained in the Green card and concluded that they were not clear. He added that what was before the Court was not noted in the correspondence file and also added that the file did not have the Plaintiff's letter, since it was never acted on. She confirmed that the Attorney General followed up on the matter but the Land Registrar never acted on it.
19. On cross-exam, she testified that she did not know about the whereabouts of the original green card. She also confirmed that the restriction was never signed and informed the Court that there was no document to support the restriction implying the same was rejected.
20. DW3 was recalled to produce a copy of the Original Green Card. She testified that she was not aware whether the requisite procedure was followed in the cancellation process.
21. DW4 Charles Mbate Githua, the Chairman of Mutithi Farmers' Co-operative Society confirmed that the 1st Defendant's husband was a member of the Society with Share Certificate No. 135. On cross-exam, he testified that not all documents were given to them by the outgoing membership of the Society due to the existing wrangles. He informed the Court that he wrote the letter dated 24th May, 2022, using a list of Register they got. He added that he used a copy of a Green Card, Presidential Report and a Copy of Register held by the Society's advocate.
22. The Plaintiff filed his Written Submissions on 30th August, 2022 and raised three issues for determination.
23. On the first issues, the Plaintiff submitted on the regime of law as at the time the Plaintiff acquired title to land. It was his submissions that having been the first to be issued with title deed, his title was valid as far as the case of *Hubert L Martin & 2 others v Maragaret J Kamar & 5 others* (2016) eKLR, is concerned. The Court held that where a Court is faced with two titles to land, it must investigate the root of each title to determine the validity.
24. He further submitted that he was able to inform this Court how he got his title and his title having been subject to fraudulent transaction should revert back to him. He relied on the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR. as quoted by the Court in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015) eKLR, where the Court observed that in case of fraudulent transfers, the title should revert to original owner. In concluding that he should be declared the lawful owner, he submitted that the 2nd Defendant did not undertake due diligence before acquiring title.
25. On whether the cancellation was lawful, he submitted on the powers of the Land Registrar under the old regime of land laws, and also submitted that he was never summoned. In concluding that the process of cancellation and or rectification of title was not lawful, he relied on a litany of cases and concluded that the actions of the Land Registrar of cancelling title were in breach of the Statutory provisions on the process of cancellation of title.
26. On the third issue of whether there was fraud, the Plaintiff through his submissions particularized fraud which he submitted were actuated by the Defendants. He pointed out the circumstances under which he found there was fraud and relied on a number of cases to buttress his claim. In the end he urged this Court to find in his favor.



27. The 4th & 5th Defendants filed their Written Submissions on 3rd October 2022, and raised two issues for determination.
28. On whether the 4th and 5th Defendants fraudulently transferred land, it was submitted that the Land Registrar had no duty to investigate and verify the authenticity of the documents. It is their submissions that the cancellation was lawful and any rectification can only be done if there was fraud. They further submitted that even if the due process was not followed, the Court should allow for investigation to be carried out and invited the Court to the holding in *Chemey Investment Limited v Attorney General and Another*, Nairobi HC Petition No. 94 of 2005), where the Court did not make a pronouncement in a matter to give room for investigations of fraud. It is their submissions that there was no case of fraud established on their end, and since that was not established, the Plaintiff should bear their own costs.
29. The 1st-3rd Defendants never filed any submissions.
30. The Court has perused the pleadings and the annexures thereto and from the analysis of evidence, pleadings, testimonies and submissions, this Court is alive to the controversies surrounding the ownership of the suit land. What is not in dispute is:
- i. There are two titles to this land one held by the Plaintiff issued on 5th May 1989, and the other held by the 2nd Defendant issued on 28th July, 2014.
 - ii. The land was first registered in the name of the Plaintiff on 5th May, 1989, before a cancellation and the same registered in the name of Mwangi Macharia Kanyatte on the even date.
 - iii. Mwangi Macharia Kanyatte was issued with title to the suit property on 29th April, 1993.
 - iv. The said Mwangi Macharia Kanyatte is alleged to have been the husband of the 1st Defendant, who acquired title to the suit property on 20th October, 2013, through a transmission process.
 - v. The 2nd Defendant entered into a sale agreement with the 1st Defendant on the 12th August, 2013.
31. The right to own and acquire property in Kenya is premised on Article 40 of *the Constitution* of Kenya, 2010. The said Article provides as follows;
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person--
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or



- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law....”

32. Further Section 26 (1) (b) of the *Land Registration Act* provides:

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.”

33. What the foregoing requires of this Court is to protect the proprietary rights of both the Plaintiff and the 2nd Defendant and in so doing, protects the Torrens system of land in Kenya. It is trite law that no land can have two titles.

34. With this in mind, the issues for determination are;

- i. Whether the Plaintiff or Mwangi Macharia Kanyatte was the bonafide owner of the parcel No. Kakuzi/ Kirimiri Block 8/439.
- ii. Whether the 2nd Defendant was a *bona fide* purchaser for value without notice.
- iii. Whether there were fraudulent transactions over the suit property.
- iv. Whether the 2nd Defendant’s title should be cancel.
- v. Who should pay costs for the suit.

Whether the Plaintiff or Mwangi Macharia Kanyatte was the bonafide owner of the parcel No. Kakuzi/ Kirimiri Block 8/439 ?

35. The Plaintiff maintains that he is the owner of the suit property having been a successful allottee of the suit property from Mutithi Farmers’ Co-operative Society. The 1st Defendant on the other hand testified that her husband was a shareholder of Mutithi Famers’ Co-operative Society and was allocated the suit property. The 1st Defendant produced a copy of a Share Certificate issued in the name of Mwangi Macharia Kanyatte being Certificate No. 135.

36. The Plaintiff informed this Court that his Share Certificate got lost, but produced a copy of a receipt by Presidential Commission on Large Scale Farms in Makuyu-Murang’a indicating plot No. 439. It is not lost to this Court that both parties gave evidence of affiliation to Mutithi Farmers’ Co-operative Society. The Plaintiff produced a register of Roll of Allotees and evidential his name is included therein.

37. There are two conflicting titles and the parties herein can only lead evidence as to how the title was acquired. A party cannot simply seek to sanctity of title without proving the root of his title. The Court



in *Munyu Maina v. Hiram Gathika Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-

We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

38. Both parties have alleged that they acquired the suit land from Mutithi Farmers’ Co-operative Society, who are not party to this suit. As per the Green Card the land was first registered in the name of the Plaintiff before the cancellation occurred and the land issued to the said Mwangi Macharia Kanyatte on the even date. PW4 the Chairman of Mutithi Farmers’ in 2008-2014, informed this Court that the Plaintiff was the original allottee of the suit land and is still the owner of the suit land. He confirmed that he wrote the letter dated 13th June, 2012, PExh 16, which indicated the land belonged to the Plaintiff. The said letter bears the letter head of Mutithi Farmers’ Co-operative Society Limited, and its’ production was not objected to.
39. Conversely DW4 testified that he is the Chairman of Mutithi Farmers’ Co-operative Society, and he wrote the letter dated 24th May, 2022, Dexh4, the contents thereof indicate Mwangi Macharia Kanyatte, was the owner of the suit property. None of the two officials was able to shade light to this Court on the cancellation that occurred, but they both confirmed that the two parties were members of Mutithi Farmers’ Co-Operative Society. None of the two officials shade light on the circumstance that led to the cancellation of the Plaintiff’s title and issuance of the same of Mwangi Macharia Kanyatte.
40. DW3 the Land Registrar testified that the title in the name of the Plaintiff was cancelled since the same was issued erroneously. She appeared not well versed with the circumstances that led to the cancellation of the title. Admittedly, on cross-examination, she testified that the corresponding file did not indicate why the Plaintiff’s title was cancelled. She further testified that from 1989 to 1993, the title belonged to the Plaintiff and added that the entries in the Green Card were unclear. She confirmed that they received a letter from the Attorney General addressed to the Permanent Secretary, Ministry of Lands, but the office acted on it. She also informed the Court that she was not aware whether the procedure for cancellation of title was followed. This evidence threw deep confusion on the true ownership of the land.
41. The foregoing property was issued under the old regime of the land laws. Section 39 of the *Land Titles Act* Cap 282, repealed by *Land Registration Act*, 2012 provided that:

39.

- (1) In case it appears to the satisfaction of the Recorder of Titles that—
 - (a) a certificate of title has been issued in error or contains a variation from the judgment or judgments relating to the immovable property the subject of the certificate; or
 - (b) a certificate of title has been fraudulently or wrongfully obtained, He may call upon the person to whom the certificate has been so issued or by whom it has been so obtained and is retained to deliver it up for the purpose of being cancelled or corrected as the case may require.



42. Section 81 of the said Act gave powers to the Land Registrar to correct such errors as may appear in the Register. The procedure for cancellation of entries in a register was established under Section 82 of the Act which provided:

82

- (1) The registrar may at any time, after such inquiry and notices, if any, as he may consider proper and upon production of such evidence as may be prescribed or as he may deem necessary, withdraw from the register by cancellation or otherwise any document or entry which he is satisfied has determined or ceased or been discharged, or for any other reason no longer affects or relates to immovable property subject to this Act.
- (2) The registrar may also direct the destruction of any document in his possession or custody which has become altogether superseded by any entry in the register, or has ceased to have any effect.

43. Similarly, part XIII of the Registration of Titles Act, CAP 281, repealed by the Land Registration Act 2012, lays down a clear procedure for rectification of titles. Section 60 of the said Act required the Registrar to:

60.

- (1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.”

44. The Act also lays out in Section 65, the special powers of the registrar which includes inter alia the power to correct clerical errors in the certificate of title, entries or register and to cancel entries. In it, all that the Registrar was required was to summon the registered proprietor before any cancellation could issue and if the proprietor could not comply the registrar had the option of moving the Court.

45. It was the testimony of the Plaintiff that he only became aware of the cancellation of title later. Impliedly, the Plaintiff was never informed of the purported cancellation as by law required. There was no shred of evidence placed before this Court by DW3, the custodian of records that there was compliance with the procedure set out hereinabove. Seemingly, the process of cancellation was undertaken autocratically by the Land Registrar, and as a matter of evidence DW3 admitted to the confusion and she informed the Court that she was not aware whether there was compliance with the process of cancellation. This Court agrees with the sentiments of the Court in the case of Kuria Greens Limited v Registrar of Titles & another [2011] eKLR where the learned judge observed

“I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the Registered Lands Act and the Land Control Act and I did not come across any provision that grants power to a Registrar of Titles or the Commissioner of Lands to arbitrarily revoke a valid land title.”

46. It is curious to note that the Plaintiff was Member No 439, which denominator is common with parcel number of the suit property. While at it, this Court is cognizant of the membership of Mwangi



Macharia Kanyatte to Mutithi Famers' Co-operative Society, which was not disputed. It is also mindful of the receipts adduced in support of the foregoing as well as the testimony of DW4. However, there being no evidence of compliance with the law on the process of cancellation of the Plaintiff's title, it can only be right to conclude that the Plaintiff is the *bona fide* owner of the suit land.

47. Additionally, it was a requirement that the title be delivered up for cancellation. Presently, the Plaintiff did not deliver up the title issued in 1989, to enable the Land Registrar to process a new one in the name of Mwangi Macharia Kanyatte. As rightly stated by the Court in *Evanson Wambugu Gachugi v Simon Wainaina Gatwiki & 2 others* [2014] eKLR,

“Moreover the original title of the suit property was with the 1st respondent. It was never surrendered to the Lands Office in support of the transfer as the original must be surrendered for cancellation before a new title is issued. In the event that the original transfer was unavailable, it was incumbent upon the Land Registrar to publicize its loss in the Kenya Gazette which was not done in this case.”

48. While this Court has the role of preserving and protecting the proprietary rights of Mwangi Macharia Kanyatte, and his estate, it can only do so within the confines of the law.

49. In the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 the learned judge rightly held

“...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 titleholder. 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 titleholder 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. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

50. Certainly, Mwangi Macharia Kanyatte, was issued with his title deed unprocedurally and/ or illegally and such cannot be sanctioned by this Court. Therefore, it follows that Mwangi's title can be impeached. Additionally, this Court notes and appreciates that the Plaintiff was the first allottee of the suit property and there being no evidence suggesting that the allocation was marred with fraud, irregularity or illegality, the allotment remains valid. The Court of Appeal in the case of *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [1997] eKLR upheld the decision of the trial Court where the trial Court when faced with an almost similar situation held;

“It is not in dispute that the 4th respondent was first in time in terms of Presidential approval of grant of suit land. Thereafter the title was perfected. Thereafter the 2nd respondent has become owner of land under Cap 281. Although Mr. Kamau Kuria disputed the fact of approval by H.E. The President as not confirming any property rights, the fact is that right had been conferred on 4th respondent on 22nd November, 1993 who passed his title to the 2nd Respondent. One has an earlier approval and grant (that is the 4th respondent). The other has an approval only and no grant and he is later in time (that is the applicant). ... The earlier grant takes priority. The land is alienated already.”

51. To this end, this Court finds and holds that the Plaintiff is a *bona fide* owner of the suit property.



Whether the 2nd Defendant was a bona fide purchaser for value without notice?

52. The 2nd Defendant bought land from the 1st Defendant vide a sale agreement entered into on 12th August, 2013. A cursory look at the agreement satisfy the conditions of a valid contract within the meaning of it under Section 3 (3) of the *Contract Act*. DW2 considered himself an innocent purchaser for value without notice in paragraph 7 of his Replying Affidavit.
53. A bonafide purchaser has been defined by the Court in the case of *Lawrence Mukiri ...v... Attorney General & 4 others* [2013] eKLR as;
- "... a bona fide purchaser 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;"
54. Further in Uganda *Katende v Haridar & Company Limited* [2008] 2 E.A.173 as quoted by the Court of Appeal in Nakuru CoA App No. 291 of 2013 *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR where the former held:
- "For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as 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 that:
- (a) He holds a certificate of title;
 - (b) He purchased the property in good faith;
 - (c) He had no knowledge of the fraud;
 - (d) He purchased for valuable consideration;
 - (e) The vendors had apparent valid title;
 - (f) He purchased without notice of any fraud;
 - (g) He was not party to any fraud."
55. The 2nd Defendant has title to the suit land having been issued with the said title on 28th July, 2014, through a transfer process. This Court has perused the requisite documents effecting transfers and appreciates compliance with procedure. It was the testimony of DW2 that prior to entering into the sale agreement, he carried out a search which confirmed the land belonged to the 1st Defendant. It was his testimony on cross-examination that through he visited the land in 2012, and found the Plaintiff was utilizing the land, it is not clear why he opted to buy the land nonetheless. Even so, having conducted a search and obtained evidence of ownership, it would be difficult to simply infer irregularities by looking at the document.



56. The Court of Appeal in Civil Appeal No. 156 of 123;- *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR held;-

"It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall".

57. It is not in dispute that the 2nd Defendant has title to the suit property and he purchased the suit land for a consideration from the 1st Defendant who had title. As to whether he was aware of the illegality or unprocedural mishaps, is a matter of evidence, which lies squarely on the part of the Plaintiff under the impetus of Sections 106-109 of the *Evidence Act*. This burden was not discharged and thus there was no material evidence placed before this Court to show that the 2nd Defendant was at the time of the purchase aware of the illegality. It is the finding of this Court that the 2nd Defendant was a bona fide purchaser for value without notice.

Whether there were fraudulent transactions over the suit property?

58. The Plaintiff alleged that the title was fraudulently transferred to the Defendants. Fraud is defined under the *Black's Law Dictionary* 10th Edition as

"A knowing misrepresentation or knowing concealment of a material fact, made to induce another to act to his or her detriment".

59. The Court of Appeal in Mombasa Civ Appeal No. 312 of 2012 *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR held;

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

60. The Plaintiff in his Summons pointed out to the issue of fraud, but did not particularize the same as required by law. There was an attempt to do so through submissions which this Court quantifies that as a trial by ambush. This Court agrees with the findings in the case of *Robin Angus Paul & 2 others v Miriam Hemed Kale* [2019] eKLR, that it is difficult to discharge the burden of proof on allegations of fraud through a suit instituted by way of Originating Summons.

61. The Plaintiff did plead, but failed to particularize fraud in the Summons and taking cue from the Court of Appeal decision in *John Kamunya & Another v John Nginyi Muchiri & 3 others* [2015] eKLR where the Court held:

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

62. The Plaintiff ought to have led evidence as to the existence of fraud on the part of either of the Defendants. Against any backdrop of evidence, the Plaintiff did not place in the least material evidence before this Court to enable the Court to interrogate and conclude that there was fraud on the part of the 1st-3rd Defendants. Even so, the 4th Defendant, the custodian of the documents did not give cogent reason and evidence to support the cancellation of the Plaintiff's title. It was the sole duty of the



Plaintiff to lead evidence that flaunting of procedure was fraudulent. In the case of *Gladys Wanjiru Ngacha v Treresia Chepsaat & 4 others*, [2013] eKLR, the Court held that:

"... 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.

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga v. Nyati* (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact".

63. Within the meaning of fraud as defined in the *Black's Law Dictionary* above, this Court finds that the fact that the official of the 4th Defendant acted in a manner suggesting procedure was followed thereby entertaining any further proceedings on the title amounted to fraud and ought to be sanctioned. The fact that procedure was flaunted without any justification and or reason means that there was fraud. Therefore, this Court finds and holds that the Plaintiff did not on a standard of proof demonstrate any existence of fraud on the part of the 1st- 3rd Defendants but established fraud against the 4th Defendant.

Whether the 2nd Defendant's title should be cancelled?

64. As held hereinabove the 2nd Defendant was an innocent purchaser for value without. What then happens to the 2nd Defendant's title was well elaborated in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR the Court held that

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part".

65. Similarly, in *David Peterson Kiengo & 2 Others v Kariuki Thuo*[2012] eKLR, the Court held:

"Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property."

66. The effect of the foregoing is that the 2nd Defendant losses protection from the law and cannot seek protection under section 26 of the *Land Registration Act*. Section 80 of the same *Act*, provides;-



- (1) 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.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
67. Rectification by Court includes cancellation or amendments of title, circumstances of which are provided above. In Kisumu Misc No. 80 of 2008 *Republic v Kisumu District Lands Officer & another* [2010] eKLR, where the Court held as follows;
- "it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration".
67. Similarly, In Civil Appeal No. 98 of 2016 *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR, the Court of Appeal agreed with the trial Court that
- "The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law".
68. It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences. But since this Court has already found hereinabove that there was fraudulent cancellation and transfer of title, it follows that cancellation will issue. In finding so, this Court appreciates the pronouncement of the Court of Appeal in *Charles Karatbe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR where the Court held:
- "The *Registration of Titles Act* is entirely a product of the Torrens System of registration. The word "Torrens" is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registerable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved."

Who should pay costs for the suit?

69. Section 27 of the *Civil Procedure Act* requires that costs do follow event, but the Courts have the discretion to rule otherwise. This Courts notes the circumstances that led to the finding of this Court and shall exercise the discretion and direct that the 4th Defendant shall pay costs of the suit.
70. The Plaintiff raised the issue of adverse possession but led no evidence to it and this Court will make no pronouncement on the same.
71. However, after a thorough and carefully analysis of the available evidence, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities. The Court proceeds to



enter judgement for the Plaintiff against the Defendants herein, Jointly and Severally in the following terms;

- a. A declaration be and is hereby made that the entry No.2 and subsequent other entries emanating thereof as noted in the Green Card for Kakuzi/ Kirimiri Block 8/ 439, were unprocedural and are therefore cancelled.
- b. A declaration be and is hereby made that the Plaintiff is the *bona fide* owner of all that parcel of land known as Kakuzi/ Kirimiri Block 8/ 439.
- c. An order be and is hereby issued directing the 4th Defendant to cancel and / or revoke Title Deed over Kakuzi/ Kirimiri Block 8/ 439, held by the 2nd Defendant being the resultant title deed arising from the transfer by the 1st Defendant.
- d. An order be and is hereby issued directing that the 4th Defendant to restore the cancelled entries No. 2 and 3 in the Green Card.
- e. The 4th Defendant shall bear costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of;

Ms Maina H/B for Mr. Gichuki for the Plaintiff

Muturi Njoroge for the 1st, 2nd and 3rd Defendants

4th Defendant – Absent

5th Defendant – Absent

Court Assistant – Joel Njonjo

L. GACHERU

JUDGE

8/12/2022

