



Vision Afrika Housing Co-operative Society Ltd & another v Gikonyo & another (Environment and Land Appeal E004 & E005 of 2024 (Consolidated)) [2025] KEELC 379 (KLR) (Environment and Land) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELC 379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E004 & E005 OF 2024 (CONSOLIDATED)
MC OUNDO, J
FEBRUARY 6, 2025**

BETWEEN

**VISION AFRIKA HOUSING CO-OPERATIVE SOCIETY LTD .. 1ST APPELLANT
JOSPHAT MICHUKI CHEGE 2ND APPELLANT**

AND

**STEPHEN KANYUIRA GERALD GIKONYO 1ST RESPONDENT
LAND REGISTRAR, NAIVASHA 2ND RESPONDENT**

(Being an Appeal from the Judgement of the Hon. Wilson Rading, Principal Magistrate dated and delivered 4th April, 2024 in the Chief Magistrate's Court at Naivasha E.L.C Case No. 57 of 2019)

JUDGMENT

1. Coming up for determination on Appeal is a matter which was heard and determined by Hon. Wilson Rading, Principal Magistrate, wherein upon considering the evidence of both parties, vide his Judgment dated 4th April, 2024, the learned Magistrate had held that the title held by the 1st Defendant was an irregular, improper, un-procedural and an illegality and therefore he could not have transferred any better title to the 2nd Defendants. That the 2nd and 3rd Defendants (the 2nd and 1st Appellants herein) did not have any bonafides in the suit property wherein he had proceeded to dismiss their claims and ordered that they bear the cost of the suit.
2. The 2nd and 3rd Defendants being dissatisfied with the Judgement and Decree of the trial Magistrate filed their Appeals No. ELCLA E005/2024 and ELCLA E004/2024 respectively which appeals were on the 11th June, 2024, consolidated with No. ELCLA E004 of 2024 being the lead file. Consequently,



before me for determination is a consolidated Appeal wherein the 1st and 2nd Appellants have appealed against the said judgement of the trial Magistrate based on the following grounds in their Amended Memorandum of Appeal:

- i. That the Learned Magistrate erred in law and fact when he made a finding that the transfer of the suit parcel Gilgil Block 1/763 (Kekopey) to the 1st Defendant (Deceased) was irregular, un-procedural and illegal and thereon the Magistrate held that the 1st Defendant engaged in irregularity to the detriment of the 1st Respondent/Plaintiff without appreciating that the 1st Defendant was already dead at the time of institution of the suit thus the orders given against him in the absence of legal representation were a nullity.
- ii. That the Learned Magistrate erred in law and fact when he failed to take cognizance of the fact that the 1st Defendant who was already dead at the time of filing the suit had been served with summons to enter appearance and therefore any court proceedings against the 1st Defendant were illegal since no proper directions had been given on the proceedings against the deceased 1st Defendant.
- iii. That the Learned Magistrate erred in law by making an order for the cancellation of title registration in respect of the suit property for the 1st Defendant (Deceased) and subsequent registration of the 2nd Defendant whereas the threshold for cancellation of title registration had not been highlighted under the provisions of Section 26(1) as read together with Section 80 of the *Land Registration Act, 2012* which stipulate that before cancellation of a title registration, fraud, corruption and misrepresentation must be proved to have been occasioned by the registered owner in registration of the title deed to land.
- iv. That the Learned Magistrate erred in law and fact by declaring that the 2nd and 3rd Defendants, the Appellants herein were not innocent purchasers for value whereas there were no pleadings made or otherwise adduced by the 1st Respondent/Plaintiff to prove that the 2nd and 3rd Defendants had engaged in acts of fraud, misrepresentation or illegality as required by law and thereon the learned Magistrate made erroneous findings on the aspect of bonafide purchaser by the 2nd and 3rd Defendants since no valid accusations had been pleaded or proved against them.
- v. That the Learned Magistrate erred in law and fact when he made a finding that the 1st Defendant's fraud or illegality could be visited upon the 2nd and 3rd Defendants so as to vitiate their claims of bonafide purchasers without appreciating that acts of fraud or un-procedural dealings and irregularity are strict liability offences/acts attributable to the individual perpetrators themselves and cannot be attributed to other parties whose culpability has not been proved.
- vi. That the Learned Magistrate erred in law and fact when he shifted the burden of proof to the 2nd and 3rd Defendants on the aspect of proof of authenticity of the 1st Respondent/Plaintiff's title deed whereas the issue of genuineness of the 1st Respondent's title deed was a matter which was key and went to the root of the 1st Respondent's case so as to establish the claim by the 1st Respondent that he never sold his land/or he never handed over his original Title Deed.
- vii. That the learned Magistrate erred in law when he failed to make a finding that the 1st Respondent's case was statute barred by operation of Section 7 of the *Limitation of Actions Act* and the exceptions under Section 26 of the *Limitation of Actions Act* could not assist the 1st Respondent's suit and still, the aspect of Adverse Possession considered by the Magistrate in his judgment was inapplicable to the case since both the 1st and 2nd Defendants had registered



interest on the suit land by 22nd March, 2005 and 26th May, 2008 respectively and which interest did not arise through adverse possession.

- viii. That the Learned Magistrate erred in law and fact when he misconstrued case law from the superior courts and then misapplied the case law which presented different facts and circumstances from the subject suit thus taking into account some irrelevant factors resulting in arriving at wrong conclusions.
3. The Appellants thus sought that the instant Appeal be allowed and the judgement of Hon. Wilson Rading, Principal Magistrate delivered on 4th April, 2024 be set aside with the effect that the 1st Respondent's (Plaintiff's) suit before the trial court is dismissed with costs and thereon orders be granted in favour of the 1st and 2nd Appellants as prayed in the Appellants' (3rd and 2nd Defendants') Counterclaims dated 6th August, 2019 and 16th September, 2019 respectively in terms of prayers a), b) and c) and prayers a), b), c) and d) respectively. That the 1st Respondent to bear the costs and interest of the present appeal and costs with interests of the proceedings before the subordinate court.
 4. The Appeal was admitted on 16th July, 2024 and directions issued for the same to be disposed of by way of written submissions wherein the parties complied and filed their submissions which I shall summarize as herein under:

Appellants' submission

5. The Appellant, vide their written submissions dated 23rd September, 2024, summarized the factual background of the matter before framing their issues for determination as follows:
 - i. Whether the orders given against the 1st Defendant who was sued while already dead are a nullity and whether proceedings against the deceased 1st Defendant are illegal on the basis of lack of service of summons to enter appearance.
 - ii. Whether the trial Magistrate erred in making a finding that the 1st Defendant's fraud and irregularity ought to be visited upon the Appellants so as to vitiate their claims of innocent purchasers even in the absence of proof of knowledge by the Appellants of any fraud or irregularities regarding the suit parcel.
 - iii. Whether the trial Magistrate erred when he shifted the burden of proof on authenticity of the 1st Respondent's (Plaintiff's) title deed to the Appellants whereas that issue was the core essence of the 1st Respondent's case so as to establish the claim that he never sold his land or he never handed over his original title deed.
 - iv. Whether the trial Magistrate erred by failing to make a finding that the 1st Respondent's case was statute barred by operation of Section 7 of the Limitation of Actions Act and that the exemptions under Section 26 of the Limitation of Actions Act could not avail the 1st Respondent's suit.
 - v. Whether the learned Magistrate erred in misconstruing case law from the superior courts and thereon misapplied the case law in regard to the different circumstances of the case before him.
6. On the first issue for determination, the Appellants submitted that it was not disputed that the 1st Respondent had sued the 1st Defendant whilst he was already dead, the said 1st Respondent's suit having been filed on 2nd July, 2019 whereas the 1st Defendant had passed away on 2nd March, 2015. That further, before the primary suit had commenced for hearing, the 1st Respondent (Plaintiff) had already been aware that the 1st Defendant was deceased. That the hearing of the Plaintiff's case had



commenced on 16th May, 2023 when the trial court was fully aware that the 1st Defendant was deceased and wherein it went gone ahead and made a determination thereby issuing orders against a deceased person, the 1st Defendant, in its impugned judgement of 4th April, 2024.

7. That being cognizance of the fact that the 1st Defendants was deceased, the trial Magistrate and that it would be absurd and futile to issue orders as against him, while analyzing the evidence, the trial court made adverse findings against the deceased 1st Defendant by stating that the transfer of title to the 1st Defendant must have been tainted with illegality, irregularity and fraud wherein he subsequently made a determination that the 1st Respondent had been the rightful owner of the suit parcel No. Gilgil/Gilgil Block 1/763 (Kekopey).
8. That the court then issued orders against the 1st Defendant's registration of title by stipulating that the transfer to the 1st Defendant and subsequent transfers of suit parcel be revoked so as to restore the status quo as at 26th July, 1996.
9. That the orders for cancellation of the deceased 1st Defendant's registration had been issued in his absence and without ever according him the right to be heard. That in any event, the registration of the 2nd Appellant (2nd Defendant) could not be effected without the initial cancellation of the 1st Defendant's registration on the suit parcel.
10. Reliance was placed on the provisions of Order 4 rule 5 of the Civil Procedure Rules to submit that it ought to have been shown that the Defendant was interested in the subject matter and that he was in existence to answer the Plaintiff's claim. That in essence, a dead man could not answer to any claim and therefore an order issued against a deceased person or an order issued to affect the rights of a deceased party would be a nullity. That such orders would be in vain as dead people did not take commands from the court neither could they protect their rights or properties. That indeed, when the learned Magistrate accused the Deceased 1st Defendant of fraudulent activities and illegalities as against the 1st Respondent (Plaintiff), he had engaged in the absurdities which he had initially cautioned himself not to venture into as per the judgement. Reliance was placed in a combination of decisions in the case of Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another [2009] eKLR and Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others [2018] eKLR to submit that it was clear beyond peradventure that the case that had been instituted against the deceased the 1st Defendant had been a nullity ab-initio.
11. Further reliance was placed on the provisions of Order 5 Rule 2 of the Civil Procedure Rules and the decided case of Mobile Kitale Service Station v Mobil Oil Kenya Limited 7 Another [2004] 1 KLR to submit that despite the fact that the summons to enter appearance against the 1st Defendant had expired on account that he could not be served having passed away prior to the filing of suit, the 1st Respondent (Plaintiff) had failed to return the summons back to court and seek for directions. That subsequently, the court had been duty bound to dismiss the suit against the 1st Defendant as per provisions of Order 5 Rule 2 (7) of the Civil Procedure Rules so as to prevent an injustice whereby adverse orders had been issued against the deceased 1st Defendant. Reliance was placed in the decided case of Ali Bin Khamis v Salim Bin Khamis Kirobe & 2 Others [1956] 23 EA 195 at page 199.
12. That the 1st Respondent had impleaded the 1st Defendant as the principle forger or fraudster who had transferred the subject title unlawfully from his names. That it was thus apparent that the 1st Defendant had been a necessary party to the case for purposes of proving the liability attaching against the Appellants (the 2nd and 3rd Defendants) with respect to the matters of fraudulent transfer and/or mistaken registration of the subject title deed. That ideally, when the proceedings and resultant decision



had been made in contravention of the rules of natural justice, the entire process had become invalid hence the decision that had been arrived at was a nullity.

13. On the second issue for determination, the Appellants submitted that there had been no particulars on elements of fraud and illegality occasioned upon by the 1st Respondent by any of the Defendants in the suit. That subsequently, it had been erroneous for the trial Magistrate to make a finding that the deceased 1st Defendant's conduct of acquiring title to the suit land in a fraudulent or irregular manner was conduct which could be visited upon the Appellants so as to defeat their claims of innocent purchasers for valuable consideration.
14. They placed reliance in the Supreme Court decision of *Zehrabanu Janmohammed (SC) (Suing as Executor of the Estate of the late H.E Daniel Toroitich Arap Moi) & Another v Nathaniel K. Lagat & 4 Others* Petition No. 17 (E021) of 2022 (Unreported) at pages 45-46 to submit that it was not automatic that when a previous owner of title was accused of fraud or irregularity, that all other subsequent owners by implication were deemed to be bound by the fraudulent activities of the previous owner. That in any case, the elements of fraud, mistake, misrepresentation, corruption or illegality had to be pleaded and proved wherein the subsequent purchasers had knowledge of the same or could have at the very least discovered the fraud or illegality by exercise of due diligence.
15. It was thus their submission that the 2nd Appellant had exhibited himself as an innocent purchaser for value from the 1st Defendant hence he had been able to pass his interest on the suit land to the 1st Appellant who was also an innocent purchaser without notice of any fraud. That indeed, the Land Registrar who had testified as DW5 had led evidence to the effect that the 2nd Appellant's title had been signed by a former Registrar known as Charles Sungu. He had also testified that the 2nd Appellant's title deed had emanated from Naivasha Lands Registry. They placed reliance in the Ugandan Case of *Bizibu William v Kalangwa Emmy & 3 Others* UG. HCCC. 17 of 2017 at pages 9, 10 and 12.
16. That pursuant to the provisions of Section 26 and 80(2) of the *Land Registration Act* a court could only direct rectification to affect the title of a proprietor who was in possession and had acquired the title for valuable consideration, firstly, only if the said proprietor had knowledge of the omission, fraud, or mistake in consequence of which the rectification was being sought. Secondly, if the proprietor had procured the title by causing registration via omission, fraud or mistake or had substantially contributed to it by any act of negligence or default.
17. That there therefore had to have been pleadings and evidence adduced as to how the corrupt scheme had been implemented and a demonstration of the illegalities that had been involved in procuring registration of the subject title. That the court was not at liberty under the law to speculate, make insinuations and/or assumptions without any evidence and/or pleadings then proceed to come up with conclusions that an illegality had been involved in procurement of the questioned title as was in this case.
18. That the trial court had engaged in a miscarriage of justice that had been detrimental to the Appellants' rights and interests on the suit land. Reliance was placed in the decided case of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR and the provisions of Order 2 Rules 4 (1) and 10 (1) of the Civil Procedure Rules to submit that a court would be engaging in a misadventure if it were to pronounce a judgement relating to fraud, illegality, misrepresentation or irregularity in the absence of proper pleadings, particulars of pleadings and/or evidence demonstrating the same.



19. Their reliance was hinged on the definition of a bonafide purchaser from the Black's Law Dictionary (revised 4th Edition) to submit that without proof of liability against the deceased 1st Defendant, there could be no proof of fraud against them.
20. They placed reliance in the decided case of *Gathoni Wahome v Kabuchi Rwario & 3 Others* [2017] eKLR to submit that the 1st Respondent's suit had been a non-starter from the outset considering that the person accused of fraudulently procuring the 1st Respondent's title deed had been deceased. That consequently, the subsequent purchasers being the Appellants herein were innocent parties and could not be held liable for the alleged fraudulent acts of the deceased 1st Defendant.
21. Reliance was placed in a combination of decisions in the case of *Wamukota v Donati* (1987) KLR and *Nyakundi Okerio & Another v Elijah Sokobe Obot & 2 Others* [2021] eKLR to submit that since the pertinent prayer in the 1st Respondent's suit had been for a declaration that the transfer of the suit property from the 1st Respondent to the 1st Defendant (Deceased) had been fraudulent, had the court found that the prayers sought against the deceased were a nullity, all other consequential prayers should never have been granted.
22. On the third issue for determination, they submitted that the burden of proving the authenticity of the 1st Respondent's title deed had been the core essence of the 1st Respondent's case in proving the root of his title deed and that the said burden had never shifted to the Appellants. That the learned Magistrate therefore erroneously shifted the burden of proof to the Appellants. Reliance was placed in the case of *Zehrabanu Janmohammed (SC)* (supra) to submit that the party claiming infringement of his property rights had the obligation to prove the legitimacy of his title deed. That indeed, the 1st Respondent did not in any way prove on a balance of probabilities that he had been in possession of an original title thus requiring protection of the court.
23. That since it had been the 1st Respondent's contention that he had never given out his title or sold the suit property, the burden of proof lay on him to establish that the title deed in his custody had been genuine and not a duplicate one. Reliance was placed on the provisions of Sections 108, 112 and 116 of the *Evidence Act*.
24. That whereas the 1st Respondent had stated that he had never occupied and/or taken possession of the suit property, the 2nd Appellant had testified that he had obtained the title deed for the suit property in his name from the 1st Defendant (Deceased) and proceeded to build a 2 roomed mabati structure thereon and had engaged in cultivation activities therein. That when the suit property was eventually sold to the 1st Appellant, the said 1st Appellant took possession of the same and commenced its subdivision into 40 plots wherein the 1st Appellant was currently in possession of the suit property wherein the 1st Respondent had sought for orders of eviction.
25. Reliance was placed in the Court of Appeal's decision in *Bandi v Dzomo & 76 others* (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) (24 June 2022) (Judgment) to submit that it had been incumbent upon the 1st Respondent to establish that the entries on the green card had been incorrect by undertaking an exercise for verification of his title deed. That further, the 1st Respondent's argument that where equities were equal, the first in time prevails had been fallacies since the 1st Respondent and the 2nd Appellant's title did not have a similar background.
26. That the matter of the disappearance of the parcel file for the suit land could not by itself be used as a guide to connote fraud on the part of the Appellants. Reliance was placed in a combination of decisions in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR and *Esther Wanjiru Muraguri v Republic* [2017] eKLR to submit that the 1st Respondent's failure to authenticate his title



deed that had been issued in the year 1996, that is, 23 years prior to the filing of the instant suit meant that he had not established that he had in his custody a genuine title deed.

That subsequently, the learned Magistrate ought to have made a finding that the 1st Respondent's case had not been proved to the required standard hence it had been wrong of him to shift the burden to them to prove the authenticity of the 1st Respondent's title.

27. On the fourth issue for determination, they hinged their reliance on the provisions of Sections 7 and 26 of the *Limitation of Actions Act* to submit that whereas Section 26 of the said Act served to extend time on causes of action if the discovery of a right of action had been prevented by fraud or mistake, the said section did not operate to extend time in cases involving an innocent purchaser for valuable consideration.
28. That indeed, the 1st Respondent's suit had been based on a claim for title to land and that it was not in contention that the deceased 1st Defendant had been registered as proprietor of the suit property on 22nd March, 2005. That it was also not in dispute that the 1st Respondent had filed the instant suit on 2nd July, 2019 over 14 years from the time when the cause of action had arisen. That it had been thus incumbent upon the 1st Respondent to demonstrate that he could not even with due diligence have discovered that the title to his land had changed hands as from 22nd March, 2005 whereupon he had been unable to file the instant suit within the requisite 12 years as envisaged under Section 7 of the *Limitation of Actions Act*.
29. It was thus their submission that the learned Magistrate had erred in interpreting the objections by the Appellants on Limitation of Time in respect to the 1st Respondent's suit as claim for adverse possession while failing to realize that the 1st Respondent had not shown that he had exercised due diligence in trying to discover the alleged fraudulent transfer of title that had occurred on 22nd March, 2005. It was their submission that a claim for title to land ought to be filed within 12 years from the date when the cause of action arose.
30. Their reliance was hinged on a combination of decisions in the case of *Margaret Wairimu Magugu v Karura Investment Limited & 4 Others* [2019] eKLR, *Iga v Makerere University* [1972] EA. 65 and *Nelson Machoka Keraro v Land Registrar Kisii & 3 Others* [2019] eKLR to submit that the law on Limitation of Actions was intended to protect Defendants against unreasonable delay in the bringing of suits against them as well as guarding against prosecution of stale claims especially where the Defendant may have lost evidence for his defence and/or crucial witnesses may have passed away due to lapse of time. They thus submitted that the 1st Respondent's suit had been statute barred hence the reliefs sought ought not to have been granted.
31. On the fifth issue for determination, they reiterated the holding of the trial court at paragraphs 116, 119 and 120 of the impugned judgement to submit that the learned Magistrate fell into error when he misinterpreted the decision in *Dina Management v County Government of Mombasa & 5 Others* [2023] eKLR and thereon misapplied the said decision to the different circumstances that had been presented herein. They relied on the case of *Zehrabanu Janmohammed (SC)* (supra) to submit on the parameters that needed to be considered on the issue of indefeasibility of title and innocent purchaser.
32. In conclusion, they submitted that in view of the foregoing, the Appellants' Appeal had merit hence the court should set aside the trial Magistrate's judgment since the same had not been legally sound.



1st Respondent's Submissions.

33. In response to the Appellants' Appeal and in opposition thereto, the 1st Respondent vide his written submissions dated 21st October 2024, summarized the factual background of the matter and then framed his issues for determination as follows:
- i. Whether the Learned Magistrate acknowledged the absence of the 1st Defendant as he was deceased.
 - ii. Whether the threshold for cancellation of the suit title had been met.
 - iii. Whether the Learned Magistrate erred in making orders to clarify on who are the bona fide innocent purchasers of the suit land.
 - iv. Whether the 1st Defendant's fraud or irregularity was visited upon the 2nd and 3rd Defendant.
 - v. Who bears the burden of proof?
 - vi. Whether the 1st Respondent's case was statute barred by *Limitation of Actions Act*.
 - vii. Whether the Learned Magistrate misconstrued case law of the senior court.
34. On the first issue for determination as to whether the Learned Magistrate had acknowledged the demise of the 1st Defendant, the 1st Respondent submitted that whereas at the time of filing the suit before the trial court the he was unaware of the 1st Defendant's demise, he had subsequently brought it to the attention of the court upon learning of the same, which had been after the suit had been filed wherein he had persuaded the court to invoke the provisions of Section 80 of the *Land Registration Act*. That ipso facto, there being other Defendants in the suit and the subject matter of the suit herein having survived the 1st Defendant, the suit would still be heard to its logical conclusion.
35. That indeed, it was impeccable to note that the Appellants had only raised the issue after the court's proceedings and judgement had been entered and delivered, hence their intention was mala fide with the purpose of defeating the procedure of justice to their favour thus the instant Appeal had no apparent bearing and the same should be plummet instantly.
36. That in any case, Magdalene Kamau Wanjiru, the 1st Defendant's widow had testified as PW2 in the trial court to the effect that the 1st Defendant never owned the suit property. That it was therefore clear that the 1st Defendant's name appearing in the green card as having bought the suit property from the 1st Respondent had been a ploy to detract the roots of ownership of the property since from the evidence that had been tendered in the lower court, it was clear that the 1st Defendant had not been part of the transaction.
37. That further, it had been clear from the trail court proceedings that the 2nd Appellant had been the perpetrator and the executor of the fraud occasioned on the suit property and the sole reason why the instant matter had been brought to court. That indeed, the 2nd Appellant witness's testimony had been marred with irregularities in regard to the identity of the 1st Defendant hence a criminal trial had been instituted against him and others.
38. That the inclusion of the 1st Defendant as a party to the suit had been informed by the fact that his name had appeared in the green card as having had bought the property from the 1st Respondent. Reliance was placed in a combination of decisions in the Indian cases of *C. Muttu v Bharath Match Works* AIR 1964 Kant 293 and *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 to submit that the presence of the 1st Defendant in the suit did not render the same a nullity as there had been other



- Defendants therein. That in any event, the trial court in its judgement did not make any orders that had directly required compliance by the 1st Defendant thus the Appellants claim was misplaced.
39. That the trial court had been right in its findings since the failure to strike out the 1st Defendant's name had been a technical issue that did not go to the root of the claim of fraud as evidenced by the testimonies of DW1, DW2 and DW3.
40. On the second issue for determination as to whether the threshold for cancellation of the suit title had been met, his reliance was hinged on the provisions of Section 80 (1) of the *Land Registration Act, 2012* to submit that he had sufficiently proved the root origin of his title to the suit land having produced a copy of the original title. That he had purchased the same from GEMA which had been a land buying company and as could also be confirmed from GEMA's register entry No. 763.
41. That he was affirmative that he did not sell his land to any person whosoever nor was he known to the 1st Defendant to whom the records alleged he had transferred the same to. That subsequently, it was clear that the subsequent title passed to the 2nd and 3rd Defendants had been tainted with illegality from the primal stage of its existence.
42. He reiterated that he had produced the original title that was still in his custody as evidence that he did not transfer the suit property to the 1st Defendant. He placed reliance in the decided case of *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 Others* [2016] eKLR to submit that the 2nd Appellant had failed to illustrate how the property had moved from the 1st Defendant to his name thus he had failed to demonstrate the root of his title. Further reliance was placed in the decided case of *Gitway Investment Ltd v Tajmal Ltd & 3 Others* [2006] eKLR to the effect that when two equities are equal, the first in time prevails. That he had met the threshold to necessitate the cancellation of the defective and illegal title owned by the 2nd Defendant which was to be subsequently passed to the 3rd Defendant. Further reliance was placed in the decided case of *Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit* [2021] eKLR.
43. On the third issue for determination, he placed reliance in a combination of decisions in the case of *Samuel Kamere v Land Registrar Kajiado, Nairobi Court of Appeal, 28 of 2005* and *Hannington Njuki v William Nyanzi High Court Civil Suit Number 434 of 1996* to submit that the 1st Appellant did not fall in the category of an innocent purchaser. That subsequently the instant Appeal was bound to fail because the 2nd Appellant had no good title to pass to anybody as the said title had been marred with fraud. Reliance was placed in the decided case of *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR.
44. On the fourth issue for determination as to whether the 1st Defendant's fraud or irregularity could be visited upon the 2nd and 3rd Defendants, he submitted in the affirmative while hinging his reliance in the decided case of *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R 1169 at page 1172. That an illegitimate title could not confer to the 2nd Appellant any interest and valid title of the suit land to pass to ensuing purchasers as the same was null and void.
45. As to who bears the burden of proof, he submitted that the Appellants having challenged the authenticity of the 1st Respondent's title to the suit land, they should provide necessary evidence in law, fact and documentary proof on the information of the title of the suit land on how it had been acquired and who was the legal registered owner. Reliance was placed on the provisions of Sections 107 and 116 of the *Evidence Act*.
46. On the sixth issue for determination as to whether the 1st Respondent's case was statute barred by *Limitation of Actions Act*, he placed reliance on the provisions of Section 26(c) of the *Limitation of*



Actions Act to submit that it was clear from the 1st Respondent's evidence that he had discovered fraud on the suit property in the year 2019 upon conducting a search. That in any event, the matter on the suit being time barred had been canvassed in the instant suit more than twice wherein the court had come to the same conclusion that it was not.

47. As to whether the learned Magistrate had misconstrued case law of the superior court, he submitted that the Appellants were not clear on which case laws and from which superior court, the Magistrate had misconstrued in the course of rendering his judgement. That further, the Appellants were wasting the courts time by tasking it with the responsibility of reading the Memorandum of Appeal beyond the scope they had provided contrary to the Rules of Appeal which required the Appellant to keep the grounds clear and straight forward. That indeed, the advocate's duty to the court as an officer of the court was not to waste court's precious time.
48. He thus submitted that the Appeal that had been made by the Appellants in their Memorandum of Appeal lacked merit and proper footing thus the same should be dismissed.

2nd Respondent's Submissions.

49. The 2nd Respondent and that vide its Submissions dated 21st October, 2024, summarized the factual background of the matter before framing two issues for determination as follows:
- i. Whether the Learned Magistrate erred in law and fact in ordering the cancellation of Title No. Gilgil/Gilgil Block 1/763 (Kikopey).
 - ii. Whether the Appellants are entitled to the prayers sought in the Memorandum of Appeal.
50. On the first issue for determination as to whether the Learned Magistrate had erred in law and in fact in ordering the cancellation of Title No. Gilgil/Gilgil Block 1/763 (Kikopey), it hinged his reliance on the provisions of Section 26 (1) (b) to submit that the title of an innocent person was impeachable so long as it had the been obtained illegally, un-procedurally or through a corrupt scheme. That the title holder needed not to have contributed to the vitiating factors and that the purpose of the said provision was to protect the real title holders from being deprived of their titles by subsequent transactions.
51. It also placed reliance in the Court of Appeal's decision in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR and the provisions of Section 80 (1) of the Land Registration Act to submit that it was clear that the court had powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration had been, made or omitted by fraud or mistake. That further, whereas Article 40 of the Constitution provided for protection of property from arbitrary deprivation and restriction from the enjoyment of the same, Article 40(6) of the Constitution provided that the said protection was not available to property that had been found to have been unlawfully acquired.
52. It was thus its submission that the learned trial Magistrate did not error in finding in favour of the 1st Respondent since it was certain that the alleged transfer of title to the Appellants herein and any subsequent purchasers had been unlawful, illegal and fraudulent for the reason that the 1st Respondent herein had never sold the property and that the root of the Appellants' title could not be explained.
53. On the second issue for determination as to whether the Appellants were entitled to the prayers sought in the Memorandum of Appeal, it submitted that the court should find that the transfer of the suit property to the Appellants had been done through fraud as the root of their title could not be explained thus the court should find that such titles fell under the category of titles that must be impeached. That indeed, the transfer of the property had been tainted by an illegality as the 1st Defendant in the suit



leading to the instant appeal did not have a clean title capable of being transferred to the 2nd Appellant and subsequently the 1st Appellant.

54. That the protection that had been provided to the Appellants by law must then be lifted once the court held that there was fraud and misrepresentation of facts. Reliance was placed in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR and the provisions of Section 80 (1) of the [Land Registration Act](#).
55. The 2nd Respondent thus submitted that the Appellants were not entitled to the prayers sought in the Memorandum of Appeal.

Analyses.

56. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited vs. First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the [Civil Procedure Act](#), a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

57. According to the proceedings herein, the 1st Respondent instituted a suit against one Samuel Kamau Gikonyo (Deceased), the Appellants and the Land Registrar Naivasha in the Chief Magistrate’s Court at Naivasha ELC Case No. 57 of 2019 vide a Plaint dated 27th June, 2019 wherein he had sought for;
- i. A declaration that the suit property Gilgil/Gilgil Block 1/763 (Kikopey) belongs to the Plaintiff.
 - ii. A declaration that the transfer of Gilgil/Gilgil Block 1/763 (Kikopey) from the Plaintiff to the 1st Defendant as well as the subsequent transfers was unlawful and fraudulent.
 - iii. An order compelling the 4th Defendant to cancel and revoke the title deed of the suit parcel and restore the status quo as at 26th July, 1996.
 - iv. An order of eviction to be issued against the 3rd Defendant.
 - v. An order of injunction restraining the 2nd and 3rd Defendants from entering into, fencing, building, selling, transferring or in any way interfering with the Plaintiff’s lawful use of Gilgil/Gilgil Block 1/763.
 - vi. Costs of the suit.
 - vii. Any other relief the honorable court shall deem fit to grant.
58. Subsequent to the filing of the suit, the 2nd Defendant, the 2nd Appellant herein filed his Statement of Defence and Counterclaim dated 16th September, 2029 wherein he stated that the 1st Respondent/Plaintiff’s suit was misconceived, bad in law, inept, a non-starter and did not disclose any reasonable cause of action against the Defendants hence the same should be struck out with costs. He admitted



that he was the current registered proprietor of the suit property and that he had acquired the title to the same procedurally and legally hence the issuance of his title deed on 26th May, 2008 and that the said land had initially been registered in the name of the 1st Defendant. That the Plaintiff's suit had been statutorily time barred since the 1st Defendant had been registered as the proprietor of the suit property in the year 2005 thus the Plaintiff's claim of ownership had been extinguished thereby stripping the court of the jurisdiction to entertain the same. That subsequently, the Plaintiff was not entitled to any of the prayers or reliefs sought in the Plaint.

59. In his counterclaim, the 2nd Defendant (now Plaintiff) sought for the present suit to be dismissed with costs and judgment entered for him against the Plaintiff (now Defendant) as follows;
- i. A declaration that the suit property Gilgil/Gilgil Block 1/764 (Kekopey) measuring approximately 2.03 Ha belongs to the 2nd Defendant (now Plaintiff).
 - ii. A declaration that the transfer of the suit property from the 1st Defendant to the 2nd Defendant (now Plaintiff) and subsequently to the 3rd Defendant was lawful and procedural.
 - iii. An order that the caution registered to restrict dealings on the suit parcel in favour of the Plaintiff (now Defendant) be removed forthwith.
 - iv. A permanent injunction restraining the Plaintiff (now Defendant) by himself, his servants or agents from entering, remaining, taking up, possessing, evicting and/or interfering with the suit land Gilgil/Gilgil Block 1/764 (Kekopey) measuring approximately 2.03 Ha.
 - v. Costs of the suit be awarded to the 2nd Defendant (now Plaintiff) with interest thereon.
 - vi. Any other or further relief that the honourable court may deem fit to grant.
60. In response, the Plaintiff denied the contents contained in the 2nd Defendant's Statement of Defence contending that at all material times relevant to the instant suit, he was the lawful owner of the suit parcel Gilgil/Gilgil Block 1/764 (Kikopey) and that he still held the title that had been issued to him on 26th July, 1996. That secondly, Section 26 of the [Limitation of Actions Act](#) had a provision for extension of time on the Limitation of action hence the said time did not begin to run until the Plaintiff had discovered the fraud.
61. In regard to the Counter Claim, the Plaintiff (now Defendant) denied transferring parcel Gilgil/Gilgil Block 1/764 (Kikopey) to the 1st Defendant hence the 2nd Defendant (now Plaintiff) could not have legally sold the suit parcel to the 3rd Defendant since he had no good title to pass. That the 2nd Defendant (now Plaintiff) was not an innocent purchaser for value. He contended that the 2nd Defendant's (now Plaintiff) counterclaim was bad in law and incompetent should be dismissed with costs and judgement be entered as had been prayed in the Plaint.
62. The 3rd Defendant (the 1st Appellant herein) vide its Statement of Defence and Counter-Claim dated 6th August, 2019 denied the allegations in the Plaint stating that the present suit was misconceived and the Plaint bad in law for non-disclosure of material facts pertinent to the suit. That it was the bonafide purchaser for valuable consideration of the suit parcel Gilgil/Gilgil Block 1/764 (Kikopey) measuring approximately 2.03 Ha having purchased the same from the current registered owner, Josephat Michuki Chege (the 2nd Defendant) at the price of Kshs. 6,800,000/= wherein it had already sib-divided the same for the benefit of its members.
63. That the Plaintiff had no claim against it for it was not guilty of any fraudulent conduct in the transfer of interest in the suit property. That in any case, the Plaintiff's case was statutorily time barred by



operation of law, the 1st Defendant having been registered as the owner of the suit property on 22nd March, 2005. It thus prayed that the Plaintiff's suit be dismissed with costs.

64. In its counter claim, the 3rd Defendant (now the Plaintiff) reiterated the contents of its Defence and sought that judgment be entered for it against the Plaintiff as follows;
- i. A permanent injunction restraining the Plaintiff by himself, his servants/agents from entering, remaining, taking up, possessing, evicting, and/or interfering with the 3rd Defendant's quiet use, enjoyment, possession and occupation of the suit parcel Gilgil/Gilgil Block 1/764 (Kekopey) measuring approximately 2.03 Ha.
 - ii. A declaration that the agreement between the 2nd and 3rd Defendant dated 17th May, 2019 for sale the suit parcel to the 3rd Defendant is legitimate and valid without any element of fraud and thus the 3rd Defendant be duly registered as the bonafide proprietor of the suit parcel.
 - iii. An order that the caution registered to restrict dealings on the suit parcel in favour of the Plaintiff be removed forthwith.
 - iv. Costs of the suit be awarded to the 3rd Defendant with interest.
 - v. Any other or further relief that the honourable court may deem fit to grant.
65. The Plaintiff's response was similar to the response in the 2nd Defendant's defence and Counter claim wherein he had sought for the dismissal of 3rd Defendant's Defence and Counterclaim and judgment be entered as prayed in his Plaint.
66. The 4th Defendant's statement of Defence dated 12th October, 2020 was a denial of the allegations contained in the Plaint. Their stand was that the transfer of title from the Plaintiff to the 1st, 2nd and 3rd Defendants had been unlawful, illegal and fraudulent and therefore the placing of the caution was to stop any further dealing, the Plaintiff being in possession of the original title, there could be no better title to pass to any party.
67. That indeed, if any entry had been made in the title, then the same had been occasioned by misrepresentation of the 1st Defendant in collusion with the 2nd Defendant with intent to defraud the Plaintiff. The 4th Defendant thus prayed that the title in the name of the 2nd Defendant be declared a nullity and be revoked and any transaction between the 1st Defendant to the 2nd Defendant be declared fraudulent, illegal and also unlawful. That the 3rd Defendant having paid the alleged purchase price to the 2nd Defendant, should seek a refund as the interest had not crystallized. It thus prayed that the Plaintiff's suit be allowed in terms of prayers (i), (ii), (iii), (iv) and (iv) and the 1st, 2nd and 3rd Defendants be condemned to order (iv).

Summary of evidence tendered before the trial court;

68. The matter had proceeded for hearing wherein the Plaintiff had adopted his witness statement and list of documents dated 27th June, 2019 as his evidence in chief before proceeding to testify as PW1 as follows.
69. That after he had heard, from his wife, about the sale of plots by GEMA in Gilgil, they had bought two plots of 5 acres jointly with his wife., one plot that had been bought in his name on 26th July, 1996 was Gilgil/ Gilgil/Block 1/763 (Kikopey) measuring 5 acres. That his wife had also applied to be allocated a plot whereby one had to pay certain fees and needed not be a member of GEMA which kept a register of their contributions.



70. That he neither knew Samuel Kamau Kironyo (the 1st Defendant) nor had he sold to him the suit property in the year 2005. He also denied knowing Josephat Michuki Chege (the 2nd Defendant). He testified that that the Identity Card Number in the Green Card No 1024517/66 was not his number as his number was 1870309/64 which also appeared on his title deed. That his name in the GEMA Register had been cancelled and replaced with the name Joel Muguku Wachira. That whereas he had visited the suit property in the year 2013 in the company of his son and a surveyor, there had been no occupation wherein they had been informed that there was a lot of land grabbing which prompted him to contact his advocate and it was when they visited the lands office, they discovered that the details in the Green Card showed that he had sold the suit property.
71. His evidence was that being in possession of the original title to the suit property, he had registered a caution on the 2 plots, reported to Gilgil Police Station and filed a civil case. That he had also testified against the 2nd Defendant in a criminal case. He thus prayed that the suit property be reverted to him.
72. His exhibits comprised of the list of documents, Supplementary List of Documents and Further List of Documents dated 22nd April, 2012, 29th January, 2021 and 1st February, 2021 respectively as herein follows;
- i. Copy of the Title Deed in the name of the Plaintiff and issued on 26th July, 1996.
 - ii. Copy of the certificate of official search dated 3rd June, 2019.
 - iii. Certified copy of Green Card of land parcel number Gilgil/Gilgil Block 1/763.
 - iv. Certified copy of an extract of GEMA register.
 - v. Copy of caution registered on 3rd June, 2019.
 - vi. Marriage Certificate between Samuel Kamau Kirunyu and Magdalene Wanjiru Kamau.
 - vii. 2nd Defendant's Witness Statement in Naivasha Criminal Case Number 1323 of 2019
73. In cross examination by the Counsel for the 2nd Defendant, the Plaintiff confirmed that he had never occupied the suit land and that he was aware that the 1st Defendant was deceased. That the Green Card that had been produced from the lands office had shown that the suit land had been transferred to Samuel Kamau Kironyo (1st Defendant) and later to the Josephat Micjuki Chege (2nd Defendant). That he was in possession of the original title wherein the title held by the 2nd Defendant was fraudulent. That he knew that the 2nd Defendant had purchased the suit land from the 1st Defendant.
74. When he was cross-examined by the Counsel for the 3rd Defendant, he confirmed that the identity card (ID) number appearing on the Green Card was not his. He also confirmed that he had never occupied the suit land or cultivated therein and that at the time he had visited the land in the year 2013, he had not been shown the beacons but it had it had just been a general stroll.
75. He also confirmed that he had never paid land rates. That he had conducted a search in the year 2019 wherein prior it had not been necessary to conduct regular searches. He denied having sold the plot to the 1st Defendant and insisted that his title deed was genuine although he did not have a letter showing that the said title had emanated from Nakuru. He confirmed that between the years 1996 and 2019, a period of 23 years, he had not placed any caution on the land but had done so on 3rd June 2019.
76. He further confirmed that during that period of time, he had not fenced the suit land despite not being under any disability. He blamed the Defendants for the fraudulent transfer of land and confirmed that



he had filed the instant suit both after a period of 14 years from the time the cause of action had arisen and after the 1st Defendant had died.

77. Upon being cross-examined by the Counsel for the 4th Defendant, he confirmed that he still had in his possession, the original title to the suit property which was a first registration as per the Green Card.
78. In re-examination, he confirmed that no one had disputed that he had been the first owner of the suit property. He also reiterated that there had been no sale agreement between him and the 1st Defendant, and lastly that by the time he filed the suit, he had not been aware that the 1st Defendant was deceased.
79. Magdalene Wanjiru, testified as PW2 the effect that she was the deceased 1st Defendant's wife. She adopted her witness statement and supplementary list of documents dated 29th January, 2021 as her evidence in chief and proceeded to testify that they lived in Ndege from the year 2005. That whereas she knew the properties that the 1st Defendant (Deceased) owned, she did not know about land parcel No. Gilgil/Gilgil Block 1/763 since the 1st Defendant had never mentioned the same to her. That further she neither knew the Plaintiff nor the 2nd Defendant. Her testimony was that there was a misjoinder of the 1st Defendant in the proceedings.
80. When she was cross-examined by Counsel for the 2nd Defendant, her response was that although she had been married to the 1st Defendant in the year 2004, she could not remember the date of the wedding. That the 1st Defendant (Deceased) used to tell her everything in terms of his properties but and she did not know when the suit property may have been bought. She confirmed that they lived in Ndege-Lanet and that she did not have title deeds to all the properties owned by the 1st Defendant.
81. That whereas she did not have a letter from the chief, they had conducted their marriage ceremony in the SDA church in Ndege and that she was the 1st Defendant's third wife after the demise of his previous wives. That whereas she did not carry their marriage photos and had no Letters of Administration, the marriage certificate had been genuine.
82. Her response when she was cross examined by Counsel for the 4th Respondent and re-examined was that she had a marriage certificate which did not contain the names of the persons who had conducted the wedding.

The Plaintiff had closed his case.

83. The 2nd Defendant testified as DW1 and adopted his witness statements dated 27th January 2021 and 24th February, 2021 as well as his list of documents filed as his evidence in chief wherein he to state that land parcel No. Gilgil/Gilgil Block 1/763 (Kikopey) was his shamba having bought the same from the 1st Defendant on 20th February, 2008. That his elder brother had drawn a Sale Agreement which had been witnessed by Jerusio Chege Magera, Joseph Nduati and Paul Gathara wherein the purchase price had been Kshs. 900,000/=
84. That whereas his father had paid Kshs. 300,000/= he had paid Kshs. 200,000/= both in cash wherein they had agreed that the balance of the purchase price would be paid after 3 months.
85. That they had subsequently received a consent of the Land Control Board on 11th March, 2008 wherein he had been issued with a title deed in his name on 26th May, 2008 and had proceeded to build a 2 roomed mabati structure therein and that he had been paying rates.
86. That he subsequently sold the suit land to the 3rd Defendant on 17th May, 2019 at a purchase price of Kshs. 6,800,000/=. That when they came to court, they had been informed that the 1st Defendant who had sold him the suit property had passed on in the year 2015.



87. It was his evidence that they had done a survey before purchasing the suit land hence the instant suit had no basis since as far as he was concerned, the suit land belonged to the 3rd Defendant. That whereas they had executed the sale Agreement before Kanyi Ngure Advocate, some of the documents were burnt during the clashes. He maintained that he had bought the suit property legitimately and further that he had sold the same to the 3rd Defendant following the proper process.
88. He relied on his list of documents and Supplementary list of documents dated the 27th January, 2021 and 24th February, 2021 as his exhibits to wit;
- i. Sale agreement for property Gilgil/Gilgil Block 1/763 (Kekohey) between the 1st and 2nd Defendants dated 20th February, 2008.
 - ii. Consent for the Land Control Board given on 11th March, 2008.
 - iii. Title deed for parcel Gilgil/Gilgil Block 1/763 (Kekohey) issued to the 2nd Defendant on 26th May, 2008.
 - iv. Receipt for payment of land rates issued to the 2nd Defendant for the suit parcel dated 17th June, 2019.
 - v. Sale agreement for suit property between the 2nd and 3rd Defendants for Kshs. 6.8 Million dated 17th May, 2019.
 - vi. Copy of ID card Samuel of Kamau Kirunyu.
 - vii. Copy of Pin Certificate of Samuel Kamau Kirunyu.
 - viii. Copy of Death Certificate of Samuel Kamau Kirunyu-1st Defendant.
 - ix. Copy of Death Certificate of his father Jeruasoo Chege Magera.
 - x. Police statement of Magdalene Wanjiru dated 13th August, 2019.
89. When cross examined by the Counsel for the Plaintiff, his response was that one Paul Warui had linked him up with the 3rd Defendant. He confirmed that he had a criminal case that was at the defence hearing in which there had been three accused persons. He confirmed that although the list in the GEMA register at plot No. 763 had indicated that the Plaintiff's name had been cancelled and replaced with the name Joel Muguku Wachira (who was the 2nd accused person in the said criminal case,) he did not know how the said names had been changed. That he had used the Kshs. 6,800,000/=, being the purchase price of the suit property, to pay debts and in construction. That whereas he had paid land rates over the years, the receipts and other documents that had been given to him by the 1st Defendant (Deceased) were burnt in Londiani in the year 2007.
90. He confirmed that after execution of the sale Agreement on 20th February 2008, they had gone to the Land Control Board, Nakuru. He however recanted his evidence stating that no document in relation to the instant case had been burnt. He confirmed that he had been 35 years old in the year 2008 hence it was his father who had taken lead in the negotiations. That whereas he had paid the rates on 17th June, 2019, he had not been aware that the Plaintiff had placed a caution on the suit property on 3rd June, 2019.
91. When he was referred to Clause 1B of his Sale Agreement with the 3rd Defendant, he confirmed that the money had been paid and that he had been in the process of transferring the suit property since the same had been registered in his name. That the documents from GEMA had been in possession of his father and which documents had indicated that the 1st Defendant had bought the suit property from a



person from GEMA. That whereas Alice Wanjiru Karanja all his wife knew about the transaction and had signed spousal consent, she was not his witness.

92. On being cross-examined by the Counsel for the 3rd Defendant, he confirmed that he had met with the 1st Defendant in Family Care hotel near Barclays Bank and that it was Paul Gathara who had informed his father that the 1st Defendant had a shamba in Subukia and Gilgil. That the 1st Defendant had shown them the land and thereafter, they had moved out of Londiani suddenly due to the clashes. That the 1st Defendant had come with his ID, title and receipts from GEMA when he had approached his father for the transaction. He confirmed that they had obtained the Land Control Board Consent on 13th March, 2008 wherein he had received his title deed on 16th May, 2008. That whereas he had built a 2 roomed structure on the suit property, the said structure was no longer there as the new owners had subdivided the suit property. That whilst he had been paid before completion of the transfer, he did not know that a caution had been placed on the suit property.
93. When he was cross-examined by the Counsel for the 4th Defendant, he confirmed that he had paid some money to both the 1st Defendant and at the lands office although he had no documents to confirm the said payments since it had been his father who had conducted the transaction. That whereas he had applied for the Land Control Board consent, he did not have the transfer form in court. He refuted the claims that he had been in police custody at the time of obtaining the Land Control Board Consent and maintained that it had been his brother, who was 55 years old then, who had drawn the agreement which had also been witnessed.
94. That whereas he had paid the 1st Defendant in cash, the same had been written on a piece of paper but which paper he had not brought to court. That he did not conduct a search since he knew he was the owner of the shamba and that he had come to learn about the caution that had been placed on the suit during the proceedings in court. He confirmed that he had a pending criminal case of forgery, and obtaining by false pretense with regard to the suit property, where the Land Registrar had also been summoned.
95. In re-examination, he explained that the criminal case was about forgery of documents and conning the 3rd Defendant. He also explained that the rates in clause 3 of his sale agreement with the 3rd Defendant had been for the purpose of meeting the requirements of the agreement. That the 1st Defendant had carried with him his ID, Pin Certificate and receipts from GEMA at the time of the sale of the suit land.
96. Joseph Nduati testified as DW2 wherein he confirmed that the 2nd Defendant was his brother and that the Plaintiff lay claim to a shamba being Gilgil/Gilgil Block 1/763 (Kikopey) which belonged to his brother. That they had been at Molo on 20th February, 2008 wherein he had been contacted by his father for purposes of drafting an agreement for sale of 5 acres parcel of land at a purchase price of Kshs. 900,000/= That Kshs. 500,000/= had been paid by his father on behalf of the 2nd Defendant on the date of execution leaving a balance of Kshs. 400,000/=.
97. That upon completing the payment of the balance of the purchase price, they had been given the title deed of the shamba in the year 2008. That during the clashes, their house in Londiani had been burnt wherein they had only rescued the Sale Agreement and the Land Control Board Consent. That whereas he lived in Maai Mahiu and had shambas in Londiani and Molo, he knew that the suit property belonged to his brother, the 2nd Defendant who had sold it to the 3rd Defendant.
98. On cross-examination by the Counsel for the Plaintiff, he confirmed that he had lived in Maai Mahiu for 12 years and that when their house got burnt down in the years 2007 to 2008, he had managed to rescue the Agreement for sale and the Land Control Board consent that had been in the custody of their father and which had partly been rained on. That the 1st Defendant had given them his ID and



KRA Pin Certificate at the time of buying the land which document must have been taken by their father who had also been in custody of the Sale Agreement. That he did not know the Plaintiff. That he had only met the 1st Defendant twice by the time of drafting the agreement hence he was not aware if the said 1st Defendant had neighbors in the suit property.

99. He confirmed that there had been documents that had showed that the shamba had belonged to the 1st Defendant who had claimed that the said shamba had been sold to him by a person from GEMA. When he was referred to the Green Card, he confirmed that the second entry therein was the Plaintiff while the third entry was the 1st Defendant. That he had not conducted a search as he had just been requested to just write down the agreement. That whereas the 2nd Defendant had informed him that the 3rd Defendant had paid him the purchase price in full, he did not tell him how he had spent the said money. He confirmed that the 1st Defendant had been in the company of his friend Paul Gathara at the time.
100. When he was cross-examined by the Counsel for the 3rd Defendant, he confirmed that he had received the Land Control Board consent and the Sale Agreement in Muchama house, Molo.
101. Upon being cross-examined by the Counsel for the 4th Defendant, he maintained that he had met the 1st Defendant twice in Molo although he could not remember the exact dates. That it was in their second meeting that the 1st Defendant had signed the agreement for sale and money paid to him. That whilst he had neither stamped the agreement nor brought an expert to verify, the signature therein had been his. He confirmed that he had drafted the agreement.
102. In re-examination, he maintained that he was aware of the agreement since he had drafted it wherein a sum of Kshs. 500,000/= had been paid at the time of signing the same. That his father had told him that the balance of the purchase price had been paid and title issued.
103. Paul Gathara, testified as DW2 (B) (sic) to the effect that he knew the 2nd Defendant as the owner of the suit property Gilgil/Gilgil Block 1/763 (Kikopey). That on 20th February, 2008 the 1st Defendant who was his neighbor in Molo had sold to the 2nd Defendant the shamba at a purchase price of Kshs. 900,000/= wherein the 2nd Defendant had paid him a sum of Kshs. 500,000/=. That the sale Agreement that had been drafted by Joseph Nduati (DW2) wherein he had appended his signature. That he had later been informed that the balance of the purchase price being Kshs. 400,000/= had been paid. That he had further learnt that both the 1st Defendant and the 2nd Defendant's father were deceased. He confirmed that on that 20th February, 2008, the 1st Defendant had brought with him the title deed, KRA PIN Certificate and ID card.
104. When he was cross-examined by Counsel for the Plaintiff, he stated that he was 69 years old and that they had met in a hotel to witness the agreement hence the transfer of the suit land had been legal. That whereas he had been informed of the 1st Defendant's demise by the 2nd Defendant's father, he was not aware that the 1st Defendant had a wife called Margaret Wanjiru but only knew that he had 5 children. He also confirmed that the 2nd Defendant's house in Londiani had burnt down
105. Upon being cross examined by the Counsel for the 3rd Defendant, he stated that he could not remember when the 1st Defendant and the 2nd Defendant's father had died.
106. His response on cross-examination by the Counsel for the 4th Defendant was that he had witnessed the agreement by appending his signature thereon on 20th February, 2008 and that whereas there had been no clashes at the time, there had been burnings. That whereas he had seen the title, receipts and Identity card (ID), he had also relied on what he had been told since he did not how to read well.



The 2nd Defendant had closed his case.

107. The 3rd Defendant's case was through the testimony of Ayub Gathuri Maingi, the 3rd Defendant's Chairman who testified as DW3 and who after adopting his Witness Statement and the 3rd Defendant's list of documents dated 6th August, 2019 as evidence in chief proceeded to testify that the 3rd Defendant had bought a parcel of land No. Gilgil/Gilgil Block 1/763 (Kekopey) from the 2nd Defendant wherein they had entered into a Sale Agreement. He confirmed that the suit land was registered in the 2nd Defendant's name and that they had paid the purchase price of Kshs. 6,800,000/= in two installments with Kshs. 4,080,000/= having been paid on 17th May, 2019 and the balance of Kshs. 2,720,000/= on 21st June, 2019.
108. That they had conducted a search on 23rd April, 2019, got copies of Identity cards and KRA PIN Certificates and thereafter, on 25th April, 2019, instructed an Advocate to process a green card which had verified that the 2nd Defendant was the owner of the suit land and that there had been neither encumbrances nor caution therein. That they had then gone with the original title deed, original ID, KRA PIN Certificate, receipts for land rates and spousal consent to the Advocate's office who had executed the transfer documents on 17th May, 2019. His evidence was that whereas they had paid the purchase price by way of RTGS, towards the tail end, there had been a caution placed on the suit land by the first owner, the Plaintiff herein. He however explained that by the time they were paying the second instalment, they had not been aware of the caution and also did not want to breach the terms of the contract. That they had inspected the suit land physically in the company of the vendor, the 2nd Defendant herein and a surveyor and had verified its size. That afterwards, they had subdivided the parcel of land into 40 equal plots hence at the moment, there were beacons for 40 equal plots.
109. He confirmed that at the time of buying the land, there had been a temporary structure on the suit land where a caretaker used to stay and that they had also met Mr. Karanja, a neighbor who had informed them the suit land had belonged to the 2nd Defendant. That he had been part of the process from the beginning and that the information had been verified from lands registry. He acknowledged that indeed the value of the suit land had appreciated and prayed that the Plaintiff's suit be dismissed with costs and the caution thereon be removed as they had prayed in their counterclaim.
110. He was referred to Clause 1B of the Agreement on cross-examination by the Counsel for the Plaintiff wherein he had responded that the title was currently in the name of the 2nd Defendant. He confirmed that he had been summoned by the DC1. That whereas a caution had been placed on the suit property on 3rd June, 2019, by the time they were transferring the second instalment via RTGS, they had not been aware of the said caution. That he was aware of the demand letter and that the broker therein had been Joel Muguku Wachira and that they had been able to obtain the 1st Defendant's identity card and a copy of KRA PIN Certificate from the 2nd Defendant. That they had also sought for the agreement and other documents from previous owners.
111. That the receipt had proved that the land rate had been paid on 17th June, 2019. That he was aware that the Plaintiff had the original title deed. That he was also aware of the ELC Case No.63 of 2019 where the 3rd Defendant was a Defendant and that in the said case, the Plaintiff's wife was the Plaintiff. That they had planned for the subdivision wherein they were to sell the 40 plots at Kshs. 280,000/= per plot which would have given them an accumulative amount of Kshs. 11,000,000/=. He also confirmed that there was pending a criminal case CR 1323/2019 which was at defence stage. That the property had not been transferred and that there was maize plantation and a house on the ground.
112. He relied as exhibits, his list of documents herein dated 6th August, 2019 which comprised of;



- i. Certificate of official search for suit parcel dated 23rd April, 2019.
 - ii. Green card for suit parcel dated 25th April, 2019.
 - iii. Copy of title deed in the name of the 2nd Defendant.
 - iv. Copies of receipts for payment of land rates by the 2nd Defendant dated 17th June, 2019.
 - v. Sale agreement between the 2nd and 3rd Defendant dated 17th May, 2019.
 - vi. Payment receipt for sale price of Kshs. 4,080,000/= dated 17th May, 2019.
 - vii. Payment receipt for sale price of Kshs. 2,720,000/= dated 21st June, 2019.
 - viii. Duly executed transfer forms by the 2nd Defendant for the suit parcel dated 17th May, 2019.
 - ix. Spousal consent forms authorizing transfer of suit property dated 17th May, 2019.
113. When cross examined by the Counsel for the 2nd Defendant, he confirmed that they had done due diligence before purchasing the suit property.
 114. His response on cross-examination by the Counsel for the 4th Defendant was that he had become the chair of the 3rd Defendant later on.
 115. In re-examination, he confirmed that the 1st Defendant's ID number tallied with the one in the Green Card and that the search had also indicated the same names. He confirmed that the 2nd instalment had been paid on 17th June, 2019 and that he had been summoned to the DCI after payment of the said instalment. He explained that ELC 63/2019 had involved Block 1/798 (Kekopey) which had been subdivided and titles issued in the year 2018. That he had testified in CR 1323 of 2019 to the effect that the 2nd Defendant had not obtained monies from them as they had bought the suit property correctly and there had been no questions.
 116. Minnie Wacuka, the County Lands Registrar testified as DW4 wherein she had adopted her Witness Statement dated 8th March, 2021 as her evidence in chief and testified that having previously been based at Naivasha Lands Registry she was currently the land Registrar based in Kericho.
 117. That the file with regard to the suit property was within the Naivasha Lands Registry. That paragraph 4 of the Green card indicated that the Plaintiff was the registered owner of the suit property. That the said Green card for land parcel No. Gilgil/Gilgil Block1/763 was opened on 9th February, 1994 wherein the area of the said parcel of land measured 2.032 hectares which was approximately 5 acres on registry map sheet No. 10. That vide the 1st entry made on 9th February, 1994 the land was registered in the name of the Government of Kenya. That entry No. 2 entered on 12th April, 1999 it was registered in the name of Stephen Kanyuira Gikonyo ID No. 1024517/66 wherein he had been issued with the title deed on the same day.
 118. That on 22nd March, 2005, the suit property had been transferred to Samuel Kamau Kironyo of ID No. 4289728 of P.O Box 125 Lari who had been issued with the title deed on the same day. That a transfer had then been effected on 26th May, 2008 to Josphat Michuki Chege of ID No. 131087630 of P.O Box 110 Londiani wherein he had been issued with a title deed. That it was at entries No.7 and 8 dated 3rd June, 2019 where a claim had been made by Stephen Kanyuira Gerald Gikonyo (the Plaintiff herein) of P.O Box No. 73297 Nairobi claiming beneficiary interests of the land and that he had in his possession the original title deed that had been issued on 26th July, 1996.



119. Her evidence was that as per the Green Card, the current owner of the land was Josphat Michuki Chege (the 2nd Defendant herein).
120. Her evidence was that it was not possible to have two legitimate titles. That she had asked the purchasers to produce stamp duty and the Land Control Board forms but they had produced none. She admitted that according to the titles register, the land was listed as the property of Stephen Kanyuira Gikonyo (the Plaintiff herein), the original owner.
121. On cross-examination by the Counsel for the Plaintiff, she confirmed that entry No. 2 on the Green card showed the name Stephen Kanyuira Gikonyo, that the Plaintiff's name on the identity card was Stephen Kanyuira Gerald Gikonyo which name was not the one on the green card. That whereas the identity card number on green card was 1024517/66, the copy of identity card number in court bore the number 1870309, had been issued on the 11th April, 1997 and registered in the green card on 12th April, 1999.
122. That whereas she was familiar with GEMA land, it was almost impossible for entry No. 1 in Gilgil/ Gilgil Block 1 to be captured wrongly. She explained that the owner must be present to transfer before the Registrar with Original identity card together with the transfer documents. That when the caution was registered, she had noted the name on the Green Card did not tally with the name in the title deed and that the original green card could not have been issued in the year 1999 which was 15 years ago as it would have appeared old and not new.
123. That from her experience, the 1st signature for entries Nos. 2 and 3 belonged to Mr. Munguti who was in Nakuru in mid-90's and early 2000. That they usually placed consents in the green card but she had doubted the signature in the Green card herein as Mr. Munguti had informed her that it had not been his signature.
124. She also confirmed that she had been examined as PW 2 in a case where the accused persons therein had been Josphat Michuki (the 2nd Defendant herein) and Joel Muguku Wachira.
125. When she was referred to the GEMA register at No. 763, she confirmed that there had been 2 cancellations, where the names Stephen Kanyuira Gerald Gikonyo and Joel Muguku Wachira had been crossed out. That one could not have a name crossed out and replaced with another crossed-out name. That there ought to have been a counter sign against the cancellation hence in the instant case, her suspicions had been raised.
126. That the green card that had been presented to court was not genuine, it had no serial number and could be accessed by members of staff and even replaced.
127. That a parcel file ought to have contained a transfer letter, clearance letter for issuance of title, stamp duty paid for transfer and that all documents to be attached in an application to the Land Control Board and any other document that would touch on the land. That since the registry was small, it had been common for parcel files to go missing. She explained that in the year 2015, the National Youth Service had visited the registry wherein they had filed all documents including the ones for Gilgil/ Gilgil Block 1 original numbers thus it would be very difficult for them to go missing and therefore the absence of the parcel file herein was suspicious.
128. She confirmed that the Plaintiff had produced in court original title in his name which had been issued on 26th July, 1996 at the Nakuru Lands Registry but whose identity card number had been different from that in the Green Card which also showed that the title had been issued on 12th April, 1999.



129. She explained that the nature of the suit property was freehold, that is, absolute ownership hence was not subject to County Government Rates. That there was no office referred to as Nakuru Land Control Board. She confirmed that in the year 2008, the land in Gilgil had been issued with a letter of consent from Gilgil Land Control Board. She maintained that it was not likely for parties to have 2 original title deeds since at the time of transfer, one would surrender the original title in their name and transfer to a new name. That they had left the matter to be investigated by the investigators who had brought it to her attention.
130. When she was cross-examined by the Counsel for the 2nd Defendant, she stated that whereas the green card had been certified as the true copy, she had pointed out the anomalies therein and proceeded to state that the certified copy was what she had been supplying to anyone interested. She explained that there was usually a parcel file to support the documents in the registry and that the same was in custody of the Land Registrar but was accessible by all the staff in the land registry.
131. That the anomalies that she had been pointed out did not affect the state of registration of the suit property. That the entries Nos. 2, 4, 5 and 6 stated that it was Josphat Michuki Chege as a reason of transfer from Samuel Kamau Kironyo from Stephen Kanyuria Gikonyo.(sic). That the interference could only be performed by someone within the registry.
132. She explained that Naivasha Lands registry had not moved from Nakuru to Naivasha in September, 2009 and that she had perused the records which had moved from Nakuru Land Registry to Naivasha lands Registry but did not have the documentations which had been moved from Nakuru lands registry to Naivasha lands registry since she had not been in Naivasha at the time. That it had been the DC1 who had informed her that 2nd Defendant had received the suit property from 1st Defendant who was now deceased. That she was not aware if any of the Defendants had served in the lands registry. That further, she had not worked in Nakuru lands registry and that the signature therein had been made in Nakuru Lands Registry wherein at that time, it would have been Gilgil Land Control Board which was in operation.
133. When the Land Registrar was cross-examined by the Counsel for the 3rd Defendant, she explained that there were freehold and leasehold titles for rates and rent and that she was not aware if there was title in freehold. She confirmed that before moving to Naivasha, there had been Land Control Board in Nakuru but that she did not have her documents to show when the Gilgil Land Control Board was constituted.
134. She reiterated that Stephen Kanyuira Gikonyo of identity card No. 1024517/66 was registered in the green card. That she had registered a caution on 3rd June, 2019 on behalf of Stephen Kanyuira Gerald Gikonyo wherein the name Gerald had been left out. That she had been presented with a copy of the identity card No. 1870309/64 of Stephen Kanyuira Gerald Gikonyo that had been issued in the year 1997 wherein the holder had been born in the year 1936. That whereas the same had been a new generation ID, she did not ask for a copy of the first-generation identity card despite the number/64 having belonged to the old generation identity card.
135. She confirmed that GEMA was a land buying company and that its Register was in the land registry in Naivasha although she had not been asked to carry it to court. That however pursuant to the issuance of the title, the said register had become obsolete.
136. Her evidence was that looking at the green card the same was not an old one although she had not subjected it to forensic investigations. That she however, was able to identify 3 signatures of the land registrars whereupon she had photographed them and sent to Mr. Munguti, who denied the signatures as not being his



137. That it was not possible to know when the cancellation of the name in the GEMA register happened but she was suspicious because for one, the name Joel Muguku Wachira did not appear in the register and that the name that had appeared in the shamba was not the name the register which was not procedural. That whereas the suit land had been registered in the name of the 2nd Defendant, the parcel file containing the documents had not been found wherein they only had the green card for the same.
138. Her evidence was that she did not have the registration documents in relation to the suit property and neither had there been a handing over register. That whereas the custodian of parcel file and green card was the land registrar who also issued the title, she could not tell when the parcel file for the suit property disappeared.
139. That the DCI had been investigating the matter but she did not know what had transpired thereafter. She explained that were a title to get lost, one needed to do a statement, apply for re-issuance, and attach police abstract and a copy of the missing title deed after which a title would be re-issued if there was no encumbrance. She admitted that it was also possible to find the lost title later after re-issuance of a new one.
140. Her evidence was that the title deed had not been taken to the Government Printer but that she had registered the caution to allow for investigations. That she could not remember if she had been given an application for caution and that the notice of a caution is normally issued to the registered owner. She explained that Gilgil/Gilgil/1 did not reflect the identity card numbers of the owners hence the requirement that they present documents. That she did not have the booking register which was in Nakuru Lands Registry.
141. She confirmed that entry No. 4 on the green card showed the identity number for Samuel Kamau Kironyo which tallied with the one that had been produced in court.
142. She admitted to knowing land registrar Charles Sunigu who had signed entries Nos. 6 and 7 who would have also signed the green card. That were the entry the same, it would have appeared in the name of Josphat Michuki Chege.
143. That the title deed had emanated at the lands registry which was supposed to keep copies of receipts although she did not have duplicate copies. That she was not aware that the 2nd Defendant had no proper documents and it was not true that one would register a fake title deed.
144. She confirmed that there were no two green cards at the lands office in Naivasha since they were only dealing with one parcel. That the Plaintiff had also surrendered original title deed to them wherein the matter had been forwarded for further investigations. That the surrendered title deed had been filed in the parcel file although she was not aware if anyone from the lands had been charged.
145. In re-examination, she reiterated that the second entry had been made on 12th April, 1999 although the papers had indicated that it had been on 26th July, 1996 thus the 2 entries were conflicting between the green card and title.
146. That they would receive transfer forms, letters of consent and stamp duty receipts but they did not get the parcel file. That further the number /66 had also raised her suspicion. She confirmed that Gilgil Land Control Board had been constituted and had members. That she had not worked with Sunigu and therefore did not know his whereabouts.
147. She clarified that the first name had been registered in the year 2001 and not 2017, that she did not know when the alteration had been done. That the registered members must confirm minutes to alter the names with a letter in the presence of the land registrar and counter sign the same. That it was possible



that somebody had made the parcel file to disappear. That whereas it had been clear that something had been done irregularly, the parcel file was accessed by the registrar and not by the staff in the registry hence the requirement for copies in triplicate.

The 3rd Defendant had closed its case.

Determination

148. Having summarized what transpired during the hearing at the trial Court, as herein above, I find the issues arising herein for determination as follows:-
- i. Whether the court proceedings against the 1st Defendant were void.
 - ii. Whether the 1st Respondent's suit was statute barred.
 - iii. Whether none particularization of fraud was fatal, if not,
 - iv. Whether the 1st Respondent had proved the allegations of fraud.
 - v. Whether the 2nd Appellant had a good title to pass.
 - vi. Whether the 1st Appellant was an innocent purchaser for value.
 - vii. Whether the trial learned Magistrate had erred in his findings.
149. On the first issue for determination, it is not in contention that the 1st Respondent herein Stephen Kanyuira Gerald Gikonyo vide a Complaint dated 27th June, 2019 filed suit against four Defendants being Samuel Kamau Kirunyu, Josphat Michuki Chege, Vision Afrika Housing Cooperative Society Limited and the Registrar-Naivasha where he lay claim that having not disposed of or sold his parcel of land comprised in No. Gilgil/Gilgil Block1/763, to third parties, that the Appellants therein had unlawfully and fraudulently transferred the same to themselves.
150. He thus sought to be declared as the proprietor of the suit property Gilgil/Gilgil Block 1/763 (Kikopey) and that the title deed of the suit parcel held by the 2nd Appellant be revoked and restored to its status quo as at 26th July 1996. That thereafter, the 1st Appellant be evicted from the suit land and there be an order of injunction restricting the Appellants from dealing with the said suit property.
151. It is also not in contention that prior to filing the suit herein, the 1st Defendant had passed away on 2nd March, 2015. It is trite law that one cannot sue a dead person. The suit having been filed more than 4 years after his death, I find that there is no and could there be no competent suit filed against the 1st Defendant as an order cannot competently be made, as a writ issued against a dead person at the date of issue is incurably bad and cannot be cured by amendment.
152. Lord Denning in *MacFoy v United Africa Co. Limited* (1961) 3 All ER 1169, held that;
- “If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...”
153. I find that the proceedings against the 1st Defendant was a non-starter null and void in the first place, having been filed against a person who was deceased.



154. On the second issue for determination, Section 7 of the *Limitation of Actions Act* provides as follows:
- “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
155. The above provisions of the law provide that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued.
156. On the other hand Section 26 of the Limitation of Actions provides as follows;
- “Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:”
157. Section 26 of the *Limitation of Actions Act* herein stipulates that in a case of fraud or mistake, the period of Limitation will not begin to run until fraud or mistake has been discovered. See court of Appeal decision in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] KECA 532 (KLR)
158. These two limitation periods serve different purposes and can apply in different contexts, depending on the nature of the claim being made. Indeed from the above captioned provisions of the law, it is possible to recover land even after 12 years where fraud is involved. The Statute of Limitations generally provides a time limit of 12 years within which one must file a lawsuit to recover land. However common law recognizes that fraud can be hidden. So, the clock for the statute of limitations doesn't necessarily start ticking when the fraud occurs, but rather when it is discovered, or when a reasonable person in the same situation would have discovered it. This is often referred to as "delayed discovery" or "concealed fraud.
159. In the present case, the 1st Respondent's evidence had been that on 26th July, 1996 he had bought land parcel No. Gilgil/Gilgil/Block 1/763 (Kikopey) measuring 5 acres from GEMA which land he had not fenced or taken occupation. That in the year 2013 while in the company of his son and a surveyor they took a stroll to the suit property wherein they had noted that the same was not occupied. It was during this visit that they had been informed that there was a lot of land grabbing going on.
160. That subsequently on the 3rd June 2019 he had conducted a search on his parcel of land No. Gilgil/Gilgil Block 1/763 wherein he had discovered that the land was now registered to one Josphat Michuki Chege (2nd Appellant) of Identity card No 131087.
161. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit.



162. Section 26 (a) and (c) of the *Limitation of Actions Act* having stipulated that the period of limitation does not begin to run until the Plaintiff has discovered the fraud, there is no doubt herein that the cause of action was on the 3rd June 2019 when the 1st Respondent discovered that his land had been fraudulently registered to the 2nd Appellant, the limitation period thus began to run on the 3rd June 2019 after the 1st Respondent had with reasonable diligence to discover the fraud. The suit was filed on the 2nd July 2019 which was within a reasonable time after discovery. I thus find that the 1st Respondent's suit was not statute barred.
163. The next issue for determination is having pleaded fraud and illegality on the part of the Appellants in the manner in which they obtained the suit land, whether the 1st Respondent had proved these allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 E.A 314, the Court of Appeal stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
164. I have no doubt in my mind that the 1st Respondent herein distinctly pleaded the facts on which fraud was alleged against the Appellants. The next step however was for him to prove those allegations to the required standard as it is settled law that fraudulent conduct must be distinctly alleged and distinctly proved. While the court acknowledges that specificity is generally preferred, there can be exceptions where the nature of the fraud is evident, and the particulars are implied through the surrounding circumstances or when fraudulent conduct is apparent and the parties are aware of the facts involved, then strict particularization of fraud may not be strictly necessary.
165. Indeed in a persuasive case in *Esther Njeri Chege (Suing as the Personal Representative of the Estate of Julius Chege Kiongo (Deceased) & another v Amaingu & 5 others* [2022] KEELC 2217 (KLR), the court had held as follows;
- “First, on the issue of particularizing fraud, it is a matter of law provided for under Order 2 Rule 10 (1) (a) of the Civil Procedure Rules and not the *Limitation of Actions Act*. In my view failure to give the particulars of fraud will not necessarily defeat the Claim”
166. In the instant case, I have examined the Complaint and confirmed that the issue of fraud was pleaded and particulars were given as follows; At paragraph 9 and 10 of the Complaint, the 1st Respondent had pleaded as follows;
- “9. That the green card in possession of the 4 Defendant has been tampered with as its entry indicates that the title was issued to the Plaintiff on 12th April 1999 which is not true as the Plaintiff was issued with a title on 26th July 1996. The green card has also captured the Identity Card number of the Plaintiff as 1024517/66 instead of 1870309/64 which is a clear indication of intended fraud.
10. The Plaintiff further avers that the entries on the green card and the title issued to the 2nd Defendant are fraudulent as the Plaintiff had conducted a search on the said parcel of land sometime in 2009 and it was in his name. The same has been backdated to suppose that the Plaintiff has neglected his parcel of land”



167. At paragraph 14 and 15, he had pleaded as follows;

“14. The Plaintiff did not at any time transfer the suit property to either of the Defendants, that neither of the Defendants is known to him.

15. The Plaintiff avers that he is in possession of the original title issued on 26th July and that the transfer from his name to that of the 1st Defendant could only have been fraudulent.”

168. Lastly the 1st Respondent at paragraph 17 (b) had sought for the following order;

“A declaration that the transfer of Gilgil/Gilgil Block 1/763 (Kikopey) from the Plaintiff to the 1st Defendant as well as the subsequent transfers was unlawful and fraudulent.”

169. Away from home, in the case of Nyarko Vrs Tetteh and Others [2019] GHASC 87 (11 December 2019) the Superior Court of Judicature in the Supreme Court Accra-AD 2019 held as follows;

“This Court has held in a number of cases such as Amuzu v Oklikah [1998-99] SCGLR 141 and Ecobank Nigeria Plc v Hiss Hands Housing Agency [2017-2018] 1 SCGLR 355 that though it is preferable to plead and particularise fraud, failure to do so is not fatal in all circumstances.

In the Oklikah case, Atuguba JSC stated at page 183 as follows:

“In this case fraud has not been distinctly pleaded. But in view, especially of the provisions of sections 5,6 and 11 of the Evidence Decree, 1975 (NRCD 323) regarding reception of evidence not objected to, it can be said, that where there is clear but unpleaded evidence not objected to, the court cannot ignore the same, the myth surrounding the pleading of fraud notwithstanding”

170. Based on the above, I find that although the 1st Respondent had not particularized fraud yet it cannot be said that the parties herein were unaware of the facts involved in the suit as the 1st Respondent had pleaded in detail the specific acts of fraud, who committed them, and how they were deceived and therefore strict particularization of fraud may not have been strictly necessary in the present circumstance.

171. Having held as above the next step was for the 1st Respondent to prove those allegations to the required standard. In so doing the 1st Respondent’s case was supported both through documentary evidence via the documents herein above produced as well as through oral evidence;

- i. To begin with it was his evidence that not only had he not known Samuel Kamau Kironyo (the 1st Defendant) or Josephat Michuki Chege (the 2nd Appellant) but that he had not sold to either of them the suit property and there had been no sale agreement between him and the proposed buyer who in this case was the deceased 1st Defendant produced as an exhibit.
- ii. Secondly via documentary evidence being the GEMA Register, the 1st Respondent was able to show that after he had bought the suit property from GEMA, his name in their Register had been unlawfully cancelled and replaced with the name Joel Muguku Wachira against at entry No. 763.
- iii. Third, that the Identity Card Number reflecting in the Green Card as No 1024517/66 was not the number on his identity card which was number 1870309/64 and which number appeared on his title deed.



- iv. That further he still had in his possession his original title deed to the suit property which was a first registration as per the Green Card.
 - v. The 1st Respondent also called PW2 as a witness who confirmed land parcel No. Gilgil/Gilgil Block 1/763 was not one of the properties owned by her husband the deceased 1st Defendant.
 - vi. Lastly having discovered the fraud, he had lodged a criminal case Number 1323 of 2019 against the 2nd Appellant jointly with others.
172. The expert witness being the land Registrar who testified as DW 4 was examined and cross-examined on the particulars of fraud wherein she had responded that the Green card for land parcel No. Gilgil/Gilgil Block1/763 was opened on 9th February, 1994 and registered in the name of the Government of Kenya wherein on the 12th April, 1999 it had been registered in the name of the 1st Respondent Stephen Kanyuira Gikonyo of identity card No. 1024517/66 and he had been issued with the title deed on the same day.
173. That subsequently on 22nd March, 2005, the suit property had been transferred to Samuel Kamau Kironyo (1st Defendant) of identity card No. 4289728 of P.O Box 125 Lari who had been issued with the title deed on the same day. That later on 26th May, 2008, a transfer had then been done to Josphat Michuki Chege of identity card No. 131087630 of P.O Box 110 Londiani who had been issued with a title deed.
174. That later, on 3rd June, 2019, a claim had been made by Stephen Kanyuira Gerald Gikonyo (the 1st Respondent) of P.O Box No. 73297 Nairobi claiming beneficiary interests of the land.
175. Her evidence in support of the claim of fraud was as follows;
- i. -It was not possible to have two legitimate titles to the same parcel of land.
 - ii. That despite requesting from the purchasers to produce stamp duty and the Land Control Board forms they had produced none.
 - iii. -That entry No. 2 on the Green card showed the name Stephen Kanyuira Gikonyo, that the 1st Respondent's name on the identity card was Stephen Kanyuira Gerald Gikonyo which name was not the one on the green card.
 - iv. -That whereas the identity card number on green card read 1024517/66, the copy of identity card number in court bore the number 1870309.
 - v. -That the second entry had been made on 12th April, 1999 although the papers had indicated that it had been made on 26th July, 1996 thus the 2 entries were conflicting between the green card and title.
 - vi. -That she was familiar with the procedures of GEMA land and it was almost impossible for entry No. 1 in Gilgil/Gilgil Block 1 to be captured wrongly.
 - vii. -That when the caution was registered, she had noted the name on the Green Card did not tally with the name in the title deed.
 - viii. -That the original green appeared new and could not have been issued in the year 1999 which was 15 years ago.
 - ix. -That the signature in the Green card was not the land Registrar, Mr. Munguti's signature.



- x. That there had been 2 cancellations in the GEMA register at No. 763, where the names Stephen Kanyuira Gerald Gikonyo and Joel Muguku Wachira had been crossed out.
- That one could not have a name crossed out and replaced with another crossed-out name. That there was no counter sign against the cancellation.
- xi. -That the green card that had been presented to court was not genuine, it had no serial number and could be accessed by members of staff and even replaced.
- xii. -That in the year 2015, the National Youth Service had visited the registry wherein they had filed all documents including the ones for Gilgil/Giligil Block 1 original numbers thus it would be very difficult for them to go missing and therefore the absence of the parcel file herein was suspicious.
- xiii. -That the 1st Respondent had in his possession his original title in his name which had been issued on 26th July, 1996 at the Nakuru Lands Registry but whose identity card number had been different from that in the Green Card which also showed that the title had been issued on 12th April, 1999.
- xiv. -That there was no office referred to as Nakuru Land Control Board, that in the year 2008, the Gilgil Land Control Board issued letters of consent for all parcels of land in Gilgil.
- xv. -That it was not likely for parties to have 2 original title deeds since at the time of transfer, one would surrender the original title in their name.
- xvi. The name Joel Muguku Wachira did not appear in the register and that the name that had appeared in the shamba was not the name in the register which was not procedural.
176. Indeed a look at the 2nd Respondent's statement of Defence dated 12th October, 2020, the same was to the effect that the transfer of title from the 1st Respondent to the Appellants had been unlawful, illegal and fraudulent and therefore the placing of the caution was to stop any further dealing, the 1st Respondent being in possession of the original title, there could be no better title to pass to any party.
177. The 2nd Appellant's case was that through his deceased father, he had purchased parcel No. Gilgil/Giligil Block 1/763 (Kikopey) from the 1st Defendant vide an agreement of 20th February, 2008 at a purchase price of Kshs. 900,000/= wherein he had been issued with a title on 26th May, 2008. That he had subsequently sold the same to the 1st Appellant on 17th May, 2019 at a purchase price of Kshs. 6,800,000/=.
178. That he did not know how the names in the GEMA Registry at plot No. 763 were changed and that the documents that had been given to him by the 1st Defendant (Deceased) were burnt in Londiani in the year 2007 save for the Sale Agreement and the Land Control Board Consent as stated by his brother DW 2. His argument was that he had conducted due diligence before he had legitimately bought the land.
179. The 1st Appellant's case on the other had been that it was an innocent purchaser without notice of any fraud. The 1st Appellant went to great lengths to prove that it was an innocent purchaser for value without notice when its Director submitted in evidence that they had conducted a search on 23rd April, 2019, got copies of IDs and KRA PIN Certificates and thereafter, on 25th April, 2019, instructed an Advocate to process a green card which had verified that the 2nd Appellant was the owner of the suit land and that there had been neither encumbrances nor caution therein.



180. It was held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that the statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the [Land Registration Act](#) 2012.
181. The court is aware of the attribute of Section 26(1) (a) and (b) of the [Land Registration Act](#) which provides that a Title to land shall not be absolute and indefeasible because it can be impeached where it is shown to have been obtained through fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme.
182. The court of Appeal in the case in Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:
- “The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of Fahiye & 2 others – v- Omar & 4 others [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (OS), it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”
183. Indeed where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance. (See the Supreme Court decision in Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR).
184. In this case based on both oral and documentary evidence adduced, I find that indeed the title held by the 2nd Appellant was procured fraudulently the same having not been obtained from 1st Respondent herein who was the owner, but from the 1st deceased Defendant who had no authority to transfer the same. Indeed in this regard, the 2nd Appellant herein did not have a good title to pass to the 1st Appellant.
185. Indeed as it had been cited with approval by the Court of appeal in Jivanji v Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431.that:
- “No person has legal capacity or authority to transfer to another person a registered proprietors interest in a parcel of land registered under the Registered [Land Act](#) without the participation or knowledge and consent of the registered proprietor. The transfer of the suit parcel of land to the first Defendant on 5th April 1991 was done by a transferor who was not the registered proprietor of that parcel of land. It was done without the knowledge and consent, or participation of the Plaintiff. The transferor had no legal Title in the Plaintiff’s said parcel of land. The transferor had no proprietary rights in that parcel of land to pass



to the first Defendant. Notwithstanding the fact that the transaction was or may have been blessed with consent of the relevant Land Control Board, was or may have been registered, that transaction was null and void ab-initio in so far as it purported to transfer the suit parcel of land to the first Defendant as there could be no valid transfer where the transferor has no Title to transfer. Documents may have been prepared, consent of the land control board obtained, signatures appended and attested and the transfer registered. But all those could not give the purported transferor the Title to transfer to the first Defendant. That transfer was unlawful.”

186. Having found that the 2nd Appellant had no good title to pass can it then be said that the 1st Appellant was an innocent purchaser without notice of any fraud?

187. The court of Appeal in Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR adopted the decision of the Ugandan Court of Appeal in Katende v Haridar & Company Limited [2008] 2 E.A.173 that weighed in on the definition of an innocent purchaser as follows:

“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.”

188. Hon. Justice Onyancha in Alberta Mae Gacii V Attorney General & 4 Others (2006) eKLR had stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.....”

189. Whereas in the case of Iqbal Singh Rai vs. Mark Lecchini and the Registrar of titles, civil Case No. 1054 of 2001, Hon. Justice Muchelule (as he then was) also opined as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor



of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

190. In my view, the conduct of the 1st Appellant’s Chairman was not of a diligent bona fide purchaser as described in *Katende v Haridar* (supra). The Chairman was not an illiterate person and knew or ought to have known how to go about a land transaction; particularly the need for a written sale agreement from the original first registered owner of the suit land, and the transfer documents thereto. The reason as to why the 1st Respondent still had in his possession his original title deed which is a fact that he knew (see paragraph 111 above) and the fact that a property cannot have two valid title deeds. There was not produced a copy of the executed transfer forms, receipts for payment of the stamp duty and transfer fees as deponed by the Land Registrar. I therefore find that the 1st Appellant was not a purchaser for value without notice.
191. Having found as above, it is my conclusion that the 2nd Appellant did not obtain a transfer from the registered proprietor, but from a fraudulent person namely the 1st deceased Defendant who had no claim to the suit property based on the findings as herein above quoted at paragraph 171-180. The 2nd Appellant could not therefore invoke indefeasibility of title as the transfer of the same to him was null and void nor could he transfer the title to the suit land to the 1st Appellant.
192. Accordingly upon careful consideration of the record, the documents, the submissions and the authorities cited, and pursuant to the provisions of Section 26 (1) (b) of the [Land Registration Act](#) and Section 80 (1) and (2) of the same Act, I am satisfied that the trial learned Principal Magistrate was able to decide on the issue of fraud on the basis of the entire evidence on record, and circumstances under which the 2nd Appellant acquired title to the suit land wherein he properly came to a logical conclusion that the transfer of the suit parcel Gilgil/Gilgil Block 1/763 (Kekopey) to the Appellants herein was irregular, un-procedural and illegal. The Appeal herein thus lacks merit and the same is dismissed with costs to the Respondent.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 6TH DAY OF FEBRUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

