



REPUBLIC OF KENYA



**Wakaimba v Registrar & 3 others (Environment & Land Case
617 of 2011) [2025] KEELC 1058 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 617 OF 2011**

**OA ANGOTE, J
MARCH 6, 2025**

BETWEEN

DAVID MBURU WAKAIMBA PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

PERCY ARTHUR OYUGI OPIO 2ND DEFENDANT

DAVID MATHENGE NDIRANGU 3RD DEFENDANT

EQUITY BANK OF KENYA LIMITED 4TH DEFENDANT

JUDGMENT

1. Vide a Complaint dated the 8th November, 2011, the Plaintiff seeks as against the Defendants, the following reliefs:
 - i. A declaration that the Plaintiff is the absolute proprietor of Title Number Ruiru East/Block 1/104.
 - ii. A mandatory injunction compelling the 1st Defendant to produce the original Land Register for Title Number Ruiru East/Block 1/104.
 - iii. A mandatory injunction compelling the 1st Defendant to rectify the Land Register for Title Number Ruiru East/Block 1/104 to show that the Plaintiff is the registered owner.
 - iv. An order cancelling Title Deed in respect of Title Number: Ruiru East/Block 1/104 issued to the 2nd Defendant, Percy Arthur Oyugi Opio on 12th March, 2010 and Charge dated 11th March, 2010 registered in favour of Equity Bank Limited.
 - v. A permanent injunction restraining the Defendants herein by themselves, their employees, servants, agents and/or any other person claiming through them from entering, remaining



thereon, disposing, trespassing, charging or in any way whatsoever from dealing with the suit property namely Title Number: Ruiru East/Block 1/104.

- vi. Costs of this suit.
 - vii. Any other relief the Court may deem fit to make.
2. It is the Plaintiff's case that sometime in the year 1994, he purchased for valuable consideration the parcel of land known as Title Number Ruiru East Block 1/104 measuring approximately Nought Decimal Five Nought Nought (0.500) Hectares or thereabouts (hereinafter the suit property) from Bernard Kuria Waweru and that after meeting all the legal pre-requisites, he was on 16th May, 1994 registered as the absolute proprietor of the suit property and a title deed was issued to him.
 3. According to the Plaintiff, immediately upon his registration as proprietor aforesaid, he took possession of the property, fenced it and begun carrying out construction of residential premises and that he has never parted with possession and has duly been paying rates to the Municipal Council of Ruiru.
 4. In early 2011, the Plaintiff states, as he continued with construction, unknown persons visited his property purporting to hold title documents thereto issued by the District Land Registrar, Thika and that he lodged a complaint with the CID so as to establish the true position but investigations could not be carried out as the green card for the suit property could not be traced at the Thika Land Registry.
 5. He stated that nonetheless, further investigations revealed that on 29th December, 2009, the 3rd Defendant was fraudulently issued with a Title Deed by the 1st Defendant without regard to the applicable law and without his knowledge or consent and that on 12th March, 2010, the property was further fraudulently transferred to the 2nd Defendant who charged it to the 4th Defendant.
 6. According to the Plaintiff, the registration aforesaid was a fraudulent scheme jointly orchestrated by the 1st -4th Defendants, the particulars of which include, the 3rd Defendant in conjunction with the 1st Defendant causing the suit property to be registered in the 3rd Defendant's name and the 2nd Defendant and the 3rd Defendant in collusion with the 1st Defendant fraudulently causing the suit property to be registered in the name of the 2nd Defendant.
 7. Further particulars of fraud were set out as follows: the 2nd and 4th Defendants, with the assistance of the 1st Defendant, fraudulently causing the property to be charged to the 4th Defendant; the 1st Defendant working in cahoots with the 2nd, 3rd and 4th Defendants to cause interference and disappearance of the Land Register for the suit property and transferring and charging the property without the original Title Deed for the suit property.
 8. As regards the 1st Defendant, the particulars of fraud against him were set out as interfering with the land register (green card) for Title Number Ruiru East/Block 1/104; causing the land register for the suit property to disappear from the Thika Land Registry; colluding with the 2nd -4th Defendants to defraud the Plaintiff of the suit property and failing to maintain a land register for the property and issuing more than one Title Deed in respect of the suit property.
 9. The 1st Defendant filed a Defence on 18th April, 2012. Vide the Defence, it denied all the assertions as set out in the Plaint putting the Plaintiff to strict proof of the same. It was its case that in the alternative and without prejudice to the foregoing, there was no conspiracy and fraud and if any transfer was effected, it was done in accordance with the law and as per the legal requirements.
 10. The 1st Defendant similarly filed a Notice of Claim against the 3rd Defendant claiming full indemnity against him for any orders that the Plaintiff, the 2nd and 4th Defendants may obtain against it on the



grounds that he instigated fraud knowingly, and by misrepresenting to the Land Registrar that he had a good title to pass and made the Land Registrar make an entry in the green card in his favour.

11. It was noted vide the Notice of Claim that should the title held by the 3rd Defendant be found to have been obtained by misrepresentation or fraud, it shall be entitled to be indemnified by the 3rd Defendant from any damages, costs interests or any other reliefs.
12. The 2nd and 4th Defendant's filed a joint a Defence and Counterclaim on 25th April, 2012. Vide the Defence, they denied the assertions as set out in the Plaint asserting that the 2nd Defendant's acquisition of the property was legitimate and that they followed due process in the entire transaction and that no demand or notice was ever served upon them.
13. It is their case vide the Counterclaim that the 2nd Defendant is the registered owner of the suit property pursuant to a sale agreement signed between him and the 3rd Defendant on 9th February, 2010 pursuant to which a Title Deed was issued to him on 12th March, 2010 at Thika Land Registry.
14. According to the Defendants, the suit property was acquired from the 3rd Defendant who acquired it from Githunguri Constituency Company Limited on 24th December, 2009; that the 2nd Defendant legally took possession of the suit property and has since charged it to the 4th Defendant for a financial facility of Kshs 7,000,000 and that the Plaintiff has by himself and in conjunction with the agents of the Land Registrar, Kiambu, fraudulently caused himself to be issued with the suit property to the detriment of the 2nd and 4th Defendants.
15. They contend that the 1st Defendant and Plaintiff were aware or ought to have been aware that the 2nd Defendant herein was the registered owner of the suit property and as such, the Plaintiff's acquisition was null and void. According to the Defendants, the Plaintiff's claim over the suit property is illegal, malicious and is tantamount to trespass.
16. They argue that as a result of the foregoing, they have suffered loss and damage and claim by way of counterclaim for the dismissal of the Plaintiff's suit as well as:
 - i. An order of permanent injunction restraining the Plaintiff by herself, his agents, workmen and/or servants from entering, accessing, remaining onto, getting ingress into the suit land and/or destroying or otherwise injuring the hedge or fence on the boundaries thereof, of from erecting or causing to be erected any structure thereon whether temporary or permanent thereon or from in any way interfering with the 2nd Defendant's peaceful access, use and enjoyment of the suit land namely: Title Number Ruiru East Block 1/104 measuring 0.500HA.
 - ii. A declaration that the said suit property lawfully belongs to the 2nd Defendant.
 - iii. A declaration that any title held by the Plaintiff purporting to be in respect of the suit land in the form of Title Number Ruiru East Block 1/ 104 is illegal and ought to be recalled by the land registrar for cancellation.
 - iv. An order that the Plaintiff do surrender to the Commissioner of Lands, any title held by the Plaintiff and purporting to be in respect of the suit land and more particularly Title Number Ruiru East Block 1/104 for immediate cancellation.
 - v. An order compelling the Commissioner of Lands/Registrar of Titles to reinstate/restitute and/or rectify and interference that may have been caused to the 2nd Defendants said suit properties and Land register thereof by reason of the Plaintiff's said fraudulent and illegal actions and/or dealings. In the Alternative, an order for re-compensation of the value of the



suit property by the 1st and 3rd Defendant to the 2nd and 4th Defendant plus costs of the whole transaction.

- vi. Compensation for all the suit properties at their prevailing current market value.
 - vii. General damages for trespass.
 - viii. General damage for injury/damage to the suit land.
 - ix. Costs of the suit with interests thereon at Court rates.
 - x. Any other relief the court deems fit to grant.
17. The 3rd Defendant filed his Defence on 8th July, 2013. He denied the assertions as set out in the Plaintiff stating that he has always been in possession of the suit property; that the report to the DCI was made in bad faith as the Plaintiff never had good title to the suit property and that as acknowledged by the Plaintiff, no proper investigations could have been carried out and as such the true position is as reflected in the file at the lands office.
18. The 3rd Defendant stated that he was at all times the genuine title holder of the suit property as affirmed by the due diligence carried out by the 2nd and 4th Defendants; that the mere fact that the property's green card was not available at the time of the disappearance does not mean that he caused its disappearance having no control over registry operations; that there is no relationship between the disappearance of the green card and ownership of the property and that the Plaintiff instigated the issuance of the criminal case against him.

Hearing and Evidence

19. The matter proceeded for hearing on 21st April, 2022. The Plaintiff, as PW1, adopted his witness statement dated 8th November, 2011 as his evidence in chief and produced the documents filed on 8th November, 2011 as PEXHB1.
20. It was his evidence that in the year 1994, there were clashes in Eldoret leading him move to Ruiru; that in Ruiru, he met his friend Kuria and as they engaged in discussions, Kuria informed him that he was selling the suit property; that he purchased the suit property and went to Kiambu where he was given a title deed; that he dug a borehole on the property and started building; that he did not finish constructing the house, pausing to seek more funds and that he has been duly paying rates to the Council.
21. It was his further evidence that together with his neighbors, they contributed and paid KPLC Kshs 200,000 to connect them to the electrical grid; that in 2011, he received a call from his daughter informing him that she had seen people on the land; that he reported the issue and discovered that the 3rd Defendant was alleging to have sold the land to the 2nd Defendant; that investigations by the Police revealed that his name had been deleted from the green card and substituted with that of the 3rd Defendant and that he seeks to have the court cancel the title to the 2nd Defendant and revert the same to him.
22. On cross-examination, he stated that he purchased the land from Bernard Kuria and whereas he had an agreement, the same got lost during the land clashes; that he does not remember where he put the receipt for the payment of the land; that he had not shown any title belonging to Bernard; that the police carried out investigations but the report is not before the court; that the adduced search shows the land is in the name of the 2nd Defendant and that he had no document showing the role of equity bank limited.



23. PW2 was Bernard Kuria Waweru. He produced the Affidavit sworn on 31st May, 2011 in the Motion of 8th November, 2011 as his evidence in chief. It was his evidence that he knows the Plaintiff having met him in 1994; that the Plaintiff was looking for land and he sold him Ruiru/East/Block/104 which was 0.50Ha for the sum of Kshs 700,000-800,000/=; that the purchase price was deposited into his account and that he had purchased the suit property from Githunguri Ranching where he had shares after balloting for the plots in 1984.
24. PW2 stated on cross-examination that he does not have the documents showing the sale of the property to the Plaintiff; that he has no documents from Githunguri Ranching; that he does not have the transfer document and that he does not have evidence of the money transfer. In re-examination, PW2 stated that he has seen the letter from Githunguri Ranching in the Plaintiff's bundle dated the 28th January, 2011 which confirms that the land was issued to him and that he was issued with a title deed in 1990.
25. DW1 was John Rimui Waweru, a Director of Githunguri Constituency Ranching Company during the period of 2003-2009. He adopted the statement of John Maina Mburu, the current chairman of Githunguri Constituency Ranching Company dated 7th November, 2013 as his evidence in chief and produced the documents filed on 8th April, 2013 as DEXHB1. He further adduced the Register of Members of Githunguri Ranch
26. It was Mr. Mburu's testimony that he is aware that the suit property originally belonged to one of their members, Bernard Waweru Kuria, certificate no 4299 in respect of plot no 104; that plots 1 to 350 already had titles thereto issued on or about 1983 and that the share certificate by the 3rd Defendant was not issued by Githunguri Constituency Ranching Company.
27. DW1 disowned the clearance certificate ref C45/69/CC/TD/09 dated 30th June, 2009 addressed to the District Land Registrar and purported to have originated from the company.
28. It was his evidence that where a member of a company transfers his shares/property to another party, the original share certificate is surrendered to the company when a new one is issued to the new owner and that having looked at the certificate allegedly given to the 3rd Defendant, the signatures of Ms Rebecca Waringa, the company's chairlady and Mr. Peter Kamunge, its former secretary were forgeries.
29. According to DW1, the transfer of shares for certificate number 4299 on the 12th November, 1991 as indicated in the share certificate is not the true position because plots 1 to 350 already had titles issued therein in 1983 and that where there was a transfer of shares, the purchaser would take to the company a sale agreement or letter of authority requesting the company to transfer the shares to the new owner.
30. Further, it was stated by DW1, the new owner would take the original share certificate and the original ballot paper that the original owner had, and surrender them to the company; that the new owner would then pay the transfer fees and an official receipt would be issued and that the company would then issue a share certificate and a clearance certificate to the new owner to facilitate the process of obtaining the title deed.
31. It was the evidence of DW1 that when the land was purported to have been registered in the name of Githunguri Constituency Ranching Company on the 24th March, 2009, he was the chairman of the Board of Directors and it was his duty to process titles and that he did not register the said transaction and neither did he process the title deed. In cross-examination, DW1 stated that the name of Bernard does not appear in the green card.
32. DW2 was Percy Arthur Oyugi, the 2nd Defendant. He relied on the witness statement dated 25th April, 2012 as his evidence in chief and produced the documents of an even date as 2DEXHB2.



33. It was his evidence that he purchased the suit property from the 3rd Defendant at a consideration of Kshs 7,000,000 through a sale agreement signed on the 9th February, 2010 and that prior to the execution of the sale agreement, he obtained from the firm of Omwancha and Mukiri Advocates the rates clearance certificate.
34. According to DW2, a search had been undertaken by Keriask and Company Valuers before he executed the agreement which affirmed that the suit property was transferrable and that he thereafter sought financial assistance and the same was granted to him by the 4th Defendant through a loan agreement executed by him on the 5th March, 2010.
35. DW2 stated that thereafter, through the firm of Omwancha and Mukiri Advocates, he executed and registered the transfer of land form and the letter of consent; that, through the aforesaid firm he signed a charge over the suit property on 5th March, 2010; that on 8th March, 2010, the transfer and charge were lodged at the Thika Land Registry and a new title applied for; that stamp duty valuation was undertaken valuing the property at Kshs. 9,000,000 which he paid stamp duty of Kshs 340,000 and that on the 16th March, 2010, he was issued with a new title.
36. It was his testimony that sometime in January, 2011, he learned that the Plaintiff had a claim over the suit property and he informed the 4th Defendant of the same; that he was invited to record a statement by the Police at Ruiru Police Station; that he was informed by the investigating officer that the Land Registrar who had issued a title to him affirmed that the same was genuine; that he was provided with certified records of the property's green card which indicated that the record was opened on the 24th December, 2009 and then registered in the name of Githunguri Constituency on the same date; that the land was thereafter transferred to the 3rd Defendant and that he carried out due diligence and was not party to any fraud.
37. In cross-examination, DW2 stated that when he went to see the land, there was an incomplete structure thereon; that he did not see any approvals with respect to the structures and that the 3rd Defendant was charged in the criminal court with respect to the suit property and the title that he had passed to him.
38. According to DW2, he did not personally conduct a search; that the land registrar is not a witness; that at the time he went to see the property, the same was fenced but he did not identify the beacons; that he did not personally ascertain the legality of the structure that was on the land and that he did not carry out a historical search as to how the 3rd Defendant acquired the land.
39. He noted that while the valuation report identified the land, the sale agreement did not; that he sued the 3rd Defendant now deceased, but did not take any step to substitute him after his death; that the green card shows Githunguri Constituency initially owned the property. And that the bank carried out due diligence and he was satisfied before charging the property.
40. DW3 was Lucy Kamau, a Human Resource Manager, Staff loans at the 4th Defendant. She adopted her witness statement dated 27th November, 2018 as her evidence in chief and produced the documents dated 25th April, 2012 as 2DEXHB2.
41. Briefly, it was her evidence that at all material times, the 2nd Defendant was an employee of the 4th Defendant; that in early, 2010, he sought for financial assistance with respect to the purchase of the suit property and to that end, he was issued with a loan for the sum of Kshs 7,000,000 and that pursuant to the loan agreement, a charge was secured over the suit property and that the 4th Defendant instructed the firm of Omwancha & Mukiri Advocates to carry out the transaction involving the sale and purchase of the suit property.



42. It was her further evidence vide the statement that the property was sold to the 2nd Defendant by the 3rd Defendant on 9th February, 2010 for a consideration of Kshs 7,000,000 effected through a sale agreement and that the firm of Mukiri aforesaid obtained a rates clearance certificate, executed and registered the transfer of land form and LCB Consent forms on the 11th March, 2010 and signed the charge over the property on the 5th March, 2010.
43. Further, it was her evidence that the said law firm lodged the transfer and charge at the Thika Land Registry and applied for issuance of a title which they obtained on the 16th March, 2010 in the names of the 2nd Defendant and that the property was valued at Kshs 9,000,000.
44. DW3 stated that on 10th January, 2011, she learnt from the 2nd Defendant that a third party was claiming ownership over the property; that the Land Registrar who conducted the investigations informed them that the title deed issued to the 2nd Defendant was genuine and was signed by himself and that the 2nd Defendant was also given a certified copy of the green card which showed that the land initially belonged to Githunguri Constituency Company Limited and was transferred to the 3rd Defendant.
45. She testified on cross-examination that the agreement given to them by the 2nd Defendant did not capture any developments on the property; that the valuation report shows pictures of incomplete structures; that they did not inquire about the structure and were only concerned with the value of the land; that she is unsure of possession and that the 2nd Defendant never took possession of the property due to allegations of fraud.
46. DW4 was Vincent Mukiri, an Advocate. He adopted his statement dated the 4th November, 2012 as his evidence in chief and placed reliance on the documents adduced by the 2nd and 4th Defendants.
47. It was his evidence that on 1st February, 2010, the 2nd Defendant, being a member of staff of the 4th Defendant, took out a mortgage to purchase the suit property under the staff mortgage scheme; that the 4th Defendant, instructed them to prepare a charge over the suit property for the sum of Kshs 7,000,000 and thereafter issue a professional undertaking to the 3rd Defendant's Advocates for the sum of Kshs 5,800,000 and that after perusal of the relevant documents, they issued the relevant undertakings and obtained the completion documents including the original title.
48. It was the evidence of DW4 that the 4th Defendant carried out investigations which revealed that the Land Registrar who handled the matter had been interviewed and affirmed that the title deed issued in respect to the property was legitimate and that no fraud was committed by the 2nd or 4th Defendants in the process and transfer of the suit property.
49. He stated on cross-examination that he was involved in the drafting of the sale agreement; that he acted for the 2nd Defendant and was also engaged by the bank; that he doesn't have a valuation report; that he does not know if there is another search; that the 2nd Defendant did not inform him of structures on the land and that the land was sold with vacant possession which meant that there was no structure on the land.

Submissions

50. The Plaintiff filed submissions on the 20th September, 2024. Counsel submitted that the Plaintiff has provided evidence to show that he is the legitimate proprietor of the suit property having acquired it by way of purchase from one Bernard Waweru Kuria in 1994 and that he is still in possession of the suit property and has original title document over the same.



51. It was submitted that the 3rd Defendant's assertions that it acquired the suit property from Githunguri Constituency Ranching Co Ltd has been refuted by the company and that the evidence makes it clear that plots 1-350 had titles issued thereon in 1983 and as such, the 3rd Defendant could not have acquired the property in 2009.
52. The Plaintiff's counsel submitted that consequently, the transfer of the property by the 3rd Defendant was tainted with illegality because he did not have a clean title capable of being transferred to the 2nd Defendant. Reliance was placed *Evanson Wambugu Gachugi vs Simon Wainaina Gatwiki & 2 Others*[2014]eKLR and *Republic vs Minister for Transport & Communication & 5 Others Ex-parte Waa Ship Garbage Collector & 15 Ors*[2006]eKLR, *Albert Mae Gacci vs Attorney General & 4 Others*[2006]eKLR
53. Counsel submitted that the Plaintiff is an innocent proprietor who is entitled to the protection of his right to property pursuant to Article 40 of the *Constitution*; that Section 26 of the *Land Registration Act* is categorical that a Certificate of Title is prima facie evidence of proprietorship but the same can be challenged when the title was acquired fraudulently, procedurally or through corrupt practice and that his evidence of ownership being uncontroverted, he is entitled to be held the legitimate proprietor.
54. Reliance in this respect was placed on the cases of *Sai Office Supplies Limited vs Rosemary Alivitsa Luseno & Another*[2014]eKLR and *Elijah Makeri Nyangwera vs Stephen Mungai Njuguna & Anor*, ELC 609B of 2012.
55. Counsel contended that the 1st Defendant's actions in issuing the 3rd Defendant with title while the Plaintiff held the original title was fraudulent and that when the Plaintiff undertook investigations, the suit property's green card disappeared pointing to collusion between the 1st and 3rd Defendant. Counsel relied on the case of *Munyu Maina vs Hiram Gathitha Maina*[2013]eKLR.
56. The 1st Defendant's counsel filed submissions on 22nd October, 2024. Counsel submitted that in determining the proprietorship of the suit property, the court should be guided by Section 26(1) of the *Land Registration Act* and that as discussed in *Kamau James Njenda vs Serah Wanjiru & Another*[2018]eKL, the import of Section 26(1) is to remove protection from an innocent title holder, meaning that his title is impeachable as long as it was acquired illegally, un procedurally or through a corrupt scheme.
57. It was submitted that the evidence shows that the Plaintiff purchased the property in 1994 whereas the 2nd Defendant alleges to have purchased it in 2010 and that as stated in *Wreck Motors Enterprises vs The Commissioner of Lands*[1997]eKLR, where there are two competing titles, the first in time prevails. Reliance in this respect was also placed on the case of *Gitwany Investments Ltd vs Tajmal Limited & 3 Others* [2006] eKLR.
58. Counsel noted that it is crucial to carry out due diligence when engaging in any form of conveyance and in case of two titles, investigation must start at the root and follow all processes and procedures as expressed in *Hubert L Martin & 2 Others vs Margaret J Kamar*[2016]eKLR and that similar sentiments were expressed by the court in *Samuel Kamere vs Land Registrar Kajiado*[2015]eKLR and by the Apex court in *Dina Management Limited vs County Government of Mobasa*[2021]eKLR.
59. It was submitted that no fraud was established as against the 1st Defendant as per the parameters set out in *R.G Patel vs Lalji Makanji*[1957]E.A 314 being something more than a mere balance of probabilities and that in the circumstances, the 1st Defendant issued titles on the basis that the documents presented are regular and in this instance it could not have any basis for suspecting that they were not.



60. The 2nd Defendant's counsel filed submissions on the 13th November, 2024. Counsel submitted that as held in *Hubert L Martin & 2 Others vs Margaret J Kamar & 5 Ors*[2016]eKLR where a proprietor's title is under challenge, it is not sufficient to dangle the same, he must demonstrate the root of his title and that in the circumstances, it is the 2nd Defendant and not the Plaintiff who has demonstrated the root of his title having traced it to Githunguri Ranching Company, a position affirmed by the green card. Reliance in this respect was also placed on the case of *Samuel Kamere vs Land Registrar Kajiado*[2015]eKLR.
61. It was submitted that not having demonstrated his proprietorship, the Plaintiff is not entitled to any of the orders sought in the suit; that on his part, the 2nd Defendant proved that he is a bona fide purchaser as defined by the cases of *Weston Gitonga & 10 Others vs Peter Rugu Gikanga & Another and Lawrence Mukiri vs Attorney General & 4 Ors*[2013]eKLR, to wit, a person who obtained a title in good faith without knowledge of fraud from a vendor with apparent valid title.
62. It was submitted that the allegations of fraud as against the 1st and 3rd Defendants have not been demonstrated to the requisite standards as expressed in *Musonga vs Nyati*{1984}KLR 425 and *Katende Vs Haridas and Company Limited*[2008]E.A 173 and that ultimately, the 2nd Defendant has established his claim and is entitled to the orders sought in the counterclaim.
63. The 4th Defendant filed submissions on the 13th November, 2024. Counsel submitted that the Plaintiff has not demonstrated the allegations of fraud as against the Defendants contrary to the evidential principle that he who alleges must prove; that in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Anor* [2000] eKLR, the court was categorical that fraud must be specifically pleaded and proved and that the same cannot be inferred from the facts.
64. Counsel contended that in *Lawrence Mukiri vs Attorney General & 4 Others*[2013]eKLR, the court defined a bona fide purchaser as one who honestly intends to purchase the property for value and must prove that he holds a certificate of title, purchased the property in good faith, had no knowledge of the fraud, vendor had apparent valid title, and he had no notice of, or was party to any fraud and that the 2nd Defendant who was financed by the 4th Defendant through a mortgage carried out the necessary due diligence and found that the property was indeed transferrable.
65. It was submitted that the 4th Defendant carried out its own investigations including a search at the Thika Lands Registry which revealed that the 3rd Defendant was the legitimate proprietor of the suit property; that an official search enjoys state guarantee and that even if the same was a mistake, the certificate of title is conclusive evidence according to the law.
66. Counsel submitted that the 1st Defendant as the custodian of records affirmed the 3rd Defendant's title and that Section 35 of the *Land Registration Act* guarantees that every document purported to be signed by the registrar shall in all proceedings be presumed to have been so signed unless the contrary is proved.
67. It was submitted that in *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KLR, the Supreme Court noted that for one to be a bona fide purchaser, they must prove that they acquired a valid title, carried out the necessary due diligence and paid valuable consideration for the suit property and that from the foregoing, it is apparent that all purchasers must investigate the root of their title.



Analysis and Determination

68. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
- i. Who between the Plaintiff and the 2nd Defendant is the lawful proprietor of the suit property?
 - ii. What are the appropriate reliefs to issue?
69. Vide the present suit, the Plaintiff seeks inter-alia, a declaration that he is the legitimate proprietor of the suit property, an order for the cancellation of the title in the name of the 2nd Defendant and the charge over the suit property, a rectification of the register to have him named as the proprietor and permanent injunctive orders restraining the Defendants from interfering with the suit property.
70. It is the Plaintiff's case that he is the legitimate owner of the suit property having obtained it by way of purchase from its initial owner, one Bernard Kuria in the year 1994; that he thereafter took possession, fenced and begun construction; that sometime in 2011, he was informed that persons unknown to him were claiming the suit property and that he discovered that the 2nd Defendant has a title to the suit property.
71. The Plaintiff adduced into evidence the title deed in his name registered on 16th May, 1994; photographs of the suit property; letter dated 28th October, 1995 from KPLC; rates clearance certificate; search dated 22nd January, 2010 indicating the 2nd Defendant as the proprietor and letter dated 17th January, 2011 from PS Ministry of Internal Security to the DC, Thika Ruiru.
72. He further adduced into evidence a copy of the title deed in the 1st Defendant's name registered on 12th March, 2010; letter dated 28th January, 2011 from Githunguri Constituency Ranching Company Limited; affidavit by Bernard Kuria Waweru dated 31st May, 2011; letter dated 25th May, 2011 to Thika District Land Registrar from M/S PK Njoroge & Co Advocates; letter dated 2nd June, 2011 from Mburu & Co Advocates to the District Land Registrar, Thika and copied to the 2nd, 3rd and 4th Defendants and the official search receipt dated 16th June, 2011.
73. The 1st Defendant on its part states that any transfer of the suit property was legitimately carried out and in the event there was any collusion and/or fraud, it was not a party to the same.
74. Through DW1, it adduced into evidence a copy of the certified copy of the Land Register; transfer documents with the requisite consents and copies of pin certificates; charge documents with the requisite consents and identification of documents; copies of the pin certificates and a copy of the Githunguri Constituency Ranching Company Register.
75. On their part, the 2nd and 4th Defendants jointly contend that the 2nd Defendant is the legitimate proprietor of the suit property having acquired the same from the 3rd Defendant sometime in 2010; that he took possession of the property and thereafter charged the same to the 4th Defendant and that they thereafter discovered that the Plaintiff was claiming ownership of the property alleging that it belonged to him.
76. They adduced into evidence a copy of the certificate of title in the 2nd Defendant's name issued on 12th March, 2010; sale agreement dated 9th February, 2010; rates clearance certificate dated 5th February, 2010; certificate of official search dated 22nd January, 2010; valuation report; transfer form; LCB consent application forms; loan agreement dated 5th March, 2010; charge dated 5th March, 2010; valuation requisition for stamp duty form; bankers cheque number 045014; official search dated 16th March, 2010; payslips and letters dated 17th March, 2010.



77. The 3rd Defendant on his part maintains that he was the initial legitimate proprietor of the suit property having acquired the same from Githunguri Constituency Ranching Limited and that he duly sold the property to the 2nd Defendant and allegations to the contrary are unfounded. No evidence was tendered on his behalf.

78. From the above, it is evident that this is a dispute involving two parties, the Plaintiff and the 2nd Defendant, each asserting ownership over the same parcel of land. In determining the matter, the court remains mindful of the evidentiary burden each party must discharge to substantiate their claim. This position is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*. Section 107 provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

79. And Sections 109 and 112 of the same Act states as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

80. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”



81. On the question of burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & Another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

82. The majority decision of the Supreme Court in *Presidential Election Petition No. 1 of 2017 - Raila Amolo Odinga & Another vs IEBC & 2 Others* (2017) eKLR had the following to say on the evidential burden of proof;

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

83. Claims of fraud have been raised by the parties as against each other. A fundamental principle of fraud is that the same must be specifically pleaded and proved. This was aptly expressed in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently”

84. Indeed, fraud cannot be inferred from facts. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud....”



85. As regards the burden of proof in matters fraud, the same is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal cases being beyond reasonable doubt. The Court in *Moses Parantai & Peris Wanjiku Mukuru* (supra), observed as follows:

“... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities...”

86. The Court will be so guided.

87. The Plaintiff and the 2nd Defendant have each presented to this court a Certificate of Title in respect of Ruiru East Block 1/104 registered pursuant to the provisions of the Registered *Land Act* (repealed). It is trite that one parcel of land cannot have two titles.

88. Ordinarily, a Certificate of Title would prima facie evince legitimate ownership of property. Where parties claim to have titles over one parcel of land, the court is mandated to conduct an investigation into the root of the titles to establish the real ownership. This position was enunciated by the Court of Appeal in *Megvel Cartons Limited vs Diesel Care Limited & 2 Others* (Civil Appeal 70 of 2018) [2023] KECA 184 (KLR) (17 February 2023) (Judgment) placing reliance on the decision of the court in *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others*[2016] eKLR, which noted thus:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

89. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, had earlier opined that where a registered proprietor’s title is under challenge, it is not enough to dangle the instrument of title as proof of ownership.

90. The Plaintiff has adduced a title in his name, indicating that he was registered as the proprietor thereof on 16th May, 1994. The 2nd Defendant has equally adduced a title in his name which shows that he was registered as the owner on 12th March, 2010. It is trite that where there are two competing titles, the first in time will prevail, unless it is shown that the same was unlawfully acquired. This position was emphasized in the case of *Wreck Motors Enterprises vs The Commissioner of Lands and others* civil appeal civil appeal No. 71 of 1997, where the Court of Appeal held as follows:

“Where there are two competing titles the one registered earlier is the one that takes priority.”



91. Similarly, the court in case of *Gitwany Investment Ltd & 3 Others vs Commissioner of Lands, HCCC No 1114 of 2002*, held that:
- “The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail.”
92. However, the first in time maxim is only applicable where there are equal equities. In the circumstances, each of the titles has been impugned and the court is mandated to investigate their roots.
93. The Plaintiff asserts that he purchased the suit property from Bernard Kuria Waweru, who was its first owner, having acquired it from Githunguri Constituency Ranching Company Limited. However, the Plaintiff did not provide any documentary evidence to substantiate this alleged sale. Despite this, his claim was corroborated by Bernard Kuria Waweru, who testified as PW2, who stated that he indeed sold the property to the Plaintiff. Further, the Plaintiff established that he took possession of the property and begun constructions thereon.
94. Regarding Bernard Kuria Waweru’s acquisition of the property, he testified that he obtained it from Githunguri Constituency Ranching Company Limited by virtue of his membership and shareholding in the company. To support this assertion, he produced a letter dated 28th January 2011 from the company which confirmed his ownership and acquisition of the property through his shares.
95. This evidence was further corroborated by DW1, the former chairman of Githunguri Constituency Company Limited who stated that according to the company’s official records, the property was originally allocated to one Benson Kuria under certificate number 4299. He adduced the Company’s members’ register affirming this position.
96. The 2nd Defendant on his part states that he lawfully purchased the property from the 3rd Defendant through a Sale Agreement dated 9th February 2010. He demonstrated the sale, payment and the process leading to the subsequent transfer of the suit property into his name. No evidence was given on behalf of the 3rd Defendant as regards his acquisition of the suit property before he sold it to the 2nd Defendant.
97. It being undisputed that the suit property originated from Githunguri Ranching, once DW1 testified that they transferred the property to Bernard Kuria, and not the 3rd Defendant, he, prima facie, established this fact and the burden shifted to the 2nd, 3rd and 4th Defendants who took a contrary position to prove the same. They did not do so.
98. In respect to the production of the green card and accompanying transfer and charge documents, these were introduced into evidence by DW1 as records held by the 1st Defendant. However, DW1 did not provide any substantive testimony with respect to these records. Crucially, no officer from the 1st Defendant was called to testify on the same.
99. It is important to underscore that records maintained by the 1st Defendant, including the green card, are not beyond scrutiny. If they were unimpeachable, courts would have no basis to issue orders for the cancellation of titles where irregularities are established.
100. As reaffirmed in *Dina Management Ltd vs County Government of Mombasa & Another*[2023] KESC 30 (KLR), a title is not an end in itself but rather the culmination of a legally sound process. The mere fact that an individual’s name appears on a green card does not, in and of itself, validate the integrity of their title, particularly in cases where the court is called upon to investigate the root of ownership.



101. Ultimately, the court finds that as between the Plaintiff and the 2nd Defendant, the Plaintiff has satisfactorily established the root of his title.
102. The above notwithstanding, whereas it is clear that the 3rd Defendant's acquisition of the suit property was irregular, the court does not find that the claims of fraud and or collusion between him and the 1st, 2nd or 4th Defendants have been established and the question that arises is whether the 2nd Defendant is, as he maintains, is a bona fide purchaser for value.
103. The thresholds for one to be considered a bona fide purchaser were initially set down in *Katende vs Haridar & Company Limited* (2008) 2 E.A.173 where the Ugandan Court of Appeal stated thus:

“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.”

104. This position was reviewed by the Court of Appeal in *Mwangi James Njehia vs Janetta Wanjiku Mwangi & Another* [2021] eKLR, which stated as follows:

“...In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“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 as was held in the case of *Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996*, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;



6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*.”

105. Similarly, the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) had this to say:

“To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...

Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”

106. The Court need not say more. The apex court’s decision is clear that there can be no protection offered to a purchaser with respect to a title whose root is defective or marred by illegality. In the circumstances, the 3rd Defendant had no title to pass to the 2nd Defendant who acquired nothing. Similarly, a charge over an invalid title cannot create a valid interest in land.

107. As aforesaid, the Plaintiff has established that his title is legitimate. He is therefore entitled to a declaration in that respect as well as vacant possession of the suit property and injunctive orders restraining interference with his property.

108. Having affirmed the Plaintiff’s proprietorship, the 2nd Defendant’s title is liable to be impeached as per Section 143 of the Registered *Land Act*(repealed) which provides as follows:

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

109. Section 80(1) of the *Land Registration Act* now provides thus:

- “(1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence



of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

110. For those reasons, the Court finds that the Plaintiff has established his case on a balance of probabilities and proceeds to make the following determination:
- a. The 2nd and 4th Defendants’ Counterclaim be and is hereby dismissed.
 - b. A declaration does hereby issue that the Plaintiff is the absolute proprietor of Title Number Ruiru East/Block 1/104.
 - c. A mandatory injunction does hereby issue compelling the 1st Defendant to rectify the Land Register for Title Number Ruiru East/Block 1/104 and indicate the Plaintiff as the registered owner.
 - d. An order does hereby issue directing the 1st Defendant to cancel the Title Deed in respect of Title Number Ruiru East/Block 1/104 issued to the 2nd Defendant, Percy Arthur Oyugi Opio on 12th March, 2010 and Charge dated 5th March, 2010 registered in favour of Equity Bank Limited.
 - e. A permanent injunction does hereby issue restraining the Defendants herein by themselves, their employees, servants, agents and/or any other person claiming through them from entering, remaining thereon, disposing, alienating, trespassing, charging or in any way whatsoever from dealing with the suit property namely parcel number Ruiru East/Block 1/104.
 - f. The 2nd and 4th Defendants to jointly and severally bear the costs of the suit and the counter claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Munyororo for Plaintiff

Ms Bwire for 2nd Defendant

Ms Taank for 4th Defendant

Court Assistant: Tracy

