



Makau v Kianda Foundation Educational Trust & 4 others (Environment and Land Case 297 of 2017) [2025] KEELC 6098 (KLR) (16 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 297 OF 2017
MD MWANGI, J
SEPTEMBER 16, 2025**

BETWEEN

PHILIP MUTISO MAKAU PLAINTIFF

AND

KIANDA FOUNDATION EDUCATIONAL TRUST 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

THE LAND REGISTRAR KAJIADO 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

DANIEL LAIBRE OLE TIRIKOG 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced his claim against the 1st to 4th Defendants by way of a Plaintiff dated 2nd May 2013. The suit, formerly Machakos HCCC No. 130 of 2012, was thereafter transferred to this court and renamed ELC CASE NO. 297 of 2017. On 21st September 2018, the Plaintiff lodged a Notice of Motion dated 20th September 2018 seeking to amend his Plaintiff and enjoin the 5th Defendant in these proceedings. The application was subsequently allowed.
2. Through an Amended Plaintiff dated 22nd March 2019, the Plaintiff avers that he is the duly registered owner of the parcel of land known as Kajiado/kaputiei-central/496, measuring 60 hectares. He asserts that he acquired the suit property in 1997 from Daniel Lairbe Ole Tirikog, the 5th Defendant herein, following an execution of a sale agreement dated 7th September 1995. Afterwards, he was duly registered as the owner and a title deed issued in his name. He maintains that he never sold the suit property neither did he re-transfer it to the 5th Defendant nor did he obtain a Land Control Board Consent allowing it to be dealt with in any manner.



3. The Plaintiff asserts that on 26th April 2012, he learned from one Josiah Kilungu that the suit property had been transferred to another person. Upon conducting a search on 27th April 2012, he discovered that the suit property had been transferred to the 1st Defendant herein. When the Plaintiff inquired from the 3rd Defendant about the transfer, he was informed that his registration was cancelled because he allegedly gave it back to the 5th Defendant. It is the Plaintiff's case that when he demanded to be shown the transfer instruments by the 3rd Defendant, he was whisked out of the office without any explanation.
4. According to the Plaintiff, registration of the suit property in favor of the 1st Defendant is a case of fraud, negligence and malice on the part of the 3rd Defendant. The Plaintiff insists that he has never transferred the suit property to anyone including the 5th and the 1st Defendants. The particulars of fraud, negligence, malice against the 3rd Defendant are pleaded as follows:
 - a. Failure by the 3rd Defendant to satisfy himself that the Plaintiff actually executed instruments of transfer to dispose of the suit land as required by the Registered Land Act.
 - b. General Failure by the 3rd Defendant to protect his Register from the infiltration of fraud.
 - c. Failure by 3rd Defendant to be cooperative, open and candid with information as required of him by the Constitution of Kenya.
 - d. The 5th Defendant purporting to retransfer suit land to himself without sale agreement, payment of any consideration, seeking and obtaining the requisite land control board consent, falsifying documents and forgery of signatures.
 - e. The 5th Defendant was purporting to sell and transfer suit land knowing full well that he did not lawfully own it, had no title or authority to sell and that the purported title was unlawfully and fraudulently obtained and thus could not pass a better title to the 1st Defendant.
 - f. The 5th Defendant unlawfully and fraudulently preparing a duplicate title deed for purposes of unlawful "retransfer" of suit land to himself.
5. Consequently, the Plaintiff seeks judgment to be entered in his favor for the following orders;
 - a. The 2nd and 3rd Defendants be ordered to cancel the registration of the suit property in the 1st Defendant's name.
 - b. The 2nd and 3rd Defendant be ordered to revoke the title deed issued to the 1st Defendant over the suit land.
 - c. This honorable court does uphold the title deed issued to the Plaintiff and declares him to be the legitimate registered owner of the suit property.
 - d. The 1st Defendant be ordered to reverse any structural development it may have begun on the suit land or in the alternative to prove cost to the Plaintiff for him to do the same himself, to remove all or any unlawful developments within the suit land.
 - e. Any other relief that this honorable court may deem fit to grant.

1st Defendant's case

6. The 1st Defendant vide a Statement of Defence dated 15th June 2012, refutes the Plaintiff's assertions against it and prays that the suit be dismissed with costs. It claims that it lawfully purchased the suit



property, Kajiado/kaputiei-central/496 from Daniel Laibre Ole Tirikog, the 5th Defendant herein for valuable consideration through a Sale Agreement executed on 7th September 2011.

7. It further alleges that after obtaining the consent to transfer, and subsequently the title deed of the suit property on 22nd February 2012, it has been in possession of the suit property since then. As a bona fide purchaser for value, the 1st Defendant alleges that it should be allowed quiet and peaceful enjoyment of the suit property. The 1st Defendant denies ever being served with any demand or notice of intention to sue by the Plaintiff.

2nd, 3rd and 4th Defendants' case

8. Through a Memorandum of Appearance dated 16th July 2012, the Hon. Attorney General entered appearance on 20th July 2012 on behalf of the 2nd, 3rd and 4th Defendants and replied to the Plaintiff's claim through their Statement of Defence dated 16th July 2012. While denying the Plaintiff's allegations levelled against them and putting him to strict proof, they assert that the Plaintiff was not the registered proprietor of the suit property. They further allege that no notice of intention to sue was ever served upon them. The court is therefore urged to dismiss the Plaintiff's suit with costs.

5th Defendant's case

9. Though the 5th Defendant entered appearance on 10th April 2019, he never filed any statement of defence in response to the Plaintiff's case. He further did not participate in the hearing of the case.

Evidence Adduced At The Hearing

Plaintiff's evidence

10. Philip Mutiso Makau, testified in his case as PW1. He testified that he was issued with the title deed to the suit property on 23rd April 1997 after purchasing it from the 5th Defendant. It was his evidence that he has never resold or re-transferred it to the 5th Defendant thereafter. According to him, he did not know the circumstances under which the 5th Defendant obtained title to the suit property after selling the suit property to him to enable him transfer it to the 1st Defendant. He therefore called upon the court to cancel the 1st Defendant's title to the suit property.
11. When PW1 was cross-examined, he explained that cumulatively, he purchased 150 acres from the 5th Defendant through various sale agreements. The acreage for the 1st, 2nd, 3rd and 4th Sale Agreements were 50, 50, 16 and 34 respectively while their purchase prices were Ksh. 125,000/=, Ksh.125,000/=, Ksh.40,000/= and Ksh.85,000/= in that order. He attested that this was demonstrable in the sale agreement dated 7th September 1995 duly signed by the 5th Defendant.
12. PW1 told the court that the 5th Defendant was hesitant at first to transfer the suit property to him in spite of him having paid the purchase price in full. He had paid Ksh.375,000/= as consideration to the 5th Defendant. Reference was made to the voucher issued by his counsel where the 5th Defendant acknowledged receipt of the purchase price. According to PW1, the 5th Defendant's hesitation is what prompted him to register a caution on the suit land title to safeguard his interests.
13. PW1 testified that the 5th Defendant only signed the transfer form after he reported him to the Land Control Board. According to his evidence, the Land Control Board indicated that the consideration was the right purchase price at the time. He stated that he appeared before the Board prior to issuance of title to him. To confirm that he legally acquired the suit property, he made reference to an application



for the consent to transfer, the letter of consent and the duly executed transfer form wherein the 5th Defendant had appended his signature.

14. PW1 further stated that the suit property which was a resultant subdivision of Kajiado/kaputiei-central/472 measuring 372 acres similarly owned by the 5th Defendant.
15. It was the testimony of PW1 that after being notified by one Josiah Kilungu that the suit property had been transferred to the 1st Defendant, he visited the Kajiado Land Registry where one Mr. Kyule told him that the title to the suit property had first been re-issued to the 5th Defendant who then transferred it to the 1st Defendant.
16. PW1 testified that around 1997, he had planted crops and trees and constructed a toilet on the suit property. He further attested that the suit property was not fenced and that the maize planted in 1997 was destroyed by wild animals.
17. PW1 stated that he did not know whether the 1st Defendant had adhered to the law in the purchase of the suit property or whether it could be classified as a purchaser for value without notice.
18. Upon being re-examined, PW1 restated his testimony that the sale agreement of 7th September 1995 recognized existence of all previous agreements and that his title to the suit property has never been cancelled. It was his testimony that the 1st Defendant benefited from 5th Defendant fraudulent activities. PW1 informed the court that he paid stamp duty in respect of the disposition of land.
19. PW2, Pius Mbithi, began his testimony by adopting his witness statement as his evidence in chief. During cross examination, he stated that in 1996, he accompanied the Plaintiff and his workers to place beacons on the suit property. During the visit, they planted maize, beans and trees. However, the maize and beans were destroyed by wild animals because the land was not fenced. It was his evidence that during this period, the Plaintiff and the 5th Defendant were good friends. He testified that although the suit land belonged to the Plaintiff, its title deed had been issued to him. He informed the court that he was not able to conduct a search in respect of the suit property because he was told to bring its original title deed.
20. Upon being re-examined, he testified that the suit land beacons were still in existence. He further stated that he knew the 5th Defendant as the person from whom the Plaintiff purchased the suit property from.

Defense hearing

21. DW1, Mary Anne Njoroge, an Advocate of the High Court of Kenya, began her testimony with adoption of her witness statement as her evidence in chief. She also produced the documents listed on the 1st Defendant's list and bundle of documents in support of her testimony. She acknowledged that she undertook conveyance on behalf of the 1st Defendant in respect of the suit property. It was her evidence that the suit property belonged to the 5th Defendant based on a search conducted at the Kajiado Land Registry. As part of due diligence, she had also sent a surveyor to verify the land on the ground. The court was informed that the 1st Defendant paid stamp duty prior to being issued with the title to the suit property.
22. DW1 testified that during the transaction, they never received any information suggesting that the Plaintiff or any other third party for that matter had any claim over the suit property. They also never came across any documentation indicating that the Plaintiff had purchased the suit property from the 5th Defendant. Based on this, she prayed for dismissal of the Plaintiff suit.



23. When she was referred to the green card entries during cross-examination, she explained that entry No. 1 dated 26/2/1996 showed that the 5th Defendant was the original owner of the suit land. Entry No. 3 related to a caution registered by the Plaintiff on the basis of a purchaser's interest whose withdrawal was effected through entry No. 4. Cancellation of the Plaintiff's title deed was effected on 23/4/1999 through entry No. 5. She further stated the 1st Defendant was re-issued with a title deed on 18/1/2007 according to entry No. 7.
24. It was DW1's testimony that when she sought an explanation from the 5th Defendant on why the Plaintiff's title was cancelled, he told her that the tile was re-issued to him because it had been fraudulently issued to the Plaintiff. She explained that according to the 5th Defendant, the Plaintiff had colluded with the Land Registry to obtain the title to the suit property. Nevertheless, she acknowledged that the 5th Defendant did not have the capacity to re-transfer the title to the suit property to himself. The witness testified that she never received any court order effecting the cancellation of the Plaintiff's title. She also confirmed that cancellation of the Plaintiff's title was effected 10 years after its issuance. It was her evidence that the green card contained inconsistencies even though it had been verified.
25. DW1 testified that the 1st Defendant had lodged criminal proceedings against the 5th Defendant. In addition, the 1st Defendant was served with an application in Machakos HCC No. 138 of 2012.
26. DW1 maintained that the 1st Defendant is the owner of the suit property and that it has never sold it to third parties. Further, as at the time the 1st Defendant purchased the property, it was vacant and undeveloped. She reiterated that the suit property which measures 150 acres was purchased at Ksh.37,500,000/=. DW1 restated her testimony that prior to undertaking the transaction, she conducted due diligence and obtained relevant documentation. She further stated that the 1st Defendant's documents were booked in the presentation book and the requisite payments made. Afterwards, the 1st Defendant was issued with a title deed. According to her, the Plaintiff's allegations against the 1st Defendant were incorrect. This is so because the 1st Defendant has never been summoned by the land Registrar in relation to any dispute over the suit property. She further testified that the 1st Defendant has never attempted to obtain a refund of the purchase price from the 5th Defendant.
27. While restating her evidence that the 1st Defendant was issued with a title deed after purchasing the property at Ksh.37,500,000/=:, she maintained that she undertook the transaction as per the law in addition to verification of the beacons by the surveyor. On this basis, she insisted that she undertook her work to the best of her abilities. She reiterated that as at the time of purchase, no developments existed on the suit property nor did they notice. Further, she never saw any documents indicating that the Plaintiff had purchased the suit land from the 5th Defendant at any one time.
28. DW2, Wilfrida Chepkoech testified that she was one of the 1st Defendant's trustees. She commenced her testimony by adopting her witness stated dated 22nd October, 2022 as her evidence in chief. She stated that she was one of the signatories of the duly executed sale agreement and transfer instrument where the 1st Defendant purchased the suit property at Ksh.37,500,000/=. According to her evidence, DW1, the 1st Defendant's counsel conducted due diligence prior to the purchase. Hence, the 1st Defendant legally obtained the suit title after following due process. She therefore requested the court to dismiss the Plaintiff's suit because the suit property was never stolen from him.
29. Upon being shown the green card during cross-examination, she admitted that title had been issued to the Plaintiff but was later cancelled through entry No. 5 and reissued to the 5th Defendant. The court was also informed that criminal proceedings had been instituted against the 5th Defendant for selling the resultant subdivisions of the suit property to third parties yet he had previously sold it to the 1st Defendant. The proceedings were still pending determination.



30. According to DW2, the resultant subdivisions were disposed of during the pendency of this suit. She attested that besides the Plaintiff and 1st Defendant, there are other 3rd parties also laying claim over the suit property.
31. DW2 attested that when the Plaintiff laid claim over the suit property in May 2012, the matter was reported to the police for further investigation. Further, when their counsel appeared before the land Registrar seeking resolution of the dispute, it was confirmed that the 1st Defendant was the owner of the suit land.
32. During re-examination, it was DW2's evidence that she did not know who cancelled the Plaintiff's title deed as per entry No. 5 of the green card. She maintained that as at the time, the 1st Defendant had already purchased the suit property and was not aware if the Plaintiff had any interests in it. She further reiterated that the criminal proceedings against the 5th Defendant were still ongoing. When she was referred to the 5th Defendant's witness statement in the criminal proceedings, she stated that he had mentioned that he sold the land to the 1st Defendant and that he did not recognize the Plaintiff.
33. DW3, Rosemary Mwangi, Land Registrar at Kajiado Central Land Registry produced a site visit report dated 12th November 2024 alongside a diagram explaining resultant subdivisions of the suit property. She stated that the report related to a site visit undertaken on 28th June 2023 pursuant to the directions on the court.
34. When she was cross-examined, she attested that she could not tell when the subdivisions were undertaken. According to her evidence, the correspondence file did not have the green card. There were no documents in the file to explain how the title was re-transferred back to the 5th Defendant from the Plaintiff. She also clarified that neither the Plaintiff nor the 1st Defendant was invited to the site visit. Notwithstanding her assertion that the title deeds for the resultant subdivisions were issued between 2016 to 2018 while this suit was ongoing, she confirmed that the titles were withheld by her office on suspicion of fraud.
35. During re-examination, DW3 stated that two records existed in respect of the suit property. She further restated that the Plaintiff and the 1st Defendant were not invited for the site visit.

Submissions

Plaintiff's Submissions

36. Through his submissions dated 27th March 2025 and 8th May 2025, the Plaintiff argues that the principles of "Nemo dat quod non habet" and "lis pendens" are applicable to this suit. He submitted that the 5th Defendant did not have the capacity to sell the suit land to the 1st Defendant having already sold it to him. According to the Plaintiff, the 3rd and 5th Defendants colluded to re-transfer the title to the 5th Defendant, thereafter to the 1st Defendant and subsequently to third parties yet injunctive orders existed during the pendency of this suit.
37. It is argued that the Land Registrar was complicit in the fraudulent interference with the green card of the suit property. This is so because no documentation exists to support the re-transfer of the suit property from the Plaintiff to the 5th Defendant. Given the lack of requisite documents, the Registrar cannot claim they acted in good faith.
38. While imploring the court to find that the Plaintiff was the true owner of the suit property, the Plaintiff submits that the title issued in favor of the 1st Defendant and any other third party must be cancelled because they were fraudulent, illegal and null and void.



1st Defendant's submissions

39. Counsel for the 1st Defendant cites Sections 107, 108 and 109 of the [Evidence Act](#) and the case of Yusuf v Mohamed & Another (Environment and Land Case 213 of 2018) {2022} KEELC 2937 (KLR) (29 June 2022) (Ruling), to submit that the Plaintiff is obligated to proof his case on a balance of probabilities that he purchased 150 acres of the suit property from the 5th Defendant.
40. It is submitted that the Plaintiff never produced any agreement to demonstrate that he indeed purchased the suit property. He also never offered any substantive explanation why the acreage indicated on the land control board consent and transfer forms were different. Further, no evidence was produced to prove he made payments in respect of land control board consent, subdivisions, valuation, mutation, stamp duty and registration. It is on this basis that the 1st Defendant submits that it should not be accused of forgery and misrepresentation because there is no privity of contract between it and the Plaintiff. Further, the 5th Defendant's statement in the criminal proceedings referred to during the hearing mentioned that he only sold 150 acres to the 1st Defendant and not the Plaintiff.
41. Counsel for the 1st Defendant argued that the Plaintiff's title cannot be protected because its acquisition was marred with irregularities and illegality. To support its arguments, the 1st Defendant refers to Sections 25 and 26 of the [Land Registration Act](#) and the Supreme Court decisions in Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) as cited in Galaxy Realtors Limited v Kenya Forest Service (Civil Appeal 41 of 20200{2024} KECA 1304 (KLR) (20 September,2024). It is argued that the Land Registrar was justified in cancelling the Plaintiff's title deed as evidenced in the green card.
42. It is submitted that the 1st Defendant's title was legally procured after conducting due diligence, payment of requisite charges and proper execution of all conveyance documents. Further, the disposition was never disputed by the 5th Defendant who admitted selling the suit property to the 1st Defendant and further stated that the Plaintiff intended to steal his land. The Court is implored to find that the 1st Defendant's title was legally and regularly obtained because no actions of forgery, fraud have been proven against it.

2nd, 3rd and 4th Defendants' Submission

43. Counsel for the 2nd, 3rd and 4th Defendants through the written submissions dated 2nd May 2025 submits that claims of fraud must be specifically pleaded and proved. These arguments are supported by making reference to Sections 107, 109 and 112 of the [Evidence Act](#) the decision in the case of Ndolo v Ndolo (2008) 1 KLR (G & F) 742. It is further argued that even though a certificate of title is prima facie proof of ownership of land, it can be challenged as stipulated in Section 26(1) of the [Land Registration Act](#). Section 32 of the Registered [Land Act](#) (Repealed), Section 107 of the Registration Act and the dictum in Wreck Motors Enterprises v the Commissioner of Land and Other Civil Appeal No.71 of 1997 and Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others (2016) eKLR are cited to guide the court in determining who the authentic owner of the suit property is. This is because both the Plaintiff and the 1st Defendant hold title deeds in respect to the suit property.
44. Article 236 of [the Constitution](#) and the Public Officers Ethics Act is mentioned to argue that the Land Registrar cannot be held personally liable for acts done in good faith and within the scope of their powers. It is maintained that the land Registrar adhered to all procedural requirements outlined in the [Land Registration Act](#). This is because no reasons were given to doubt the 5th Defendant's documents and his conduct as the documents appeared legitimate at the time. The court is called upon to frown



upon the 5th Defendant's conduct as it occasioned this protracted and convoluted litigation. This is because he failed to fulfill his contractual obligations and to ensure absolute clarity while dealing with the Plaintiff and the 1st Defendant. As a result, the 5th Defendant conduct has created conflicting interests with regard to the suit property.

45. In concluding, the Attorney General reiterates that the 5th Defendant's misrepresentation is the core issue in this suit. Hence, the Land Registrars must be exonerated from any wrongdoing because they acted appropriately and without malice. Accordingly, the 5th Defendant must bear the costs of this suit should the Plaintiff's claim partially succeed. It is further argued that neither the Plaintiff nor the 1st Defendant has proved any of the allegations against the 2nd and 3rd Defendants.

Issues for determination

46. Having carefully analyzed the Plaintiff's case, the Defendants' statements of Defence, the evidence adduced as well as the respective submissions by the parties, the following issues present themselves for determination;
- a. Whether the Plaintiff is the lawful and absolute proprietor of Kajiado/kaputiei-central/496;
 - b. Whether the 1st Defendant lawfully acquired the title deed for Kajiado/kaputiei-central/496;
 - c. Whether the Plaintiff is entitled to the reliefs sought; and
 - d. What orders should issue on the costs of the suit.

Analysis and determination

A. Whether The Plaintiff Is The Lawful And Absolute Proprietor Of Kajiado/kaputiei-central/496

47. Before proceeding to determine the issues identified for determination, I will first deal with the assertions raised by the 2nd, 3rd and 4th Defendants in their Statement of Defence that they were never served with a notice of intention to sue by the Plaintiff. From the evidence produced before the court, on 30th April 2012, the Attorney General through the State Law Office, Civil Litigation Registry acknowledged receipt of a notice of intention to sue from the Plaintiff of even date. The Notice specifically stated that the Plaintiff intended to institute legal proceedings against the Ministry of Lands and in particular the department of Registrar amongst other parties. I find these allegations incorrect and misleading.
48. Further Section 13A of the *Government Proceedings Act* CAP 40 which required Parties to notify the Attorney General before they could institute proceedings against the Government was declared unconstitutional by D.S. Majanja J. in *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] KEHC 2402 (KLR), where the learned judge held as follows;

“Viewed against the prism of *the Constitution*, it also becomes evident that Section 13A of the GPA provides on impediment to access to justice. Where the state is at the front, left and Centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13A of the *Government Proceedings Act* as a mandatory requirement violates the provisions of the Article 48.”



49. The Plaintiff seeks to have the 1st Defendant's title to the suit property cancelled on the premises that it was illegally and unprocedurally procured. According to the Plaintiff, the 5th Defendant fraudulently colluded with the Kajiado Land Registry officials to facilitate reissuance of the title to the suit property to him after he had sold it to the Plaintiff. This was notwithstanding that he was aware that he had lawfully sold it to the Plaintiff and a title issued in that respect.
50. In its defence, the 1st Defendant maintains that it lawfully and procedurally acquired the suit property upon execution and acquisition of all relevant documentations. It is on this basis that it pleads that its title cannot be impeached on any ground. Therefore, as a bona fide purchaser for value, it insists that it is entitled to quiet and peaceful enjoyment of the suit property.
51. According to the 1st Defendant's submissions, the Plaintiff's title cannot be protected because it is tainted with illegalities. They reiterate that the 5th Defendant's statement specifically mentioned that he had never sold the suit property to the Plaintiff. These assertions were also put forward by DW1 during her testimony. The 1st Defendant argues that the Plaintiff is not deserving of the prayers sought because he has not proved his case to the required standards as provided in Sections 107, 108 and 109 of the *Evidence Act*.
52. Although the 2nd, 3rd and 4th Defendants claim that the Plaintiff is not the registered owner of the suit property, it is their submission that the Land Registrars followed all the legal requirements while executing their duties as stipulated in the *Land Registration Act*. Accordingly, it is their position that they cannot be held liable because they acted appropriately and without any malice.
53. As rightfully submitted by the 1st Defendant, in a civil suit, parties are obligated to prove their cases on a balance of probabilities. While making reference to Denning J dictum, the Court of Appeal in *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] KECA 616 (KLR), described the burden of proof as follows;

“The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

54. Differently constituted, the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] KECA 423 (KLR), made similar pronouncements on this principle by stating as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “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.” Section 109 stipulates



that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

55. Both the Plaintiff and the 1st Defendant lay claim over the title to the suit property as demonstrated by their respective title deeds which they both possess indicating that they are the absolute proprietors of the suit property. The title held by the Plaintiff was issued in 1997 while the 1st Defendant’s title was issued in 2012. It is not contested that their claims over the property is founded on sale agreements between themselves and the 5th Defendant. It is also not in dispute that both the Plaintiff and the 1st Defendant fully complied with the terms of their respective Sale Agreements; in particular payment of the purchase price. They also produced supporting documentations before this court showing that the 5th Defendant acknowledged receipt of the said purchase price(s) from them.

56. Bearing in mind that the Plaintiff and the 1st Defendant challenge each other’s title, this court must not only investigate the root of each title but also the circumstances under which it was obtained. Based on its findings, it can then make an appropriate determination as to whose title is worthy of legal protection. While dealing with a similar case, the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] KECA 94 (KLR), adopted a comparable approach by holding as follows;

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

57. Similar pronouncements were also made by Sila J in *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] KEELC 1092 (KLR), where the learned Judge held as follows;

“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.”

58. The Plaintiff testified that the contractual relationship between himself and the 5th Defendant was initiated through various sale agreements. In support of his case and testimony, he produced a duly executed and attested sale agreement dated 7th September, 1995 between himself and the 5th Defendant. The agreement stipulated that the 5th Defendant was selling 34 acres to be excised from Plot No. 472 of Rumamen Ranch, Konza. The 34 acres were being sold at a consideration of Ksh. 85,000/=. Clause 5 of the agreement stipulated that the Plaintiff was entitled to ownership, possession and occupation of the said land upon payment of the last installment.



59. The agreement further stated that the 5th Defendant had previously sold to the Plaintiff 50, 50 and 16 acres through sale agreements dated 18th April, 1995, 12th May, 1995 and 12th July, 1995 respectively. Based on the agreement, the total acreage bought by the Plaintiff from the 5th Defendant amounted to 150 acres which is equivalent to 60.7028ha.
60. It is not in dispute that the suit property was initially owned by the 5th Defendant. The mutation form for Kajiado/kaputiei-central/472 measuring 99.5ha registered on 16th October, 1995 shows that it was subdivided into two parcels; namely Kajiado/kaputiei-centraL/495 measuring 38.8ha and Kajiado/kaputiei-central/496 (suit property) measuring 60.7ha. Entry No.1 of the green card indeed confirms that the 5th Defendant was the original owner of the suit property.
61. The Plaintiff submits that his title must be protected because he not only followed the due process while obtaining it but that he complied with all the relevant legal requirements. According to an application for Purko Land Control Board Consent dated 4th March, 1996, approval was sought seeking to transfer Kajiado/kaputiei-central/496 measuring 60.7ha from the 5th Defendant to the Plaintiff. The approval was granted through a letter of consent dated 22nd April, 1997. This paved the way for the lodging of a transfer instrument seeking transfer of the suit property to the Plaintiff as evidenced in a transfer instrument dated 20th February 1997 and registered on 23rd April, 1997. The Plaintiff produced a receipt dated 22nd April 1997 to prove that he indeed paid stamp duty in respect of the transaction.
62. The above events preceded the issuance of the title of the suit property to the Plaintiff on 23rd April, 1997. Notwithstanding these clearly outlined processes, the Plaintiff's title was cancelled through entry no. 5 registered on 23rd April, 1997 as per the green card. The 1st, 2nd, 3rd and 4th Defendants all acknowledge that the Plaintiff's title was indeed cancelled. However, none of them has offered any satisfactory explanation why the title was cancelled nor the circumstances leading to the cancellation. DW1 in her testimony admitted that a title can only be cancelled through a court order. She admitted that she had not seen any such order directing that the title be cancelled.
63. According to Plaintiff's testimony, the 5th Defendant had refused to transfer the suit property to him even though he fully paid the purchase price to him. To protect his interest, the Plaintiff registered a caution on the title as evidence by Entry No. 3 of the green card on 24th October, 1996, claiming a purchaser's interest. According to PW1, the 5th Defendant only agreed to sign the transfer form effecting transfer of the title in his favor after he reported him to the Land Control Board. This is what informed the withdrawal of the caution on 23rd April, 1997 based on entry No. 4 of the green card to give way to the issuance of the title in Plaintiff's favour.
64. The Plaintiff has maintained that he never sold nor re-transferred the suit property to the 5th Defendant nor did he dispose of the suit property in any manner. He testified that the 5th Defendant did not have any problem with the purchase price of Ksh.375,000/= which was appropriate at the time of the purchase.
65. Taking the foregoing into consideration, the circumstances under which the 5th Defendant was re-issued with the title to the suit property are unclear, suspicious and questionable. None of the parties including the land Registrar who is the custodian of all documents, has tabled any documentation before this court to demonstrate how the title deed was re-issued to the 5th Defendant. This is material especially so because the Plaintiff insists that he has never signed any application for consent nor transfer form re-transferring the property to the 5th Defendant.



66. It was the evidence of DW1 that when she questioned the 5th Defendant as to the reason why the Plaintiff's title had been cancelled, the 5th Defendant alleged that it was so cancelled because it had been fraudfully issued to him in the first place. Unfortunately, the 5th Defendant never responded to the Plaintiff's Amended Complaint, neither did he file any documents nor testify before this court to explain the circumstances under which he was re-issued with the title to the suit property on 18th January 2007. Further, the 1st Defendant never called him to testify in support of its case yet he was listed as one of their witnesses according to its List of witnesses dated 5th May 2015 filed on 13th May 2015.
67. Given that no such evidence exists before this court and that the Plaintiff has undoubtedly proven how he acquired the title to the suit property, I find that he has proven his case on balance of probabilities that he is the absolute proprietor of the suit property. Accordingly, his right to own property guaranteed under Article 40 (1) of *the Constitution* and Section 25 *Land Registration Act* (Cap. 300) needs to be safeguarded.
68. I must be categorical that the Land Registrar has no legal authority to cancel a title. The only institution with the mandate to cancel a title to land on the basis of fraud or illegality is a court of law. The Court of Appeal in the case of Super Nova Properties Limited & another –vs- District Land Registrar Mombasa & 2 others; KACC & 2 others (interested parties) (2018) KECA 17 (KLR) (19th April 2018) (Judgement), rendered itself on the matter agreeing with the trial court that,
- “The Learned Judge held and correctly so, that the Registrar of Titles had no power to revoke a title.”
69. The purported cancellation of the Plaintiff's title to the suit property for whatever reasons was null and void. As Lord Denning held in the case of *Macfoy vs. United Africa Co. Ltd.* [1961] 3 All ER, 1169;
- “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. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”
- B. Whether the 1st Defendant lawfully acquired the title deed for Kajiado/kaputiei-central/496
70. While giving his testimony, the Plaintiff testified that he instituted these legal proceedings against the 1st Defendant because he discovered that it was unprocedurally and unlawfully issued with a title to the suit property without his consent or knowledge. This was confirmed by a certificate of official search he had conducted on 26th April 2013. The search confirmed that the 1st Defendant was issued with the title to the suit property on 22nd February 2012.
71. The 1st Defendant on its part alleges that it followed the due process in acquiring the suit property. Prior to the purchase, DW1 attested that due diligence was conducted through a search which indicated that the 5th Defendant was the registered proprietor of the suit property. Further, they also engaged the services of a qualified surveyor as part of their due diligence. This is what informed its decision to enter into an agreement for sale of the suit property with the 5th Defendant which was executed on 7th September 2011. According to the duly signed and executed agreement, the purchase price was Ksh.37,500,000/=. Following issuance of a consent to transfer the suit property to the 1st Defendant by the Land Control Board dispensed through a letter of consent dated 7th December 2011, after an undated application for consent was lodged, the suit property was subsequently transferred to the



- 1st Defendant. A duly executed transfer instrument dated 8th December 2011 and registered on 14th December 2011 indeed confirms this position. Afterwards, the 1st Defendant was issued with the title dated 22nd February 2012.
72. The 1st Defendant has implored the court to protect the validity of its title because it was obtained after conducting due diligence, payment of the requisite fee and proper execution of all conveyance documents. It affirms that an official search dated 8th August 2011 actually established that the 5th Defendant was the absolute proprietor of the suit property and that he was issued with a title deed on 18th January 2007. It has further alleged that the 5th Defendant actually confirmed the suit property belonged to him.
73. The 1st Defendant insists that it was a bona fide purchaser for value without notice. For a party to be considered a bona fide purchaser for value it must meet the threshold established by the Court of Appeal in the case of Samuel Kamere –vs- Land Registrar (2015) eKLR, where the court stated that;
- “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title; Secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property”.
74. The responsibility to carry out the necessary due diligence to determine the lawful owner of the suit property is critical. The Supreme Court in the Torino case emphasized on this responsibility stating that the purchaser has the onus to conduct sufficient due diligence beyond the mere search prior to the purchase.
75. The 1st Defendant insists that it conducted due diligence. The question that begs answer is whether the same was sufficient.
76. DW1 who is an advocate testified that she enquired from the 5th Defendant why the title in favour of the Plaintiff had been cancelled. The answer by the 5th Defendant ought to have aroused her curiosity and prompted her to conduct further investigations before proceeding to transact with him. I say so because the law is clear that a Land Registrar has no legal authority to cancel a title as already elaborated earlier on. The purported cancellation further was undertaken ten (10) years after the title had been issued to the Plaintiff. The transfer to the Plaintiff by the 5th Defendant, then a re-transfer to the Defendant that was not supported by any documents alone called for further enquiries.
77. The Court of Appeal in Embakasi Properties Limited & another v Commissioner of Lands & another [2019] KECA 1001 (KLR), hit the nail on the head citing the pronouncement in the case of in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Civil Appeal No.246 of 2013, in describing the risks of transacting in land, in Kenya without conducting due diligence as follows;
- “It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market.”
78. To a diligent legal mind, the purported cancellation of the title of the Plaintiff by a Registrar who has no such powers clearly points to obvious illegalities and irregularities. Though was the re-transfer. Surely, due diligence must go beyond a mere search of the title. The 1st Defendant who had at its disposal the services of an Advocate, failed to conduct sufficient due diligence which would have demonstrated to



them that the 5th Defendant had no good title to pass to them having already sold and transferred the suit property and the title to the Plaintiff.

79. Having said so, I inevitably proceed to discuss the conduct of the Land Registrars. The Land Registrar is statutorily obligated under Section 9 of the [Land Registration Act](#) to maintain the register and any documents required to be kept under the ACT in a SECURE, ACCESSIBLE and RELIABLE format.
80. The system of registration of land in Kenya is the Torren System of Land Registration. One of the principles of the Torrens system as summarized by the Canadian Court of Appeal in the case of Regal Constellation Hotel Limited as cited in the case of Embakasi Properties Limited & another (2019) KECA/001 KLR, is the insurance principle. Under this principle the state guarantees the occurrence of all registered titles through the register, and that there would be indemnity in case a registered proprietor is deprived of his title or is prejudiced by a correction of any mistake in the register.
81. The court in the Embakasi Properties case stated that;

On the facts and in the circumstances of this matter, therefore, we are convinced by the argument that the Torrens system of registration was applicable. It will be recalled from what we have said previously in this judgment that on 11th November, 2015 the Court directed that this appeal be heard by a bench of five (5) Judges on the argument that it raises novel and weighty issues, in particular the applicability of the Torrens system of land registration in Kenya. With respect, there has been no confusion on the application of the Torrens system in Kenyan land law. Since the enactment of the repealed Registration of Titles Act and the Registered [Land Act](#), it has consistently been acknowledged in countless judicial decisions that the law on registration of titles in Kenya is based on the Torrens System. Souza Figueredo V Moorings Hotel, [1960] EA 926; Cross V Great Insurance Company Limited of India, [1966] EA 94 and Charles Karathe Kiarie & 2 others V Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR are some of the authorities that have unequivocally applied the principles of Torrens system.

The three main principles of the Torrens system were aptly summarized by the Canadian Court of Appeal in the case of Regal Constellation Hotel Ltd Re 2004 Can LII 2006 Ontario C.A.) Page 13 para 42 as follows:

“The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.”

We reiterate that under the insurance principle the State guarantees the accuracy of all registered titles through the register; and that there would be indemnity in case a registered proprietor is deprived of his title or is prejudiced by a correction of any mistake in the register. The mirror principle is a guarantee that the register is a perfect mirror of the state of title while the curtain principle holds that a purchaser need not worry about the history of the title so long as from the register it is clear that whoever is transferring the property to him has the capacity. Embakasi Properties Limited & another v Commissioner of Lands & another [2019] KECA 1001 (KLR).”

82. The insurance principle places liability on the state for any inaccuracies or mistakes. The conduct of the land Registrars in the handling of the transactions involved in this matter was lackluster, negligent and



recklessness as well as outrightly illegal in purporting to cancel the title of the Plaintiff. The state must bear responsibility for the conduct of its officers in the name of the land Registrars for such conduct. I believe that is why the law under Section 13 sets the bar high on qualifications of Registrars. It requires that they be Advocates of the High Court of Kenya of not less than 10 years standing with at least 10 years' experience in Land Administration or management and meet the requirements of Chapter 6 of the Constitution.

83. Unfortunately in this matter, the 1st Defendant has not sought any relief against the state. I will leave the matter at that. I believe the 1st Defendant will get appropriate legal advice from its counsel.
84. Preceding from the above events, it is clear that the 5th Defendant did not have any proprietary rights over the suit property as at the time he purportedly sold the suit property to the 1st Defendant. He could not sell what he did not own. The 1st Defendant's title is defeasible as provided in Section 26 of the Land Registration Act (Cap. 300) which provides as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. {emphasis}.”

85. The above legal provisions were accentuated by the Supreme Court in the case of Dina Management Limited (*supra*). The Apex Court stated that;

“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.”

86. Accordingly, the Plaintiff is justified in seeking to have the 1st Defendant's title cancelled because it was acquired unprocedurally or through a corrupt scheme. The only available remedy for the 1st Defendant is to pursue the 5th Defendant and seek a refund of its monies under the doctrine of unjust enrichment.

C. Whether the Plaintiff is entitled to the reliefs sought?

87. The prayers sought by the Plaintiff includes revocation of the 1st Defendant's title and cancellation of the registration made in its name. During the hearing, the Kajiado Land Registrar testified that the suit property was further subdivided into the following parcels, namely; KAJIADO/KAPUTIEI-CENTRAL/5261 to 5273; 5759 to 5761; 6254; 6255; 6275 to 6293; and 6377 to 6339. According to the testimony of the Registrar, title deeds for the resultant subdivisions had been held on suspicion of fraud.
88. Through its submission, the Attorney General has defended the 3rd Defendant by arguing that the Registrar had no reason to doubt the 5th Defendant's documents and conduct. This is untenable considering that the Registrar is the custodian of the register and all pertinent documents.



89. The 3rd Defendant did not offer any explanation why it continued to facilitate and allow subdivision of the suit property while this suit was ongoing yet there were injunctive orders in existence. On 19th June 2014, Thurunira Jaden J issued conservatory orders restraining the 1st Defendant from altering the physical status of the land until the suit was heard and determined.

90. Further, on 14th November 2017, Christine Ochieng J issued inhibition orders directing the 3rd Defendant not to register any transfer, sale, disposal or lease in respect to the suit property until the suit was finally determined. This order was issued following a ruling determining the Plaintiff's application dated 27th July 2017. While delivering the Ruling, the learned Judge stated as follows;

“In the current scenario, in so far as there are already injunctive orders in place, to restrain the 1st Defendant from embarking on activities to alter the suit land there was none to protect the title. Since two parties are staking claim to the suit land and as an independent arbiter, it is the duty of the Court to protect each party and grant them a chance to present their case before making a final determination. Further I note the 3rd Defendant who is the custodian of all the records relating to the suit land has not been cooperative to assist the Plaintiff obtain correct status of the title to the suit land.”

91. I am satisfied that the Plaintiff has proved his case to the required standard. In all fairness and in the interest of justice, the Plaintiff's title must be reinstated to the original status prior to the purported cancellation. This court has the power to order the rectification of the register under section 80 of the *Land Registration Act*. The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR), dealing with a matter involving alleged acquisition, seizure and subsequent sub-division of land without following due process of law, held as follows; -

“..... no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions.”

92. Accordingly, and in order to remedy the illegalities committed against the Plaintiff, the court directs that the register be rectified by cancelling the 1st Defendant title as well as all the subsequent subdivisions.

D. Costs

93. Taking into account the Plaintiff has fully succeeded in his claim, he is entitled to the costs of this suit. Considering the unbecoming conduct of the Land Registrars as discussed above, I find it appropriate the they bear the costs of this suit alongside the 5th Defendant.

Disposition

94. Consequently, I hereby allow the Plaintiff's case and proceed to enter judgment in the following terms;

- a. The Plaintiff is declared to be the legitimate and registered owner of Kajiado/kaputiei-central/496.
- b. The 2nd and 3rd Defendants are hereby ordered to cancel the registration of Kajiado/kaputiei-central/496 in the 1st Defendant's name.
- c. The 2nd and 3rd Defendants are hereby ordered to revoke the title deed issued to the 1st Defendant in respect of Kajiado/kaputiei-central/496 and the title deeds issued in respect of



Kajiado/kaputiei-central/5261 to 5273; 5759 to 5761; 6254; 6255; 6275 to 6293; and 6377 to 6339 being subdivisions of Kajiado/kaputiei-central/496.

- f. The 1st Defendant is hereby ordered to reverse any structural development it may have begun on Kajiado/kaputiei-central/496 or in the alternative to prove cost to the Plaintiff for him to do the same himself, to remove all or any unlawful developments within the suit land.
- g. The Plaintiff's cost of the suit shall be borne by the 2nd, 3rd, 4th and 5th Defendants.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF SEPTEMBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Olonde for the Plaintiff

Ms. Marachi h/b for Mrs. Owino for the 1st Defendant

NA for the 2nd to the 5th Defendants

Court Assistant: Mpoye

