



REPUBLIC OF KENYA



**Gitau v Munyaka & 2 others (Environment and Land Appeal E003 of 2024)  
[2025] KEELC 4755 (KLR) (Environment and Land) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4755 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E003 OF 2024**

**MC OUNDO, J**

**JUNE 26, 2025**

**BETWEEN**

**SAMWEL NDUNGU GITAU ..... APPELLANT**

**AND**

**SAMUEL KIRAGU MUNYAKA ..... 1<sup>ST</sup> RESPONDENT**

**MARY NJERI KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgement of the Hon. Wilson Rading, Principal Magistrate, in Naivasha CM ELC No. E082 of 2021 delivered on 4th April 2024)*

**JUDGMENT**

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Wilson Rading, Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment delivered on 4<sup>th</sup> April, 2024, the learned Magistrate found in favor of the Plaintiff and directed for the rectification of the Register to land parcel No. Miti Mingi/Mbaruk Block 5/613 (Kianjoya) with costs of the suit.
2. The Appellant, being dissatisfied with the entire Judgment, has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
  - i. The Honourable Magistrate misdirected himself on the legal principles governing standard of proof required and the burden of proof borne on the Plaintiff in civil suits and thereby arrived at a wrong decision.



- ii. The Honourable Magistrate erred in law in holding that the Appellant knew of the Respondent's interest in the suit land at the time of purchase whereas the evidence on record indicates that the Caution was registered approximately a month after the successful transfer of the suit property to the Appellant herein.
  - iii. The Honourable Magistrate erred in law and fact when he failed to evaluate the Appellant's evidence on record and the Appellant's Submissions and thus arrived at a wrong decision.
  - iv. The Honourable Magistrate erred in Law and fact in imputing fraud on the transaction between the 1<sup>st</sup> Defendant and the Appellant herein in total disregard of the unchallenged documentary evidence produced by the Appellant during trial.
  - v. The Honourable Magistrate erred in law by failing to appreciate the Legal principles regarding the reliance placed on official searches in land transaction and thereby wrongly held that the Appellant was not a bona fide Purchaser for value without notice.
3. The Appeal was disposed of by way of written submissions, wherein the Appellant and the 1<sup>st</sup> Respondent complied and filed their submissions which I shall summarize as herein under.

### **Appellant's submission**

4. The Appellant, vide his submissions dated 24<sup>th</sup> March 2025 summarized the factual background of the matter thus framing his issues for determination as follows:
- i. Whether the learned trial Magistrate misdirected himself on the legal principles governing standard of proof required and borne on the Plaintiff in civil suits.
  - ii. Whether the Learned trial Magistrate erred in law and fact in holding that the Appellant knew of the Respondent's interest in the suit land at the time of purchase.
  - iii. Whether the Learned trial Magistrate erred in law and fact when he failed to evaluate the Appellant's evidence on record and the Appellant's Submissions.
  - iv. Whether the learned trial Magistrate erred in Law and fact in imputing fraud on the transaction between the Appellant and the 2<sup>nd</sup> Respondent.
  - v. In determination of the appeal, what orders ought to be made on orders of costs.
5. On the first issue for determination, he placed reliance on the provisions of Section 107 of the [Evidence Act](#) to submit that it was trite law that a party who sought to rely on the existence of a fact or a set of facts must provide evidence that those facts exist, otherwise known as "Burden of proof". That it was also trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property was conclusive proof that they were the absolute and legal owner of the property. His further reliance was hinged on the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012 to the effect that the owner of a registered title attains indefeasible rights, and interests on the land vested in them by the law.
6. That the Appellant had purchased the suit property from the 2<sup>nd</sup> Respondent wherein they had entered into an agreement for the sale of the same on the 28<sup>th</sup> May, 2021, which agreement had been executed and the payment for the agreed price made. That thereafter, the 2<sup>nd</sup> Respondent had presented the requisite documents to have the suit property registered in the name of the Appellant. That the consent to transfer the land had been obtained from Gilgil Land Control Board and the same presented to the land Registrar Naivasha for registration. That the Appellant had then been issued with a title to the



suit property and that the copy of the Green Card from the land registrar showed that the suit property had changed from one David Njau Wako to the 1<sup>st</sup> Respondent who had thereafter transferred the same to the 2<sup>nd</sup> Respondent. That later on, the suit land had been transferred to the Appellant.

7. On the second issue for determination as to whether the Learned trial Magistrate erred in law and fact in holding that the Appellant had known of the Respondent's interest in the suit land at the time of the purchase, he placed reliance on the definition of a bona fide purchaser found in the Black's Law Dictionary, 8<sup>th</sup> Edition as well as the decided case of Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR to submit that he had conducted sufficient enquiry of the 2<sup>nd</sup> Respondent's title wherein he had not discovered any anomalies as set out in Section 26 (1) of the Land Registration Act. That the search on the property on the 19<sup>th</sup> May 2021 clearly indicated that the 2<sup>nd</sup> Respondent was the registered proprietor of the title which did not have any encumbrances. That the 1<sup>st</sup> Respondent subsequently lodged a claim of caution on the 28<sup>th</sup> June 2021 a month after the Appellant had conducted a search over the property and after the documents had been presented before the Registrar of lands. That nevertheless, the said caution had been rejected because the 1<sup>st</sup> Respondent had failed to honor summons by the Directorate of Criminal Investigation to produce proof of ownership of the suit property to support the allegation.
8. As to whether the learned trial Magistrate had erred in law and in fact when he had failed to evaluate the Appellant's evidence on record and the Appellant's submission, reliance was placed on the provisions of Sections 108 109 and 110 of the Evidence Act to submit that in the instant matter, the Appellant's evidence had remained uncontroverted. That whereas the Appellant had attached the original title deed, the Defendants never produced any title to the suit property. That in any case, it had been said time and again that a Title Deed was an indefeasible evidence of the ownership of land. That it was also not in dispute that the ownership of the land was uncontroverted.
9. On the fourth issue for determination as to whether the trial Magistrate erred in law and fact in imputing fraud on the transaction between the Appellant and the 2<sup>nd</sup> Respondent, he placed reliance in a combination of decisions in the case of Vijay Morjaria v Nadhusingh Darbar & another [2000] eKLR and Moses Parantai & Peris Wanjiku Suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR to submit that the documents that the 1<sup>st</sup> Respondent had produced to prove fraud were limited to a search of title in the year 2006 and a Caution that had been registered approximately a month after the successful transfer of the suit property to the Appellant herein. That the allegations of fraud that had been particularize by the 1<sup>st</sup> Respondent had remained unsubstantiated hence the same had not been proved to the required standard.
10. As to who should bear the costs of the suit, he placed reliance on the provisions of Section 27 (1) of the Civil Procedure Act as well as a combination of decisions in the case of Harun Mutwiri v Nairobi City County Government [2018] eKLR and Kenya Union of Commercial, Food and Allied Workes v Bidco Africa Limited & Another [2015] eKLR to seek that the instant Appeal be allowed and the judgement of the honourable Magistrate's Court at Naivasha be set aside and/or quashed with costs.

### **1<sup>st</sup> Respondent's Submissions.**

11. In response to the Appellant's Appeal and in opposition thereto, the 1<sup>st</sup> Respondent vide his written submissions dated 24<sup>th</sup> March, 2025, summarized the factual background of the matter before framing his issues for determination as follows:



- i. Whether the 1<sup>st</sup> Respondent established and/or proved an element of fraud on the part of the Appellant and the 2<sup>nd</sup> Respondent to warrant rectification of the register.
  - ii. Whether the Appellant is a bona fide purchaser for value of the suit parcel.
  - iii. Whether the 1<sup>st</sup> Respondent is the bona fide legal owner of the suit land parcel and had acquired an absolute and indefeasible title to the suit land.
  - iv. Whether the Appellant is entitled to the prayers sought.
12. On the first issue for determination, he placed reliance in the Supreme Court of Kenya's decision in *Fanikiwa Limited & 3Others v Sirikwa Squatters Group & 17 others* (Petition 32 (E038) & (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgement) in Paragraph 80 to submitted that in the instant case, his pleadings were to the effect that the Appellant and the 2<sup>nd</sup> Respondent had fraudulently registered and caused to be issued a title deed in their favour without following the due process, leading to the illegal entries in the land register, which allegations had been proved.
  13. That indeed, in the Plaint dated 19<sup>th</sup> November, 2021, he had set out the particulars of the illegality and/or fraud stating that the 2<sup>nd</sup> Respondent had made the documents without the authority to procure registration of the suit properties in their names, altered the documents with the purpose of obtaining registration and procured registration of the suit land without following the due process.
  14. That he had acquired the land parcel Miti Mingi/Mbaruk Block 5/613 (Kianjoya) in the year 1997 wherein a title deed had been issued in his name as per a search that had been conducted on 4<sup>th</sup> December, 2006.
  15. That at the trial court, he had drawn the attention of the court to the documents that had been adduced by both parties and which had indicated that the title deed held by the 2<sup>nd</sup> Respondent had been issued on 20<sup>th</sup> November, 2002 yet the search that had been conducted at the land registry on 4<sup>th</sup> December 2006 had indicated that he had still been the registered proprietor.
  16. That subsequently, it had been aptly demonstrated that the title held by the 2<sup>nd</sup> Respondent and subsequently the title issued to the Appellant had been obtained fraudulently and without due regard to the legal process. That indeed, he had specifically pleaded the allegations of fraud and had clearly set out the particulars of the same against the Appellant and the 2<sup>nd</sup> Respondent. It was thus his submission that he had established and proved an element of fraud on the part of the Appellant and the 2<sup>nd</sup> Respondent to warrant rectification of the register.
  17. As to whether the Appellant was a bona fide purchaser for value, he placed reliance in Samuel Kamere's case (*supra*) to submit that in the case herein, the Appellant's title, which he had adduced as proof of ownership of the land was under challenge thus the legality of the acquisition of the title ought to be critically examined. Further reliance was placed in the decided case of *Richard Oduol Opole v Commissioner of Lands and 2 Others* [2015] eKLR to submit that where the 1<sup>st</sup> Defendant's title was tainted with illegality, it shared its DNA all the way to the 2<sup>nd</sup> Defendant.
  18. That the Appellant on the other hand had stated that he had purchased the suit land from the 2<sup>nd</sup> Respondent who had established herself as the registered proprietor of the suit land and showed the Appellant her title deed that had been issued on 20<sup>th</sup> November 2002. That indeed, the process of acquisition of the title by the 2<sup>nd</sup> Respondent had been marred with illegality and fraud as he had proven wherein he had lodged a caution over it. It was thus his submission that the subsequent



acquisition of the title by the Appellant was not legal, formal and free from any encumbrance as could be seen from the facts of the case.

19. With regard to the due diligence that had been conducted to determine the lawful owner from whom he had acquired a legitimate title, he placed reliance in the Samuel Kamere's case (supra) to reiterate that the Appellant did not conduct due diligence hence he could not be a bona fide purchaser for value without notice.
20. On the third element, he submitted that the Appellant had indeed entered into a legal and binding agreement for sale of the suit land with the 2<sup>nd</sup> Respondent wherein he paid the full consideration. That having determined that the Appellant did not acquire a valid and legal title wherein he had even failed to conduct due diligence, that the Appellant was not a bona fide purchaser for value without notice.
21. On the third issue for determination as to whether the 1<sup>st</sup> Respondent was the bona fide legal owner of the suit land and had an absolute indefeasible title to the same, he placed reliance on the provisions of Sections 24(a) and 26 of the Land Registration Act and the decided case of *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR to submit that he had acquired the suit land in the year 1997 where he had been registered as the proprietor and granted absolute ownership upon the issuance of his certificate of title. That subsequently the title got lost wherein the same had been reported to the authorities. That the subsequent title held by the 2<sup>nd</sup> Respondent was therefore tainted with illegalities, misrepresentation and fraud since it was trite that the first title ranked in priority.
22. That indeed the 2<sup>nd</sup> Respondent was the villain who had fraudulently and deceitfully snatched the 1<sup>st</sup> Respondent's interests in the land wherein she and proceeded to pass it to the Appellant despite the fact that she had no interest to pass. He thus submitted that he was the bona fide legal owner and had an absolute indefeasible title to the suit land parcel.
23. As to whether the Appellant was entitled to the prayers that had been sought herein, he placed reliance on the provisions of Section 107 of the Evidence Act to submit that the process of acquisition of the title deed held by the Appellant was marred with illegalities and fraud.
24. In regard to costs, he placed reliance on the provisions of section 27 of the Civil Procedure Act to submit that the same followed the event and prayed that the costs be borne by the Appellant. It was thus his submission that the Appellant was not entitled to the prayers sought.
25. In conclusion, he submitted that the trial court's decision had been rightfully arrived at after much consideration of the pleadings, evidence adduced and the submissions of both parties. He thus urged the court to dismiss the Appellant's appeal and uphold the trial court's decision.

#### **Analyses of the evidence.**

26. According to the proceedings in the trial court, Samuel Kiragu Munyaka the Plaintiff/1<sup>st</sup> Respondent) instituted the instant suit against, Mary Njeri Kimanire, 1<sup>st</sup> Defendant /2<sup>nd</sup> Respondent, Samwel Ndungu Gitau 2<sup>nd</sup> Defendant/Appellant, the Land Registrar and the Hon. Attorney General the 4<sup>th</sup> Defendant/3<sup>rd</sup> Respondent respectively, vide CMCELC No. E082 of 2021 in a Plaint dated 19<sup>th</sup> November, 2021 wherein he had sought for the following orders;
  - i. An order for the rectification of the register relating to the Title No. Miti Mingi/Mbaruk Block 5/613 (Kianjoya) by expunging all illegal entries therein.
  - ii. General damages
  - iii. Interest on (b) above.



- iv. Costs of the suit.
27. Subsequent to the filing of the suit, the 2<sup>nd</sup> Defendant/Appellant herein filed his Statement of Defence and Counterclaim dated 10<sup>th</sup> November, 2022 denying the allegations contained in the Plaint while putting the Plaintiff to strict proof wherein he had sought for the Plaintiff's suit to be dismissed with costs to the Defendants.
28. In his counterclaim, the 2<sup>nd</sup> Defendant had argued that the parcel of land being LR NO. Miti Mingi/Mbaruk Block 5/613 (Kianjoya) had been sold to him as a purchaser for value by the 1<sup>st</sup> Defendant, herein who had demonstrated that she had a good title. That he was therefore the rightful owner of LR No. Miti Mingi/Mbaruk Block 5/613 (Kianjoya), having purchased its rights and interest from the said 1<sup>st</sup> Defendant. He thus prayed for the following orders:
- i. A declaration that he was the bona fide owner of the parcel of land being LR NO. Miti Mingi/Mbaruk Block 5/613 (Kianjoya).
  - ii. The Plaintiff to bear the costs of the suit and counter claim.
29. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the other hand filed their Statement of Defence dated 6<sup>th</sup> December 2021 wherein they denied the allegations contained in the Plaint putting the Plaintiff to strict proof while stating that had any of the transactions alleged in the Plaint occurred, then the same had been due to misrepresentation of facts and fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had misled them into effecting the said transactions for which the 3<sup>rd</sup> Defendant claimed indemnity from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
30. They particularized the fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as having presented forged documents to the officers of the 3<sup>rd</sup> Defendant, misrepresenting facts to the 3<sup>rd</sup> Defendant and deliberately concealing facts from the 3<sup>rd</sup> Defendant. That in any case, the 3<sup>rd</sup> Defendant was not an expert in detecting fraud, and could not and was not mandated to either investigate or suspect that the documents presented for registration at their offices had been forged since its duties were limited only to its statutory duties.
31. They particularized the Statutory Duties of the 3<sup>rd</sup> Defendant as:
- i. Issuing Titles;
  - ii. Transferring proprietary rights of land in accordance to the documents filed in the registry;
  - iii. Perusing and scrutinizing documents for transfer of land;
  - iv. Correcting entries made fraudulently on record;
  - v. Establishing boundaries;
  - vi. Drawing and maintaining a record of maps and plans; and
  - vii. Placing beacons on boundaries.
- Subsequently, they denied the entitlement reliefs made in the Plaint and sought for a dismissal of the Plaintiff's suit against them, with costs.
32. The 1<sup>st</sup> Defendant neither entered Appearance nor filed any Defence despite having been served by way of substituted service hence Judgement had been entered against her.



33. The case proceeded for hearing wherein the Plaintiff while testifying as PW1 adopted his witness statement dated 19<sup>th</sup> November 2021 as his evidence in chief and produced his filed documents in evidence as follows;
- i. Copy of police abstract.
  - ii. Application for caution.
  - iii. Search dated 4<sup>th</sup> December 2021.
  - iv. Photographs of Construction.
34. In cross examination by the Counsel for the 2<sup>nd</sup> Defendant, he confirmed that the shamba was his. That his title was not in court because the same had been suspended. That he was last on the land in the year 2006 wherein his neighbor, one Kingori had informed him that the land had been sold the by one Mwalimu John who was his neighbor.
35. He however confirmed that he had not sued the said John as a Defendant and proceeded to testify that when he had questioned the said John, he informed him that he was selling the land on behalf of his sister, the 1<sup>st</sup> Defendant herein. He admitted that he did not receive his title deed a fact which he was just realizing after 15 years. He further confirmed that the entry for the 4<sup>th</sup> June 1997 in the Green Card was David Njau Wakio. That the entry on 29<sup>th</sup> November 2002 was in regard to Samuel Kiragu Munyaka while Mary Njeri Kimani, the 1<sup>st</sup> Defendant herein had been registered on the same on the 1<sup>st</sup> October 2021 wherein later, the name of Samuel Ndungu Gitau, the 2<sup>nd</sup> Defendant herein had been entered.
36. He testified that there had been no fraud committed on the part of the registry. That he had been able to ‘take a pending caution’(sic). He denied that he had not been summoned by the Directorate of Criminal Investigations (DCI) Nakuru stating that the 1<sup>st</sup> Defendant must have engaged in fraud.
37. In re-examination, he confirmed that he used to visit the shamba from the year 2006 to the year 2021. That he had not sued ‘mwalimu’ since he did not have the title to the suit land. He confirmed that he had lodged his caution in June 2021. He clarified that he had not been summoned by the Directorate of Criminal Investigations (DCI) Nakuru but Directorate of Criminal Investigations (DCI) Naivasha wherein he had written a letter to the DCI headquarters Kiambu Road.

#### **The Plaintiff had thus closed his case**

38. Samuel Ndungu Gitau, the 2<sup>nd</sup> Defendant herein adopted his witness statement as his evidence in chief and sought to produce the following filed documents as his evidence;
- i. The 2<sup>nd</sup> Defendant’s statement
  - ii. Copy of Official Search dated 19<sup>th</sup> May 2021.
  - iii. Copy of Title Deed registered in the name of Mary Njeri Kimani.
  - iv. Copy of the Agreement for Sale dated 28<sup>th</sup> May 2021.
  - v. Copy of RTGS funds transfer application form.
  - vi. Copy of application for Land Board Consent.
  - vii. Copy of Land Board Consent.
  - viii. Copy of Title Deed Registered in the name of Samuel Ndungu Gitau.



- ix. Copy of Green Card.
39. In cross-examination by the Counsel for the Plaintiff, he confirmed that he had bought the shamba and that he knew that there were procedures to be followed. He admitted that the Sale Agreement had no stamp duty. That whereas he was aware that three copies of the transfer forms were prepared, he had not produced any. That further, whilst there should have been payment made for the Land Control Board, he had no receipt to that effect. He admitted that he had seen the caution that had been placed by the Plaintiff on the green card. He confirmed that he got his title deed on the 1<sup>st</sup> October 2021.
40. That he had seen the lawyer's stamp on the 1<sup>st</sup> Defendant's title and whereas he knew 'Mwalimu', he had met physically with the person who was selling the shamba. That in the year 2021, he had been summoned to the Directorate of Criminal Investigations (DCI) Nakuru in relation to the instant case by which time, the title deed had not yet been processed. He confirmed that the Plaintiff had been demanding the land and that he was aware that there had been tussling over the suit land.
41. In re-examination, he confirmed that he had conducted a search on 19<sup>th</sup> May 2021 at which time it had been free of cost. That the transfer forms had been taken to the Ministry of land without which no transfer could ensue. He confirmed that the Green Card had a caution placed on 1<sup>st</sup> October 2021. That the Plaintiff had failed to appear several times hence he had never seen him.

**The 2 Defendant had thus closed his case.**

42. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants having failed to attend court; their case had been marked as closed.
43. I have looked at the Plaintiff's witness statements dated 19<sup>th</sup> November 2021 wherein he had stated that on or about the year 1997, he had acquired ownership of that property known as Miti Mingi/ Mbaruk Block 5/613 (Kianjoya) (the suit property) and in so doing he had been issued with a title deed affirming ownership. That a search had been conducted on 4<sup>th</sup> December 2006 which search had confirmed that according to the records held by the 3<sup>rd</sup> Defendant, the ownership of the suit property had not changed.
44. That on or about June 2021 he had visited the suit property with a view of checking on its status and whilst there, a concerned neighbor had sought to enquire what he had been doing therein. That it was during the interaction with the said neighbor that he had been informed of an impending sale of the suit property by the 1<sup>st</sup> Defendant. That the said revelation had prompted a frantic search for the original title deed and that it was at that juncture that he had discovered that the same had been misplaced and/or lost.
45. That subsequently, he had reported the said loss vide OB Number 87/28/06/2021 and thereafter proceeded to register a caution over the land. He thus stated that the 1<sup>st</sup> Defendant had proceeded to register and obtain a title deed to the suit property which registration and issuance of title had been done erroneously, illegally and/or fraudulently.
46. He particularized illegality and/or fraud on the part of Plaintiff (sic) as:
- i. Making documents without authority to procure registration of the suit properties in their names.
  - ii. Altering documents with the purpose of obtaining registration.
  - iii. Procuring registration of the suit land without following due process.
  - iv. Res ipsa loquitor.



47. That indeed, the 2<sup>nd</sup> Defendant had caused the construction of a permanent house on the suit property. That having demonstrated that the sale/transfer to the 1<sup>st</sup> Defendant had been illegal ab initio, the title deed held by the 2<sup>nd</sup> Defendant and/or other party was not a good title as the 1<sup>st</sup> Defendant lacked the capacity to offer good title over the land. He had thus sought for the orders in the Plaintiff.
48. The 2<sup>nd</sup> Defendant's witness statement recorded on the 10<sup>th</sup> November 2022, was to the effect that on the 28<sup>th</sup> May 2021, he had purchased the parcel of land L.R No. Miti Mingi/Mbaruk Block 5/613(Kianjoya) for Kshs. 2,200,000/= from one Mary Njeri Kimani vide an agreement. That before the purchase, he had obtained all requisite documents of title from Mary Njeri Kimani wherein he had also conducted due diligence at the Lands Registry Naivasha. That upon completion of the purchase, the title had been transferred to him. That he had been in use of the parcel of land and had constructed a section of the perimeter wall as well as a pit latrine therein.
49. Since the purchase, he had never been served with any orders of injunction or otherwise, until the 2<sup>nd</sup> November 2022 when he had been served by a court process server with some of the documents in the instant matter. That prior, in the year 2021, the Directorate of Criminal Investigations (DCI) Nakuru, had informed him of the allegations levelled by the Plaintiff over ownership of the suit land and also that the Plaintiff had failed to honor the summons to present himself at the Directorate of Criminal Investigations (DCI) offices to lodge the complaint and avail his documents.
50. That he had followed the requirements as per the process and law up to the issuance of the title deed to his name. He had thus sought for the dismissal of the Plaintiff's suit and declaration that he had good title to the suit parcel.

#### **Determination.**

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

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

52. The summary of the evidence adduced by the Plaintiff in the trial court had been that he had acquired ownership of that property known as Miti Mingi/Mbaruk Block 5/613 (Kianjoya) (the suit property) on or about the year 1997 where he had been issued with a title deed. A search of 4<sup>th</sup> December 2006 affirmed the said ownership. Sometime in June 2021 when he visited the suit property with a view of checking on its status, a concerned neighbor had sought to enquire what he had been doing therein. That it was during the interaction with the said neighbor that he had been informed of an impending sale of the suit property by the 1<sup>st</sup> Defendant. A subsequent search for his title revealed that the same had either been misplaced and/or lost. He reported the said loss vide OB Number 87/28/06/2021 and thereafter proceeded to register a caution over the land.



53. There had been no evidence tendered by the 1<sup>st</sup> Defendant wherein the 2<sup>nd</sup> Defendant's case had been that after due diligence, and noting that the first Defendant had been registered proprietor of the said suit property on 20<sup>th</sup> November 2002, he had purchased the said suit property from the 1<sup>st</sup> Defendant KShs. 2,200,000/= vide a sale agreement of 28<sup>th</sup> May 2021 wherein subsequently a transfer had been effected and he had been registered as the proprietor of the same on the 18<sup>th</sup> October 2021, after following the proper procedures.
54. A look at the Green Card herein produced in evidence is clear that the suit land was registered to one David Njau Wako on the 20<sup>th</sup> May 1997, then to the Plaintiff on the 4<sup>th</sup> June 1997 wherein he was issued with a title deed. On the 20<sup>th</sup> November 2002 the title was registered to the 1<sup>st</sup> Defendant and subsequently on the 1<sup>st</sup> October 2021 to the 2<sup>nd</sup> Defendant.
55. Having summarized what transpired during the hearing at the trial Court, as herein above, and having looked at the recorded statements herein which were adopted as the evidence in chief, I find the issue arising herein for determination as follows: -

**Whether the trial learned trial Magistrate erred in his findings.**

56. I note that these properties were initially registered under the repealed Registered *Land Act* which is now governed by The *Land Act*, 2012 and The *Land Registration Act*, 2012. Indeed, the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the *Land Registration Act* provides as follows:

“The Certificate of Title issued by the Registrar upon registration, 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 the 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
  - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme’
57. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
58. The import of Section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.



59. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, had held 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.”

60. Having said this the court finds that there is no contention that between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, originally, the suit parcel of land was registered to the Plaintiff on the 4<sup>th</sup> June 1997 wherein after four years, the same was transferred to the 1<sup>st</sup> Defendant who chose to stay away from the proceedings and thereafter 19 (nineteen) years, in 2021, she had transferred it to the 2<sup>nd</sup> Defendant vide a sale agreement.

61. No evidence had been called from the gate keeper of the land records to confirm how the title moved from the Plaintiff to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants especially when it had been argued that there was no sale of the suit land by the Plaintiff and further that his title had been misplaced, or got lost.

62. Indeed, it had been incumbent upon the 2<sup>nd</sup> Defendant to call an officer from the lands office to avail the parcel file for the suit land, so as to confirm how the title moved from the Plaintiff to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

63. In the Plaint dated 19<sup>th</sup> November, 2021, the Plaintiff had set out the particulars of the illegality and/or fraud stating that the 1<sup>st</sup> Defendant made the documents without the authority to procure registration of the suit properties in her name and further altered the documents with the purpose of obtaining registration wherein she had procured registration of the suit land without following the due process.

64. Having pleaded fraud and illegality on the part of the 1<sup>st</sup> Defendant in the manner in which she obtained the suit land, whether the Plaintiff had proved these allegations. Fraud is a serious matter which must be proved to the required standard. In *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), the Supreme Court had at paragraphs 80, 82 and 83 observed as follows:

“...However, it is trite law that fraud which, depending on the circumstances is recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities as required in other civil claims.”

65. I have no doubt in my mind that the Plaintiff herein distinctly pleaded the facts on which fraud was alleged against the 1<sup>st</sup> Defendant. The next step however was for him to prove those allegations to the required standard as it is settled law that fraudulent conduct must be distinctly alleged and distinctly proved. While the court acknowledges that specificity is generally preferred, there can be exceptions where the nature of the fraud is evident, and the particulars are implied through the surrounding circumstances or when fraudulent conduct is apparent.

66. To begin with, it was the Plaintiff’s evidence that after registration as proprietor of the land in the year 1997 and having confirmed that the same was still registered to him vide a search conducted on 4<sup>th</sup>



December 2006, it had only been in June 2021 that he had discovered that the title had changed hands despite there having been no sale agreement between him and the 1<sup>st</sup> Defendant who had subsequently disposed of the land to the 2<sup>nd</sup> Defendant. That further, his title deed was missing wherein he had made a report to the police.

67. The 2<sup>nd</sup> Defendant's case on the other had been that he was an innocent purchaser without notice of any fraud. That before he purchased the land, he had searched in the lands Registry as due diligence wherein he had confirmed that the land belonged to the 1<sup>st</sup> Defendant and that there had been neither encumbrances nor caution therein.
68. Indeed, where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance. (See the Supreme Court decision in *Dina Management Limited vs. County Government of Mombasa & 5 others* [2023] KESC 30 (KLR).
69. In this case based on both oral and documentary evidence adduced, I find that indeed the title held by the 2<sup>nd</sup> Defendant/Appellant was procured fraudulently the same having not been obtained from Plaintiff/1<sup>st</sup> Respondent herein who was the owner, but from the 1<sup>st</sup> Defendant who had no authority to transfer the same as she had no good title to pass to the 2<sup>nd</sup> Defendant/Appellant.
70. Indeed as it had been cited with approval by the Court of Appeal in *Jivanji v Sanyo Electrical Company Ltd* [2003] KLR 425 at p. 431.that:

“No person has legal capacity or authority to transfer to another person a registered proprietors interest in a parcel of land registered under the Registered *Land Act* without the participation or knowledge and consent of the registered proprietor. The transfer of the suit parcel of land to the first Defendant on 5<sup>th</sup> April 1991 was done by a transferor who was not the registered proprietor of that parcel of land. It was done without the knowledge and consent, or participation of the Plaintiff. The transferor had no legal Title in the Plaintiff's said parcel of land. The transferor had no proprietary rights in that parcel of land to pass to the first Defendant. Notwithstanding the fact that the transaction was or may have been blessed with consent of the relevant Land Control Board, was or may have been registered, that transaction was null and void ab-initio in so far as it purported to transfer the suit parcel of land to the first Defendant as there could be no valid transfer where the transferor has no Title to transfer. Documents may have been prepared, consent of the land control board obtained, signatures appended and attested and the transfer registered. But all those could not give the purported transferor the Title to transfer to the first Defendant. That transfer was unlawful.”

71. Having found that the 1<sup>st</sup> Defendant had no good title to pass can it then be said that the Appellant was an innocent purchaser without notice of any fraud?
72. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”



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

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

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

“At the time when the 1<sup>st</sup>Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1<sup>st</sup>defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1<sup>st</sup>Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

75. Lastly in the *Dina Management Limited* (supra) the Supreme Court had at paragraphs 108, 110 and 111 observed as follows:

“...Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property...

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. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to *Bawazir & Co. (1993) Ltd*, who in turn could pass to the appellant.

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. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser”

76. In my view, there having been no copy of the executed transfer forms, receipts for payment of the stamp duty and transfer fees transferring the suit land from the Plaintiff to the 1<sup>st</sup> Defendant, I therefore find that the 2<sup>nd</sup> Defendant/ Appellant herein was not a purchaser for value without notice having not obtained a transfer from the registered proprietor, but from a fraudulent person namely



the 1<sup>st</sup> Defendant who had no claim to the suit property. The Appellant could not therefore invoke indefeasibility of title as the transfer of the same to him was null and void.

77. Accordingly upon careful consideration of the record, the documents, the submissions and the authorities cited, and pursuant to the provisions of Section 26 (1) (b) of the *Land Registration Act* and Section 80 (1) and (2) of the same Act, I am satisfied that the trial learned Principal Magistrate was able to decide on the issue of a Certificate of Title that had been acquired illegally, un-procedurally or through a corrupt scheme as well as on the issue of a bonafide purchaser on the basis of the entire evidence on record, and circumstances under which the Appellant acquired title to the suit land wherein he properly came to a logical conclusion that the transfer of the suit parcel No. Miti Mingi/ Mbaruk Block 5/613 (Kianjoya) to the Appellant herein was irregular, un-procedural and illegal. The Appeal herein thus lacks merit and the same is dismissed with costs to the 2<sup>nd</sup> Respondent.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

