



**Kanyuira v Kironyo & 3 others (Environment & Land Case
57 of 2019) [2024] KEMC 74 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEMC 74 (KLR)

**REPUBLIC OF KENYA
IN THE NAIVASHA LAW COURTS
ENVIRONMENT & LAND CASE 57 OF 2019**

WR OUTA, PM

APRIL 4, 2024

BETWEEN

STEPHEN KANYUIRA GERALD KANYUIRA PLAINTIFF

AND

SAMUEL KAMAU KIRONYO 1ST DEFENDANT

JOSPHAT MICHUKI CHEGE 2ND DEFENDANT

VISION AFRIKA HOUSING CO-OPERATIVE SOCIETY LTD 3RD DEFENDANT

THE LAND REGISTRAR NAIVASHA 4TH DEFENDANT

JUDGMENT

Background

1. The plaintiff moved to the seat of justice vide a plaint dated the 27th day of June, 2019 and through the firm of Eyase Kanyuira & Associates seeking orders as against the defendants in the following terms: -
 - a. A declaration that the suit property Gilgil/Gilgil block 1/763 (Kikopey) belongs to the plaintiff;
 - b. A declaration that the transfer of Gilgil/Gilgil block 1/763 (Kikopey) from the plaintiff to the 1st defendant as well as the subsequent transfers was unlawful and fraudulent;
 - c. An order compelling the 4th defendant to cancel and revoke the title deed of the suit parcel and restore the status quo as at 26th July, 1996;
 - d. An order of eviction to be issued against the 3rd defendant; and



- e. An order of injunction restraining the 2nd and 3rd defendant from entering into, fencing, building, selling, transferring or in any way interfering with the plaintiff's lawful use of Gilgil/Gilgil block 1/763 (Kikopey).
2. The plaintiff avers that at all material times, they were the lawful owners of the suit property which they acquired in the year 1996 from GEMA and a title was issued on 26th July, 1996.
3. The plaintiff avers that they were notified of suspicious activities on the said parcel of land, following which they conducted a search dated the 15th of May, 2019 on the suit property which indicated that the title to the property had changed ownership and is currently registered in the name of Josphat Michuki Chege, the 2nd defendant herein and his title was issued on the 26th of May, 2008.
4. That upon further scrutiny, the plaintiff discovered that the green card entry indicated that the land had initially been transferred to Samuel Kamau Kirongo, the 1st defendant on 22nd March, 2005 and a title thereof was issued before it was later transferred to the said Josphat Michuki Chege.
5. The plaintiff further avers that the green card held by the 4th defendant has been tampered with as its entry indicates that the title was issued to the plaintiff on 12th April, 1999 as opposed to 26th July, 1996. Further, the plaintiff indicates that it has captured his identity number as wrongly.
6. As per the plaintiff, the entries on the green card as well as the title issued to the 2nd defendant are fraudulent as he had conducted a search on the said property sometimes in the year 2009 and the same was in his name. In his view, the entries have been backdated to create an impression that he neglected the property.
7. The claimant posits that upon paying a visit to the suit property, he discovered a signage by the 3rd defendant advertising the property for sale and upon enquiry discovered that the 3rd defendant had allegedly bought the land from the 2nd defendant and had already subdivided the same into 40 plots of one eighth of na acre.
8. That as per the GEMA register from whom the plaintiff bought the land from, the plaintiff has an entry No. 763 in his favor. It is the plaintiff's stance that he did not transfer the property to either of the defendants and that neither of them is known to him.

2nd Defendant's Statement of Defence

9. The 2nd defendant filed their defence and a counterclaim of even date through the firm of Geoffrey Otieno and company advocates in which they have denied the contents of the plaint seriatim save for the descriptive parts and the jurisdiction of this honorable court. It is their position that they are currently the registered proprietors of land subject to the title deed issued on the 26th day of May, 2008.
10. The 2nd defendant admits that the suit property was registered in the name of the first defendant before it was transferred to him.
11. In the counterclaim, the 2nd defendant seeks orders to the effect that: -
 - a. A declaration to the effect that the suit property belongs to them;
 - b. A declaration that the transfer of the suit property from the 1st defendant to the 2nd defendant and subsequently to the 3rd defendant was lawful and procedural;
 - c. An order that the caution registered to restrict dealings on the suit property be removed forthwith;



- d. A permanent injunction restraining the plaintiff by himself, his servant or agents from entering, remaining, taking up, possessing, evicting and/or interfering with the suit property;
- e. Costs of this suit

3rd Defendant's Statement of Defence

- 12. The 3rd defendant entered appearance and filed a defense and counterclaim through the firm of Kanyi Ngure & Company Advocates of even date in which they have denied the contents of the plaint seriatim save for the descriptive parts and the jurisdiction of this honorable court.
- 13. The 3rd defendant maintains that this suit is misconceived and bad in law for non-disclosure of material facts. The 3rd defendant avers that they are a bona fide purchaser for value having purchased the same from the current registered owner Josphat Michuki Chege at the price of 6.8 million.
- 14. The 3rd defendant avers that the issuance of a title deed in its favor was halted by the registration of a caution in favor of the plaintiff is what has halted the issuance of a title deed in its favor.
- 15. It is its position that it scouted the suit property before purchase and conducted a search on 23rd April, 2019 which verified the registered owner as the 2nd defendant.
- 16. That on the 25th April, 2019, the 3rd defendant applied for a copy of the green card which confirmed the ownership of the 2nd defendant and that the suit property was free of any encumbrances.
- 17. The 3rd defendant posits that upon doing due diligence they proceeded to execute the sale agreement as required in law and paid the consideration as per the terms of the agreement for sale.
- 18. The 3rd defendant urges this honorable court to find the plaintiff's claim tainted and bad in law for reasons that will be considered elsewhere in this judgment.
- 19. Further, the 3rd defendant argues this suit offends the provisions of Section 7 of the Limitation of Actions Act since the 1st defendant was registered owner of the suit property on the 22nd March, 2005 thus the plaintiff's claim for ownership was extinguished and is statutory barred via operation of time and as such the court has no mandate to entertain it.
- 20. In its counterclaim, the 3rd defendant sought several orders from this honorable court. to wit: -
 - a. A permanent injunction restraining the plaintiff by himself, his servants/agents from entering, remaining, taking, possessing, evicting and/or interfering with the 3rd defendant's quiet use, enjoyment, possession and occupation of the suit property;
 - b. A declaration that the agreement between the 2nd defendant and the 3rd defendant dated 17th May, 2019 for the sale of the suit property is legitimate and valid without any element of fraud and thus the 3rd defendant should be duly registered as the bonafide proprietor of the suit property;
 - c. An order that the caution registered to restrict dealings on the suit property in favor of the plaintiff be removed forthwith; and
 - d. That costs of the suit be awarded to the 3rd defendant with interest.



4th Defendant's Statement of Defence

21. The 4th defendant entered appearance and filed a defence dated the 12th day of October 2020 through the Honourable Attorney General. In the said defence, they admit to paragraph 6 of the plaint that the plaintiff was and is the lawful registered holder of the suit property.
22. Further, they aver that the suit land got registered in the name of the 2nd defendant who passed out as having obtained registration of the suit fraudulently, illegally and unlawfully as the title to the suit property is in the name of the plaintiff hence no better title could pass and/or can pass.
23. In addition, the 4th defendant maintains in line with the plaintiff's averments in the plaint that the transfer to Josephat Michuki Chege from the said Samuel Kamau Kirongo is fraudulent and the same should be expunged from the register.
24. The defendant in their defence asserts that they shall Cleve full indemnity from the defendants in person, estate or whichever. It is also their position that this honorable court should declare the 2nd defendant's title a nullity and have it revoked.
25. It is the 4th defendant's position, that the 3rd defendant having paid the alleged purchase price to the 2nd defendant do see a refund from them as the interest in the suit property has not crystalized.
26. The matter proceeded for hearing with the plaintiff testifying how he acquired the land and denied selling the land to the 1st Defendant who is now deceased. PW 2 Magdalene Kamau Wanjiru testified that she is a widow of the 1st Defendant and denied that at any point in time the suit property belonged to the 1st Defendant or at any time selling the same to the 1st defendant. DW 1 Josephat Michuki Chege testified that he is the registered owner of the suit property having bought it from the first defendant in 2008 for the sum of Kshs 900,000/=, built a structure there and was cultivating it until 2019 when he sold to the defendant and DW 2 and DW3 confirmed that they were witnesses to the purchase by the 2nd Defendant. DW 4 Ayub Gatheru Maingi testified on behalf of the 3rd Defendant as its chairman and bought the suit property from the 2nd Defendant though the same was yet to be transferred and they had done due diligence. DW 4, Minnie Wacuka testified that she is a former Lands Registrar and allowed the registration of the caution by the plaintiff following the anomalies she noted in the green card and the Gema Register.
27. Pursuant to the directions of this honorable court on the 21st day of November, 2023, the parties filed their written submissions I will consider at this juncture and summarize as hereunder: -

Plaintiff's Written Submissions

28. It is the plaintiff's submission that the 1st defendant was deceased as at the time of filing this suit and that they plaintiff only came to know of the same after they had already filed the suit.
29. The plaintiff submits that during the hearing the plaintiff denied having transferred the suit property to the first defendant and as well produced in court the original title as part of his exhibit. The plaintiff submits that the alleged transfers were fraudulent and irregular and ought to be cancelled and ownership reverted to him.
30. The plaintiff further relied on the testimony of the first defendant's widow who testified to the effect that she was married to the 1st defendant as from 2004 and formalized the said marriage in 2005. It was here testimony that the plaintiff was unknown to her and the deceased neither purchased any property from him nor owned any such property akin to the suit property herein.



31. The plaintiff submits that it is not in contention that they were the registered proprietors of the suit property. In support thereof, the referred this court to the GEMA register number 763 which reads the name of the plaintiff which has also been reflected in the green card being the second entry. Furthermore, the plaintiff avers that he is still in possession of the original title deed.
32. The plaintiff relied on the provisions of section 25 & 26 of the Land Registration Act which provides for indefeasibility of title as well as grounds of challenge thereof. Namely: -
 - a. On the ground of fraud misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate has been acquired illegally, unprocedurally or through a corrupt scheme.
33. To augment this position, the plaintiff referred this court to the authority in Elijah Makweri Nyangw'ra v/s Stephen Mungai Njuguna & another (2013) eKLR where the court in considering Section 26(1) (a) and (b) of the Land Registration Act rendered itself in part that the law is extremely protective of title and only two instances warrant its challenge. The first being where it is obtained through fraud or misrepresentation and the second is where the same was acquired through a corrupt scheme.
34. In the said case, the court went further to state that where title is impeachable by virtue of having been acquired illegally, unprocedurally or through a corrupt scheme, the holder thereof need not necessarily be a party to the vitiating factors noted therein. Further, the court noted that the heavy import of Section 26(1)(b) is to remove the protection from an innocent purchaser of value of innocent title holder...meaning that the title of an innocent purchaser is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme notwithstanding that the innocent purchaser did not contribute to the vitiating factors.
35. Moving forward, the plaintiff submits that a property cannot have two title deeds – whereas they obtained title on 26th July, 1996, the 2nd defendant was registered as the proprietor of the suit property on 26th May, 2008. The plaintiff relied on the case of Wreck Motors Enterprises v/s The Commissioner of Lands and others Civil Appeal No. 71 of 1997 and as reiterated in Gitwany v/s Tajmall Ltd & 3 others 2006 eKLR that: -

“...where there are two competing titles the one registered earlier is the one that takes priority.”
36. On whether the 2nd defendant acquired a valid title, the plaintiff relied on the case of Iqbal Singh Rai v/a Mark Lecchini and the Registrar of Titles Civil Case No 1054 of 2001 where the court having observed that at the time when the defendant sought to purchase the suit property it was registered in the name of the plaintiff whom he never dealt with, proceeded to hold that he could not invoke indefeasibility as the person he dealt with was a fraud and the subsequent transfers by him were null and void.
37. To this end, the plaintiff submits that the effect of the above position is that a fraudulently obtained title is bad in law and the same cannot be resurrected or sanitized through subsequent transfers whether the said transfers are innocent or fraudulent. See also Munyu Maina v/s Hiran Gathiha Maina (2013) eKLR.

2nd Defendant's Written Submissions

38. On whether the plaintiff's suit is timed barred, the 2nd defendant submits that Order 2 Rule 15(1) of the Civil Procedure Rules provides that at any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that: -
 - a. It discloses no reasonable causes of action or defense in law;



- b. It is scandalous, frivolous and vexatious;
 - c. It may prejudice, embarrass or delay the cause of action; or
 - d. It is otherwise an abuse of the court process
39. The 2nd defendant relied on Section 7 of the *Limitation of Actions Act* which is to the effect that: -
- “An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
40. The 2nd defendant further cited section 26 of the *Limitation of Actions Act*, which provides that: -
- “Where in the case of an action for which the period of limitation is prescribed, either –
- a. The action is based upon fraud of the defendant or his agent or of any person through whom he claims or his agent; or
 - b. The right of action is concealed by the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - c. The right of action is concealed by the fraud of any such person as aforesaid; or
 - d. The cause is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
41. In light of the foregoing, the 2nd defendant contends that the plaintiff has not shown any ground upon which they can escape the application of the *Limitation of Actions Act*.
42. In support of the foregoing position, the 2nd defendant cited the case of IGA v/s Makerere University (1972) EA 65 where the Court of Appeal held thus: -
- “A plaint which is barred by limitation of time is a plaint barred by law and must be rejected. Reading these provisions together seems to me that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption, the court shall reject his claim. The appellant was clearly out of time despite the opportunity afforded to him by the judge, he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy of relief.”
43. The 2nd defendant submits that the plaintiff has not in any way suggested that he made visits to the suit property to confirm the status on the ground. As per the 2nd defendant, for a party to rely on fraud/ mistake as a ground for extending time to file suit, he/she must demonstrate that they could not have discovered the fraud or mistake even while employing reasonable diligence.
44. The defendant cited and referred this honorable court to the case of David Peterson Kiengo & 2 others v/s Kariuki Thuo (2012) eKLR where the court held that the person whose name is on the register holds guaranteed title to the property – since the state guarantees the accuracy of the register making it unnecessary for a person to investigate the history of past dealings with the land in question before acquiring interest.



45. Moreover, with respect to the case against the 1st defendant, the 2nd defendant argues that this suit was instituted while the former was already deceased and hence in violation of Order 4 Rule 5 of the Civil Procedure Rules. The defendant proceeded to cite the case of Viktar Maina Ngunjiri & 4 others v/s The Attorney General and 6 others (2018) eKLR.
46. To boot, it is the position of the 2nd defendant that the plaintiff has not disclosed the nature of fraud or misrepresentation visited upon him by the 2nd and 3rd defendant. Further the defendant submits that the plaintiff has not demonstrated any ground upon which he can challenge the title deed of the 2nd defendant and subsequent sale of the suit property to the 3rd defendant. Against this background, the 2nd defendant urges this honorable court to find that the plaintiff has not reasonable cause of action raised against the 2nd and 3rd defendant and as such should dismiss the suit instituted against them with costs.

3rd Defendant's Written Submissions

47. The 3rd defendant filed their written submissions on the 12th day of February, 2024 through the firm of Kanyi Ngure & Company Advocates.
48. Like the 2nd defendant, the 3rd defendant submits that the suit by the plaintiff is time barred under Section 7 the *Limitation of Actions Act*. Further, the 3rd defendant cited Section 26 of the same Act which seeks to extend time on causes of Action where the discovery of a right was prevented by fraud or mistake and thus the right of action only accrues from the date of discovery of that mistake or form when the unlawful conduct could have been with reasonable due diligence been discovered. In the eyes of the 3rd defendant, the plaintiff did not exercise due diligence and thus cannot benefit from section 26 of the *Limitation of Actions Act*.
49. The 3rd defendant further submits that the plaintiff did not tender any evidence to show that they were conducting regular searches on the suit property as from when it was registered in their favor on the 26th of July, 1996. Further, that the plaintiff did not indicate that they took possession of the said property even by way of fencing but only made a visit there sometimes 2013 with a surveyor but was not shown the beacons affixed to demarcate his parcel.
50. It is on this basis that the 3rd defendant submits that for a party to rely on fraud or mistake for extending time to file the suit as envisaged under section 26 of the *Limitation of Actions Act*, they must demonstrate that they could not have discovered the fraud or mistake even while employing reasonable diligence. It is thus the submission of the third defendant that it is evident that the plaintiff did not exercise such diligence and thus has not exhibited any ground upon which he can escape the application of the *Limitation of Actions Act*.
51. The 3rd defendant proceeds to further argue that the plaintiff has not pleaded that both the 2nd and 3rd defendants are bonafide purchasers for value and failed to prove that they were indeed involved in the fraudulent transfers of the suit property. To this end, it is their submission that title to the said property was registered in favor of the 1st defendant on 22nd March, 2005 and thus the plaintiff had 12 years to file the suit latest 22nd March, 2017.
52. They cited the case of Margaret Wairimu Magugu v/s Karura Investment Limited and 4 others (2019) eKLR where the court observed that: -

“...therefore, the deceased had all the time between October 1993 up to October 2004 within which he would have a challenge to the registration of the respondent as the owner of the property. He did not do so and by the time he died 19 years had already lapsed with the 1st



respondent as the registered proprietor in possession of the property. Could the appellant, as the administrator claiming through the deceased do so approximately 24 years later?

...the appellant contends that the action is founded on fraud, time under section 7 could not by dint of section 26 of the Act begin to run until the fraud was discovered and that fraud was not discovered until when she commenced gathering the deceased's estate for purposes of administration. The court citing several authorities proceeded to make a determination that it was unconceivable that the deceased in that case for 19 years and the appellant (administrator) for 24 years had not discovered the fraud."

53. The 3rd defendant further relies on the testimony of DW5 to the effect that it is possible that a person may report the loss of a title deed and after being re-issued with another title deed he may sell his parcel and surrender the duplicate title deed but thereafter proceed to complain that he never sold his land while furnishing the previous title deed that he reported as lost.
54. In this regard, the 3rd defendant maintains that the plaintiff had the onus of seeking a verification and/or authentication of his title deed from the Nakuru Lands Registry where his title is said to have emanated from. In support of this position, the 3rd defendant relied on the case of Esther Wanjiru Maraguri v/ s R (2017) eKLR.
55. It is the submission of the 3rd defendant further that the plaintiff has proved fraud on their part as the same ought to have been specifically pleaded and strictly proved. In the case of Koinange and 13 others v/s Koinange (1986) KLR the court held that: -

“It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud had the burden of proving it and they had to discharge that burden...allegations of fraud must be strictly proved and although the standard of proof ought not to be beyond reasonable doubt, it ought to be more than on a balance of probabilities...”
56. The 3rd defendant maintains that the plaintiff instituted this case against the 1st defendant who was already deceased and thus could not be called to answer the plaintiff's demand. In the eyes of the 3rd defendant this offends Order 4 Rule 5 and within the parameters set in the case of Geeta Bharat Shah and 4 others v/s Omar Said Mwatayari and another (2009) eKLR this honorable court ought to down its tools as it has no jurisdiction to proceed to hear a suit filed against a person who was already dead as at the time it was filed.
57. In this regard the defendant also citing Viktar Maina Ngunjiri and 4 others v/s Attorney General and 6 others (2018) eKLR posits that it is clear beyond peradventure that the case instituted against the 1st defendant was nullity ab initio.
58. That the plaintiff having accused the 1st defendant as the principal forger or fraudster who transferred the suit property unlawfully from the plaintiff's names; it was necessary for the 1st defendant to be a possible and able party for purposes of proving liability attaching against the 2nd and 3rd defendant defendants with respect to the allegations of fraud.
59. That on a common-sense basis, without proof of liability against the deceased, then there can be no proof of fraud on the part of the 2nd and third defendant. In this regard, the 3rd defendant relied on



the authority in *Gathoni Wahome v/s Kabuchi Rwario and 3 others* 2017 eKLR where the court had the following to say: -

“...arguing that the claim against the important party to the suit had abated, counsel for the 1st defendant urges the court to dismiss the suit with costs to the defendants...

...in a rejoinder, counsel for the plaintiff submits that the suit has not abated as there are other defendants...

Whereas evidence adduced in this suit shows that the 1st defendant was the main actor and the cause of all the trouble the plaintiff has found himself in the case as presented. If the plaintiff wanted to hold the 1st defendant accountable for his action, in my view she would have urged a claim against him based on representation that he had authority to deal with the property when he had not. That way, the court would have basis for making orders against him. In my view, no orders can issue against the 1st defendant. This is so despite showing that he was the main actor and the cause of the plaintiff's woes. The upshot of the foregoing is that the plaintiff's claim is found unsustainable against all the defendants.”

60. The 3rd defendant citing the case of *Wamukota v/s Donati* (1987) KLR that a court cannot make a finding that there were fraudulent transactions when the particulars of fraud were not set out in the pleadings. Furthermore, that it is improper for a court to make a determination of fraud against a party who is not party to the suit.
61. Ultimately, the 3rd defendant submits that the plaintiff's suit was a non-starter from its outset considering the person accused of fraudulently procuring the plaintiff's title deed unlawfully is deceased. as such, the subsequent purchaser's being the 2nd and 3rd defendants are innocent parties premised on the simple fact that they cannot be held liable for the alleged fraudulent acts of the deceased.
62. On whether, the 2nd and 3rd defendants are innocent purchasers, it is the submission of the 3rd defendant that the 2nd defendant having testified that pursuant to an agreement dated 17th June, 2019 he sold the suit parcel to the 3rd defendant for a consideration of 6.8 million then it is clear that the 3rd defendant was indeed an innocent purchaser for value.
63. It is the submission of the 3rd defendant that as per the definition of a bona fide purchaser, all persons who might have participated in a fraudulent transaction and who had knowledge of it are deemed to be privy and to have notice of the fraud. That however, a suit must disclose which acts of fraud are attributable to a particular defendant. In light of this, the 3rd defendant maintains that from the plaintiff's pleadings, no acts of fraud have been attributed to them or the 2nd defendant and thus the plaintiff's claim for recovery and possession of land cannot succeed against them.
64. The 3rd defendant further called to the attention of this honorable that Section 26(1) of the *land Registration Act* is an abstract provision which highlights on the grounds upon which a title deed may be rectified while on the other hand section 80 of the *Land Registration Act* empowers the court on rectification of title to land where a proprietor who is in possession had acquired title for valuable consideration only if such proprietor had knowledge of the fraudulent dealing.
65. On the aspect of due diligence, the 3rd defendant avers that the 2nd defendant testified that at the time of registration of the suit parcel, the same had no encumbrances and was unoccupied at the time of purchase – 20th February, 2008. They further rely on the testimony of the 2nd defendant that they built a two roomed semi-permanent house which he made use of during the cultivating season.



66. Further, the defendant relies on the Torrens System and the case of David Peterson Kiengo and 2 others v/s Kariuki Thuo (2012) where the High Court held that it is unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership.
67. On this basis, the 2nd and 3rd defendant claim to be a bonafide purchasers for value from the 1st defendant and in return the 2nd defendant was able to pass his interests on the land to the 3rd defendant.

4th Defendant's Written Submissions

68. The 4th defendant submits that that it is questionable how the 1st defendant acquired the suit property for the reason that the plaintiff has never sold the property to anyone rendering the 1st defendant's root of title unexplainable. In the eyes of the 4th defendant, it is certain that the transaction between the 1st, 2nd and 3rd defendants is unlawful, illegal and fraudulent.
69. Furthermore, the 4th defendant invites this honorable court to find that the plaintiff still has the original document of title which is an indicator that he did not transfer the same to the 1st defendant. In this regard, the 4th defendant referred this honorable court to the authority in Hubert L. Martin and 2 others v/s Margaret J. Kamar and 5 others & Munyu Maina v/s Hiram Gathiha Maina (2009) eKLR.
70. It is also the submission of the 4th defendant that this honorable court should find that the 1st defendant did not have a clean title capable of being transferred to the 2nd defendant and subsequently to the 3rd defendant. It is their submission that the 1st defendant managed to obtain the said title fraudulently and its protection under section 26 of the *Land Registration Act* is therefore impeachable on grounds of fraud and/or misrepresentation.
71. To this end, the fourth defendant cited the case of Alice Chemutai Too v/s Nickson Kipkurui Korir and 2 others (2015) eKLR where the court held that: -

“...it will be seen from the above that title is protected, but the protection is removed and title can be impeached if it's procured through fraud or misrepresentation to which the person is proved to be a party or where it is procured illegally, unprocedurally or through a corrupt scheme.

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact to put down our feet and affirm that no fraudster no any beneficiary of fraudulent activities stands to gain for his fraud and no title holder will ever be deprived of his good title by the tricks of con artists.”

72. The 4th defendant submits that the plaintiff is entitled to the orders sought and that this honorable court should invoke its powers under Section 80 of the *Land Registration Act* and order for rectification of the register. The said section is to the effect that: -

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

Legal Analysis And Determination

73. Having considered the testimonies, exhibits by the parties, their rival arguments as well as written submissions, I find that the following issues to arise for determination by this honorable court: -



- a. Whether the plaintiff's claim against the 1st, 2nd and 3rd defendant is time barred under the [Limitation of Actions Act](#);
 - b. Whether the demise of the 1st defendant abates/extinguishes the plaintiff's claim;
 - c. Whether the plaintiff is entitled to a remedial appendage under Section 80 of the [Land Registration Act](#);
 - d. Whether the 2nd and 3rd defendant are bona fide purchasers for value without notice; and
 - e. Who should bear the costs of this suit
74. The parties can rest assured that this honourable court has considered their detailed submissions and authorities in detail even if the same have not been reproduced herein due to reasons for brevity. I also thank the parties for their detailed written submissions which went a long way for the court to understand the parties respective positions.
75. 2nd and 3rd defendant in their submissions have urged this honorable to strike out the plaintiff's pleadings particularly for reasons that they allegedly don't disclose any specific fraud on their part. In the case of Vijay Morjaria v/s Nansingh Madhusing Darbar and another (2000) eKLR the court observed that: -
- “It is well settled that fraud must be specifically pleaded and that particulars must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved...it is not allowable to leave fraud to be inferred from the facts...”
76. I must hasten state that albeit the position adopted by the 2nd and 3rd defendant is true as enumerated by the authority in Vijay Morjaria (Supra), the plaintiff did not necessarily have to prove any fraud on the part of the 2nd and 3rd defendant as they were only enjoined in these proceedings as subsequent purchasers.
77. All the plaintiff had to do is plead and strictly prove fraud on the part of the 1st defendant. The fate of the 2nd and 3rd defendant rests on the determination of this honorable court with regard to the regularity and legality of the 1st defendant's title following which the Nemo Dat Rule as well as Section 26(1)(a) and (b) of the [Land Registration Act](#) will come into play.
78. Back to the channel, on the first issue, the 2nd and 3rd defendant have extensively submitted on it while the plaintiff and the 4th defendant did not. The former have anchored their claims on Sections 7 & 26 of the [Limitation of Actions Act](#).
79. The said sections respectively provide that: -
- “Section 7; An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person;
- Section 26; Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or



- (b) The right of action is concealed by the fraud of any such person as aforesaid; or
- (c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. Emphasis mine.

80. The plaintiff herein avers to have acquired the suit property on the 26th day of July, 1996 the same having been allocated to him by GEMA – which was then a land buying company. On the other hand, the 2nd defendant avers to have bought the said property from one Samuel Kamau Kirunyu in the year 2005. As per the provisions of Section 7 of the Limitations of Actions Act, a person is barred from instituting a claim 12 years after his right of action accrued.
81. Without doubt, the period between the year 2005 and 2019 (when the plaintiff lodged a caution and instituted these proceedings) is roughly 14 years. However, Section 7 of the *Limitation of Actions Act* ought to be read together with Section 26 of the same Act of parliament.
82. The latter is to the effect that where an action which is ordinarily subject to limitation of time is anchored on fraud on the part of the defendant, his agent or any person through whom he claims, the period of limitation (12 years for this matter) starts running when the plaintiff discovers the fraud, mistake or at such a time when with reasonable due diligence, the plaintiff would have discovered it.
83. In light of the foregoing, the question that begs for an answer is when did the time start running for this particular suit or rather, when would the plaintiff have been reasonably expected to have discovered the fraud in the eyes of reasonable man if he exercised due diligence?
84. To my mind, there is no law that requires a proprietor of land to conduct searches on their parcels of land within any prescribed intervals. As such, the argument by the 2nd and 3rd defendant that the plaintiff failed to do so lacks a proper footing and must be dismissed.
85. However, I am of the considered opinion that the plaintiff would have been expected to have discovered the alleged fraud, once any of the adversaries (running from the 1st defendant to the 3rd defendant) asserted manifest and adverse possession of his suit property.
86. From the material before me, there is nothing to show that the 1st defendant did anything on the land after acquiring the alleged interest enough to signal the plaintiff of any adverse dealings with his land. It was the 2nd defendant's testimony that he visited the land on 20th February, 2008 and that the same was unoccupied at the time.
87. Therefore, it is proper for this honorable court to infer that there was no dealing with the land as of 20th February, 2008 which would have led the plaintiff to discover fraudulent dealings with his land pursuant to Section 26 of the Limitations of Actions Act.
88. The 2nd defendant however avers that after purchase, they constructed some semi-permanent structures on the suit property which they used as their residence during the cultivating seasons. In my understanding, this is the only time when the plaintiff would have been expected to discover adverse and fraudulent dealings with his land. More so, this is the time that the limitation under Section 7 would have started running. The 2nd defendant did not however disclose when exactly the said two bedroomed structure was constructed upon the suit property.



89. Even if this court were to presume that the 2nd defendant constructed the structure on the very day that he paid a visit to the suit property (which is very unlikely); the period between 20th February, 2008 and 3rd June, 2019 (when a caution was lodged) is exactly 11 years, 3 months and 14 days.
90. In *Mtana Lewa v/s Kahindi Ngala Mwagandi* [2015] eKLR, the court found that adverse possession was a constitutional claim where a registered owner loses his land and title out of his default or inaction in failing to take action against a trespasser for a period of 12 years without interruption while knowing it and without license or authority to possess or occupy the land. This case stresses that knowledge of adverse possession is paramount. In the present case, the time from when actual and/or constructive knowledge would have been expected on the part of the plaintiff is well within the 12 year- widow period.
91. As such, I find and hold that the plaintiff's claim is not in any way barred by laches and that the same was instituted within the 12-year time period under Section 7 of the Limitations of Actions Act.
92. On the second issue of whether the claim by the plaintiff abates for reasons that the 1st defendant was and has been deceased from the time of institution of these proceedings, the 2nd and 3rd defendant relied on Order 4 Rule 5 of the Civil Procedure Rules. The same is to the effect that that the defendant's interest and liability must be shown.
93. In particular, the 3rd defendant cited and referred this honorable court to the case of *Gathoni Wahome v/s Kabuchi Rwaro and 3 others* 2017 eKLR where the court had the following to say: -

“...arguing that the claim against the important party to the suit had abated, counsel for the 1st defendant urges the court to dismiss the suit with costs to the defendants...

...in a rejoinder, counsel for the plaintiff submits that the suit has not abated as there are other defendants...

Whereas evidence adduced in this suit shows that the 1st defendant was the main actor and the cause of all the trouble the plaintiff has found himself in the case as presented. If the plaintiff wanted to hold the 1st defendant accountable for his action, in my view she would have urged a claim against him based on representation that he had authority to deal with the property when he had not. That way, the court would have basis for making orders against him. In my view, no orders can issue against the 1st defendant. This is so despite showing that he was the main actor and the cause of the plaintiff's woes. The upshot of the foregoing is that the plaintiff's claim is found unsustainable against all the defendants.”

94. That case is somewhat different from the instant one for reasons that in *Gathoni Wahome* (Supra), the 1st defendant happens to have demised during the pendency of the said proceedings thus requiring the invocation Order 24 Rule 4 of the Civil Procedure Rules which requires that: -

“(1) Where one or two or more defendants die and the cause of action does not survive or continue against the surviving defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) ...



(3) where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

95. I am of the considered opinion that the authority in *Gathoni Wahome (Supra)* is of little relevance to this case more so owing to the disparities with respect to the circumstances would cause abatement.
96. Reverting to the instant case, I have no doubt in my mind that the plaintiff instituted this suit against several defendants including the 1st defendant who was since deceased. By the same note, I am not lost to the fact that it would not only be absurd but also futile to issue orders as against the said since deceased 1st defendant.
97. Be that as it may, it is the imperative of justice and the overriding objectives under Sections 1A and 1B of the *Civil Procedure Act* that should guide on the determination to make on this issue. As such, the court has to determine on the one hand whether the orders sought by the plaintiff are directed against the deceased so as to render them personally liable or whether the orders sought could still bear fruits even with the death of 1st defendant.
98. A thorough consideration of the plaintiff’s pleadings discloses that the plaintiff seeks the indulgence of this honorable court to invoke the provisions of Section 80 of the *Land Registration Act*.
- “Section 80(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
99. The mandate of rectification of the register is bestowed on the Lands Registrar. Thus, there is no doubt that the orders sought by the plaintiff would be enforceable if they were successful even with the death of the 1st defendant. For the reasons stated hereinabove on this issue, I come to the ultimate conclusion that the plaintiffs claim cannot abate for reasons that the 1st defendant is deceased.
100. However, I must note that the absence of the 1st defendant does not absolve the plaintiff of their legal and evidential burden of proof as required under Sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya. It is trite law that whoever desires the court to make a determination on any legal right or liability based on the existence of facts which they assert must prove that indeed those facts exist. See *Ngamau Katitu v/s Republic (2020) eKLR*.
101. At this juncture, I will proceed to make a determination on the third issue. The plaintiff avers that they purchased the suit property and acquired title thereof in the year 1996 from GEMA which was then a land buying company. In this regard, the plaintiff refers this court to GEMA’s register entry number 763. The same reads the name of the plaintiff. It is therefore on even ground that the plaintiff legally and procedurally acquired the said property from GEMA. In any event, the green card speaks to that effect.
102. Furthermore, the plaintiff avers that that they still have the original title to the suit property. Evidence of the same was produced by way of Exhibit P.EXT 1 being a copy of the said title deed issued to the plaintiff on 26th June, 1996. Having this in mind, the only way the 1st defendant could have acquired legal title to the suit property was through dealing with the plaintiff for a transfer to the suit property. If that was the case, then the plaintiff would definitely not be in possession of the original title to the suit property since the same would have been given to the 1st defendant as part of the completion documents to effect the transfer.



103. This position was confirmed by DW5 (Land Registrar). I also take note that the said registrar confirmed that she was familiar with the Registrar known as Charles Sungu and that the entries No. 6 and 7 on the green card in relation to the title to the 2nd defendant had been signed by the said Charles Sungu.
104. However, it is apt to note that the acceptability of any dealings with regard to the suit property by the 2nd and 3rd defendant (whether innocent or otherwise) are subject to the viability of title held by 1st defendant. If the 1st defendant's root of title is tainted with illegality, then he could not have transferred any better title to the 2nd defendant and subsequently the interested transferred to the 3rd defendant by the latter was also tainted.
105. In light of the foregoing, one wonders how the 1st defendant effected a transfer without the original title document from the plaintiff? To my mind this is a clear indicator of irregularity and unprocedural dealings with the suit property to the detriment of the plaintiff.
106. I take cognizance that the 3rd defendant argued (relying on the testimony of DW5) that a proprietor of land can claim loss of a title deed and then be re-issued with a second title and thereafter sell his land through a surrender of the said re-issued title deed only to later produce the duplicate copy of the title deed and claim that they never sold the land in the first place.
107. In the opinion of the 3rd defendant, the plaintiff shouldered the obligation to seek verification and/or authentication of their title from the Nakuru Lands Registry where his title deed is said to have emanated from. More so, they opine that the signature of the land registrar who signed the title deed should have been verified and the title be submitted to the government printers for verification of the title deed paper and imprints thereon.
108. In this regard, this honorable court shall place reliance on Section 26 of the [Land Registration Act](#) which is to the effect that: -
- “26. 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”
109. Pursuant to Section 26, this court is enjoined to presume the plaintiff's title as valid unless the contrary is proved, by the same note, the plaintiff is not expected to verify his instrument of title unless its root was challenged by the defendant.
110. With all due respect, the argument by the 3rd defendant as to the genuineness of the plaintiff's title does not place any burden on the plaintiff. He who alleges must prove and therefore it is the 3rd defendant that shouldered the burden of substantiating their allegations by seeking the relevant information with regard to the title document. To my mind, the Lands Registry is as a public office and thus the defendant cannot be heard to say that they would be denied any information that would have been requisite to augment their allegations as to the genuineness of the plaintiff's title.



111. In all honesty, only when the 2nd and 3rd defendant would have tabled evidence and/or material capable of creating doubt in the mind of the court that the evidential burden would have shifted to the plaintiff. In the absence of such evidence, the arguments by the 3rd defendant that the plaintiff ought to have adduced proof of genuineness is untenable.
112. Against the foregoing analysis, I find that the plaintiff proved to the required threshold that they are the legal owners of the suit property and that the transfer to the 1st defendant could only have been irregular, unprocedural and illegal. As such, I find and hold that the plaintiff is entitled to a remedial appendage under Section 80 of the [Land Registration Act](#).
113. For avoidance of doubt, the Lands Registrar Naivasha is hereby directed to rectify the register and reinstate title with respect to all that parcel of land known as Gilgil/Gilgil block 1/763 (Kikopey) in favor of the plaintiff.
114. On the issue of whether the 2nd and 3rd defendant are bona fide purchasers for value without notice, I note that the 3rd defendant based their argument on the Torren System. In particular, they relied on and cited the case of David Peterson Kiengo and 2 others v/s Kariuki Thuo (2012) where the High Court held that it is unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership.
115. I must hasten to point out that the position adopted by the court in David Peterson Kiengo (Supra) and as relied on by the 3rd defendant was made in 2012 and has since been overruled. Seven years down the line the court in National Land Commission v/s Afrison Export Import Limited & 10 others [2019] eKLR where a search on a piece of land conducted in January 2018 showed that there were no encumbrances on the land and a second search on the same property in August 2018 showed that there were two undischarged mortgages. The court pronounced itself thus: -
- “Based on the inherent danger of the search system which is based on the Torrens System of registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Applicant had bothered to delve into the history of the title, it would have discovered that the title had two mortgages besides other entries in the register and the other transactions in respect of L.R. No. 7879/4 which were not noted on the register...we do not think the Applicant’s contention that it solely relied on the search when undertaking the compulsory acquisition of the land on which the two schools sit was diligent and pragmatic...in light of the foregoing, our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search.” Emphasis mine.
116. Before the Supreme Court decision in the case of Dina Management v/s County Government of Mombasa and 5 others 2023 eKLR, there had been conflicting decisions on the position of a bona fide purchaser for value more so from the jurisprudence flowing from the spectrum of the 2nd tier superior court. Preceding decisions to the Dina Management case (Supra) had trailed in dissimilar positions concerning this subject causing nothing but confusion.
117. For instance, in 2013, the Court of Appeal in Arthi Highway Developers Limited v/s West End Butchery Limited and 6 others (2013) (2015) eKLR in which the court had established the existence of fraud from the first owner, proceeded to strike down titles that were passed to the subsequent purchasers. In the said case, the 2nd tier Superior Court applied the Nemo Dat Quod Non Habet rule which is to the effect that no one can give that which they do not have. As such, the court found that the fraud (first owner) in that case did not pass any good title to the ensuing purchasers. On this basis, the court held that they were not bona fide purchasers for value.



118. In a clear contrast to its decision in Arthi Highway Developers case (Supra) the same court in 2021 – Tarabana Company limited v/s Sehmi and 7 others (2021) eKLR proceeded to hold that the appellant therein as a bona fide purchaser despite the subject title having had a history of illegality.
119. It is these inconsistencies that I believe the Supreme Court well dealt with in the case of Dina Management (Supra). The supreme court noted that although Article 40 of *the Constitution* of Kenya, 2010 entitles every person of the right to own property, the right is conditional upon Article 40(6) which limits the right as against any property that is unlawfully acquired. Moving forward, the Supreme Court found that the allocation of the subject suit property to the very first owner was illegal since no documents had been produced to show that it was lawful and as such it could not be protected under Article 40 of the 2010 Constitution.
120. Accordingly, the Supreme Court held that no good title could have been transferred from the first owner to all other subsequent purchasers down that line since the first owner’s root of title had been successfully challenged. The Supreme Court cited with approval the authority in Funzi Development ltd and others v/s County Council of Kwale (2014) eKLR which held that: -
- “...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility sanction on illegality or give its seal of approval to an illegal or irregularly obtained title.”
121. In the spirit of the Supreme Court decision, I find that the subject of bona fide purchaser is now well settled and with finality. The emphasis is that one cannot hide under the Torren system, they have to go behind the search to satisfy themselves as to its validity and root. Where there is fraud on the part of the defendant from which a subsequent transfer has been effected, then the Nemo Dat Rule comes into play and such a person cannot be regarded a bona fide purchaser for value without notice.
122. The 2nd and 3rd defendant in this case are a no exemption to this position of the law, having established elsewhere in this judgment that the title held by the 1st defendant was irregular, improper, unprocedural and an illegality, the 1st defendant could not have transferred any better title to the 2nd and 3rd defendant. In addition, in light of the aforementioned Supreme Court Decision they cannot be heard to say that they relied on the Torren system or claim to be bona fide purchasers for value.
123. Ultimately, I find and hold that the 2nd and 3rd defendant do not have any bonafides in the suit property and their claims in that respect are hereby dismissed in their entirety including the counter claim.
124. On the issue of costs, this court finds that costs to be borne by the 2nd and 3rd defendant.
125. For avoidance of doubt, the following orders issue from this honorable court in favor of the plaintiff: -
- a. A declaration be and hereby issues from this honorable court that the plaintiff is the rightful owner of all that parcel of land known as Gilgil/Gilgil block 1/763 (Kikopey);
 - b. A declaration be and hereby issues from this honorable court that the alleged transfer from the plaintiff to the 1st defendant as well as the subsequent transfers as unlawful and fraudulent.
 - c. The land Registrar be and is hereby directed to cancel and revoke the title deed of the suit parcel known as Gilgil/Gilgil block 1/763 (Kikopey) and restore the status quo as at 26th July 1996.
 - d. An order of eviction be and is hereby issued against the 3rd defendant, his agents, servants or otherwise from all that parcel of land known as Gilgil/Gilgil block 1/763 (Kikopey);



- e. An order of injunction is hereby issued against the 2nd and 3rd defendants restraining them from entering into, fencing, building, selling, transferring or in any other way interfering with the Plaintiff's lawful use of Gilgil/Gilgil block 1/763 (Kikopey);
- f. Costs of the suit to be borne by the 2nd and 3rd Defendants.

126. It is so ordered.

127. This judgement is delivered remotely through e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIVASHA THIS 4DAY OF APRIL 2024

WILSON RADINGFKCDISRES

PRINCIPAL MAGISTRATE

