

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA**

**ELC APPEAL No. E014 OF 2025**

**EVERLYN RACHEAL WAMBUI NJOGU.....**

**APPELLANT**

**VERSUS**

**PAUL KIMANI MAINA (Suing as the administrator  
of the estate of WANJIKU NDERI MUCHIRI**

**alias WANJIRU NDERI) .....1<sup>ST</sup>**

**RESPONDENT**

**THE DISTRICT LAND REGISTRAR-NAIVASHA.....2<sup>ND</sup>**

**RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup>**

**RESPONDENT** *(Being an Appeal from the Judgement of the Chief  
Magistrate's Court at Naivasha (the Honourable Yvonne Inyama-Principal  
Magistrate) dated 25<sup>th</sup> July 2025 in MCELC No. E046 of 2022)*

**IN**

**REPUBLIC OF KENYA**

**THE CHIEF MAGISTRATES COURT OF KENYA AT NAKURU**

**MCELC SUIT NO. E046 OF 2022**

**BETWEEN**

**PAUL KIMANI MAINA (Suing as the administrator  
of the estate of WANJIKU NDERI MUCHIRI**

**alias WANJIRU NDERI) .....**

**.....PLAINTIFF**

**VERSUS**

**EVERLYN RACHEAL WAMBUI NJOGU.....1<sup>ST</sup>**

**DEFENDANT**

**THE DISTRICT LAND REGISTRAR-NAIVASHA.....2<sup>ND</sup>  
DEFENDANT**

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

### **JUDGMENT**

1. Before me for determination on appeal is a matter which was heard and determined by Hon. Yvonne Inyama, Principal Magistrate, whereupon, considering the evidence of both parties, she found that the 1<sup>st</sup> Defendant's title had been acquired irregularly and proceeded to dismiss her Counter Claim with costs vide her Judgment delivered on 25<sup>th</sup> July, 2025.
2. On the other hand, the learned Magistrate found that the Plaintiff's case had been proved on a balance of probabilities and proceeded to enter judgment in his favour as against the 1<sup>st</sup> Defendant in the following terms:
  - 
  - i. A declaration is hereby issued to the effect that the suit property belongs to the estate of Wanjiru Nderi Muchiri alias Ruth Wanjiru Nderi.
  - ii. The 2<sup>nd</sup> Defendant be ordered to amend the register and re-issue a title deed.
  - iii. The Plaintiff is awarded costs of the suit and interest at court rates.
3. The 1<sup>st</sup> Defendant/Appellant being dissatisfied with the said findings and Judgement, has now filed the present Appeal based on the following grounds in her Memorandum of Appeal:
  - i. That the learned Magistrate erred in law and fact by declaring that the suit property belongs to the Estate of Wanjiru Nderi Muchiri alias Ruth Wanjiru Nderi despite the 1<sup>st</sup> Respondent failing to provide probative evidence in support of the estate's interest in the subject land.

- ii. That the learned Magistrate erred in law and fact in finding that the parcel numbers on the ballot papers had changed upon subdivision without any evidence in support thereof.
- iii. The learned Magistrate erred in law and in fact by believing the testimony of the Plaintiff that the family had been in possession of the subject property when no evidence was tendered before the court and when in fact the property had been sold to the Appellant in vacant possession.
- iv. The learned Magistrate erred in law and fact by shifting the burden of proof to the Appellant when the 1<sup>st</sup> Respondent had not discharged the same.
- v. The Learned Magistrate erred in law and fact by departing from the 1<sup>st</sup> Respondent's pleaded claim of fraudulent and illegal acquisition of property, which had not been proved to the expected standard, to make a finding that the Appellant had acquired the title of the suit property irregularly.
- vi. The learned Magistrate erred in law and fact by failing to find that the evidence that had been produced by the 1<sup>st</sup> Respondent related to payment for parcel numbers 150 and 323 under a previous sale agreement which had been nullified, and had no nexus, legal or otherwise, to the suit property.
- vii. The learned Magistrate erred in fact and law by failing to consider two membership registers and disregarded DW2's evidence as the Chairman of Naivasha Unity Farmers Company, who had given the history of the property and authenticated the register that had been filed by the Appellant, thereby arriving at a wrong decision.
- viii. The learned Magistrate erred in law and fact by dismissing the Applicant's counterclaim that had sought the de-registration of the caution that had been registered

against the title to the suit property, despite clear evidence that she is the legal proprietor.

ix. That the learned Magistrate erred in law and fact by making findings and rendering the judgment against the court record and the weight of the evidence that had been adduced by the parties at the hearing.

4. The Appellant thus prayed for the following orders:

i. That the Appeal be allowed, and the judgment of the Magistrates Court in Naivasha ELC E046 of 2022 delivered on 25<sup>th</sup> July 2025 be set aside.

ii. The Appellant's counterclaim be allowed as prayed.

iii. Costs of the Appeal and those of the trial court be awarded to the Appellant.

5. The 1<sup>st</sup> Respondent opposed the Appellant's Appeal vide his Grounds of Opposition dated 31<sup>st</sup> October 2025 on the following ground:

i. The Appeal is devoid of merit.

ii. The evidence on record clearly established that the Appellant's title had been obtained through an irregular and unprocedural process.

iii. The Appellant had failed to produce any credible documentary evidence to support a lawful acquisition of the property.

iv. The Respondent's evidence was consistent, corroborated, and had proved possession and entitlement to the property beyond mere assertion.

v. The Appellant had misconceived the law on the burden of proof, which had properly shifted once the legitimacy of her title had been questioned.

vi. The issues raised in the instant Appeal were matters of fact that had already been settled by the evidence on record and did not warrant appellate interference.

- vii. The Appeal is frivolous, vexatious and an abuse of the court process, intended only to delay the enforcement of lawful rights.
6. The Appeal was disposed of by way of Written submissions where the Appellant vide her submissions dated 8<sup>th</sup> January 2026 summarized the factual background of the matter and reiterated her grounds of appeal before founding her submissions on the decided case of **Munyu Maina v Hiram Gathiha Maina [2013] KECA 94 (KLR)** where the court had cited the case of **Selle -vs-Associated Motor Boat Co. [1968] EA 123** on the duty of the first Appellate Court which is to re-evaluate the evidence which had been adduced in the subordinate court both on points of law and facts and to render its own reasoned findings and conclusions.
7. Thereafter, she placed reliance on the provisions of Sections 107 to 109 of the Evidence Act to submit that the burden of proof in civil matters rests upon a party who asserts the existence of the fact which is the essence of the maxim, *“he who alleges must prove”*.
8. That the jurisprudence established had crystalized the specific evidentiary requirements that any party asserting ownership derived from a land-buying company must satisfy, the requirements that constitute the foundational pillars upon which such a claim stands. She placed reliance on the decided cases of **Lucia Wambui Kariuki & Another v Grace Wanjiru & Another [2022] eKLR**, **Wandaka & 2 others v Mwangi [2025] KECA 83 (KLR)** and **Karenju v Kamau [2025] KEELC 273 (KLR)** to submit that said authorities had established a clear, four-pillar evidentiary test to establish the root of the title being:
  - i. Share Certificate;
  - ii. Payment receipts to the company;
  - iii. Ballot corresponding to the final title number; and
  - iv. Clearance certificate from the company or the Lands Registry.
9. She further relied on the provisions of Section 26 (1) of the Land Registration Act, which confers upon a registered proprietor a prima facie

indefeasible title, placing the initial and persistent burden on any challenger to adduce credible evidence to impeach it.

10. She submitted that the 1<sup>st</sup> Respondent, Paul Kimani Maina, bore the legal burden under the provisions of Section 107 of the Evidence Act to prove, on a balance of probabilities, that the estate of Ruth Wanjiru Nderi held a valid and allocable interest in Plot No. 383. However, an analysis of his evidence against the four mandatory pillars had revealed a complete and fatal deficit.
11. That the share certificate was the *sine qua non* of membership in a company, as it was the primary instrument that denoted one's stake and entitlement. That, nonetheless, the 1<sup>st</sup> Respondent did not produce, at any stage of the trial, a share certificate issued by Naivasha Unity Farmers Company Limited in the name of Ruth Wanjiru Nderi. That the only linking factor had been a receipt dated 1<sup>st</sup> November 2000 for a share in 191 and a confirmation by the chairman that indeed she had bought shares for Plot 191.
12. He attacked the receipts produced as exhibits by the 1<sup>st</sup> Respondent to the effect that one appeared to have been issued on 15<sup>th</sup> May 1975 for the payment of a registration fee, the second one dated the 1<sup>st</sup> August 1978, was for payment of the Share capital, while the one issued in the year 1978 had the name of the Respondent's mother superimposed on a name that had been cancelled, and had indicated a payment for an entrance fee. A receipt dated 13<sup>th</sup> October 1998 indicated a payment for a development fund related to Plot Nos. 150 and 323. Two receipts dated 1<sup>st</sup> November 2000 showed that one was for miscellaneous/announcements and the other for payment of a Block title.
13. In relation to the register, she submitted that in the "name" section of a register labelled P11, the 1<sup>st</sup> Respondent's mother's name had again been superimposed above a cancelled entry, wherein in the completed column, it stated "transferred" and showed a date of 13<sup>th</sup> May 1985. Details about the Respondent's mother, including entry "1372 B" were depicted in the first column on a page labelled as P.48.

14. The testimony of Peter Mwangi, the Chairman of Unity Farmers, had, however, discredited the Plaintiff's receipts wherein he had stated that they were dated even before the incorporation of the company and therefore did not belong to Unity Farmers. His evidence had been that the receipt dated 1<sup>st</sup> November 2020 had been issued to them for Kshs. 4800/= for 191 and not the suit land. That his testimony was not controverted, therefore establishing a critical fact that the receipts predating 16<sup>th</sup> May 2000, which was the date of incorporation of the company, were payments to the failed scheme of the late Member of Parliament, Simon Thuo Kairu.
15. That whereas the receipt dated 1<sup>st</sup> November 2000 bore the company name, the same had explicitly stated that it was regarding Plot 191 and not 383. That, subsequently, no receipt had been produced evidencing payment to the company for an interest in Plot 383.
16. That indeed, the 1<sup>st</sup> Respondent had admitted to producing ballot papers numbered 150 and 323 for plots under the scheme and that a subsequent receipt dated 13<sup>th</sup> October 1998 had indicated that his mother had received "2 shares" after a payment for Plot Nos. 150 and 323. In cross-examination, however, he had conceded that the Register showed that the membership number 383 belonged to the 1<sup>st</sup> Defendant and interestingly, the register extract that had been produced by the 1<sup>st</sup> Respondent did not show the specific land allocated to the members.
17. She placed reliance in the **Lucia Wambui Kariuki's** case (supra) where it had been held that ballot number must agree or correspond with the land reference number, to submit that by the 1<sup>st</sup> Respondent's own admission, the register had shown that membership number 383 belonged to the Appellant had severed any possible link between his mother's ballots and the Suit Property. Further reliance was placed on the decided case of **Wandaka & 2 Others vs Mwangi [2025] KECA 83 (KLR)**, where it had been held that the essence of balloting was to identify each plot with a ballot number.
18. That there was no scintilla of evidence that Naivasha Unity Farmers Company Limited had ever issued a clearance certificate to Ruth Wanjiru

Nderi or her estate in respect of Plot No. 383, directing the Land Registrar to process a title in her name. T

19. That in a desperate attempt to salvage his claim, the 1<sup>st</sup> Respondent had produced a register extract, which had been conclusively discredited by the chairman of Naivasha Unity Farmers, who categorically stated that the document was spurious and was in relation to a defunct scheme.
20. The Appellant submitted that a document that was not an official register of a legitimate land-owning entity could not form the basis of a claim to ownership. That in any event, the 1<sup>st</sup> Respondent's oral claim to the effect that the Chairman had plotted to take away his land was a bare speculative allegation devoid of any evidential support.
21. That the 1<sup>st</sup> Respondent's assertion that parcel numbers 150 and 323 had been transmuted into Plot 383 after subdivision was unsubstantiated by the evidence on record. She relied on the provisions of Sections 32 of the Survey Act and 19 of the Land Registration Act to argue that the law requires any subdivision and re-numbering of registered land to comply with the mandatory statutory procedures under both provisions of the law. That accordingly, the 1<sup>st</sup> Respondent was required to request from the land office and place on record the authenticated survey plan, mutation form, or any entry in the register to substantiate the alleged subdivision and re-numbering. The absence of the requisite documentation and corroborative proof rendered his allegation unproven; hence, the court should have taken cognisance of this fact.
22. That the 1<sup>st</sup> Respondent's claim that his mother utilized Plot 383 before her death necessitated the production of corroborative evidence, such as photographs, cultivation records, witness statements, or any form of physical or documentary proof which he did not provide. That in any event, the Appellant had testified that at the time of purchase in the year 2009, the suit property had been vacant and she was not cross-examined on the same. That subsequently, the inescapable conclusion was that the 1<sup>st</sup> Respondent had failed to discharge the burden of proof placed upon him as provided for under Sections 107 to 109 of the Evidence Act, and

the settled jurisprudence. The trial court's declaration of ownership in his favour had thus been made in error and was legally untenable.

23. On the issue of the allegation of fraud, she placed reliance on the Court of Appeal's decision in the case of **Joseph Kipkoech Chemor v Kimaiyo Chemor & another [2019] KECA 525 (KLR)** to submit that the legal principles governing allegations of fraud were stringent and designed to protect against casual and damaging accusations. That whereas the 1<sup>st</sup> Respondent had pleaded and particularized fraud to the effect that she (Appellant) had made documents without authority, altered documents and procured registration without due process, she (Appellant) had provided a lawful explanation that the title had been issued in the year 2009 and that she had never applied to have the register rectified. On the other hand, the 1<sup>st</sup> Respondent had not adduced any evidence whatsoever to contradict the said explanation or to implicate the Appellant in having created any clerical error.
24. That whereas the 1<sup>st</sup> Respondent was required to produce the forged documents he claimed to have been used to procure the title, the evidence on record shows that no such documents had been presented before the court. Reliance was placed in the **Lucia Wambui Kariuki's** case (supra) on the instruments that the 1<sup>st</sup> Respondent needed to produce before the court. It was her submission that the 1<sup>st</sup> Respondent's evidence had fallen short of the aforementioned standard as no evidence of fabrication or alteration by the Appellant had been produced. She reiterated that the register that the 1<sup>st</sup> Respondent had produced, on a claim that it had been altered, had been discredited by the Chairman of Naivasha Unity as illegitimate and unrelated to the Appellant.
25. Her submission was that the 1<sup>st</sup> Respondent led no evidence, forensic, testimonial or documentary to show that the Appellant had participated in altering any genuine company land records. Furthermore, he did not present any evidence of the bypassing of due process; the evidence on record demonstrates the contrary. That indeed, the Appellant's Sale Agreement had been drafted and signed at the company offices in the presence of the Secretary. That in any case, the Appellant is the prima

facie proprietor of the suit property pursuant to the provisions of Section 26(1) of the Land Registration Act since she holds a Certificate of Title to the Suit Property that had been issued on 23<sup>rd</sup> March 2009. That, nevertheless, the Appellant did not rest on the said presumption but had further proved the legality of her acquisition, wherein her evidence had formed a coherent, documented and lawful chain.

26. The Appellant reiterated the evidence that she had adduced in court and the Sale Agreement dated 19<sup>th</sup> March 2009 that she had produced and then placed reliance on the decided case of **Gabriel Kamau Kiarie t/a Gbka Investment v Gitau Kingere Njau & 3 Others [2020] KEELC 273** to submit that she had underscored the necessity for a purchaser of land from a member of a land-buying company to prove the root of title by tracing the chain of ownership starting from the original allottee. She also reiterated the evidence that had adduced in court by the Chairman of Naivasha Unity Farmers, one Peter Mwangi to confirm that there had been compelling evidence corroborating her title. That such evidence had remained entirely unchallenged on cross-examination. That such evidence was not only supportive but dispositive since it had come from the chairman of the very entity that owned the land and oversaw its allocation.

27. That accordingly, the trial court had revealed its most egregious error, which was a complete inversion of the burden of proof by holding that the Appellant had a duty to link the vendor to the land, which was a profound misdirection in law. That the burden to prove that the registered proprietor's title was invalid rested at all times with the 1<sup>st</sup> Respondent. That, unfortunately, the court had erroneously required her to disprove the 1<sup>st</sup> Respondent's failed case by tracing her vendor's history, a task that had been made impossible by the 1<sup>st</sup> Respondent's reliance on a spurious register. She submitted that the said misplaced burden had fundamentally vitiated the trial court's reasoning. Reliance was placed in the decoded cases of **Laisu & 2 others v Sharif & another [2024] KEHC 15512 (KLR)** and **Joseph Kipkoech Chemor's case (supra)** to submit that, pursuant to the evidence that had been adduced, the

Learned Magistrate had made no finding of fraud against the Appellant in the judgment.

28. She submitted that her counterclaim for the removal of caution was a logical and necessary relief flowing from her status as the registered proprietor, since pursuant to the provisions of Section 71(1) of the Land Registration Act, a caution could only be properly lodged by a person claiming a registrable interest. The court is empowered under the said provisions to order the removal of a caution. That the 1<sup>st</sup> Respondent having failed to prove any interest in Plot No. 383, there was no legal basis for the caution to subsist. She thus submitted that the dismissal of her counterclaim was inconsistent with the court's own finding, and as such, the caution constituted a clog on her title and should be vacated.
29. That, interestingly, the trial court, having found that fraud was unproven, it had introduced a new, unpleaded basis for impeaching the Appellant's title to the effect that the same had been acquired irregularly, despite the Appellant having defended against a pleaded case of fraud and not a vague allegation of irregularity. She placed reliance on the decided case of **Accounting Officer Kenya Ports Authority (exparte) v Public Procurement and Administrative Review Board and 3 Others (Interested Parties) eKLR (sic)** where the court had cited the case of **Habig Nig Bank Limited vs Nashtex International Big Ltd, Nigeria Court of Appeal of Kaduna Division CA/K/13/04**, to submit that a court could not *sua sponte* create a new cause of action for a party who had failed to prove their pleaded case. That indeed, the said action had deprived the Appellant of a fair opportunity to defend herself against the specific allegation upon which the case had been decided.
30. In conclusion, she submitted that the Record of Appeal and the grounds set in the Memorandum of Appeal reveal that the impugned judgment was erroneous both in law and fact, being contrary to the overwhelming weight of the evidence that had been adduced by the Appellant. On the other hand, the 1<sup>st</sup> Respondent had neither established his claim of ownership of the suit property nor adduced sufficient evidence to substantiate the serious allegations of fraud.

31. She thus prayed that the Honourable Court:
- i. Allows the instant Appeal in its entirety.
  - ii. Sets aside the judgement and decree of the trial court in Naivasha MCELC No. E046 of 2022.
  - iii. Allows the Appellant's Counterclaim, thereby affirming her as the absolute and indefeasible proprietor of Land Parcel No. Naivasha/Maraigushu Block 18/383 and thereafter orders the removal of any caution or encumbrance lodged against the title and for costs of both the Appeal and of the case before the lower court.

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

32. The 1<sup>st</sup> Respondent, in opposition of the appeal, summarized the factual background of the matter before framing two (2) issues for determination as follows:
- i. Whether the 1<sup>st</sup> Respondent demonstrated that the suit property belongs to the deceased, Wanjiru Nderi Muchiri alias Ruth Nderi; and
  - ii. Whether the anomalies in the Appellant's alleged purchase and registration rendered her title a nullity.
33. On the first issue for determination, the 1<sup>st</sup> Respondent submitted that his position rested on a consistent and well-documented chain of ownership. The evidence presented in the trial Court had shown that the deceased was a registered member of Naivasha Unity Farmers Company Limited, as depicted in the official membership register. That such membership was the foundation of land allocation. Without a status as a shareholder or contributor, one could neither ballot for nor obtain land. It had further been evidenced that the deceased had paid all requisite fees, had received the corresponding share documentation and taken possession of the land, where she had cultivated the same over time. The said conduct was consistent with the pattern of ownership in land-buying companies, where occupation and development typically follow allocation.

34. That in any case, the said facts had not been rebutted. That indeed, the Appellant did not dispute that the deceased's name appeared in the register, nor did she suggest that the deceased had ever relinquished her interest, nor did she provide the evidence of a transfer originating from the deceased or her estate. That the register, the receipts, and the historical occupation all pointed to a legitimate allocation in favour of the deceased. It was thus his submission that there was enough proof to the required standard demonstrating that there was a clear factual foundation supporting ownership by the Deceased. Further, the Deceased's interest was rooted in established procedures, including membership, ballot allocation, payment of dues, and occupation, which chain was never lawfully broken.
35. On the second issue for determination as to whether the anomalies in the Appellant's alleged purchase and registration had rendered her title a nullity, reliance was placed on the Supreme Court decision in **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, where the Court had relied on the definition of a bona fide purchaser advanced in the **Black's Law Dictionary 9<sup>th</sup> Edition** and further affirmed the holding in the Court of Appeal in **Uganda in Katende v Haridar & Company Ltd [2008] 2 EA 173** on the ingredients that must be proved for one to successfully rely on the bona fide doctrine.
36. From the aforementioned case, it was clear that if a registered proprietor's title is challenged, presenting the instrument of title as proof of ownership is insufficient since it is the instrument that is in question. Subsequently, the registered proprietor must go beyond the instrument, proving the legality of title and demonstrating that the acquisition was lawful, formal, and free from any encumbrance, including interests not noted in the register. He submitted that the claimant bears the burden of proving that proper due diligence, as required by law, has been exercised. Once the 1<sup>st</sup> Respondent demonstrated a valid root of title, the burden decisively shifted to the Appellant, as established in the **Dina Management** case (Supra), where the Supreme Court held that when the

root of a proprietor's title is challenged, the proprietor must go beyond merely producing the title deed and must demonstrate the legality of the acquisition process. Nonetheless, the Appellant wholly failed to discharge this burden.

37. That whereas the Appellant's claim initially stated that she had purchased the land from Wambui Otieno, under cross-examination, she admitted that neither she nor Wambui Otieno had appeared in the official members' register. Furthermore, no evidence was presented to show that Wambui Otieno was ever a shareholder of Naivasha Unity Farmers Company Limited, nor that she held a ballot or paid any dues entitling her to the land, since no receipts, share certificates, or ballot documents were produced. Additionally, the alleged sale agreement was not submitted to the Court, leaving the Court without any objective basis to assess its authenticity.

38. Additionally, there were startling inconsistencies in the title register. That, indeed, the first entry is dated 2004, indicating the issuance of a title deed long before the Appellant's alleged purchase in March 2009, yet the Appellant simultaneously claimed to be the first registered owner. That it was thus baffling as to whose name the initial title had been issued in 2004, and how the same had passed to the Appellant in 2009. That transfer instrument had been produced, no consent to transfer had been demonstrated, and no explanation had been offered on how a non-member, such as Wambui Otieno, could have been registered in the first place. It was his submission that the aforementioned constellation of irregularities did not merely raise suspicion; it satisfied the very hallmarks of fraud as defined in Black's Law Dictionary (12<sup>th</sup> Edition), that is, a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.

39. He argued that the justice system could never endorse the passing of titles obtained through deception. Therefore, a purchaser dealing with someone who is not the registered proprietor cannot rely on statutory protection under the indefeasibility of title. The Appellant had shown no evidence of due diligence, as her title stands alone and is unsupported by

any valid primary documentation, making it incapable of withstanding scrutiny.

40. In conclusion, he submitted that the Plaintiff had established a clear, credible, and legally protected chain of ownership from Naivasha Unity Farmers Company Limited to the deceased. That the Appellant, on the other hand, had hinged her claim on a sequence devoid of legality, consistency, or documentary proof. That her title was riddled with anomalies and unsupported by due process, stood impeached under statute and precedent, thus fit only for revocation. He thus urged the Honourable Court to grant the orders that had been sought in the Plaint, including a declaration of ownership, rectification of the register, revocation of the 1<sup>st</sup> Defendant's title, and costs of the suit.

**Analyses of the evidence.**

41. According to the proceedings in the trial court, Paul Kimani Maina, the Plaintiff/1<sup>st</sup> Respondent herein, instituted a suit against Everlyn Rachael Wambui Njogu, the District Land Registrar-Naivasha, and the Honourable Attorney General as the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants respectively, in Naivasha CMCELC No. E046 of 2022 via a Plaint dated 1<sup>st</sup> July 2022, seeking the following orders;

- i. A declaration that the suit property Naivasha/Maraigushu Block 18/383 belongs to Wanjiru Nderi Muchiri alia Ruth Wanjiru Nderi.
- ii. An order mandating the 2<sup>nd</sup> Defendant to amend the register and re-issue a title deed in the name of Wanjiru Nderi Muchiri alias Ruth Wanjiru Nderi.
- iii. General damages.
- iv. Costs of the suit.
- v. Any other relief that the court may deem fit and just to grant.
- vi. Interest on (c) and (d) above.

42. Following the filing of the suit, the 1<sup>st</sup> Defendant submitted her Statement of Defence and Counterclaim dated 19<sup>th</sup> July 2023, claiming that the Plaintiff and his deceased mother had no interest, legal or

equitable, in land parcel No. Naivasha/Maraigushu Block 18/383. She stated that she purchased the suit property from Wambui Otieno through an agreement for sale of land dated 19<sup>th</sup> March 2009, for a consideration of Kshs. 400,000/-, which she had fully paid. She also stated that she submitted the transfer forms upon execution by both parties, which had been processed and registered accordingly.

43. The Plaintiff had never owned the suit property herein, as the receipts in the list of documents referred to other land parcels, not the suit property. Her registration as the proprietor of the suit property was procedural, in order, and involved a first registration; therefore, the Plaintiff's allegation of fraud was ill-advised. Additionally, via a Gazette Notice No. 2688 dated 10<sup>th</sup> April 2003, Unity Farmers Company Limited advertised that all members who had not paid for their respective shares by 4<sup>th</sup> June 2003 would forfeit their shares, which would then be sold, and the proceeds utilised to set off the company's debts.
44. She argued that the suit therein was misconceived, lacked merit, and was an abuse of the court process, and should be dismissed with costs. She therefore requested that the Plaintiff's suit be dismissed with costs.
45. Her counter-claim against the Plaintiff was for orders that:
  - i. The caution registered against title No. Naivasha/Maraigushu Block 18/383 by the Defendant be de-registered.
  - ii. Costs of the suit be awarded to the Defendant.
46. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants neither appeared nor filed their Statements of Defence.
47. Subsequently, the case proceeded to a hearing where the Plaintiff testified as PW1, adopted his witness statement as his evidence in chief, and produced the following documents in evidence.
  - i. Gazette Notice for 4<sup>th</sup> December 2015.
  - ii. Letter of Administration in Succession Cause No. 159 of 2015, dated 10th February 2016.
  - iii. Certificate of Confirmation of Grant in Succession Cause No. 159 of 2017 dated 5<sup>th</sup> November 2019.

- iv. Certificate of Official Search for Naivasha/Maraigushu Block 18/383 dated 16<sup>th</sup> February 2017.
  - v. Copy of register extract relating to Naivasha Farmers Company Ltd.
  - vi. Receipts.
  - vii. Ballot Card.
48. In cross-examination, he testified that at the time of succession, he was unaware of the title to the 1<sup>st</sup> Defendant. He confirmed that he had submitted the ballot paper, register, proof of ownership in the succession case, and the receipts. He also confirmed that the ballot papers pertained to Plot Nos. 150 and 323 and that he had handed over all receipts to the advocate. He stated that although the land had been subdivided and surveyed, only the parcel numbers had changed, not the land's position. He did not know why the 1<sup>st</sup> Defendant's plot was No. 383; the Chairman of the Company could explain that, although he plotted to take the land.
49. He was unaware of the Notice to repossess land and the reallocation of the same to a third party, although he observed the cancellation when entering Mary Wanjiku's name; however, he did not know who had cancelled the entry. He confirmed that the cancellation had not been countersigned and noted that Wanjiru Nderi was listed on page 48. His mother was listed as No. 1372B according to the registered title No. 18/383. The land numbers had changed following subdivision, with the register now showing that land No. 383 is owned by the Defendant. Nevertheless, he insisted that the suit land belonged to his mother, as he possessed the ballot papers and receipts.
50. During re-examination, he confirmed that he possessed ballot No. 383 and 150 and stated that, at the time the ballots were issued, the title deeds had not yet been available. He clarified that ballot 383 had not been purchased. However, he mentioned that the deceased had bought ballot number 150, which was sold to her by Joseph Mwangi Ngugi. He affirmed that the deceased's ballot was 383, which she received directly from the company. Additionally, he confirmed that the register he presented was authentic, having obtained it from the land office.

51. That whereas he noted that the register did not indicate the issuance of a title for land parcel No. Naivasha/Maraigushu Block 18/383, they had paid all the sums due for the two parcels of land as evidenced by the receipts produced in court. He confirmed that he had filed a defence to the counterclaim dated 1<sup>st</sup> August 2023 and that he was in occupation of the suit property. Regarding the succession case, he had presented receipts and ballot papers before the High Court, but he was not aware if the title had been issued to the 1<sup>st</sup> Defendant.

The Plaintiff had thus closed his case.

52. The Defence case began with the testimony of Evelyn Rachael Wambui Njogu, the 1<sup>st</sup> Defendant, who, while giving evidence as DW1, adopted her witness statement dated 20<sup>th</sup> July 2023 as her primary evidence and submitted the following documents in evidence.

- i. Members Register.
- ii. Title Deed for Naivasha/Maraigushu Block 18/383 (Unity).
- iii. Certificate of Official Search for the land.
- iv. Agreement for sale of Naivasha/Maraigushu Block 18/383 (Unity).
- v. Kenya Gazette Notice No. 2688.

53. Subsequently, she testified that in 2009, she received a call concerning the land titled Block 18/383 Naivasha/Maraigushu, which was being sold by Wambui Otieno for Kshs. 400,000/= . She met the seller and the agent, where they drafted and signed a Sale Agreement at the offices of Unity Farm. She was then handed all the documents, in the presence of the Secretary to Naivasha Unity.

54. She confirmed the authenticity of the ownership documents by checking the records of Naivasha Unity. The Vendor provided her with the ID number and the Pin Certificate, and she made the payment in cash. The suit property was to be registered in her name; accordingly, amendments were required. Afterwards, she obtained the title deed for the suit property and conducted a search confirming that she was the registered owner.

55. She had visited the suit property before purchasing it and placed beacons since it was neither fenced nor cultivated. She then took possession, fenced the land, and has remained in possession to date. The company was aware of the dispute. As the owner of the suit property, she filed an application seeking to revoke the grant. She requested that the caution over the suit land be lifted, as she is the rightful owner, and that the suit be dismissed.
56. In cross-examination, she confirmed that she bought the suit property from Wambui Otieno. She admitted that she was not a shareholder, that is, an original member or allottee, and that the said Wambui was the original member. She visited Unity offices where due diligence had been conducted, but she could not recall whether she had seen a Share Certificate. Nevertheless, they were aware that payments were required, and receipts were provided. Upon further examination, she stated that Wambui did not provide her with receipts. She confirmed that she had submitted the Sale Agreement dated 19<sup>th</sup> March 2009.
57. She also confirmed that there was no stamp duty receipt and that the Title Deed was issued on 23<sup>rd</sup> March 2009, whereas the Agreement was dated 19<sup>th</sup> March 2009. She confirmed that the entry on page 2, part B, indicated the date 19<sup>th</sup> August 2004 and bore her name. She explained that entry 2 was dated 23<sup>rd</sup> March 2009, the date when the title was issued. She further stated that, although the title had been issued in 2009, she had never applied to rectify the register. She affirmed that, in the absence of a registered agreement with the Lands Office, there was no proof. She maintained that she had purchased the suit land and that the office search reflected the same date as that in the Sale Agreement. However, she admitted that no documents had been presented to prove that the suit land was owned by Wambui Otieno, confirming that she was the registered owner of the property.
58. She explained that she had obtained the register from the police station as well as from the Unity offices, during the criminal proceedings and that the same indicated it had come from investigations. She stated that the secretary had agreed to amend the register upon payment of the

purchase price. She confirmed that No. 383 was her entry and that the name recorded against it was Rachael Wambui Njogu, with no record of Wambui Otieno. She admitted that she did not possess a register bearing the name Wambui Otieno. She also acknowledged that the name Wambui Otieno was not recorded in the Plaintiff's register. She accepted that there were no receipts to Unity in her name. In 2022, upon discovering that another person was farming on her land, she lodged a complaint with the DCI and the sub-chief. She, however, had no proof to produce in court.

59. That her fence had been tampered with. She admitted that she did not reside on the land and that there was no proof before the court that she was farming on the suit property. She confirmed that the Plaintiff had been farming on her land parcel No. 18/383.

60. In re-examination, she maintained that she was not an original member but that she had purchased the suit property from Wambui Otieno, although she did not know Wambui's husband. She stated that there was no title in force at the time of purchase and that there could not have been transfer forms on land without a title. She claimed that she had an agreement along with the documents at the office and that the records had been amended to reflect her name.

61. The LCB consent was not required. Although entry 1 in the title indicated 19th August 2004, the title deed in her favour was issued on 23rd March 2009, the DCI noted that the entry made at the land office was a mistake. Therefore, she should not be blamed, nor did this falsify her title. Since only two pages of the register were before the court, it could not be definitively confirmed that her name was missing from the register.

62. She lodged a report with the sub-chief and the DCI and submitted her statement. She insisted that she was the sole farmer on the suit property and that she had planted maize and beans, but the maize was not yet ready for harvest. She confirmed that she received the register from the Unity Official and submitted it to the DCI, and that the DCI, upon request, obtained the register from the Lands Office. She stated that she had compared the two registers.

63. DW2, Peter Mwangi Makui, testified that he was the chairman of Naivasha Unity Farmers, that he knew the Plaintiff, who was one of the members at Naivasha Unity, and a son of Ruth Mwangi Nderi. He stated that the dispute between the Plaintiff and the 1<sup>st</sup> Defendant had been duly noted.
64. He adopted his witness statement as his evidence in chief and then testified that Naivasha Unity began operation on 16th May 2000, which was the day of its incorporation as a limited leasing company. However, before it came into existence, in 1977, there was a Member of Parliament called Mr. Kairu, who was the then Assistant Minister for Labour, and who had taken money from members of the public, promising to buy them land. No land, however, was bought.
65. That the said Kairu had entered into an agreement with Abadere Estates to purchase land at a price of Kshs. 750,000/=, which he was to raise. 75,000/=, being 10% of the purchase price. However, the remaining balance was never raised, and Mr. Kairu was not re-elected. He had instructed members of the public to take possession of the land, which had not yet been subdivided. The vendor demanded that he pay the remaining balance or be evicted. Mr. Kairu had 4,000 members, and the land's area was 335.8 hectares.
66. Subsequently, the Government intervened to facilitate an agreement and arrange payment, during which they met the landowner and agreed to purchase the land for Kshs. 4,120,000/=. The initial agreement with Mr. Kairu was made void due to non-payment. They negotiated a new purchase price and completed the land purchase. In 2001, he received funds and paid for the land with two cheques; afterwards, they obtained the title. Later, a surveyor subdivided the land, and the first group of people to acquire land and titles was advertised in the newspaper.
67. He confirmed that the suit property belonged to the 1<sup>st</sup> Defendant herein and that he had been the chairman of Unity Farmers Company from the year 1986, when he was elected, to date. He stated that the issue between the Plaintiff and the 1<sup>st</sup> Defendant was brought to him, wherein, although the Plaintiff claimed he had two shares, the record

showed he had paid for only one share and was allocated share No.191, which he was currently occupying, although the Survey of Kenya had duplicated the said number.

68. That although he could not recall the plot number of the community borehole's location, its title number was different from that of the Plaintiff's land, and although they had visited the surveyor to rectify the duplication of No. 191, the Plaintiff was not the owner of land parcel No. 18/383.

69. When he was shown the register produced herein, he confirmed that it belonged to the late Kairu and not to Unity Farmers Company Limited. He stated that he had reviewed the Plaintiff's receipts and found that they were issued before the company was incorporated, and thus were not the company's receipts. He verified that the receipt dated 1st November 2000 for Kshs. 4,800/= was issued by the company and was not for the suit land. He added that each member was required to pay a certain amount; the Plaintiff's plot was No. 191, whereas the suit property belonged to the 1st Defendant.

70. They had collected a sum of Kshs. 250/= from the Plaintiff's mother for plot No. 191, and those former members were supposed to have searched for the late Kairu to obtain a refund. They obtained the new numbers after subdividing the land, and plot No. 191 was available for the Plaintiff, who could settle there, as had been communicated to him. They had also approached the land registrar, but the matter remained unresolved since the Plaintiff had filed a suit in court.

71. In cross-examination, he confirmed that he was elected as the chairman of Naivasha Unity, the suit land was previously owned by Abedere Company. He stated that MP Thuo was supposed to buy land from Abadere but failed to do so. Subsequently, the people united and elected him as chairman in 1986. Although the company was not registered until 2000, it had already been carrying out its functions even before his election and/or the company's registration. He first admitted that he had not presented an agreement, but confirmed that the deceased was a member who had paid for one share, and that the Plaintiff

was a member through his mother, the deceased herein; this was the reason why the register did not include the Plaintiff's name. He testified that, because he had not presented the full register, there was no evidence in court to support his position.

72. He acknowledged that he had seen the Plaintiff's receipt, which indicated the amount of money paid to the late MP who had taken the money to Unity Company Limited, the entity that issued the receipts. He confirmed that the receipts for the years 2000 and 2004 were valid and bore the name Unity Farmers. He stated that they had ledger 183 "b", which covered the receipts for the years 2000 and 2004, and ledger 153 "b". Although the numbers differed, he argued that this did not mean that the same person owned two parcels of land. He maintained that the land issued to the Plaintiff was Plot No. 191.

73. In re-examination, he confirmed that they had different ledgers and receipts for the land, although the documents did not show the same.

The Defence had thus closed her case.

### **Determination.**

74. I have considered the record of the 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."*

75. It is worth noting that despite the Honorable Attorney General having entered an appearance and filed their statement of defence on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, they neither complied with the pre-trial directives nor participated in the proceedings before the trial court.
76. The summary of the Plaintiff's/Respondent's case in the trial court, both in evidence and vide his adopted statement, was that he had filed suit as the administrator of the estate of his late mother, Wanjiru Nderi Muchiri alias Ruth Wanjiru Nderi, who died in 2002. That his mother was an original member of Naivasha Unity Farmers Company and had paid all fees, received receipts, and was issued a ballot for Plot No. 383.
77. He maintained that his mother had exclusive possession and farmed the land until her death, and he continues to occupy and farm the property. He argued that the 1<sup>st</sup> Defendant's title, issued in 2004/2009, was fraudulent because it was registered after his mother's death without any legal transfer from her estate. He produced Letters of Administration and Grant Confirmation, Ballot cards and receipts from the company, and a register extract showing his mother's name (No. 1372B) associated with the land. He sought the revocation of the 1<sup>st</sup> Defendant's title deed and an order for the title to be reissued in the name of the deceased to allow for the proper distribution of the estate. On cross-examination, he acknowledged that some ballot papers referred to Plot Nos. 150 and 323, explaining that the parcel numbers had changed during subdivision, but the physical location remained the same.
78. The 1<sup>st</sup> Defendants' defence and counterclaim, on the other hand, had been that she was the lawful registered proprietor of the suit property, having purchased the land in March 2009 from Wambui Otieno for Kshs. 400,000/- in a transaction that was executed at the Unity Farmers Company offices.

79. She presented a Title Deed issued on 23<sup>rd</sup> March 2009 in evidence, arguing that her registration was procedural and followed a "first registration" process after the company subdivided the land.
80. She cited a 2003 Gazette Notice stating that members of Unity Farmers Company who had failed to pay for shares by June 2003 were to forfeit them, implying the Plaintiff's mother might have lost her rights. She acknowledged that she had no receipts from the original member, Wambui Otieno and no proof that Otieno ever owned the land. She also admitted that although the Title Deed showed an entry date of 19<sup>th</sup> August 2004, her Sale Agreement was dated 19<sup>th</sup> March 2009. She admitted that the Plaintiff was currently farming the land, despite her claim that it had been fenced. She requested the dismissal of the Plaintiff's suit. In her counterclaim, she sought the de-registration of the caution registered by the Plaintiff on the suit land.
81. Her witness, Peter Mwangi Makui, the Chairman of Naivasha Unity Farmers Company, who testified as DW 2, provided context on the land's history. He explained the transition from a failed land scheme by a former MP, Mr Kairu, to the incorporation of Naivasha Unity Farmers in 2000, which formally acquired the land afresh and subdivided it. He also confirmed that the Plaintiff's mother was a member of Naivasha Unity Farmers and was entitled to only one share in Plot No. 191, and not in the suit property, Plot No. 383.
82. He asserted that Plot No. 383 belonged to the 1<sup>st</sup> Defendant and admitted that the company operated and issued documents even before its formal registration in 2000. He acknowledged that the Plaintiff's mother had paid for shares but claimed that the records for Plot 383 were amended at the office level to incorporate the 1<sup>st</sup> Defendant's name. He conceded that he had not presented the full register to the court to prove his claims.
83. Having summarised 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: -

- i. Whether the Plaintiffs proved fraud against the 1<sup>st</sup> Defendant for which title in respect of Naivasha/Maraigushu Block 18/383 should be declared as belonging to Wanjiru Nderi Muchiri alias Ruth Wanjiru Nderi and the register be amended to that effect and a title deed issued in her name.
- ii. Whether the caution on the suit land should be de-registered as claimed in the counter-claim.
- iii. Who should pay the costs of the Appeal and the trial court suit?

84. On the first issue for determination, **In R.G Patel vs Lalji Makanji 1957**

**E.A 314**, the Court of Appeal had held as follows:

*“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.*

85. Section 26 (1) of the Land Registration Act of 2012 also provides as follows:-

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.*

86. It was held in the case of **Republic vs Senior Registrar of Titles Ex parte Brookside Court Limited (2012) eKLR**, that statutorily, the

sanctity of title to land is assured and protected under Sections 24, 25 and 26 of the Land Registration Act. The court is also aware of the attribute of Section 26(1) (a) and (b) of the Land Registration Act, which provides that a Title to land shall not be absolute and indefeasible because it can be impeached where it is shown to have been obtained through fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme.

87. In the Plaint filed before the trial court, the 1<sup>st</sup> Respondent/Plaintiff had challenged Appellant/1<sup>st</sup> Defendant's title to the effect that it had been obtained fraudulently and therefore sought that it be cancelled and revert back to his mother, the original allottee Wanjiru Nderi Muchiri alias Ruth Wanjiru Nderi.

88. The Appellant put up a defence and counterclaim that she had legally purchased the suit property from one Wambui Otieno vide a sale agreement of 19<sup>th</sup> March 2009 at a purchase price of Ksh 400,000/= which she had paid in full. That, subsequently, she was issued with a title on the 19<sup>th</sup> August 2004.

89. Now, since the 1<sup>st</sup> Respondent had challenged the Title held by the Appellant, evidence according to Section 26 of the Land Registration Act had to be led to prove that the Appellant's title to parcel No. Naivasha/Maraigushu Block 18/383 (Naivasha uniti) was acquired unlawfully.

90. 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.

91. The Court of Appeal in the case of **Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another [2020] eKLR** held as follows:

*"The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been*

*obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant's title to the suit land was indefeasible... In the persuasive case of **Fahiye & 2 others - v- Omar & 4 others [2014] 2KLR, 224**, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In **Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (OS))**, it was correctly pointed out that: "The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of **Champaklal Ramji Shah & 3 Anors -v- AG & Anor, HCCC No. 145 of 1997**, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required."*

92. The Supreme Court's decision in **Dina Management Limited vs County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** was as follows:

*"To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.*

*...Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title*

*did not comply with the law, then such a title cannot be held as indefeasible...*

*Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein.*

*Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired...."*

93. The 1<sup>st</sup> Respondent's evidence was that his mother, a member of Naivasha Unity Farmers, was allocated the suit parcel of land because of her shares in the company. She died in 2002, while the Appellant's title was processed in 2004. His argument was that, since his mother was the rightful allottee, any transfer of her interest could only happen through a succession process, which did not occur.
94. He also pointed out that whilst the Appellant's Sale Agreement was dated 19<sup>th</sup> March 2009, her title deed at entry No. 1 was dated 19<sup>th</sup> August 2004, which was not legally possible to be registered as the owner of a parcel of land five years before execution of a sale agreement.
95. That although the Appellant's claim had been that she had purchased the suit land from Wambui Otieno, yet she had neither produced any receipts nor documents proving that the said Wambui Otieno ever owned the land. Furthermore, the Company Chairman (DW2) admitted that the records were amended at the office to reflect the Appellant's name, which suggested a circumvention of official land transfer procedures.
96. That Appellant had also admitted that there had been no stamp duty receipt and no Land Control Board (LCB) consent, wherein, under the Land Control Act, a sale of agricultural land without LCB consent was void for all purposes.
97. It is trite that transferring land from a land-buying company to its members is a formal legal process that moves ownership from a corporate entity to individual shareholders. The membership register, therefore, serves as the "master record" of the land-buying company and is the primary legal evidence of who is entitled to the company's land. It verifies genuine membership and confirms a shareholder's status. Additionally, it

tracks which specific plot has been allocated to each member to prevent the company from accidentally or fraudulently transferring the same land to multiple parties. During mass titling or subdivision, the register ensures titles are issued in the correct order of priority or payment, maintaining an orderly system for the Land Registry. If two individuals claim the same plot, the court or the Land Registrar will rely on the historical entries in the company's membership register to establish the rightful claimant.

98. It is also not in dispute that, to prove membership and entitlement to land held by a land-buying company, one must possess documents that establish both the ownership stake in the entity and the specific parcel of land assigned, including Ballot Cards or Share Certificates proving one as a shareholder entitled to a portion of the company's land, original receipts for the purchase price, registration fees, and titling costs

99. Indeed, in the case of **Wandaka & 2 others v Mwangi [2025] KECA 83 (KLR)** the court of Appeal held as follows:

*“Land-buying companies assumed prominence soon after Kenya gained independence. Groups of people would come together and buy huge chunks of land from the departing settlers. Thereafter, the land would be subdivided and the members would then ballot for the plots arising from that subdivision. For all practical purposes, the receipt for payment of the parcel of land and the ballot paper authenticated ownership pending commencement of the formal registration process for the issuance of title deeds.”*

100. The 1<sup>st</sup> Respondent herein having not only pleaded and particularized fraud, but there was also sufficient evidence tendered to prove that Wambui Otieno was not a member of the Naivasha Unity Farmers Company, which was a land-buying company. Indeed, her name did not appear in the members' register; no evidence was adduced to show that she had a share certificate or ballot or that she had ever paid for any dues entitling her to the land. The sudden magical appearance of an alleged sale agreement dated 19<sup>th</sup> March 2009 and a title deed issued on 19<sup>th</sup>

August 2004, before the sale agreement smelled nothing short of a rat, leaving the Court without any objective basis to assess the authenticity of the said title.

101. Just as the trial court found, I find that the Appellants' title was acquired illegally, un-procedurally, or through a corrupt scheme and as such is doomed to be impeached.

102. On the other hand, the 1<sup>st</sup> Respondent produced a Copy of the register extract relating to Naivasha Farmers Company Ltd, together with the company's receipts and ballot card showing that his mother was a member and although the Appellant's evidence had been that the 1<sup>st</sup> Respondent's mother had forfeited her shares via Gazette Notice No. 2688 of 2003, nothing in the said Notice spoke of the such forfeiture and no evidence was adduced to the effect that she had been a member who had defaulted or that her shares had been sold.

103. The evidence of the Chairman of Naivasha Unity Farmers Company, who testified as DW2, was to the effect that after this initial agreement between the Company and Aberdere Company (who were the original land owners) became null and void for non-payment, a new agreement had been entered into between the Government and Aberdere Company, and therefore the suit land belonged to the Appellant. No tangible evidence was placed before the court to support this assertion; in a case like this one, which hinged on fraud, such evidence would have been required. I find that in the circumstances, the Chairman's evidence remained just an assertion and of no value to the Appellant's case.

104. Lastly, it is not in contention that the 1<sup>st</sup> Respondent's mother, being a member of the Company, and upon payment of the requisite fee, had taken possession and had been in occupation of the suit land until her demise. The Appellant admitted during the cross-examination that she neither resided on the land nor did she have proof that she was farming on the suit property

105. Section 30(g) of the Registered Land Act, Cap 300 (now repealed) provided that the rights of a person in possession or actual occupation were overriding interests as follows:

*“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register (a) the rights of a person or actual occupation of land to which he is entitled in right only by such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”*

106. The Supreme Court in the case of **Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)**, while deciding on whether a constructive trust can be imported into a land sale agreement to defeat a registered title, held as follows:

*“...While sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust.*

*We have found that the doctrines of equity are part of our laws by virtue of section 3 of the Judicature Act. And while the Constitution entitles every person to the right to property at article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while sections 25 and 26 of the Land Registration Act provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, section 28 provides that the registration is*

*subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.*

*We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.(my emphasis)*

107. From the above finding, it is trite that the law supports the importation of a constructive trust where required by equity and good conscience to prevent unjust enrichment, and this imposition acts as an overriding interest that defeats the claim of the registered proprietor under the framework of the Land Registration Act and the Constitution.
108. The 1<sup>st</sup> Respondent's mother, having occupied the land upon payments of the fee to the company, her right as the person in actual occupation was a key overriding interest which meant that she as a purchaser in possession, even without a formal title, had a protected interest that a subsequent buyer or chargee would take notice of. She was thus protected against fraudulent vendors attempting to sell the same land multiple times. The 1<sup>st</sup> Respondent's mother, having been the one who was farming the land, her interest prevailed over the Appellant's title, more so now that the same had been obtained fraudulently.
109. Having re-evaluated the evidence on both the facts and the law, as is expected of me as the first appellate Court, I find no fault with the holding of the learned Principal Magistrate at the trial. The Appeal herein thus lacks merit, and the same is dismissed with costs.

**Dated and delivered via Microsoft Teams at Naivasha this 19<sup>th</sup> day of February  
2026.**

A handwritten signature in black ink, appearing to read 'M.C. Oundo', enclosed within a circular scribble.

**M.C. OUNDO**

**ENVIRONMENT & LAND COURT - JUDGE**