

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ELC APPEAL NO.E009 OF 2024

TIMAU FARMERS COMPANY LIMITED.....1ST

APPELLANT

JOSHUA MARETE.....2ND

APPELLANT

SUSAN MWONTUNTI M'ITURIA.....3RD

APPELLANT

MARGARET NKATHA MWITHIMBU.....4TH

APPELLANT

VERSUS

GEORGE

MWANGI

KAGUAI.....RESPONDENT

***(Being an appeal from the judgement of Hon Kithinji
(CM) delivered at Nanyuki Law Courts on 29/5/2024 in
CMELC 131 of 2018)***

JUDGMENT

The Case before the Magistrates Court

1. The suit before the magistrates court was instituted by the respondent herein vide a plaint dated 2.6.2018. His

claim was that he was a member of the 1st defendant whose aim was to purchase land for settlement of its members. That at various times, he made monetary subscriptions to the 1st defendant so as to be allotted land in parcel Daiga/Umande Block 10, of which he was eventually allotted plot 533. He also purchased plot 534 from one Julius Gichuhi Wagachatha.

2. However, the 1st defendant under the stewardship of the 2nd defendant, representing himself as the chairman caused plot 534 to be registered in favour of the 2nd defendant who later sold the said suit parcels to the 3rd and 4th defendants. The respondent therefore contends that the registration of the suit parcel in the names of the 2nd, 3rd and 4th defendants was fraudulently done and therefore sought the following orders;

“a) Rectification of the register of Land Parcel Number Daiga/Umande Block 10/534 (Timau) cancelling the registrations of the 2nd, 3rd and 4th defendants as proprietor and in place

thereof registering the name of the plaintiff as proprietor thereof.

b) Costs of this suit with interest at court rates.

c) Any further or other relief”.

3. The 1st and 2nd appellants opposed the suit as 1st and 2nd defendants vide their statement of defence dated 6.12.2022. They contend that pursuant to a gazette notice no 78 of 2.1.2015 all allottees were notified of various subdivisions of parcel Daiga/Umande Block 1030 where they were required to submit to the chairman the original membership receipt, Identity card, survey fees receipt and proof of fully paid shares within 30 days, otherwise the company would issue clearance certificates to new eligible members.

4. That it so happened that some shareholders in order to avoid paying the dues owed to the 1st defendant, they colluded with some unauthorized persons who stole the company's seal and issued fake clearance certificates to people who were yet to clear their dues. This incident

culminated in the 1st defendant preferring a suit before the High Court at Meru H.C.C.C No. 63 of 2010.

5. These defendants further contend that the respondent ought to have been a fully paid up shareholder to enable him to qualify for land allocation and subsequent registration, of which the respondent never responded to the notice. However, the 2nd defendant did comply with the gazette notice requirements and was issued with a clearance certificate by the 1st defendant. The two defendants had sought for the dismissal of respondent's case.

6. The 3rd appellant opposed the suit vide her statement of defence dated 23.8.2021. She avers that herself and the 4th appellant bought the suit land from the 2nd defendant, after conducting a search and confirming that the latter was the registered owner of the said land. She denies the allegations of fraud levelled against them.

7. At the trial, the respondent testified as Pw1. He adopted his witness statement dated 2.6.2018 as his evidence. He also produced the documents in his list dated

2.6.2018 as his evidence. His evidence mirrors his pleading.

- 8.** On cross-examination, the respondent stated that he had one share, then he bought another from a neighbour Julius Gichuki who is deceased, and the parcel is no 534. He had confirmed that Julius had paid all dues to the company. However, the register shows that the said parcel 534 belonged to the 1st appellant, it then went to 2nd appellant and then to 3rd appellant. In re-examination, the respondent had stated that the register indicates that parcel 534 was under his name.
- 9.** Pw2 was one Joshua M'Ringera who introduced himself as the chairman of the 1st appellant, and that he is the one who keeps the membership register. He avers that he was the chairman in 1990, while the 2nd appellant was chairman in 2016. He avers that the respondent was the owner of plot 534 as per the register which was prepared in 1989 and which he produced as an exhibit. He avers that the 2nd appellant obtained the title to the suit plot in

year 2016 illegally. He avers that the register at the lands office is the same as the one he had produced.

10. On cross-examination, Pw2 stated that his term as chairman in the company ended in 1989, but thereafter, he became the secretary. He is aware of the Kenya gazette which required one to get a clearance certificate, but he terms the same as illegal. He avers that a clearance certificate was being signed by 3 people, adding that 2nd defendant is not the current chairman of the company.

11. Dw1 was the 2nd defendant, Joshua Marete. He adopted his witness statement dated 15.7.2023 as his evidence. He produced the certificate of incorporation of the company as his evidence. He avers that he is the chairman of the 1st appellant.

12. On cross-examination, he stated that he has been the chairman of the company from its formation. That he bought the suit land from the company at sh. 100 000 and he was given a receipt and a clearance certificate which was not signed by the chairman. He doesn't know

the persons who signed the said clearance certificate He averred that he did not have the company's register, that the one they took to the Registrar is in court, an extract copy without stamp, but the one at lands is a printed copy. He avers that he is the one who prepared plaintiff exhibit 2 which shows that parcel 534 was for the respondent, but contends that the latter failed to pay the survey fees, that is why the plot was taken, but he was given a clearance certificate no. 534.

13. He further avers that he sold the suit land to the 3rd and 4th defendants and if there is a problem, then the registrar is to blame. That when one failed to pay for the land, the same reverted back to the company. He avers that the 3rd and 4th defendants got their title on 11.3.2019.

14. Dw2 was one Jadiel Kiruki Marete who introduced himself as the secretary of the company. He adopted his witness statement dated 15.7.2023 as his evidence. He avers that there was a resolution from the company where members were required to pay Ksh 600 as survey

fees, and no one was to get a clearance certificate without such payment, and that there were notices to all members directing them to clear outstanding dues in order to get titles, of which Julius never cleared, hence his share was re-allocated to other members despite the gazette notice. He avers that the 2nd appellant paid sh.100 000 and his name was put in the register.

15. On cross-examination, Dw2 stated that there was no agreement between the 2nd appellant and the 1st appellant, but he is the one who signed the transfer in favour of the 2nd appellant. He avers that the gazette notice is the one which gave the 2nd appellant the plot. That the register is prepared by the chairman, secretary and the treasurer and in this case, they prepared another register after some members failed to pay. He avers that the original register was at the lands office and it shows that the respondent was the owner of the suit plot 534. He further avers that he is the one who signed the clearance certificate for the 2nd appellant, that

the same has no date, but the one for the respondent has a date.

16. He contends that the company had two registers, of which the original one had the name of the respondent.

17. Dw3 is Susan Mwontuti M'Ituru, the 3rd appellant. She adopted her witness statement dated 23.8.2024 as her evidence. She also produced the documents in her list dated 20.8.2021 as exhibits 1-7. Her evidence mirrors her pleadings, that she bought the land from the 2nd appellant. On cross-examination, she stated that she could not remember the land board issue.

18. In a judgment delivered on 29.5.2024, the trial court found that the respondent had proved his case and issued the following orders;

“a) That an order is hereby issued for rectification of the register of Land Parcel Number Daiga/Umande Block 10/534 (Timau) cancelling the registrations of the 2nd, 3rd and 4th defendants as proprietor

and in place thereof registering the name of the plaintiff as proprietor thereof.

b) That the plaintiff shall have the costs of this suit with interest at court rates”.

The Appeal

19. Aggrieved by the aforesaid decision, the appellants filed their Memorandum of Appeal raising 9 grounds summarized as follows; That the trial magistrate erred in law and fact in failing to find that, the respondent had not proved his case including fraud while the appellants had proved their case and that the title of the 3rd and 4th appellants was indefeasible, as they were bonafide purchasers for value.

20. The appeal was heard by way of written submissions. The submissions of the appellants are dated 14.10.2025, whose they have rehashed the evidence tendered, adding that the respondent had confirmed in evidence that the suit plot was 1st transferred to the 2nd appellant, then to the 3rd and 4th appellants and that no fraud was

attributed to the appellants and none was proved to the required standard. Thus the trial court misunderstood the law governing fraudulent acquisition of property.

21. To this end, the appellants cited the provisions of Section 26 (1) of the Land Registration Act, as well as the case of **Mbengi & Another v Muribia (Environment and Land Case No.E012 of 2021) (2022) KEELC 3289 (KLR).**

22. The submissions of the respondent are dated 6.11.2025. He avers that pursuant to the provisions of Section 26 (1) of the Land Registration Act, a court has powers to cancel a title which was obtained through fraud, misrepresentation, illegally, un-procedurally or through corrupt schemes, while section 80 of the said Act empowers the court to give cancellation orders and rectification of a title. And in the case at hand, the titles of the appellants were obtained fraudulently, as the respondent already had a clearance certificate from the 1st appellant in respect of the suit property.

DETERMINATION

23. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of **Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.**

24. The uncontroverted issues are that the claimants here in derive their interests from the 1st appellant which appears to have been a land buying company. The respondent contends that he bought parcel 534 from one Julius Gichuki, the appellants on the other hand contends that members were required to pay all outstanding dues to the company, failure to which a parcel would revert back to the company to be given to another member, and this is what happened for parcel 534, paving way for

the 2nd appellant to get the land from the company, then he sold the same to the 3rd and 4th appellants.

25. The issues falling for determination are whether the trial court erred in failing to find that the respondent had not proved his case and that the titles of the 2nd-4th appellants were indefeasible.

26. On proof, the provisions of Section 107 of the evidence Act stipulate that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See **Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR** and **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR**. In the case at hand, the respondent pleaded that the acquisition of title by the 2nd defendant, then by 3rd and 4th defendants was fraudulent.

27. The standard of proof in respect to a charge of fraud, was enunciated in the case of **R.G. Patel v. Lalji Makanji(1957) EA 314** where the former Court of Appeal for Eastern Africa stated thus:

“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.”

28. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA.** (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

29. A perusal of the respondent's documents reveal that he had an agreement dated 13.8.2005 indicating that he had bought plot 534 from Julius Gichuki which land was a share within the 1st appellant and he was given a clearance certificate on the same date. His clearance certificate was signed by chairman, secretary and treasurer. He has receipts indicating that he paid for the plots 534 and 533 for survey fees and clearance fee. He has availed the land owners register from the 1st appellant indicating that he owns plot 534. This far, the respondent had proved that he indeed owned plot 534 within the 1st appellants land. However, it is also apparent that by then, the parcel was not yet registered in the name of Gichuki.

30. In **Beatrice Wambui Maina v Embakasi Ranching Company Ltd & another [2022] eKLR**, the court while dealing with disputes emanating from a land buying company cited the case of **Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR** where it was stated that;

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....”

31. This far, it is apparent that the respondent had availed sufficient proof tracing his claim of the suit parcel no 534 within the company.

32. The appellants have advanced a claim that the respondent’s plot reverted back to the company after failing to pay dues to the company. The 1st and 2nd appellants contend that there was a resolution passed by members for payment of sh.600 which would pave way for issuance of the clearance certificate. However, no evidence of this resolution was tabled before the trial

court. Thus the gazette notice has no foundation. What more, the respondent already had a clearance certificate dating way back on 13.8.2005.

33. Still on the gazette notice, it stated that *“notice is given that after the expiry of thirty (30) days from the date hereof, the company will issue clearance certificate to eligible applicants, unless the allottees presents to the chairman board of directors, the original identity card, survey fees receipt and proof of fully paid shares”*. There ought to have been a follow up information of the parcels listed, sieving the compliant ones with the none compliant ones amongst the parcels listed in the notice so as to commence the reversion of interest process to the 1st appellant. There is however no such information. The 2nd appellant simply acquired an undated clearance certificate for the suit plot which is signed by Chairman Joshua, but he says he did not sign the same! There is also no evidence as to when the 1st and 2nd appellants came up with the second register of members, yet they indicate that the one at lands office is the printed one

availed by the respondent. Put it differently, when was the final register compiled, and which one was used to generate the titles. Again the 1st and 2nd appellants have not shed light on that issue. This far, it becomes clear that there is no evidence as to how the interest in the suit land transitioned unto the 1st appellant, then to the 2nd appellant and finally to the 3rd and 4th appellants. It follows that the titles of the 2nd- 4th appellants were acquired through fraudulent transactions.

34. On the indefeasibility of the title of the 3rd and 4th appellants, I make reference to the provisions of **Article 40 (1)** of the **Constitution** which enshrine the right to own property. However, there is a rider at **Article 40 (6)** where it is provided that;

“The rights under this Article do not extend to any property that has been unlawfully acquired”

35. Thus, the post 2010 Constitution has brought about new jurisprudence where the central question is no

longer “**who is the registered owner**” but “**How did you become the registered owner**”.

36. In Sehmi & another v Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment) Neutral citation: [2025] KESC 21 (KLR), the Supreme Court of Kenya cited its earlier decision of **Dina Management Limited vs. County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)**, where the court stated that;

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly bona fide purchaser.”

37. What the new jurisprudence portends is that the sanctity of a title is contingent upon the legality of the process that created it. Consequently, a registered

proprietor cannot merely dangle the instrument of title as proof of ownership when the root is challenged; See **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009.**

38. From the foregoing analysis, it becomes clear that the title of the 3rd and 4th appellants are nothing but paper documents as no good title was transmitted to them by the 2nd appellant.

39. In the end, I find no basis to disturb the findings of the trial court. Thus this appeal is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 25TH DAY OF MARCH 2026 THROUGH MICROSOFT TEAMS.

**LUCY N. MBUGUA
JUDGE**

In the presence of:

Bwongwonga and Mr. Kaumbi for appellants

Nancy Mwangi – Court Assistant

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