

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ELC APPEAL CASE NO. E011 OF 2025

**VIRGINIA WAIRIMU KAMAU (Suing as
Administrator of the estate of
HELLEN NDUTA KAMAU (Deceased).....
APPELLANT**

VERSUS

**AGRICULTURAL & INDUSTRIAL
HOLDINGS LTD.....1ST
RESPONDENT**

**JOSEPH KIMANI GITAU.....2ND
RESPONDENT**

**WAMBUI NJENGA.....3RD
RESPONDENT**

**BONIFACE WAWERU NDERITU.....4TH
RESPONDENT**

LAND REGISTRAR, NAIVASHA.....5TH

RESPONDENT *(An Appeal arising from the Judgment of Honourable
Magistrate W.O Rading delivered on 17th July 2025 in Naivasha MCELC No.
E005 of 2020 in the Chief Magistrate’s Court: Virginia Wairimu Kamau-
versus-Agricultural & Industrial Holdings Ltd & 4 Others)*

JUDGEMENT.

1. Before me for determination on appeal is a matter which was heard and determined by the Hon. W O Rading, Senior Resident Magistrate, in MCELC No. E005 of 2020, wherein, upon considering the evidence of both parties, the Learned Magistrate, vide his Judgement delivered on 17th July, 2025, dismissed the Plaintiff’s suit.

2. The Plaintiff/Appellant, being dissatisfied with the said Judgement, has now filed the present Appeal based on the following grounds in her Memorandum of Appeal:

- i. The learned trial magistrate erred in dismissing the Plaintiff's suit on the basis of the equitable doctrine of constructive trust and proprietary estoppel, while there was no evidence before the court to warrant such a finding.
- ii. The learned trial magistrate erred in law and in fact in holding that the issue of the doctrine of proprietary estoppel applied to the instant suit despite making a finding that transactions relating to the suit land did not involve the legal owner.
- iii. The learned trial magistrate erred in law and in fact in holding that the beneficiaries of the deceased made a representation to 3rd Defendant giving rise to proprietary estoppel on the basis of an Affidavit sworn by the 4th Defendant, who was not the legal owner of the suit property and had no legal capacity to deal with the suit property, thereby making erroneous decision.
- iv. The learned trial magistrate erred in law and fact in misapprehending the law, specifically the doctrine of constructive trust and proprietary estoppel, which were neither pleaded nor raised by the Defendants during trial or submissions.
- v. The learned trial magistrate erred and misdirected himself in the interpretation of the principle of bona fide purchaser for value without notice, thereby arriving at an erroneous decision resulting in a violation of the Plaintiff's right to property under Article 40 of the Constitution of Kenya, 2010.

- vi. The learned trial magistrate erred in law and in fact in holding that the 2nd Defendant was a bona fide purchaser for value without notice, having acquired the land from the 3rd Defendant, who had a good title, a finding that was unsupported by any evidence, thereby arriving at a wrong conclusion.
- vii. The learned trial magistrate erred in law and in fact in holding that the 2nd Defendant's title, being first registered, lowered the level of due diligence into the root of the title on the part of the 2nd Defendant, a finding that has no basis in law and flies in the face of all that is right and just.
- viii. The learned trial magistrate erred in law and in fact in holding that the Plaintiff did not prove allegations of fraud against the Defendant in total disregard of the overwhelming evidence on record, which was not controverted by the Defendants, thereby arriving at an erroneous decision.
- ix. The learned trial magistrate relied on his own surmises, conjectures, presupposition and theories on the transfer of suit land to the 3rd Defendant in absence of pleadings of the 3rd and 4th Defendants thereby validating the subsequent transactions relating to the suit land notwithstanding that the transactions were null and void ab initio.
- x. The learned trial magistrate erred in law and in fact in failing to find that the Plaintiff proved her case against the Defendants on a balance of probabilities, thereby making a conclusion of facts that were not supported by evidence in court.

- x. The learned trial magistrate misdirected himself I law by selectively interpreting the law making a finding that the Defendants had no legal capacity to deal with the suit land being property of a deceased person under provisions of Section 45(1) of the Law of Succession Act while at the same time making a finding that the transfer of the suit land to 3rd Defendant and subsequent transfer to 2nd Defendant were valid thus making contradictory findings regarding the validity of the transactions between the 2nd and 3rd Defendants.
- xii. The learned trial magistrate erred in law and in fact by failing to correctly evaluate the pleadings, evidence and Appellant's submissions and as a result reached an irrational and erroneous decision leading to miscarriage of justice.
- xiii. The learned trial magistrate erred in law and in fact in considering extraneous matters and failing to properly evaluate the law and material placed before him and thereby arriving at a wrong conclusion.
- xiv. In all circumstances of the case, the findings of the trial magistrate are insupportable in law and not on the basis of the pleadings and the materials placed before him and in any case, the judgement is in contravention of the provisions of Order 21 Rule 1 of the Civil Procedure Rules, 2010.

3. The Appellant thus prayed for the following orders:

- i. That the instant appeal be allowed.
- ii. That the judgement delivered by the learned trial magistrate on 17th July, 2025, be set aside or vacated.
- iii. The Honourable Court be pleased to make its own finding based on the evidence available.

- iv. In the alternative, the judgement and the decree appealed from be set aside and the Honourable Court be pleased to order the suit to be remitted to another magistrate for retrial.
 - v. The Respondent be ordered to pay costs of this appeal, and in case of (d) above, the Respondent be ordered to pay costs of the abortive suit.
4. By their dated 19th February 2026 and 3rd March 2026, respectively, both the 1st and 2nd Respondents agreed with the finding of the Lower Court's judgement and prayed for the same to be affirmed in its entirety. The 3rd to 5th Respondents did not participate in the Appeal.
 5. Directions were issued for the disposal of the Appeal by way of written submissions, wherein the parties complied and filed their respective submissions, which I shall summarise as herein under.

Appellant's Submissions.

6. The Appellant's Submissions dated 18th February, 2026, in support of her appeal are cantered on the argument that the trial court's judgment was a product of misapplied legal doctrines, a disregard for statutory law, and findings of fact unsupported by the evidence. Her submissions are organized into four primary limbs:
 - i. Whether the learned trial Magistrate erred in law and in fact in holding that there was no proof to support the particulars of fraud and illegalities.
 - ii. Whether the learned trial Magistrate erred in law and in fact in declaring the 2nd Respondent a bona fide purchaser for value without notice.
 - iii. Whether the learned trial Magistrate erred in law and in fact in applying the doctrine of constructive trust and proprietary estoppel.

- iv. Whether the learned trial Magistrate erred in law and in fact in failing to correctly evaluate evidence and the law and by considering extraneous matters thus arriving at an erroneous decision.
 - v. Who pays the costs of the Appeal?
7. The Appellant contends that the trial Magistrate failed to recognize clear evidence of fraud in that the transfer of the deceased's shares and the suit land was conducted outside the Law of Succession Act and the Companies Act. She asserts that because no Grant of Letters of Administration had been obtained at the time of the transfer, the transactions were null and void ab initio under Section 45(1) of the Law of Succession Act.
 8. She pointed out that the 2nd Respondent paid title processing fees to the 1st Respondent before entering into a sale agreement for the shares, suggesting the process was fraudulent and done in reverse.
 9. She also submitted that the transfer was based on an affidavit by the 4th Respondent, who was neither a beneficiary nor a legal representative of the estate. Furthermore, the deceased's original share certificate remained in her possession, and the 1st Respondent issued a replacement certificate in the deceased's name in 2017—long after the purported transfer.
 10. She relied on the provisions of Section 45(1) of the Law of Succession Act (Cap 160) as the primary statutory basis prohibiting the intermeddling or dealing with the estate of a deceased person without legal authority. She further relied on the following decisions to buttress her argument.
 - i. **Zacharia Wambugu Gachimu & Another v John Ndungu Maina** (sic) to demonstrate that a title originating from a fraudulent or illegal process—specifically in contravention of succession laws—is

impeachable under Section 26(1) of the Land Registration Act.

- ii. **Muriu v Muriu & 3 Others (Environment & Land Case 36 of 2019) [2023] KEELC 18910 (KLR) (14 July 2023) (Judgment) (Persuasive)**, to support the position that transactions entered into with persons who had not been appointed administrators were void, as the assets had not legally vested in them.
 - iii. **Re Estate of Barasa Kanenje Manya (Deceased) Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) (30 July) Ruling** that reinforced the strict requirement for legal capacity when dealing with the property of the deceased.
 - iv. **Joyce Wanjiru Kimani & Another v Njenga Kinyanjui [2019] KEHC 3054 (KLR)**: to illustrate the court's intolerance for the fraudulent deprivation of an estate's assets.
11. On the second issue for determination on the status of the 2nd Respondent as a bona fide purchaser, the Appellant disputed the finding that the 2nd Respondent was an innocent purchaser for value without notice. She argued that the Magistrate erred in law by holding that a first registration lessens the duty of due diligence. Citing the case in **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)**, she asserted that the court ought to first establish the root of the title, which in this case was fraudulent. She maintained that the 2nd Respondent had the opportunity to inspect the shareholder register, which would have revealed the illegality, but failed to do so.
12. She also relied on the decision in **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] KECA 816 (KLR)** to argue that a purchaser who failed to conduct a proper search or

ignores red flags, like paying fees before an agreement is signed, cannot claim to be bona fide and finally on the decision in **Njonjo v Attorney General & 2 Others [2024] KECA 599 (KLR)** to submit that even if a purchaser claimed reliance on official documents, their conduct must reflect the character of a truly innocent party.

13. On the third issue for determination, the Appellant faulted the trial court for manufacturing equitable defences for the Respondents, stating that the doctrines of constructive trust and proprietary estoppel were neither pleaded by the Defendants nor supported by evidence.
14. She denied that the beneficiaries ever made representations to the 3rd Respondent or authorised the 4th Respondent to act on their behalf. She argues that equity cannot be used to sanitise an illegality or to override express provisions of the Law of Succession. She relied on the decision in **Mboroki v Nchebere [2025] KEELC 5022 (KLR)** to argue that for the doctrine of proprietary estoppel or constructive trust to apply, there must be a valid agreement with the legal owner, which was absent here.
15. That further the 2nd Respondent's remedy lay in a claim against the people who sold him a defective title, being the 3rd and 4th Respondents, rather than depriving the rightful estate, as was held in the case of **Njeru v Ndungu alias Angelica Wangui Njuguna & 3 Others [2025] KEELC 1059 (KLR)**
16. The Appellant then based her argument on the provisions of Section 26(1)(b) of the Land Registration Act, 2012, which was a statutory provision for the cancellation of a title obtained through fraud, misrepresentation, or illegal process and on the case in **Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another** (sic) on the principle that once a Plaintiff proves a title was obtained illegally, the court must cancel it, regardless of whether the current holder was a direct party to the fraud. Lastly, she relied on Article 40 of the Constitution of Kenya, 2010, to clarify that the constitutional protection of property rights extends only to property lawfully acquired.

17. She argued that the trial Magistrate had relied on surmises, conjectures, and theories rather than the record. There was no evidence of a land exchange for Parcel No. 2903 for the suit land, as suggested by the Magistrate.
18. Citing the provisions of Section 78 of the Civil Procedure Act, regarding the mandate of the 1st Appellate Court to re-examine, re-evaluate, and analyze the evidence on record to reach its own independent conclusion, the Appellant invited the court to draw an adverse inference against the 1st Respondent for failing to produce board minutes or share transfer instruments, suggesting such documents would have been unfavourable to their case. She urged the Appellate Court to exercise its duty to re-evaluate the evidence, set aside the lower court's judgment, and allow the appeal.
19. Lastly, she sought, pursuant to the provisions of Section 27 of the Civil Procedure Act, to be awarded costs as the winning party.

1st Respondents' Submissions.

20. The 1st Respondent's submissions dated 9th March 2026, focused on exonerating itself from allegations of fraud and defending the factual findings of the trial court. It contended that although the Appellant pleaded fraud in her Complaint, she failed to provide evidence linking the company to any fraudulent activity. They argue that during cross-examination, the Appellant allegedly exonerated them by acknowledging that the company acted based on the Affidavit sworn by the 4th Defendant and representations made by family members.
21. The company maintains it had no motive, benefit, or opportunity to engage in conspiracy. It did not benefit financially from the transaction; its role was purely administrative, based on information supplied by the parties involved. That it had acted reasonably and in good faith, following the directions of the deceased's family.

22. The 1st Respondent described Ground 4 of the Appeal as a misleading distortion of fact, clarifying that the 4th Respondent did not deal with the property in a legal vacuum; his affidavit merely restated a family agreement.
23. Crucially, they assert that the 4th Respondent was accompanied by the deceased's family members to the company's offices, and all parties were in agreement at that time. This version of events, they argue, was correctly captured and analyzed by the trial Magistrate.
24. The 1st Respondent concluded by maintaining that there was no wrongdoing on its part. Having acted in good faith, based on the representations made to it, the company urged the Court to find that the allegations of fraud remained unproven and that the Appeal against it should be dismissed.

2nd Respondents Submissions.

25. The 2nd Defendant, on the other hand, vide his submissions dated 12th March 2026, focused on his status as an innocent purchaser and the lack of evidence linking him to any fraudulent scheme. He maintained that he acted as any prudent purchaser would and argued that since a formal title had not yet been issued by the Ministry of Lands, he had conducted his due diligence through the 1st Respondent's office in the company of the deceased's family members.
26. That he had only proceeded with the purchase after the 1st Respondent confirmed that the parcel of land belonged to the 3rd Respondent and provided assurances regarding the transaction. He denied participation in any Fraud and referred to the definition of fraud in Black's Law Dictionary and the Registration of Titles Act (RTA),(sic) in support of his submission stating that the apart form there having been no evidence whatsoever that he participated in any fraud or mischief, the Appellant failed to discharge the burden of proof required to link him to the alleged illegalities. That he had relied on the documents presented to him, which

were confirmed as genuine by the issuing entity, the 1st Respondent herein.

27. He argued that he had met the legal threshold to be protected under Section 26 of the Land Registration Act and cited the case in **Mukiri v Attorney General & 4 Others [2013] eKLR** to outline the specific conditions for a *bona fide* purchaser, which included paying valuable consideration, acting in good faith, and having no notice of fraud. He submitted that since he fulfilled these conditions and received confirmation from the company managing the shares/land, there is no legal basis to warrant the revocation of his title. He urged the Court to find the Appeal meritless and dismiss it with costs.

Analyses of the evidence.

28. 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.”

29. The summary of the core dispute is that Virginia Wairimu Kamau the Appellant/Plaintiff herein, instituted a suit against Agricultural & Industrial Holdings Ltd, Joseph Kimani Gitau, Wambui Njenga, Boniface Waweru

Nderitu and the Land Registrar, Naivasha as the 1st to 5th Respondents/Defendants respectively in Naivasha MCELC No. E005 of 2020 vide a Plaint dated 12th October 2020 wherein she had sought the following orders;

- i. A declaration that the 2nd Respondent/Defendant's title to the suit land was obtained fraudulently and illegally and was therefore null and void.
- ii. An order against the 5th Respondent/Defendant to cancel the 2nd Respondent/Defendant's and the same to be issued in the name of Hellen Nduta Kamau (Deceased).
- iii. Permanent injunction restraining the Respondent/Defendants from interfering with the Plaintiff's quiet enjoyment of the suit land.
- iv. Costs of the suit and interest.
- v. Any other further relief the honourable court may deem fit or necessary.

30. Subsequent to the filing of the suit, the 1st Defendant/Respondent filed its Statement of Defence dated 5th November, 2021, denying all the allegations contained in the Plaint, putting the Plaintiff to strict proof, while praying that the Plaintiff's suit be dismissed with costs.

31. The 2nd Respondent/Defendant, on the other hand, vide his Statement of Defence dated 24th June, 2021, denied the allegations contained in the Plaint, putting the Appellant/Plaintiff to strict proof while arguing that the Plaintiff's suit was fatal, incompetent and ambiguous and did not sufficiently disclose the material particulars. That the same should be struck out.

32. He stated that he was the legal owner of the land parcel No. Gilgil/Gilgil Block 1/2914 (Kekopey), having purchased it for value and paid the purchase price in full as an innocent purchaser. He denied ever receiving or being served with a demand or notice of intention to sue, as alleged in paragraph 17 of the Plaint. He further contended that the instant suit was

premature and should be dismissed with costs for being scandalous, frivolous and vexatious.

33. Subsequently, the case had proceeded for hearing wherein PW1, the Appellant/Plaintiff herein, Virginia Wairimu Kamau, a retired caregiver residing in Switzerland, adopted her witness statement dated 22nd October 2022 as her evidence in chief and sought to rely on her list of documents filed on 12th June 2020.
34. She then proceeded to testify that she had been issued a Grant of Letters of Administration in Succession cause No. 420/2016. That her mother, whose her land measuring 0,089 hectares had been transferred fraudulently to the 2nd Defendant, was a member of GEMA. She prayed that the court nullify the title deed by the 2nd Defendant.
35. She then proceeded to produce in evidence the documents as per her List of Documents dated 12th October 2020 as follows:
 - i. Copy of the grant of Letters of Administration.
 - ii. Application for shares dated 18th November, 1977.
 - iii. Copy of receipt No. 19222 for Kshs. 650/=.
 - iv. Copy of share certificate dated 25th January, 2017.
 - v. Copy of ballot card.
 - vi. Copy of the extract of title.
 - vii. Copy of affidavit dated 26th July 2010.
 - viii. Undated internal memo
36. During cross-examination by the Counsel for the 1st Respondent/Defendant, the witness stated that Wambui Njenga was her mother's sister and explained that, after her parents' divorce in 1968, she had grown up with her mother's family. She identified Ben Amos Njau as her son and noted that he had been involved in a legal matter at the Kikuyu Law Courts. In that case, she testified that the 3rd Defendant, her

aunt, had stood surety for him by using her own title deed, clarifying that her son did not possess the title deed for the Gilgil land.

37. Regarding the 4th Respondent/Defendant, Boniface, the witness stated that he was her uncle but denied that he had entered into any agreement for the transfer of the land, adding that there had been no family meeting to discuss the matter. Although she acknowledged that an affidavit sworn by Boniface had been presented to the 1st Respondent/Defendant, she remarked that it would have been difficult for the company to verify its authenticity. She further alleged that the company had misled the parties, though she conceded that the 1st Respondent/Defendant had never interfered with the actual possession of the land.
38. Under cross-examination by counsel for the 2nd Respondent/Defendant, the witness testified that she had last been in up-country Kenya and had left on 29th May 2024. She stated that she resided in Gilgil town and described the suit land as being in Kekopey. She noted that the land had no specific landmarks and was used primarily for grazing, as no one lived on the property. She informed the court that all her siblings were deceased.
39. The witness further explained that her mother's land lacked a title at the relevant time and that her mother had been a shareholder in GEMA. Although she had seen the sale agreement and was aware that the 2nd Respondent/Defendant had purchased the property, she noted that her mother's name had been removed from the register. She admitted, however, that she had not reported the matter to the police.
40. On re-examination, the witness observed that the land was currently changing hands. She maintained that it would not have been difficult for the company to contact her and reiterated that the property remained undeveloped.

The Appellant/Plaintiff had thus closed her case.

41. The 1st Respondent/Defendant's case proceeded with the testimony of DW1 Onesmus Maina, an Accountant and property manager in "PUOT" registry of the 1st Respondent/Defendant who proceeded to adopt his witness statement filed on 23rd September 2022 as his evidence in chief, as well as his filed list of documents in evidence, which was an Affidavit sworn by Boniface Waweru Nderitu on 24th July 2010.
42. On cross-examination by the counsel for the Appellant/Plaintiff, he confirmed that the subject land belonged to Hellen Nduta, Wambui Njenga, Bonface Njenga and other siblings. That the said beneficiaries had gone to the board and consented to the transfer of the land. That they had relied on the Affidavit and effected the transfer.
43. During cross-examination by counsel for the 2nd Respondent/Defendant, he confirmed that the family members were living on the suit land and that the 2nd Respondent/Defendant had not committed any fraud, as the suit land had been legally transferred to him and the title had been attached.
44. On re-examination, he reiterated that Boniface Waweru Ndiritu, Mary Nyambura Kamau and John Ndiritu Kamau had all appeared before the board.

The 1st Respondent/Defendant had thus closed its case.

45. DW2, Joseph Kimani Gitau, the 2nd Respondent/Defendant, formally adopted his witness statement dated 11th March 2024, and his list of documents dated 2nd October 2018 as his exhibits as set out below:
 - i. Sale Agreement dated 24th August 2020.
 - ii. Title deed for land parcel No. Gilgil/Gilgil Block 1/2914 (Kekopey) issued on 30th March, 2011.
 - iii. Receipt for title fee issued by Agricultural & Industrial Holdings Ltd dated 18th August, 2010.
46. He then prayed for the court to dismiss the suit.

47. On cross-examination by counsel for the Appellant/Plaintiff, he stated that he had been informed of the land's availability by a broker and was taken to view the property by Wambui Njoroge. He testified that he visited the land-buying company to verify the authenticity of the documents and was given the go-ahead by Gema (the 1st Respondent) to proceed with the transfer. He maintained that he dealt exclusively with Wambui Njenga, whom he understood to be the owner, and denied having any information regarding Hellen or the transfer of shares following her death.
48. He explained that because no title existed at the time, the transfer was handled through the Gema office. He admitted that he had paid for the title on 18th August 2010, which was notably before the sale agreement was finalized. He further testified that he paid Ksh 400,000/= to Wambui Njenga and was unaware of how the funds were distributed or whether she held the land in trust for Hellen's family. He confirmed he was in possession of the original title deed and had been farming maize and beans on the property, noting that the lower portion of the land was rocky.
49. When cross-examined by Counsel for 1st Respondent/Defendant, he reaffirmed his ownership of the land, stating that he had fenced the property and held the title deed. While he had not produced an official search, he claimed to have conducted a personal search at the Gema office. He asserted that he had involved the concerned parties at the time of the transfer and disagreed with the Gema representative's previous testimony. He noted that the family appeared to agree that Wambui Njenga was the owner and stated that the property was vacant when he purchased it.
50. In re-examination, the witness stated that he had not been shown any forged documents during the acquisition of the title. He mentioned that there were affidavits regarding an exchange of plot numbers, where Wambui Njenga took Plot No. 236, and the others took Plot No. 235. He

reiterated that Gema was responsible for the transfer and maintained that the Plaintiff was not in possession of the land.

Following this testimony, the 2nd Respondent/Defendant closed their case.

Determination.

51. I have considered the record of appeal, the holding of the trial Magistrate, the written submissions of learned Counsel, the authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have reconsidered the decision appealed against and the evidence adduced in the trial court, and I have assessed them and find the issues arising therein for determination as follows:

- i. Whether the 2nd Respondent's title to the suit land was obtained fraudulently and illegally and is therefore null and void.
- ii. Whether the 2nd Respondent's title should be cancelled and issued in the name of Hellen Nduta Kamau (deceased)
- iii. Whether a permanent injunction should issue restraining the Respondents from interfering with the Appellant's quiet enjoyment of the suit land.

52. On the first issue for determination, it is trite that the registration of a person and Certificate of title held by a person as a proprietor of a property was conclusive proof that such a person is the absolute and legal owner of the property pursuant to the provisions of Sections 24, 25 and 26 of the Land Registration Act, which stipulate that the owner of a registered title attains indefeasible rights, and interests on the land vested in them by the law.

53. The law is very clear on the position of a holder of a title deed in respect of land. Indeed, Section 26(1) of the Land Registration Act provides as follows:

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

a. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

54. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation, to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

55. The purpose of Section 26 (1)(b) is to remove protection from an innocent purchaser or title holder. It means that the title of an innocent person is impeachable as long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The aim of Section 26 (1)(b) is to protect the true title holders from losing their titles due to subsequent transactions.

56. Although in the case of **Republic v Senior Registrar of Titles Ex parte Brookside Court Limited (2012) eKLR**, it was held 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

57. Indeed, the Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, had held as follows:

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

58. In this case, the Appellant challenged the 2nd Respondent’s title to the suit parcels of land, No. Gilgil/Gilgil Block 1/2914 (Kekopey), measuring 0.809 hectares. The summary of her adopted statement was that she was a daughter and legal Administrator of the Estate of Hellen Nduta Kamau. That her mother was a genuine member (No. 1282) of Gema Holdings Ltd (now the 1st Respondent) since 1977 and was allocated Plot No. 236 (now Gilgil/Gilgil Block 1/2914), measuring approximately 0.809 Ha. That her mother was in actual possession of the land until her death in 2007, after which her children, who were her beneficiaries, have remained in occupation and use of the land to the present day.

59. Despite numerous visits to the 1st Respondent’s offices to secure a title in her mother's name for estate distribution, the company officials were unhelpful. In May 2019, she learned that individuals sent by the 2nd

Respondent had attempted to view the land with the intent to buy it, but had left upon finding her siblings in occupation.

60. After difficulties at the Naivasha Land Registry, a title extract obtained in December 2019 showed that the land had been registered in the 2nd Respondent's name on 30th March 2011. She was informed by company employees that the 3rd and 4th Respondents had facilitated the transfer of the deceased's shares to the 3rd Respondent, who then transferred them to the 2nd Respondent. That the Respondents had colluded to defraud the estate using false documents, specifically an unauthorised affidavit, and misrepresentations to the Land Registrar (5th Respondent).
61. The 1st Respondent's witness adopted statement as a Property Manager of the 1st Respondent was that the 1st Respondent was established to acquire land from departing settlers to settle its 30,000+ shareholders, wherein it had subdivided its 30,000-acre Gilgil land for its members. That both Hellen Nduta Kamau (the deceased) and Wambui Njenga (the 3rd Respondent) were shareholders, each holding 8 shares. During the balloting process, Hellen was allocated Plot No. 236, and Wambui was allocated Plot No. 235.
62. That, based on a family arrangement presented by Boniface Waweru Nderitu (the 4th Respondent) via an affidavit dated 24th July 2010, the family had allegedly agreed that, because Wambui Njenga had used her title deed (for Plot No. 235) as surety for the release of the deceased's grandson (Amos Njau), who faced criminal charges, Hellen's Plot (No. 236) be transferred to Wambui in exchange, so that once the court released the security for Plot No. 235, Wambui would transfer that plot back to the deceased's children. That the 1st Respondent had transferred Plot No. 236 (now Parcel No. 2914) to Wambui Njenga to hold in trust for Hellen's family until the criminal case concluded. That it acted in good faith, believing it was honouring the family's wishes as deponed in the affidavit, and was surprised that Wambui Njenga was now claiming absolute legal

ownership of the land instead of acknowledging the trust relationship. The 1st Respondent categorically denied any fraud or conspiracy on its part.

63. The 2nd Respondent, in his adopted statement, stated that he was a bona fide purchaser for value without notice and therefore the registered owner of Parcel No. Gilgil/Gilgil Block 1/2914, having purchased it from Wambui Njenga (the 3rd Respondent) on 24th August 2010 (noted as 2020 in the statement, but supported by 2010/2011 documentation). He further stated that the shares in Plot No. 236 were acquired through Agricultural and Industrial Holdings Ltd. The vendor provided all ownership documents and accompanied him to the company's offices to verify the transaction.
64. That after payment of fees and the processing of the transfer by the 1st Respondent and the vendor, a formal title deed was issued in his name on 30th March 2011, and he took immediate possession of the land. He denied that the Appellants had ever been in possession of the suit property. That he was not a party to any fraud, misrepresentation, or illegal scheme, having relied on the official records and processes of the 1st Respondent.
65. Fraud is a serious matter which must be proved to the required standard. In **Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment)**, the Supreme Court had observed as follows:
- "...However, it is trite law that fraud which, depending on the circumstances is recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities as required in other civil claims."*
66. I have no doubt in my mind that the Appellant herein had distinctly pleaded the facts on which fraud was alleged against the Respondents as

per paragraph 15 of her Complaint. The next step, however, was for her to prove those allegations to the required standard, that the 2nd Respondent's title to parcel No. Gilgil/Gilgil Block 1/2914 (Kikopey) was acquired illegally, as it is settled law that fraudulent conduct must be distinctly alleged and distinctly proved.

67. The 2nd Respondent relied on his title as proof of ownership; however, it is now well established that when the registered proprietor's root title(s) is challenged, merely presenting/dangling the instrument of title is insufficient. The registered proprietor must go further to demonstrate the legality of the title, proving that the acquisition was lawful, formal, and free from any encumbrances, as held by the Supreme Court in the case of **Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**

68. While this court recognises that specificity is generally preferred, there are exceptions where the nature of the fraud is clear, and the details are implied through surrounding circumstances or when fraudulent conduct is obvious.

69. Based on a careful review of the pleadings, witness statements, and the evidence adduced during the trial, the following facts appear to be undisputed by the parties.

70. It is not in contention that Hellen Nduta Kamau, the deceased, who died on 28th February 2007, was the legitimate shareholder of the 1st Respondents (Member No. 1282) and was allocated Plot No. 236 (Kekopey), which is the subject of this suit. The Deceased and 3rd Respondent were sisters, whereas the 4th Respondent was a brother-in-law/relative of the deceased.

71. The parties do not dispute that the deceased's grandson, Amos Njau, faced a criminal charge at the Kikuyu Law Courts and that a title deed was required to stand as surety for his release, where the 3rd Respondent's title was deposited as security.

72. It is not disputed that, vide an Affidavit sworn on 24th July 2010 by the 4th Respondent and presented to the 1st Respondent, authorising the 1st Respondent to transfer the deceased's interest/shares to the 3rd Respondent, Wambui Njenga, the 1st Respondent complied. Thereafter, the 3rd Respondent entered into a sale agreement with the 2nd Respondent for the sale of the deceased parcel of land, and a formal title for Gilgil/Gilgil Block 1/2914 was eventually issued in the name of the 2nd Respondent on 30th March 2011.
73. Lastly, it is not contested that the Appellant was granted the letters of Administration intestate of all the estate of the deceased Hellen Nduta Kamau on the 29th December 2016.
74. The question to ask ourselves is whether these actions/transactions were legally permissible under Kenyan Succession and Land laws?
75. Section 45 of the Law of Succession Act provides a prohibitory framework on dealings relating to the property that are held in the name of a deceased person as follows;

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled

after deducting any payments made in the due course of administration."

76. Further, Section 79 of the same Act contains a framework in relation to the person in whom property of the deceased vests as follows:

"The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."

77. Since the transactions occurred in 2010 and 2011, the provisions of the old Companies Act (Cap 486), which contained Section 78, were the law in force and applicable at the time. Since the land was tied to shares in the 1st Respondent company, the law governing share transmission was applicable and provided as follows:

"A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer."

78. The 1st Respondent (the company) facilitated the transfer by moving shares from the deceased to the 3rd Respondent. Based on the above captioned provision of the law, when a shareholder dies, shares could only be "transmitted" to a legal personal representative (the administrator) upon production of a Grant of Representation. By transferring shares solely on the basis of an affidavit by a non-administrator, the company, I find, bypassed the mandatory procedures set out in the Companies Act,

acted as its own administrator of its internal register, and facilitated illegality.

79. It therefore follows that, based on the statutory framework and judicial precedents as stated above, the actions taken by the Respondents—specifically the transfer of a deceased person’s property based on an alleged family agreement and/or an affidavit—faced significant legal hurdles. Under Section 45(1) of the Law of Succession Act (Cap 160), it is an offence for any person to “take possession of, dispose of, or otherwise intermeddle with” the free property of a deceased person without a Grant of Representation (Probate or Letters of Administration). The courts have consistently held that any transaction involving the estate of a deceased person carried out by someone without a Grant is null and void ab initio. Therefore, a family agreement or a sworn affidavit by a relative, such as the 4th Respondent, could not override the Law of Succession. Even if the family genuinely agreed to the transfer, they lacked the legal capacity to effect it until an administrator was formally appointed by the Court. In this case, the Appellant was formally appointed by the court as an administrator of the deceased’s estate on the 29th December 2016; it thus goes without saying that the transactions carried out on the deceased's property prior to 2016 were null and void.

80. The 2nd Respondent relies on his status as a registered owner of land parcel No. Gilgil/Gilgil Block 1/2914 (Kekopey) by virtue of being a bona fide purchaser for value without notice based on a sale agreement dated 24th August 2010 between him and the 3rd Respondent for 2 acres out of Gilgil/Gilgil Block 1/Share 236 (Kikopey). To succeed in this defence, the 2nd Respondent ought to have satisfied the three-fold test as was established by the Ugandan Court of Appeal in **Katende v Haridar & Company Limited [2008] 2 EA.173** that weighed in on the definition of an innocent purchaser as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to

purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) he holds a certificate of title;*
- (b) he purchased the property in good faith;*
- (c) he had no knowledge of the fraud;*
- (d) he purchased for valuable consideration;*
- (e) the vendors had apparent valid title;*
- (f) he purchased without notice of any fraud;*
- (g) he was not party to any fraud."*

81. From the evidence herein adduced, I find that the 2nd Respondent did not carry out proper due diligence to establish the lawful owner of the suit property before purchasing it. He admitted to having paid the title processing fees on 18th August 2010, prior to the execution of the Sale Agreement on 24th August 2010. In law, paying for the "fruit" before the "tree" is planted is often seen as a sign of a pre-arranged scheme rather than an arms-length transaction and therefore raises a red flag.

82. Had he investigated, he would have discovered that the land belonged to a deceased person (Hellen) and that the seller (Wambui) acquired it via an unauthorised affidavit. As the Supreme Court in **Dina Management Limited** (supra) held, a purchaser must investigate the history (root) of the title; the 2nd Respondent failed to verify if a Grant of Letters of Administration existed for the deceased original owner. The Appellant claims the family was in possession, a prudent purchaser was required to visit the land and ask occupants about their interest in the same, which the 2nd Respondent failed to do. Even if the 2nd Respondent was personally innocent, the principle of *Nemo dat quod non habet* (no one can give what they do not have) applies. Because the 3rd Respondent (Wambui) acquired the land through intermeddling, she never acquired a valid legal title and consequently, had no valid title to pass to the 2nd Respondent. In

Zacharia Wambugu Gachimu (supra), this court had held that where a title is born out of an illegal process (intermeddling), the "innocent purchaser" defence cannot save it. No evidence had been adduced that the 2nd Respondent acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase.

83. It is trite that an owner of a registered title acquires indefeasible rights and interests in the land vested in them by law. However, there are specific exceptions to the indefeasibility of title, under which ownership can be challenged and cancelled under Section 26(1)(b) of the Land Registration Act, if it was obtained through fraud, misrepresentation, or an illegal process.

84. In the landmark case by the Supreme Court in **Dina Management Case** (supra), the Supreme Court of Kenya ruled that a purchaser must investigate the root of the title 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. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.

Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by

the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser”

85. In its holding, the Supreme Court had established that once the first step in the chain of ownership (the transfer from the deceased’s estate) was found to be illegal, the subsequent title held by the 2nd Respondent would be deemed tainted and subject to cancellation, regardless of whether he paid for it.
86. The net effect of a combination of Section 45 of the Succession Act, Section 78 of the repealed Company Act and Section 26(1)(b) of the Land Registration Act, in the present case, I find, was both protection for the estate of the deceased and a restriction on the company. The effect of Section 78 of the repealed Company Act (now Section 500) is that the company had no jurisdiction to recognise any transfer of a deceased member's interest unless it was executed by a court-sanctioned administrator. By allowing a brother-in-law to move shares via an affidavit, the 1st Respondent acted *ultra vires* (beyond its legal power), rendering the subsequent sale to the 2nd Respondent voidable under Section 26(1)(b) of the Land Registration Act as an "unprocedural" and "illegal" acquisition.
87. The legal conclusion is therefore that the 2010 transfer was an illegal and unprocedural process. Since the root (the share transfer) was an act of intermeddling, the resulting title issued to the 2nd Respondent was legally poisoned and remained open to cancellation by the Court.
88. I accordingly allow the appeal, set aside the judgment of the learned Trial Magistrate and substitute therefor with the orders allowing the Appellant's suit vide her Complaint dated 12th October, 2020. I award the costs of the suit in the Magistrates’ Court and this appeal to the Appellant.

**Dated and delivered via Microsoft Teams at Naivasha, this 23rd day of April
2026.**



M.C. OUNDO

ENVIRONMENT & LAND COURT- JUDGE.