



Kimani (Suing as the Administrator of the Estate of the Late John Kimani Gaitho) v Muhia & 2 others (Environment and Land Appeal E009 of 2024) [2025] KEELC 5510 (KLR) (Environment and Land) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

MC OUNDO, J

JULY 24, 2025

(FORMERLY NAKURU ELC E040 OF 2024)

BETWEEN

**PETER KAROKI KIMANI APPELLANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN
KIMANI GAITHO**

AND

**JANE WANGUI MUHIA 1ST RESPONDENT
NAIVASHA LAND REGISTRAR 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

(Being an Appeal from the whole judgment delivered by Hon. Yusuf Barasa Mukhula Principal Magistrate, Naivasha on 8th August, 2024 in Naivasha MCELC E018 of 2021)

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Y.M Barasa, Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment delivered on 8th August, 2024, the learned Magistrate dismissed the Plaintiff's case with costs to the Defendants.
2. The Plaintiff/Appellant being dissatisfied with the said findings and Judgement, has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:



- i. That the learned Magistrate erred in law and in fact by finding that the 1st Respondent was the legal registered owner of land parcel number Kijabe/Kijabe Block1/1555, and he therefore rendered a wrong decision.
 - ii. That the learned Magistrate erred in law and in fact by failing to consider the Appellant's evidence and submissions and he therefore rendered a wrong decision.
 - iii. That the learned Magistrate erred in law and in fact by failing to consider that the evidence of the Respondents was not corroborated and he therefore rendered a wrong decision.
 - iv. That the learned magistrate erred in law and in fact by finding that the Appellant had not proved his case on a balance of probabilities and he therefore rendered a wrong decision.
 - v. That the learned magistrate erred in law and in fact by rendering a non-conclusive judgment by not rendering a judgment against the 2nd and 3rd Respondents and he therefore rendered a wrong decision.
 - vi. That the learned magistrate erred in law and in fact by failing to find that the 1st Respondent's evidence was full of inconsistencies and as such the same was not believable and as such he rendered a wrong decision.
 - vii. That the learned magistrate erred in law and in fact by considering extraneous matters in arriving at his decision and he therefore made a wrong decision.
3. The Appellant thus prayed for the following orders:
- i. The appeal be allowed.
 - ii. The judgment delivered on the 8th August, 2024 by Hon. Yusuf Barasa Mukhula (PM) be vacated and the Appellant prayers as sought in his lower court pleadings be allowed.
 - iii. Costs of the appeal and of the lower court.
4. The Appeal was disposed of by way of written submissions wherein the Appellant vide his submissions dated 19th May 2025 relied on the decision in the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) to submit that the first appellate court had jurisdiction to reverse or affirm the findings of the trial court. That a first appeal was a valuable right of the parties and unless restricted by law, the whole case was therein open for rehearing both on questions of fact and law. That the judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.
5. That while reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. That a first appellate court was the final court of fact ordinarily and therefore a litigant was entitled to a full, fair, and independent consideration of the evidence at the appellate stage and that anything less was unjust. That while considering the scope of the provisions of Section 78 of *Civil Procedure Act*, a court of first appeal could appreciate the entire evidence and come to a different conclusion.
6. He reiterated the orders that the Appellant had sought in Court before the trial court as well as the evidence that had been adduced by the Appellant and his two witnesses as well as the evidence that had been adduced by the Respondents in the trial court to frame his issues for determination as follows;



- i. How was Royson Wahome Gichachi registered as the owner of the subject land without first being a member of the Maai Mahiu Kijabe Longonot Ltd?
 - ii. How was transfer of the subject land effected from the Government of Kenya to Royson Wahome Gichachi and eventually to the 1st Respondent?
 - iii. Who witnessed the said sale?
 - iv. Who transferred the subject land to Royson Wahome Gichachi?
 - v. Why did the 1st Respondent fail to avail evidence of any of the said Royson Wahome Gichachi if he was deceased?
7. He then placed reliance on the provisions of Section 26 (1) of the [Land Registration Act](#) and the decided case *In re Estate of Raphael Ngugi (Deceased) [2022] eKLR* where the court had cited the Court of Appeal's decision in *Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No.239, of 2009*, to submit that the burden of proof of the 1st Respondent's legality of the title deed of the subject land which she held had shifted to her. That it was incumbent upon her to prove that the alleged vendor, Royson Wahome Gichache, who allegedly sold her the subject land was a member of Maai Mahiu Kijabe Longonot Ltd (the Company). That subsequently, whereas she ought to have proved that she had bought the suit land from the said alleged vendor, she had failed to do so.
 8. That apart from the green-card and the title deed of the suit land, the 1st Respondent never presented any other document in relation to the transfer of the suit land to her hence her allegations that those documents got burnt had been a mere fabrication. That in any case, the suit land was unregistered prior to the names of Royson Wahome Gichachi being introduced in the green-card.
 9. His further reliance was hinged on the decisions in the case of *Sara Leitich v Joshua Rutto & 2 others [2021] eKLR*, where the court had cited the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others [2015] eKLR* and *Mbuthi v Osman & another (Environment & Land Case E004 of 2022) [2024] KEELC 387 (KLR) (1 February 2024) (Judgment)* to submit that there had been no dispute that the subject land originated from the land buying company, however, there was no evidence that had been presented before the trial court indicating that the alleged vendor, Royson Wahome Gichachi had been a member of the said company. That in fact, the list of members of the said company relied on by the 2nd Respondent that had been used in issuing title documents to the members had indicated that the Appellant's late father, John Kimani Gaitho had been the allottee of the suit land herein.
 10. That from the foregoing, it was clear from the history in the documents that the Appellant had presented as exhibits, that his late father had been a member of the company. That further, the Appellant's third witness had confirmed that according to the list of their company's members, they did not have any member by the name Royson Wahome Gichachi but that one John Kimani Gaitho, the Appellant's father, had been the allottee of plot number 1555.
 11. That the 2nd Appellant's witness, Danson Gakio Kerioko had confirmed to the court that his land neighbored the subject land and that he knew the Appellant's parents as the owners of the suit land.
 12. He submitted that the fact that the Appellant may not have followed the correct procedure in having the suit land registered in the name of his late father, should not deny them proprietary rights over their father's estate. He thus sought that the appeal be allowed as prayed.



1st Respondent's Submissions

13. In response, the 1st Respondent vide her submissions dated 3rd April 2025 submitted the trial Magistrate's finding that she was the legal registered owner of land parcel No. Kijabe/Kijabe Block 1/1555 (suit land), had been sound in law and supported by the evidence on record.
14. That she had testified on oath had produced the title for the suit land that had indicated her as the legitimate owner of the same. That the Green Card had also reflected the same position wherein the matter had been investigated by the DCI who also had confirmed that she was the true owner of the suit land.
15. That DW2, the land Registrar in Naivasha lands office had also confirmed that she was the lawful owner of the suit land as per the records at the lands offices. That the evidence tendered had been that the first owner of the suit land was the Government of Kenya wherein the second registered owner was Royson Wahome before the same was transferred to Herself-Jane Wangui Muhia. That subsequently, it was clear that the suit land had never been in the name of the Appellant's deceased's father.
16. She placed reliance on the provisions of Section 26 of the Land Registration Act to submit the person named as the proprietor was the absolute and indefeasible owner subject to any encumbrances, easements, restrictions and conditions contained in the title. That it had therefore been the duty of the Appellant to show evidentially to the degree of balance of probability that the 1st Respondent had acquired the land fraudulently and illegally but he had failed to do so.
17. She hinged her reliance in the decided case of Elijah Makeri Nyangwara-vs-Stephen, Mungai Njuguna [2013] eKLR to submit that she had bought the property from the 2nd registered owner, Royson Wahome and that there had been no evidence that her purchase had been unlawful and or fraudulent. Further reliance was placed in the case of Dr. Joseph N.K. Arap Ngok -vs- Moiwo Ole Keiwua & others [1997] eKLR to submit that her title was indefeasible since there was no evidence that it had been fraudulently acquired. That ground 1 of the Appeal had failed dismally.
18. In response to ground 2 of the Memorandum of Appeal, her submission had been that at page 7 of the impugned judgement the trial Magistrate had stated that he had carefully perused through the parties' documents and seen nothing irregular or illegal as to how the title had been acquired. That subsequently, it was evidently clear that the trial Magistrate had analyzed/scrutinized the evidence on record before arriving at the decision appealed against. That the judgement had addressed the suit and costs hence none of the grounds of Appeal had been proved especially weighing the same against the evidence of DW2, the land Registrar. She thus prayed that the Appeal be dismissed with costs to the Defendants.
19. The 2nd and 3rd Respondents did not participate.

Analyses of the evidence.

20. According to the proceedings in the trial court, vide a Plaint dated 5th May, 2021 Peter Karoki Kimani, (the Plaintiff/Appellant) instituted the instant suit against the 1st, 2nd and 3rd Defendants/Respondents herein and the National Land Commission vide Naivasha CMCELC No. 18 of 2021 wherein he had sought for the following orders;
 - i. General damages for illegal transfer of land parcel number Kijabe/Kijabe block 1/1555.
 - ii. A Declaration that land parcel number Kijabe/Kijabe block 1/1555 falls under the estate of the Plaintiff's late father.



- iii. Cancellation of the title deed of land parcel number Kijabe/Kijabe block 1/1555 in the names of the 1st Defendant.
 - iv. A declaration that the transfer of land parcel number Kijabe/Kijabe block 1/1555 in the names of Royson Wahome Gichachi and resultant transfer to 1st Defendant is nullity ab initio.
 - v. Compensation for illegal transfer of land parcel number Kijabe/Kijabe block 1/ 1555 to Royson Wahome Gichachi and to 1st Defendant.
 - vi. Costs of the suit.
 - vii. Interest on (a) (e) (b) (f) at court rates from the date of filing this suit till payment in full.
 - viii. Any other or further relief that the Honorable Court may deem fit to grant.
21. Subsequent to the filing of the suit, the 1st Defendant filed her Statement of Defence dated 26th April, 2021 denying the allegations contained in the Plaint and put the Plaintiff to strict proof. She stated that the share certificate No. 199 that had allegedly been issued to the deceased's father had indicated allocation of Plot No. 1049. That indeed, plot No. 1555 had been allocated to one Royson Wahome Gichathi who had sold the same to the 1st Defendant. That subsequently, there was no way that plot No. 1555 title could have been processed in favour of the Plaintiff's father as the deceased did not have any beneficial interest over the land parcel contrary to the Plaintiff's allegations.
22. That accordingly, plot No. 1555 had never been allocated and/or owned by the Plaintiff's deceased father to be transferred to his name. That she had purchased the plot from the said Royson Wahome Gichahi after which the same had been transferred into her name wherein she had possession to date. That on the other hand, the Plaintiff had never been in physical occupation of the suit land.
23. That pursuant to a complaint lodged by the Plaintiff against her at the Naivasha DCI Office vide OB 34.25.02.20, Investigations had been carried out and the complaint dismissed. That the Plaintiff's deceased father had never been the allottee and/or owner of Title No. Kijabe/Kijabe Block 1/1555 (suit land) hence the Plaintiff's claim was misplaced, misconceived, lacked merits and ought to be dismissed with costs.
24. The 2nd and 3rd Defendants on the other hand vide their Statement of Defence dated 14th July 2021, denied the allegations contained in the Plaint putting the Plaintiff to strict proof and sought that the suit against them be dismissed with costs.
25. The case subsequently proceeded for hearing wherein the Plaintiff, PW1 adopted his witness statement as his evidence in chief and produced the documents in his filed list of documents evidence as Plaintiff Exhibits 1 to 10 as follows;
- i. A copy of the grant of letters of administration as Pf exh 1.
 - ii. A copy of the certificate of confirmation of grant as Pf exh 2.
 - iii. A copy of the death certificate of the late John Kimani Gaitho as Pf exh 3.
 - iv. Copies of Maai Mahiu Longonot Company Limited documents issued to John Kimani Gaitho as Pf exh 4.
 - v. A copy of the transfer form from the Government of Kenya to the deceased dated 10th May 2016 as Pf exh 5.
 - vi. A copy of the application for registration of the transfer dated 10th May 2016 as Pf exh 6.



- vii. A copy of the official search dated 14th June 2016 as Pf exh 7.
 - viii. A copy of the official search dated 21st February 2020 as Pf exh 8.
 - ix. A copy of the Green Card of the said land as Pf exh 9.
 - x. A copy of the letter from the Directorate of Criminal Investigations as Pf exh 10.
26. When cross-examined by the Counsel for the 1st Defendant, the Plaintiff confirmed that he was the administrator of his deceased father's estate. He admitted that although his father's name did not reflect in the Green Card, yet his father owned the land as per the Share Certificate number 199.
 27. When he was probed further, he confirmed that whereas the Share Certificate No. 199 had belonged to his father, it had been indicated that he lived in plot 1049 which plot was different from plot No. 1555. He confirmed that there was a members' register at the land registry and that he had the transfer form and documents showing that the land was in his father's name. He further confirmed at the time the Succession Cause proceedings at the Limuru Law Court were ongoing, the land had not been registered to the 1st Defendant. That a search dated 14th June 2016 showed that the registered owner of the suit land was John Kimani (Deceased).
 28. He had produced a search indicating that the land was registered in the name of John Gaitho. That the Green Card had shown movement of land wherein in entry No. 1 land had been registered to the Government of Kenya, entry No. 2, it was registered to Rayson Wahome and entry No. 3 to Jane Wangui Muhia, the 1st Defendant herein. He confirmed that as per the Green Card, John Kimani Gaitho never owned the suit land. That he had reported to the police that the land had been fraudulently stolen wherein the DCI had conducted investigations wherein vide a letter dated 20th December 2020 they reported that there had been no evidence showing that the 1st Defendant had acquired the title fraudulently.
 29. He insisted that his father had been allocated the suit land but he did not know whether the land had been registered in the 1st Defendant's name at the time when he had filed the Succession Cause at the Limuru Law Courts. That whereas he had paid for the transfer of the land from the Government to his father's name, the said transfer had not been registered in the Green Card.
 30. He testified that he had wanted orders nullifying the transfer of land from the Government of Kenya to Rayson and to Jane be so that the same could revert to the deceased John Kimani. He maintained that his father owned share certificate No. 199 for plot No. 1555, however he also confirmed that whereas there had been ballot No.1555, there had been no ballot No. 199 and that title had not been issued in the deceased's name.
 31. When cross-examined by the State Counsel for the 2nd and 3rd Defendants, his response had been that the land had been given to his father in the year 1975 by the company. That the ballot card did not indicate the ballot number but the date of allocation as 16th October 1984. He confirmed that indeed the land had been given to his father after he had died and that it had been his mother who had balloted.
 32. He reiterated that he had wanted the title cancelled and registered in his father's name. He confirmed that at the time he signed the transfer form, he had not filed the Succession Cause. That they had occupied the land from the year 1975 wherein there was construction ongoing.
 33. He also confirmed that the company did not issue them with clearance certificate, but maintained that he had paid for the transfer although he did not have the receipts in court. He also confirmed that his late father was not registered in the Green Card and that there were no documents showing that the land registrar had cancelled his father's name. That he did not conduct a search. That the DCI had



informed him that the land Registrar did not provide all the documents. He however confirmed that there were records that the land registrar had given the DCI to assist in their investigation.

34. In re-examination, he maintained that he had registered the land from the Government of Kenya to the deceased with the land Registrar by the name Esther Biro. That he had conducted a search that had indicated that the suit land was registered to his father and he did not know how the land had been transferred from his father's name to Loise's name. That he had neither seen the name of Loise or Jane in the company's list that had been provided to him by the Chairman whom he knew.
35. PW2, one Danson Gakio Kerieko, adopted his witness statement as his evidence in chief. He had not been cross examined.
36. Patrick Ndong'u Kuria adopted his witness statement dated 12th November 2021 as his evidence in chief and testified as PW3 to the effect that he was the Board Secretary of the company. He then produced CR12 dated 13th July 2023 as Pf exh 11.
37. When cross-examined by the Counsel for the 1st Defendant, he confirmed that he was the Company's Secretary as indicated in the CR 12 form. That he did not have the minutes of the Annual General Meeting (AGM) where he had been elected. He acknowledged that the company had a list of disputes which it was attempting to resolve although he did not have documents to that effect. That whereas the company had 2500 members, he had only annexed one page of the company's register of members which concerned the matter in court.
38. When he was cross-examined by the State Counsel for the 2nd and 3rd Defendants, he confirmed that whereas the late John Kimani had been a member, he did not know when he had been allotted the suit land. That he was familiar with the ballot which was No. 1555. That however, in the ballot that he had produced, there was no ballot number but the date when the late John had been allocated the land before he had passed which was 16th October 1984. That whereas they provided a copy of share certificate to show that someone was a member and which was used to allocate a member land, they did not issue clearance certificate. That John was to live in plot number 1049 which plot was not the same as number 1555.
39. In re-examination, he explained that plot No. 1045 had been sub-divided into 2 and later to 5 portions and thereafter ballots were given wherein he got plot No. 1555. He confirmed that the date that the same had been published was in the year 1975 while the ballot had been conducted in the year 1984.
40. That plot numbers were on the ballot wherein they had given the Land Registrar the numbers and list of all members. He confirmed that the 1st Defendant's name was not in the register and that he did not come across the name of Loise as the owner of the suit land. That the entry list had 2500 members recorded as per registrar. He confirmed that a member were issued with a share certificate and a ballot wherein the owner of the share certificate and ballot No. 199 was John Kimani.

The Plaintiff had thus closed his case

41. DW1, Jane Wangui Muhia, the 1st Defendant herein adopted her witness statement as her evidence in chief and produced the following documents as her exhibits:
 - i. Copy of title No. Kijabe/Kijabe Block 1/1555 as Df exh 1.
 - ii. Police file DCI Naivasha as Df exh 2.
 - iii. Police from DCI Naivasha as Df exh 3.



42. She then proceeded to testify that she had bought the suit parcel of land from one Rayson Wahome at a purchase price of Kshs. 300,000/= wherein they had entered into an Agreement before an Advocate based in Nairobi wherein the vendor, Wahome had later died. That she had paid the purchase price in instalment after which the transfer had been done and she received her title.
43. That she had been summoned to Naivasha Police Station wherein she was told that she had taken somebody's land. That after an investigation had been conducted and a report prepared, a letter from the DC1, had confirmed that the land was hers. That indeed, the title and the Green Card also confirmed that the land was hers. That the Plaintiff's land was plot No. 1049 and not No. 1555. She thus sought for the Plaintiff's suit to be dismissed a stating that he had never utilized the land.
44. When cross-examined by Counsel for the Plaintiff, she confirmed that she had bought the land from Loise vide a sale agreement in the year 2007 but she could not recall when they had appeared before the Advocate. She also confirmed that the person who had sold her the land had died. That she had been issued with Share Certificate and title and that she had made the last instalment in the year 2007.
45. That there were clashes in the year 2006 wherein the title together with the share certificate got burnt in the year 2007. That they had attended the Land Control Board (LCB) in Naivasha and that the seller's wife had been informed. She confirmed that that she did not have her original title. That she had built a structure on the suit land in the year 2019 and that she had neighbors.
46. When she was cross-examined by the State Counsel for the 2nd and 3rd Defendants, she confirmed that the title had not been given to anyone else and that there was no one on the land. She confirmed that they had gone to the Land Control Board wherein seller had paid some money to the land office before she was issued with the title.
47. In re-examination, she confirmed that there was no other previous title when she was issued with her title s and that she had constructed a structure on the suit land.

The 1st Defendant had thus closed her case.

48. The 2nd and 3rd Defendants' case opened with the testimony of DW2, Mr. Roussos Ritho Mwangi, the Land Registrar Naivasha who produced the list of documents filed as follows:
 - i. A copy of Green Card for land parcel number Kijabe/Kijabe Block 1/1555 Df exh 4.
 - ii. A copy of members' register of Maai Mahiu Longonot Farmers Company Df exh 5.
49. He then proceeded to testify that the current registered owner of the suit land was Jane Wambui Muhia, the 1st Defendant herein who had been registered as such on 14th November 2007. That as per the Green Card. the first owner of the land had been the Government of Kenya, the second owner had been Royson Wahome and then Jane Wangui Muhia. He explained that the allocating body was Maai Mahiu Company and that the government used to issue land on behalf of the company.
50. That the transfer documents were presented to them for registration as well as the receipts of payments and government letter. That however, they did not have the copies of the documents that he had referred to since the author of the same was the land buying company.
51. That he was not in a position to confirm if the search dated 14th June 2016 had originated from their offices since a search should reflect what was in the Green Card. He explained that the transfer documents were supposed to be commenced by an Advocate and signed by the Land Registrar. That nonetheless, in the Plaintiff's case, the transfer document that had been done could not effect registration.



52. That he had seen a copy of the 1st Defendant's title wherein she had been registered as No. 3 which registration tallied with the Green Card. He explained that the said registration No. 3 had been an old number and after the amendment to the sheet number had been done by the registry, there was a new number. That however, it was the surveyor who was responsible for the documents the amendment of the index. He also explained that if there was an error in the index number, an application for rectification would be made.
53. When cross-examined by the Counsel for the Plaintiff, he confirmed that he had been a Land Registrar for 4 years and that they were the custodians of the documents once they had been presented. That to effect transfer, the 1st Defendant was to present the transfer documents, such as the form of transfer, receipts, Land Control Board consent, documents from land seller's office and signed consent and all receipts of payment and title deed from the previous owner.
54. That these documents were placed in a parcel file although he did not have the same in court. He confirmed that it was not ideal to not have the said file, because sometimes the parcel files got misplaced although it could be re-constructed pursuant to a court order. He confirmed that the transfer document that had been presented to them had a stamp affixed by his colleague. That they did not have the list of the register and that Kekawa was his predecessor who had signed the search dated 14th June 2016. He also confirmed that he only had the Green Card.
55. He explained that Section 14 of the *Land Registration Act* gave the Land Registrar the power to either accept or reject a document. That the land buying company would submit a receipt to them wherein their relevance would be to find out whether Kimani Gaitho was allotted land.
56. That they could not issue title deeds without the list and that he did not agree that title ought not to have been issued to Royson as the same were transactions that had been done by the land buying company's Director. He confirmed that he had seen the signature on the 1st Defendant's title and that they use a black pen to sign transfers. That he had not seen the Registry Index Map that the Plaintiff had produced. He explained that apart from the transfer document, a ballot could also be presented. That the ballot was in the parcel file that he did not have in court as they could not trace it.
57. When he was cross-examined by the Counsel for the 1st Defendant, he explained that when a party sought a certificate of search, he would make an application and attach copies of an ID, pin certificate and receipt. That they would then pick the details from the Green Card and reproduce the same in the search.
58. That the search of 14th June 2022 did not tally with the Green Card since it had indicated that John Kamau was the owner of the suit land while the Green Card had indicated Jane Wangui was the owner, which was what was the current status. That he did not know if the transfer documents had been paid for but that the same as they were, had not been registrable. That whereas pursuant to the register the owner was John Kimani Gaitho, there had been an alteration although he would not know who had done the same.
59. He explained that there were situations for example when the land buying company had failed to update the register, where the names in the title did not tally with the ones in the register. He confirmed that as per the Green Card, the land belonged to the 1st Defendant.
60. In re-examination, he confirmed that the entries made in the Green Card were entered from their documents and that the entry in a search should reflect the entries in a Green Card. He confirmed that the transfer documents dated 10th May 2016 were not executed by the Land Registrar since whereas the signature of the land registrar should appear in the second page, that had not been the case.



61. He explained that it was not unusual for the parcel files to go missing and that an entry in the sheet number did not invalidate the title. He maintained that it was the land buying company that issued ballot and that not all land registrars were Advocates.

The 2nd and 3rd Defendants had thus closed their case.

Determination.

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

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

63. The summary of the Plaintiff's/Appellant's case in the trial court both in evidence and vide his adopted statement was that his deceased father John Kimani Gaitho was a shareholder of Maai Mahiu Kijabe Longonot Company Limited vide share certificate number 119 wherein he had been allocated land parcel number Kijabe/Kijabe Block 1/1555 measuring approximately 2.02 hectares or thereabouts. That subsequently his father died before being issued with the title deed to the said land wherein on the 10th May 2016, he had applied to the Land Registrar Naivasha to have the said land transferred in the name of their late father so as to enable them institute succession proceedings against his estate.

64. That indeed the land had been transferred from the Government of Kenya into their late father's name. That thereafter, he and his siblings had initiated a Succession Cause No. 87 of 2018 at Limuru Law Courts and a Grant of Letters of Administration intestate was issued on the 4th April 2019 and confirmed on 8th May 2020. When he attempted to have the said property transmitted from their late father's name to his name as the administrator of his father's estate, he discovered that ownership of the said land had mysteriously changed from his late father's name to the 1st Defendant.

65. That he had later applied for a Green Card of the said land at the Naivasha Land Registry which showed that the land was transferred from the Government of Kenya to one Royson Wahome Gichachi who then transferred it to the 1st Defendant.

66. That the said Royson Wahome Gichachi and 1st Defendant were not beneficiaries of his father's estate. That the said transfer had been irregular and illegal. That it was clear that the 1st Respondent in cahoots with some officials from the Land Registry had illegally removed his father's name from register thus depriving his estate the property.

67. That their family had been in quiet occupation of the suit land since the death of their father where they had been engaging in farming activities. That 1st Defendant had the sole intention of disposing of the land to the detriment of the estate of John Kimani Gaitho (deceased) because they were now receiving strangers who were bent on purchasing the land.



68. The 1st Defendant's witness statement dated 26th August 2021 was to the effect that she was the registered owner of land parcel number Kijabe/Kijabe Block 1/1555 which she had bought in the year 1985 from Royson Wahome Gichachi. That in the year 2007, she had been issued with a title deed from the Naivasha Lands Offices and had been in quiet possession of the suit land from the year 1985 until the year 2020 when the Plaintiff reported her over the ownership of the same at the Naivasha Police Station, DCI division. That investigations had been carried out wherein she had been vindicated of no wrong doing. That the Plaintiff was dissatisfied with the investigations and filed the instant suit claiming that the suit land had belonged to his father John Gaitho (Deceased) and that he was the beneficial owner.
69. The 2nd and 3rd Defendants' witness statement dated 6th August 2021 by Minnie Wacuka the then Land Registrar, Naivasha was to the effect that according to the records in their custody, the suit property herein being Kijabe/Kijabe Block 1/1555 had first been registered under the Government of the Republic of Kenya on 26th April 1985. That on 18th September 1985, it was transferred to Royson Wahome Gachachi of Identity Card Number 0341127/64 wherein a land certificate had been issued on the same day wherein on the 14th November 2007, he had transferred it to Jane Wangui Muhia of Identity Card Number 4429482 and a title deed issued on the same day. That a restriction had been placed on 28th February, 2020 to restrict any dealings on the suit property as the same had been under investigation on the ownership status which restriction was still in place.
70. Having summarized what transpired during the hearing at the trial Court, as herein above, and having looked at the recorded statements herein which were adopted as the evidence in chief, I find the issues arising herein for determination as follows: -
- i. Whether the Plot No. 1555 was allocated to the deceased John Kimani Gaitho as a shareholder of Mai Mahiu Longonot Company Limited through balloting.
 - ii. Whether the Appellant discharged the onus of proof on Fraud.
71. It is not disputed that Mai Mahiu Longonot Company Limited was/is a land buying company which generally operates by acquiring large tracts of land, then subdividing them into smaller plots for sale to individual buyers in this instance the company used the balloting method which generally meant that each eligible shareholder on its list of members got a ballot that corresponded to a specific plot number. After the ballot, the company would issue an allotment letter formally assigning each person the specific plot number they balloted for which letter was a crucial step towards getting the individual title deed after availing the said to the Land Registrar.
72. In the instant case, the Appellant's witness PW3 a Board Secretary in Mai Mahiu Longonot Company testified that indeed late John Kimani had been a member of the company. That the ballot herein produced as Pf exh 4 (Copies of Maai Mahiu Longonot Company Limited documents issued to John Kimani Gaitho) had no ballot number but a date when he had been allocated the land, which was 16th October 1984. That John was to occupy/live in plot number 1049 which plot was not the same as number 1555.
73. During cross examination by Counsel for the 1st Respondent, the Appellant conceded that whereas the Share Certificate No. 199 belonged to his father, it had indicated that he lived in plot 1049 which plot was different from plot No. 1555. It is therefore clear that the deceased John Kimani Gaitho was not allocated Plot No. 1555.
74. The Appellant herein filed suit against the Respondents on an allegation that the Registration of the 1st Respondent to land parcel No. Kijabe/Kijabe Block 1/1555 was illegal, the land having been allocated



through balloting, to his deceased father John Kimani Gaiho a member of the Maai Mahiu Longonot Company Limited. The 1st Respondent's response had been that she had purchased the land from one Royson Wahome Gichahi who had then transferred it into her name and the title deed was produced as Pf exh 1

75. The acts allegedly committed by the Respondents was that the parcel of land No. Kijabe/Kijabe block 1/1555 having been part of the estate of the Appellant's late father, by transferring the same in the names of Royson Wahome Gichahi and therein after to the 1st Respondent was a nullity ab initio which amounted to fraudulent acts which should have been distinctly alleged.
76. The Court of Appeal in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] KECA 816 (KLR) cited the following passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

77. The standard of proof on the issue of fraud is very clear in law, wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR and in the case of Davy vs Garrette [1978] Ch.473 at pg 469, where it had been held that it was not allowable to leave fraud to be inferred from the facts.
78. The facts as stated by the Appellant were that his deceased father one John Kimani Gaiho being a member of the Maai Mahiu Longonot Company Limited, as per the Share Certificate number 199, was allocated parcel No. 1555 after he had balloted for it. That upon the demise of his father he had sought to file a Succession Cause and include the property as his father's estate wherein upon visiting the land registry he had been shocked to find that the land had been illegally/fraudulently registered to the 1st Respondent. That he first filed a report with the police before filing suit to recover the same.
79. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the [Land Registration Act](#) provides as follows:

“The Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts 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'
80. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
81. The import of Section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
82. The Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] KECA 223 (KLR) held 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489. In my view the complaint by the appellant is well-merited since the plaint and the re-amended plaint were defective on their faces. The ground of appeal grounded on failure to specifically plead fraud must succeed”.
83. In this case however, it was clear that although the Appellant sought to impeach the title held by the 1st Respondent as having been obtained unlawfully, the onus of proof was on him pursuant to the provisions of Section 107 of the *Evidence Act* which provides 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 and Section 109 of the same act stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, to support their claim with evidence.
84. What came out in evidence from the Appellant himself that after he had reported the matter to the police investigations had been carried out wherein vide a letter from the DCI herein produced as Pf exh 10, the police had exonerated the 1st Respondent from any fraudulent act after the matter had been investigated.
85. Further evidence received from the Land Registrar, the custodian of the records pertaining land, was that the title held by the 1st Respondent to parcel of land No. Kijabe/Kijabe Block 1/1555 tallied with the Green card in their office.
86. That the search dated 14th June 2016 herein produced by the Plaintiff as Pf exh 7 that had indicated that John Kamau was the owner of the land had not originated from their offices since it did not reflect what was in contained in the Green Card. Further, that the transfer dated 10th May 2016 transferring the land from the Government of Kenya to the deceased, herein produced as Pf exh 5 had not been executed by the Land Registrar. The same did not bear the Registrar’s signature. The Appellant had



also conceded that his father's name did not feature in the Green card produced as Pf exh 9 and Df exh 4.

87. While it is trite that indefeasibility of title is not absolute, the onus of proof having been placed upon the Appellant to prove fraud in the manner in which title to land parcel No. Kijabe/Kijabe Block 1/1555 was registered to the 1st Respondent by the 2nd and 3rd Respondents, and he not having discharged the onus of such proof, his claim of ownership over the parcel of land, I find is unmerited and his appeal is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 24TH DAY OF JULY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

